

IN THE HIGH COURT OF SIERRA LEONE

HOLDEN AT FREETOWN

THE STATE

VS

WURRAH SUNUNU TIMBO

G J SOYEI Esq for the State

A Y BREWAH Esq for the accused person

JUDGMENT

1. The accused is charged on a one count Indictment with the offence of Fraudulent Conversion of Property Contrary to Section 20(1)(iv)(a) of the Larceny Act, 1916. The Particulars of Offence allege that on a date unknown between 1<sup>st</sup> and 30<sup>th</sup> November, 2007, at Freetown, the accused fraudulently converted to his own use or benefit, certain property, to wit, one Nissan Xterra vehicle of the value of Le42,000,000 entrusted to him by the complainant FINDA KOMBA, for the purpose of sale.
2. Originally, the Indictment which is dated 25<sup>th</sup> March, 2009 had charged two Counts, but on 18 May, 2009 when the matter came up before ADEMOSU, JA for hearing, MR SOYEI, Counsel for the State said: *"I am offering no evidence on the 2<sup>nd</sup> Count."* Thereupon, ADEMOSU, JA said: *"The Indictment on the 2<sup>nd</sup> Count is dismissed. The accused is discharged for want of prosecution on the count."* The reason for the withdrawal of the Count was not stated, but in view of the evidence which was led, and which was sought to be led at the trial before me, MR SOYEI's action becomes inexplicable.
3. At the 3<sup>rd</sup> hearing before me on 12 October, 2009, I Ordered, pursuant to an Application in writing dated 18 May, 2009 made by the Acting Director of Public Prosecutions, and by Mr SOYEI in open Court, and to Section 144(2) of the Criminal Procedure Act, 1965, that the accused person be tried by Judge alone, instead of by Judge and Jury. Mr SOYEI started leading evidence the same day.
4. First witness, PW1, was the complainant, FINDA KOMBA. She narrated the transaction which took place between her and the accused. According to her testimony, she was a nursing sister by profession, but was at the

material time doing business; she was engaged in clearing and forwarding at the QE11 Quay. She got to know ~~to know~~ the accused through this business. In November, 2007 she transacted business with the accused. She cleared a vehicle from the Quay, and gave it to the accused to sell. He was to give her the proceeds of sale. She gave him two jeeps, one of them being the Xtera. Accused was to sell each vehicle for USD14,000. She was the owner of the Xtera vehicle. She produced and tendered in evidence as "A" a copy of an email dated 22 March, 2008 apparently sent through the mail box of ANSUMANA KEITA but addressed to PW1 by one SHUAIB LEIGH. This email, reads as follows:

*W. Leigh*

*"As we discussed this morning in our conversation, I am authorizing you to collect two Nissan Xterras both 2000 models or the amount of \$28,000 in cash, which would be the sale price of the two vehicles, if sold from Mr Tipapa Timbo of #7 Tejan Lane at Kissy, Freetown. I had, since January of this year instructed the above-named man to handover these mentioned vehicles to you but had failed Please be aware that the two vehicles cannot be sold without your consent, as the container was rightfully sent to Sierra Leone in your name."*

5. She also as tendered as "B" a copy of a Dock Receipt which she described as a Bill of Lading. It is undated, save for two dates which appear in the container number section: CUTOFF: 12/24/07; SAILING 01/08/08. It is numbered 524495449. The exporter is said to be KENNETH MAHOI of 9620 Barrell House Road, Apartment R, Laurel, MD 20723. The consignees are Mahemood Timbo and Finda Komba. The party to be notified is Timbo Mahemood. The commodities in the container are said to be personal effects and three Nissan Xterra vehicles. There are no indorsements at the bottom of the document to show whether it was handled by the Shippers' agents or the Ship's company's agents, in Sierra Leone.
6. She continued her testimony by saying that she gave exhibit "B" to Maersk Line, and then took it to the Quay to clear the container. She got to know accused as someone who sold vehicles. She told Mr Leigh to send the money for clearing the goods, directly to the accused. The accused cleared the three vehicles. The owner took possession of one of the three vehicles cleared. The accused, after receiving the money, called her on the phone to say he had cleared the vehicles. He took the vehicles to a



car dealer along Pademba Raod. He said he would sell the vehicles, and give her the money within a short space of time.

7. After some months, accused told her, someone had absconded with one of the vehicles. She did not believe him, and told him he had sold the vehicle. He told her to report the matter to the Police. She reported the matter at the Kissy Police Station as her store is in that area. The case was charged to Court No.2. Accused told her to go to the Police Station for her money; and that he would give her one of the vehicles. The agreed price of sale was USD14,000. She handed the vehicles to him at the Quay. He paid for the vehicle to be cleared, and his agents drove the cars out of the Quay. When asked to give her the vehicles, accused gave her different excuses for failing to do so.
8. Under cross-examination, PW1 said, that exhibit "B" was sent to her by Mr Leigh through her husband, Kenneth Mahoi, who was a shipper. Both of them are in business together. She said exhibit "A" was written many months after accused had taken possession of the vehicles. Leigh is brother-in-law to Leigh. She did not know that Leigh had sold the vehicles before she got exhibit "A".
9. At the end of her testimony, in the exercise of my discretion, I stated in open Court that I would give Mr Soyei time to review his case, as it appeared to me that on the basis of the evidence adduced, the prosecution was bound to fail.
10. On the adjourned date, Mr Soyei called his next witness, PW2, SYLVETER MAHOI. He was PW1's driver, and he also helped in her shop. He knew about the transaction between accused and PW1, and he had driven one of the vehicles out of the Quay. He was there when PW1 handed over the cars to accused. He was present when accused went to PW1's shop to inform her that the vehicles had gone missing. Whilst the case was pending, they had both gone to the CID because PW1 wanted to recover the vehicles. He was not cross-examined by Mr Brewah.
11. PW3 was PC 2655 SIDI KHALILU MANSARAY, presently attached to MIST, CID Headquarters, but at the relevant time, attached to Kissy Police Station. He tendered in evidence, the two recorded interviews of the accused as exhibits "C" and "D" respectively. He was not cross-examined by Mr Brewah.

12. As Mr Soyei had no more witnesses for that day, he asked for an adjournment. He said he was in the process of filing additional witness notices. On the next adjourned date, 9 November, 2009 WPC FELICIA SOPHIANA, whose name was not on the back of the Indictment, was in Court. Mr Soyei had filed an additional witness Notice in respect of this witness on 4 November, 2009. But because her evidence, it appeared, would relate to documents which were in the custody of personnel of the Sierra Leone Road Transport Authority, I advised Mr Soyei that, in order not to waste the Court's time, he should proceed when both witnesses were present. I adjourned to 12 November, 2009. On that day, Mr Soyei was absent. PW1 informed me that one of the additional witnesses, Mrs Pratt, had been in Court, but that she had been told to go back to her office by Mr Soyei as he was going to adjourn the case - see pages 9-10 of my minutes. Mr Soyei had not appeared before <sup>me</sup> that morning either in Chambers, or in open Court, and I viewed his conduct as distinctly disrespectful and Contemptuous of the Court. I was not prepared to accommodate or to put up with Counsel's contempt, but mindful of my duties as a Judge, I called upon DPC FELICIA SOFIANA who was in Court, to testify. She narrated what she did in the course of investigation into the matter of the missing cars, in October, 2009, more than two years after the alleged entrustment of the vehicles to accused, and after this trial had commenced in the High Court. She contacted the accused who told her how he had come to possess the vehicles, and that he had sold the vehicles to Aziz, a car dealer. The vehicles, according to her, are with Messrs Campbell and Gbow who had also bought them from somebody else.

13. When Ms SOPHIANA completed her testimony, it was about 11.10am. I stood the trial down for Mr Soyei to appear. When Court resumed at midday, Mr Soyei was still absent. PW1 informed the Court that she had gone over to the Law Officers' Department in search of Mr Soyei. He had told her that he was unwell as he had taken a few injections and that he could not come to Court. There was no letter forthcoming from Mr Soyei. In view of this brazen discourtesy, I declared the prosecution's case closed, and proceeded to put the accused to his election. He elected to rely on exhibits "C" and "D". ~~and~~ closed his case. Addresses were fixed for Wednesday 18 November, 2009.

14. On that day, Mr Soyei appeared in Court, and apologised for his absence on 12 November, 2009. He requested leave to reopen his case. In view of



Mr Soyei's past conduct, I stated that he should seek leave in writing and by affidavit evidence, and that he must do so against Friday 20 November, 2009. When Court resumed on that day Mr Soyei had not filed the requested affidavit. He was also absent from Court at 10.05am. I could not, in view of Mr Soyei's insouciance and impudence, go on to wait for him indefinitely. I invited Mr Brewah to address the Court. He said he did not wish to address the Court. I thereupon reserved Judgment for 4 December, 2009. But because of my commitments in this Court, and in the Court of Appeal, I have only been able to deliver this Judgment today.

15. I have no doubt in my mind that Mr Soyei's behaviour to, and in this Court, stems from his perception that he has presented an extremely weak case to the Court. This is a trial by Judge alone, and I am both the tribunal of fact, and of the Law. I can only convict the accused, if I am satisfied in my mind, so that I am sure that he is Guilty of the offence with which he has been charged. The prosecution must prove every element of the offence with which the accused is charged beyond all reasonable doubt. If the prosecution fails to prove any element of the offence with which the accused is charged, I am duty bound to acquit and discharge the accused. If on the evidence as a whole, I have any doubt as to the accused's guilt, I should acquit and discharge him. Mr Soyei had already started on the wrong footing, by withdrawing an identical Count from the Court's consideration before ADEMOSU, JA. He compounded his problems by the contradictory and conflicting evidence he led in support of his case. Exhibit "A" is undated, save for the dates which appear in the "container number" column. It refers to 3 Nissan Xterra vehicles. It names two persons: Mahemood Timbo, and PW1 as consignees, and the party to be notified is Timbo Mahemood. No evidence has been led as to who Mahemood Timbo is, though it later appears, that he is the person referred to by the accused in exhibit "C". But in exhibit "A", it appears that if any entrustment had been done in the past, it must have been done by Mr LEIGH. His direction to PW1 is "*to collect two Nissan Xterras both 2000 models or the amount of \$28,000 in cash which would be the sales price of the two vehicles, if sold, from Mr Tipapa Timbo of # 7 Tejan Lane, Kissy.....*" the accused's address as stated in exhibit "C". In other words, her mandate was to either recover the vehicles, or their respective purchase prices. Surely, failing to hand over the cars or the money, cannot be the basis for a criminal charge. Such failure, might, in

the civil Courts, be remedied by claims for Delivery, and/or for Damages for Detinue and Conversion.

16. PROFESSOR KENNY in his OUTLINES OF THE CRIMINAL LAW

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explained the fundamentals of the offence of Fraudulent Conversion. At paras 327a & 328 on page 346, he says: "*In practice, where e.g. A employs B to sell A's car for and B disposes of the car and absconds, the charge is usually laid in the alternatives (i) larceny by bailee of the car, and (ii) fraudulent conversion of the cash which B received for it. But it cannot be both; and so, if the evidence establishes that B took the car and sold it as his own, he stole the car, in which case the money he received was for himself and there was no fiduciary element to bring the case within s.20(1)(iv)(a); conversely, if he merely carried out his instructions in selling the car as A's employee, to the purchaser, this could not be larceny of the car by him; but the money then would be received with the fiduciary duty, arising from his contract with A, to transmit the money or its equivalent to A, and this would constitute the misdemeanour under s.20(1)(iv)(b). .... the only kind of situation therefore which will fit the words of subsection (1)(iv)(a) is one in which ownership is handed over, since there is no available intermediate position between legal possession and ownership. Under this interpretation the crime of fraudulent conversion exactly fills the gap in the law which previously existed, since it completes the net around the dishonest servant, and reaches the dishonest agent.*" At para 329 on page 347 the Learned Author says: "*There must always be a fiduciary element in the transaction under which the offender obtained the property and where only a debt is contracted, there can be no criminal liability under section 20.....*" And as to the requisite mens rea, he says at para 331 at page 348 that "*it is essential to establish that the delinquent intended to appropriate some economic benefit (either by depriving the prosecutor of it, or by denying it to him) to which he knew the prosecutor was entitled. Pure carelessness, however great, will therefore not be enough; so that there is no crime committed by an agent who has negligently lost the property or who has made mistakes in keeping his accounts or has deducted more than is due to him by way of commission and so on; in every case the jury must be satisfied that there was an intent to defraud.*"

17. Clearly on the evidence led through PW1, if believed, the accused was a bailee, though it is not clear whether he was a bailee for reward or not.

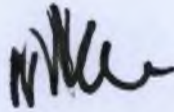


The cars were indeed delivered to him, whether on the instructions of Mr Leigh or otherwise. Therefore, if he absconded with or disposed of the cars, then this was Larceny by Bailee contrary to Section 2 of the Larceny Act, 1916; and if he sold the cars in accordance with the instructions he had received from PW1, and then received the purchase price of the cars, he would be duty bound to transmit that money to PW1; and if he failed to do so, this would be an offence under Section 20(1)(iv)(b) and not (a).

18. The accused's own version of events is contained in exhibits "C" and "D". According to him, he did sell the cars, but only for USD12,000 each; that he remitted some part of the purchase price of the first one to Mr Leigh after deducting his expenses; and that there was a balance due from the purchaser of the second one. He said he sold the cars on the instructions of Mr Leigh, and not PW1. He was told to conduct the business with her as the documents for the vehicles were in the joint names of herself and MAHMOUD TIMBO who took away the third vehicle. It was when PW1 called him on the phone, and he went to see her, that PW1 told him that Mr Leigh owed her husband USD28,000, and that her husband had sent her to collect the two vehicles from him. He advised her to report the matter to the Police. His version shows that he had transactions with Mr Leigh in the USA, who was his brother-in-law. He remitted money to him, and made disbursements here in Sierra Leone, from monies collected from the sales of vehicles, on Mr Leigh's instructions. He had no direct dealings with PW1. This perhaps explains why exhibit "B" is undated and unsigned. Though Mr MAHOI'S name appears in the exporter column at the top of the page, there is nothing to authenticate this document.

19. The extracts from Professor's Kenny's work, show that the charge the accused is facing is not only inappropriate, but also wrong. There was no entrustment of the Xterra vehicle by PW1 to the accused, for the purpose of sale. The accused cleared the goods from the Quay as admitted by PW1, and the prosecution has not been able to successfully contradict the accused's explanation as to who gave him instructions to sell both vehicles, and as to how he applied the proceeds of sale. In any event, he is not charged with converting the proceeds of sale. The prosecution has therefore failed, and I have no hesitation in finding the accused Not Guilty of the offence charged in the Indictment. He is therefore ACQUITTED AND DISCHARGED.

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N C BROWNE-MARKE

Justice of Appeal

23 March, 2010.