

Selected ACC Judgments:
Synopsis and
Governance-based
Perspectives

“Access Sierra Leone”

In Partnership with PDC

1 July 2016

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In Partnership with *Partners for Democratic Change*



Produced by *Campaign for Good Governance* & *The Centre for Accountability and the Rule of Law*



Legal Consultant: Ms. Amira Hudroge.



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Note from Partners

This work was produced as part of the wider "Accountable Governance, Justice and Security Project" funded by the United States Government's Bureau for International Narcotics and Law Enforcement Affairs through the U.S-based organization, Partners for Change. Implemented in Nigeria and Sierra Leone under the "Access Nigeria Programme" and "Access Sierra Leone Programme", respectively, the aim was to improve government practices especially institutional transparency and to improve understandings between government and civil society in the West African sub-region. In Sierra Leone, the "Access Programme" aimed more specifically to improve the effectiveness of justice and security institutions and to combat impunity. It was funded and administered principally through CGG, and its various components in Sierra Leone included "Using Technology to Simplify Data on Corruption", "Judicial Accountability", the "Freedom of Information Audit", and *this work*. This particular project aimed to analyse the processes, outcomes, impact and public reception of 8 ACC cases, rendering this information and its implications for governance accessible for policy makers, legal practitioners and the generally interested public.

We consider the methodology and results of this work to be not only experimental, but ground-breaking and compelling. On one hand, it includes case reports/summaries with a format based on the All England Law Reports, also modeled on the recently launched ACC Case Reports, with an attempt to simplify as much as possible the employ of legal jargon. On the other hand, it goes much further than providing summaries since it attempts to discern patterns in the facts of these cases, in the trial processes and their outcomes and to, either streamline or flesh out these discernments with the employ of both desk and investigative research, so as to derive governance/policy-expedient conclusions. CGG delegated monitoring and supervision to the Centre for Accountability and Rule of Law, due to its rights-based orientation and for the benefit of its guidance and experience in trial monitoring. Ms. Hudroge was contracted to achieve this work due to her experience in the area of case reporting and her keen analytical skills. In full awareness of the time constraints of Policy makers, the "Findings and Recommendations" section precedes the body of the work. To this end also, each analytical snapshot terminates with a sectional "Overview." In observance of scientific research methodology, the snapshots themselves manifest a clear computation of available data to arrive at the articulated conclusions. We have no doubt about the practical utility of this work and view it as a potentially three dimensional prototype on which either case reporting, or policy based research or a sui generis fused mode, as is the case here, can be modeled in the interests of both our jurisprudence and governance.

Programmes Director, CGG: Mrs. Marcella Samba Sesay

Executive Director, CARL: Mr. Ibrahim Tommy



Note from Author

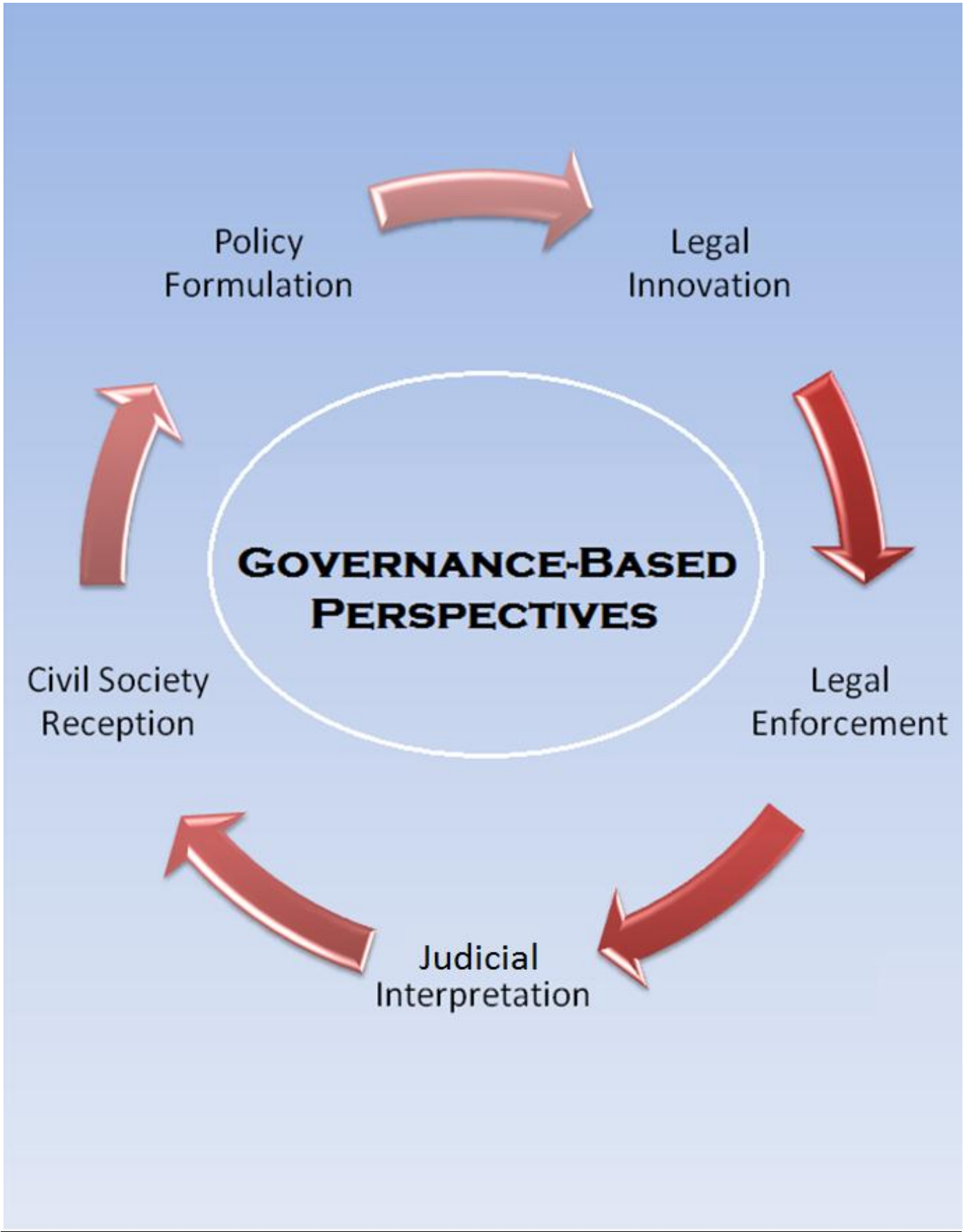
It should be noted that any tendency to refer to authorities from outside ours, but other common law jurisdictions in compiling these case reports in itself speaks to the problem of the absence of case reporting in Sierra Leone. It should also be noted that this is a review of 8 judgements out of 82 ACC convictions,¹ so that these findings are based on a circumscribed view of the available jurisprudence. We definitely cannot avouch these findings would subsist as is, were the parameters of this review to be drawn more widely, especially in so far as observations about the development of case law are concerned. Arguably though, the random selection of cases based only on the dual criteria of their notoriety and the fact of their having been tried during the tenure of a single Commissioner goes to the authenticity of those issues that are identified as being consistent across all 8 cases. Then there is the issue of Public Procurement. Public Procurement, (first introduced into the Sierra Leone legal system by the Local Government Act 2004 and the PPA 2004 and until recently regulated by the PPA 2004 and PPR 2006), is summarily addressed in snapshot 3 entitled "*Conspiracy and Procurement*." Snapshot 3 briefly considers modes of fraudulent, corrupt or coercive practices, the handling of allegations of flawed procurement processes, modes of enforcement of procurement regulations and modes of imposing sanctions for breaches thereof. Its final draft was completed and submitted to CGG and CARL prior to the passing of the new or amended PPA in 2016. The PPA 2016 was signed by President Ernest Bai Koroma on 25 February 2016 making it fully effective. However, the sections addressed in our suggestions concerning corrupt, fraudulent and collusive practices in Procurement, notably ss. 1, 2, 29, 32 through 40, 42 and 46, remain numbered as such in the PPA 2016, with no alteration made to the content/substance of the aforementioned provisions that would affect our recommendations. CGG and CARL maintain that aside s. 14 on one hand, and ss. 57 and 65 PPA 2016 on the other, which increase the powers of the NPPA and IPRP respectively, none of the amendments to the original PPA affect the arguments made here. CGG and CARL therefore continue to fully support the recommendations made in this work that concern the procurement process and proffer that they should be read and understood as continuing to be relevant to the procurement process now carried out under the PPA 2016. Our stance is that they remain *mutatis mutandis* equally relevant.

Legal Consultant: Ms. Amira Hudroge

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¹ The ACC cannot confirm the number of cases it has tried, but confirms they number above 30.





FINDINGS AND RECOMMENDATIONS

BACKGROUND

Governance refers to the administrative and process-oriented elements of governing, the capacity of the government to effectively formulate and implement sound policies and the adherence of citizens to them. Good Governance (GG) refers to how public institutions **should** conduct public affairs and manage public resources in a manner conducive to successful economic development. Corruption affects GG as charted in **Section III**;¹ the ideals of GG are also those of anti-corruption and democratic governance.² **This has been a pioneer project, analysing a selection of ACC judgments with a view to offering the benefits of insight for the conduct of future trials and for enhanced policy formulation, as a GG initiative.**

Anti-corruption modes are varied and may include legal and policy reforms: feeding problem analyses into donor policies³ (increasing donor demands for accountability), bolstering constitutional checks (judicial independence, oversight agencies), involving CSOs in the budget process, creating legal obligations for companies (integrity pledges, self-declarations of situations to authorities and anti-corruption staff orientation), creating sanctionable ethical codes of conduct for MDA staff, reforms in the fields of procurement, public service delivery, financial management systems (improving audit and public administration capacity), minimizing cash transactions, creating legally enforceable transparency obligations re public expenditures (publishing budget allocations), enhancing the effectiveness of internal disciplinary mechanisms, improving specifically human capacity in budgeting, procurement, IT, leadership, management and strategic planning, creating university education programs inculcating ethics, creating legal protection for whistle-blowers, incentive based pay for civil servants and finally Prosecution. **The impact of reform is hinged on enforcement and responsive governance.** As far as the impact of anti-corruption trials is concerned, research indicates that theirs and the efficacy of any other modes of anti-corruption is unclear; it is unclear under which circumstances any particular mode works best.⁴ Still, the pursuit of anti-corruption trials is motivated by general principles of criminal justice concerning detection and punishment.⁵ With regard to anti-corruption initiatives generally, experts now suggest a focal shift from sector-specific reforms and GG initiatives to addressing political corruption/accountability, by addressing "*the fundamental framework conditions associated with politics*"⁶ since political corruption tends to override any other initiatives.

¹Section III. Conspiracy and Procurement, p. 4, para. 1.

²Unnamed, (2016). *Good Governance*, Wikipedia, https://en.wikipedia.org/wiki/Good_governance: The UN identifies 8 characteristics of GG; Consensus Oriented, Participatory, Rule of Law compliant, Effective and Efficient, Accountable, Transparent, Responsive, Equitable and Inclusive.

³Coffey, (2016), *Governance and Anti-corruption*, <http://www.coffey.com/en/expertise/industry/international-development/governance-and-anti-corruption/>. The International Fund for Agricultural Development (IFAD), (2012), *Good Governance & Anti-Corruption*, http://www.ifad.org/operations/finance/pack/pdf/d_1.pdf, p. 9; Such analyses include risk assessments and reviews of internal controls and checks.

⁴Stephenson M., (2014), *Should We Use Randomized Trials for Anticorruption Education and Training*, <http://globalanticorruptionblog.com/2014/08/28/should-we-use-randomized-trials-for-anticorruption-education-and-training/>; "The messiness of reality makes it very difficult to figure out what works, and to isolate the impact of any one intervention...long-term behavioral change...is...very difficult to measure." Raffer P., (2011), *Randomised Control Trials*, Anti-Corruption Research Network (ACRN), <http://corruptionresearchnetwork.org/resources/frontpage-articles/randomised-control-trials-2013-a-new-approach-to-assessing-anti-corruption-policies>. Soreide T., (2012), *Democracy's Shortcomings in Anti-Corruption*, Chr. Michelsen Institute, <http://www.cmi.no/publications/file/4678-democracys-shortcomings-in-anti-corruption.pdf>, p. 2; "There is limited empirical evidence on what works in fighting corruption."

⁵Soreide T., (2012), *Democracy's Shortcomings in Anti-Corruption*, Chr. Michelsen Institute, <http://www.cmi.no/publications/file/4678-democracys-shortcomings-in-anti-corruption.pdf>, p. 11. See also p. 2; "Giving decision-makers incentives (either carrots or sticks) to behave honestly will have a perceivable anti-corruption effect."

⁶Ibid at p. 7.



The snaps are; 1.) Criminal trial based analyses of the judgments i.e. of the actual trial process/performance; see **Section II. Diligent Case Preparation**, and 2.) Governance based analyses of the judgments, i.e. channeling the information therein into the governance process; see **Section I. IM and KM** and **Section IV. Control and Management of Public Funds**. **Section III. Conspiracy and Procurement** falls into both categories. Category 1 analyses consider the effectiveness of these ACC trials in attaining the objects of criminal trials both generally, (deterrence, counter-impunity, the enforcement of individual and collective responsibility), and with specific regard to anti-corruption i.e. enhancing anti-corruption. The analyses consider whether the success/efficacy of trials is enhanced by their method of conduct. Category 2 analyses considers the trials as an autopsy into the operation of MDAs, harnessing judicial articulations as prescriptions a.) on their appropriate modus operandi, expressly recognizing legitimate/illegitimate conduct, b.) on the scope of rights and duties of the governing as against the governed and vice versa and c.) on remedial actions. Category 2 is pertinent to policy formulation since the information uncovered *actually* situating the Accused within institutional contexts, aids the charting of macro and meso level triggers of corruption in the Accused, going a step beyond the usual theoretical bases of anti-corruption policies which are generally non-prescriptive.⁷ Category 1 and category 2 assessments converge by considering the extent to which trial conduct and prosecutorial strategy facilitate the revelation of policy worthy information and by considering whether prosecution reinforces rules, processes and disciplinary procedures that are part of the usual governance process.

⁷ The theoretical models for anti-corruption policies tend to be the principal-agent, political economy and collective action problem analyses; Mungiu-Pippidi A. (2011), *Contextual Choices in Fighting Corruption: Lessons Learned*, Report 4, Evaluation Department, Norwegian Agency for Development Cooperation, NORAD.



OVERALL FINDINGS

Re: Section 1. IM/KM

The MDAs concerned failed to make Information/Knowledge Management values and principles central to their organizational management styles shaping routine practices, resulting in a generalized practice/culture of non-reporting contributing to the commission of corruption offences. IM means the systems and processes for collecting, managing and distributing information. KM means the strategies and processes designed to identify, capture, structure, leverage, and share the explicit and tacit knowledge of individuals.

In the Sesay, Ken Gborie, ABC, Daoh and Katta cases, apparent poor communication (KM) resulted in poor work coordination; there was ignorance about individual roles and responsibilities and those of colleagues and their respective bounds, the source of these obligations and their precise nature. This contributed to the commission of acts of corruption.

Re: Section II. Diligent Case Preparation

The ACC did not submit evidence supporting several charges in the Sesay, Doah, Al Jazeera, FCC, Lukuley and Katta cases, due to non-exhaustive investigative/prosecutorial techniques on securing/eliciting evidence. Evidential issues at trial stemmed from failure to meet the evidential requirements during investigations. ACC investigators appear to have failed to insist on developing lines of interviewing/ probing critical sources, and when testifying, to master crucial case data.

Decisions to prosecute, based on one main source of evidence or where the Accused are acquitted on all charges, likely undermine public confidence in the ACC, the criminal justice system and the rule of law; Daoh and Al Jazeera.

In the ABC, Lukuley, Doah and Katta cases, the ACC defectively framed several charges; in Daoh, it construed misappropriation as a strict liability offence. In Lukuley, it overloaded the indictment by duplicating the charges; bringing several different charges against an Accused for the same set of circumstances, charging as a single count, different criminal acts which are non-continuous offences, allegedly committed during an extended temporal frame or, charging the commission of a non-continuous offence between two stated dates, instead of, "on a day unknown" between the two dates. In the ABC and Lukuley cases, the ACC brought charges as a means for enforcing compliance with investigations, but it was held that compliance should be sought via alternative means. The ACC has also thrice erroneously framed conspiracy charges, in the FCC, Ken Gborie and Katta cases as s. 128, instead of s. 128 (1).

In Sesay and Doah, the ACC *appears* to have not directed the judge's attention to the tilt of the gamut of cohesive circumstantial, not just direct evidence and they appear to have not explicitly corroborated crucial aspects of the case.



OVERALL FINDINGS

Re: Section III. Conspiracy and Procurement

Conspiracy is an agreement between persons to do an unlawful act by unlawful means (common purpose) and the intention to play a role in the agreed scheme. To address collusive practices, prosecutors prefer to charge conspiracy to commit s. 48 (2) (b) ACA, i.e. wilful or negligent failure to comply with procurement procedure, since it fits the reality and since evidential tests for conspiracy may be less cumbersome. Conspiracy allows for wide ranging circumstantial evidence to be admitted against the Accused for the fact of an existing scheme to be established. The Accused's role in the scheme must also be established; you must prove that the Accused did an act which contributed to an outcome and the facts of that act and that outcome are proof itself of the Accused's intention to want to bring about that outcome.

Charging conspiracy based purely on the same facts supporting substantive offences is permissible as *per Katta* the most recent case reviewed, although the success of a conspiracy appears to then be contingent on the success of the substantive offence; *Lukuley* and *Sesay*.

Generally, evidence admissible against an Accused may be admitted against other Co-Accused; specifically in conspiracy cases this kind of evidence is generalized evidence of the nature and objects of a conspiracy. Generally and specifically in conspiracy cases, a conviction requires evidence implicating the Accused, independent of the evidence against one's co-Accused.

In *Sesay* the charges under s. 128 (1) ACA (conspiracy) and s. 48(2) (b) ACA were interpreted as requiring all the Accused to be "Public Officers"; the Accused had to be capable of committing the substantive offence. However, s. 48 (2) (b) never expressly required the Accused to be "Public Officers." This "Public Officer" criterion may hinder prosecutions of private parties and mixed public-private sector bodies for collusive practices. Authorities suggest that in order for a conspiracy to exist, it suffices for one of the parties to be capable of committing the substantive offence. *Ken Gborie* adopts a function-based approach to interpreting who is capable of committing s. 48(2) (b) ACA.

Alternative ACA charges for collusive acts are; conspiracy to procure, aid and abet the commission of s. 48 (2) (b) ACA. Other possible charges are procuring, aiding and abetting the offence in s. 48 (2) (b) ACA, but these have less liberal evidential rules and quantitative qualifiers for weighting the contribution of the Accused towards the substantive offence; the Accused must have acted with the intention/ knowledge that his act would have an effect on the act of a principal. S. 32 ACA entitled Bid Rigging is relevant, but is targeted at the treatment of tenders, proposals, quotations or bids, so the evidential requirements are higher. Offering and accepting an advantage under s. 28, using influence for contracts under s. 29, peddling influence under s. 31, offering, receiving or soliciting an advantage for bid-rigging under s. 32, have higher evidential standards bearing on an "exchange element." Procurement officials can be prosecuted under the substantive offence of s. 48 (2) (b), and collusive practices in procurement can be prosecuted under the common law of fraud, embezzlement, theft and larceny by servant.⁸

⁸ Telephone conversation with Emmanuel Abdulai Saffa, Coordinator Society for Democratic Initiatives (SDI), 22 June 2016.



OVERALL FINDINGS

Re: Section IV. Control and Management of Public Funds

- Monitoring and control occur principally at the request and retirement stages and in between, there is the obligation to comply with the legitimate procurement process for contractual payments/ the disbursement of public funds; Reg. 70 FMR.

- In *Lukuley*, parliament approved vague expenditure headings such as "facilitation and protocol" and "community relations." This was surprising given that Reg. 12 FMR requires expenditure heads be described/ambit to the vote. Neither did the SLMA Board of Directors when processing such requests for payment require more detail. Also, several legal provisions require oversight responsibility to be exercised over a budgetary agency's budget; s. 20 (2) GBAA on a budgetary agency's budget committee, s. 20 (3) GBAA on MOFED's internal audit department and budget bureau, s. 20 (1) GBAA on MOFED's budget bureau and its Financial Secretary, s. 53 (1) GBAA on the Vote Controller's monthly submission on revenue and expenditure to the Financial Secretary or MPs, s. 53 (2) GBAA on the Minister of Finance's quarterly submission to Parliament summarizing government receipts and payments. This was a clear instance of the ignoring of existing written financial controls.

- Reg. 73 (1) FMR states:"All disbursements of public money shall be properly supported by payment vouchers." Reg. 74 (1) FMR states that vouchers for contractual payments shall be supported by documentary proof of having followed the legitimate procurement procedure. Retirement of these documents can be made to the concerned unit within MOHS, to the donor or to MOFED, depending on the source and pathway of the funds. The rule on vouchers also extends to payment of government staff as per Reg. 96 (2), (5), (3) FMR. The absence of supporting documents for the disbursement of public funds was the crux of the *ABC*, *SLMA*, *FCC*, *Daoh* and *Ken Gborie* cases.

- Reg. 6 FMR states that each budgetary agency shall have a Chief Finance Officer (CFO) to assist the Vote Controller in the effective financial management of an agency. There is no CFO at the MOHS; the functions of CFO are said to be performed by the Senior Accountant and Director of Financial Resources (DFR), but there are no written provisions on the offices of the DFR, CFO and Senior Accountant in the GBA/FMR.

- Finance Officers (FOs) are attached to programmes and are responsible for the disbursement of programme funds. Under the supervision of the DFR, the FO reviews requests for funds and funds are retired through him. In *Ken Gborie*, the FO was repeatedly bypassed by the Accused; the Director and the M & E Officer, DPI, who took on the responsibility of disbursing/administering project funds.

- The absence of provisions in the GBAA/FMR on the FO and the DFR or the relationship between them fostered a culture of programme officers/managers hogging the financial management of public/donor funds, bypassing FOs and disregarding their advice on observing legitimate procurement



OVERALL FINDINGS

processes. This tacit understanding of the suitable manner of managing donor funds was taken advantage of by the Accused.

- The Court in examining the liability of the Accused in the FCC case, as concerns issues of administration, financial management did not seek to ascertain what their roles and responsibilities were in other public administration/financial management related laws; GBAA and FMR.

- In the FCC case, the Court appeared not to recognise that audits are seen as the most crucial form of financial control and means of monitoring the monitors (for e.g. the DFR/ FO). The Court rubbished audit findings without asking incisive questions to clarify the underlying technicalities and did not discuss the implications of the FCC's lax responses to audit recommendations/info. requests despite GBAA/FMR audit compliance obligations.

- Audits recommendations tend to revert to ignored legal/statutory obligations. Compliance with audit recommendations demonstrates a belated attempt to exercise powers/duties and that any prior lapse was inadvertent. Where complete compliance is impracticable, steps taken towards that end, may well serve as proof of diligence. Noncompliance demonstrates an all encompassing lack of diligence towards professional obligations (general professional negligence) or wilful/ intentional breaches.

- Time-bound legal obligations to respond to the audit queries and recommendations from the Auditor-General exist in the GBAA/FMR, but none such exist to respond to internal and external audits, not undertaken by the Auditor-General, although Reg. 2 FMR and 46 (2) GBAA obligate the Vote Controller, to "promptly answer all audit queries."



OVERALL RECOMMENDATIONS

Re: Section 1. IM/KM

- IM and KM should be incorporated as key values and essential modus operandi into current MDA management styles and strategies; organizational culture should be transformed by engaging with staff and making understood the functional necessity of IM/KM. Durable KM/IM systems should be built, maintained and regularly reviewed, including providing adequate record keeping facilities and employing qualified IM/KM professionals.
- ACC investigators should be aided in developing their knowledgebase of the employ of IM systems for investigations.
- Human resources units of MDAs should work with the ACC and governance institutions to devise interactive training sessions and manuals which identify relevant legal/policy provisions as per the office and construe these conjointly with relevant donor instructions. Training should address probable scenarios possibly through role play; steps to be taken to address any potential problems, legal and ethical obligations and the practical (institutional and societal) consequences of non-adherence to new policies on IM/KM, including sanctions. Staff should be encouraged to seek assistance in clarifying these issues from HR units. Internal monitoring on adherence and disciplinary measures should also be consistently enforced.

Re: Section II. Diligent Case Preparation

- Prosecution should not be motivated by public relations. The evidence must disclose a prospect of conviction. Investigations and persuasive press statements could satisfy the public relations element. Civil, administrative and disciplinary sanctions could be pursued or prosecutions postponed pending the securing of more evidence.
- More comprehensive communication and coordinated team work between prosecution and investigations, including joint assessments of evidential strengths and weaknesses/GAP analysis from which clearer directives can be issued to investigators, may generate more pointed evidence. The net must be cast wide in securing information; interviewing should be open, persistent and legitimately exploiting all sources available. Levels of planning for evidence presentation should move from the general to the specific. The relevance of particular kinds of evidence and the nexuses between them should be spelt out. Investigators should know crucial case data and MDA processes. *The Acting Chief of Investigations, in the Investigations, Intelligence and Prosecutions Unit (IIP) ACC, asserts that Prosecutors now have a substantial influence over the progress/ direction of investigations, although initially investigators would complete investigations with limited prosecutorial input. He asserts that the Prosecution's final trial brief and oral closing submissions tend to be watertight and compelling but that recently "a poor manner of presentation of material has crept in."*
- Resource constraints may have impacted evidential issues. Efficient case management software would have an invaluable impact on searching and analyzing large quantities of data. *The Acting Chief of Investigations asserts that resource constraints are a non-issue but admits to the lack of case/evidential management software with more sophisticated modes of analyses than current methods that employ word docs.*



OVERALL RECOMMENDATIONS

- Duplicating charges should be avoided; the most serious offence encapsulating the seriousness of the criminal conduct should be charged.
- Expert knowledge on technical matters/that the ACC feels ill-equipped to address, should shape the investigations phase, rather than being only delimited by trial examinations.
- The ACC should maintain inter-institutional cooperation with clear lines of communication; preferably standing inter-agency investigation teams, with investigators, accountants, auditors from the customs, tax and labour department, Audit Service SL, the financial intelligence unit of the Bank of Sierra Leone, the SLPA, Court Registries, the NPPA, internal auditors and staff of the internal disciplinary units of concerned MDAs. Standing inter-agency investigation teams would allow for the progressive alignment of working methods and process in areas of shared concern /competence; as opposed to just cooperating when the need arises, working methods would be streamlined and harmonised to better inform and enhance each other and to facilitate investigate needs. *However, the Acting Chief of Investigations states that it is sufficient that the ACC's interaction with the SLP is generally regulated by ss. 78 (2) (b), 79 and 10 (2) ACA '08, that an ACC Financial Intelligence Unit was established in 2013 and that the ACC has institutional go-to persons.* The discerned issues suggest that delicate drafting matters could involve the LOD. *However, the Acting Chief of Investigations asserts that drafting indictments is simple with never any need for the LOD.*

Re: Section III. Conspiracy and Procurement

- All suggestions concerning improvements that might mitigate corrupt practices in procurement ultimately depend on human will power; massive institutional corruption can hardly be countered.
- Decisions to employ the sole source procurement and selective/restricted bidding method and the supporting reasoning could be subject to an obligation to publish; shortlists of bidders (restricted bidding) could be drawn up more transparently amidst larger groups with the reasoning published.
- Donor reps. could be positioned in all procurement organs in procuring entities for a broad overview of the process and to ensure the cohesiveness in the necessary links. Worst case scenario, they could prompt review/investigations and in the event of a trial/inquiry provide objective evidence.
- Open bidding processes minimise the risk for collusion/corruption if used in competitive markets. Although restricted bidding processes may be conducted in the same manner as open bidding, inviting a select group to bid to the exclusion of others, restricted bidding appears imprudent given the already oligopolistic nature of markets in SL.
- The role of the PC, the significance of its decisions/recommendations needs to be stark and unequivocal. It could more proactively inquire into the status of awards, ensuring its decisions are observed. If contracts are awarded contrary or prior to its conclusive determination, it should issue statements to the procuring entity, the NPPA, the ACC and be able to nullify or retract such contracts.



OVERALL RECOMMENDATIONS

The Independent Procurement Review Panel should also be able to do this. This could be stipulated in the internal regulatory instruments of MDAs and the PPA currently under review.

Procurement officials should exercise due diligence to determine the real beneficial ownership of bidding companies where such information is not disclosed. However, procurement officers have a tendency of compromising due to low salaries and not being highly qualified. The creation of a directorate/training institution for the public sector procurement cadre to harmonise the whole landscape so that the knowledge of officers is uniform is a compelling policy issue under review.

For joint charges of s. 128 (1) and s. 48 (2) (b), the ACC should openly test out the facts against relevant descriptions of the prohibited conduct found in the PPA and PP Regulations, funnelling the attention of the judge to lists of indicia from global anti-corruption authorities and the NPPA for identifying botched procurement processes and the correlation/correspondence of the facts to the indicia. The ACC's arguments could be framed in terms of alleged facts, legislation + indicia, to streamline the judicial deliberative process. Judgments on collusion should consistently refer to the original source of breached rules, the PPA and PPR, more illustrative yardsticks than the ACA 08.

The PPA and PPR constitute a largely prohibitory framework and do not identify every single instance of collusive practice, which tends to be implicit and elusive. Therefore, judges should interpret the law on collusion progressively, realistically and prohibitively. Evidential assessments should seek to ascertain the presence of prohibited/undesirable outcomes and weigh circumstantial evidence to assess whether the manner in which the bidding process was implemented affected fair and competitive bidding. Judgments should look beyond ACC judgments with similar or identical statutory offences, to also draw from fraud-related judgments prosecuted at common law. They should be openly deliberative, stem from and feed into the policy formation process including the parliamentary review.

Trials on collusion should further elaborate on the nature of the evidence that would meet that standard of the burden of proof beyond reasonable doubt.

The current procurement regulatory framework has several inconsistencies. The PPA, its Regulations, the standard bidding documents and procurement manual need to be harmonised. These inconsistencies should be ironed out in the parliamentary review.

Although different actions can be taken for breaches of the PPA, the ACC has priority over corrupt acts. Apparently, the current PPA review seeks to improve weak channels of communication between all procurement concerned MDAs to avoid overlap. A memorandum of understanding setting out the respective areas of competence of all implicated bodies might be a good place to start.



OVERALL RECOMMENDATIONS

☑ Banks must exercise due diligence in dealing with MDAs and public funds; staff should know that distinct sets of rules apply to specific types of transactions carried out by MDAs and should seek these out where unknown. Their diligence would uncover contractors' fraudulent backgrounds (preventing government official owned firms from bidding against private firms, uncovering joint shareholding by firms) and confirm the contractual award by verifying its documentary basis in order to process contractual payments made with cheques; minutes of the Procurement Committee meetings/report, contract document etc., see Reg. 73 (1) FMR.

☑ The PPA review has not addressed the question of the best available option to prosecute collusion; this should be addressed, especially since the implications of Sesay for private parties have not been raised in the review. Further, the review should identify and criminalize specific manifestations of collusive practices, indicating that these identified forms are non-exhaustive

Re: Section IV. Control and Management of Public Funds

☑ Ss. 24 (1), 24 (1) (c), 24 (3) and 24 (4) of the GBAA and Regs. 69 (1), (2), (3) of the FMR on the seeking, receipt and maintenance of grants should be harmonized and the meaning of key terms made explicit; "external grants," "domestic grants," "support of government budget programme," "programme," versus "government project," and there should be more clarity on whose personal responsibility it is to "notify the department" of the receipt of a grant. These slight instances of haziness may work collectively to foster corruption. "Financial management" and "Retirement" would also benefit from greater elaboration in the FMR/GBAA or internal policy documents. Judgments should refer to such sources where relevant, since the sense to be derived from terms is necessarily always contextual.

☑ The MOHS hosts a donor liaison office and the presently non-functional Integrated Health Programmes Administration Unit. MOFED hosts an aid coordination and management division. Also, there is DACO, the National Directorate Development Assistance Coordinating Office. If these bodies are to do more than facilitate and organize grant seeking, for e.g. aid in the monitoring of disbursements and in ensuring proper retirement through the FO and the DFR, it would be necessary to have a single regulatory instrument/policy statement spelling out the roles of these distinct bodies, their relationship with each other; demarcating the bounds of their unique responsibilities and the possible areas of overlap or more direct coordination/ interaction.

☑ FOs are advised to make it standard practice to put in writing pre-and post implementation clarifications made to programme implementers of the requisite forms of retirement attached to specific types of funds.

☑ In Ken Gborie, the defence argued the imprecision of the particulars of the charges based on the mixing of funds in the account. There were challenges to evidential clarity in the judgement on the issue of the source of funding of individual programmes. This could be avoided where separate grants



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intended for separate programmes are paid into separate programme accounts, a donor preference possible under s. 8(1) (ii) GBAA.

☑ The simultaneous coincidence of the roles of heads of department/units, Programme Implementers/Officers and account signatories in single individuals in Ken Gborie, enabled the Accused to overstep the bounds of their distinctive roles as Director and M & E officer respectively, and as Programme Implementers, into the domain of financial management. It's worth considering alternative scenarios which do not amount to the threefold coincidence.

☑ As per the experience in the ABC case, staff members that do sign salary vouchers should only do so at the point of receipt of cash and not before.

☑ MOHS standard good practice is for there to be 2 account signatories from the professional wing and 2 from the administrative wing of the MOHS and that these should be further subdivided into category A and category B signatories; all transactions that require signatures must be signed by one category A and one Category B signatory, each from either wing. The default signatories for most programmes are the Permanent Secretary and the DFR from the administrative wing and the Chief Medical Officer and the Programme Manager/Director/ Coordinator from the professional wing. Since Ken Gborie and Magbity were both from the professional wing, the choice of signatories suggests that a systemic check was bypassed; a weakness incipient at the very point of opening the account and setting up a mandate card. This signals that the choice of signatories should be particularly heeded.

☑ Requests for access to budgetary allocations should be subject to written requirements for internal financial accuracy and consistency with Parliamentary approved expenditure heads. Such requirements are absent in the FMR/GBBA, so could be expressed in internal policy documents.

☑ Donors must also clearly stipulate in their instructions that funds sourced from their grants must retired either with donors, the Department/Ministry concerned or to MOFED; whichever it is, it must be clearly spelled out. Donors should also actively liaise with and demand clear information from concerned departments so that they are all on the same page; London Mining Corp. apparently failed to do this in the ABC case. From a supra-national perspective, donors must pre-assess the financial management capacity of recipients. It may be worth considering making donor reps. signatories to programme accounts.

☑ The Central Government should exercise due diligence, using available opportunities to enquire into and discern receipt of funds from other sources, especially where they are aware of activities unsupported by the central government.

☑ Reserve accounts should only be accessed pursuant to collective decisions by the MDAs Board of Directors/Management (FCC). Withdrawal thresholds concerning the principal signatory/Vote Controller for all accounts, should be discussed and achieved by a collective decision and the knowledge thereof be thoroughly circulated in the MDA.



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- Cheques issued by MDAs should be made out to named individuals/institutions and never to payee/cash as was the case in the Lukuley, Ken Gborie and the ABC cases.
- The division of the functions of the CFO between the Senior Accountant and DFR of the MOHS, and their interrelationship should be expressly recognized in regulatory instruments or internal policy documents. It should be clear in what way they assume the necessary functions of the CFO.
- Audit recommendations that revert to pre-existing due diligence statutory obligation that were initially ignored should be seized upon by the Prosecution and construed conjunctively with the ACA 2008, to reinforce the elements of offences under this latter Act; for e.g. recklessness.
- Regular internal audits are recommended, as well as detailed written obligations to respond to internal and external audit queries/recommendations within specified time frames, i.e. audits not undertaken by the Auditor-General.
- A breach of generalised obligations in Reg. 2 FMR and 46 (2) GBAA on the Vote Controller, to "promptly answer all audit queries," should in light of Reg. 246 (1) FMR amount to financial misconduct, incurring under Reg. 246 (6) FMR, either disciplinary hearings or criminal proceedings.



SNAPSHOTS OF ACC JUDGMENTS REVIEWED:

Snapshot I. Information/Knowledge Management

Snapshot II. Diligent Case Preparation

Snapshot III. Conspiracy and Procurement

Snapshot IV. Control and Management of Public Funds



ACC Case/Judgment Review:

<u>Case Name</u>	<u>Date of Verdict/ Sentence</u>	<u>Judge</u>	<u>Verdict</u>	<u>Appeal Status</u>
<i>The State v. Philip Conteh (The ABC Case)</i>	19 May 2011	Hon. Mr. Justice Nicholas Browne Marke	All Accused convicted of several counts	Accused Appealed on 8/06/11. Judgment due on 15/06/12 but reserved by J. Hamilton. Judgments may only be reserved for 3 months under Constitution.
<i>The State v. Allieu Sesay (The NRA Case)</i>	28 June 2011	Hon. Mr. Justice Samuel Ademusu	All Accused acquitted and discharged on every count.	ACC withdrew its appeal
<i>The State v. Philip Lukuley (The SLMA Case)</i>	11 July 2011	Hon. Mr. Justice Nicholas Browne Marke	Accused convicted of several counts	Cross Appeal. Accused is deceased; matter expired.
<i>The State v. Herbert George Williams (The FCC Case)</i>	10 August 2012	Hon. Mr. Justice John Bosco Abubaker Katutsi	5 of the 9 Accused were convicted	No Appeal
<i>The State v. Momoh Konte and Alex Mansaray (The Al Jazeera Case)</i>	24 May 2013	Hon. Mr. Justice Abdulai Hamid Charm	Accused acquitted on all charges	No Appeal
<i>The State v. Kizito Daoh (The Daoh Case)</i>	24 October 2013	Hon. Mr. Justice Abdulai Hamid Charm	All Accused acquitted on all charges	ACC appealed. On 23 June 2015, oral pleadings were held to determine the date of filing synopses. ACC was to file its synopsis in early 2015, but no action taken on file.
<i>The State v. Solomon Katta (The Katta case)</i>	10 April 2014	Hon. Mr. Justice M.A. Paul	The 5 Accused present were convicted	Accused appealed. Appeal not yet ready for hearing.
<i>The State v. Magnus Ken Gborie et al. (The GAVI Funds Case)</i>	2 July 2014	Hon Mr. Justice M.A. Paul	All Accused were convicted	Accused appealed. Also matter came up for hearing in the Supreme Court on 13 April 2015, but no progress was made; adjourned and notice to be sent for the next hearing.



Snapshot 1

I. Information/Knowledge Management:

All 8 cases reviewed indicate that this is an area, the neglect of which is a significant contributory cause to the commission of corruption offences. Information management (IM) means the systems and processes within an organisation for the creation, collection, management and distribution of information. It may or may not comprise electronic technologies. Knowledge management (KM) means strategies and processes designed to identify, capture, structure, value, leverage, and share an organization's intellectual assets, i.e. the explicit and tacit knowledge of individuals, so as to enhance organizational performance. KM since it refers to the consistent transfer, exchange and circulation of skills and awareness could be seen as a broader concept encompassing IM which centers on the efficient management of hard data¹ by means of the efficient design and employ of systems, structures, tools and databases whether physical or electronic (record keeping and archiving), to effectuate this. However you choose to conceptualise the relationship between the two thematic areas, they are undeniably complementary in the sense that a cohesive information management system cannot be *sustained* in the absence of thorough knowledge management processes, and by contrast, KM comprises as part of the transfer of knowledge/information, mapped out and functional means and methods of information storage and transfer. KM therefore corresponds to organizational culture which exists at a strategic level and information management corresponds to activities carried out at a tactical level. The link between weak IM and the prevalence of corrupt practices has been widely charted.² Recognition that this systemic glitch may be perpetuated in order to be exploited is expressed in The ABC case that; "*The only reason why proper and adequate records of expenditure were not kept, was to use the monies donated for purposes other than those for which they were meant.*"³ That this systemic glitch easily lends itself to exploitation is also recognized also by Judge Paul in Ken Gborie who states that; "*The absence of supporting documents provided him (Magbity) with a convenient shield behind which to hide.*"⁴

This review and the uncovered murkiness surrounding bureaucratic procedure indicate that failures to account are at least partly attributable to a generalized practice/culture of non-reporting, where the weight of reporting is not adequately reinforced through reiteration. The review evinces failure by the concerned MDAs to make the aforementioned management principles central to their organizational management styles, failure to make them premier values and routine, obligatory practices. This can be seen in the evidence of the Accused and witnesses, (whether in leadership/management or more subordinate roles), i.e. their statements explaining their own conduct or their understanding of the role/conduct of colleagues. In Doah, the evidence of the Accused and of the ACC investigators showed confusion concerning the precise obligations attaching to particular offices and spheres of activity regarding the extent of the obligation to retire certain types of funds assigned for project implementation, to submit project activity reports, and confusion also concerning the source of such obligations.

The need to strengthen poor IM/KM systems is clearly supported by the key findings of the audits in themselves, carried out in these contexts, which predated and prompted ACC prosecutions. In the FCC Case, the FCC could not provide supporting documents for unsupported expenditures requested by Audit Service SL. The GAVI draft audit which prompted the ACC investigations in Ken Gborie, revealed lack of accountability in financial management including lack of basic book keeping, weak record management including expenditures unsupported by documentation. Similarly, the audit in Doah that predated the investigations queried the absence of financial reports for funds assigned towards project implementation. Palpably and curiously then, the steadfast obstinacy of the problem of poor IM/KM persists in spite of the consistency of the lucid findings of these audits, which in turn raises the question about the extent to which these findings are being harnessed to inform reformative efforts. **Clearly, it is imperative that both these approaches to institutional/bureaucratic management and administration be**

¹ This conception would require the hard data treated by IM systems to be considered as; "intellectual assets."

² Omolla J. O., (2011), *Strategies to Fight Corruption with Particular Reference to Records Management*, Paper presented during a workshop for Administrators at the University of Nairobi, Kenya.

http://legaloffice.uonbi.ac.ke/sites/default/files/centraladmin/legaloffice/Records%20Manager%20-%20corruption%20prevention%20ccu%201%20%5BCompatibility%20M_0.pdf

Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF

Keorapetse D.L., (2012), *Records Management as a Means to Fight Corruption and Enhancing Accountability in Botswana*, Esarbica Journal/ Journal of the Eastern and Southern Africa Regional Branch of The International Council on Archives, Volume 31.

³ The Attitudinal Behavioural Change (The ABC Case) The State v. Philip Conteh, Allieu Kamara, Lansana Zanto Kamara before Hon. Mr. Justice N.C.Browne-Marke, 19 May 2011, lines 26-28, p. 29.

⁴ The GAVI Funds Case The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, 24 May 2013, lines 13-14, p. 87.



recognized and incorporated as key values and essential modus operandi into current management styles and strategies, suggesting initiatives to transform organizational culture.⁵

This recommendation is buttressed by the following instances; in *Sesay*, the issue of poor IM /KM is discernible from circumstantial evidence strongly suggestive of a flawed procurement; apparently, there may have been poor circulation of information/poor communication between members of the Procurement Committee and Unit respectively, resulting in poor work coordination, and ignorance about one's role and the roles of colleagues. In *Ken Gborie*, the Court stated that it was inappropriate for Ken Gborie in his role as Director DPI and principal signatory to the DPI account to facilitate the hiring of vehicles for the PBF survey or be the go-between regarding payment for 4 hired vehicles, turning a blind eye to the requirements of the law on procurement while doing so.⁶ In *The ABC case*, an Accused openly talks about the ABC having a lax record management system, about it being indifferent to basic accounting principles and about himself not knowing of the relevance of the Financial Management Regulations 2007 as a source of his obligations. The alleged loss/destruction of records at the ABC secretariat raises the issue of secure and alternative storage loci/networks.⁷ In *Daoh*, the case was premised on the failure of the Accused (all senior MOHS staff), to document expenditure of donor funded activities, amounting to misappropriation, but the effect of the judgment tended towards suggesting that maladministration in itself was not necessarily criminal. The evidence in the *ABC case*, *Ken Gborie* and *Daoh* raise issues about the need for more active involvement by donors and Ministries in demanding and securing documentation. In *Lukuley*, the issue of information management is relevant to the Accused's efforts to destroy physical records. In the *FCC case*, charges were brought because of purchases untraceable via logs, suggesting they were missing from the store,⁸ and for undocumented expenditures for FCC projects. Here, FCC management admitted to auditors that they had an inappropriate archiving system. Here also, the need for there be a written formalized statement of reasons proffered for a withdrawal, which is compatible with written receipts later provided was raised and is compelling, there being no other way to guarantee that disparate disbursements with receipts attached were all sourced from a single withdrawal, as alleged. In *Katta*, there was a failure by the staff of a private commercial institution, Ecobank to observe its internal policy and staff were not au fait with the precise bounds of theirs and the responsibilities of their colleagues and so in some instances demonstrated blind obedience to illegitimate exercises of authority.⁹ However, in *Katta*, where one Accused could clearly identify the rules concerning record keeping in his testimony but did not observe them as per the instance, his *awareness* was circumstantial evidence of a *conspiracy* to cause loss. Such *awareness* could also be evidence of willfulness and dishonesty on a charge of *misappropriation* (not in this instance).

How then to effect a break in entrenched patterns of behavior, or cultural change?¹⁰ First, IM/KM needs to be promoted as a value that is, its functional necessity must be well understood.¹¹ To actively secure staff compliance and

⁵ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 56, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF; "A strategy for keeping practical, productive records systems must therefore underpin anti-corruption strategies."

⁶ The *GAVI Funds Case*, p. 79; "Conduct that did not seem right."

⁷ Wikipedia, (2015), *Records Management*, https://en.wikipedia.org/wiki/Records_management; "In addition to on-site storage of records, many organizations operate their own off-site records centers or contract with commercial records centres."

⁸ FMR 2007 provides a wealth of provisions on the FCC scenario (see factual summary); Reg. 68 states that every Govt. dept. shall maintain adequate records of stores. Reg. 184 states that all stores received shall be brought on charge in the stores ledger and shall be supported by the relevant receipts. Reg. 188 (1) states that a stores ledger shall be kept in respect of every store to record for each item in stock, the quantity, the value, of all receipts, issues and balances. Reg. 188 (2) states that the stores ledger may be manual and bound, in loose leaf or electronic form. Reg. 189 (1) states that a manual stores ledger shall maintain a separate folio for each item in stock. Reg. 193(2) states that entries of receipts and issues shall be made promptly, so that at all times it correctly reflects the amount held in stock. Reg. 69 (1) states that anyone with government stores under his control shall be personally responsible for their proper custody, care and use. Reg. 222 (1) states that Vote Controllers shall ensure that whenever one officer relinquishes to another the whole or part of his responsibilities for any store, the stocks and store ledgers are properly examined and the handing-over and taking-over conducted in such a manner that there can be no doubt as to the items handed over. Reg. 221(3) states that the officer taking over shall check the accuracy of the stores records, i.e. temporally and factually (as against stock).

⁹ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 42, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF; "Formal rules exist in sub-Saharan Africa (public) services. However, the more formal ways of working have gradually become eroded as informal and often ad hoc work methods have prevailed."

¹⁰ *Ibid* at p. 3; "A phased approach is critical to bringing about records reforms (...). A number of steps must be taken if records are to support accountability efforts. These include: *encouraging a culture* for creating, maintaining and using records. This includes obtaining and retaining the commitment of legislators, senior public officials and high ranking civil servants to support programme development; identifying and strengthening current records legislation and enacting legislation where it does not exist. This includes institutionalising records management



participation, it's important to be seen to also engage their views on methods by which to achieve such behavioral shifts. When these have been integrated into the equation, instruction can begin firstly, on how to actually build, maintain and further durable KM/IM systems. Necessarily, this includes: "providing adequate record keeping storage facilities, (and) employ(ing) qualified records professionals to manage record keeping systems." Secondly, instruction should address concrete role play or probable scenarios. Third, instruction should address the practical; institutional and societal consequences of non-adherence to new policies on IM/KM, including penalties/sanctions attached for defaulting on obligations.¹² Fourthly, instruction should serve as a means of reinforcing all the above. Internal monitoring on adherence and internal disciplinary measures should also be consistently enforced.¹³

"When government practices reflect known rules and adhere to acceptable standard codes of behaviour, the tendency is for public servants to behave rationally with equity and fairness. It is when the rules are unknown or ambiguous that the environment opens up to corruption. The same principle is applicable to records systems. If the systems are rule-based in design and consistently follow regular routines, they can provide a disincentive to individuals tempted to tamper with the evidence they manage."¹⁴ Since non-awareness of the applicable regulations and the precisely applicable provisions thereof is apparently contributory to the commission of corrupt acts, it is recommended that human resources sections in tandem with governance institutions like the ACC and even the Office of the Ombudsman devise training/orientation sessions and manuals for MDAs. These sessions should identify relevant legal/policy provisions as per the office, openly examine them and exemplify their application, with an emphasis on consistent circulation and dissemination of these expositions, and reiteration of their content and importance; for e.g. regulatory instruments in most of these instances were the Government Budgeting and Accountability Act 2005 (GBBA 05), the Financial Management Regulations 2007 (FMR 07), the Public Procurement Act 2004 (PPA 04), the Public Procurement Regulations 2006 (PPR 06), and the Anti-Corruption Act 2005 (ACA 05). Specifically s. 11(3) FMR 07 requires every person who collects or receives any public moneys to keep a record of receipts and deposits thereof in such form and manner as the Accountant General may determine. It is these sorts of provisions that should be identified, extracted and disseminated.

Importantly, attention should be brought to the need for MDA staff to also own the responsibility to identify applicable rules/conditionalities that attach to donor funds and further, to construe these in conjunction with obligations in the national regulatory framework including institutional policies for e.g. MDA staff in the *Daoh case*, should have owned the responsibility to identify the more precision driven obligation to account, with regard to a particular field of action/domain/type of expenditure, since this was stipulated by donors, (in the GAVI Draft Audit) making it clear that specifically the provision of activity reports was required. Regarding longstanding donor funded programmes with a consistent approach, these matters should be encapsulated in memoranda addressed to the relevant parties: superiors as well as subordinates working on that programme. The watchword is awareness so that vigilance is always exercised in bringing the relevant to the fore, which suggests that HR units should be particularly attentive to identifying and promoting understanding of these issues. Internal audit mechanisms should be strengthened (see section IV. **Control and Management of Public Funds**), and regular reviews of IM systems should be ensured.

through legislation and empowering records managers to enforce compliance with public sector record keeping requirements; defining and implementing records related standards and introducing or strengthening the record keeping components of accounting and auditing standards; developing financial management systems that explicitly incorporate a record keeping component."

¹¹ Wikipedia, (2015), *Records Management*, https://en.wikipedia.org/wiki/Records_management; "Records management is often seen as an unnecessary or low priority administrative task that can be performed at the lowest levels within an organization. Publicised events have demonstrated that records management is in fact the responsibility of all individuals within an organization and the corporate entity."

¹² Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 40, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF; "Even when public servants have appropriate technical skills, they may not have incentives to make improved financial management systems work. Strengthening internal regulators may provide the necessary incentives."

¹³ Aiim, (2015), *What is Information Management?*, <http://www.aiim.org/What-is-Information-Management#sthash.0pFiW0ZG.dpuf>; "Information management is a corporate responsibility that needs to be addressed and followed from the upper most senior levels of management to the front line worker. Organizations must be held and must hold its employees accountable to capture, manage, store, share, preserve and deliver information appropriately and responsibly. Part of that responsibility lies in training the organization to become familiar with the policies, processes, technologies and best practices in IM."

¹⁴ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 53, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF



There is however a need for actual interactive sessions as opposed to just distribution of information. Training would appear to already be mandated by the existing legal framework; for e.g. under s. 15(1) of the Sierra Leone Maritime Association Act, the Executive Director is responsible for SLMA staff training and development based on guidelines approved by the Board. There are likely similar provisions in the governing instruments of other MDAs. Moreover, staff should be encouraged to seek assistance in clarifying these issues from HR departments at an agency or ministerial level. This is so that, vis-à-vis observations made above, staff will benefit from greater clarity regarding their and the roles/obligations of colleagues.



Snapshot 2

II. Diligent Case Preparation:

Judges' reasoning indicates the acquittals in *Sesay*, *Doah*, the *Al Jazeera case*, and the Courts' decisions to not uphold most of the charges in *the FCC* and *Lukuley* cases are attributable to lapses of the ACC that can be summed up as; **lack of prosecutorial/investigative diligence** or **non-exhaustive investigative/prosecutorial techniques**. Generally, this nonexhaustive approach, affected the securing of evidence and the presentation of the cases, ultimately resulting in the Prosecution's failure to meet the standard of the burden of proof, (proof beyond reasonable doubt of every element of every offence). The Prosecution either adduced evidence falling below the standard or simply did not adduce any evidence at all to substantiate the charges. Categorically, manifestations of this nonexhaustive approach can be seen in;

1. Non-Exhaustive Approaches to Securing Evidence:

A. General.

B. Inadequate Witness Preparation.

2. The Defective Framing of Charges:

A. General.

B. Inappropriate Channel for Enforcing Compliance.

3. The Failure to Hone in on the Crux/Pivot of the Case, Potential Trial Clinchers and other Key Aspects.

One fallout from inadequate witness preparation was the unfamiliarity of investigator witnesses' with crucial case data suggesting ill-motivated prosecutions and misidentified illegalities due to misconceptions about appropriate standards of conduct. The review finds that the aforementioned yardsticks for judging the prosecution's performance could be largely consistently applied across the board, the controversial nature of the *Sesay* verdict notwithstanding. These objectionable trends in prosecution are examined below.

1. Non-Exhaustive Approaches to Securing Evidence

A. General.¹

In *Sesay*, investigators did not follow through on ambivalent responses/insist on developing lines of interviewing and did not confront the Accused with all the charges, startling given the tendency of the Accused to simply rely on their interview statements at trial. In this light, pushful but legitimate investigative techniques are useful.² In *the FCC case*, misappropriation charges were brought which during trial were discovered to be unwarranted; one Accused was impeded in effecting his project by squatters and allegedly missing purchases were very present; indicative of less than thorough efforts by the ACC to verify the circumstances through use of its power of summons of witnesses under s. 56 (1) (A) ACA 08. In *Doah*, a lot of Defence claims supported by prima facie evidence were not investigated; claims of retirement of receipts and reports, claims by one Accused that he did not sign for funds. Yet, still the ACC pressed ahead with its contentions. Mission sites the Accused claimed to have visited were also not visited by Investigations. Investigator witnesses seemed only to be able to proffer iffy comments when these evidences were raised by the

¹Dandurand Y., (2009), *Addressing Inefficiencies in the Criminal Justice Process*, A Preliminary Review Prepared for the BC Justice Efficiencies Project, International Centre for Criminal Law Reform and Criminal Justice Policy, pp 20-21, <http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/InefficienciesPreliminaryReport.pdf>. "Many of the failed or delayed prosecutions can be attributed to poor investigation and the fact that the evidentiary requirements of a case may not have been adequately addressed at the investigation stage".

²USAID Nepal, (2005), *Anticorruption Investigation and Trial Guide Tools and Techniques to Investigate and Try the Corruption Case*, p. 25, http://pdf.usaid.gov/pdf_docs/PNADE146.pdf; Even use of arrest and detention where appropriate. The investigators' strength "may be a magnet towards which cooperating witnesses are drawn and a shield behind which they feel safe. It also sends a strong message to future witnesses who may not be inclined to cooperate, that the consequences can be severe."



Defence. Such clarifications could have disclosed compliance by the Accused with their obligations, and so would have skillfully underlined the existence of the obligation as against non-compliant Accused. In *Lukuley*, although the Prosecution contested that Lukuley's per diem had been fixed above the limit, it did not adduce evidence indicating the then applicable rates of per diem. In *Doah*, the *FCC case*, and in *Lukuley*, where SLMA board members were not called, the Prosecution's failure to probe critical evidentiary sources raised negative inferences of evidence unfavorable to the Prosecution.³ In the *Al Jazeera case*, the judgment appears to indicate that the Prosecution did not adduce evidence external to the documentary, which in hindsight appears to have been too tenuous for bringing charges. The Prosecution may have been influenced by public opinion⁴ which may well have been assuaged solely by investigations and persuasive press statements on the state of the evidence. Even here, the Prosecution was denied its request to have the unedited version of the documentary played since it was tardy in doing so. It should have focused more on proving conspiracy so as to succeed on soliciting charges.

In *Katta*, the Prosecution conceded to leading no evidence supporting 3 counts resulting in Katta being discharged on those counts while in *Lukuley*, where the Prosecution had led evidence on certain misappropriation charges, it could not then withdraw them as it sought to do in its closing submissions, so that the Accused was acquitted on those charges. In *Sesay*, an ACC investigator testified that they had no specific evidence supporting allegations that Allieu Sesay had received a reward from his wife. It is probable that *Doah*, temporally the antepenultimate case in the review, may have sought to mitigate this undesirable evidential trend by awarding costs to the Defence on acquittal of all the charges, deeming the evidence too tenuous for initiating prosecution. By contrast, in *Ken Gborie*, the Court recognised instances where the Prosecution made adequate efforts to secure the relevant, existing evidence, and produced everything the MOHS gave it.

Investigators who see themselves as being responsible for the final outcome will seek the best possible case presentation. It's important to cast the net wide in securing information, since to do so likely increases the cogency of evidence derived therefrom. It is imperative that investigators be able to communicate effectively to obtain information from people especially if there is little or no forensic/tangible evidence. ⁵ Investigations should be methodical, guided by reasoning, logic, intuition and built around anticipated factual and legal challenges. ⁶ Interviewing requires openness and following the facts wherever they lead, not attempting to fit them into pre-determined conclusions.⁷ although malleable, interview plans should be set out in writing in advance, covering all important topics including how to secure evidence supporting elements of the offence and how to combat likely defences. Questioning should be persistent where necessary: all relevant questions should be asked even where the defendant refuses to answer: the focus is on getting complete, accurate and reliable information that can establish the truth. It's recommended to start with an open account/free report, which precedes any revelation of the case against the suspect, covering all possible explanations for the contested acts, so as to pre-empt later changes in the account.

³Tanford J. Alexander, (2009), *The Trial Process: Law, Tactics, and Ethics, Fourth Edition*, Bloomington, Chapter 2, Preparing For Trial, p. 26, <http://www.law.indiana.edu/instruction/tanford/web/reference/02prep.pdf>. "The law allows for an adverse inference to be drawn from the failure to call an available witness with natural ties to your client."

⁴OECD Anti-Corruption Network for Eastern Europe and Central Asia, (2010), *Proceedings of the Expert Seminar on Effective Means of Investigation and Prosecution of Corruption*, Romania, p. 84; "Public opinion formed by mass media could influence the independence of the anti-corruption institution in indirect and direct ways."

⁵Alifano C.M., (2006), *Fundamentals of Criminal Investigation*, Worldwide Law Enforcement Consulting Group Inc., p.2; <http://www.worldwidelawenforcement.com/docs/FUNDAMENTALS%20OF%20CRIMINAL%20INVESTIGATIONS.pdf>

⁶ *Ibid* at FN 2.

⁷ *Ibid* at FN 5.



If the information provided is limited, it can be expanded by requiring more detail. The critical guideline should be; how to fill in evidential gaps.⁸

A prosecution should not be brought where there is no reasonable prospect of a conviction. *Daoh*, raises the issue of the Prosecutors objective assessment of whether the evidence disclosed a prima facie case i.e. was of such sufficiency, admissibility, substantiality, credibility, reliability that a judge would conclude that the Accused was guilty beyond a reasonable doubt. Consequently, it's important to have more than one source of evidence to initiate a case, reference *Al Jazeera*. Insufficient evidence might simply have meant postponing the proceedings. Where the evidence is sufficient to justify Prosecution, one must then determine whether it's in the public interest. Factors considered here are; the amount involved, the level of seniority of the Accused, the abuse by the Accused of their position of trust/authority, the prevalence of the type of offence, the need to maintain the rule of law and public confidence in the criminal justice system, available efficient alternatives to Prosecution, a resource-based cost benefit analysis of prosecution, supporting judicial precedents, employ of the trial as a test case for certain matters and prosecution as a public relations gimmick.⁹ *Doah*, as with any wrongful decision to prosecute, likely undermined public confidence in the criminal justice system and could decrease respect for the law.

The above raise questions about the point at which prosecutors become involved in the investigation and influence the type of evidence secured.¹⁰ For example, one expert witness on Procurement states; "(...) in general, we tend to believe some of the ACC losses concerning procurement cases have been due to (the fact that) they did not always talk to the NPPA prior to the indictment, although that is changing (...) I have been called upon countless times to give directions for investigations (...)." ¹¹ The impact of expert knowledge shaping the case's presentation from the investigation phase is quite different from having the expert provide exclusively in court witness testimony; "As a witness, I was only called at a certain stage at the courts and my responses were based only on the questions asked." ¹² The evidentiary potential of sources such as these should be maximized.

On integrating investigative and prosecutorial functions¹³ to address prosecution issues early, the ACC does however confirm¹⁴ that Prosecutors do oversee investigations and that cases benefit greatly from early prosecutorial input.¹⁵ Further, although investigators may mention the charges that their findings may support, the preferment of charges is strictly the Prosecutors' domain. The ACC affirms that investigators are kept well informed during litigation about the progress of the case and even postmortems are held after judgment for improvement of subsequent brief preparation.

⁸Police Interrogation Manuals, (Undated), *Investigative Interviewing Suspect Guide*; <https://www.fvi.org.nz/request/244/response/2484/attach/5/Investigative%20interviewing%20suspect%20guide.pdf>. See also UK Home Office, (2014), *Interviewing Suspects, Guidance Based on Police and Criminal Evidence Act (PACE) 1984*; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293597/Interviewing_suspects_v3.0_EXT.pdf

UK Government, (Undated), *Interviewing Suspects*; http://www.hse.gov.uk/enforce/enforcementguide/investigation/witness-questioning.htm#P1_57

⁹DPP Republic of Ireland, (2010), *Guidelines for Prosecutors, Director of Public Prosecutions*, pp.16 -21;

<https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>. See also, College of Policing UK, (2015), *Charging and Case Preparation*, <https://www.app.college.police.uk/app-content/prosecution-and-case-management/charging-and-case-preparation/Prosecution>. Also of note, Australian Law Reform Commission, (Undated), *Reporting, Prosecution and Pre-trial Processes, The Prosecution Phase*; <http://www.alrc.gov.au/sites/default/files/pdfs/publications/26.%20Reporting%2C%20Prosecution%20and%20Pretrial.pdf> See also, Reid J.E., (2006), *Investigator Tips, Developing an Interview Strategy*;

[http://reid.com/educational_info/r_tips.html?serial=1109694033875718&print=\[print\]](http://reid.com/educational_info/r_tips.html?serial=1109694033875718&print=[print])

¹⁰Ibid at FN 9.

¹¹Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

¹²Ibid. See also the *Katta* case, pp. 102-103.; "The function of an expert is to provide the judge and jury with a ready made inference which the judge and jury due to the technical nature of the facts are unable to formulate. Therefore, 'an expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury' (...); DPP v. Jordan 1977, Lord Wilberforce."

¹³Harvey R., *The Independence of the Prosecutor, A Police Perspective*, p. 14 on the need to integrate the Investigation and Prosecution phases.

¹⁴Responses furnished by the Former Director of Investigations, Intelligence and Prosecutions (IIP UNIT), ACC, Mr. Reginald Fynn, 2 July 2015.

¹⁵Harvey R., *The Independence of the Prosecutor, A Police Perspective*, Also ibid at FN 1, p.22; "The early involvement of the prosecution, even when an investigation is ongoing, is to be encouraged. It can assist in ensuring that the evidentiary requirements of a particular case are met through the investigation and maximize the chance that the prosecution will be efficiently conducted and successful."



Once an indictment is filed, the prosecutor holding the file will constantly review the evidence on his own, review with the Director of Investigations, Intelligence and Prosecutions (IIP Unit) if an event demands and, if a major legal question comes up, review with the Commission as a whole. However, the ACC as an independent prosecuting agency does not discuss its investigations or prosecutions including the charges/drafting the indictment with the SLPA or State Prosecutors in the Law Officer's Department. In light of the ACC's articulated tack, a possible suggestion might be a more collaborative approach with the SLPA and State Prosecutors, *if needed* and more comprehensive *communication* between the prosecution and investigators.¹⁶

B. Inadequate Witness Preparation:

Apart from obvious reasons, it should be noted that thorough trial preparation is ethically required by the Legal Practitioners Act 2000 and these obligations also include the investigations phase, presumably noted in the ACC Investigations Manual. Thorough trial preparation includes adequate witness preparation. In *Sesay*, investigator witnesses' were unfamiliar with crucial case data bearing on the innocence/culpability of the Accused. In *the FCC case*, 3 Prosecution witnesses, including an ACC investigator provided testimony which favored the Accused. As an expert witness in Procurement states; "(...) in general, we (the NPPA) tend to believe some of the ACC losses concerning procurement cases have been due to its inability to grasp the technical facts."¹⁷ This inability to grasp the technical facts is exemplified in *Doah*; when an Investigator was confronted by a retirement of funds submitted by an Accused, he retorts that what was required was the submission of a report not retirement, although he then admits that that Accused had submitted 2 reports to him. The investigator did not make a very convincing case of his knowledge on the most crucial aspects of the case; types of allocations and attached obligations and the hierarchical structure of the MOHS.¹⁸ These events underscore the need for frequent resort as and when necessary to expert witnesses; "I can recall 3 cases in which I testified that resulted in convictions; *Ken Gborie, the FCC case and Sarah Bendu*."¹⁹

2. The Defective Framing of Charges

A. General:

The Prosecution's approach to drafting the charges has been repeatedly repudiated. The Court has remarked on the Prosecution's charging strategy generally not complying with the technical drafting requirements. In *the ABC case* and in *Lukuley*, the Court disapproved of overloading the indictment by duplicating the charges i.e. bringing several different charges against an Accused for the same set of circumstances, since it encumbers both the prosecution and the judge in assessing the evidence supporting every element of every offence. He advised proffering only the most obvious charge unless the evidence is uncertain. The Prosecution had been inconsistent even in drafting duplicitous counts since some acts are charged under several rubrics, while others that easily could be, are not. In *Lukuley*, a charge of abuse of office was held to be redundant, since the Accused was found guilty of abuse of position for the same act. Duplicity also means charging different criminal acts which are non-continuous offences, allegedly committed during an extended temporal frame, as one count *and also*, charging the commission of a non-continuous offence between two stated dates, instead of, "on a day unknown" between the two dates. In *Lukuley*, several charges were struck out for these reasons. In *Lukuley*, one count merged the elements of different offences resulting in the Accused's being discharged on it. The literature supports the view that the Prosecutor must not "over-charge" based on the same set of facts to avoid complicating the trial. The preferred approach is to charge the most serious offence which encapsulates the seriousness of the criminal conduct so as to enhance clear case presentation.²⁰

In the *Al Jazeera case, ABC case, and Sesay*, drafting conspiracy charges as having being committed with "other parties unknown" where there are identifiable alleged co-conspirators which the evidence purportedly relates to, seems superfluous and could encumber the Prosecution. In the *FCC case*, one misappropriation charge erroneously,

¹⁶ See final point in Overview section below.

¹⁷ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

¹⁸ Ibid at FN 4; p.12; "One thing an Investigator can do to support a bribery investigation is to obtain organisational information concerning job descriptions, liabilities and executive powers in the company".

¹⁹ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

²⁰ DPP Republic of Ireland, (2010), *Guidelines for Prosecutors, Director of Public Prosecutions*; p. 26 on charging and case preparation; <https://www.dppireland.ie/publications/category/14/guidelines-for-prosecutors/>



comprised even the withholding tax paid by the Accused. In *Katta*, the Prosecution charged conspiracy under s. 128 ACA, instead of s. 128 (1); the error was tempered by Justice Paul who reasoned that not specifying the relevant subsection does not make Count 1 defective; the exact scenario obtained in *Ken Gborie* roughly 2 months later. In *Doah*, the Prosecution did not charge s. 48 ACA 08, failure to comply with applicable procedures, in respect of the Accused's failure to provide financial reports. Had this been the principal charge or investigative focus, motives may have been uncovered that go toward misappropriation. Instead, the Prosecution construed misappropriation as a strict liability offence, where the Accused's omissions sufficed to establish the offence.

B. Inappropriate Channel for Enforcing Compliance:

In the *ABC case* and in *Lukuley*, it was stated that where there are alternative means of securing compliance with investigations, the ACC should not rely on the Court to enforce the ACC's investigative methods/sanction the Accused for noncompliance with investigations, but should use its own coercive powers to secure the compliance of suspect. Therefore, charges based on s. 130 (1) ACA 08, which makes noncompliance an offence, constitute an erroneous approach to drafting in the face of existing alternatives. Conteh who was so charged in the *ABC case*, did actually end up cooperating and was acquitted of 3 such noncompliance charges under s. 127 (1) ACA, obstructing justice and under s. 130 (1) ACA, failing to comply with a requirement under the ACA. Although Lukuley was convicted on count 174 under s. 130 (1), for failure to comply with a s. 63 (1) ACA notice to provide his passport, the Court nonetheless commented that the ACC could have requested the CIO of Immigration to sequester the passport and that Public Prosecutors would normally have detained the Accused, meaning the ACC could have arrested the Accused.

3. Failure to Hone in on /Emphasize Clinchers:

Although only judgments and media reports were reviewed, not the Prosecution's briefs, oral or written motions, it is only natural to presume that Judges' evaluations of the Prosecution's evidence would disclose those facts or lines of argument espoused by the Prosecution as being decisive and towards which it had striven to funnel their attention. The controversial nature of the *Sesay* verdict notwithstanding, the Prosecution allowed Judge Ademusu the facility of declaring that the Prosecution had built its entire case on the evidence of just one unreliable witness (Labour),²¹ and of not assessing the tilt of the gamut of other pieces of evidence, both witness and documentary. His assertion (adopted angle of analysis) was as a result of the Prosecution's omission to stress that their case rested on cohesive circumstantial evidence, not just direct evidence.²²

It should be underlined that the law does not require a certain amount or type of evidence. Likewise, evidential weight is not contingent on the quantity but on the quality of the evidence; the value of a mesh of circumstantial evidence as against a direct piece of evidence is a matter of fact;²³ *this makes it worth underscoring the cohesiveness as between the pieces and their incline*. In *Sesay* and *Doah*, the error is in not explicitly corroborating crucial aspects of the case. Corroboration means showing how different evidential sources make the same point. In *Sesay*, it would have signified strengthening the other aspects of the case given the uncorroborated testimony of a single witness, so that the Prosecution's logic of a faulty procurement process would have carried safely over the weak spots.²⁴ Since circumstantial evidence operate as pieces of the puzzle that help enough of the picture to emerge, prosecutors should have breathed more life into these; "evidence does not sit up and bark like a dog to inform someone that it is evidence."²⁵

Similarly, in *Doah* the Prosecution did not sufficiently clarify the interaction between obligations sourced from donor instructions bearing on donor funds and obligations sourced from the national regulatory framework. Again, the Judge

²¹ American Prosecutors' Research Institute, (2005), *Basic Trial Techniques For Prosecutors*, p.5, http://www.ndaa.org/pdf/basic_trial_techniques_05.pdf; The Prosecution should anticipate and prepare for all possible defenses and arguments including; there is only one witness, the evidence/witness is credible, there is very little corroborating (physical) evidence.

²² Ibid at FN 2, p. 10; Direct evidence is an event which is directly observed with no intervening events. Circumstantial evidence is made up of those items from which one can infer events or derive conclusions. It is not that evidence which a witness saw or heard, but rather a fact which can be used to infer or deduce another fact. It implies something that occurred, but does not directly prove it. It is usually one fact in a chain of facts which one must prove to establish a person is guilty or not guilty.

²³ Ibid at FN 20, p. 13-16. This is supported by Judge Paul's exposition on circumstantial evidence in, *The GAVI Funds Case/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M.Roberts*, 2 July 2014, where he states that a case may be based on circumstantial evidence alone.

²⁴ Ibid at FN3, p.58

²⁵ Ibid at FN 2, p. 9.



here, Judge Charm in ruling the absence of documentation did not per se amount to misappropriation, failed to overtly acknowledge in his reasoning that the existence of obligations of providing fuel invoices and a list of signatures of per diem recipients were confirmed by the GAVI Draft Audit Report and that some Accused simply had not met these obligations. Spelling out the interactive status could have focused the Judge on commenting thereupon. There are statements in the *ABC case* which appear to equate the failure to document with misappropriation, which may well have motivated or contributed to *Doah's* case theory. Whether or not this is the case, a review of the judgment fails to disclose any assertion by the Prosecution of this supportive precedent.²⁶

Doah shows that investigators and prosecutors should initially assess whether the alleged corrupt conduct is criminal, civil or administrative and where appropriate, help prompt administrative and disciplinary sanctions and monitor them. Such measures could lead to fines, restitution orders, dismissal/demotion or restructuring an operation.²⁷

²⁶The Attitudinal Behavioural Change (The ABC) Case/The State v. Philip Conteh, Allieu Kamara, Lansana Zanto Kamara before Hon. Mr. Justice N.C. Browne-Marke, 19 May 2011, lines 26-28, p. 29; *"The only reason why proper and adequate records of expenditure were not kept, was to use the monies donated for purposes other than those for which they were meant."*

²⁷ Ibid at FN2, p.5.



Overview

- Areas of focus could be: more control and leadership by Prosecutors of pre-trial investigations to generate more pointed evidence and more effective and coordinated team work, including free flowing and comprehensive communication and a conjoint evaluation of the weight of evidence prior to trial especially through the spectacles of the presiding judge to assess its potential to meet the standard of proof beyond reasonable doubt. Such assessments should include identification of evidential strengths and weaknesses and GAP analysis of evidence from which clearer directives can be issued to investigators, identification of prosecutorial strategy/case framework within which details are fleshed out based on the different trial phases.
- The evidentiary approach must strive to be watertight, spell out the relevance of particular kinds of evidence and the nexuses between them. Elaborate case theories require even more work to ensure tight links where holes cannot be poked. This means that the Prosecution needs to have thorough, lucid and cogent expositions on the evidence substantiating its theory.
- Levels of planning should move from the general to the specific at every seminal trial phase; allegations supported by generalized evidence predictably would be countered by denials, precipitating the adducing of more targeted evidence; e.g. Forensic Document Examiners, Handwriting Experts, amassing authorities that could be easily pulled up for employ by the Prosecution etc.
- Efficient case management software (not currently employed) would have an invaluable impact on searching and analyzing large quantities of data.

- Investigators should reference the provisions on their powers when in doubt, legitimately exploiting all sources available.
- The witness testimonies above evince a lack of foresight and an anticipatory approach to likely Defence examination strategies and indicate an overall need for better preparation. For investigators, this means a grasp of not just the fundamentals; case theories, key legal and bureaucratic concepts, common facts about the case and surrounding issues, but also a grasp of crucial data on which the case hinges. In light of the nature of ACC cases, an understanding of the process/ procedures integral to such bureaucracies is key.
- Could the mishaps²⁸ above have been due to resource constraints affecting investigations or prosecutions?

²⁸ Ibid at FN19, p. 16; A very high rate of prosecutions resulting in acquittals could undermine public confidence in the criminal justice system.



• *Would they have been avoided by increased inter-institutional cooperation with clear lines of communication? (See antepenultimate point in [Overview of Section III](#); p. 19) Are there collaborative endeavors involving investigators, accountants, auditors from the customs, tax and labour department, Audit Service Sierra Leone, the financial intelligence unit of the Bank of Sierra Leone, the SLPA, Court Registries, the NPPA, MDAs directly or indirectly concerned and specifically internal auditors and persons within internal disciplinary units of these MDAs? Such collaboration could come in the form of ad hoc innovations or standing inter-agency investigation teams.*

• *Collaboration or more active communication with State Prosecutors is suggested in process of drafting, or at the very least during the review of indictments.*

• *It should be noted that the judgments reviewed range from 2011 to 2014, so that the aforementioned propositions are attempts at logical derivations based on this set of selected cases within that loosely defined period.*

• *With respect to the above propositions, the Acting Chief of Investigations, Intelligence and Prosecutions²⁹ maintains that his experience at the ACC since 2008, by all accounts indicates that Prosecutors have a substantial influence over the progress and direction of investigations. He does concede that this was not always the case. He clarifies that at the ACC's inception phase, most prosecutors were non-Sierra Leoneans, unfamiliar with the local culture possibly incurring communication gaps. Their stints at the ACC seemed too transitory to allow for cultural acclimatisation. Communication may also have been hindered by the stationing of investigators at Gloucester Street and prosecutors at the Guma Building. The Ag. Chief IIP admits that pre the tenure of Commissioner Tejan-Cole, investigators were given free-reign to conduct investigations with prosecutorial directives given mainly at the start, so that they would complete investigations with limited prosecutorial input, then submit their completed dossiers to the Prosecutor, trial ready as it were. Based on Commissioner Tejan-Cole's review of ACC working methods possibly prompted by concern over failed prosecutions, the level of interaction between investigators and prosecutors was increased.³⁰ As it stands, prosecutors assigned to a case communicate almost daily with assigned investigators, meaning that prosecutorial directives shaping the direction/progress of the investigation, are constantly evolving with the nature of the evidence unearthed. Generally, investigators tend to do at least 35% of the work by the time the dossier is submitted to the Prosecutor.*

²⁹ Interview with Acting Chief of Investigations, Intelligence and Prosecutions, ACC, Sariffou Harleston, 9 June 2016.

³⁰ Ibid; "Tejan Cole came with the practice of closer monitoring of investigators by prosecutors and that increased the interaction. He noticed a bit of a disconnect with the two arms." Harleston's commentary is consistent with the Responses furnished by the Former Director of Investigations, Intelligence and Prosecutions (IIP Unit), ACC, Mr. Reginald Fynn, 2 July 2015, final para., p. 3 above.



With regards to the final presentation of the case in the form of the Prosecution's final trial brief and oral closing submissions, Harleston asserts that from his experience, these have been watertight and compelling, but does admit that more recently " a poor manner of presentation of material has crept in." He admits that there is a dearth of case/evidential management software/apps at the ACC, but asserts that that does not necessarily translate into challenges with efficient evidential management/analysis, since there are existing methods of evidential management/analysis employing basic word documents. He does however admit to the benefits of more sophisticated apps. He asserted that the issue of work constraints due to a lack of resources is a non-issue. On clear lines of communication re inter-institutional cooperation, the only provisions regulating the ACC's interaction with the SLP very generally are ss. 78 (2) (b), 79 and 10 (2) ACA '08. There are no standing inter-agency investigation teams but instead go-to persons within various institutions, although a Financial Intelligence Unit was established at the ACC in 2013 for dealing with technically loaded investigations. However, this author submits that standing inter-agency investigation teams would allow for the progressive inter-institutional alignment of working methods and process in areas of shared concern /competence; as opposed to just cooperating when the need arises, working methods would be streamlined and harmonised to better inform and enhance each other and to facilitate investigate needs. Harleston states that drafting indictments is very simple and that complexity notwithstanding, there is no need for ever involving the LOD. In general regarding the aforementioned identified lapses, he states; "In the early years we had the usual starts and stops of a fledgling organisation. Things continue to improve over time. Work methods have been constantly refined."



Snapshot 3

III. Conspiracy and Procurement:

The offence of conspiracy was charged in 6 of the 8 cases reviewed, with convictions in 2 cases. Note that the charge of conspiracy concerned procurement in 2 cases: Sesay and Ken Gborie. Regarding acquittals, in Sesay the Accused were acquitted of conspiracy to willfully fail to comply with procurement procedure. In Lukuley the Accused was acquitted of a conspiracy to willfully failure to comply with applicable procedures relating to management of funds and also acquitted of a conspiracy to misappropriate public funds for want of evidence in both instances. In the FCC case, the Accused were acquitted of conspiracy to misappropriate since the charge was erroneously plead. In the Al Jazeera case, the Accused was acquitted of conspiring to offer and solicit an advantage, the evidence demonstrating no such common design. Regarding convictions; in Katta, the Accused were convicted of conspiring to cause loss of revenue, while in Ken Gborie, the Accused were convicted of conspiring to willfully fail to comply with procurement procedure. Charges were also brought in Sesay, the FCC case and Ken Gborie for willful failure to comply with procurement procedure (as a substantive offence and not through the mode of conspiracy).¹

1. Conspiracy:

A. Pleading:

Conspiracy as a mode of commission can be charged in relation to any substantive offence of the ACA 2008. The Prosecution has kept repeating the same error in pleading conspiracy, but the Court's approach has grown more tolerant to these misses over time. In the FCC case in August 2012, conspiracy was plead under s. 128 generally, instead of 128 (1) and even though all s.128 (2) simply refers to are the investigative powers for conspiracy, the conspiracy charge was dismissed for possibly prejudicing the Defence. It could not be amended since, it was argued, the erroneous charge never created an offence in the first place, and any amendment would now introduce an offence never part of the committal proceedings. In Ken Gborie in July of 2014, the same problem arose, but this time J. Paul interpreted s. 128 without more, as creating the offence of conspiracy. Here, it was held that a statute should be construed in conformity with the common law and that conspiracy was a common law offence. The Accused had pleaded not guilty to the offence, meaning that he understood the charge and was not prejudiced in his defence. In Katta in April of 2014, J. Paul followed the precedent he had set, by dismissing the Defence's argument that the conspiracy charge was defective and vague since it was again charged under s. 128 ACA, instead of s. 128 (1). Referring to Ken Gborie, he stated that s.128 without more does indeed create the offence of conspiracy, since the ACA simply imported the preexisting common law offence and statutes had to be construed in conformity with the common law, unless there was a contrary intention. The Accused was not prejudiced in his defence since he must have understood the charge in order to have pled to it and s. 148(1) of the CPA of 1965 made such amendments possible, contrary to dicta in the FCC case.

B. Evidence:

Sesay makes clear that the law on conspiracy criminalizes the existence of an agreement between two or more to do an unlawful act by unlawful means *and* the intention to play a role in the agreed scheme. According to Sesay, proving a conspiracy means proving that the parties allegedly involved had a common purpose. Similarly, in Katta, J. Paul stated that the offence of conspiracy is the agreement between two or more persons to do an unlawful act but he went further in saying that the offence requires an act in pursuit of that criminal purpose, accompanied by the intention to do the unlawful act. As per the review, the Prosecution's case theories set out corruption offences *generally* as requiring a lot of "hands" to pull off and conceal. The more massive the amounts at stake, the more convoluted the criminal plan becomes, requiring more persons to effectuate it; a conspiracy. Katta recognized that conspiracies come in different forms, with roles of varying significance and conspirators need not know each other or to have started the conspiracy simultaneously; it can be joined tacitly at a later stage by others, aware of all the essential facts and having the same object.

The rules as set out in the cases reviewed, on the admissibility of, and weight to be given to evidence sought to be adduced in support of a conspiracy charge, are consistent with each other and with more generalized rules on evidence concerning joint trials simpliciter. Sesay is authority for the general principle that the Prosecution must adduce all evidence on which it intends to rely as probative of guilt of the Accused before the close of its case. In the ABC case

¹ See heading 4, p. 5 below.



where conspiracy was not charged, it was stated that despite a joint trial, each Accused's case/evidence must be treated separately, that evidence inculcating one Accused should not be treated as necessarily inculcating another and that, where there is no direct or circumstantial evidence establishing an Accused's guilt, independent of the evidence against their co-Accused, he is entitled to an acquittal. Regarding conspiracy then, Sesay indicates that acts clearly proved against some defendants may be used against all the defendants, **as evidence of the nature and objects** of a conspiracy. The Al Jazeera case further sharpened this principle stating that a **conspiracy may be proved** against an Accused by admitting the acts of his co-Accused against him, but only if that co-Accused acted in furtherance of a common plan between himself and the Accused; the co-Accused's conduct sought to be admitted should indicate the pursuit of a plan as between them and even where this criterion is met, other independent evidence implicating the Accused in the conspiracy is needed. Therefore, evidence of the Co-Accused's conduct by itself does not suffice. Katta added very little to these conditions, saying that in proving conspiracy, the words, deeds or omissions, of an Accused conspirator in furtherance of the common design, made in the absence of the co-Accused/co-conspirators, may be admitted in evidence against these co-Accused and that this was a question for determination on an individual case basis. **The net effect of these cases is that generally and in conspiracy cases specifically, evidence admissible against an Accused may be admitted against other Co-Accused. However, a conviction requires evidence independent of the evidence against one's co-Accused.** This is a due process protection mechanism consistent with the presumption of innocence and the standard of the burden of proof (beyond a reasonable doubt), incumbent on the Prosecution.

It is difficult to secure evidence directly implicating an Accused in corruption offences. In Katta it was stated quite generally that; *"It is difficult to detect corruption in public service since participants consciously cover their tracks. Perpetrators of corruption offences are skilled and devious schemers, operating covertly."* In relation to proving conspiracy, it is even more difficult to secure direct evidence of a common agreement and of an Accused's consent to/ involvement in it. Sesay makes clear that; *"it is possible to infer such an agreement from the circumstances."* Hence, the Prosecution's heavy reliance on circumstantial evidence, especially as regards conspiracies, to prove the existence of an agreement and the Accused's involvement in it. As was voiced in Katta; *"the intention to do the unlawful act and the act done in pursuit of that criminal purpose, tend to be rarely capable of being proved through direct evidence. These elements of the offence must be inferred from objective factual circumstances, i.e. acts or omissions of the parties. Very often, the act is the only proof of conspiracy...Circumstantial evidence ...are thus relied upon to demonstrate the agreement to participate or commit the crime and the commission of the crime itself."* **In short, the fact that various acts were committed by the various Accused which all work together to produce a natural consequence/outcome can be proof of intention and agreement.** For example in Katta it was held that, although there was no direct evidence of Fornah's acts as proof of a conspiracy, conspiracy may be inferred from his acts where it appears to be the natural consequence of his actions. Turay's role in the conspiracy was evident from his overt acts and omissions which breached all known bank procedures to ensure the diversion of NRA cheque into Magsons' account and Mrs. Katta's phone conversations to these two were, *"part of the multitudinous little things that corroborate the overarching conspiracy"* to divert the cheque, going to show she was party to the conspiracy. Katta was held to be complicit in the overarching conspiracy, since he started withdrawing from the account as soon as the payment was made. On the other hand, in the Al Jazeera case, the Accused were acquitted of conspiring to solicit and to accept the offer of an advantage, since taken together their conduct did not amount to collusion or go towards proof of such an agreement.

In the FCC case, the Court stated that it's unadvisable to charge a conspiracy where the supporting evidence is simply evidence of the actual commission of substantive offence (s).² However, in Katta, J. Paul reasoned that it was

²Ramsay I. and Pinnock T., (Undated), *Conspiracy-An Expanding Net*, [www.jambar.org/index.php?...Conspiracy%20-%20An%20Expanding%](http://www.jambar.org/index.php?...Conspiracy%20-%20An%20Expanding%20), p. 8; In *R v. Dawson* (1960) 1 W.L.R. 163, p. 170, the Court complained, *"This Court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury."* See also pp. 5-6; The practice direction which followed the UK Criminal Law Act 1977 advised judges that, *"In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts"*; Practice Direction (1977) 1 W.L.R. 537. The direction was issued in response to complaints that unjustified charges of conspiracy were being brought to enable the prosecution to take advantage of the hearsay exception rule of the conspiracy doctrine.



permissible to charge conspiracy and substantive offences on the same facts and that charging a general conspiracy more accurately reflects the reality than just charging the substantive offences which are subsumed within it. The consequence of this, is that the proof of the conspiracy is then entirely contingent on convictions for these substantive offences so that where these fail, the former also does, as in Lukuley where the Accused was charged with conspiracy to willfully miscalculate his per diem which was contingent on misappropriation charges and in Sesay where Sesay was acquitted of conspiracy since the substantive offence of personally breaching s. 48(2) (b) failed.

Therefore, for a charge of conspiracy, the Prosecution may seek to admit diverse and disparate pieces of circumstantial evidence as admitted against one Accused, as against co-Accused, even where not directly related to the latter, to set the scene; to depict a large scale enterprise, to prove the element of a grand scheme/design/plan and to demonstrate the coalescence of that scheme.³ In line with due process safeguards, the evidential principles enunciated above do not prevent this, but operate to ensure that where such generalized evidence has no direct nexus to an Accused, it does not serve as the basis for their convictions; only evidence implicating the Accused in the orchestration of the conspiracy, not just his co-Accused, should be the basis for attributing personal responsibility to him for the offence.

Direct evidence is by definition independent of any other and so qualifies as both admissible and grounds for conviction. The above principles on admissibility and grounds for conviction therefore only require testing as against circumstantial evidence, since its nexus to the Accused in question may vary, as stated by J. Paul in Ken Gborie: "Circumstantial evidence constitute a network of facts cast around the Accused; they may be unsubstantial, salient but not cohesive enough, or salient, coherent and cohesive leaving the Accused with no plausible argument or alibi." The evidential principles from the review exist to ensure that convictions are not based on circumstantial evidence with tenuous links to the Accused. To say that in order for circumstantial evidence to serve as the basis of conviction against a particular Accused, it must be independent from the bulk of the evidence admitted as against her co-Accused, simply means that that piece of evidence must bear pertinently on the Accused. It is its direct relevance to the Accused in question that makes it **independent of the bulk of the other evidence admitted against co-Accused**. This is because it may possibly be considered generalized circumstantial evidence as against one's co-Accused. Or, if the piece of evidence simultaneously implicates all co-Accused, it can still meet the independent evidence criteria since it is independent in terms of implicating each individual Accused. Since the test does not stop circumstantial evidence from coming in at all, but stops improximate circumstantial evidence from being the basis of a conviction for reasons cited above, by itself, it does not render proving a conspiracy impracticably difficult.

2. Procurement and the Evidential Test for Conspiracy:

As to whether this requirement for "proximate circumstantial evidence" is practical and makes for good law in relation to conspiracies in procurement, note that it is not a more stringent standard unmatched by the nature of the circumstantial evidence that conspiracies in procurement normally throw up.⁴ The exposition above seeks to make clear the evidential requirements for proving a conspiracy, to be harnessed for further elaboration if need be. If Sesay becomes an authoritative precedent, this evidential test above will only apply to conspiracies in procurement (i.e. under s. 48(2) (b) ACA 08), where the conspirators are considered public officers, but the test will not be applicable where private parties are also so charged, that charge being voidable.⁵ If the reasoning in Sesay as regards the capacity of private parties to commit conspiracy under s. 48(2) (b) ACA 08 is overruled, the test will be relevant across the board.

³ The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, p. 60; "...the overt acts which are proved against some defendants may be looked at as against all of them to show the nature and the objects of the Conspiracy."

⁴ See the discussion on indicia for identifying conspiracies in procurement at Application, p. 12 below.

⁵ See the discussion on the impact of Sesay at heading 5, pp.6-9 below.



3. Public Procurement:

Public procurement, a practice designed to meet public needs in a way that serves the public interest, is starkly a good governance issue. It aims to secure goods, services or works, from an external source at optimum conditions to obtain the best value for tax payer's money.⁶ The PPA 2004 generally establishes an open bidding process as per s. 37(1)⁷ with the exception of sole source procurements in s. 46, and restricted bidding in s. 42. The point of a competitive process is to achieve best value for money since competition stimulates innovative ranges of better quality services and goods,⁸ more efficient performance and lower costs. These factors support economic growth and are lost in the face of corruption/collusion. Corruption/collusion results in overpriced *gratuitously* awarded contracts which produce defective outcomes and divert public funds away from public amenities. **Procurement focused anti-corruption efforts therefore directly impact governance.**

Procurement fraud is deliberate deception to secure unlawful gain. It can take the form of cartels, prevalent in smaller markets with fewer competitors i.e. explicitly deceitful behavior among otherwise rival firms for their mutual benefit based on secret conspiracies determining the winner of contracts. Cartels operate through bid-rigging/collusive tendering, meaning they artificially inflate prices (price fixing) and submit tailored bids and agree on who will win or agree not to bid against one another, compensating each other with subcontracts. Similarly, complementary bidding⁹ is the submission of token tenders by bidders that are too high or deliberately defective, and sometimes from shell companies,¹⁰ to simply create the appearance of genuine competitive bidding, securing the winning bidder's place at inflated prices. Cartels may engage in bid suppression/bid limiting so that competitors refrain from bidding or withdraw previously submitted bids or may engage in bid rotation where bidders take turns at being the winning bidder depending on the size of the contract, geographic areas, job, etc. tending to occur with successive contracts. Similarly, the Cartel may divide markets up and agree not to compete on certain bases. These practices involve misrepresentation, sometimes through the submission of false invoices or statements of prior work experience etc. Collusion and corruption coincide when public officials are favored for facilitating collusion. Such facilitation may involve unevenly evaluating bid components, providing bidders with advance "inside" information or failing to share key bidding information with all bidders. **All these tendencies make it compelling for procurement officials to exercise due diligence to determine the real beneficial ownership of a bidding company where such information is not disclosed as part of the bid package.**¹¹ Banks have a major due diligence role, to perform checks verifying the background of firms and to confirm the contractual award by verifying the documentary basis of the award; minutes of the Procurement Committee meetings/report, contract document etc. in order to process contractual payments made via cheques (see Reg. 73 (1) FMR at p. 12 of **Section IV.**)

⁶ S. 1 PPA 2004; "Procurement" means the acquisition by any contractual means of goods, works, intellectual services or other services. S. 29 (1) PPA 2004; All procuring entities shall undertake procurement planning, with a view to achieving maximum value for public expenditures and the other objects of this Act.

⁷ S. 37(1) PPA: Public procurement shall be undertaken by means of advertised open bid proceedings, to which equal access shall be provided to all eligible and qualified bidders without discrimination, subject only to the exceptions provided in sections 38, 39, 40 and 41.

⁸ Kühn S. and Sherman L.B., (2014), *Curbing Corruption in Procurement, A Practical Guide*, Transparency International, p.10, http://issuu.com/transparencyinternational/docs/2014_anticorruption_publicprocurement?e=2496456/8718192. OECD,(2010), *OECD Policy Roundtables Collusion and Corruption in Public Procurement*, Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition, pp.202, 476, 448, <http://www.oecd.org/competition/cartels/46235884.pdf>. The Irish Competition Authority, (2009), *The Detection and Prevention of Collusive Tendering*, <http://www.tca.ie/images/uploaded/documents/Booklet%20-%20The%20Detection%20and%20Prevention%20of%20Collusive%20Tendering.pdf>, p.3.

⁹ Also known as cover/protective/shadow/courtesy bidding.

¹⁰ Wikipedia (2015), see section on *Procurement Fraud*, <https://en.wikipedia.org/wiki/Procurement>. Project Auditors, (2014), *Procurement Fraud*, http://www.projectauditors.com/Dictionary2/1.8/index.php/term/62555a9cae535_f6f68555aaf5d5c5b.shtml. International Anti-Corruption Resource Centre ,(2015), *Guide to Combating Corruption & Fraud in Development Projects*, <http://guide.iacrc.org/potential-scheme-collusive-bidding/>; A front or shell company/shadow vendor has no physical presence, employees or commercial activity and its main purpose may simply be as a token bidder for collusive agreements between bidders. It may also serve to disguise the identity of government officials.

¹¹Kühn S. and Sherman L.B., (2014), *Curbing Corruption in Procurement, A Practical Guide*, Transparency International, p.20, http://issuu.com/transparencyinternational/docs/2014_anticorruption_publicprocurement?e=2496456/8718192; stating that "*Disclosure of ownership should be mandated for privately held companies and that special due diligence is required to make sure that all bidders are treated exactly the same.*" International Anti-Corruption Resource Centre,(2015), *Guide to Combating Corruption & Fraud in Development Projects*, <http://guide.iacrc.org/potential-scheme-collusive-bidding/>; states specifically under the heading, Basic Steps to Detect and Prove Collusive Bidding: "*Do due diligence background checks on the winning and losing bidders to identify, for example, undisclosed common ownership, employees or other affiliations, or prior involvement in other collusive bidding schemes.*" National Technical Expert Team, (2014), *National Anti-Corruption Strategy (Sierra Leone) (2014-2018)*, Commissioned by the ACC; <http://www.psr.gov.sl/sites/default/files/STRATEGY.pdf>, p. 31, calling for due diligence by public authorities in order to examine the credibility and integrity of bidders.



Banks are obliged and have an opportunity to conduct due diligence checks each time a contractor takes out securities; *bid, advance, performance and retention securities* (refer to p. 21 of **Section IV.**) Due diligence checks may prevent government official owned firms from bidding against private firms since the former do not factor a cost/expense margin into their quotations and only equals should be bidders. Due diligence background checks may also reveal any joint shareholding by firms.¹²

4. Prosecuting Collusion in Procurement, Sesay:

As regards collusion, note that public officials can easily enough be prosecuted for the substantive offence of willful failure to comply with procurement procedure; 3 cases in the review evince this. It was charged under 3 counts in **Sesay**, as against Sesay himself, resulting only in acquittals. It was charged under 2 counts against the same set of 4 individuals in the **FCC case**, resulting in the convictions of Williams on both counts, Philips and Konehni under one such count, Kwesi-John being acquitted on both counts. In **Ken Gborie**, this substantive offence was charged under one count against Ken Gborie and Magbity resulting in the convictions of both.

The **Sesay** judgment surprisingly contains only a few references to the Public Procurement Act 2004 and Regulations,¹³ despite the fact that provisions of the PPA 2004 make it clear that prosecutions can be brought for breaches of the PPA; s. 33 (6) PPA states that public officers who contravene the PPA and its regulations are liable to administrative and civil sanctions and prosecution under criminal laws, including the ACA 2000. Also s. 34 (6) PPA states that bidders who engage in **fraudulent, corrupt or coercive practices** in public procurement are subject to prosecution under criminal laws, including the ACA 2000. These provisions make clear that as regards public procurement, the primary/statutory source of the obligation is the PPA and regulations, and that the ACA is simply the statute that provides the legal avenue/cause of action for prosecuting such breaches. Hence, breaches of the PPA could be prosecuted by State Prosecutors under other causes of action/criminal law provisions. The **Sesay** judgment itself referred principally to the applicable ACA provisions, but did not as could have been expected correlate the charges to the source provisions in the PPA. Although the judgment failed to employ this correlative approach in the interests of diligence/thoroughness and so as to use the PPA as an additional descriptive guide against which to test the facts of the case, a process which would have augured better in the interests of justice, the Former Director of IIP, ACC, Prosecutions makes clear that there was no such similar omission by the Prosecution.¹⁴

The **Sesay** judgment refers vaguely to the PPA and regulations on only eight fleeting occasions.¹⁵ Specifically, in discussing the conspiracy charge against the three private parties, it once refers to the PPA 2004; "...*there is nothing in the PPA No. 14 of 2004 which expressly prohibits a parent company and its subsidiary from bidding for the same contracts.*"¹⁶ Its evaluation of the charge of conspiring to willfully fail to comply with procurement procedures and guidelines i.e. s. 48 (2) (b) ACA 08, completely sidesteps the need to discuss what these procedures and guidelines are by interpreting s. 48 (2) (b) as being directed at the conduct of public officers so that private parties quite simply cannot be amenable to conspiracy charges to commit the said offence. Neither are provisions of the PPA or its regulations discussed in relation to assessments of the following charges; i. Re the charges of misleading the ACC contrary to s. 127 (1) ACA '08¹⁷ which although not directly correlative to any one particular PPA provision,

¹² Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

¹³ Responses furnished by the Former Director of Investigations, Intelligence and Prosecutions (IIP UNIT), ACC, Mr. Reginald Fynn, 2 July 2015; "Q. *In Sesay, did the Prosecution in its submissions set out the relevant provisions of the PPA 2004, go back and forth on the precise conduct that the ACA actually criminalized, use the PPA to flesh out the prohibited conduct? A. The procurement violations were laid out for the judge who appeared to believe they were of a minor non criminal kind.*"

¹⁴ Ibid.

¹⁵ The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011; at p. 44: Prosecution Witness 3, A.H. Charm said Fatma Allie Contracts were below the threshold of the PPA. At p. 49: Prosecution Witness 11, Gaiva Paul Lavaly, local representative of Crown Agents U.K. said that he gave advice to the Procurement Committee meeting about what was to prevail according to the *procurement rules*. At p. 50: Prosecution Witness 11 stated that one of his functions was to ensure that appropriate procedures were followed as laid down in the *NPPA and the Regulations*. At p 51: Prosecution Witness 15, Osman Rahman Kamara, an ACC investigator, stated that one of his functions was to ensure that appropriate procedures were followed as laid down in the *NPPA and the Regulations*. At pp. 63-64: "Prosecution Witness 2, Labor, did not for one moment say that Sesay told the Committee to violate the Procurement Rules." At pp. 72 and 73: Prosecution Witness 3, A.H. Charm said Fatma Allie Contracts were below the threshold of the PPA. At pp. 73 and 74: Prosecution Witness 2, Labor said that Sesay's minutes admonished the Procurement Committee to follow strictly the *Procurement rules and Guidelines*... and the same Accused instructed him to bend the *Procurement rules*.

¹⁶ The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, at p. 61.

¹⁷ Ibid, at pp. 65 and 66.



roughly approximates to s. 32 (6) of the PPA which imposes disclosure obligations on the procuring entity (procurement records and proceedings) in relation to ACC requests; ii. Re the charge of offer of an advantage,¹⁸ which corresponds to s. 34 (2) PPA prohibiting bidders from offering directly or indirectly any inducement in order to influence a procurement process or the execution of a contract, s.34 (4) PPA which states that where this happens the procuring entity shall reject a bid and notify law enforcement and s. 34 (6) PPA which makes it clear that this is a crime subject to prosecution; iii. Re the charge of accepting an advantage,¹⁹ which corresponds to s. 33 (1) (d) PPA which prohibits public officers involved in procurement and administering the implementation of contracts, from aiding or abetting corrupt or fraudulent practices by soliciting or accepting any inducements and s. 33 (6) PPA which states that a breach of s. 33 makes them liable to prosecution. The charges of peddling influence²⁰ also correlate to the preceding PPA provisions. iv. Re the charge of conflict of interest,²¹ note that s. 33 (1) (c) of the PPA also obligates any public officer involved in procurement and administering the implementation of contracts to disclose any conflict of interest and recuse himself, s. 33 (3) specifically to recuse himself where he has a financial interest in the bidder, where the bidder is a close relative or his employer or an employer of a relative, and under s. 33 (4) this recusal continues to apply to the administration and management of an awarded contract. v. Re the charges of abuse of office, and abuse of position respectively,²² similar provisions can be found in s. 33 (1) (a) PPA which makes it incumbent on the public officer to discharge his duties impartially so as to assure fair competitive access to procurement, and s. 33 (1) (d), to not commit or abet corrupt or fraudulent practices, coercion or collusion.

5. Prosecuting Collusion in Procurement, Sesay on Private Parties:

Ken Gborie demonstrates that where the charge of conspiracy to commit s. 48 (2) (b) ACA 08 involves only one private party, it is no less a conspiracy than that that would exist between parties to bypass the right procurement procedure, except that it likely does not involve collusive bidding but rather involves agreeing to use a wrongful procurement method, i.e. sole source procurement and an active role by public officers in making this award. However, in Sesay the facts concerned 3 private parties. It is submitted that the PPA and PP regulations are more illustrative of prohibited conduct tending to occur around procurement. They could have served as a yardstick in Sesay, against which to measure the allegations of the Prosecution against the three private parties, of conspiring to willfully fail to comply with applicable procedures i.e. the exercise would have been to test out the law on conspiracy and on willful failure to comply, and on collusion as set out in the PPA on one hand, as against the Prosecution's contentions and its evidence on the other. However, that juncture was averted by the pronouncement that private parties could not commit s. 48 (2) (b) and could not by extension therefore be liable for a conspiracy to commit it. S.48. (2) (b) in short talks about how a person with access to and control over public property, commits an offence if he willfully or negligently fails to comply with the law on procurement or the tendering of contracts. There is no use of the term, "public officer", although it may be implicit in the aforementioned acts. As an aside, Sesay was acquitted of conspiracy since the substantive offences upon which this conspiracy was based failed i.e. that he personally failed to observe procurement procedure in awarding the contracts. Public concern was expressed over the "public officer" bar in Sesay being a highly obstructive precedent to future prosecutions of collusive procurement. Since s. 48 (2) (b) aims to ensure that the persons controlling/implementing the procurement process observe procurement regulations, it is obvious that private persons vying for a public contracts cannot on their own breach it. However, the "public officer" bar is impractical for the following reasons.

A. Contra the "Public Officer" criterion:

Firstly, s.48 (2) (b) does not say public officer specifically because it is meant to also catch members of mixed nature bodies. To now use specifically "Public Officer" may be illegitimately exclusionary. S. 48 (2) (b) should still apply to members of state owned enterprises; companies with the state as the main stockholder, that undertake commercial activities on behalf of government. It could apply to members of a mixed company of public-private nature, with elements of state and private ownership which may use both private and public capital, where the state may have some

¹⁸ Ibid, at pp. 66 through 68.

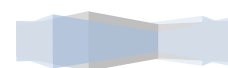
¹⁹ Ibid, at pp. 68 through 69.

²⁰ Ibid, at pp. 69 to 70. Alternative charges in the ACA 2008 also appropriate for the circumstances would have been; s. 29(1) prohibiting the offering an advantage to a public officer for using his influence for the procurement of contracts with a public body, (c) or in obtaining an advantage under any contract and s. 29(2) prohibiting the acceptance or seeking of such.

²¹ National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, p. 70.

²² Ibid, at pp. 71 and 72.

²³ Ibid, at pp. 72 and 73.



level of control, depending on the proportion of stock owned by the state, for e.g. the state may manage the company, appoint and replace its directors, and determine the direction and results of its activity. There are also companies spawned from public-private partnerships for projects, where both sides have shares.²⁴ As far as the ACA is concerned, conspiracy to commit s.48 (2) (b) is the most suitable charge for collusion in procurement; collusive procurement is clearly a conspiracy (an agreement to act to circumvent procurement law), while s. 48 (2) (b) aims to enforce procurement law. Conspiracy is traditionally an offence which allows admission of the kind of wide ranging circumstantial evidence likely to be seen in collusive procurement; direct evidence of collusion in procurement is unlikely and it is intuition that guides the assembly of circumstantial evidence making the Prosecution's case.²⁵ Further, precluding private persons from prosecution based on these charges is impractical because alternative charges e.g. offering an advantage to influence also make clear that there was an agreement to circumvent procurement procedure. Also, parties chose to conspire precisely because they are not personally placed to commit the substantive offence themselves; *in practice they quite simply cannot!*²⁶ Moreover, the ACC was established by the ACA 2000 as amended by the ACA 2008 to prevent, investigate, prosecute, and punish corruption and corrupt practices; collusive procurement is one such practice, which is widely recognized both nationally and internationally as a pervasive problem contributing to Sierra Leone's underdevelopment.²⁷ It is as such one area the Act was designed to regulate. The possibility of charging conspiracy to commit s. 48 (2) (b) is a deliberate recognition by legislators of the need to singularly recognize a specific kind of corrupt practice that plagues Sierra Leone, a recognition unattainable by simply prosecuting under other heads. Importantly, there is at common law no principle making the commission of conspiracy dependent on some of the Accused's ability to meet the technical requirements of the substantive offence; **"It is clear that there may be a conspiracy although only one party is capable of committing the substantive offence as a principal. If, for example, the offence can be committed only by a licensee and A, who agrees with B, a customer who is incapable of committing the substantive offence as a principal, that he, A, will do so, there is a conspiracy to contravene the licensing legislation. The course of conduct will necessarily amount to the commission of the offence by one of the parties."**²⁸

²⁴Castro and Janssens, (2013), *Mixed Private-Public Ownership Companies "Empresa Mixta"*, AfDB, <http://ppp.worldbank.org/public-private-partnership/library/mixed-private-public-ownership-companies-empresa-mixta>. PPIRC (2014), *What are Public Private Partnerships?*, <http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>.

²⁵ Procuring officers and investigators may simply be prompted by a hunch to review the case and each piece of circumstantial evidence may on its own suggest that something is not quite right with the procurement process, a sense that grows with one's amassing of circumstantial evidence, which all tend to point in a particular direction. The Irish Competition Authority, (2009), *The Detection and Prevention of Collusive Tendering*, p.2, <http://www.tca.ie/images/uploaded/documents/Booklet%20-%20The%20Detection%20and%20Prevention%20of%20Collusive%20Tendering.pdf>; "Did you get the nagging feeling that something wasn't quite "right" about some aspect of the process? On reflection, did the tenders seem very alike to you? Unreasonably so? Or did you notice a peculiar pattern emerging, compared to previous tender exercises?"

²⁶ Shorunkeh-Sawyer B., (2011), *Beyond Reasonable Doubt: A British QC Damns the Faulty Reasoning in the Allieu Sesay Judgment*, referring to Lady Joanna Greenberg QC, http://www.anticorruption.gov.sl/show_news.php?id=94

²⁷ Unnamed, (Feb 13 2015), *Unlawful Deals to Sierra Leone's 5 Biggest Ebola Contractors*, http://www.switsalone.com/21064_unlawful-deals-to-sierra-leones-5-biggest-ebola-contractors/. Transparency International Sierra Leone, (2015), *Corruption in Sierra Leone*, <http://tisierraleone.org/page38.html>; 70% of government spending is on public procurement, which is prone to corruption. Degun G., (27 May 2014), *Global Fund Exposes Ministry of Health of Procurement Irregularities*, http://mysierraleoneonline.com/sl_portal/site/news/detail/2523; piece concerning a global fund investigation which revealed fake invoices and evidence that suppliers did not exist for contracts awarded between 2008-11. National Public Procurement Authority, (Date), *Report on the sensitization workshops for Local Councils and Private Sector Service Providers*, http://www.publicprocurement.gov.sl/files/Sensitisation_Report.pdf. Department of Intelligence, Investigation and Prosecutions, ACC, (10 May 2010), *Anti-Corruption Commission Report for the Deputy Commissioner on Investigation of Allieu Sesay*, reposted on June 1, 2010, http://www.standardtimespress.org/artman/publish/article_4659.shtml; on the allegations of collusive bidding against Cole and Pratt. Vandy E.P., (3 May 2015), *'I paid a bribe Sierra Leone' – a new website for reporting graft* <http://www.thesierraleonetelegraph.com/?p=9268>. Sesay J.A.K., (1 December 2011), *Preventing Corruption in Sierra Leone: Is the Anti-Corruption Commission's System and Processes Review Project working?*, <http://www.carl-sl.org/home/reports/531-preventing-corruption-in-sierra-leone-is-the-anti-corruption-commissions-system-and-processes-review-project-working>. ACC Commissioner and NPPA CEO, (16 July 2008), *Joint Press Release, ACC and NPPA, Public Procurement by Public Entities* <http://news.sl/drwebsite/exec/view.cgi?archive=5&num=9141>; on the ACC's recognition of non compliance with procurement law by public entities. Clinton N, (11 February 2015), *Why Does Third-World Competent Public Procurement Matter to International Trade?*, <http://public.spendmatters.eu/2015/02/11/why-does-third-world-competent-public-procurement-matter-to-international-trade/>. Auditor General Sierra Leone (2011), *Auditor General's Annual Report on the Accounts of Sierra Leone, Executive Summary*, <http://www.sierraherald.com/audit-2011-executive-summary.htm>. National Technical Expert Team, (Undated), *National Anti-Corruption Strategy Sierra Leone 2014-2018*, <http://www.psr.gov.sl/sites/default/files/STRATEGY.pdf>; talks about the high incidence of corruption at the interface of the public and the private sectors, through procurement. Heggstad K., Frøystad M., and Isaksen J., (2010), *The basics of integrity in procurement, A guidebook*, Chr. Michelsen Institute Commissioned by DFID, <http://www.cmi.no/file/2971>.

²⁸ Ormerod D., Laird K., (2015), *Smith and Hogan's Criminal Law*, 14th Edition, Oxford University Press, Oxford, citing in support of this principle; *Whitchurch* (1890) 24 QBD 420 and *Duguid* (1906) 21 Cox CC 200.



Importantly, there is also dicta that strongly suggests J. Ademusu's public officer criterion is desperately mistaken. 3 years later in 2014, J. Paul in Ken Gborie makes clear that; "in order to found a conviction under Section 48(2) (b) ACA 08, the prosecution need not prove that the person charged is a public officer."²⁹ This was stated when the possibility of convicting for the substantive offence itself in s. 48 (2) (b) was under consideration. The natural outcome of J. Paul's reasoning must therefore be that there cannot be any requirement for persons Accused of conspiracy to commit the offence in s. 48 (2) (b), to satisfy the public officer criterion (even if not herein stated as such). J. Paul in Ken Gborie instead makes the Accused's "function" the decisive factor in determining whether he can be charged and convicted under s. 48 (2) (b), i.e. his actual involvement in the administration, custody, management, receipt or use of any part of public revenue or public property.

Even in evaluating the charges of misappropriation of donor funds/property under s. 37(1) of the ACA 08, J. Paul in Ken Gborie adopts the same function-centred approach. He stated; "An offence under Section 37(1) of the Anti-Corruption Act 08 can be committed by a non-member of a public body."³⁰ What mattered was that the Accused was part of the management of an organisation, public body or otherwise, that had received donations for the benefit of the people of Sierra Leone or a sector thereof. Here, the 3rd Accused, Roberts, who was not a member of a public body, but the proprietor of a private enterprise, was capable of committing s. 37 (1).

J. Paul's treatment of the offence of conspiracy in Katta runs counter to Sesay where the Accused had to be capable of committing the particular substantive offence underlying the conspiracy with which he had been charged. In Katta, the Defence contested the charge of conspiracy to cause loss of revenue to NRA (GOSL) since there was no such substantive offence articulated in the ACA 08.³¹ This Defence argument was ignored although other Defence arguments were addressed.³² All 4 Accused were convicted under this charge, despite there being no discussion of the elements of the substantive offence or whether the Accused was capable of committing the latter. Since there was a conviction for conspiracy for a substantive offence absent from the charging statute, any requirement that the Accused be capable of committing the substantive offence underlying a conspiracy with which he is charged seems redundant.

B. Alternative Charges for Private Parties:

"The issue of the best way to prosecute collusion in procurement has not been raised in the PPA review at all."³³ If the Sesay approach to collusive procurement is upheld, prosecutors would have to prosecute the latter under alternative charges. CARL reporting on Sesay suggests that conspiracy can still be charged in these circumstances, stating; "a company, not being a public body, is no bar for conviction if he conspires to procure, aid or abet the commission of a corrupt offence" since, CARL states, "s. 128 (1) ACA 2008 provides that, acts of aiding, abetting and procuring a corrupt practice amount to an offence even in situations where the offence had not been completed."³⁴ Although this is true, technically the issue in Sesay was not that the substantive offence was not completed, but that it should be capable of being committed by all the parties charged with conspiracy. Conspiracy in itself at common law is at any rate complete with a simple criminal agreement and intent; Sesay simply created a technical bar to further consideration of conspiracy, by assessing the potential of the alleged co-conspirators to meet the requirements of the substantive offence. CARL's suggestion does however mean that conspiracy would be the mode of commission/inchoate offence and that procuring, aiding and abetting would then be the substantive offence so that J. Ademusu's technical bar is circumvented. It is also possible to charge procuring, aiding and abetting the offence in s. 48 (2) ACA, if J. Ademusu had based his approach on s. 128 (1) ACA which states that; "any rules which apply to proving the substantive offence, shall also apply in like manner to proving conspiracy to commit such offence."³⁵ This is because there would be no extension of the evidential requirements of s. 48 (2) (b) ACA to the offences of

²⁹ The Gavi Funds case, p. 92.

³⁰ The Gavi Funds case, p. 39.

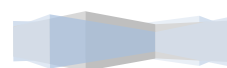
³¹ The NRA case, p. 16 (Handwritten judgment).

³² Ibid at pp. 15-25; "Having disposed of these arguments, I come now to the substantive matter before me"; p. 25.

³³ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

³⁴ Sesay J.A.K. , (06 July 2011), A Recount of the Judgment in the Trial of Allieu Sesay et al., <http://www.carl-sl.org/home/reports/502-joseph-ak-sesay>

³⁵ S.128. (1) ACA 08: Any attempt or conspiracy to commit a corruption offence or aiding, abetting, counseling, commanding or procuring the commission of a corruption offence shall be punishable as if the offence had been completed and any rules of evidence which apply with respect to the proof of any such offence shall apply in like manner to the proof of conspiracy to commit such offence. (2) The powers of investigation conferred by Part V shall apply with respect to a conspiracy to commit an offence under this Act in like manner as they apply to the investigation of any such offence.



procuring, aiding and abetting. However, this trio of inchoate offences do come with their own baggage in terms of evidential rules and *quantitative qualifiers* for weighting the contribution of the Accused towards the substantive offence. The triad of inchoate offences may not be subject to the same liberal evidential regime as conspiracy.³⁶ Similarly, the chances are that there is no evidence of the private parties having offered the procuring officer an advantage, so that this cannot be charged.

It is also possible to bring charges for collusive scenarios in procurement under s. 32 ACA 08 which is entitled Bid Rigging. This is a more targeted provision than s. 48 (2) (b) since it addresses specific manifestations of collusion in procurement, not just a general nonobservance of procurement procedure. These concrete, identifiable prohibited acts targeted by s. 32 ACA are all associated with the treatment of tenders, proposals, quotations or bids. The evidential requirements of s. 32 ACA are higher since it requires proof of either the giving/offering or receiving/soliciting of an advantage as an inducement, or proof of an agreement to give/offer, receive/solicit an advantage as an inducement, for the performance of the prohibited acts, that could be described as the mishandling of tenders, proposals, quotation or bids. Of course, these elements of the offence can be proved through either direct or circumstantial evidence or both. Clearly, s. 32 ACA does encompass a conspiracy scenario since it also criminalizes agreements to commit the aforementioned prohibited acts. The actual acts which would be subject to inducement are; refraining from submitting the said documents, withdrawing or changing them, or submitting them with a specified price or with any specified inclusions or exclusions. The evidential requirement for s. 32 ACA are higher since s. 36 (2) is of a more complex construction and its scope for the admission for circumstantial evidence is narrower than under s. 48 (2) (b). Whereas conspiracy to commit s. 48 (2) (b) is a conspiracy to effect an outcome, conspiracy under s. 36 (2) is a conspiracy to commit a specific act in order to achieve a specific object. There is therefore a third elemental limb in s. 32 which makes the inference exercise possible under s. 48 (2) (b) unworkable. In s. 48 (2) (b) the achievement of an object requiring the participation of different parties, can give rise to the inference that they conspired to do so. In s. 32, the conspiracy is twice removed so that the achievement of an object, cannot give rise to any such inference. Under s. 32 (3) ACA 08, a conviction under this section can incur a fine of a minimum of Le30 million or imprisonment for a minimum term of 3 years or both.

6. Collusion in Sesay:

J. Ademusu does not test out the allegations of collusion against the sum total of relevant facts adduced by the Prosecution. He summarily dismisses the allegations of collusion against Cee Dee, Tabod and Taria by only making reference to the single fact that they are not public officers,³⁷ mistaking the Prosecution's argument as being that, the undisclosed relationship between Cee Dee and First Fidelity should without more be taken as evidence of collusion. Contrarily, the Prosecution's argument here was also grounded in the host of circumstances indicative of a flawed procurement procedure and of collusive practices. These facts are consistent with the indicia for identifying collusion according to recognized authorities in the field of anti-corruption.³⁸ Taria was also charged with conspiring with Sesay, although there are no express allegations against it of having a closeted relationship with companies against which it bid. J. Ademusu erroneously states that there is nothing unhealthy "as regards Cee Dee, First Fidelity and Tabod tendering for one contract", which is factually inaccurate as the three did not simultaneously bid for a single contract.

³⁶ Perry D., (2011), *UK: Secondary Liability In The Criminal Law*, <http://www.mondaq.com/x/136506/Crime/Secondary+Liability+In+The+Criminal+Law>; Aiding requires actual support or assistance to be given to the principal. Abetting means to incite by aid, instigate or encourage. The Accused must intend for his acts to assist/encourage or knew/believe that his conduct has the capacity to assist/encourage. "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the principal offence"; *Johnson v. Youden* [1950] 1 K.B. 544, *Churchill* [1967] 2 A.C. 224 and *Maxwell* [1978] 1 WLR 1350. This means having knowledge that the principal is going to do an unlawful act with an unlawful frame of mind. Some cases have watered down this standard to an awareness of risk. Procuring means to produce by endeavour, so that some amount of causation is vital, although it need not be the only cause; *Attorney General's Reference (No. 1 of 1975)* [1975] Q.B. 773. Procuring requires the Accused to endeavour to cause the commission of the offence.

³⁷ The NRA case/*The State v. Allieu Sesay et al.*, 28 June 2011, lines; "Without further ado... (they) do not fulfill the words of s. 48 (2)."

³⁸ See for example: Kühn S. and Sherman L.B., (2014), *Curbing Corruption in Procurement, A Practical Guide*, Transparency International, p.20, http://issuu.com/transparencymaterial/docs/2014_anticorruption_publicprocurement?e=2496456/8718192. International Anti-Corruption Resource Centre, (2015), *Guide to Combating Corruption & Fraud in Development Projects*, <http://guide.iacr.org/potential-scheme-collusive-bidding/>. OECD,(2010), *OECD Policy Roundtables, Collusion and Corruption in Public Procurement*, Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition, pp.202, 476, 448, <http://www.oecd.org/competition/cartels/46235884.pdf>.



The relationship between these 3 companies, 2 of whom won contractual awards, is as follows: Cee Dee and First Fidelity (FF) were partners and had some common membership in the form of Samuel Cole and Franklyn Pratt who were subscribers to FF and shareholders in Cee Dee Investments.³⁹ These 2 companies bid for the ICT infrastructure contract, with Cee Dee winning it.⁴⁰ J. Ademusu's judgment obscurely repeats Franklyn Pratt's statement that this partnership between FF and Cee Dee does not include Tabod, although a piece of PW2 (the Acting Senior Procurement Manager, Head of the Procurement Unit and member of the Procurement Committee, NRA) Labor's evidence is that, Samuel Cole collected bidding documents on behalf of Tabod,⁴¹ although Cole said he took no part in the procurement process,⁴² making Cole a link between Tabod, FF, and Cee Dee. Tabod and FF bid separately for the local area network contract, with Tabod winning.⁴³ Clearly then, FF bid for both the ICT infrastructure contract and the local area network contract. J. Ademusu misses the Prosecution's point completely in arguing the lawful right of individuals to be members/shareholders of "as many contracting companies as possible", the legitimacy of conjoint relationships between companies, that their conduct was compatible with free enterprise and investors' rights and opportunities to invest, that the PPA does not expressly prohibit a parent company and its subsidiary from bidding for the same contracts and that the companies involved had performed their contractual obligations. Based on these arguments, he ruled there was no overt conduct on which a conspiracy (collusive practices) by the three could be inferred. What matters however, is the bigger picture and how the pieces of the puzzle fit together and whether the undisclosed relationships and the manner in which the bidding process was implemented affected fair and competitive bidding.

Regarding the contracts for ACs, bidding docs were issued to 5 but only 3 bidding docs were received at the close of bid submission time, which Taria being the lowest priced bid. The evaluation of bids report recommended asking bidders for their technical specifications, but only Taria responded with specifications. Of the original 5, 2 bidders later disclaimed bidding documents.⁴⁴ Post the award to Taria, Taria was later permitted by Sesay to change the originally agreed upon brand of AC without relevant contractual amendments.

Regarding the local area network contract, bidding docs were issued to initially 5 bidders including Tabod Ents., FF and Damsel, although the latter bid is disclaimed by Damsel.⁴⁵ Only 4 including these named, submitted their bids at the bid opening. The evaluation report recommended Tabod as the most responsive bidder.

Regarding the ICT infrastructure contract, bidding docs were issues to 5 bidders including FF, Cee Dee and Taria with all 5 being submitted at the close of bid submission, with Cee Dee being the most responsive bidder.

None of these companies disclosed any relationship between any of them. Note that Franklyn Pratt in his admission to the ACC that he set up FF and was one of the directors, said he could not recall the names of the 7 shareholders, except when confronted with the name of the 2nd Accused, Samuel Cole. Pratt said that FF was set up to do supplies and general maintenance, that FF tendered bids to the NRA for 2 IT contracts; that although FF had never before done IT installation, it would have subcontracted this work, had it won either contract.⁴⁶ According to Allieu Sesay, the

³⁹ The NRA case, 28 June 2011, p. 23; The ACC tendered business registration documents of Cee Dee and Tabod. Tabod's was dated 9 May 2007. It also tendered the M and A of First Fidelity, dated 21 May 2009.

⁴⁰ It should also be noted that Taria was also a bidder for that contract and although there is no evident relationship between Taria and Cee Dee, Tabod, and First Fidelity, Taria's bid for AC contracts also raised collusive issues.

⁴¹ The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, p. 38, lines 1-4; "...told him to ensure that Tabod get the contract....he contacted the 2nd Accused to send somebody to come and collect the documents...."

⁴² It should also be noted that although Cole also states that the Local Area Network Contract was signed for by him on behalf of Cee Dee, (The NRA Case, 28 June 2011, at p.35 lines 3 and 4), count 7 against Cole and Pratt makes clear that this Local Area Network Contract was awarded to Tabod (The NRA case, 28 June 2011, at p. 4); the charge in count 7 is that Sesay, Cole and Pratt conspired to this end.

⁴³ The NRA case, 28 June 2011, at p. 4, p. 26 and at p.42, final para. make clear that the contract for local area network was awarded to Tabod. However, the term *local area network contract* is used in relation to both Tabod and Cee Dee at p.42, final para. This does not change the fact that the 2nd Accused is associated through PW2's testimony with Tabod; an area not developed in the judgment.

⁴⁴ The NRA case, 28 June 2011, at pp. 46-47; M.P. Traders and Choithrams Electricals. Often, bidding documents would be supported by proforma invoices although it should be noted that "strictly speaking, invoices do not matter and are not part of the procurement process, so the weight they are given in the Prosecution's case is questionable"; interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

⁴⁵ The NRA case, 28 June 2011, at p. 52; PW18 Luke, said he was IT consultant at Damsel Business Centre and did not know about the IT installation at Quay side; his business was different, not Damsel Enterprises as in the bidding documents. Since, the actual owner of said, Damsel Ents. was not called, this is a disclaimer.

⁴⁶ Although the PPA 2004 does not expressly exclude bidders lacking the technical expertise, it does list it among the criteria for consideration (optional) in determining the award of contracts: s. 21 (1); criteria set by the procuring entity, may include – professional and technical qualifications.



Procurement Committee (PC) on the basis of the evaluation reports, conclusively approved contractual awards to Taria, Cee Dee and Tabod *and he directed that their recommendation for further action pre-awards be followed up, though precisely how, he did not state in his direction.* He said he awarded the contracts on the basis of their (PC) approval and that he granted Taria permission to change the make of ACs without resorting to written contractual amendments as required because there was no cost difference. Vagg, the DFID rep. said that by the date for bid opening, he still had not seen the bidding documents. 2 DFID reps and one NRA member said the PC did not recommend any of the winning contractors. The external audit confirms this and clarifies that none of the contracts were approved by the PC, that they were awarded without addressing recommendations of the reports, without addressing Vagg's concerns, signed by Sesay without Vagg's certification, that Sesay changed contractual terms without contacting the DFID reps. Vagg said he had noted that the company profiles were not detailed enough, that only 3 companies submitted profiles out of the 15 invited to bid and those 3 profiles were identical.⁴⁷ Vagg alerted the PC to the fact that one of these 3 was a boutique.⁴⁸ Similarly, an ACC investigator said that the given addresses of certain shareholders were false.⁴⁹ Vagg noted there were 4 companies instead of 5 in one evaluation report. Vagg and another witness said that 2 evaluation reports were rejected because they were not signed. The Director of ICT in the PC said that he had not even evaluated company profiles, when he learnt contracts had been awarded. 3 NRA members denied having been part of the evaluation report, although their names appear on it. Some witnesses describe the reports as incomplete. PW2, Labor's evidence that Sesay had predetermined the winner of the contracts, is corroborated by PW4, Alfred Demby, Director of Modernisation Programme and Chairman of the PC.⁵⁰ Labor testifies that Sesay applied for a waiver to use the restricted bidding method; there is a letter from the NPPA authorising this for the 3 contracts. Demby said that the original budget by DFID was lower than what turned out to be the lowest bid. Demby said that the DFID reps queried why ICT providers were not included on the short list and that Vagg asked him *who* had awarded the contracts. Labor was sacked from the NRA and PW3 Mr. Charm, Director Policy and Legal Affairs and Mr. Demby were demoted.⁵¹

It is submitted that the manner in which the 3 companies participated in the bidding process fits within the description of fraudulent and collusive practices in the PPA 2004 and corresponds with the indicia for collusion set out by globally renowned/credible authorities in anti-corruption. It is submitted that the Prosecution may consider in cases such as these, openly testing out the facts as against relevant descriptions of the prohibited conduct as found in the legislation, and try funneling the attention of the judge to the fact that anti-corruption authorities have set out lists of the indicia to be used in identifying collusive bidding or corrupted procurement processes and that the facts here correspond to said indicia. This would compel judges to re-think the facts and make it difficult for them to ignore or outrightly dismiss the apparent without coming across as blatantly biased. (Also note that "red flags are fleshed out in a number of (NPPA) monitoring tools which look at procurement procedures, functionality of the procurement structures, procurement processes, require the collection of daily and weekly findings and analyses which may prompt investigation and/or monitoring.")⁵² At the least, J. Ademusu's arguments employed to exculpate the 3 company reps and even Sesay, would have been better replaced by arguments predicated on the reasonable doubt standard. Some further elaboration about the threshold that such evidence must meet would have greatly illuminated this area.

Application: Under s. 34 (6) PPA, bidders should not engage in or abet corrupt or fraudulent practices including misrepresentation, corruption, collusion, price fixing, and non-performance of contractual obligations; forms of conduct for which they may be prosecuted under s. 34(6) PPA or debarred under s. 35(1) PPA. The bidders were also under an obligation to not misrepresent facts in order to influence procurement or the execution of a contract, and not

⁴⁷ *The NRA case*, 28 June 2011, at p. 54; Vagg did not say which of these 3 profiles were identical which would have helped greatly.

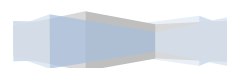
⁴⁸ *The NRA case*, 28 June 2011, at p. 54; Vagg did not say which company was a boutique.

⁴⁹ *The NRA case*, 28 June 2011, at p.55; PW22 Sitta did not say who these shareholders were, although he said he was tasked to investigate Tabod, Habika Ents., and Taria Ents. at the Administrator General's office.

⁵⁰ *The NRA case*, 28 June 2011, at p. 45, lines 4-5; "The Witness told the Court substantially the same story as PW2 as regards the process involved in the award of contracts."

⁵¹ *The NRA case*, 28 June 2011, at pp. 41 and 42.

⁵² Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "I developed such tools."



to interfere in the ability of competing bidders to participate in procurement under s. 34 (2). The Accused's non-disclosure amounts to an omission or misrepresentation of the facts. As to whether it was done to influence the selection process, the sum total of the evidence tends towards that conclusion since they appear to present a collusive bidding scheme which may have involved "price fixing, coercive, corrupt or fraudulent practices designed to deprive the procuring entity of the benefits of free and open competition" as prohibited under s. 34 (3). From the facts that identical profiles of bidders were submitted, that an applicant connected to other bidders, who bid on 2 IT contracts was not technically qualified and admitted to intending to subcontract, the fact that the winning bid was higher than the procurer's cost estimates, that it was a small group of bidders which kept getting smaller and that Taria and FF bid twice, that some bidders who bought bidding forms did not submit them, that the losing bids were defective, that the addresses of some shareholders were misrepresented, that there was common personnel in the form of Pratt and Cole and specifically that Cole appears to have been connected to 3 bidders, that Sesay who awarded the contract to Taria became involved in its supervision, that Taria's contract specifications were altered after the contractual award, that there were issues surrounding the authenticity and accuracy of the minutes of the 14th July meeting; from all these facts the appearance of "*a scheme/arrangement between the two or more (consultants) with or without the knowledge of the procuring entity, designed to establish prices at artificial, noncompetitive levels*" is discernible, falling within s. 2 PPA 2004.

With regard to Sesay, Cole, Pratt, and Gabisi, and as to the effect of applying the proximate circumstantial evidence test (above) to the evidence admitted against each Accused and as to whether this test was met, note that the more generalised circumstantial evidence would have been admissible on the basis of being indicative of the background of a flawed procurement process (i.e. of things not going quite right). Note also that there were clearly more proximate pieces of circumstantial evidence bearing more directly on the Accused by, for example identifying the Accused as representatives of bidding companies who participated in this flawed procurement process and, in some instances, by identifying the Accused as associated with companies that had bid against each other. These latter pieces of circumstantial evidence bore directly on the Accused and gained significance when viewed against the sum total of generalised/improximate circumstantial evidence. It is submitted that these latter proximate pieces of evidence by their nexus to each of the individual Accused met the independent evidence criteria necessary to ground a conviction in the trial of each Accused.

7. Suggestions on Procurement Methods and Corrupt Practices:

The procurement procedure as revealed by the cases is uniform and consistent with the PPA 2004; there is a procurement unit which is responsible for daily administration of procurement activities, under which is the procurement committee which approves awards.⁵³ In general, the choice of a bidding model depends on the assessed risks of corruption and collusion inherent in the circumstances since each bidding model has its own risks. The FCC case and Ken Gborie evince instances of the unapproved employ of sole source procurement, a method which allows direct negotiation with a supplier but which normally needs to be approved by the PC under exceptional circumstances under ss. 46 and 47. In Sesay, selective/ restricted bidding was authorised by the NPPA and the NRA invited a select group of 5 to bid to the exclusion of others, but it was conducted in the same manner as a dynamic/open competitive bid with bidders eventually simultaneously gathering at a public venue to submit once and for all, sealed bids which are then disclosed with full identification of each bidder's price and specifications. Typical open bidding processes are said to avoid opportunities for corruption of procurement officials or preferential treatment and if used in competitive markets, the risk for collusion is small. ***It therefore appears imprudent that given the already oligopolistic nature of markets in SL, there appeared to be a move for a restricted bidding process in Sesay.***

In Sesay, the award of DFID funded contracts were to be monitored by DFID reps. Such donor reps. are expected at least popularly, to be beyond the reach of corruption, to evaluate the process, bids and represent donor interests and viewpoints. In Sesay, the donor representative Vagg was to be actively involved in the award of contracts at the final stage, although he was bypassed. It would be practical to assume that his role was stated in the MOU between DFID and the NRA or some other form of donor instruction, which are normally given pride of place among procurement rules; s. 1(2) of the PPA states that, "*Where this Act conflicts with the procurement rules of a donor or funding agency, the application of which is mandatory pursuant to or under an obligation entered into by the Government, the*

⁵³ This point is made in the FCC case, in Sesay and in Ken Gborie.



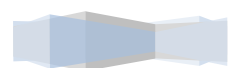
requirements of those rules shall prevail; but in all other respects, the procurement shall be governed by this Act." ⁵⁴ S. 32 (6) of the PPA states that; "Records and documents maintained by procuring entities on procurement ... and where donor funds have been utilised for the procurement, donor officials shall also have access, upon request, to procurement files for the purpose of audit and review." The judgment makes apparent Vagg was a member of only the PC, and not of the PU and the Evaluation Committee. Would the presence of donor reps. in these organs for the same reasons mitigate the risk of a defective process, nip it in the bud or worst case scenario prompt review/investigations into it and in the event of a trial/inquiry provide objective evidence?

A lot has been written about the possibilities of altering the mechanics of procurement to create alternative arrangements that produce desired outcomes. Pragmatism dictates however that the re-design of methods of operation depends on human will power. Hypothetical scenarios of large scale corruption in theory would simply overwhelm any possibility of any model working efficiently, meaning the process would be both marred and that fact of it being thus, would be well concealed.

It is suggested that for both donor and non-donor funded contracts, the role of the PC, the weight or significance of its findings/decisions/recommendations need to be starkly clear, with such findings being spelled out unequivocally. The question as to whether the PC actually approved an award should not be subject to discussion as in Sesay. It's worth considering making it obligatory on the PC to verify whether contracts are being awarded contrary or prior to their conclusive determination and to issue statements to the procuring entity, the NPPA and the ACC when this is the case. Similarly, it could be endowed with powers which enable it to nullify or retract such contracts, such contracts technically being voidable, having been concluded unlawfully.⁵⁵ A final proposition is that the actual activity of drawing up a shortlist of bidders could be more transparent; it could be compiled openly by the PU as a whole, or if it continues to be done by just 2 individuals as in Sesay, (the Head of the PU and a donor approved Procurement Specialist), to have attached the reasoning behind their decisions.

⁵⁴National Commission for Democracy, (2014), NCD North hosts workshop on the Promotion of Democratic Good Governance, <http://www.ncd-sl.org/media-center/news-and-events/92-ncd-north-hosts-workshop-on-the-promotion-of-democratic-good-governance>; donor policies should match those of the state to avoid sub-standard procurement. World Bank, (2012), *Sierra Leone - Assessment of national public procurement system based on OECD and DAC benchmarking tool, Draft Report*, May 20, 2012; <http://documents.worldbank.org/curated/en/2012/05/16597175/sierra-leone-assessment-national-public-procurement-system-based-oecd-dac-benchmarking-tool>, pp.22; stating that, the procurement rules of a donor or funding agency that are prescribed as part of an international donor/funding agreement would prevail in cases of conflict with the PPA, and citing citing s. 1 (2) PPA and Regulation 1(2)(a) of the PPR. Confirmed in interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "The review also seeks to address how to partner with development partners/donors; they insist on using their own procurement processes, because they lack confidence in the Sierra Leonean system. The review seeks to harmonize all this."

⁵⁵ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "Regarding the possibility of voiding a contract where the procurement process was not adhered to, one of the changes in the Public Procurement bill is that the Independent Procurement Review Panel (IPRP) should be able to at any point put an injunction in the contract. The IPRP would now be able to sit as a court (...)"



Conclusions:

Sesay's "public officer" criterion, is a legal development which has yet to be overturned, potentially hindering future prosecutions of private parties for collusive practices. Aside outright reversal of this reasoning, it's possible to re-interpret the criterion as accommodating companies of a mixed public-private nature, where the state has some control.⁵⁶ Other possible alternatives and their implications are discussed above. Furthermore, the PPA is currently under review in Parliament for amendments that will strengthen it. The Former Director of IIP, ACC admits that, "although s.128 ACA was designed for collusive conduct, its design coupled with the imprecise nature of s.48, seems defective in relation to procurement and that the PPA efforts could provide curative action here."⁵⁷ The suggestion made above for corrupt, fraudulent and especially collusive practices to be fleshed out in order that allegations might be tested against them, may well be underway as *"the review aims to make specifically criminal a number of breaches and in some cases fix penalties, in particular, violations relating to tender and rushed processes."*⁵⁸ *"In parliament at the pre-legislative meetings, (...) at the committee level where every section in the bill is discussed in detail, all these definitions of collusive, fraudulent and corrupt practices have been raised as issues needing to be addressed. The ACC sent a rep to (...) address issues of definition (...). The NPPA holds the view that when the issue is in the well of parliament, those issues will be addressed. But the implications of the Allieu Sesay judgment for private parties were not really raised at all."*⁵⁹

Although ss. 33 (6) and 34 (6) PPA make public officers and contractors respectively, amenable to sanctions which include criminal prosecution under the ACA, most of the PPA's provisions prohibiting certain forms of conduct are open ended and do not restrict prosecutorial action to the ACC. Breaches of the PPA may give rise to civil and administrative action,⁶⁰ including a review by the head of the procuring entity, or by the IPRP and debarment of bidders and suppliers by the NPPA. However, under ss. 77 and 78 ACA 2008, public officers/bodies have a duty to report acts of corruption or to refer suspected cases of corruption to the ACC respectively, demarcating the scope of the ACC's competence as against disciplinary actions by other bodies. Nonetheless, the potential for overlap may be one reason why the current parliamentary review of the PPA includes review of channels of communication/cooperation between the NPPA, the ACC and the Ministry of Finance.⁶¹ *"There is currently no line of communication between the NPPA and these institutions. 4 years ago, I proposed that they set out a memorandum of understanding between these institutions; it got aborted in not agreeing about areas of competence. For now, the only line of communication is in PPA which states that the NPPA may approach the appropriate authority; ACC, if, there is an issue of corruption, or Accountant General, Auditor General for an issue of not following generally accepted accounting procedures, anything deemed abnormal in the procurement process. The NPPA like other public bodies are obligated to recommend to the ACC suspected cases of corruption."*⁶² These modes of inquiry/sanctions outside the ACA 2008, underline that if the J. Ademusu "public officer" tack is upheld, it is still possible for Law Officers to prosecute breaches of the PPA (specifically collusion/conspiracy), under the Common Law of Fraud; *"it was not uncommon prior to the ACC Act for State Prosecutors at the LOD to bring charges of fraud for botched procurement processes."*⁶³ However, the ACC would still have primary competence over corruption.

It would bode well if the developmental path of the law on conspiracy, flawed procurement and specifically conspiracy in procurement processes were clearly encapsulated in a single judgment in a manner succinct and clear enough for subsequent judgments to refer to as guideposts, yet flexible enough to allow for the necessary maneuvering as the facts may demand. This scenario calls for more openly deliberative/contemplative judgments, not just a cut and dry application of identified law to accepted facts, but judgments which are expressed in retrospective and projective terms that are policy-oriented and whose outcomes are also steeped in policy. Litigation, parliamentary debates,

⁵⁶ See above heading 5. A. at pp. 6-8.

⁵⁷ Responses furnished by the Former Director of Investigations, Intelligence and Prosecutions (IIP UNIT), ACC, Mr. Reginald Fynn, 2 July 2015.

⁵⁸ Ibid.

⁵⁹ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

⁶⁰ Such as under s. 65 (1) for e.g., which provides for an application for review by the Independent Procurement Review Panel. Responses furnished by the Former Director of IIP, ACC, Mr. Reginald Fynn, 2 July 2015; *"The current PPA review will also consider the possibility of an appeals process to the IPRP, try to control vexatious complaints and to strengthen its independence."*

⁶¹ Interview with the Head of Administration and Human Resources Department, NPPA, Mr. Sylvester H. Demby, 30 June 2015. Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

⁶² Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

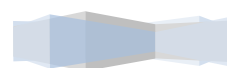
⁶³ Ibid.



written government policies (including anti-corruption policies) and independent research by civil society and local and international think tanks form part of the continuous, policy formation feedback loop. It's therefore apparent that efforts to feed these into judicial deliberations, would go some way towards further refining or streamlining the policy making process.⁶⁴ Given parliamentary review of the PPA has been ongoing for the past 7-8 years,⁶⁵ and that from the debates generated therefrom, can be gleaned public sentiment/perception of the issues and the nature and regularity of the problem, the review should be, for reasons of consistency and complementarity, a principal reference point for such judgments. It's important also to look beyond ACC judgments with similar or identical statutory offences, to also draw from fraud-related judgments prosecuted at common law.

⁶⁴ Integrity Action/Tiri (2007), *Integrity in Reconstruction*, Sierra Leone Executive Summary, p. 2, <http://www.integrityaction.org/sites/www.integrityaction.org/files/documents/files/Sierra%20Leone%20Summary.pdf>. "A public sector procurement code needs to be devised." World Bank, (2012), *Sierra Leone - Assessment of national public procurement system based on OECD and DAC benchmarking tool*, Draft Report, May 20, 2012; <http://documents.worldbank.org/curated/en/2012/05/16597175/sierra-leone-assessment-national-public-procurement-system-based-oecd-dac-benchmarking-tool>, pp. 17, 120-121; talks about the need for many improvements to be made to the legal framework, and about how there are several inconsistencies among the PPA, its Regulations and the procurement manual, stressing on the need for harmonization. National Technical Expert Team (2014), *National Anti-Corruption Strategy (Sierra Leone) (2014-2018)*, Commissioned by the ACC; <http://www.psr.gov.sl/sites/default/files/STRATEGY.pdf>, p. 31, called for review of and simplifying the current regulatory framework. Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "There are various sources regulating Procurement; the PPA, the PP Regulations 2006, the standard bidding documents and manuals. There are issues in the other documents which the Act is blind to. So the review is also about addressing this. There is a disparity between the manual and the Act for e.g. certain parts of the manual give the NPPA certain powers not in the PPA, but then the PPA trumps the manual."

⁶⁵ Interview with the Head of Administration and Human Resources Department, NPPA, Mr. Sylvester H. Demby, 30 June 2015. Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "The review has been going on since 2008."



Overview

Based on their assessment of the evidence, ACC prosecutors tend to charge conspiracy to commit s. 48 (2) (b) ACA to address collusive practices, since this charge is the most fitting in terms of reflecting the circumstances/reality of collusive practices and since it may be evidentially less cumbersome for prosecutors in terms of tests and standards to be met; the charge of offering and accepting an advantage under s. 28 and other similar charges such as; using influence for contracts under s. 29, peddling influence under s. 31, offering, receiving or soliciting an advantage for bid-rigging under s. 32, are definitely more precisely framed offences with higher evidential standards bearing on an "exchange element."

Aiding, abetting, procuring an offence requires a two tier approach to proving the Accused's guilt; first, proving the Accused's act and intention and proving the link between the latter and the act/s and mental state of the principal; in short, you would have to prove that the Accused acted with the intention or knowledge that his act would have an effect or impact on the act of a principal whom the Accused knew was engaged in conduct to a certain end/conduct that would have a certain outcome. This two tier approach is expressed in various manners in different sources of law, but this is the gist of its more challenging nature.

Conspiracy also allows for wide ranging circumstantial evidence to be admitted against the Accused for the fact of an existing scheme to be established. Once that scheme is established, the fact of the Accused's role in it must also be proved to ground a conviction, demanding a link between the circumstantial evidence and the Accused. All you have to do is prove that the Accused did an act which contributed to an outcome and the facts of that act and that outcome are proof itself of the Accused's intention to want to bring about that outcome.

As far as the actual procurement officials are concerned, they can always be prosecuted under the substantive offence of s. 48 (2) (b); simply willfully failing to observe procurement procedure.

The Sesay judgment surprisingly contains only a few references to the Public Procurement Act 2004, despite the fact that it is the PPA that is the original source of the procurement rules not being observed and may provide a more illustrative yardstick against which to test conduct that is mostly implicit and elusive. It is suggested that such a correlative approach is preferable.

It is suggested, again, because collusive practices are implicit and elusive, that judges might consider a teleological (progressive and realistic) interpretation of the law/relevant statutes. It must be recognized that this is an area which is still very much in its gestation phase, and that strictly literal interpretations of the law may be unduly restrictive and abstract. It must be recognized that the PPA is largely prohibitory in nature and yet as is characteristic of law, it simply sets out framework principles which an objective, insightful, well-informed, realistic and practical adjudicator must employ both as a prism and a yardstick to evaluate the facts. Clearly, the PPA cannot set



out every single instance of what might amount to a collusive practice, which is why it frames most of its prohibitions in terms of undesirable outcomes, so that this might potentially be the starting point of any evidential assessment. This requires looking at the bigger picture not facts in isolation, to determine whether the manner in which the bidding process was implemented affected fair and competitive bidding. Clearly, the only definitive statement that can be made about the forms of collusive practices is that they are deceptive and disguised and not static in their forms, nay they seek to employ shifting market forces and features to enhance these characteristics of theirs. These facts call for a return to very basic principles of statutory interpretation such as, that guided by legislative intent and given the prevalence of the problem, a prohibitive rather permissive approach⁶⁶ to statutory construction.

● In the same vein, the Prosecution should seek to buttress its allegations by demonstrating how they align with globally recognized indicia for collusive practices as set out by credible anti-corruption authorities and in the NPPA monitoring tools. Again, these indicia are to serve as an illustrative list to flesh out the possibilities, and not as a restrictive list. They might fill in the gaps between the loosely articulated limbs of the framework (PPA).

● Essentially, what's suggested is an expressly comparative approach (alleged facts, legislation + indicia) and for the Prosecution to try framing its arguments/submissions in these terms. This more compelling approach attempts to cover all bases and may streamline the judicial deliberative process; at the very least, it would have to be addressed.

● In Sesay, the allegations of collusion against the representatives of 3 private companies, forming the substance of the charges under s. 128 (1) and s. 48(2) (b) are not addressed at all, such consideration appearing to have been made redundant by a technical bar requiring first of all, that the substantive offence be capable of commission by all the Accused. Since the 3 Accused were not Public Officers, it was deemed that they could not commit s. 48 (2) (b) and therefore could not technically be capable of committing a conspiracy to commit s. 48 (2) (b). The "Public Officer" criterion which the Sesay judgment sets out as a condition necessary to be fulfilled for commission of s. 48 (2) (b) is doubtful, because that section itself never uses those precise words. Also, there are authorities which suggest that since the substantive offence need not have been completed for a conspiracy, there is no need to extend the requirements of the substantive offence to the charge of conspiracy, no need to test out whether the accused could have met the requirements for commission of the substantive offence. These authorities strongly suggest that all that is needed is for one of the parties to be capable of committing the substantive offence, in order for a conspiracy to exist. Additionally, the Sesay judgment does not say how this Public Officer requirement will play out against members of /mixed public-private sector bodies.

● The approaches to the construction of the substantive offences under s. 48 (2) (b) ACA and s. 37 (1) ACA 08 in Ken Gborie are function, rather than title-focused,

⁶⁶ In this area of practice, statements like, "this (identified) circumstance/practice is not expressly prohibited in the relevant instruments, and therefore is permissible", sounds nearly shocking! See for e.g., the NRA Case, p. 61; "...there is nothing in the PPA No. 14 of 2004 which expressly prohibits a parent company and its subsidiary from bidding for the same contracts."



countering J. Ademusu's "public officer" criterion in Sesay. The approach to the necessary relationship between the mode of commission (conspiracy) and the substantive offence, i.e. the delinking of the two in Katta also differs from the approach taken in Sesay.

● Since a likely recurrent issue in cases like Sesay, which can serve to develop the substance of the law and public policy on collusive practices in procurement, is whether the evidence of collusion between the parties meets the standard of the burden of proof for criminal liability, (i.e. proof beyond reasonable doubt), it is suggested that such cases should aim to provide more incisive analyses employing the evidence in hand, to articulate the nature of the evidence that would meet that standard.

● It might also be worth considering creating an obligation to publish decisions to employ the sole source procurement and selective/restricted bidding methods in the same way that calls for proposals and tenders are subject to an obligation to publish.

● Donor representatives could also be positioned not just in a single procuring organ, such as the PU, but also in all such procurement concerned organs in a procuring entity, that they might have a broad overview of the process and ensure the cohesiveness in the necessary links in between.

● All suggestions concerning improvements that might mitigate corrupt practices in procurement ultimately depend on human will power; massive institutional corruption can hardly be countered.

● The role of the PC and its decisions should be starkly clear, unequivocal and not subject to discussion as in Sesay. The PC could be more proactive in inquiring about the status of awards and ensuring its decisions are complied with.

● The drawing up of shortlists of bidders could be more carried out more transparently amidst a larger group with the reasoning behind their decisions attached and possibly published.

● "Procurement Officers have a tendency of compromising because they are the most lowly paid and not even highly qualified. The PPA review is considering the creation of a directorate/training institution for the public sector procurement cadre to be sited in MOFED. The NPPA had developed a national curriculum, outsourced to IPA, but also approached the Tertiary Education Commission to develop a curriculum to harmonise the whole landscape so that the knowledge of officers is uniform. If however a directorate is created for training, it will be fully responsible."⁶⁷ This is clearly a compelling issue for policy focus.

● There is a current review of the PPA which has been ongoing since 2008 and a likely result appears to be a further elaboration of certain prohibited forms of conduct; "to

⁶⁷ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.



make certain breaches specifically criminal."

● *Although different actions can be taken for breaches of the PPA, the ACC has priority over corrupt acts. Nonetheless, this potential for overlap, may be one reason behind the current PPA review's looking into improving channels of communication between all procurement concerned MDAs. A memorandum of understanding setting out the respective areas of competence of all implicated bodies might be a good place to start.*

● *The possibility of prosecuting collusive practices in procurement still exists under the common law of fraud, embezzlement, theft and larceny by servant.⁶⁸*

● *Judgments in this area need to be fully contextualized, acknowledged as stemming from and feeding into the policy formation process and as such should be explicit, well-researched and openly deliberative pointing the way to the future.*

⁶⁸ Telephone conversation with Emmanuel Abdulai Saffa, Coordinator Society for Democratic Initiatives (SDI), 22 June 2016.



Snapshot 4

IV. Control and Management of Public Funds:

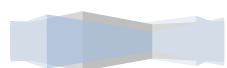
This review demonstrates the conventional wisdom that no-one is beyond the practice of corruption and that the issue of tightening access and control is especially pertinent in relation to persons who have *principal* access and control over public funds. Such individuals occupy positions in which a high level of public trust is invested and deal with massive sums of money. This section is therefore concerned with *controlling the financial controllers*. *Unquestionably, checks/restrictions and control over their access to and expending of public funds are found in the GBAA 2005 and FMR 2007.*¹ Indeed it is the GBAA and the FMR that set out the legal requirements/controls applicable to every phase of the treatment/handling public funds; including their safeguarding, their circulation, their conversion into employable forms and their being fed into the governance process. However, this section's analysis of financial controls is not an exercise of strictly identifying and weighing the relevant legal provisions, nor does it undertake such an exercise based exclusively on a methodological appraisal of the unique facts of each individual case. This, like previous sections is a wholesale and collective analysis of all 8 judgments through the identification of commonalities across cases. This section is concerned with commonalities discernible in the facts surrounding the exercise or non-exercise of financial controls. Therefore, on the basis of a collective analysis, it commences by descriptively chronicling *the trajectory common* to public funds, once a "budgetary agency"² has expressed designs over a specified sum. It is in chronicling this *common trajectory* that instances of lapsed exercises of control are identified *with the aid of* the applicable but sidelined regulatory provisions.

At the risk of stating the obvious, the control and management of public funds can first and foremost be conceived of as determined by and dependent upon the extent to which such controls are expressed, set out, encompassed and instituted by regulatory instruments. Secondly, more realistically, control and management can be seen as determined by and dependent upon those offices/bodies which the very regulatory instruments assign the responsibility of effecting observance of the provisions which bear upon efficient financial management. Thirdly, control and management of public funds can be seen as the operation of certain mechanisms/devices, created by such regulatory instruments, at different phases/episodes of the trajectory. This threefold conceptualisation hints at the theory/practice divide, revealing a truism that; *"things only have the value/importance we give them."* Clearly then, since practical matters depend on practicalities and not documented abstractions, *ensuring* effective financial control depends to a greater extent on the second and third conceptual modes. *In support of this view is the review's finding that in most but not all instances here, the existing legal restrictions on accessing and handling public funds were simply not observed.* In attempting to suss out the reasons for instances of non-observance, the place of the latter two modes in such instances, will be a starting point for consideration (*why did the designated enforcement body not fulfil its enforcement role, or, why did the designated device not function?*) which may lead to the uncovering of other causative factors. Only at this point of addressing *the why*, does it become necessary to *not only* scrutinize identified commonalities, but also to scrutinize identified distinctiveness in the most pertinent circumstances surrounding the commission of the offence.

As stated above, this section first chronicles the *common trajectory* by setting out the transactional/transitional phases which public funds undergo during the course of seeking to employ them as part of the governance process/in the provision of social amenities. Although each of these transactional/transitional phases may involve one or more financial controls, the first overview presents a mainly temporally descriptive perspective as discerned from the judgments reviewed; *i.) "Access to and Maintenance of Public Funds"* *ii.) "The Administration and Management of Public Funds"* and *iii.) "The Retirement/Accountability for Expenditures"* phases. The second part of this section then goes on to describe in a moderately chronological manner, financial controls as discernible from the judgments reviewed, exercised during the identified transitional phases; for e.g. it starts with the control of *"Budgetary Allocations"*, then addresses *"Donor Control"* since these two mostly coincide with transitional phase i.) above, of; *"Access to and Maintenance of Public Funds."* Subsequently, the exercise of *"Control by the Central Government"* and *"Control by Banks"* are addressed since they correspond in large part to transitional phase ii.) above, of; the

¹ The Government Budgeting and Accountability Act 2005 (GBAA 2005) states in its preamble that it is an Act to secure transparency and accountability in the appropriation, control and management of the finances and other financial resources of Sierra Leone and to provide for other related matters. S. 82 of the GBAA 2005 states that a Minister may make regulations generally for carrying out the purposes of this Act. The Financial Management Regulations 2007 (FMR 2007) which were made under s. 82 GBAA by the Minister of Finance (see FMR 2007 Preamble), state at Part 1, Regulation 1 that, these Regulations shall apply to Government, Ministries, Departments, Agencies and bodies corporate in which the government is either the sole shareholder or majority shareholder.

² S. 2 GBAA states that, *"'budgetary agency' means a government department or other public body to which a specific head or division or both of expenditure is allocated in the annual estimates."*



"Administration and Management of Public Funds". Latter discussion points are the roles of the "Finance Officer", the "Directorate of Financial Resources" of the MOHS and "Audits" as a means of control, since *although* these may be viewed as being relevant throughout the various transitional stages, they are especially relevant to the final transitional phase iii.) above, of; *The Retirement/Accountability for Expenditures*. Admittedly, these are roughly hewn sequences. As already stated, attempts are made to identify the precise locus of legal non-compliance/failure to exercise diligence across these transitional phases and control modes, by referencing throughout applicable provisions from the FMR 2007 and GBAA 2005, and to further uncover the reasons behind these lapses.

A lax system of control over public funds suggests laxity at each seminal/transitional phase. An effective system suggests that the controls present at each of these phases present opportunities for clamping down on inappropriate practices, so that the detection of such practices, whether due to incompetence/negligence on one hand or malice/dishonesty on the other, pre-empts such shortcomings from occurring further down the sequence of phases. This may be even more relevant, where there are a number of sub-transactions underlying a single programme or even project. In short, an effective system of financial control enjoys the benefits of early detection.³

➔ **This brings us to the issue of Information/Knowledge Management:**

Section I. of this review entitled; "*Information/Knowledge Management*" described the criticality of Knowledge and Information management commenting on the role of IM as a factor engendering or facilitating the conditions in which the contested corrupt acts in the judgements occurred. The prism of that analysis was as such, *organisational culture*; that is to say, IM was conceived of as being multiply relevant and as serving a much wider purpose than financial control. It was described as the means and methods of assembling and compartmentalizing information in a logical and accessible manner to users and making such information available to them. Through IM, organizational memory is created and preserved, on which the distinctive institutional personality depends. An IM system comprises a centralized base, decentralized bases and has a peripheral reach; it is a network which enables information to be pumped all along its arteries to its various organs or enables their retrieval of such. An IM system is the overall efficiency mechanism, essentially the hard-drive, brain/heart of an institution, the hub of all administrative activity. It is the basis on which purpose is cyclically fashioned out and consequently objectives, means and desired outcomes also. Ideally, it should be the basis of all decision making and ensuing action. It enables sequenced, coherent and cohesive decision making. In this wide sense, IM aims at generally enhancing efficiency, effectiveness and functionality. Naturally then, IM has an overarching salience to all sections in this Report.

Section IV. approaches IM specifically as a means of control and management of public funds. In enhancing the efficiency of decision making processes, IM increases the efficient use of financial resources. *But beyond this*, IM is a means of financial control in MDAs, by recording information generated around all transactional processes; access, administration, management, retirement. This enables proper budget implementation, financial forecasting and most saliently, the exercise and enforcement of personal responsibility for financial decisions. It enables questions to be asked and answered and for the attribution of blame or allocation of individual and collective responsibility.⁴ *In short, it enables accountability.*⁵ Specifically as a financial control, IM reinforces other financial controls; such as internal and external audits.⁶ It can provide verifiable evidence of fraud and so lead investigators to the root of corruption.⁷ As such IM can serve as a cost effective restraint to corruption and fraud.⁸ Therefore, "*well-managed records systems*

³ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 52, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF; "Through early detection, records can aid in the reduction of financial losses attributed to repetitive (i.e. drip-feed) fraud."

⁴ ARMA International, (2014), *Generally Accepted Recordkeeping Principles*, <http://www.arma.org/r2/generally-accepted-br-recordkeeping-principles>; "Only through records can an organization know what it has done and effectively plan what it will do in the future (...) Records (...) effectively support(s) the activity of that organization, including: facilitating and sustaining day-to-day operations, supporting predictive activities such as budgeting and planning, assisting in answering questions about past decisions and activities."

⁵ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 44, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF; "The ability to remove ambiguity and firmly establish who did what, when, why and how is a powerful means of constraining individuals from engaging in corruption and enforcing accountability. Records underpin accountability - they are unbiased in recording responsibility and therefore liability."

⁶ Ibid at p. 2.

⁷ Ibid at p. 52.

⁸ Ibid at p. 56.



are vital to the success of anti-corruption strategies.⁹ Since corruption is best identified through records, sound record management systems are key to corruption prevention. Poor records management systems on the other hand aid in corrupt practices and "good governance is dependent on good records management."¹⁰ "A study by Barata, Bennett, Cain and Routledge (2001) established that the financial systems with the weakest controls are those that are traditionally key targets for fraud in most countries."¹¹ The bottom line therefore is that any attempt to strengthen financial controls, must begin by strengthening IM systems. The next logical step is that tools should be developed for providing orientation to government anti-corruption agencies on how to fully maximise employ of the existing IM systems in MDA's under investigations.¹²

Again, the findings of the GAVI draft audit concerning the Health System Strengthening grant as articulated in Ken Gborie make clear the role of IM as a financial control; *lack of accountability in financial management including lack of basic book keeping, weak record management, a lack of supporting financial programmatic documentation relating to programme expenditure and unjustified disbursements/cash withdrawals without supporting documentation.*¹³

The GBAA 2005 and FMR 2007 create and lengthily explain how to comply with IM and record keeping obligations. Generally, financial legislation/regulations provide the foundation for designing financial management systems. However, the following problems have been noted as being associated with the former; 1.) That in developing countries, records professionals have not been trained to understand how legislation affects the creation and use of financial records; 2.) That legislation tends to specify what records should be kept but not how to keep them; 3.) That aside the implementation of financial regulations on IM, there is a need for capacity building so that changes in wider legal requirements and even in the very financial regulations can be handled and effected into practical systems, that which is achievable only through training and education. These issues should be borne in mind when reviewing the events as transpired in the case studies. As some commentators put it, the very existence of informal/chaotic systems is a sign that financial regulations are not working¹⁴ and might suggest a need for review; "*if corruption is to be deterred, new methods of combating malfeasance must be employed and existing, but dysfunctional, controls must be restructured and then implemented properly.*"¹⁵

The problem of IM was generally relevant in 7 of the 8 judgments (The Al-Jazeera case not included) and more specifically relevant in its role as a financial control, in 5 of the 8 judgments; the ABC, the SLMA, the FCC, the Daoh and the Ken Gborie cases, all discussed below.

1. Chronicling the Common Trajectory of Public Funds/ Transactional or Transitional Phases:

A. Access to and Maintenance of Public Funds:

The judgments reviewed throw up 2 modes of accessing public funds by senior public officials. First, they may access parliamentary budgetary allocations/appropriations to their agency maintained in the Consolidated Fund¹⁶ by submitting requests, framed in a manner demonstrating consistency with the purposes for which such allocations were made, with their agency's Board of Directors i.e. for agencies that are so structured as transpired for e.g. in Lukuley, or they may submit a PET 1 form to MOFED.¹⁷ It also depends on the thresholds.¹⁸ The PET 1 form submitted for

⁹ Ibid at p. 2.

¹⁰ Omolla J. O., (2011), *Strategies to Fight Corruption with Particular Reference to Records Management*, Paper presented during a workshop for Administrators at the University of Nairobi, Kenya, p.4; http://legaloffice.uonbi.ac.ke/sites/default/files/centraladmin/legaloffice/Records%20Manager%20-%20corruption%20prevention%20ccu%201%20%5BCompatibility%20M_0.pdf

¹¹ Keorapetse D.L., Keakopa S.M, (2012), *Esarbiga Journal*, Volume 31.

¹² Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, pp. 1 and 7; http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF

¹³ The GAVI Funds Case/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, 2 July 2014, pp. 20-21.

¹⁴ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 42; http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF

¹⁵ Ibid at p. 22.

¹⁶ Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015; Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

¹⁷ Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015.

¹⁸ Ibid.



employ of parliamentary budgetary allocations/appropriations goes to the Accountant-General who then forwards it with the cheque after seeing that all the documents are in place to the Bank of Sierra Leone instructing them to disburse the money, so that it is then sent to the account of the requesters.¹⁹

Secondly, grants may be applied for from donors either by the budgetary agency itself, or by the Ministry under which it falls.

Relevant Law: On grant seeking see the following:

S. 24 (1) GBAA 2005 includes as government revenue; taxes, fines, profits, fees, loan repayments, loans and s. 24 (1) (c) specifically includes domestic and external grants as revenue. S. 24 (3) states that exceptionally, and where the Minister deems it acceptable, a budgetary agency may be permitted to spend in support of Government budget programme, any revenues the agency raises as long as such revenues and expenditures had been included in the approved budget estimates. S.24 (4) states that the approved budget should have had a separate column under revenue and expenditure to show the external grants the budgetary agency is likely to receive from donors. Simply put, budgetary agencies may apply for and receive grants to support their programmes, where these have been included in revenue forecasts in their approved budget.

Regulation 69 (1) of the FMR 2007 states that, where a government project receives from a donor, an advance (...) by way of grant (...), the actual amount received shall be classified and brought to account in accordance with the chart of accounts, a responsibility set out under Reg. 69 (2) as belonging to the department and Accountant-General. Reg. 69 (3) states that, where a donor makes a payment on behalf of a government project, out of a grant (...), the actual amount paid shall be notified to the responsible department and the Accountant-General, classified and brought to account in accordance with the chart of accounts by the department and Accountant-General.

What the above mentioned legal provisions seek to enable is simply put, a situation where the central government knows the worth of incoming donations and what they are to be used for. This would be achieved where units within ministries must pre-communicate the fact of their intended grant applications, as well as the fact of an actual grant award. Clearly then, a budgetary agency can take it upon itself to seek funding and the central government²⁰ would, all things being equal, be in the know. The above mentioned provisions are the only rules of the GBAA 2005 and FMR 2007 that directly bear upon grant seeking and receipt. They raise the following issues:

¹⁹ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015; "The official term for monies sent to programme account by GOSL via the Accountant-General is 'grants', whilst where the Accountant-General instructs the Bank of Sierra Leone to directly pay the supplier, the official term for such monies from the GOSL are 'appropriations.'"

²⁰ Its respective Ministry and MOFED itself.



- I. Use of the word, "exceptionally", in s. 24 (3), makes it is apparent that grant seeking is primarily dealt with at a central government level.
- II. According to s.24 (4), the requirement for expected grants to be depicted in separate columns under revenue and expenditure in the approved budget, only applies to "external grants" the budgetary agency is likely to receive from donors. Read in conjunction with s. 24 (3), it's clear that although domestic grants need not be presented in a separate column in the approved budget, they do need to be included in the approved budget.
- III. S. 24 GBAA 2005 is framed in a manner that suggests that grants cannot be sought by budgetary agencies for anything other than programme support, for example may not be sought to cover the agency's general running and administrative costs. Although in the ABC case, the ABC is faulted for not complying with s.129 (1) FMR 2007 requiring notifying the Accountant-General about the setting up of an separate account,²¹ no mention is made in the judgment, of the ABC's having breached s. 24 by soliciting grants for general administrative costs instead of programmatic costs. However, even assuming the ABC had complied with the notification requirement in s. 24, prior to grant seeking, s. 24 still implies that the ABC should not have received grants for general administration. In that hypothetical, a grant intended for general administration could only then be received and so employed legitimately, where the budgetary agency itself is construed as a government programme, plausible given the nature of the ABC.
- IV. What is not expressly stated but implied from a joint reading of Regulations 69 (1) and 69(2) of the FMR 2007 is that receipt of grants for/by government projects should be communicated to the department and the Accountant-General, since the latter can only update the chart of accounts to reflect grants, where they are aware of them.
- V. Further, the terms used in s. 24 GBAA and Reg.69 FMR on the employ of grants, are inconsistent and give rise to some, at least theoretical complications; while s. 24 permits budgetary agencies to seek grants for programme support, Reg. 69 speaks of situations where grants are actually made to government projects. This inconsistency is curious given that projects are popularly perceived as subcomponents of programmes.²² This inconsistency is even worsened by the fact that these terms are not defined in the GBAA and FMR in the context of public administration/financial management in the governance arena. If projects and programmes are construed synonymously, Reg. 69 implies that it is the budgetary agency that must communicate to the Accountant-General, the making of a grant to a government project. This interpretation would make sense since there is no provision made in either instrument for grant seeking by projects conceived of as separate entities in and of themselves. If projects and programmes are construed differently and even assuming grants to government projects are made entirely on the initiative of the donor, government projects necessarily remain located in

²¹ The ABC also appears to have breached Reg. 69 (1) and (3) FMR which made it incumbent on it to notify the responsible department and the Accountant-General of any grant it received.

²² Confirmed by the following interviewees; Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015; Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015; Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015; Interview with Senior Accountant, MOHS, Foday Kandehe Kamara, 5 November 2015.



budgetary agencies. The fact that Reg. 69 requires notification in these circumstances, underlines the fact that a grant made to a government project, is not being made directly through/to the central government. The danger with the project /programme inconsistency may also illogically be misinterpreted to mean that receipt of grants to programmes need not be communicated, since there is no such express obligation. The reality is that "donor agencies can support a project and a programme. Projects are more time bound than programmes. Projects and programmes can receive funds from the GOSL and from donors."²³

VI. As to how Reg. 69 grants for government projects could be maintained, it is submitted that they could be maintained in government programme accounts, see discussion below concerning Ken Gborie, or in an account exclusive to the grant, see s. 8(1) (ii) GBAA which makes clear that an account can be set up for external grants, if a donor requires and that such an account would be considered as part of the Consolidated Fund.²⁴

It is submitted that the above gaps in clarity, may be dimensions of the contributory causative factors concerning corruption, touched on and framed broadly above. As with all causal analysis, broadly framed causal factors may be quite dynamic inhering a multitude of other interactive causative elements. It is submitted that the above identified literal inconsistencies, may well be part of the interplay of determinants underlying lapses of diligence generally, although they do not appear to be directly relevant to the cases reviewed herein.

Common sense demands that all initiatives at grant seeking originating from various quarters should be centrally channelled within a Ministry or Dept. before ever being submitted with a donor and never dispatched outside of this channel. Centrally channelling all donor applications would allow all such applications to be streamlined, (both in terms of their content and in terms of organizational management), and logged prior to being sent out and then upon their success, to be monitored.

Within the MOHS, this would be the donor coordination unit²⁵, called the donor liaison office.²⁶ "Programme implementers may go directly to the fund provider. At the MOHS, the seeking of grants must be communicated to the Permanent Secretary, so that the application is made on behalf of the actual grant seekers, formally through the Permanent Secretary, who is Vote Controller."²⁷

Additionally, there does exist an aid coordination and management division within MOFED under s. 3 (3) (a) GBAA which states that: "there shall be established or continue to exist within the Ministry, as the case may be, (...) an aid coordination management division as the Minister may consider necessary or expedient."

"Moreover, MOHS has IHPAU, an Integrated Health Projects Administration Unit" currently,

²³ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015. However, note interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015; "As far as I know, I do not know of donors funding strictly projects within the context of the MOHS."

²⁴ Note that under s. 7 GBAA the Consolidated Fund is composed in essence of all government revenues and that under s. 8 GBAA it is comprised of different bank accounts.

²⁵ Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.

²⁶ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

²⁷ Ibid.



"non-functional. It came about as a result of donors' dissatisfaction with the MOHS' human resources problems, i.e. capacity to properly financially manage grants. It was suggested to donors to employ a financial management specialist that donors would pay to ensure the administration according to donor specifications. It was set up in late 2012."

"MOFED's IPAU is also a unit that integrates all projects and takes care of all donor funds."²⁸

In addition to the 4 offices already cited, there is a National Directorate Development Assistance Coordinating Office (DACO) created in 2004 by the government for the coordination of aid at a national level. However, note that in spite of DACO, it has been recognised that the coordination of aid has been fragmented; there is no national policy on aid coordination.²⁹

Pertinent to analyses of the causality of corruption in the context of aid, is a consideration of the interplay between, the facts of the fragmented coordination of aid, the sidelining or bypassing of the aforementioned devices and the potential failure of these offices to exercise the necessary level of due diligence.

In *Ken Gborie*, the particular GAVI grant the handling of which prompted the GAVI draft audit and the more widely defined ACC investigations,³⁰ was programme specific, termed the GAVI Health Sector Support (HSS) grant. The GAVI HSS grant was paid into a pre-existing *Expanded Programme for Immunization* (EPI) account, Sierra Leone Commercial Bank (SLCB).³¹ Trial evidence describes the EPI account as a "GAVI account"³² into which the MOHS told GAVI to pay the HSS grant, but the evidence is also that there was no specific GAVI account,³³ which suggests that the former phrase actually meant that the EPI already contained GAVI funds prior to the arrival of the GAVI HSS grant.³⁴ The evidence makes clear that the EPI held funds from Global Fund, WHO and the World Bank,³⁵ although the evidence also states that *all donor funds, not just those named*, were kept in the EPI account.³⁶ That all donor

²⁸ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

²⁹ Unnamed, (2007), Network for Integrity in Reconstruction, *Sierra Leone Executive Summary*, p.4; <http://www.integrityaction.org/sites/www.integrityaction.org/files/documents/files/Sierra%20Leone%20Summary.pdf>. See also, Unnamed, (2006), Awareness Times, *What the Development Assistance Coordination Office is all about in Sierra Leone*, <http://news.sl/drwebsite/exec/view.cgi?archive=3&num=1913&printer=1>; "DACO has established a Development Assistance Database (DAD) to track and monitor all donor commitments and all disbursements to Sierra Leone."

³⁰ The focus of ACC investigation of the DPI was the management by the DPI of all projects supported by grants maintained in the DPI account, UTB and not just GAVI supported programmes/projects, see The *GAVI Funds Case*/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, 2 July 2014, pp. 22, 28, 48.

³¹ The State v. Kizito Daoh, Alhassan L. Sesay, A.A. Sandy, Edward Bai Kamara, Duramani Conteh before Hon. Mr. Justice Abdulai Charm 24 October 2013, p.19; Joseph Teckman Kanu/PW2, former Permanent Secretary of the MOHS testified that, the two implementing arms of the MOHS are the DPI and the EPI.

³² Magbity in his interview statement to ACC investigators states; "When the proposal was approved by GAVI, we were asked to submit details of account to which GAVI should deposit the funds for the project. Management agreed that we use an existing GAVI account in the Ministry, that is, the GAVI EPI account"; The *GAVI Funds Case*/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, 2 July 2014, p. 86.

³³ "It was made clear by PW1 (ACC Investigator, Musa Jamiru Bala Jawara) in answers to questions posed under cross-examination by M.P. Fofanah Esq. that after the approval of GAVI project, the Ministry of Health and Sanitation, rather than open a separate account decided to use an already existing account, the EPI account at SLCB. He made clear that there is nothing like GAVI account (...) PW2 (ACC Investigator, Felix Lansana Tejan Kabba) said likewise in answer to question posed to him under cross-examination by Mr. Fofanah"; The *GAVI Funds Case*/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, The *GAVI Funds Case*, 2 July 2014, pp.48-49.

³⁴ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015; *the EPI account used to be called the GAVI/EPI account because although it contained mixed funds, prior to receipt of the HSS grant, GAVI grants were paid therein to support immunisation.*

³⁵ "It was in evidence that the DPI account was fed with donor funds transferred from the Expanded Programme for Immunisation (EPI) account held and operated by the Ministry of Health and Sanitation at the Sierra Leone Commercial Bank for the implementation of GAVI Alliance *and other donor projects*. The donors include World, Bank, Global Fund, WHO and other donor institutions"; The *GAVI Funds Case*, p. 48.

³⁶ "He (PW1) made clear that the EPI account is a central account for donor funds operated by the MOHS at the SLCB (...) He made clear that the EPI account is the only account into which GAVI and other donor funds are lodged (...) PW2 said likewise in answer to question posed to him under cross-examination by Mr. Fofanah"; The *GAVI Funds Case*, p.49. The letter of the Senior Permanent Secretary MOHS dated 26th October 2011 to the Programme Manager, CH/EPI and Director, DPI suggests UNFPA ("*not managed by fiduciary agents*") was also a relevant donor, The *GAVI Funds Case*, pp. 62-63.



funds, were maintained in the EPI account is however untrue; "a good number of programmes have accounts for themselves, for running and administrative costs."³⁷ There appears to have been no real reason for maintaining grants from different donors in a single account other than that the GOSL tries to discourage the proliferation of GOSL accounts.³⁸ However, grants can be maintained in a grant-exclusive account specifically set up for the purpose of their receipt, see point VI. above and s. 8(1) (ii) GBAA. Accounts in which public funds including grants are maintained, whether on a grant-exclusive or mixed basis, can only be set up with the authorisation of the Accountant-General,³⁹ see the ABC case where the grant account was established illegitimately. Where grants are programme driven, such programmes are effectuated by means of a series of projects, drawn up on the basis of time considered obligations, part of donor conditionalities.⁴⁰

The indictment in Ken Gborie comprises 19 counts. In every charge against the two, it erroneously describes Ken Gborie as the "Director of Planning and Information of the GAVI HSS Support Project with the MOHS" and Magbity as the "Principal Monitoring and Evaluation Officer of GAVI HSS Support Project with the MOHS." The Director and M and E Officer of the DPI, MOHS, were in reality responsible for ensuring the implementation of donor funded programmes including the GAVI HSS support project. Since, the indictment does not in any of the counts name the grants that are the source of the funds forming the subject matter of the charges, it suggests that all charges implicating the above two concern GAVI funds. Attempts by the Defence to raise this as an argument that there was, "lack of clarity in the charges" affecting its preparation to meet evidence uncovering withdrawals from grants other than GAVI, were dismissed in the judgment, since the misdescription was deemed not to affect the substance of the charges so as to be prejudicial to the Defence. What mattered was that the act of misappropriation had been committed and not the source of the grants.⁴¹

The evidence itself best established the donor/grant source, by reference first, to (the dates of) the requests for project implementation approval/transfer of funds, secondly, by reference to the dates of the concerned cheques/withdrawals; these would make clear the names of the concerned programmes/projects and thus the precise donor or grant source. The projects for which the funds, which form the subject matter of the charges, were purportedly drawn were those supported by Global Fund, World Bank and WHO. The evidence established that the Le51,375,000 in count 2 was for a GAVI HSS grant funded activity,⁴² that the Le242,400,000 for the *Service Availability and Readiness Assessment*

³⁷ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

³⁸ Interview with Senior Accountant, MOHS, Foday Kandeh Kamara, 5 November 2015; Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015.

³⁹ See FMR 2007, Part 10, Bank Accounts and Cheques etc; Regulation 129 (1), Accountant-General to Authorize Opening of Bank Accounts; "No Public Officer shall, except with the authority of the Accountant-General, open a bank account for the deposit, custody or withdrawal of public moneys or other moneys for which he is responsible as a public officer or for the transaction of official banking business."

⁴⁰ Confirmed by the following interviewees; Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015; Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015; Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015; Interview with Senior Account, MOHS, Foday Kandeh Kamara, 5 November 2015.

⁴¹ There is no denial that the Accused occupied the positions described in the particulars of offence in the DPI and were involved in the implementation, not only of programmes funded by GAVI Alliance but also of other programmes implemented by the DPI funded by other donors such as the WB and Global Fund while they occupied the said positions. There is no denial that the donor programmes however described, were implemented with Donor Funds kept in the DPI, UTB account to which the 1st and 2nd accused were signatories. If the various bank instruments related to donor funds other than GAVI Alliance, it was a fact within their knowledge as they were directly involved in the implementation of the donor programmes. The 1st and 2nd accused persons were never misled or prejudiced in the conduct of their defence. They knew at all times what donor funded programme or activity the charges relate to and who the donors were. All the counts in the indictment are offences known to the Law; The GAVI Funds Case, p. 28. "So, whether the allegations of misappropriation and so on relate to GAVI Alliance funded activity or not, if there is evidence before this Court, in support of the offences charged, and such evidence go to prove misappropriation of funds donated by other donors as noted above, the submissions on behalf of the 1st and 2nd accused persons will not avail them"; The GAVI Funds Case, p. 29. "So whether or not an activity is sponsored by a particular donor, the structure at DPI remains, that is, the 1st accused and the 2nd accused remained Director and Principal Monitoring and Evaluation officer respectively. The *modus operandi* remained the same. That is, expenditures were meant to be documented and disbursements were meant to be justified. In other words, full accountability was required in the application of all donor funds for all donor activities"; The GAVI Funds Case, p. 49. "(...) All donor funds ought to be accounted for and not limited only to GAVI Funds"; The GAVI Funds Case, p. 66. "It changes nothing that the funds for the activity were transferred from the IPA Unit of the Ministry of Finance. I venture to say that even if the money had been granted by the WB to Sierra Leone so that it can be said that it is money belonging to the GOSL, it remains a donor fund and a charge can be brought against the 1st accused under S. 37(1) ACA 2008"; The GAVI Funds Case, p. 43.

⁴² A letter dated 24th March 2009 from Ken Gborie to the Senior Permanent Secretary requested Le127,870,000 to conduct an assessment of the impact of newly harmonised forms, on data quality and timeliness of reporting, i.e. a GAVI HSS programme; consequently the equivalent of \$41,821.75 was transferred into the DPI account; The GAVI Funds Case, pp. 40-41. Then, the assessment of impact of newly harmonized forms, on data quality and timeliness of reporting was conducted by the DPI from 5th to 19th April, 2009; The GAVI Funds Case, p. 40. Note also, an



(SARA) activity in April 2011 in count 3 was sourced from the Global Fund,⁴³ the Le62,500,000 in count 4 and the Le 47,500,000 in count 5 (replicated in counts 18 and 19) for the PBF Monitoring which took place between April and May 2012, was sourced from the World Bank through MOFED's Integrated Projects Administration Unit,⁴⁴ the sums in counts 6 through 14, totalling Le399,320,000, withdrawn by Magbity at various points from January to July 2008, were sourced from the GAVI HSS grant.⁴⁵ Apart from the sums in counts 4 and 5, all these sums had been maintained in the EPI account, transferred upon request to the DPI account.⁴⁶

Mixing differently sourced grants in a single account may imply different things depending on the purpose/s for which the grants were made. Mixing grants purposed for distinct areas/programmes in health care in a single account does seem unusual, but not fated to impropriety, since it is implicit that where funds from such a shared account are routed into programmes/projects, this financial routing is being done in accordance with donor instructions, so that programmes/projects would then be implemented by the *specific sums (grants) initially designated by donors* for their implementation. Likewise, mixing grants purposed for the same area/programmes in health care could be workable and practical especially where a programme is initially drafted by the MOHS or budgetary agency as involving differently sourced grants. Accountability is workable in the latter scenario as it is in the former, where for example, a specific grant is exclusively used to implement a specific project, as part of the programme, in accordance with donor instructions. Similarly, differently sourced grants maintained in a shared account, to be employed in jointly funded projects, would be administered in accordance with donor instructions pre-emptively stipulating the financial breakdown of such projects, i.e. qualifying and quantifying individually specified grant support on a percentage/specific amount basis, in relation to the overall project cost. Any query seeking to quantify loss, allocate or apportion responsibility in relation to specific donors/grants for a jointly funded project/programme would recognise such financial breakdowns; *"the monies are tagged i.e. divided into different portions as to how to be used."*⁴⁷ *"The maintenance of grants depends on the accountant attached to the programme and the requirements of the donor; the people who run the project rely on the advice of the accountant, but donors do not like mixed accounts; they prefer each grant to be given its own account."*⁴⁸ Mixing of funds however, need not be a sticking point in ensuring accountability for donor funds.

Ken Gborie and Magbity in their respective capacities were signatories to the DPI account and at times project implementers, e.g., they were team leaders of the WB, PBF survey.⁴⁹ This function overlap might suggest a

email from the GAVI Alliance Secretariat, addressed to the Senior Permanent Secretary, MOHS, "summarizing the misused amounts which form part of the particulars of the offence in count 2"; The *GAVI Funds Case*, p. 43. "There is before this Court, evidence of payment to the 3rd accused, the sum of Le51,375,000 by the DPI out of GAVI HSS donor fund"; The *GAVI Funds Case*, p. 44.

⁴³ Defence Counsel for the 1st accused submitted that count 3 related to funds donated by Global Fund; The *GAVI Funds Case*, p. 22. This is what the Court also concluded, that the Le242,400,000 in count 3 related to the Service Availability and Readiness Assessment (SARA) done in April, 2011, an activity funded by Global Fund; The *GAVI Funds Case*, pp. 50& 56. The 3rd accused told investigators that he was paid for car hire in connection with the SARA activity funded by Global Fund; The *GAVI Funds Case*, pp. 58 & 61.

⁴⁴ Defence Counsel for the 1st accused submitted that count 4 related to the funds donated by Global Fund; The *GAVI Funds Case*, p. 22, but later it appears he also submitted that count 4 and corresponding count 18 related to funds donated by the World Bank; The *GAVI Funds Case*, p. 29. The Court found that "Counts 18 and 19 make reference to a specific donor activity"; The *GAVI Funds Case*, p. 28. Gborie's letter of 17th April 2012 requests funds for Performance Based Funding (PBF) Monitoring of Implementers at Health Facility level country-wide, otherwise known as PBF. Magbity in his interview statement stated that it was a programme funded by WB from the Reproductive and Child Health Project Phase 2 through the Integrated Projects Administration Unit at the MOFED; The *GAVI Funds Case*, p. 67. The source of the payment to 78 Enterprises from the DPI account was donor funds made available for the PBF Programme by MOFED; The *GAVI Funds Case*, p. 68. The PBF activity took place between April and May 2012 for all Peripheral Health Unit (PHU) in the country; The *GAVI Funds Case*, pp. 71, 73, 76, 77, 78.

⁴⁵ Defence Counsel for the 2nd Accused submitted that counts 6 to 14 relate to funds donated by Global Fund and WHO, The *GAVI Funds Case*, p. 22. However, **the Court held** that Counts 6-14 relate to the GAVI HSS grant. "It is easy to see that the funds misappropriated by the 2nd Accused in collusion with his colleague Medical Doctors were GAVI Funds." The Court concludes thus, "given the relevant period in which the withdrawals were made"; The *GAVI Funds Case*, pp. 90-91. When the ACC requested in its notice to MOHS, documents related (generally) to the investigations; records of disbursements, *including* receipts and payment vouchers regarding GAVI Alliance cash support to MOHS, they were never provided with documents relating to these huge withdrawals by Magbity; The *GAVI Funds Case*, pp. 84 and 87. According to the Court, this absence of supporting documentation confirmed the GAVI draft audit report finding that there were cash withdrawals without supporting documentation; The *GAVI Funds Case*, pp. 87-88. *More practically however, the Court's conclusion would have been even more compelling if it were to attest to the fact that there were only GAVI funds in the DPI account during the period relevant to Magbity's sporadic withdrawals.* Note also that the Prosecution conceded counts 15 and 16, which respectively had charged Ken Gborie with misappropriation of donor funds of first, Le50, 000,000 in January 2012 and of Le 49,070,000 in May 2012.

⁴⁶ The *GAVI Funds Case*, pp. 48-49.

⁴⁷ Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.

⁴⁸ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

⁴⁹ As per the evidence of PW5, Momoh Gboa, the proprietor of 78 Ents, The *GAVI Funds Case*, pp. 69, 70 and 77.



detrimental concentration of power in the hands of the "controllers." This is because in Ken Gborie, the reasons proffered by Ken Gborie and Magbity to skilfully profit from cheques made out to contractors, (that they were involved in helping contractors sublease vehicles) is arguably why the capacity of programme implementers to also act as account signatories might not be as credible as once thought. Further, the fact that the choice of signatories did not reflect MOHS standard good practice strongly suggests a weakness incipient from the very point of opening the account and setting up a mandate card; the instruction from the account holder to the bank indicating the requisite signatories. Ken Gborie was a category A signatory and from the professional wing of the MOHS, Magbity was a category B signatory and also from the professional wing. MOHS standard good practice is that every account should have 4 signatories; 2 from the administrative wing i.e. the Permanent Secretary and the Director of Financial Resources and 2 from the professional wing; the Chief Medical Officer and the Programme Manager/Director/Coordinator. These must be further divided into subsets of category A and B signatories, so that accessing an account requires one from each category, one category A and one category B signatory who come from the professional and administrative wing respectively.⁵⁰ These are the default signatories for most programmes, although donor conditions may differ.⁵¹

Of course, the DPI comprised other project implementers; Magbity said in his statement that on arrival of the GAVI HSS grant, he allocated to units of the DPI, the responsibility for implementing grant supported activities and lodging implementation requests and confirmed to them the required quantum.⁵² Therefore references in the judgement to the submissions of implementation requests by Ken Gborie may not all have involved him as a project implementer and likely imply that his final endorsement of such requests pre-submission was required.⁵³ Implementation requests formally submitted by both Accused were to go through a chain of command,⁵⁴ being submitted through the Chief Medical Officer to the Permanent Secretary for approval.⁵⁵ The Permanent Secretary reviews the request, then forwards it to the Director of Financial Resources (DFR) authorising the latter to process it. The DFR reviews the request, ascertains whether there are funds for the programme in question, assesses the compatibility of the request with donor instructions; the DFR would assess the clarity, numerical accuracy, financial prudence/reasonableness, consistency between request, grant instructions and wider ministerial policy.⁵⁶ Requests would flesh out the framework for project modalities in the grant instructions. *"If the request is compatible with donor instructions, the DFR minutes the request to the Finance Officer (FO). At this juncture, the FO plays a due diligence role by reviewing the request as against the necessary requirements; the FO brings any lapses discovered to the DFR's attention for e.g. erroneous budget calculations, lapses concerning procurement procedure where the requests are for procurement payments, etc. If there are no such lapses, the FO goes ahead and processes the request, meaning he prepares a payment voucher and writes out the cheque, takes the payment voucher back to the DFR who verifies whether the FO fulfilled his due diligence role and signs the cheque."*⁵⁷ *"The FO does not handle the request at the submission stage; his only involvement at the submission stage is that s/he may only be called upon to prepare a payment schedule i.e. a list of persons that will be paid as a result of the implementation of the project."*⁵⁸

Once the programme/project budget was transferred from the EPI to the DPI account, it should have been directly accessible by the DPI account signatories by means of cheques.⁵⁹ However, the above described chain was not properly observed here; instead of cheques being drawn up by the FO according to the instructions in the approval and given to the signatories, Ken Gborie and Magbity for signing,⁶⁰ the FO was in reality bypassed.⁶¹ The Director and the M and E Officer DPI took on the responsibility of administering project funds without the aid of an FO. In Daoh, funds appear to have been accessed in the same manner as in Ken Gborie; project implementation request for GAVI funds submitted by persons who signed payment vouchers for receipt of the funds. It's not clear from the Daoh

⁵⁰ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

⁵¹ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

⁵² The GAVI Funds Case, p. 86.

⁵³ References to requests being made by Ken Gborie at, pp. 40, 43, 67 and 98.

⁵⁴ The GAVI Funds Case, pp. 43, 49.

⁵⁵ The GAVI Funds Case, pp. 40, 52 and 64.

⁵⁶ Interview with Senior Account, MOHS, Foday Kande Kamara, 5 November 2015; Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

⁵⁷ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

⁵⁸ Interview with Alusine Kargbo, Director of Financial Resources, MOHS, 4 November 2015.

⁵⁹ The GAVI Funds Case, p. 49.

⁶⁰ The GAVI Funds Case, pp. 43-49.

⁶¹ The GAVI Funds Case, pp. 52, 64, 65, 78, 98, 99.



judgement who the signatories to the cheques may have been, but the Prosecution did allege an obligation to retire to the DPI.

Donor consultants already are part of the procurement apparatus of MDAs so that the possibility of them also being made signatories to grant/programme accounts, as part of the conditions in donor instructions, does not seem implausible. As one government official put it: the donors "ask you to take the driver's seat, but they retain the steering wheel."⁶² It's worth considering whether this approach could be extended to area of account signatories.

B. Administration and Management of Public Funds:

Monitoring and control occur principally at the request and retirement stages; at both these stages there must be alignment with the original purpose of the allocation. Actual project implementation of long term projects/programmes could allow for intermittent audits. For shorter term projects, ongoing control and monitoring during implementation seems challenging and only practicable through requirements for contractual payments to comply with lawful procurement procedure; cheques should only be signed as contractual payments,⁶³ where a legitimate procurement process has taken place.

In essence, the actual exercise of the check of procurement occurs at the retirement stage (below), upon verification that the procurement process was observed. In practical terms, the awareness of signatories that this verification exercise is inevitable, should, while project implementation is ongoing, regulate expenditures of public funds, effected by cheque withdrawals. In Ken Gborie, Ken Gborie and Magbity were found guilty of signing cheques for withdrawals from the DPI Account, while providing no evidence of the authority on which they signed them, or on what supporting documents.⁶⁴

Relevant Law: Concerning public funds generally, Reg. 70(2) FMR states: "*Payments; Expenditure commitments shall be controlled against approved procurement plans and allocations from approved budgets and a Vote Controller shall make an expenditure commitment only against the procurement plan approved by the Budget Bureau for his head and within the cumulative allocations for the year.*" This means public funds cannot even be expended on contracts without just the procurement plans first of all being approved. Also relevant, Reg.70 (3) FMR states that: "*At a minimum, a procurement plan shall include proper description of the procurement item, the estimated contract value, when the item is needed and the procurement method.*" More importantly, Reg.70 (9) FMR states that: "*The procurement committee of the budgetary agency shall invite bids and select a supplier in accordance with the agency's procurement plan and any procurement regulations.*" Documents related to this procurement process should be maintained together and appended to the copy of the cheque and payment voucher on retirement. Concerning public funds generally, Reg. 80 (2) FMR states that: "*unless a budgetary agency has adopted a computerized on-line system of payment, a vote-controller shall, for the purposes of payment, submit payment vouchers to the Treasury (...) copy retained as the departmental record.*" Reg. 80 (3) FMR states: "*On receipt by the Treasury of the vouchers referred to in sub regulation 2, they will be checked*" and the treasury officer shall acknowledge receipt of the vouchers to the Vote Controller.

⁶² Unnamed, (2007), Network for Integrity in Reconstruction, *Sierra Leone Executive Summary*, p.4; <http://www.integrityaction.org/sites/www.integrityaction.org/files/documents/files/Sierra%20Leone%20Summary.pdf>

⁶³ As concerns public funds generally, see s. 29 (1) GBAA 2005, Payment for work done, which states that, "No payment shall be made for work done, goods supplied or services rendered, whether under a contract or not, in connection with any part of the public service, unless in addition to any other voucher or certificate that is required, the head of the budgetary agency concerned, or any other officer authorised by such head of the agency certifies—(a) that the work has been performed, the goods supplied or the service rendered, as the case may be, and that the price charged by the contract, is reasonable; or (b) where payment is to be made before the completion of the work, delivery of the goods or rendering of the service, as the case may be, that the payment is in accordance with the contract.

⁶⁴ The GAVI Funds Case, pp. 64, 77-78.



C. Retirement/Accounting for Expenditures:

Documentation supporting expenditures is crucial since in its absence, it is indeterminate that the monies were expended in accordance with the legitimate reasons initially proffered for transfers.

In Ken Gborie, issues of impropriety arose at the retirement stage; the stage of final accounting. Both Accused together endorsed various cheque withdrawals but failed to comply with GBAA and FMR obligations to account for these expenditures; there was no supporting documentation attesting to a legitimate purpose, as proof of expenditure. This failure to retire/account concerned both the appending of procurement documents and the appending of payment vouchers and/or receipts.

Relevant Law: Reg. 74 (1) FMR states that: "*For payments on procurement of goods and services, the voucher shall be supported with a certification that the procurement was carried out in accordance with the approved or revised plan as provided for in sub regulation 3 of regulation 70 and shall also be supported by the relevant minutes of the Procurement Committee meetings.*"

There were no procurement documents supporting the payment in count 2 of Le51, 375,000 from the GAVI HSS grant to Rolaan Ents. in April 2009 for vehicles for the assessment of forms' impact. There were no procurement documents supporting the payment in count 3 of Le242, 400,000 from the Global Fund again to the same Rolaan Ents. in April 2011 for vehicles for the SARA activity. There were no procurement documents supporting the payments on which counts 4 and 5 (18, 19) and 17 were based; 2 cheques worth Le180, 180,000 and Le235,420,000 respectively, from the World Bank grant made out to 78 Ents. in April and May 2012 for vehicles for the PBF Monitoring. Both Accused signed cheques making out these contractual payments to Rolaan and 78 Ents., knowing that the PPA had not been complied with. For all these cheques, MOHS and MOFED could provide no supporting documentation. The FCC case also evinced convictions for bypassing procurement procedure in contracting Morgan Heritage for \$130,000 and Rugged Musical Set, for \$35,000.

In most cases concerning the bypassing of procurement procedure, it is basically the signatories to accounts that can make payment happen/award contracts, that bypass the correct procedure. A simple suggestion is that contracts that bypass the normal procurement procedure should be null and void if discovered in time and that this could be stipulated in the internal regulatory instruments of MDAs.⁶⁵

However, interviews with government employed accountants suggest the method of retirement is contingent on a number of factors including the source and pathway of funds. Specifically at MOHS, the practice is that vouchers (retirement documents) are submitted to the FO and then further submitted to the DFR for verification.⁶⁶ Where donor funds have been channeled through MOFED to the Ministry concerned, vouchers are likely retired to MOFED and where the funds are non-donor funds from the GOSL, they may be retired to MOFED,⁶⁷ "*GOSL funded programmes/projects go through the normal MOHS procurement procedure, but the documents are retired to the Accountant-General and MOFED; normally a whole bundle of documents and a cheque list at a time.*"⁶⁸ However, some GOSL sourced funds can also be retired to the MOHS.⁶⁹ For donor funds remitted directly into a ministry/programme account, the Ministry, e.g. MOHS, keeps the supporting documents, although in the past such documents were retired with donors, but the latter is now more the exception than the rule.⁷⁰ The manner in which

⁶⁵ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "*Regarding the possibility of voiding a contract where the procurement process was not adhered to, one of the changes in the Public Procurement bill is that the Independent Procurement Review Panel (IPRP) should be able to at any point put an injunction in the contract. The IPRP would now be able to sit as a court (...)*"

⁶⁶ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

⁶⁷ Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015.

⁶⁸ Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.

⁶⁹ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

⁷⁰ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.



documents are retired, whether as the programme progresses or whether at the end of the programme, depends on the donors' discretion, but the donor may intermittently send to check on the supporting documents.⁷¹

The proprietors of both Rolaan and 78 Ents., testified that the payments they made to the 2 Accused, sourced from the aforementioned contractual payments, were meant as payments to persons who'd also made available vehicles for loan hire, but the MOHS/MOFED could provide no payment vouchers or even receipts signed by such persons. 9 DPI cheques sourced from GAVI HSS fund, not signed by either of the Accused, but made out in favour of and encashed by Magbity, were the subject of counts 6 through 14. Here also, the MOHS could provide no supporting documents and Magbity could provide no credible explanation. The SLMA case concerned payments made by the Executive Director (ED), vaguely termed, "Facilitation and Protocol" and "Community Relations" and for which most payment vouchers had been destroyed on the instructions of the ED. For the few that were retrieved, the payee was dubiously indicated as, "cash". None of the retrieved vouchers included the names of the providers of *these services*, seemingly in violation of Reg. 73 (3) FMR above; in effect sham vouchers whose purpose did not correspond with their payees. The FCC case also evinced convictions of persons to whom cheques were made out, who spent them without providing supporting documents; Brimah, the Development Planning Officer was convicted on count 12 for misappropriating Le9, 800,000 for the purported councillors' needs assessment and Garber, FCC civil engineer was convicted on count 13 for misappropriating Le9, 225,000 for rehabilitation work at Hargan Street. However, in the FCC case, witness evidence was accepted in the absence of supporting documents; Prosecution witness evidence was the basis of acquittal of Williams on Count 11 for misappropriating Le10, 000,000 from FCC account at Skye Bank, purporting to be payment for Morgan Heritage Concert. In the ABC case, 89 cheques were cashed and spent without supporting docs.⁷²

Relevant Law: Reg. 73 (1) FMR is ignored across the ABC, SLMA, FCC, and Ken Gborie cases. It states: "*All disbursements of public money shall be properly supported by payment vouchers.*" Further Reg. 73 (3) FMR states that, "*All payment vouchers shall (...) contain or have attached thereto full particulars of the service for which payment is made including dates, numbers, distances, and rates, so that they can be checked without reference to any other document.*" Also related is Reg. 74 (1) FMR: "*An officer, including a Minister or a Chairman of a statutory body who signs a voucher shall ensure that; a.) the services specified in the voucher have been duly and competently performed; b.) the prices charged are either according to contracts or approved scales or are fair and reasonable according to local rates; c.) authority has been obtained as quoted; d.) the calculations and castings have been verified and are arithmetically correct; (...) g.) the persons named in the voucher are those entitled to receive payment.*" Reg. 80 (2) FMR appears to require submission with MOFED: "*Unless a budgetary agency has adopted a computerized on-line system of payment, a vote-controller shall, for the purposes of payment, submit payment vouchers to the Treasury (...) copy retained as the departmental record (...).*"

The rule on vouchers also extends to payment of government staff.

Relevant Law: Reg. 96 (2) FMR states that: "*A salary voucher in the form determined by the Accountant-General shall be prepared for each month and a paying officer nominated by the vote controller.*" Reg. 96 (3) FMR states: "*The salary voucher shall show full details of basic salary, all allowances, income tax deduction, social security contribution by employer and employee, all other deductions and the net amount payable to the employee.*" Reg. 96 (5) FMR states: "*Subject to sub-regulation (6), payment shall only be made to the person listed on the salary voucher after proper identification and signing.*"

⁷¹ Ibid.

⁷² The Attitudinal Behavioural Change (The ABC) Case/The State v. Philip Conteh, Allieu Kamara, Lansana Zanto Kamara before Hon. Mr. Justice N.C. Browne-Marke 19 May 2011, p. 13.



In the *ABC case*, staff did not always sign payment/salary vouchers,⁷³ facilitating the ABC's claiming of salaries for August 2010 twice from London Mining, *and* an overlap between this latter request of London Mining for salaries i.e. for August to December 2010, with the period for which the GOSL provided salaries, i.e. for September to December 2010.⁷⁴

*Moreover, staff that do sign vouchers, should only do so at the point of receipt of cash, unlike what transpired with Rogers at the ABC, who was made to sign, then promised later payment.*⁷⁵

Charges for misappropriation brought as a result of failure to retire public funds resulted in convictions in *Ken Gborie* but acquittals in *Daoh*. The convictions in *Ken Gborie* resulted from contractual payments without documentary proof of observing the procurement process, payments received by the 1st and 2nd Accused for so-called 3rd parties without documentary proof of onward payments to such 3rd parties and withdrawals by the 2nd Accused *without any reason proffered* and without documentary evidence of expenditures. In *Daoh*, all 5 Accused were acquitted because there was no legal obligation to "retire" per diem and fuel funds for supervisory activities or submit activity reports; "omissions" which the Prosecution had argued constituted the proof of dishonesty required for misappropriation. The absence of documentation seemingly qualified as proof of misappropriation in *Ken Gborie* but not in *Daoh*, for the following reasons. In *Ken Gborie*, not only were there legally prescribed obligations in the FMR/GBAA applicable to contractual payments from public funds and direct withdrawals from public funds, (whereas in *Daoh*, there were no such legal obligations to retire per diem/fuel funds and provide activity reports), but more importantly in *Ken Gborie*, *there was evidence of material benefit accruing to the Accused as a result of their having bypassed the appropriate processes*. Further, prosecutorial diligence was exercised in *Ken Gborie*, but not in *Daoh*; in *Ken Gborie* the Prosecution sought to no avail, supporting documents for DPI related expenditures from the MOHS/MOFED, especially for cheques endorsed by both or either of the Accused; "They produced all the documents made available to them by the MOHS (...) The prosecution was not to conjure up documents from the sky where none exists. It would be an absurdity to require the prosecution to go further than they did in the name of discharging the standard of proof beyond reasonable doubt, as required of them by law."⁷⁶ The Prosecution was less diligent in *Daoh*; although during the investigation, various notices were served to institutions including MOHS for the production of documents,⁷⁷ the Prosecution did not verify the source of fuel receipts appended to the relevant mission document bundles submitted to MOHS. In *Daoh*, although the Prosecution sought to employ the "omissions" as proof that no activities were conducted, it did not adduce any evidence in support of its allegations that the Accused did not visit mission sites; it did not follow up assertions from 3 Accused that they had submitted reports to DPI. In *Daoh*, the only source that created obligations to account for per diem, fuel funds and to provide activity reports was the GAVI Draft Audit Report which concerned the GAVI grant for 2008 to 2011. This audit did not however mention an obligation to "retire" anything, but rather required fuel invoices, list of signatures confirming receipt by per diem recipients, mission orders with proof of visits, supplier invoices for any external purchases, all within a technical activity report. Moreover, the audit report only came about in 2012, after the concerned missions had been held.

⁷³ Although departmental records of staff payments were kept; The *ABC Case*, p. 11. "We do not have a voucher system...they disburse the salaries and the staff sign for it"; The *ABC Case* p. 12. "There are no vouchers to verify to whom payments were made"; The *ABC Case*, p. 24. "Schedule of payment of salary made to the ABC staff"; The *ABC Case*, p. 26. "The 1st and 2nd Accused have not actually given any clear explanation in their respective statements as to why there are no vouchers, invoices or other documents to support any of their expenditures"; The *ABC Case*, p. 29.

⁷⁴ Though the 1st Accused has acknowledged receipt of salary support from LMC for August 2010, that same month is the beginning of the period, August to December 2010, for which payment/ salary needs, were requested; The *ABC Case*, p. 20. Roger's salary was included in this latter budget; The *ABC Case*, p. 23. As to August 2010, funding must have been received because PW7 was asked to sign exhibit 4; The *ABC Case*, p. 24. According to PW9 and exhibit 37, a departmental record/ schedule of payments of salary made to ABC staff, indicate that salaries were paid to ABC staff for September through December 2010; The *ABC Case*, p. 23. These salaries in exhibit 37 were sourced from the consolidated fund; The *ABC Case*, p. 28.

⁷⁵ Rogers said he signed the payment vouchers for August and September 2010, but received no salaries for these months. He signed them at the behest of the 2nd Accused in late October 2010, but received no such salaries and the 2nd Accused said that Rogers would hear from him later; The *ABC Case*, pp. 21-22.

⁷⁶ The *GAVI Funds case*, pp.60-61.

⁷⁷ The State v. Kizito Daoh, Alhassan L. Sesay, A.A. Sandy, Edward Bai Kamara, Duramani Conteh before Hon. Mr. Justice Abdulai Charm 24 October 2013, p.15.



Relevant Law: Specifically "retirement" obligations in the FMR/GBAA concern imprests; lump sums for the implementation of entire projects, ("What is subject to retirement is an imprest, which is a bulk amount given for an activity (ies) (...) the recommendation in the draft audit does not say that DSA's should be retired"; The Daoh case; p. 29). Reg. 83 (5) FMR on the issuance of imprests states: "All imprests shall be issued in the names of the officers who will hold them and the imprests shall remain their personal responsibility until they are refunded or discharged by the submission of properly completed payment vouchers or handed over to another officer in accordance with regulation 88." Reg. 85 FMR on duties of imprest holders states: "An officer holding an imprest shall- a.) ensure that an imprest issued to him is used wholly and exclusively for the purpose for which it is issued; b.) account for the imprest in accordance with these regulations and the terms under which it is issued; **d?Illegible;** e.) obtain proper receipts of or payment vouchers for disbursements from the imprests." Reg. 89 (1) FMR on retirement of imprests states: "Except as otherwise provided in regulation 91, all imprests shall be retired as soon as the necessity for them ceases to exist or by the close of business on the last working day of the financial year in which they were issued, whichever first occurs." Reg. 89 (4) FMR states: "Officers holding imprests are not relieved of their responsibilities in respect of the imprests until payment vouchers submitted to the Treasury have been examined and found to be correct." There are no obligations in the FMR/GBAA to account specifically for the retirement of per diem and fuel funds or for submitting reports for donor funded activities. However note that although the FMR/GBAA do not talk of retiring donor funds, the FMR does express generalised obligations in relation to public funds, which donor funds do qualify as; Reg. 73 (1) FMR states: "All disbursements of public money shall be properly supported by payment vouchers."

Daoh brought to the fore, the need to avoid depending on any popular understandings of the term "retirement". Although used in the FMR, it is not therein defined; a point worthy of consideration. The Prosecution's case may well have been strengthened by use of a more neutral term such as, "an obligation to account," as well as by making clear the distinctive nature/source of the said obligations and by making clear that all obligations relating generally to public funds expressed in the relevant regulatory instruments, were by default applicable to donor funds.

The Prosecution's case in Daoh could only have stood a chance, had it firstly sought to counter the assertions by the Accused by properly investigating all their leads, by accurately defining the nature of the obligations in question and their source, by making it clear that these obligations had prior to the GAVI audit, been expected and recognized as best practice at the MOHS,⁷⁸ so that the ex post facto nature of their articulation in the audit was simply an encapsulation of tacit understandings. Lastly, the Prosecution could have drawn attention to the very practical consequences of not observing these practices.⁷⁹

2. Modes of Control:

The above exercise of tracing the key phases through which public funds go, makes it clear that, in the cases reviewed, there are failings all along the transactional chain. The glitch here is systemic so that blame cannot be laid at the doorstep of a single individual/body. "Systemic flaws" here refer not just to flaws in the formal process, but also to

⁷⁸ PW2, Joseph Teckman Kanu, Permanent Secretary MSWGCA, former Permanent Secretary, MOHS, testified that there are two ways to tell if an official has gone on assignment: (1) The Official's absence from post and (2) the back to office report that would *normally* be submitted on the outcome of the mission. He testified that for good accounting practice, the beneficiary of a DSA should sign and receive his DSA; *The State v. Kizito Daoh et al.*, p.20. Lawrence Sawber Caulker, Deputy Accountant-General in the MOFED testified that what is required with respect to a per diem is to *report* on the activity the per diem is given for; *The State v. Kizito Daoh et al.*, p. 22.

⁷⁹ "It is about whether the Accused gave the money they received as the DSA to the rest of their team or simply kept it for themselves. It is about whether the money received for fuel was spent as was intended"; *The State v. Kizito Daoh et al.*, p. 24.



instances of failure by these various agencies along the transactional chain to exercise due diligence to prevent or detect impropriety.⁸⁰ *The exercise of due diligence by bodies along the transactional chain and clear lines of communication and collaboration may well have worked towards nipping impropriety in the bud.*⁸¹ The review evinces failure to exercise due diligence by Parliament, Directors' Boards, Donors, Ministries/Departments (Central Government), Banks, Finance Officers and MOHS' Directorate of Financial Resources. These are modes of control, improperly employed.

A. Budget Allocations:

In Lukuley, Lukuley as the Executive Director (ED) of the SLMA was the head of that budgetary agency and therefore was the Vote Controller; as per s. 45 (1) GBAA. As Vote Controller he was obligated under s. 45 (2) *to comply with financial instructions/directions from the Minister of Finance or the Accountant-General and any regulations made under the GBAA* concerning the handling of public monies/properties. Such obligations should have governed the submission of Lukuley's requests for funds with the SLMA accountant. His requests were made firstly, pursuant to his powers under s. 15 SLMA Act, which makes the ED responsible for the conduct and management of the daily business or activities of the SLMA, and secondly, pursuant to s. 46 (1) GBAA, which states that; the Vote Controller shall control and be accountable for all public moneys received, held or spent by or on account of the budgetary agency as provided for by the expenditure heads/divisions with an Appropriation Act.

Lukuley's *requests submitted with his Board of Directors for access to budgetary allocations should have been subject to two forms of control*; i.) assessing the internal financial accuracy of the requests and ii.) assessing their consistency with Parliamentary approved budgetary/expenditure heads, i.e. ensuring that the proffered reasons/causes of the requests were indeed the same as those for which public monies were allocated to the agency by Parliament. Practically then, it would seem that both assessments should require the requests to be detailed in terms of appending financial calculations and elaborating on exactly how their purpose was compatible with the purported budget head. It is unclear from the Lukuley judgment whether there was any such requirement or whether this practice was observed.

With regard to assessing internal financial accuracy, a number of Lukuley's requests lodged with the SLMA accountant were for the processing of salaries and allowances of the ED and SLMA board members and their respective rates of per diem. No convictions resulted from any of the charges brought against Lukuley for payments made subsequent to these particular requests; since he it was held he could not have fraudulently misappropriated amounts that had already been approved by the Board even prior to Parliamentary budget approval.

Relevant Law: *There are* relevant legal provisions recognising the need for accuracy in such requests. *As concerns salaries*, Reg. 95 (1) FMR states that a Vote Controller shall ensure that the personnel emoluments records maintained for all the employees in his budgetary agency *are correct*, and personnel emoluments mean salaries, allowances and all employee benefits as stated in, Reg. 94 FMR. Reg. 14 FMR states that each allowance shall be described in a separate line and not included with salary. *As concerns per diem*, Reg. 14 (3) GBAA makes clear that per diem is not a personnel emolument, since *"transport and travelling allowances shall not be regarded as personnel emoluments."*

It is unclear from the Lukuley judgment whether there was requirement for documents containing the calculations of salaries and allowances to be appended to any request for processing and payment. As to whether the calculation of per diem requires supporting documents post a trip, to provide conclusive proof of dates of arrival and departure, proof of engagement and lodging, the Senior Accountant MOHS responds that, in the processing of per diem, the accountants must verify that the individual's itinerary is attached to the request for payment.⁸²

⁸⁰ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "There is a failing all along the chain."

⁸¹ Barata K. Cain, P., Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 52, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF; "For corruption to be contained, governments need to strengthen the systems that manage financial and other state resources and enable governments to account effectively to the people."

⁸² Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.



Lukuley also lodged numerous requests with the SLMA accountant under the expenditure head of "facilitation and protocol" and "community relations," both ambiguous budget heads, so that the issue of financial control here goes as far back as the actual budget approval process. It is curious how such vague budget headings managed to get past the SLMA's budget committee instituted under s. 20 (2) GBAA,⁸³ as responsible for preparing the agency's annual budget and monitoring its expenditure and results. Management can also be faulted for including vague headings in a budget proposal especially in a context where corruption is rife.⁸⁴ After the fact, the Board upon its consideration of such requests could also have been more active in requiring more them to be more detailed. It is even more curious how such vague budget headings managed to get past MOFED's internal audit department and budget bureau, two organs who in turn, according to s. 20 (3) GBAA, are to monitor budget committees. Additionally, s. 20 (1) GBAA states that the budget bureau within MOFED shall, under the supervision of the Financial Secretary, be responsible for preparing and monitoring the budget in collaboration with the budgetary agencies.

Most of all, it is curious how such vague budget headings managed to secure Parliamentary approval.

Relevant Law: The budget documents laid before Parliament include estimates of expenditure and revenue of each budgetary agency under s. 23 GBAA. According to Reg. 11 (1) FMR, the estimates of expenditure shall show, as nearly as can be predicted the amounts expected to be spent during the financial year. These estimates shall be divided into heads of expenditure, under Reg. 11 (2) FMR. Vague budget headings appear to have been envisaged and addressed in Reg. 12 FMR which states that, the purposes of expenditure and the services to be provided under each head shall be outlined in a preamble to the head to be called, "the Ambit of the Vote." Importantly, Reg. 12 (2) FMR states that no expenditure shall be charged to the head unless it falls within the ambit of the vote. The heads of expenditure shall be divided into programmes considered necessary for the services thereunder to be provided efficiently, as per Reg.13 (1) FMR. Further, the programmes shall include all the items relating to the particular service to be provided under that programme, as per Reg. 13 (2) FMR.

Although provision is made for a category of personnel emoluments under the expenditure within each programme, as per Reg.13 (3) FMR, none of the disbursements Lukuley made under the headings concerned here, whether to chiefdom elders or Parliamentarians, could legitimately fall under that category.

PW1, the SLMA accountant, testified that the ED would usually request funds under the heading of "facilitation and protocol" and "community relations," by sending her a memo to that effect. As per the regulations cited above, such requests would have to have been clearly in accordance with, or within the bounds of the "the Ambit of the Vote" for either of these budget headings. Although the vagueness of these budget headings is lamented in the Lukuley judgment, their "Ambits" as per the relevant SLMA budget are not provided in the judgment to add substance to their meaning. Were Lukuley's disbursements under these expenditure headings in line with the figures submitted in the budget as part of these headings?

Relevant Law: As far as stipulating numerical accuracy in budgets proposals, Reg. 7 (3) FMR states, that a Vote Controller shall in preparing draft estimates of revenue and expenditure, set up and chair a budget committee in his budget entity to ensure that the estimates are realistic and accurate in all respects (...).Reg.7 (2) (b) FMR states that the budget call circular requires every Vote Controller to submit detailed work plans for (...) recurrent and capital expenditure for the following three years. Specifically with regards to capital expenditure which the above headings in Lukuley could not have qualified as, Reg. 17 (1) FMR stipulates that capital expenditures being presented to Parliament through an Appropriation Bill shall contain sufficient detail as to enable Parliament to identify them.

⁸³ S. 20 (2) GBAA states that; (2) Each budgetary agency shall establish a budget committee comprising the Vote Controller, the professional head, if any, programme managers and provincial and district managers, to be responsible for preparing the strategic plans and annual estimates of the agency, apportioning quarterly allocations and monitoring expenditure and results.

⁸⁴ The annual budget for the SLMA is put together by the various heads of depts. and decided upon by management who then submit it to the board for approval (...), then MOFED, then Parliament. It follows therefore that if, management keeps its expenditure within that approved budget, management cannot be said to have wrongfully utilised funds which have been budgeted for; The SLMA case; p.12. His management presented figures to the board for their approval; The SLMA case, p.23.



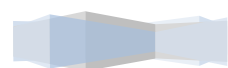
What is clear is that requests for funds under the aforementioned headings were made for widely varying purposes, ranging from entertainment of Parliamentarians, to the payment of *shake hand fees* in the provinces, to responding to the storms in Kono. These disparate reasons advanced for the use of funds requested under these headings, in addition to the fact that, payment vouchers for such cheques were not signed by the ultimate recipient of their proceeds/providers of the service as they should have been, as per Regs. 73 (1) and (3) and 74 FMR but were instead always made out generally to: "payee" so that Lukuley himself personally handled these proceeds, and the fact that Lukuley requested his subordinates to remove documents relating to payments under these headings, makes it clear that, the vagueness of these headings was an intentional ploy for the misuse of public funds.

Lastly, it is curious that none of the oddities concerning the expenditures made under "facilitation and protocol" and "community relations" were ever remarked by the office of the Financial Secretary, the office of the Minister of Finance or members of Parliament; this in spite of the Vote Controller's obligation under s. 53 (1) to submit at the end of each month information on revenue and expenditure of that ending month, to the Financial Secretary, and the Minister of Finance's obligation under s. 53 (2) to submit a summary of government receipts and payments on a quarterly basis to Parliament.

Payments made under the budget headings for "*facilitation and protocol*" and "*community relations*," potentially breached a host of regulatory provisions.

Relevant Law: Firstly, under Reg. 23 (1) FMR, the Vote Controller is obligated to control the expenditure in respect of any service under his control and to ensure that the provision authorized for that service by a budget warrant is not exceeded. Under Reg. 23 (2), excess expenditure incurred without proper authority, shall be the personal and pecuniary responsibility of the Vote Controller. Additionally, Reg. 37 (3) (a) and (b) states that overspending of a head of expenditure or a main division within a head, or, expenditure not in accordance with the purpose of a head or, not in accordance with the purpose of the main division amounts to "*unauthorized expenditure*," required by s. 39 (4) FMR to be addressed by the Financial Secretary. Since Lukuley claimed to have once disbursed funds under the above headings for the storms in Kono, note that for emergency disbursements which cannot be postponed without detriment to the public service or appropriately charged to an existing appropriation, a Vote Controller shall first seek approval/authority from the Minister of Finance as per Reg. 24 (1) FMR. Further, under s. 25 (4) and (5) GBAA, it is the Minister of Finance that has a vote over an unallocated expenditure head for emergencies and unforeseen exceptional situations. Ss. 39 through 41 GBAA also provide for public emergencies through a contingencies fund subject to the control of the Minister of Finance, sourced from the consolidated fund.

The following provisions might also be relevant: Reg. 39 (2) FMR: "*Accounts which are intended for use during the financial year shall not delay the reporting of any unauthorized expenditure to Parliament.*" Reg. 39 (3) states that: "*If the appropriate authority of Parliament cannot be identified by the time of closure of the accounts, then such payments shall be treated as an unauthorized expenditure and shall be dealt with in accordance with sub-regulation (2) of regulation 37.*" Reg. 39 (4) FMR: "*If no appropriate head of expenditure can be identified, such expenditure shall be included in a programme for which the Financial Secretary is responsible, as an unauthorized expenditure and dealt with in accordance with sub-regulation (2) of regulation 37.*" Reg. 37 (2) FMR states: "*Where it is discovered that a Vote Controller has taken any action which anticipates the approval of expenditure by Parliament, when any payment made as a result of such action shall be treated as unauthorized expenditure, a new programme entitled; "Unauthorised Expenditure" shall be opened for the head in question, and such unauthorized expenditure shall be the responsibility of the Vote Controller.*"



Clearer and unequivocal budget headings and "Ambits" would prevent misuse of the kind described above; there would be no leeway for these sorts of miscellaneous disbursements. This really depends on Parliament's approval being based on its recognition of its role as a vigilant guardian of national resources and not a self-interested rubber stamping body. A more vigilant Parliament would demand for such vague headings to be reformulated. With regards to the discrepancy between Lukuley's account that he never took possession of monies withdrawn as "facilitation and protocol" and "community relations", and the testimony of the SLMA accountant that she handed over these monies to him, one simple suggestion where money is handed over in person to the requester, is the practice of logging events and having witnesses sign; whether the money is handed over or kept in a safe. It is plausible to also consider requiring the presence of the same witness for any further withdrawals/expenditures from the said sum.

B. Donors:

Donors themselves should be partly responsible for demanding and seeking to enforce the thorough retirement of their funds donated to MDAs/GOSL. This is nothing unusual; "some donors demand periodic updates and like to work in partnership (hands-on) with implementers."⁸⁵ "Most donor demand financial and technical reports periodically."⁸⁶ In the ABC case, the ABC submitted with London Mining prior to the donation, forecasts of activities and expenditures for given periods. After having received London Mining's (LMC) donations and after these stipulated periods had passed, the ABC would again submit a statement of activities undertaken and monies expended, purporting to be in line with its prior budget forecast, but without documentation supporting the expenditures.⁸⁷ Had the donors adamantly and outrightly remarked that proper retirement was not taking place, the ABC may have tried to be more efficient. Alternatively, the LMC could have alerted the MOIC that one of its units, was failing to properly retire donor funds. LMC did not appear to make retirement part of its initial conditions/instructions and appeared to simply accept the ABC's claims of expenditure without actual proof. From a supra-national level, donor control might be enhanced by the employ by donors of assessment tools for evaluating the capability of government record keeping systems to support financial management requirements, including "tools to assess the vulnerability of records systems to corruption and fraud."⁸⁸

C. Ministry/Department:

Central government authorities that is the Ministry or Department within which the alleged offence was committed, can also be faulted for not exercising due diligence. In the ABC case, it was in evidence that MOIC did provide the ABC with funds for specific purposes, to be achieved within a specific time frame.⁸⁹ It was also in evidence that there were meetings held between the MOIC budget committee and the 2nd Accused, Allieu Kamara during which they discussed budget related matters.⁹⁰ It is therefore curious that during discussions concerning the forecasting of expenditure and activities, there would be no recap of completed or ongoing activities including the sources of

⁸⁵ Interview with Desk Officer for Tertiary Hospitals (Accountant), MOHS, Fayia Musa Tucker, 12 November 2015.

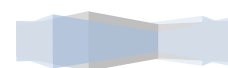
⁸⁶ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

⁸⁷ The ABC Case, p.20; Letter dated 27 September 2010 addressed by Philip Conteh to London Mining's Managing Director, states that; "We are presenting our proposals and support request for the period October 2010 to December 2010 (...) As usual we will produce an end of quarter report outlining our achievements in line with our set plans."

⁸⁸ Barata K, Cain, P, Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 7, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF

⁸⁹ The ABC Case, pp. 25 through 27 details how MOFED provided Le149, 800,000 through MOIC for the ABC for 2010. This was to be provided on a quarterly basis. MOIC budget committee meetings were held at the end of each quarter to determine the amount of each quarterly allocation and the purposes/activities for which they were to be used. Most often the expenditures envisaged appear to be, imprest, stationery, fuel, oil, public relations, office, general and towards the end of 2010, salaries. Specifically, Le1, 000, 000 was given to ABC per month as imprest. The accountant had a notebook in which all the amounts given to the ABC were entered, although receipts were not maintained for all such allocations.

⁹⁰ Ibid.



funds sustaining such activities. In short, it is curious that the MOIC never detected that the ABC was conducting and engaged in activities which it itself had never provided funds for, for e.g., "National Pride Week."⁹¹

Had the MOIC been well-informed or rather sought to inform itself thoroughly of the activities of the ABC, it would have picked up on this, would have sought to identify the source of financial support of these activities and sought to clarify the fund raising process in this respect. Having clarified that the fund raising process was not centralised, it would naturally then have been lead to query the receipt and maintenance of such donor funds. This would have readily made evident the discrepancies and irregularities in ABC's approach. In this vein it should be noted that the MOIC accountant, PW9 testified that the ABC should have reported its receipt of funds to the Permanent Secretary,⁹² which appears to mean "including grants." Yet what is truly curious is that the central government did not detect sooner that ABC was in receipt and control of donor funds from LMC, especially given that PW9 himself testifies that the ABC's allocation fell under the MOIC's head of expenditure, the bulk of the ABC's allocation was actually disbursed by the MOIC on its behalf and, given LMC's CEO had written to HE the President, committing his company to supporting the ABC to the tune of USD 200,000 per year for 2 years.⁹³

D. Banks:

The ABC was in receipt of government funding from budgetary allocation through the Consolidated Fund to the MOIC's account at the Bank of Sierra Leone,⁹⁴ which the MOIC mostly disbursed on the ABC's behalf.⁹⁵ In his evidence, the 1st Accused in the ABC case, Philip Conteh said that he was unaware of the aforementioned obligations under the GBAA/FMR. Conteh's alleged ignorance about the ABC's obligations under the aforementioned provisions is less than credible, unrealistic and impractical; one would reasonably assume that the ABC leadership must have between themselves discussed financial matters including accessing donor funds. Further, one would reasonably assume that the ABC leadership, had it been constituted of reasonable persons, would in the normal course of events have inquired with other public officers, into the necessary procedures for setting up an ABC specific account at the Sierra Leone Commercial Bank (SLCB). The ABC judgment tends to indicate that the ABC SLCB account ended up containing exclusively donor funds from London Mining and Comium. This strongly suggests that the ABC account was set up specifically for receipt of donor funds and that the bypassing of any higher level approval for its establishment was intended, so as keep superiors in the dark about such grants. It also strongly suggests that the circumventing of the Attorney General was intentional so that the Accused as signatories to their own separate account would not have to ask for approval from for e.g. the Permanent Secretary prior to endorsing cheques.⁹⁶ The bypassing also meant there would be no Finance Officer attached to grants/programmes who would supervise their disbursements (see description on the Finance Officer below).

The ABC account was set up at the SLCB which is a 100% owned by the GOSL⁹⁷ and where the Consolidated Fund is located. It is strongly desirable that the staff of any bank handling the business of the GOSL be au fait with legal prescriptions and banking regulations concerning transactions by the GOSL and its MDAs. It is not too farfetched to expect that bank staff from the Bank of Sierra Leone and the SLCB to know the requirements concerning the setting up of a separate account by an MDA, or at least to know that a distinct set of rules applies to MDAs. What transpired with the ABC raises commonsense and highly practical questions like; "Didn't the banking staff that processed the ABC's application for opening its own separate account at the SLCB, first seek to verify whether the Accountant-General had given her approval? Did the relevant banking staff not know that the Accountant-General's approval was

⁹¹ The ABC Case, p. 11; The ABC received the sum of Le 150 Million from Comium SL as sponsorship for the programme entitled, "National Pride Week", covering the country's independence anniversary celebration in April 2009.

⁹² The ABC Case, p. 27.

⁹³ The ABC Case, p. 16; "I have today met with Philip Conteh and Allieu Kamara from the ABC secretariat who discussed the need for a credible sponsor and partner in this programme (...) we have today discussed a support plan for the next 2 years of USD 200,000 per year based on a specific plan and regular reviews of its achievements."

⁹⁴ The ABC Case, p. 25; "The MOIC received 4 allocations for the ABC in 2010" and p. 26; "The MOIC operates an account at the Bank of Sierra Leone." Reg. 128 states; "Appointment of Bankers to Government; Subject to the instructions of the Minister, the Financial Secretary may appoint one or more banks in SL to be bankers to the government for the custody of public moneys and other official funds and for the transaction of official banking business."

⁹⁵ The ABC Case, p. 27; "The bulk of the ABC's allocation was actually disbursed by the Ministry on its behalf"

⁹⁶ Refer to The GAVI Funds case, where the Accused as signatories to the DPI account had to lodge project implementation requests with the Permanent Secretary of the MOHS for funds to be transferred to the DPI account.

⁹⁷ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.



a prerequisite for the opening of bank accounts by MDAs? Did the relevant banking staff not know or seek to verify the status of the ABC as an agency under the MOIC?" These sorts of questions highlight the need for greater responsibility and a higher level of diligence to be exercised by banks/bank staff when dealing with MDAs. **Bank staff should be alive to the fact that specific sets of rules likely apply to specific types of transactions sought to be carried out by MDAs.**

Banks are obviously third parties to whatever procurement process may have been conducted. In spite of the fact that 3rd parties may not infringe on private business relationships, banks are entitled to take certain steps to verify that cheque payments for contracts which they are being asked to process, have been made pursuant to a legitimate procurement process, see Ken Gborie, the FCC case, and the NRA case. Contractual payments are not only processed via cheques as in the FCC case, Ken Gborie and Sesay's cheques to his wife in the NRA case, but there is also a specific committee⁹⁸ within MOFED that processes advances/payments for contractual awards, based on the notification of contractual award and the contract document drafted by the Procurement Committee that determines the award. **Normally, banks also require the same set of documents** if they are to collaborate in the process either by processing cheques for contractual payments or by providing securities to contractors. Winning bidders must take out an *advance security* commensurate to the advance MOFED would have processed for them based on contractual terms, and which is returned after the contract is performed and the contractors paid. They must also take out *performance security* which would be forfeited where there is poor/non performance and *retention security* which is held on to by the procuring entity for contractual defects during the warranty period. Banks are therefore heavily involved and would be expected to perform due diligence checks in every relevant sphere; verifying the contractual award and the background of the contractor.⁹⁹

Relevant Law: Further, Reg. 74 (1) FMR states that: "*For payments on procurement of goods and services, the voucher shall be supported with a certification that the procurement was carried out in accordance with the approved or revised plan as provided for in sub regulation 3 of regulation 70 and shall also be supported by the relevant minutes of the Procurement Committee meetings.*"

If, presumably the voucher and all the aforementioned attendants are to be appended to cheques for contractual payments, query therefore how cheques for illegitimate contractual payments in the Ken Gborie, FCC and NRA cases surmounted these hurdles.

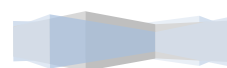
In the FCC case the Accused had to resort to a reserve in a foreign bank account for payment of the Morgan Heritage concert, which they easily accessed in spite of its being a reserve account. Reserve accounts are only to be employed in exceptional circumstances. Yet this special account had no special access procedure as one would expect, for e.g. a more public process requiring more signatories, or requiring a statement of confirmation that the signing of the cheque was based on a collective decision and not just the whim of a couple of higher uppers. Also, William's withdrawal of USD10,000 on which count 19 was based, also raises the question of how/whether withdrawal thresholds for signatories of MDA accounts are determined and what sort of approval processes are put in place, if any, where thresholds are exceeded.

In the Ken Gborie and Lukuley cases, there was a tendency for some cheques to be made out to "cash" or "payee." Greater specificity could be demanded by banks for all such cheques to be made out to a named individual or institution, anticipating any possible future enquiries and attempts to establish accountability.

Katta recognized that Ecobank was duty bound to protect and collect NRA taxes in a suspense account and transmit to the Consolidated Account, Central Bank in accordance with its MOU with the NRA. Here, the Addax cheque payable to the NRA was paid ultimately into the Magsons' account, but first converted into a manager/ banker's cheque, so

⁹⁸ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014. Also, interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015; "*What I can say is that MOFED's responsibility is to verify that the procurement process was carried out.*" Interview with Senior Accountant, MOHS, Foday Kandeh Kamara, 5 November 2015; "*For GOSL sourced programmes/projects, after verification of the procurement documents, the Accountant-General signs cheques that he sends to the Bank of Sierra Leone for payment to contractors.*"

⁹⁹ Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.



that the Magsons' account would be credited from the manager's cheque account. The Defence argued that payment into the Magsons' account was a 3rd party transaction and/or mis-posting.¹⁰⁰ Ecobank's internal audit and the Court held it was a cheque diversion and that the conversion of the Addax cheque into a manager's cheque and payment into the Magsons' account breached all bank procedures.¹⁰¹

A legitimate conversion of the Addax cheque to a manager's cheque required a signed request letter from an account holder (payer/payee) addressed to the branch manager/head of operations and technology. There was no written instruction from Addax or the NRA to convert the cheque and the NRA lacked the capacity to make such a request holding only a transit account and having no say over the employ of taxes. Turay, an employee of 6 years, was head of Retail Operations and head of Rapid Transfer. He supervised the Bank's Ops dept., being its Assistant Manager. He instructed Emmanuel Ngegba, a treasury officer of 7 months to convert the Addax cheque to a manager's cheque, debiting the Addax account and crediting the manager's cheque account. Ngegba complied as Turay was the most senior staff in the absence of the head of ops. Ngegba asked Turay to confirm the conversion with the Ecobank relationship officer for Addax, the latter's authorisation normally not being sought for such conversions although cc'd in on requests. Since Turay's email suggested that Addax had already requested a conversion, the RO confirmed the authenticity of the Addax cheque. Turay and bank authorised signatory Issa Daramy co-signed the manager's cheque.

A 3rd party transaction means the actual payee of a cheque endorses it be paid to someone else, but the NRA lacked that capacity and the head of Ops did not designate Turay to authorize payment into the Magsons' account. Turay said he could authorize payment into the Magsons' account as the then immediate authority in the absence of the head of ops. Turay would assign work to Emmanuel Sesay who worked the Funds Transfer Desk in the Bank Ops Department, and would supervise him. Sesay would transfer funds from one account to another and process cheques. Sesay was directly answerable to the Head of Ops. Sesay credited the manager's cheque into the Magsons' account as instructed by Turay because, he claimed, there was an authorizing NRA letter. Sesay agreed that his compliance was improper practice in banking regulations. Turay said that King provided an NRA authorizing letter (not produced at trial) and told him that payment into Magsons' account was for clearing and forwarding services. He said he spoke to King's boss on the phone, who said he had confirmed with an unspecified bank director and that he Turay also spoke to an unspecified bank director/s.¹⁰²

Mrs. Katta was acting branch Manager, Ecobank, Waterloo and signatory to the Magsons' account. The references section in the Magsons' account opening application was not completed since both signatories were already known to Ecobank; Mrs. Katta as a bank employee and Mr. Katta as an existing account holder.¹⁰³ It was held that as a bank insider, Mrs. Katta was the facilitator of transactions on the Magsons' account. Hence the bank's breach of its own procedure by not appointing the Kattas signatories by means of a bank resolution and not requiring references.¹⁰⁴ The bank tended to make her a go-to person regarding the account,¹⁰⁵ PW7 David John, a cashier testified to confirming a Le45 million cheque from the Magsons' account by calling up Mrs. Katta, after noting she was a signatory to the account. This was a due diligence measure but it was unclear whether she confirmed in her capacity as senior staff or signatory.¹⁰⁶

It was held that Turay had constructive knowledge due to his high position at the bank and awareness of the MOU, that Mrs. Katta and Sesay also had constructive knowledge. The Court held that these Accused breached the trust held in them as bank employees and that their conduct failed the standard of even the ordinary honest person. It held that

¹⁰⁰ The Katta handwritten judgment does not clearly define "mis-posting", but the context suggests an erroneously processed 3rd party transaction.

¹⁰¹ The Katta handwritten judgment; "He (Turay) breached all known bank procedures to ensure the diversion of NRA cheques into Magsons' account"; p. 86, "The Addax cheque was converted to a Manager's or banker's cheque in breach of all laid down procedures on 29th May 2013 and on 30th May 2013 when the Manager's cheque was paid into Magsons' account, also in breach of all banks' laid down procedures"; p. 109, "The fourth Accused authorised its conversion to a manager's cheque in breach of all bank's procedures"; p.122.

¹⁰² The Katta handwritten judgment, pp. 78-79.

¹⁰³ The Katta handwritten judgment, pp. 96-97; evidence of PW4, Allie Mohamed Sillah, Head of Operations and Technology, Ecobank.

¹⁰⁴ The Katta handwritten judgment, p. 97; "The absence of such a board resolution which appears to be a breach of the bank's procedure (...) (suggests) that there was a relaxation by the bank of its own procedure by reason of its involvement in the company of the 6th Accused who is a member of their staff (...) I would consider this rather disconcerting and reckless on the part of the bank (...)."

¹⁰⁵ The Katta handwritten judgment, p. 108.

¹⁰⁶ The Katta handwritten judgment, p. 105-107; "I needed a confirmation from a senior staff of Ecobank before I could pay (...) I recognised that my colleague staff is a signatory to the account (...) before a cheque is processed above Le5m you need to call on signatories of that account to confirm (...)."



there were lapses of internal control procedures by the bank.¹⁰⁷ The Court held such acts were probably widespread and involved either active collaboration from bank staff or a breach by banks of their; "know your customer" obligations in the exercise of their required due diligence.¹⁰⁸

Indeed the lapses in internal control procedures were either intentional as in the case of Turay, Sesay and Mrs. Katta's actions, or by contrast breaches in due diligence obligations. Apart other indicia, Sesay's intention/constructive knowledge is evident in his admission that his compliance here was improper banking practice and Turay's intention is evident in the taking advantage of the absence of the head of Ops. and the relative inexperience of Ngegba.¹⁰⁹ As concerns due diligence obligations, query why the co-signatory of the manager's cheque did not detect the irregularity in its conversion and note that Ngegba who converted the cheque had doubts about Turay's instruction, deeming Turay's email to the relationship officer to be the first of its kind, but he complied since the payee was the same. Note also that David John is unclear about the capacity in which he contacted Mrs. Katta to confirm payment, and note the bank's own failure to effect the standard account application procedure to the Kattas due to Mrs. Katta's affiliation. All the above make it abundantly clear that the need for banks and their staff to exercise due diligence cannot be over-exaggerated. The exercise of due diligence by banks, militates against "*informal and often ad hoc work methods*" which it is documented, have a tendency to creep in and erode more formal ways of working in sub-Saharan Africa (public) services, undermining the legitimacy of systems.¹¹⁰

E. Finance Officers (FOs):

Discussions on this office feature prominently in *Ken Gborie* and it is briefly mentioned twice in *Daoh*, although it is absent in the other cases reviewed. Ken Gborie's evidence was that the FO in charge of the GAVI Project Fund for 2008 through 2011 was Paul Kamara, later replaced.¹¹¹ Ken Gborie's evidence also suggested that FOs are attached to units, stating that Sahr Amara was FO for the Unit/DPI,¹¹² as Magbity's evidence also suggested, by stating that, "Sahr Amara was Finance Officer at DPI" and that Paul Kamara and Osman Bangura were at different times FOs at the EPI.¹¹³ The reality is that FOs are attached to programmes, although a single accountant may act as FO to several smaller programmes simultaneously and so appear to be attached to a unit.¹¹⁴ Ken Gborie's evidence is that project implementation requests go to the Chief Medical Officer and the Permanent Secretary and upon their approval, the funds are disbursed by the "FO."¹¹⁵ Magbity also testified that the "DPI FO" Sahr Amara disbursed funds for supervision.¹¹⁶ PW1/ACC Investigator described the FO's role as; "*raising the cheque*" based on the instructions in the approval and submitting the cheque to the Ken Gborie and Magbity or to Dr. Michael Amara i.e. the DPI account signatories, for endorsement, after which it could be cashed.¹¹⁷ In *Daoh*, although the 5 Accused were attached to various units of the MOHS,¹¹⁸ the "Audit Report (GAVI HSS1Grant, Phase 1, 2008-2011) required recipients of "advances" to retire donor funds to the "HSS FO."¹¹⁹

¹⁰⁷ The *Katta* handwritten judgment, p. 123; "*Learned Counsel further pointed to the testimony of PW11 and Exhibit QQ which highlighted lapses in the bank's internal control procedures*", p. 126; "(...) there was lapse of internal control procedures by the bank (...)", pp. 44-45: "*He (PW4) said that investigations in the internal control process of the bank revealed there were no supporting documents from ADDAX instructing the bank to convert the cheque*", p. 62; "*He (PW11, Abdulai Jalloh, Head Internal Audit Ecobank) said the investigation also revealed certain internal control lapses in the bank.*"

¹⁰⁸ The *Katta* handwritten judgment, pp. 146-146.

¹⁰⁹ See Section I., p. 3, on the need for a thorough understanding of the requisite interaction with one's subordinates and superiors in MDAs and banks.

¹¹⁰ Barata K. Cain. P. Thurston A., (1999), *From Accounting to Accountability: Managing Accounting Records as a Strategic Resource*, World Bank infoDEV Programme 980121-257, International Records Management Trust, p. 42, http://www.irmt.org/documents/research_reports/accounting_recs/IRMT_acc_rec_background.PDF.

¹¹¹ The *GAVI Funds case*, p. 52.

¹¹² The *GAVI Funds case*, p. 53; "Sahr Amara was Finance Officer for the Unit."

¹¹³ The *GAVI Funds case*, p. 90.

¹¹⁴ Interview with Alusine Kargbo, Director of Financial Resources, MOHS, 4 November 2015.

¹¹⁵ The *GAVI Funds case*, p. 52.

¹¹⁶ The *GAVI Funds case*, p. 90.

¹¹⁷ The *GAVI Funds case*, pp. 43 and 49; PW1/ACC Investigator.

¹¹⁸ For example one Accused was the Director of Primary Health Care, another Accused was the Director of Hospital and Laboratory Services, whilst another was Director of Human Resources and Nursing Services.

¹¹⁹ The *State v. Kizito Daoh*, Alhassan L. Sesay, A.A. Sandy, Edward Bai Kamara, Duramani Conteh before Hon. Mr. Justice Abdulai Charm 24 October 2013, pp.17 and 29. The *GAVI Funds case*, pp. 17 and 29. It was from the DPI that each of the Accused received monies for supervision purposes; The *State v. Kizito Daoh*, p. 27. According to the Prosecution, the Accused were not only under an obligation to retire the amount given to them, but also to provide end of activity Report to the DPI; The *State v. Kizito Daoh*, p. 24. "What was required of each of them



"Overall responsibility for a programme lies with the programme manager. The role of the FO is to manage the books, advice programme managers on the appropriate/legitimate procurement processes, although the actual implementation of the procurement process is left with programme manager."¹²⁰ "Programme Officers submit implementation requests with the Permanent Secretary, from whence it goes to the DFR, and finally to the FO who draws up a cheque. FOs therefore have the liberty of demanding a procurement process."¹²¹ Generally, Programme Officers call FOs when they want to make out a cheque and the FO issues out the cheque. As concerns retirement, the FO takes retirement documents back to the DFR who can clarify/advice on any areas the FO finds unclear. This process by the DFR is called verification; the DFR tells the FO if the right processes have not been followed. After verification, the FO goes back to the Programme Manager and shows him the financial report. The FO then can either retire documents with the agency or in some cases, with donors. It is the FOs that should always be part of the liquidation process. Also, on a quarterly basis, the FO captures all the income and expenditures as part of the Treasury and other government agency reports; TOGAS."¹²²

The office of the FO appears to be entirely absent in the regulatory instruments; neither the GBAA nor FMR refer to an FO. There is no other legal provision thereupon. There is on the other hand a Reg. 6 (1) FMR on a distinct office, called the Chief Finance Officer, which states that: "Unless directed otherwise by the Accountant-General, each budgetary agency shall have an accounting officer (hereafter called the Chief Financial Officer) serving on the senior management team." Reg. 6 (2) FMR states that: "The Accountant-General is responsible for determining the level of qualification, skills, knowledge and experience required by a CFO in a budgetary agency." Reg. 6 (3) FMR states that: "The CFO is directly accountable to the Vote Controller." Reg. 6 (4) FMR states that: "Without limiting the right of the Vote Controller to assign specific responsibilities, the general responsibility of the CFO is to assist the Vote Controller in discharging the duties prescribed in regulation 1 which relate to the effective financial management of the budgetary agency including the exercise of sound budgeting and budgetary control practices, the operation of internal controls and the timely production of financial reports." Most aspects of Reg. 6 FMR on the CFO's role and relationship with colleagues can be construed as relating to keeping tabs on programme/project expenditures.¹²³ Yet, according to the Senior Accountant MOHS; "although there should be a CFO at the MOHS, there isn't one. The functions of the CFO are performed at times by the DFR, at times by the Senior Accountant."¹²⁴

It is curious that in the FCC case, which resulted in the conviction of Garber, the FCC civil engineer for failure to account/retire his project expenses re a Le9, 225,000 rehabilitation project at Hargan Street Market, no mention is made of an FO that could have reminded this project implementer of this responsibility. In Ken Gborie, it was repeatedly held that the FO was bypassed by the Accused, notably in the signing of cheques, for contractual payments worth Le51, 375,000 in May 2009 and Le242, 400,000 in April 2011 made out to Rolaan Ents., worth Le415, 600,000 in April and May 2012 made out to 78 Ents., and in the signing of cheques collectively worth Le399, 320,000 from January to July 2008 made out to Magbity. Indications that Ken Gborie bypassed the FO and did not deal with him¹²⁵ are as follows; Ken Gborie signed the Rolaan cheques without supporting documents/authority,¹²⁶ he did not know the name/surname of the "FO - DPI"¹²⁷ and said he could not tell what the functions of the FO were,¹²⁸ although he did say that the disbursement of funds is the function of the FO post approval of implementation requests¹²⁹ confirmed by

according to the exhibits relied upon by the Prosecution was end of supervision Report, which must be submitted to the DPI within a given deadline"; The State v. Kizito Daoh, p. 29. 2 of the Accused claimed to have submitted such reports to the DPI; The State v. Kizito Daoh, p.32.

¹²⁰ Interview with Alusine Kargbo, Director of Financial Resources, MOHS, 4 November 2015.

¹²¹ This would be in relation specifically to requests for procurement payments; Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.

¹²² Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

¹²³ Reg. 6 (4) FMR states that; "the general responsibility of the CFO includes; (i) supervising all officers entrusted with the receipt and expenditure of the budgetary agency's funds and taking precautions, by the maintenance of frequent checks, including surprise audits, against the occurrence of fraud, embezzlement or carelessness; (j) supervising the expenditure and other disbursements of the budgetary agency and ensuring that no payment is made without proper authority, and in case of any apparent extravagance calling this to the attention of the officer concerned and his superiors; (n) after consultation with the Vote Controller, monitoring the budgetary agency's procedures for the procurement of goods, services and works in accordance with the Public Procurement Act 2004 and regulations made under it.

¹²⁴ Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.

¹²⁵ Ken Gborie did not deal with the FO concerning Rolaan; The GAVI Funds case, p. 66. Ken Gborie did not deal with the FO concerning 78 Ents; The GAVI Funds case, p. 90.

¹²⁶ The GAVI Funds case, p.64.

¹²⁷ The GAVI Funds case, p. 64; "He did not know the surname of the Finance Officer in the Directorate of which he is head."

¹²⁸ The GAVI Funds case, p. 64.

¹²⁹ The GAVI Funds case, p. 64.



Magbity who identified Sahr Amara as the "FO, DPI" responsible for this.¹³⁰ Also, there was no evidence of the involvement of the FO in the procurement of the services of 78 Ents.¹³¹ Ken Gborie's evidence is that instead of the FO presenting the cheques to signatories, it was Dr. Michael Amara, an alternate signatory to the DPI account who prepared the 2 cheques paid to 78 Ents. and presented them to him for signature for unlawful procurements.¹³² Michael Amara then instructed the proprietor of 78, to pay Ken Gborie and Magbity out of what had been paid him.¹³³ It was held that Ken Gborie and Magbity dealt with Michael Amara instead of the FO to deliberately circumvent procurement rules.¹³⁴ Again, with regards to the cheques made out to Magbity, these were written and signed by Drs. Duramani Conteh and Clifford Kamara, usurping the function of the FO; none of the persons Magbity identifies as FOs, whether at the DPI or the EPI "appear to have played any role in the systematic withdrawals of the monies."¹³⁵

The Senior Permanent Secretary's (SPS) letter of October 2011 to the EPI and DPI, and the GAVI Draft Audit Report (above) both note the non-involvement of the Directorate of Financial Resources in the financial management of donor funds. The SPS's letter calls for a change in this regard.¹³⁶ However, neither this letter, nor any other evidence in the Ken Gborie judgement, nor the relevant regulatory instruments indicate the necessary/appropriate relationship between the FO and this Directorate. In Daoh, where the Prosecution argued that not all the Accused had complied with their purported obligations to retire funds/reports to the DPI through the FO, the issue of bypassing the FO is also implicit there.

From the evidence of the 1st and 2nd Accused in Ken Gborie, the mentions of the FO in Daoh and interviews of MOHS accountants, it's clear that the FO is a crucial financial management control by overseeing/ensuring the retirement of programme/project expenditures. Practically, overseeing/ensuring the retirement of programme/project expenditures would involve keeping tabs on project implementers and knowing the deadlines for submission of such retirements/reports and alerting implementers to the fact of such impending deadlines. Various software packages allow for pre-programmed electronic reminders, for e.g. Microsoft Outlook for alerts sent at various intervals before an actual deadline to the project implementers and/or the FO who would then take further action. Daoh also underscores that the FO should know precisely the obligations attached as per the type of funds/project involved i.e. the appropriate manner and forms of retirement required and that the FO should underline these fine lines for the benefit of project implementers. As always, it is best practice to have such correspondences preserved in writing. This could be a standardized procedure for every project implementation request that is approved, i.e. a pre-implementation obligation to clarify the precise, requisite form(s) of retirement and a post-implementation obligation to remind. Prompts for retirement from the FO that are ignored could then prompt an internal audit or complaint to the ACC.

Although the very thorough FMR does not mention FOs, the practice appears to be that; "the FO directly reports to the DFR. The FO falls within the office of the DFR and is under the DFR's authority. You work with the DFR who delegates responsibilities to you and you serve as an eye for your boss. As FO, your other immediate boss is the Programme Manager, but the authority of the DFR trumps the latter."¹³⁷ However, there is no legal provision on the role of the FO anywhere and no legal provisions on the necessary relationship between the Director of Financial Resources and the FO.¹³⁸

¹³⁰ The GAVI Funds case, p. 90.

¹³¹ The GAVI Funds case, p. 98.

¹³² The GAVI Funds case, p. 99-101.

¹³³ The GAVI Funds case, p. 76; From the evidence of PW5 (Momoh Gbao) which I accept, he was simply instructed by Dr. Michael Amara to issue cheques in favour of the 1st and 2nd accused persons as team leaders for the survey.

¹³⁴ The GAVI Funds case, pp. 64- 65, 99-101.

¹³⁵ The GAVI Funds case, p. 90.

¹³⁶ The GAVI Funds case, p. 63.

¹³⁷ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

¹³⁸ Confirmed in interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.



The above evidence then begs the question as to why and how, in both Ken Gborie and Daoh, it became possible to bypass the FO if he had been truly, diligently and exhaustively performing his role. Although, "at certain points in the past at the MOHS, there were not enough accountants and so there not enough FOs, to be able to assign one for every programme"¹³⁹ which may well have impacted accountability in certain cases, in Ken Gborie, there's no question that there was an FO attached to the GAVI HSS grant/programme since the judgment repeatedly states; "the FO was bypassed."¹⁴⁰ Unfortunately, the undeniable fact is that bypassing of what should otherwise be the lynchpin of the disbursement of programme funds, is a deeply entrenched, intentional and calculated practice at the MOHS. Interviews with accountants at the MOHS, confirm this disturbing fact as a longstanding, and even post Ken Gborie, ongoing "culture."¹⁴¹ "Before GAVI, Programme Managers would hog the financial management of funds."¹⁴² "Currently, liquidation for some programmes is indeed done through the FO, but for others, programme managers just want to grab everything. Most times, the programme managers don't allow the FOs to do their jobs. Generally, for some programmes, sometimes Programme Officers are very hard to deal with; for e.g. not going through the procurement process and withholding of tax."¹⁴³ Another adds; "Programme Managers seem intent on conducting procurement in the way they want and even though we try to advice, sometimes they disregard our advice, so we just limit our role to verifying procurement/retirement document and leave the final assessment about whether the procurement process was followed to the auditors."¹⁴⁴ Even more irksome is that the DFR continues to states that the; "Programme Managers are responsible for the disbursement of funds." However, Ken Gborie may or may not have something to do with the fact that; "some Programme Officers are very cooperative (...) some programme managers are now asking for FOs to take them though their jobs."¹⁴⁵

F. The Directorate of Financial Resources:

In Ken Gborie, the GAVI Draft Audit Report dated 7th December 2012 (GAVI HSS1Grant, Phase 1, 2008-2011) produced by the GAVI Transparency Accountability Policy Team (TAP) found amongst others, that (a) the Directorate of Financial Resources (DFR) of the MOHS, had been up to that point totally uninvolved in the financial management of the HSS grant/programme and that there was an absence of clear accountability in the financial management of the programme.¹⁴⁶ The judgment states that; "management of funds for GAVI HSS grant and disbursement of same as planned upon request to implementers was meant to be the responsibility of the Director of Financial Resources of the MOHS"¹⁴⁷ and that; "the evidence (...) is that it is the Directorate of Financial Resources, MOHS which was responsible for effecting payments to implementers of donor funded projects."¹⁴⁸ The evidence was that this function of effecting payments to implementers of donor funded projects was usurped by Ken Gborie,¹⁴⁹ Magbity¹⁵⁰ and Michael Mathew Amara;¹⁵¹ this finding of the ACC Investigation corresponded with the GAVI Draft

¹³⁹ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

¹⁴⁰ The GAVI Funds Case, pp. 52, 64, 65, 78, 98, 99.

¹⁴¹ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015; "Among Programme Managers, the hogging culture had long existed."

¹⁴² Interview with Alusine Kargbo, Director of Financial Resources, MOHS, 4 November 2015.

¹⁴³ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

¹⁴⁴ Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.

¹⁴⁵ Interview with Finance Officer for Directorate of Nutrition, MOHS, David Kargbo, 4 November 2015.

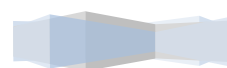
¹⁴⁶ The GAVI Funds case, p. 20.

¹⁴⁷ The GAVI Funds case, p. 21.

¹⁴⁸ The GAVI Funds case, p.62.

¹⁴⁹ Director DPI, whose actual responsibility was to approve proposals for activities for donor funded projects and to coordinate them; The GAVI Funds case, pp. 20, 94.

¹⁵⁰ The Principal Monitoring and Evaluation Officer, DPI, whose actual responsibility was to coordinate all DPI programme activities; The GAVI Funds case, pp. 20 and 85.



Audit Report finding (above) that the DFR had been uninvolved. The non-involvement of the DFR was equally true of other donor funded activities.¹⁵² Formally, at least the DPI was meant to be responsible for the *implementation* of donor funded programmes/activities.¹⁵³ The judgment also states that "*the DPI was required to follow through the process (...) for making payments to implementers (...)*"¹⁵⁴

Prior to the GAVI Draft Audit Report, the Senior Permanent Secretary MOHS, recognized the disruptive murkiness in this area. His letter dated 26th October 2011¹⁵⁵ to the EPI Programme Manager, copied to the Director of Planning and Information among others,¹⁵⁶ instructed for management of health projects/programme funds, including from GAVI, Global Fund, UNFPA, the World Bank and others not managed by fiduciary agents recruited by the fund providers, to be *transferred to*, and even centralized within the Office of the Director of Financial Resources MOHS. The letter instructed that "*people should do the work for which they are best suited*," i.e. for medical personnel to focus their attention fully on programmatic issues and for "*financial management*" to be left with the financial director.¹⁵⁷ The SPS' letter also required that all documents relevant to the operations of the GAVI Fund and other accounts to be immediately submitted to the DFR.¹⁵⁸ "*Financial management*" of donor funds had indeed been taken up by Ken Gborie and Magbity; it was held that Gborie and Magbity were undoubtedly involved in the administration, *management* and receipt of public funds,¹⁵⁹ since they would sign cheques drawn up and presented to them by Michael Amara who was not a FO.¹⁶⁰ This was made possible since the Accused were signatories to account.¹⁶¹

The GAVI Draft Audit report, the ACC Investigations, the SPS' letter and the facts of the case converged on the fact of *financial mismanagement* of donor funds, an aspect of which was that the FO and the appropriate processes for contractual awards kept being bypassed. *However, the imperative need of spelling out the lien/link between the role of the DFR and that of the FO appears to have been shockingly ignored in both the SPS' letter and the entire Ken Gborie judgment and that lack of clarity may well be a critical factor behind the events as they transpired,¹⁶² especially since neither the office of the DFR, nor FO, nor the necessary relationship between the two is to be found in any regulatory instrument.*

The term, "*financial management*" would also have benefited from greater clarity and elaboration here. The SPS' use of the term raises key questions like; in this context, did "*financial management*" only signify the drawing up and signing of cheques for disbursement of project funds? Did "*financial management*" extend as far back in time as the actual preparation, submission and approval of a project implementation request? Did "*financial management*" include the funds transfer into the DPI account, post- approval of a project implementation request? Did "*financial management*" encompass the process of retiring project funds, and also encompass the means to ensure that project funds were retired? Did "*financial management*" encompass the ensuing courses of action in the event of non-retirement of project funds? Was "*financial management*" inclusive of all these facets of project implementation or did it concern exclusively only one such facet? As simplistic as these questions may seem, failure to address them may work in conjunction with other instances lacking clarity, and may give rise to opportunities seized upon by project managers/officers and persons intent on plying such sources of murkiness and the ignorance/confusion they engender to their own ends.

¹⁵¹ The Principal Health Economist, DPI; The *GAVI Funds case*, p.94.

¹⁵² The *GAVI Funds case*, p.62; Evidence of PW1/ACC Investigator, Musa Bala Jawara.

¹⁵³ There is no denial of the fact that the Accused were involved in the implementation of donor funded activities implemented by the DPI; The *GAVI Funds case*, pp. 27-28. "The DPI account was used to implement the GAVI HSS project and other donor projects"; The *GAVI Funds case*, p.49. "The DPI submitted requests for supervision for both national and district levels"; The *GAVI Funds case*, p. 86. "The DPI was required to follow through the process of obtaining approvals from the Ministry for donor activities"; The *GAVI Funds case*, p.49.

¹⁵⁴ The *GAVI Funds case*, p. 49.

¹⁵⁵ The *GAVI Funds case*, p. 62. At p.89; "There was absence of clear accountability in the financial management of GAVI donor programmes and, in particular, the total non-involvement until December, 2012, of the Directorate of Financial Resources of the MOHS."

¹⁵⁶ The *GAVI Funds case*, pp. 62-63.

¹⁵⁷ The *GAVI Funds case*, p. 63.

¹⁵⁸ The *GAVI Funds case*, p. 63.

¹⁵⁹ The *GAVI Funds case*, p. 94.

¹⁶⁰ The *GAVI Funds case*, pp. 51, 63, 64, 65, 69, 70, 72, 76, 78, 99.

¹⁶¹ Ken Gborie was a category A signatory to the DPI account, Magbity was a category B signatory to the same account; The *GAVI Funds case*, pp. 19, 20. Michael Amara was a category B signatory; The *GAVI Funds case*, p. 94.

¹⁶² This has been noted above under the discussion concerning the role of the Finance Officer.



Specifically as concerns the DFR, the unavoidable question one is prompted to ask, is that if the DFR MOHS already existed at the time of Ken Gborie and Magbity's criminal acts, (which it did) wasn't it therefore necessarily the case that it had failed to exercise due diligence in the "financial management" of donor funds and that it was this failure that had prompted the SPS' letter? This seems an inevitable conclusion, unless by some unlikely stroke of fortune, the DFR had initially been only charged with managing MOHS funds other than donor funds or even donor funds other than those donor funds identified in the SPS' letter; that was not the case.

The finding of the GAVI Draft Audit Report suggests that there might have been a lack of clarity regarding the identification of responsible party for the financial management of donor funds,¹⁶³ but that this should be the case, is also odd, given that that is the whole point of the DFR. The judgment also suggests that that responsibility may well have been specifically assigned to the DFR by donors/ GAVI?¹⁶⁴ However, the fact that the SPS' letter does not refer to any prior understanding about the allocation of responsibilities in the area of the financial management of donor funds (regulatory instruments/policy documents) and actually uses the words "Transfer of Management"¹⁶⁵ is not only a demand to change the then operational status quo, but also suggests that the approach to financial management in Ken Gborie that spawned the offences, was simply part of a probably ongoing and longstanding tacit understanding of the suitable manner of managing donor funds, taken advantage of by the Accused (Reference Section I. on IM) As one interviewee puts it; "among Programme Managers, the hogging culture had long existed."¹⁶⁶

G. Audits:

Audits feature in 3 of the 8 cases reviewed; The FCC, Ken Gborie and the Daoh cases. S. 6 (3) (a) GBAA states; "for the purposes of this section, "internal audit" means the function within an organisation which measures, evaluates and reports upon the effectiveness of internal controls, both financial and otherwise, as a contribution to the efficient use of resources within the organization." There's no definition of external audit as such in the GBAA or FMR. There are discussions of audits at several points in the FCC case, although there is some inconsistency in the Court's approach to their salience; audit findings were considered too insubstantial for grounding convictions for some charges, but served as the basis of some convictions, while they were demanded as essential for the substantiation of at least one charge (discussed below). The FCC judgment's descriptions of the responses of the FCC management to audit queries and findings compound the viewpoint that the full salience of audits may not have been given the pride of place they deserve.

¹⁶³ See FN 146.

¹⁶⁴ See FN 147.

¹⁶⁵ The GAVI Funds case, p. 63. The letter appears to however be referring to a prior instruction to transfer management of these donor funds to the DFR: also at p 63; "If, however, you were not aware of this instruction..."

¹⁶⁶ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.



i. Audit Findings Considered Insubstantial For Grounding Convictions; Counts 8,9,15: Count 8 charges Williams, the FCC Mayor, Philips, the FCC Chief Administrator, and Thomas, the FCC Head of Cashier's Office, with misappropriating Le55, 589,100 collected as market dues on a date unknown between January and December 2009. Count 9 charges the same Accused with misappropriating Le24, 317,300 collected as municipal licences on a date unknown between October and December 2009. Count 15 charges the same Accused with misappropriating Le2, 063, 4000 collected as wharf landing fees on a date unknown between October 2009 and December 2009.

a. Internal Audit Findings on Counts 8, 9, 15: These provisions appear to be the basis of the internal audit conducted by Abdul Karim Fofanah/PW11 in the FCC case, the findings of which formed the basis of the Prosecution case.¹⁶⁷ PW11 testified to the established process of revenue collection, transmission and safeguarding. According to PW11, revenue collectors would collect revenues, take them daily to the internal audit department to be verified where revenue collectors would be issued with a stamped daily collection analysis form. The revenue collectors would then take this form and proceed to pay in these revenues at the cashier's office, where they would be issued with receipts by the cashiers. The process as described by PW11 is aligned with Reg. 42 FMR which states that, departmental revenue collectors who receive taxes (...) or other public moneys, whether of a revenue nature or otherwise, shall pay (in) such moneys either daily or at the earliest opportunity (...).¹⁶⁸ See also Reg. 62 (1) FMR which states that all departmental revenue or other public moneys collected shall be paid either daily or if it is not possible, at the earliest opportunity, into a bank account authorized by the Accountant-General or into the Treasury, (presumably the revenues in question here, since daily paid in, went on to be deposited in an account).

Relevant Law: Note that under s. 6 (2) GBAA, the Minister of Finance may require any Vote Controller to establish or maintain an internal audit division or other unit in the budgetary agency under him, and such division or unit shall be responsible to the Minister responsible for that budgetary agency. Internal audit units are meant to make periodic audit reports; s. 6 (4) (c) GBAA, report promptly on any irregularity; s. 6 (4) (b) GBAA, continuously review systems and procedures to ensure adequacy, effectiveness and efficiency; s. 6 (4) (g), and ensure strict adherence to all control procedures introduced to safeguard the assets and records of Government; s. 6 (4) (a) GBAA. Generally, the internal audit unit reports to the Vote Controller, unless the matter concerns the management of internal controls by the Vote Controller, when it otherwise reports to the Minister (MOFED); s. 6 (5) GBAA. The reports from the internal audit unit are made on a quarterly basis, identifying means of preventing irregularities, submitted to the Vote Controller; Reg. 163 (6) FMR 6, and the Chief Internal Auditor and the Auditor-General; Reg. 163 (7) FMR.

¹⁶⁷ The FCC case, p. 15; "The Prosecution can be said to be grounded chiefly on his findings."

¹⁶⁸ The rest of that Regulation reads; "...into a bank authorized by the Accountant-General for the credit of the Consolidated Fund."



PW11's audit report found that the receipts issued to revenue collectors by cashiers for payment of revenues, specifically market dues and municipal licence fees,¹⁶⁹ tallied with the daily collection analysis form. PW11's audit report found therefore that the revenues collected by the revenue collectors were actually received by the cash office. PW11's audit report also found that there was: "*Improper Recording of Cash into the Cash and Deposit Register.*" This signified discrepancies worth Le2, 630,400 between, on one hand, the two sources already mentioned (receipts/daily analysis collection form) which evidenced what was collected and paid into the cashier's, and on the other, the cash deposit ledger/analysis, used to record the cash received.¹⁷⁰

Relevant Law: The recording of cash received into a daily collection register accords with Reg. 45 (1) FMR which states that, "*the date of receipt of any sum of money determines the date of record of the transaction in the accounts*", and Reg. 58 FMR, which states that, "*Receipt of departmental moneys shall be posted into the cash book at the time of the actual transaction or as soon as possible thereafter on the day of the transaction.*" Likewise, Reg.45 (5) FMR states; "*The register shall be in the charge of an officer to be designated by the Vote Controller and such officer shall ensure that details of receipt books are fully and correctly entered in it as soon as they are received.* Similarly, Reg. 45 (4) FMR states that; "*a register in the form prescribed by the Accountant-General shall be kept in each department or office for departmental revenues as the Accountant-General may direct.*" Further, under Reg. 61 FMR, if the officer who posts departmental revenue assessment registers (...),ledgers (...) notes a difference between the amount collected and the amount due, he shall inform the officer in charge of revenue collection and such difference shall be immediately investigated and appropriate action be taken.

PW11 concluded that any misappropriation had to have been by the cashiers and revenue collectors.¹⁷¹ In this regard it should be noted that Reg. 44 (1) FMR prohibits "*use of any public money by a public officer in any manner between the time of its receipt and payment into the bank, Treasury or other public office designated by the Accountant-General and prohibits public money from being lent or borrowed in any manner or for any purpose by any person.*" PW11 submitted his report to Williams and Philips, recommending that they ensure frequent on the spot checks to ensure transparency in the cash office.¹⁷² There is no evidence of the FCC's response to this internal audit recommendation and it's unclear from the FCC judgment whether the FCC did comply with PW11's recommendation.

b. External Audit Findings on Counts 8, 9, 15: An external audit was conducted by Albert Lamin/PW14, Senior Auditor with Audit Services SL, to enable the Auditor General to express an opinion on the FCC's financial statement for the Financial Year January - December 2009.¹⁷³ The external audit found that there was; "*Inadequate Control over the Collection, Recording and Reporting of Financial Transactions.*" The focus of the external audit was a sample of daily market dues collection sheets and corresponding receipts issued by FCC cashiers and the timeline was January to December 2009;¹⁷⁴ no findings were made on municipal fees and wharf landing fees. PW14 testified that he found a discrepancy of Le 60,813,600,¹⁷⁵ between the record of the market supervisor and the record of the cashier.¹⁷⁶

¹⁶⁹ The FCC case, p. 16; There is however some inconsistency in PW11's testimony since he states at p. 16 that; "*During his exercise of auditing, I looked at the cash receipts. I did not check the amount on these receipts against the daily analysis form recorded therein.*" Yet PW11 also continues in the same breath at p.16; "*I don't have the receipts issued by the Head Cashier for the market dues and Municipal licence fees. I saw them during the audit. The receipt issued by the cashier had the same figure – the same with the daily collection analysis form verified by the internal audit department.*" It is the latter stance that is accepted by the Court, perhaps because it reiterates the finding at p. 3 of his report that; "*Correct receipts were issued for monies collected and paid into cash office*"; The FCC case, pp.17-18.

¹⁷⁰ The FCC case, p.18.

¹⁷¹ The FCC case, p.15.

¹⁷² The FCC case, pp. 17-18.

¹⁷³ The FCC case, p. 18; This audit to enable the Auditor-General to perform its functions was required by s. 81 (3) Local Government Act.

¹⁷⁴ The FCC case, p. 16; "*Our findings in regard to market dues for January to December 2009.*" However, also note that Appendix B of the external audit report is marked; "*market dues between the 27-28 of 2009 to 29/12/09.*" The dates of the latter statement make no sense.

¹⁷⁵ The FCC case, p. 16.

¹⁷⁶ The FCC case, p.16; There's no further elaboration on whether the record of the market supervisor is the same as the daily market collection analysis form or whether it is separate, but the different terms are used in the judgment to refer to the focus of the external audit and the sources forming the basis of its findings.



Relevant Law: That the market supervisor may have maintained a record is in accordance with s. 11 (3) GBAA which states that; "every person who collects or receives any public moneys shall keep a record of receipts and deposits thereof in such form and manner as the Accountant-General may determine" and Reg. 60 (1) FMR which states that; "departmental revenue collectors shall keep records of moneys collected in such form as the Accountant-General may determine". Reg. 60 (2) FMR states that; "these records shall show the person from whom revenue is due, the amount payable, the date, location, receipt number and amount of the collections made". Of interest, Reg. 60 (3) FMR; states that; "these records shall (...) be reconciled with the cash collections monthly."

The Court quoting from the report, noted an inconsistency in the discrepancy PW14 purported to have uncovered, i.e. it pointed out that at paragraph 3 of the external audit findings, the discrepancy is Le 60,748,700, between sample daily market collection sheets and receipts¹⁷⁷ while in appendix B, the discrepancy is down as, Le60,821,700.¹⁷⁸ This external audit report was sent to Philips, since according to PW14, the Chief Administrator was the Vote Controller and the audit recommended that the Vote Controller ensure that missing monies be retrieved from the parties concerned.¹⁷⁹ The FCC responded to the findings of the external audit by stating that it could not dismiss the occurrence of leakages in revenue collection due to some ineffective control mechanisms, but did not suggest the point at which these leakages in revenue collection may have occurred. The FCC however disputed the difference of Le60, 821, 700, "observed between the sample of daily market collection sheets and receipts issued for the same day by the cashier."¹⁸⁰ The FCC in fact recapitulated PW14's calculations and forwarded this to him, arguing that it indicated a likely duplication supporting the external audit findings. PW14 adamantly denied this suggested duplication in court.¹⁸¹

c. The Court's Approach to weighing the facts underlying Counts 8, 9, 15 as against the Internal and External Audit Findings Thereupon:

The Court's approach to reconciling the internal and external audit findings is somewhat disconcerting. It contests the internal accuracy and consistency of PW11's internal audit report, by declaring his findings inconsistent with each other and it contests the accuracy of PW14's external audit report finding by declaring it inconsistent with a finding of the internal audit. Among the lot of findings noted in the judgment as generated by both audits, the Court appears conveniently to prize and accept as authentic only a single finding among the lot.

It held that PW14's finding of a discrepancy between the sample of daily market collection sheets¹⁸² and corresponding receipts for January to December 2009 was inconsistent with PW11's finding that the receipts issued to revenue collectors by cashiers for payment of revenues, specifically market dues and municipal licence fees, tallied with the daily collection analysis form. What the Court does not openly query in its assessment of this purported inconsistency, is that although PW11's audit appeared to be more widely drawn by looking at two instead of one type of revenue, whether the temporal scope of PW11's audit differed from that of PW14's (unclear from judgment). The Court also did not address whether the comparative analyses here was exactly the same; i.e. looked at exactly the same sources of information since PW14 at a certain point uses the term, "record of the market

¹⁷⁷ The *FCC case*, 18; Since here the comparative analysis appears to have been made between the "daily market collection sheets and receipts issued for the same by the cashier," one would presume that the daily market collection sheets accord in meaning with the record of the market supervisor (see preceding footnote).

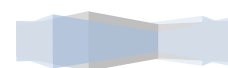
¹⁷⁸ The *FCC case*, p.18.

¹⁷⁹ The *FCC case*, p.16.

¹⁸⁰ The *FCC case*, p.19.

¹⁸¹ The *FCC case*, p.19.

¹⁸² Note the discussion on the differing terms used in PW14's report above.



supervisor." The Court should have first clarified these areas before categorically stating that these two findings on the co-relation of receipts to sales were inconsistent with each other. More importantly, the Court could have sought to clarify the production dates of each report and asked PW11 and PW14 whether the latter in time was aware of a preceding report and referenced that report in its own work processes, whether there was a legal obligation on public auditors to liaise with each other where they were investigating the same situation especially where their findings differed and whether there were regulatory provisions on the relationship between public internal and external auditors generally.

Relevant Law: On the relationship between internal and external audit units, see Reg. 163 (5) FMR which states that; "*the (internal audit) unit shall review external audit queries and reports (...) and draft responses for the vote controller's consideration.*" This means that where an internal audit report happens to be the latter in time, any preceding external audit report would have been taken note of, in its production. See also s. 6 (4) (d) GBAA which states that internal audit units shall review management response to Auditor-General's report and s. 6 (4) (e) GBAA, which states that internal audit units shall review external audit reports. Reg. 163 (8) FMR states that, the Chief Internal Auditor (MOFED) shall ensure that the status and powers of the internal audit function (in governmental agencies) conform to internationally accepted standards, in particular its independence from operational management and its access to information. Similarly, under s. 6 (1) (b) GBAA, it is *the Internal Audit Department within (MOFED); "which shall be responsible for (b) ensuring that the internal audit unit in every budgetary agency (...) is appropriate to the needs of the organisation concerned and conform to internationally recognised standards."* Note, that it is the Chief Internal Auditor (MOFED) that under Reg. 162 FMR sets standards and develops *instructions for internal audit units in budgetary agencies*, and, that as per Reg. 39 (6) FMR; "*all budgetary agencies shall use uniform accounting practices approved by the Accountant-General.*"

It is submitted that only where the clarifications noted above were made, with the aid of law cited above, could it categorically be stated that these particular findings were inconsistent inter se.

The Court also held that PW11's finding that there were discrepancies between monies collected by revenue collectors and paid into the cash office, on one hand, and the cash deposit register on the other, is "surprising" given that PW11 also found that monies collected are actually received by the cash office and correct receipts issued.¹⁸³ The Court appeared to attribute this apparent inconsistency to the fact that PW11 had admitted the internal audit report was a draft and that there were inconsistencies therein and yet PW11 never admitted that there was an inconsistency regarding this particular finding. These apparent inconsistencies were construed as a reasonable doubt used to exculpate at least one Accused (see below). The Court did not appear to appreciate the niceties of PW11's findings. Monies collected, as down in the daily collection form, could easily have been paid to the cashier, as evidenced by the receipts, with cashiers still going on to incorrectly log the amount in the cash register. In this regard, PW11's statement that he believed any misappropriation would have been attributable to the revenue collectors or cashiers, is salient (see above).

¹⁸³ The *FCC case*, p.18.



Williams was acquitted on all three of these charges since although as the FCC Mayor he did have obligations under s. 11 (3) (E) of the Local Government Act 2004 (LGA) to ensure that the financial affairs of the local council were properly managed and controlled, it was however held that it was impracticable to expect the Mayor to exercise (hands on) control over revenue collection and the recording of finances and to be responsible for discrepancies therein. PW11 confirmed that Williams as Mayor had nothing to do with the collection of the aforementioned fees. Philips was also acquitted on all three charges. As Chief Administrator, he was under s.31 (4) LGA, responsible for financial and resource management and daily administration. He was under s.31 (5) LGA to ensure in the administration of his duties, the accountability and transparency in the management and delivery of local council services. Further, under s. 33 (2) LGA, other staff of the FCC were responsible to the Chief Administrator. However, in spite of all these obligations, the Court found that Philips played only administrative roles and was not part of the FCC revenue collection mechanism. The fact that Philips did not act on the external auditors' recommendation to recover the money from those concerned for its misappropriation, did not beyond a reasonable doubt, amount to misappropriation under s. 36 (1) ACA 2008. Thomas was Head Cashier and his office was responsible for collecting revenue from revenue collectors. Thomas' evidence talks about his supervision of sub-cashiers and a licences officer and how the cash office received revenues and issued corresponding receipts but he did not address the alleged discrepancy between the records of the revenue collectors¹⁸⁴ and the cash register's record. The Court construed the "inconsistencies" in the findings of the internal and external audits (above) as constituting a reasonable doubt, which operated in Thomas' favour, resulting in his acquittal on all 3 charges.¹⁸⁵ Oddly enough, the FCC judgment later states that Thomas is convicted on count 8,¹⁸⁶ a likely typo.

ii. Audit Findings as the Basis of Convictions For Counts 10, 12, 13: Count 10 charges Alimamy Turay, the Municipal Trade Officer with misappropriation on a date unknown between December 2009 and June 2010 of Le22, 470, 000 collected as market dues. PW11's internal audit found that market tickets issued to Turay were not recorded as sold in the market dues issue ledger, neither was there any other indication that these tickets had been sold and the books could not be located or accounted for.

Relevant Law: Reg. 50 (4) FMR states that: "all revenue of Government shall be documented on receipts on specially pre-printed and serially numbered forms printed by the Government Printer." Reg. 48 (2) (d) FMR states that; "receipts shall be given from the official books or forms bearing printed consecutive numbers for every sum paid to the Government." Reg. 51 (3) FMR states that; "no (...) copy of a receipt shall be destroyed; but that they shall be retained and produced for inspection when required." Reg. 52 (1) FMR states that; "a receipt in the proper form shall be issued immediately after public money is received" and Reg. 42 (2) FMR states that; "the revenue collectors shall give receipts for (public) moneys paid (...)." More importantly, Reg.45 (6) FMR states that; "all issues of receipt books shall be acknowledged in writing by the officer to whom the issue is made." Reg. 47 (2) FMR also states that; "the officer in charge shall lock up at the close of each working day all receipt books actually in use." Reg. 49 (2) states that; "a departmental revenue collector shall return early enough to his office to enable him to lodge the receipt books and collections safely in the office." Reg. 47 (3) states that; "any officer in charge who makes collections outside the office shall return to his office before the close of business so that his receipt books and collections can be lodged in safe custody." As per Reg. 125 (5) (e) FMR, states that; "when not in use, revenue receipt books shall be kept in a strongroom, safe or strongbox." As per Reg. 111 (3); "if a Vote Controller is not satisfied that there are adequate facilities in his department for the safe custody of (...) valuables, he shall report to the Accountant- General."

The ticket books had been issued to Turay from December to May 2010 and were worth Le22, 470,000.¹⁸⁷ The Court holds that uncontroverted evidence showed that ticket books worth Le22, 470,000 were issued to Turay¹⁸⁸ whereas

¹⁸⁴ The FCC case, p.17; "The amount recorded (as received), by the revenue collectors." There is no mention at this point in the judgment of a daily collection record, but one assumes this is what is meant.

¹⁸⁵ The FCC case, p.19; "The Court finds 5th Accused not guilty and he is accordingly acquitted."

¹⁸⁶ The FCC case, p.34.

¹⁸⁷ The FCC case, p.19.



PW11 at one point states that he has no evidence that the books were received by the Accused;¹⁸⁹ the Court appears to only heed the first of these facts. It held that the Prosecution had discharged its burden of proof by proving that Turay was issued with ticket books for which he could not account and concerning which he chose to exercise his right to silence, an unfeasible choice in the face of adverse audit conclusions. He was therefore deemed to have caused the FCC to be deprived of revenue and convicted on count 10.

Count 12 charges Aiah Brimah, the FCC Development and Planning Officer, with misappropriating on a date unknown in May 2009, Le9,800,000 made payable on cheque No. 1007508 and payment voucher No. 4131 purporting to be "payment for allowances to Councilor's Needs Assessment."¹⁹⁰ Count 13 charges Franklyn Garber, the FCC Civil Engineer with misappropriating on a date unknown in May 2009 Le 9,225,000 made payable on cheque No. 1007494 and payment voucher No. 4025 purporting to be payment for rehabilitation work and steel doors at Hargan Street market. PW14's external audit found that apart from the cheques and payment vouchers made out in the names of the Accused for the amounts in both counts 12 and 13, there were no other documents supporting further expenditures. The Prosecution contended that Brimah and Garber cashed the aforementioned cheques. Brimah called only one witness, Alusine Allieu, who testified to being paid Le200,000 out of the Le9,800,000 without signing for it, but he was deemed by the Court to be generally of dubious credibility. Garber's statement talked about work that was to be done or done and problems in payments but did not refer to the Le9, 225,000 or how it was spent. In relation to both situations, PW14's external audit recommended that "all these payments without supporting documents be presented to the Audit Service SL before the response date," presumably meaning, be presented with documents supporting expenditures attached. The FCC responded to this query within 30 days, appreciating the importance of supporting evidence, but apparently not providing the requested documents. Note that for external audit queries, specifically by the Auditor-General, there is an obligation to respond within 30 days as per ss. 64 (3) and 65 GBAA. The other more generalised obligations to respond to audit queries, potentially both internal and external, are found in Reg. 2 FMR and s. 46 (2) GBAA.

A week after the FCC response, PW14 and team conducted a verification exercise with the FCC but were still not given supporting documents. The FCC told them that the absence of supporting documents may have been due to an inappropriate archiving system or movement of documents, concerning which PW14 testified that tardiness has never prevented Audit SL from accepting (requested) supporting documents. The Prosecution proved its case against both Accused through their failure to account for public monies which they undoubtedly received; Brimah was convicted of count 12 and Garber of count 13.

Counts 2, 3,5,6,7 concern allegations that Williams, Philips, Konnehi, the acting treasurer and Kwesi-John, the Deputy Chief Administrator failed to pay PAYE tax to the National Revenue Authority for and on behalf of FCC staff at various points in 2009 and 2010 and count 4 alleges that the same Accused failed to pay the National Social Security and Insurance Trust (NASSIT) contribution for and on behalf of its staff in 2010. All these counts allege a violation of s. 48 (1) (d) ACA 2008.¹⁹¹ These charges failed for several reasons¹⁹² including the evidence of the PW11, who "carried out the audit that culminated into these charges,"¹⁹³ that; "the reason why the City Council could not meet its obligations to NASSIT and NRA is because of the financial constraints they found themselves in."¹⁹⁴ It appears, although it is not fully certain from the judgment, that this may have been PW11's audit finding.

¹⁸⁸ The *FCC case*, p.19.

¹⁸⁹ The *FCC case*, p. 19; "the witness said; 'I have no evidence that the books were received by the Accused.'"

¹⁹⁰ The *FCC case*, p. 21.

¹⁹¹ S. 48. (1) (d) ACA 2008, on the Protection of Public Property states; "Any person who fraudulently or otherwise unlawfully fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges, commits an offence."

¹⁹² These charges failed because; ACC prosecutions are not part of the enforcement mechanisms in the NRA and NASSIT's governing statutes; because s. 48 (1) (d) ACA criminalizes failure to pay taxes, levies, charges, but NASSIT social security contribution does not qualify as PAYE tax; because the ACC failed to establish the Accused's responsibility for payment of taxes and failure to pay due to fraudulent or unlawful reasons; because the 4 Accused could not have been simultaneously responsible for remitting sums withheld from employees; because the FCC like other MDAs had set up a payment plan with the NRA in 2011 due to financial constraints so that failure to pay was not unlawful or fraudulent and because no evidence indicates that the monies withheld from salaries of FCC employees left the FCC coffers.

¹⁹³ The *FCC case*, p.14.

¹⁹⁴ The *FCC case*, p.14.



iii. Audit Findings Demanded as Essential for the Substantiation of Charges For Count 14:

Count 14 charges Aiah Brimah, the FCC Development Planning Officer with misappropriating on a date unknown between July 2010 and March 2011 Le2,815,000, purported to have been paid to participants at the 3 day sectoral, strategic planning residential retreat at Hill Valley Hotel as daily subsistence allowance (DSA). In evidence is a document indicating that Le151, 397,000 was requested for the retreat and indicating a breakdown of how it was to be used; Le26, 025,000 was for DSA for 78 participants.¹⁹⁵ In evidence also was the cheque made out to Brimah for Le46, 672,000 dated 29 September 2010 and a copy of his ID card from when he cashed it. The Prosecution alleged that it was from this cashed amount that the Le26, 025,000 meant for DSA was to be taken. In evidence is a list of the signatures of retreat participants who received DSA. The Prosecution contended, apparently on the basis of this list of recipients, that Brimah actually expended only Le23, 210,000 as DSA on 88 participants, leaving him with an unspent and unaccounted for Le2, 815,000. Referring to the erroneous statement of ACC investigator, Maada Konneh/PW3 that Brimah withdrew the whole of the Le46, 672,000 for DSA (an inaccurate conclusion against the admitted breakdown of figures),¹⁹⁶ and PW3's statement that the unaccounted for money "was about Le2, 000, 000",¹⁹⁷ the Court refused to rely on the indictment's allegation of an outstanding unaccounted for balance of Le2, 815,000. PW3's erroneous statement regarding DSA was held to call into question his reliability concerning the status of these monies. Consequently, the Court disregarded PW3's statement that documents submitted by the FCC to the ACC indicated that part of the Le 46,672,000 remained unaccounted for since, it held, PW3 was an investigator and not an auditor. Therefore, it held there was a need for evidence independent of PW3's claim, i.e. an audited account on the issue, for the Prosecution to meet its burden of proof. Brimah was therefore acquitted of count 14.

In the FCC case, the Court's approach to audits as stated above is slightly labyrinthine. On one hand, it underlines the importance of having audits conducted (see count 23) and of having the FCC cooperate in facilitating audits by complying with requests for information (see counts 12 & 13 above). On the other hand, it designates itself as fully capable of or entitled to accept, interpret or dismiss audit findings (see counts 8,9,10, 15) without seeking further illumination on the technicalities underlying them. Its message is that audits should be carried out where there are allegations/suggestions of corruption but that their calculations/computations/findings may be rubbish without asking incisive questions aimed to clarify.

Hence, the Court reinforces the need to comply with audit requests for information, (counts 12 and 13), but does not discuss the implications of the FCC's near lax responses to audit recommendations once an audit has generated actual findings. Re counts 8 and 9, it did not discuss whether the internal audit recommendation was complied with and does not make much of Philips noncompliance with the external audit recommendation, in spite of its implications for due diligence obligations and intent underlying the facts of the charges, neither did it seek to ascertain who was responsible for the FCC's recapitulation of the external audit findings.

Both the internal and external audit recommendations re counts 8, 9 and 15 highlight the fact that audits and other devices/obligations in the relevant regulatory instruments, the FMR and GBAA for example, are mutually reinforcing forms of financial control. This is not surprising given that s. 6(3)(a) GBAA cited above, states that the point of audits is to evaluate the effectiveness of internal controls, including financial controls. "Internal Controls" are defined in s. 6 (3) (b) GBAA as "a system which ensures- (i) that financial and other records are reliable and complete, and (ii) adherence to the organisation's management policies, the orderly and efficient conduct of the organization and the proper

¹⁹⁵ The *FCC case*, p.23; Exhibit GG is described as giving the breakdown of how the sum (above) requested for the retreat was to be used. However, what it is not stated is the nature of the document that exhibit GG was. It is unclear whether or not it is a sort of budget statement.

¹⁹⁶ The breakdown in exhibit GG that is.

¹⁹⁷ The *FCC case*, p. 23; "The unaccounted for money was about Le2, 000,000. The Witness did not show how he came to this figure of Le2, 000, 000; in any case he says it was about that."



recording and safeguarding of the assets and other resources of the organisation." According to s. 163 (3) FMR, the internal audit unit annually prepares a programme of audit which factors in the budgetary agency's existing system of internal controls; i.e. it refers back to the obligations in the FMR/GBAA.

It is unclear if the internal audit recommendation to ensure frequent on the spot checks to ensure transparency in the cash office was observed by the FCC, unlikely since not raised as a supporting argument by the Defence.

Relevant Law: A similar obligation exists under Reg. 63 (1) FMR which states that; "a Vote Controller shall ensure that his accounts are properly maintained and are correct at all times" and Reg. 63 (2) GBAA which states that; "a Vote Controller shall in relation to sub regulation 1 appoint an officer who shall examine and check daily, all entries in cash books and other books of account, the counterfoils, or copies of receipts or original documents to verify the correctness of the transactions." As per Reg. 63 (3) FMR; "the officer appointed under sub regulation 1 shall not have taken part in the work to be checked" and as per Reg. 63 (4) FMR; "The checking officer shall after checking the cash books and receipt books initial and date them in such a way that the period and items covered by the check may be clearly identified." Further, the Vote Controller has an obligation under Regs. 64 (1) through (3) GBAA to arrange at least quarterly, a surprise check.

Similarly, although the Chief Administrator did not comply with the external audit recommendation to retrieve the missing monies from the parties concerned, similar obligations do exist under the FMR and GBAA

Relevant Law: Obligations to pay monies due to a department or institution or to retrieve monies do exist under s. 64 (6) GBAA, and Reg. 165 (2) FMR, although these apply more specifically to demands made in audit reports by the Auditor-General.

This mutual reinforcement between audit recommendations and the above cited provisions of statutory instruments underscore that the crux of corruption cases concerning multiple senior level Accused within organizations often concern the failure to exercise due diligence obligations. Audit recommendations tend to relocate the very due diligence obligations of a statutory instrument that were initially ignored, tend to simply revert back to these or the next logical course of action. The more similar the audit recommendation to a pre-existing statutory obligation, the more compelling the Prosecution case should be, in terms of attributing fault for a loss, since that audit recommendation underscores the breach of a statutory obligation. Breaches of statutory obligations of diligence can then be construed conjunctively with the ACA 2008, to reinforce the elements of offences under this latter Act; for e.g. recklessness.

Where audit recommendations tend to revert back to a legal/statutory obligation and these recommendations are not complied with, it is submitted that that inaction could infer guilt, since at the very least, it demonstrates an all encompassing lack of diligence



towards professional obligations i.e. general professional negligence. At the most, it demonstrates wilful/ intentional breaches of that legal obligation.

As concerns the findings that the Accused's statutory obligations, e.g. under the Local Government Act (LGA), only imposed administrative roles/responsibilities on them in relation to financial/organisational management, this is disputable since the Accused have extensive and detailed co-relative obligations on these areas in other statutes.

Relevant Law: In this light see the following:

- Reg. 49 (1) FMR makes the Vote Controller responsible for ensuring that a proper system exists for the safe custody, recording and proper use of all departmental revenue receipts, licences and other documents issued for the receipt of public moneys in his Department/office.
- Reg. 156 (3) FMR states that in the case of any loss/ failure to collect revenue or debts in which defects in systems, procedures or instructions appear to have been either wholly or partially responsible, the Vote Controller, Accountant-General or Financial Secretary, as appropriate, shall take necessary action to correct the fault.
- Reg. 103 (3) FMR states that, a Vote Controller shall be responsible for the keeping of proper accounts in his department or office (...).
- Reg. 2 FMR states that, (...) A Vote Controller shall -a) check all cash in his charge and verify the amounts with the balances in the cash books; c.) Promptly make good any deficiency in cash for which he is responsible; d.) ensure that all books of account under his control are correctly posted and kept up to date e.) report to the Financial Secretary any apparent defect in the procedure for revenue collection (...); i.) maintain efficient systems of financial management and control; p.) collect departmental revenues efficiently; q.) report promptly to his Minister or other appropriate authority or both, instances of fraud or corruption; r.) initiate the disciplining of staff who contravene the law.
- Similarly under S. 46 (2) GBAA, it shall be the function of the Vote Controller to; (b) maintain efficient systems of financial management and control; (i) collect departmental revenues efficiently; (j) report promptly to his Minister or other appropriate authority or both instances of fraud and corruption; (k) initiate the disciplining of staff who contravene the law.
- S. 46 (5) GBAA states that the delegation of any (of his) functions (...) shall not relieve the Vote Controller of any personal accountability or responsibility.
- Reg. 40 (1) FMR states that the Vote Controller is personally responsible for ensuring that adequate safeguards exist and are applied for the assessment, collection of and accounting for such revenues and other public moneys relating to their departments or offices.
- S. 61 GBAA states that the responsibility of the Auditor-General for examining and certifying the public accounts, or for auditing other Government accounts does not relieve any officer responsible for the keeping or rendering of such accounts from his duty to comply and to ensure the compliance of his subordinates with the provisions of this or any other enactment or with any regulations made or directions issued thereunder.



- Reg. 3 (2) FMR states that (...) any public officer whose duties require him to render accounts shall be responsible for any inaccuracies in those accounts.
- Reg. 150 (3) FMR states that the Vote Controller shall, on receiving the report (of loss or shortage of public monies...receipts) submit a report thereon to the Accountant-General and Auditor-General, and if the loss or shortage is of a large or unusual nature, a copy of this report shall also be submitted to the Financial Secretary.
- Reg. 150 (5) FMR states that the Vote Controller shall immediately on receiving the report of the loss or shortage arrange for an investigation to be conducted.
- Reg. 150 (6) FMR states that without prejudice to sub-regulation 5, where the Vote Controller suspects that misappropriation, theft or fraud is involved, he shall make an immediate report to the Police.
- Reg. 151 (1) FMR states that, the Vote Controller shall, after investigating the loss or shortage, submit a report thereon to the Accountant-General with a copy to the Auditor-General.
- Reg. 151 (2) FMR states that, the Report which shall bear the signature of the Vote Controller, shall state; a.) The nature of the loss or shortage and the amount involved; b.) the place, and if known, the date on which the loss or shortage occurred; c.) the date and if applicable, time of the discovery of the loss or shortage; d.) the exact circumstances in which the loss or shortage arose; e.) whether the loss or shortage was the result of a failure to observe current accounting instructions; f.) whether the loss or shortage was due to a fault in the accounting system; g.) whether the loss or shortage was discovered as a result of an internal check and if not, why the internal check failed to reveal it; h.) whether misappropriation, fraud, negligence or other irregularity was involved; i.) the name and designation of the officer considered to be responsible for the loss or shortage; j.) whether the officer involved or responsible has made good the loss or shortage; k.) whether the officer's suspension or interdiction from duty is recommended. l.) whether disciplinary or surcharge action is recommended and against whom and if not why not; m.) whether the loss or shortage was reported to the police and (if so, the Police report shall be attached); and n.) the measures taken or recommended to prevent the recurrence of a similar loss or shortage.

Taken together, all these legal provisions strongly suggest that the Accused were expected to act to guarantee/ensure certain desired outcomes, including the efficient and legitimate employ of resources; these expected acts often involve the exercise of control over subordinates. Compliance with audit recommendations demonstrates a belated attempt to exercise these very powers/duties and that any prior lapse was inadvertent. Although complete compliance may be rendered impracticable by circumstances, steps taken towards that end, may well serve as proof of diligence.

Regulations on audits are meant to maximize their impact. They are not only financial investigations clarifying the accuracy of accounts; expenditures, revenue, losses etc. but also as per their recommendations may serve to remedy inconsistencies detected and prevent recurrences of the ineptitudes that lead to such inconsistencies. It is this criticality of the function of audits that makes it shocking that the FCC appeared to brush off audit queries and recommendations, notably requests for information, without which the function of audits is totally undermined.



Although the FCC seemed to respond with a certain ambivalence/laxity to audit queries and recommendations in counts 7,8,12 and 13, the GBAA and FMR do create obligations for compliance with audits in the following sections. Popularly, audits tend to be seen as the most crucial form of financial control since, being a practical computation, they are not dependent on human discretion/will and may "save the day" where all else fails. As one interviewee puts it, since the advice of government accountants is sometimes disregarded, they "just limit their role to verifying retirement documents and leave the final assessment about whether" the (legitimate) process was followed to the auditors.¹⁹⁸ Another interviewee describes internal and external auditors as the means and mechanisms in place for monitoring the monitors including the DFR and the FO.¹⁹⁹

Relevant Law: On obligations for compliance with audits see the following:

- Reg. 163 (8) FMR states that, the Chief Internal Auditor shall ensure that the status and powers of the internal audit function in each agency of government conform to internationally accepted standards, in particular (...) its access to information.
- Reg. 2 FMR states that, in the performance of his functions under the GBAA 2000; a Vote Controller shall (k) ensure effective internal audit and the operation of an audit committee; f.) produce, when required by the Accountant General, Head of Internal Audit Unit of the Ministry, or Auditor General or by such officers as may be authorized by any of the above, all cash books, records, vouchers or other items of value in his charge; s.) submit timely financial reports; u.) promptly answer all audit queries.
- S. 46 (2) GBAA states that, it shall be the function of a Vote Controller to, d.) ensure effective internal audit and the operation of an audit committee; l.) submit timely financial reports; n.) promptly answer all audit queries.
- Reg. 4 (1) FMR states that, the Accountant-General shall maintain or cause to be maintained by each Vote Controller a register of all audit queries and audit inspection reports. Reg. 4 (2) FMR states that, the register shall contain, a.) the reference and the date of the audit query or report and, b) the date on which the audit query or report was answered or otherwise dealt with. Reg. 4 (3) FMR states that, the Vote Controller concerned shall examine and initial the register at the end of every month.
- S. 9 (4) GBAA states that, notwithstanding the other provisions of this Act or any other enactment, the Accountant-General shall have free access at all reasonable times to all files, documents and other records relating to the accounts of every budgetary agency and shall be entitled to require and receive from members of a budgetary agency such information, reports and explanations as he may deem necessary for the proper performance of his functions.
- S. 64 (2) GBAA states that, the Auditor-General shall as a result of the audit conducted by him, make such queries and observations addressed to the Accountant-General or any other person and call for such accounts, vouchers, statements, documents and explanations as he may think necessary.

¹⁹⁸ Interview with Senior Accountant, MOHS, Foday Kande Kamara, 5 November 2015.

¹⁹⁹ Interview with Accountant, Ministry for Youth Affairs, Bashiru Kamara, 13 November 2015.



- S. 64 (3) GBAA states that, every query or observation under subsection (2) received by the Accountant-General or any other person shall, within thirty days after its receipt by that person, be returned by him, with the necessary reply to the Auditor-General.
- S. 65 GBAA states that, (...) every person who fails or refuses to reply to an audit query or observation within the appropriate period specified in subsection (3) of section 64 shall, if the Auditor-General so directs, have his emoluments and allowances withheld for so long as the officer fails to reply.
- S. 64 (6) GBAA states that, every sum specified (...) by the Auditor-General to be due from any person shall be paid by that person to the department, or institution, as the case may be, within thirty days after it has been so specified.
- Reg. 165 (1) FMR states that, a Vote Controller, after consultation with the head of his internal audit department and other relevant officers, shall respond to a report or management letter from the Auditor General and to relevant provisions of a Public Accounts Committee report within 30 days of receipt, explaining how each irregularity cited in the report or letter arose and the corrective action taken or to be taken, with copies to the Accountant General and Chief Internal Auditor.
- Reg. 165 (2) FMR states that, failure to respond within 30 days or to take effective corrective action, including initiation of changes to strengthen systems, disciplinary action against culpable officers and recovery of public monies shall be treated as financial misconduct.
- Reg. 246 (1) FMR states that a Vote Controller or accounting officer and any other public officer for a budgetary agency commits an act of financial misconduct if he is willfully or negligently; a.) fails to comply with the requirements of these Regulations or any other financial instructions issued by the Ministry (...).
- Reg. 246 (2) FMR states that, a charge of financial misconduct against a Vote Controller, an accounting officer or any other public officer shall be investigated, heard and disposed of in terms of the conditions of appointment or employment applicable to that officer.
- Reg. 246 (3) FMR states that, where an act of financial misconduct is alleged, the matter shall be immediately reported to the Financial Secretary and the Establishment Secretary.
- Reg. 246 (4) FMR states that, if a Vote Controller, an accounting officer or any other public officer is alleged to have committed financial misconduct, the establishment secretary shall ensure that an investigation is conducted into the matter and if misconduct is confirmed, shall ensure that a disciplinary hearing is held in accordance with the terms and conditions of appointment or employment applicable.
- Reg. 246 (5) FMR states that, the establishment secretary shall ensure the investigation is instituted within 30 days from the date of discovery of the alleged financial misconduct.
- Reg. 246 (6) FMR states that, if the allegations are confirmed, the Vote Controller shall ensure that appropriate disciplinary or criminal proceedings are initiated immediately.



- Reg. 246 (8) FMR states that, the responsible Vote Controller shall promptly advise the Minister and the Auditor General of any criminal charges laid against any person for financial misconduct under this regulation and the act.
- Reg. 246 (9) FMR states that the Ministry may direct a budgetary agency to lay charges of criminal financial misconduct against a public officer if the responsible Vote Controller fails to take appropriate action.

What is evident from the above provisions is that although there are time-bound legal obligations to respond to the audit queries and recommendations from the Auditor-General, there appear to be no such parallel sanctionable obligations in regard to internal and external audits (not undertaken by the Auditor-General), other than the obligations specified in Reg. 2 FMR and 46 (2) GBAA incumbent on the Vote Controller. A breach of these provisions, in light of Reg. 246 (1) FMR, may amount to financial misconduct which could incur either disciplinary hearings or criminal proceedings under Reg. 246 (6) FMR. Possible suggestions in this regard would be for there to be more regular internal audits and detailed compelling obligations attached to both internal and external audits (not undertaken by the Auditor-General), to respond to audit queries/recommendations within specified time frames.

Also notable is that, the FMR require public auditors to be separate from management and the accounting functions of a budgetary agency; for example, Reg. 163 (2) states specifically that, the head of a budgetary agency's internal audit unit *shall be independent of the finance and accounting function of the agency*; and Reg. 163 (8) states more generally that, the Chief Internal Auditor shall ensure, that the status and powers of the internal audit function in each Ministry, Department and agency of government conform to internationally accepted standards, in particular *its independence from operational management* (...). The testimony of PW11 in respect of count 23 raises questions as to whether this requirement for independence was observed. Count 23 charged Williams and Philips with misappropriation of Le7, 640,000 purporting to be payment made to one Ibrahim Kamara as "*incentive for Revenue Enforcement team*." The Prosecution contended that there was no such genuine incentive and that this was in reality a scheme enabling misappropriation of public funds by the Accused. PW11 testified that in 2009 the FCC decided to remunerate people who had put in extra hours and done special work, so it gave incentives to revenue collectors and he, PW11 signed for Le 100,000 on the list of recipients. The Court acquitted Williams and Philips of count 23 based on PW11's evidence and corroborating evidence of the incentive from PW7 and the ACC investigator. The question is how could PW11 have been an internal auditor and also a revenue collector and whether this dual function did not violate the aforementioned provisions.²⁰⁰ However, it is submitted that such dual functions could be permissible if the activity concerned, comprised more than the simple collection of revenue, so that there was scope for PW11's auditing function within it; for example, the evidence refers to not just to revenue collectors but to a revenue *enforcement team*.

²⁰⁰ There would be a violation for example if he were the head of the agency's internal audit unit. However, a revenue enforcement team does appear to be unlikely to be part of "operational management."



Overview

- *The key question is how to control the controllers, i.e. those with principal access to public funds?*
- *Financial management/control problems can either be the absence of written relevant financial controls, the unclear or incomplete expression of written applicable financial controls or the ignoring of existing written financial controls.*
- *An effective system of financial controls means you have opportunities spanning different transactional phases to clamp down on inappropriate practices.*
- *Strengthening information and knowledge management systems and aiding ACC investigators in developing their knowledgebase of the employ of IM systems for investigations is key to improving accountability.*
- *Legal obligations on IM/KM must be clear, thorough, clearly understood and human capacity in this field (IM/KM/Record Management) beefed up.*
- *Ss. 24 (1), 24 (1) (c), 24 (3) and 24 (4) of the GBAA and Regs. 69 (1), (2), (3) of the FMR on the seeking, receipt and maintenance of grants should be harmonized and the meaning of key terms and concepts made more explicit. These include; "external grants," "domestic grants," "support of government budget programme," "programme," as opposed to "government project," and there could be more clarity on whose personal responsibility it is to "notify the department" of the receipt of a grant. These apparently slight instances of haziness may work collectively to foster corruption.*
- *There are aid coordination bodies at various levels; Ministerial, Central Government and Nation-wide. The MOHS or e.g. hosts a donor liaison office and the Integrated Health Programmes Administration Unit, for now non-functional. MOFED hosts an aid coordination and management division. At the national level, there is DACO, the National Directorate Development Assistance Coordinating Office. If these bodies are to do more than facilitate and organize grant seeking, for e.g. aid in the monitoring of disbursements and in ensuring proper retirement through the programme Finance Officer and the Director of Financial Resources, then it would be necessary, to have a single regulatory instrument/policy statement spelling out the roles of these distinct bodies, their relationship with each other; demarcating the bounds of their unique responsibilities and the possible areas of overlap or more direct coordination/ interaction.*



- *The situation that arose in Ken Gborie where during the trial the defence sought to use the mixing of funds in the account in its favour arguing the imprecision of the particulars of the charges, and the challenges to evidential clarity apparent in the judgement, on the issue of the source of funding of individual programmes, could be avoided where separate grants intended for separate programmes, are paid into separate programme accounts, which is what donors actually prefer and which is possible under s. 8(1) (ii) GBAA.*
- *It's also worth considering whether heads of department/units, should also be Programme Implementers/Officers and account signatories simultaneously. This coincidence of roles in single individuals created a situation in Ken Gborie, wherein the Accused were enabled to overstep the bounds of their distinctive roles as Director and M & E officer respectively, and even their distinctive roles as Programme Implementers, into the domain of financial management. It's worth considering alternate possible scenarios which do not amount to the threefold coincidence.*
- *MOHS standard good practice for account signatories is that there should be 2 signatories from the professional wing of the MOHS and 2 from the administrative wing and that these should be further subdivided into category A and category B signatories; all transactions that require signatures must be signed by one category A and one Category B signatory, each from either wing. The default signatories for most programmes are the Permanent Secretary and the Director of Financial Resources from the administrative wing and the Chief Medical Officer and the Programme Manager/Director/ Coordinator from the professional wing. Since Ken Gborie and Magbity were both from the professional wing, the choice of signatories suggests a weakness incipient at the very point of opening the account and setting up a mandate card. The choice of signatories therefore, should be particularly heeded to avoid any similar recurrence.*
- *Monitoring and control occur principally at the request and retirement stages and in between, there is the obligation to comply with the legitimate procurement process for contractual payments/ the disbursement of public funds; Reg. 70 FMR.*
- *Reg. 73 (1) FMR states:"All disbursements of public money shall be properly supported by payment vouchers" Reg. 74 (1) FMR states that such vouchers for contractual payments shall be supported by documentary proof of having followed the legitimate procurement procedure. Retirement of these stipulated documents can be made to the concerned unit within MOHS, to the donor or to MOFED, depending on the source and pathway of the funds.*



- *The absence of supporting documents for the disbursement of public funds was the crux of the case, in [the ABC](#), [the SLMA](#), [the FCC](#), [the Daoh](#) and [the Ken Gborie](#) cases.*
- *It is suggested that contracts that bypass the normal procurement procedure should be deemed to be null and void if discovered in time, that this could be stipulated in the internal regulatory instruments of MDAs and that the current review of the Public Procurement Bill offers an unmissable opportunity for this change.*
- *The rule on vouchers also extends to payment of government staff as per Reg. 96 (2), (5), (3) FMR. As per the experience in the ABC case, staff members that do sign salary vouchers, should only do so at the point of receipt of cash and not before.*
- *The absence of a definition for the term, "retirement" in the regulatory instruments may have contributed to the confusion in the Prosecution's in case in [Daoh](#). In [Daoh](#), the Prosecution failed to observe the basic legal principle of; establishing the existence of an obligation and its source ("retirement" of fuel expenses and per diem), establishing a breach of said obligation and establishing that the Accused were at fault in causing in the breach. The Prosecution failed to meet the burden of burden of proof with regard to step 1; establishing the obligation and its source.*
- *It's unclear from the judgments reviewed whether for requests for access to budgetary allocations submitted with Boards of Directors, for those MDAs that are so structured, there are requirements for their internal financial accuracy and their consistency with Parliamentary approved expenditure heads. Since there are no such requirements in the FMR and GBAA, they should at the very least be expressed in internal policy documents.*
- *In [Lukuley](#), parliamentary appropriations were made to the SLMA under the expenditure heads of, "facilitation and protocol" and "community relations." There is no further description in the judgment of what Parliament understood these terms to mean. How such vague budget headings made it into the Parliamentary approved budget, and why the Board of Directors when processing such requests for payment did not require more detail, is shocking especially in a context where corruption is rife. There are also a number of legal provisions that should have arrested this situation, but did not; s. 20 (2) GBAA makes a budgetary agency's budget committee responsible for preparing the agency's annual budget and monitoring its expenditure and results. Management also has a role in putting together a budget proposal. S. 20 (3) GBAA requires MOFED's internal audit department and budget bureau to monitor budget committees. S. 20 (1) GBAA states that MOFED's budget bureau shall, under the supervision of the Financial Secretary, be responsible for preparing and monitoring the budget in collaboration with the budgetary agencies. It is even more shocking that such vague budget headings*



managed to secure Parliamentary approval; Reg. 12 FMR requires each expenditure head to be described in the "ambit to the vote." S. 53 (1) GBAA obliges the Vote Controller to submit at the end of each month, information on revenue and expenditure to the Financial Secretary or members of Parliament. S. 53 (2) GBAA obliges the Minister of Finance to submit a summary of government receipts and payments on a quarterly basis to Parliament.

- *Donors must also clearly stipulate in their conditions/instructions that funds sourced from their grants must be retired either with donors, the Department/Ministry concerned or to MOFED; whichever it is, it must be clearly spelled out. Donors should also actively liaise with the concerned department so that they are all on the same page; London Mining Corp. apparently failed to do this in the ABC case. From a supra-national perspective, donors must pre-assess the financial management capacity of recipients.*
- *The Central Government i.e. Departments and Ministries should also exercise due diligence. In the ABC case, in spite of making appropriations to the agency and holding meetings for budget discussions, the MOIC was never able to discern the ABC's receipt of LMC's grants, or the fact that the ABC was engaged in activities unsupported by the MOIC.*
- *Banks must also exercise due diligence when dealing with MDAs and public funds. Bank staff must at least know that distinct sets of rules likely apply to specific types of transactions sought to be carried out by MDAs as distinct from regular Bank customers, or even private non-natural persons. The exercise of due diligence by banks would uncover contractual payments where legitimate procurement processes have not been conducted. This is especially because there are a number of securities which contractors must take out once they have been awarded a contract and which require banks to be diligent in verifying that the legitimate procurement process was observed. Additionally, should due diligence background checks conducted by banks on contractors reveal attempts to deceive, banks should be obliged to communicate this to the MDA concerned.*
- *The experience in the FCC case suggests that reserve accounts should only be accessed following collective decisions by either a Board of Directors or Management. The establishment of withdrawal thresholds with regards to the principal signatory/Vote Controller should be actively discussed and achieved by a collective decision and the knowledge thereof be thoroughly circulated in the MDA.*
- *Cheques issued by MDA's should be made out to named individuals/institutions and never to payee/cash as was the case in some of the judgments reviewed; Lukuley, Ken Gborie and the ABC case.*



- FOs are attached to programmes and are responsible for the disbursement of programme funds. In Ken Gborie, the FO was repeatedly bypassed and the Director and M & E Officer DPI took on the responsibility of disbursing/administering project funds. At the MOHS, programme/project implementation requests are submitted by programme implementers through the Chief Medical Officer to the Permanent Secretary for approval. The Permanent Secretary reviews the request, then forwards it to the Director of Financial Resources (DFR) authorising the latter to process it. The DFR assesses the request and if valid, minutes it to the Finance Officer (FO) who also reviews the request's validity; checks budget accuracy and adherence to procurement procedure, and then processes it, by preparing a payment voucher and writing out a cheque in line with the DFR's instructions. These are then reviewed by the DFR. The cheque is then signed by the account signatory. Before retiring documents, the FO must take them to the DFR to be verified.
- The GAVI Draft Audit Report of 2012 and the ACC investigation into the Ken Gborie case and the judgment itself, found that the DFR had been uninvolved in the financial management of GAVI HSS programme funds at the DPI. The financial management had been taken up by the Director of the DPI and the M & E officer.
- It appears that the approach to financial management in Ken Gborie that spawned the offences was simply part of a probably ongoing and longstanding tacit understanding of the suitable manner of managing donor funds, taken advantage of by the Accused. The fact that there are no provisions on the FO, the DFR or the relationship between them in the GBAA or FMR or anywhere else may well be a critical factor behind what all interviewees confirm in different ways; that there is a culture of programme officer/managers hogging the financial management of public/donor funds bypassing FOs and disregarding the advice of FOs/accountants with regards to following the legitimate procurement process. Apart from the obvious suggestions of encapsulating these roles and their interrelationship in regulatory instruments or internal policy documents, another possible suggestion could be to make donor representatives signatories to programme accounts.
- FOs may also consider making it a standard practice to put in writing pre-and post implementation clarifications made to programme implementers, of the requisite form of retirement attached to specific sums.
- Reg. 6 FMR states that each budgetary agency shall have a Chief Finance Officer (CFO) to assist the Vote Controller in the effective financial management of an agency, but there is no CFO at the MOHS. The functions of CFO are said to be performed by the Senior Accountant and DFR. The review makes crystal clear that the existence of designated offices in and of themselves matter little, rather what matters is that, the functions they have been assigned necessarily must be fulfilled one way or the other. If therefore the functions of the CFO as assigned by the FMR are to be divided up between the Senior Accountant and the DFR of the MOHS for e.g. then, this fact should be expressly recognised by these offices again ideally in writing. Clearly the fact of the absence of a CFO at the MOHS is further complicated



by the absence of written provisions on the offices of the DFR, the FO and the Senior Accountant in the GBAA and FMR. Where internal policy documents encapsulate these roles, it should be clear in what way they assume the necessary functions of the CFO.

- *The term, "financial management" would also have benefited from greater clarity and elaboration in the FMR, GBAA or internal policy documents and judgments concerning this issue would do well to refer to such sources where relevant, since the sense to be derived from terms is necessarily always contextual.*
- *Audits feature in 3 of the 8 cases reviewed; The FCC, Ken Gborie and the Daoh case. Audits measure, evaluate and report upon the effectiveness of internal controls. In the FCC case, the Court based some charges on audit findings, considered some audit findings too insubstantial for grounding convictions for some charges, and demanded audit findings as essential for the substantiation of at least one charge. The Court underlined the importance of having audits conducted and of having the FCC cooperate in facilitating audits by complying with requests for information, but designated itself as fully capable of or entitled to accept, interpret or dismiss audit findings without seeking further illumination on the technicalities underlying them. Thus, it signalled that audits should be carried out where there are allegations/suggestions of corruption but that their findings may be rubbished without asking incisive questions aimed to clarify.*
- *In the FCC case, the Court did not discuss the implications of the FCC's near lax responses to audit recommendations once an audit has generated actual findings. It did not discuss whether the internal audit recommendation was complied with and does not make much of noncompliance with the external audit recommendation, in spite of its implications for due diligence obligations and intent underlying the facts of the charges and in spite of the fact that the GBAA and FMR do create obligations for compliance with audits.*
- *In the FCC case, the Court declared PW11's internal audit findings inconsistent with each other and contested the accuracy of PW14's external audit finding by declaring it inconsistent with a finding of the internal audit. The Court appeared conveniently to prize and accept as authentic only a single finding among the lot of findings generated by both audits. This it did without clarifying the temporal scope of the internal audit, the sources (interchangeable terms used) and the inter-relationship between the 2 reports. There was, literally, no inconsistency the findings of PW11; it was possible for receipts issued to revenue collectors by cashiers to tally with the daily collection form, whilst the amount logged into the cash register as received differed from these.*
- *All the above inconsistencies in the Court's approach to the issue of audits in the FCC case, suggests that their salience as the last bastion of financial control was*



not really given the pride of place it deserves.

- *Popularly, audits tend to be seen as the most crucial form of financial control which when all else fails "save the day." They are the only means of monitoring the monitors including as in Ken Gborie, the DFR and the FO. This criticality of the function of audits makes it shocking that in the FCC case, the FCC appeared to brush off audit queries and recommendations, notably requests for information, without which the function of audits is totally undermined.*
- *The FCC told Audit SL that the absence of supporting documents may have been due to an inappropriate archiving system OR movement of documents. This alternate explanation shows clearly that the FCC was in complete darkness about the location of the required documents/had not kept tabs on them.*
- *In the FCC case, the Court appears to let slide the fact that auditor witnesses employ different terms interchangeably to refer to the documentary sources forming the bases of their audits. This was also the approach taken to some contradictions in testimony of PW11. Diligent clarifying approaches cost little and would go a long way especially in the long term towards enhancing the cause of justice.*
- *It is surprising that the Court in examining the liability of the Accused in the FCC case especially the Vote Controller as concerns issues of administration, financial management; the collection and recording of revenue, found that they could only have been expected to exercise purely administrative roles and not hands on control over financial matters. It is surprising that the Court did not seek to ascertain what their roles and responsibilities were in other public administration/financial management related laws such as the more obvious GBAA and FMR; provisions in the latter suggest that a more hands on role was indeed legally mandated.*
- *Re the preceding point; compliance with audit recommendations would have demonstrated a belated attempt to exercise these very powers/duties and that any prior lapse was inadvertent. Although complete compliance may be rendered impracticable by circumstances, steps taken towards that end, may well serve as proof of diligence.*
- *In the FCC case, both the internal and external audit recommendations highlight the fact that audits and other devices/obligations in the relevant regulatory instruments, the FMR and GBAA for example, are mutually reinforcing forms of financial control.*



- *This mutual reinforcement between audit recommendations and the controls in regulatory instruments underscore that the crux of corruption cases concerning multiple senior level Accused within organizations often concern the failure to exercise due diligence obligations. Audit recommendations tend to relocate the very due diligence obligations of a statutory instrument that were initially ignored, tend to simply revert to these or the next logical/practical course of action. The more similar the audit recommendation to a pre-existing statutory obligation, the more compelling the Prosecution case should be, in terms of attributing fault for a loss, since that audit recommendation underscores the breach of a legal, written obligation. Breaches of statutory obligations of diligence could then be construed conjunctively with the ACA 2008, to reinforce the elements of offences under this latter Act; for e.g. recklessness.*

- *Where audit recommendations tend to revert to a legal/statutory obligation and these recommendations are not complied with, it is submitted that that inaction could infer guilt, since at the very least, it demonstrates an all encompassing lack of diligence towards professional obligations i.e. general professional negligence. At the most, it demonstrates wilful/ intentional breaches of that legal obligation.*

- *What is evident from the GBAA and FMR is that although there are time-bound legal obligations to respond to the audit queries and recommendations from the Auditor-General, there appear to be no such parallel sanctionable obligations in regard to internal and external audits (not undertaken by the Auditor-General), other than generalised obligations in Reg. 2 FMR and 46 (2) GBAA incumbent on the Vote Controller, to "promptly answer all audit queries." A breach of these provisions, in light of Reg. 246 (1) FMR, may amount to financial misconduct which could incur either disciplinary hearings or criminal proceedings under Reg. 246 (6) FMR. Possible suggestions in this regard would be for there to be more regular internal audits and detailed compelling obligations attached to both internal and external audits (not undertaken by the Auditor-General), to respond to audit queries/recommendations within specified time frames.*



CASE REPORTS/SYNPOSES



THE ABC CASE



**The Attitudinal Behavioural Case/The State v. Philip Conteh, Allieu Kamara, Lansana Zanto Kamara
before Hon. Mr. Justice N.C.Brown-Marke
19 May 2011**

FACTS: The ABC was set up by the President to pursue the "agenda for change" and funded partly by the GOSL through the Ministry of Information and Communications (MOIC). Conteh was its Executive Director, Allieu Kamara its Programme Manager and Zanto Kamara, Regional Co-ordinator. All Accused denied all the charges brought under the ACA 2008. Counts 1 and 2 charge Conteh and Allieu Kamara with willful failure to comply with the rules on the management of donations under s. 48 (2) (b) ACA. Count 3 charges Zanto under s. 37(1) ACA with misappropriating Le 2 million meant for payment of rent at Lunsar, while count 4 charges Zanto with abuse of office under s. 42(1) ACA by *improperly conferring an advantage on himself* in the form of that Le 2 Million. Count 5 charges Zanto with abuse of position under s. 43 ACA *by failing to perform an act in the discharge of his duties* i.e. by not using the entire Le 6 million for the Lunsar rent. Counts 6 through 12 charge Conteh and Allieu Kamara with misappropriation of Roger's (the ABC's Bo District Focal Person's) salary between May to November 2010. Count 13 charges Conteh and Allieu Kamara with abuse of office for *improperly conferring advantages on themselves*, i.e. Roger's salary, while count 14 charges them with abuse of position by *failing to pay* Rogers. Count 15 charges Conteh with obstructing justice under s. 127 (1) ACA, by failing to provide the 2 sureties required by the ACC. Counts 16 and 17 charge Conteh with failing to attend ACC interviews thereby obstructing justice under s. 127 (1) and failing to comply with a requirement under the ACA, s. 130 (1) ACA.

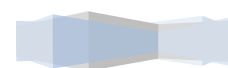
The ABC received funds from the GOSL and donors. A credit deposit slip from 2009 shows that Le317, 275, 000 was paid into the ABC's account (funding source undisclosed in judgment). In 2010, Le149, 800,000 was allocated to the ABC from the Ministry for Finance (MOFED) through the MOIC, to be provided quarterly for non-salary budgetary requirements. Additionally, the evidence is that ABC staff were paid for 4 months from the GOSL's consolidated fund and that the ABC received a monthly imprest of Le 1 million from the GOSL. However, in March 2010, Allieu Kamara met London Mining's (LM) Managing Director (MD) in Lunsar, then later in Freetown, Allieu Kamara and Conteh spoke with LM's CEO. The Accused claimed they sought LM's help to pay salaries.¹ However, the GOSL schedule for salaries indicates payments to ABC staff for September to December 2010. In April 2010, Conteh sent LM a draft budget for June to August 2010 for \$88,660 inclusive Le 8 million for rent. LM's letter of 12 June 2010 to the ABC confirmed it would provide \$85,000. The MOIC had a general Bank of Sierra Leone (BOSL) account, but it was the ABC's Sierra Leone Commercial Bank (SLCB) account that was so credited on 22 and 25 June 2010. The ABC did not apply through the Accountant General to open a new/separate bank account, neither did the ABC report periodically to their Ministry's Permanent Secretary (PS) upon receipt of funds; both binding protocols on MDAs. LM paid additional sums of \$10,000 and \$8000; this \$18,000 went towards the salaries of 2 persons in August and September 2010. In total, LM donated \$113,000 to ABC. Conteh's letter of 27 September 2010 to LM suggests ABC tried to claim salaries for Roger's for August 2010 twice. Comium also donated Le150 Million to the ABC, evidenced by ABC's bank statement, a copy of Comium's cheque and a receipt from Conteh. Also in evidence were 89 cheques drawn from ABC's account to which Conteh and Allieu Sesay were signatories in 2009 and at one point only Conteh was signatory.² 5 of these cheques mentioned in passing were from 2009 and 2010.³

Regarding Counts 1 and 2, Conteh says that he knew nothing of the relevant regulations. Regarding counts 3 through 5, the Lunsar landlord confirmed that he leased the property to Zanto was for 1 year from July 2010 for Le 4 Million. Zanto argued it was a biannual lease, and that the Le 4 million was a tentative payment. He claimed they'd envisaged a bi-annual rent of Le 6 million for Lunsar hence the cheque for Le 6 million and that Conteh and Allieu Kamara authorized him to retain the Le 2 million till given the balance. Zanto claimed he gave that Le 2 million to a woman in Lunsar to keep. Regarding counts 6 through 14 concerning

¹ The ABC Judgment, pp. 12-13, statement of Philip Conteh, exhibit 1; "We never received monies from GOSL for salaries since the establishment of the ABC secretariat. That is the reason for the backlog."

² "The first (specimen signature) card is dated 13 March 2009. The mandate is for 2 signatures; that of the 1st Accused (...) and (...) 2nd Accused (...) The second card (...) is undated, but it gives the mandate to sign cheques, unusually to 1st Accused alone"; The ABC Judgment, p. 18.

³ The ABC Judgment, p. 13.



Rogers' salary, Conteh and Allieu Kamara were responsible for paying salaries. They denied retaining Rogers' salaries for May through November 2010, during which he received no monies, despite the fact that they had secured his signature on payment vouchers for August and September 2010. According to Conteh salaries were paid in full for May to July 2010 and therefore Rogers was paid, but vouchers to verify the recipients of these payments are factually absent. ABC's salary records for August and September 2010 show that salaries were paid, but these records do not indicate the precise dates of these payments.⁴ Conteh attributes informational gaps to losing records during a burglary of computers and documents on August 2010, but admits to a *financial system generally indifferent to basic accounting principles; there was poor record keeping, including neglect of the use of vouchers and staff simply signed for salaries received.* PW9⁵ tendered the MOIC schedule of payments of salary⁶ made to ABC staff for September to December 2010 and testified that the 3 Accused and Rogers received salaries from the GOSL in arrears for September to December 2010; which would mean a periodic overlap with the provision of LM funds for the same period. However, Rogers' name is not on this schedule. Regarding counts 16 and 17, a s. 63(1) ACA notice, was served on Conteh and he allegedly failed to comply by providing 2 sureties, initially refusing to be interviewed and being uncooperative during interviews.

JUDGE'S REASONING: ABC was a public body. It was set up by the President, initially housed in the Office of President, State House, before moving to the MOIC, the Accused used the SL coat of arms and GOSL letterhead in their correspondence and received monies from the consolidated fund. All Accused as members of ABC's management were public officers. Regarding counts 1 and 2, the applicable regulations were regularly flouted with expenditures in the 89 cheques not being documented; Conteh and Allieu Kamara were the signatories on the specimen signature cards for the ABC's SLCB account and the cheques made mostly payable to "cash", were signed by the 1st or 2nd Accused on the back and so must have been encashed by either one of them. In the absence of vouchers, it's near impossible to track the reasons for expenditures. Conteh and Allieu Kamara do not explain the absence of supporting documents; vouchers, invoices. Despite the burglary, if such documents existed, donors should have had copies. However, Conteh would send the MD of LM reports of these expenditures with a table of activities but no supporting documents. Regarding counts 3 to 5, the handing over Le 2 million given in one's official capacity to someone who had nothing to do with one's office is unjustifiable; Zanto should have returned the money to the ABC. The landlord repeated without being asked, that the rent paid by Zanto was for one year and that Zanto consented to payment without haggling, suggesting that Zanto wanted to retain the balance. The Prosecution bore no obligation to investigate whether Le 2 million was with Mamusu or not. The complaint against Zanto supporting the charges under ss. 42(1), 43 and 37(1) ACA is the same; the Accused is alleged to have misappropriated a certain sum and he abused his office and position by misappropriating that sum. The sentences imposed recognize that ss. 42 (1) and 43 ACA are alternatives to the charge in s. 37(1). Regarding counts 6 to 14, Rogers is considered a truthful witness and his evidence trumps. However, since it is unclear that the Accused received monies for salaries for Rogers for October and December 2010, they are given the benefit of the doubt. Further, counts 13 and 14 bunch up several offences in a single count and so are duplicitous; they allege that several transactions concerning Rogers \$1050 were committed "*on a date unknown between May and November.*" This phrasing deprives the Court of jurisdiction. Regarding counts 15 to 17, the ACC need not rely on the Court to punish suspects since it can arrest uncooperative suspects. It was not evident that Conteh was uncooperative. Although he did not immediately oblige the ACC's invite on 23 November 2010, he turned up 2 days later, cooperated with the 5 day interview and surrendered documents. J. Brown-Marke expressed a preference for not being bound by the Le 30 million minimum fine for a guilty verdict in respect of ss. 37, 42 and 43 ACA.

VERDICT: Conteh and Allieu Kamara were convicted on count 1 and fined Le 30 million each with an alternative 3 year imprisonment term. Although convicted of count 2, they were only cautioned and discharged of it, in view of sentence in count 1. Both were convicted on count 6 and fined Le 30 million each, with an alternative 3 year imprisonment term. Although convicted of counts 7-10, they were only cautioned and discharged on those counts in view of the sentence in count 6. Both were acquitted on count

⁴ The *ABC* Judgment, p. 22: "*Exhibit 4 is the salary record for August 2010 (...) Exhibit 5 is that for September 2010.*"

⁵ Allanson Moriba, the MOIC Accountant.

⁶ The *ABC* Judgment, p. 23: "*Exhibit 37 (...) This document (which) is headed GOSL -MOIC-ABC Secretariat - Schedule of Salary for the months of September-December 2010.*"



11 and simply discharged on counts 13 and 14. Zanto was convicted of count 3 and fined Le 30 million, with an alternative 3 year imprisonment term. Zanto was also was convicted of counts 4 and 5, but in view of the sentence in count 3, he was only cautioned and discharged on those counts. Conteh was acquitted on counts 15, 16, 17. Fines were cumulative, while imprisonment was to run concurrently.

APPLIED LAW: The Prosecution bears the burden of proof on a standard of proof beyond reasonable doubt for every element of every offence charged. The Accused only sometimes bears the evidentiary and not the legal burden; i.e. proving or disproving a piece of evidence and only a balance of probabilities. No particular words are absolutely necessary in establishing this burden of proof: *Koroma v. R (1964-66) ALR SL 542 at 548 LL4-5*. The legal burden never shifts except where the Accused relies on the defence of insanity. Where the Prosecution fails to prove its case beyond reasonable doubt, even a weak Defence's case will be given the benefit of the doubt. Despite a joint trial, each Accused's case/evidence must be treated separately. Evidence inculcating one Accused should not be treated as necessarily inculcating another. Where there is no direct or circumstantial evidence establishing an Accused's guilt, independent of the evidence against their co-Accused, he is entitled to an acquittal.

Misappropriation of donor funds under s. 37 (1) ACA only requires the Accused to be part of the management of a private/ public organization managing property donated for the benefit of the people of Sierra Leone. Although dishonesty is not stated as an element of this offence, it is nonetheless required. A dishonest act is one which the Accused recognizes is dishonest by the standards of reasonable and honest people; *Ghosh [1982] 2 QB 1053*, so that his genuine belief that he was morally justified in so acting is irrelevant. Misappropriation is the adverse interference with, or usurpation of an owner's rights; *Morris [1983] 3 All ER 288*. The fact of an adverse interference is not necessarily nullified by consent; *Lawrence v. Metropolitan Police Commissioner [1971] 2 All ER 1253*, and *R v. Gomez [1993] 1 ALL ER 1*. A manager's dishonest appropriation of an employer's property is seriously incompatible with their duty; *Sinclair v. Neighbour [1966] 3 All ER 988*.

Willful or negligent failure to comply with the applicable procedures under s. 48(2) ACA only requires the Accused to have access to or control of public property not necessarily to be a public officer. It sets out various modes of access including administration and management, areas subject to compliance with regulation. Under s. 48 (4) ACA public property includes public funds and public funds are defined in s. 1 ACA as including donations for the benefit of Sierra Leone. The Prosecution alleged willful failure, but its mention of negligent failure in its closing address was dismissed by the Judge. The applicable rules were the FMR 2007,⁷ and the GBAA 2005.⁸ The FMR was enacted to enhance the efficiency of the GBAA.⁹ Reg. 1 FMR 2007 articulates the FMR's applicability to MDAs. Re the circumstances of the ABC case, the applicable law is as follows: Regs. 44 (1), 69 (3), 73 (1), 129 (1) FMR. Reg. 44 (1) prohibits the use, lending/borrowing of public monies by public officers. Reg. 69 (3) requires donations made to government projects to be notified to the responsible department and the Accountant General, and brought to account. Reg. 73 (1) stipulates that all disbursements of public money shall be properly supported by payment vouchers. Reg. 129 (1) FMR requires the authority of the Accountant General to open a bank account for the deposit, custody or withdrawal of public or other moneys for which a public officer is responsible.

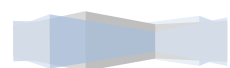
S. 43 ACA on abuse of position makes it an offence for a public officer to knowingly do or omit to do something in the discharge of his functions, thereby contravening the law. S. 42 (1) ACA on abuse of office makes it an offence for a public officer to use his office to improperly confer an advantage on himself or any other person. The act or omission must be intended and could be the facilitating or causing of a monetary payment to someone to whom it is not due. The intention of s. 42(1) is to cover the dishonest abuse of any position of financial trust/ responsibility but it is not confined to fiduciary relationships¹⁰ and extends to

⁷ Financial Management Regulations 2007.

⁸ Government Budgeting and Accountability Act 2005.

⁹ The FMR was enacted under s. 82 GBAA which states; "The Minister may make regulations generally for carrying out the purposes of this Act."

¹⁰ Refer to also to discussion on "fiduciary relationships" in work by this author; Hudroge A., (2015), *The Sierra Leone Anti-Commission Case Law Reports*. The relevant authority is, *The State v. Alimu Bah*, The High Court of Sierra Leone, Hon. Justice M.M.Y.Sey, 17 June 2010; see specifically the **Critique** at p. 364.



fraudulent acts of employees that cannot be prosecuted as theft; *The State v. Fofanah and Mans* 18 January 2011. Under s. 1 ACA, advantage includes monetary payments and a public officer is a member of a public body, including a person holding or acting in an office in any of the three branches of government, whether appointed, elected, permanent, temporary, paid, unpaid. S.1 also defines public body as one set up partly or wholly out of public funds, whether from the consolidated funds or otherwise.

S. 130 (1) ACA makes it an offence to fail to comply with any requirement under the ACA for which no offence is specifically created and the ensuing penalty is a fine of no less than Le 5 million. S.127 (1) (a) criminalizes the obstruction or hindrance, without justification or lawful excuse, of a person acting under the ACA. The ensuing penalty under s. 127 (2) is a fine of no less than Le 5 million or imprisonment term of a minimum of 3 years, or both this fine and imprisonment term.

ANALYSIS: I. Circumstantial evidence: The Prosecution's compelling evidence notwithstanding, no mention is made of the fact that the Defence did not call the individual whose word, that he paid an annual rent of Le 3 million, influenced their expectation of the rent.

II. Potentially erroneous legal findings: A judicial reference to the rule that doubt regarding the Accused's guilt in respect of a charge should compel an acquittal on that charge, erroneously expresses the standard of doubt as "any" doubt,¹¹ whereas it should be "reasonable" doubt.¹²

III. Precedential consistency: For the definition of *misappropriation* and of *willfulness*, J. Brown-Marke refers to his statements in prior ACC judgments; *The State v. Hamzaa Sesay and Bendu*, 10 Feb 2011, culled from his prior statements in *The State v. Manneh and Anor*, 20 May 2008. On the burden and standard of proof, he refers to his prior ACC judgment in *The State v. Fofanah and Mans*, 18 January 2011. Although he does not expressly cite *The State v. Philip Lukuley*, 11 July 2011, the latter is adhered to by statements here, in *ABC*, that the ACC has coercive powers including arrest to secure the compliance of the suspect and that the Court should not be the primary resort for sanctions against the Accused for uncooperative conduct.¹³

IV. Re Governance: Reg. 69 (3) FMR requires donations made to government projects to be notified to the responsible department and the Accountant General. Funding modalities should be standardized across MDAs, with grant seeking being thoroughly formalized and centralized, meaning channeled through and with prior authorization of either department, the Ministry or GOSL, with all major stakeholders copied in and not simply conducted on personal initiative. This would result in donations being made directly to the department as a collective and not to a "project" within it, avoiding the need for the communication in Reg. 69 (3). Other areas concerning funding that should be standardized and made starkly clear as much as possible if not across, at least within MDAs, are the modes of communication/interaction between project/programme stakeholders, methods of project implementation and modes of accessing funds. This is so that illegitimacy can be promptly identified through deviancy. Conteh says that the GOSL never funded salary payments, and that LMC helped address the backlog¹⁴ but the evidence contradicts this.¹⁵ Although LMC appeared to concede liberty to ABC in the employ of its donations, the appropriateness of relying extensively on LMC for the payment of staff salaries is questionable; as is the fact that a new public body should be established without funding for the payment of salaries having been secured/worked out. It was held that since the Accused were the ABC account signatories *and* since their signatures were on the back of the cheques, they encashed the cheques they made out to themselves. This indicates a need for a systemic check against the signatories to an MDAs exclusive account being drawn exclusively from members of its management/staff able to exercise the dual powers of issuing cheques to, and for encashment by, themselves. The tendency to do the latter might be heightened by management/signatories also being programme/project implementers. It's worth considering how these functions might be suitably broken down.

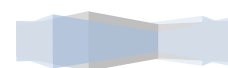
¹¹ The *ABC* Judgment, p. 30.

¹² The *ABC* Judgment, p. 31.

¹³ See p. 5 of snapshot **II. Diligent Case Preparation**, heading 2; **The Defective Framing of Charges**. Specifically, **2.B. Inappropriate Channel for Enforcing Compliance**.

¹⁴ The *ABC* Judgment, pp. 12 and 13.

¹⁵ See FN 6 above.



V. Knowledge/Information Management: ABC's management did not from inception institute a practice of thorough documenting of expenditure. Conteh confirmed that ABC's financial system was *a financial system generally indifferent to basic accounting principles; there was poor record keeping, including neglect of the use of vouchers and staff simply signed for salaries received. "Its vision on paper about behavioral change said nothing about financial probity."*¹⁶ This is a point well worthy of consideration and further development as the review evinces IM/KM as a critical factor in the commission of corruption offences. The mass of documentary evidence in ABC, came from the private sector (e.g. LMC) which although evidently more adept at information management, did not demand proof of expenditure of its donations from the ABC.¹⁷ Conteh and Allieu Kamara maintained no supporting documents for expenditures of cheques which they issued and encashed. However, Reg. 73 (1) requires that vouchers accompany the disbursement of public funds. Those records that *were* being generated were arguably ineffectual; the ABC judgment and others reviewed highlight a tendency for cheques¹⁸/ payment vouchers¹⁹ to be made payable to "cash," instead of being payable to an actual named payee/beneficiary. Also, the MOIC Accountant was to obtain receipts for all monies the MOIC budget Committee paid to the ABC, but instead kept a notebook (not in evidence) of these payments to the ABC and only had receipts for the sum of Le 6 million. Conteh attributed the fact of ABC having scanty records of its financial activities to an office burglary in August 2010 when most PCs and documents were stolen. This loss could have been mitigated by maintaining duplicates of records in alternative loci²⁰; saved in a secure location on a central network or share drive for all ABC staff or the MOIC intranet or network, or on a hard drive in a safe. *"The only reason why proper and adequate records of expenditure were not kept, was to use the monies donated for purposes other than those for which they were meant."*²¹ This principle appears to be gaining the status of a rebuttable presumption and given ABC preceded Daoh, it may well have influenced the Prosecution's case theory there, although there was no precedential citing of it in Daoh. If indeed it motivated the prosecution of Daoh, then the Prosecution erred in not proffering a more appropriate charge for the analogous facts of Daoh; failure to comply with applicable law under s. 48 (2) (b) ACA. The ABC appears to have only maintained salary records for August and September 2010.²²

MEDIA REVIEW: ABC was launched in 2008, its agenda articulated by State House Reps. published in the Patriotic Vanguard. In 2009 prior to trial, Conteh was criticized by the media regarding Fyfe at his home. Openly satirical papers provided less factual coverage of the trial. Conforming to the general trend, media coverage was likely to contextualize the verdict against other ACC trial verdicts especially the preceding and the succeeding trial verdicts, with intense and opinionated coverage at the indictment and verdict stage, but more factual than polemic coverage during trial. Here, at the indictment and verdict stages, *Nassit ferrygate* reared its head; *Awoko* exclaimed the ABC indictments were a publicity ploy to divert attention away from *ferrygate* and CARL raised *ferrygate* at the verdict stage. Against the backdrop of *ferrygate*, the ABC sentences caused the Press generally to lament fines in favour of custodial sentences saying fines were paid off by the political establishment. Cumulative and concurrent terms and fines tend to be misunderstood and misrepresented. There was spin off press coverage on Conteh's failure to surrender his official car 2 months post-verdict, on continuing allegations of corruption and infighting at the ABC under different leadership, and on ABC's continued failure to pay Rogers, denied by the ABC. In 2012, ABC got cozy with African Minerals (AM) and expressed a desire to partner up with AM. In 2014, ABC signed an MOU with the ACC for closer collaboration to fight corruption through educational and research ventures.

¹⁶ The ABC Judgment, p. 21.

¹⁷ The ABC Judgment, p. 29; *"Even if this were so (thefts), the donors would have been favoured with copies of such documents (...) When one is dealing with monies which are not one's own, but which are intended for specific purposes, the least one is expected to do would be, in my judgment, to let the persons who made these monies available, aware of how they were spent."*

¹⁸ See FN 3; regarding the 89 cheques, the 5 that are mentioned in passing are mostly made payable to "cash."

¹⁹ The ABC Judgment, pp. 20-21; LMC vouchers here, specifically exhibits 25 to 28.

²⁰ See FN 17.

²¹ The ABC Judgment, p.29.

²² Unclear whether these are even specifically ABC records; *"Exhibit 4 is the salary record for August 2010(...) Exhibit 5 is that of September 2010."*



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***THE NRA CASE #1
(SESA Y)***



The NRA Case/The State v. Allieu Sesay, Samuel Cole, Franklyn Pratt, Gloria Gabisi, Fatmata Ojubara Sesay before Hon. Mr. Justice Ademusu, 28 June 2011

FACTS: Counts 1,3,5 charged Mr. Sesay with wilful failure to comply with procurement procedure contrary to s. 48(2) (b) of the ACA 2008 *in awarding* contracts worth Le218,500,000 to Taria Ents. for the supply of air conditioners, contracts worth Le344, 900,000 to Tabod International for the provision of local area network at Cline Town and contracts worth Le450, 000,000 to Cee Dee Investments for providing ICT infrastructure at Customs House; counts 2, 4, and 6 repeat ad verbatim counts 1,3 and 5 respectively. Counts 7, 8 and 9 charged him under s. 128(1) ACA *with conspiring* with Mssrs. Cole, Pratt, Ms. Gabisi and with other persons unknown, to wilfully fail to comply with procurement procedure in tendering those contracts. Counts 13 through 30 charged Mr. Sesay with abuse of his office as NRA Commissioner General contrary to s. 42 (1) ACA by improperly awarding 18 contracts worth about Le 50 million to Fatma Allie Enterprises (FAE) owned by his wife Fatmata Ojubara Sesay; the same facts support the abuse of position charges in counts 31 to 48 contrary to s. 43 of the ACA 2008. Count 49 charged him with s.45 (1) of the ACA for failing to disclose to the NRA a direct, personal interest in FAE. Counts 10-12 charged him with knowingly misleading the ACC contrary to s. 127 (1) (b) ACA *by stating that:* the NRA service providers' databases *neither contained his wife's name*, nor that of any business in which she had an interest and that FAE *did not have transactions with the NRA*. Mr. Sesay was allegedly paid by Mrs. Sesay a total of \$14,000 for helping secure contracts for FAE; hence, the charges of offering an advantage to a public officer as a reward, contrary to s. 28 (1) (c) ACA, as counts 50 and 52, *and* accepting an advantage as a reward, contrary to s. 28 (2) (c), under counts 51 and 53. The same facts give rise to charges of peddling influence; counts 54 and 56 under s. 31 (2), i.e. that Mrs. Sesay gave Mr. Sesay an advantage *for using his influence to secure contracts*, and counts 55 and 57 under s. 31(3), that Mr. Sesay accepted that advantage as *consideration for his using his influence*. All Accused pleaded not guilty to the charges and relied on their interview statements, except for Mr. Sesay who testified.

Alfred Labor, former acting Senior Procurement Manager, Head of Procurement Unit (PU) and member of the Procurement Committee (PC) NRA, testified that Mr. Sesay wanted full control over the procurement process for the Asycuda contracts and that Mr. Sesay replaced all lists of contractors Labor, Lavalay (local Crown Agents Rep.) and Ganda (IT Director, NRA) compiled with his own, dictated the winner of the contract, and demanded Labor heed *only his* instructions as Mr. Sesay wanted to determine the awards outside the procurement process and felt the recommendations of the Extended Procurement Committee (EPC) on bidding applications was an obstacle. According to Labor, contractual awards should be determined by the PC based on an Evaluation Report. Labor testified that Mr. Sesay instructed him to ensure FAE's contractual awards, which he did. Labor testified that Mr. Sesay approved the Asycuda contracts, but also admitted that Mr. Sesay wrote a letter saying guidelines on contractual awards should always be observed. Labor admitted in his statement to having signed a fake minutes of a 16th July procurement meeting, renounced this in court, asserting no such meeting was held and then says he faked the minutes under Mr. Sesay's instruction. Labor was sacked from the NRA upon an internal inquiry into the DFID projects.

Mr. Sesay testified to being the NRA Vote Controller, responsible for its daily management, was responsible for notifying bidders of contractual awards and for signing contracts. He said that although the EPC on 14 July recommended further action pre-awards, that EPC meeting constituted a conclusive approval of contractual awards to Taria, Cee Dee and Tabod so he went ahead and awarded these contracts. He said he directed that the recommended actions be taken, but did not order precisely how. He said he granted Taria permission to install media ACs when all out of Kelvinator ACs as stipulated in the contracts and that he informed Charm (NRA's Policy and Legal Affairs Director and Chairperson of the PC) and Labor. He denied all Labor's allegations saying he could not have met Labor on the date they allegedly talked about Gabisi's contract as his passport showed he was then in the US. He said he signed NRA cheques to FAE and admitted that FAE was in the NRA suppliers' database. He said that FAE's letter to the NRA prompted him to instruct the Admin. and HR Dept. to update their database and to inform its Acting Director and the PU that Mrs. Sesay had an interest in FAE, but that he, Mr. Sesay did not and that FAE should not be treated preferentially. Charm admitted receiving this letter and minuting it to Labor. Mr. Sesay and Charm testified that all FAE contracts were handled strictly by the PU, being below the threshold of the Public Procurement



Act (PPA) i.e. Le15 million. Mr. Sesay denied telling or influencing Labor or anyone to give FAE contracts and said the he responded to the ACC notice based on his understanding of it, by saying that NRA transactions concerned business establishments and rarely individuals and that their service providers database did not have the name Fatmata Ojubara Sesay. He said he asked his wife to transfer €5000 to him in Brussels to buy a car for her business. He produced the relevant email, the car's bill of lading in Mrs. Sesay's name, *the indemnity form he signed when he could not present the original bill of lading* and an invoice.

The ACC contested the nondisclosure of the relationship between First Fidelity Company and Cee Dee Investment as partners and the fact that Samuel Cole and Franklyn Pratt were subscribers to First Fidelity and shareholders in Cee Dee Investments, companies that both tendered bids for the ICT infrastructure contract. DFID commissioned accounting firm PKF to carry out an audit of its grant to the NRA of £620,000. PKF found that the Asycuda contracts were not approved by the EPC; the funds were not used in accordance with the NRA-DFID MOU; the contracts were awarded without taking the actions raised by the DFID procurement consultant; the contracts were issued by the NRA and signed by Mr. Sesay without certification by the DFID engineer, that a brand of ACs differing from contractual terms had been installed with Mr. Sesay's approval without consulting the DFID engineer/consultant. DIFD then halted payments to the NRA. DFID engineer Vagg, an EPC member testified that Labor gave them a list of 5 contractors to invite to bid in each contract and when they requested the profiles of these 15 companies they only got back 3 identical ones. Vagg discovered one of these companies was a boutique and reported this. Vagg complained of still not seeing the bidding documents by time the bid opening date was set. TS. Koroma, a DFID procurement consultant produced 3 evaluation reports of the bids which, which Vagg says mirrored his own actions by not recommending any of the listed contractors, causing the PC not to recommend any contractors.

JUDGE'S REASONING: The charges are unsupported by cogent evidence; the Prosecution generally fails to meet its burden of proof. ACC investigators tended not to confront the Accused with the charges in interviews, failing to elicit needed evidence. Counts 1, 2,3,4,5 and 6 (see above) failed, since Mr. Sesay did not influence the decisions of the PC, never taking part in its meetings; Labor apart, no other member of any procurement organ said they were influenced by Mr. Sesay. Mr. Sesay did not tell the PC directly or through Labor to violate the procurement rules. Instead Labor testified that Mr. Sesay told the Evaluation Committee in writing that they should always observe procurement guidelines. Based on his overall responsibility, any failure to see signs of a flawed procurement process are allegations of negligence and vicarious liability; torts not crimes. Counts 7, 8 and 9, the conspiracy charges fail since the substantive offence, i.e. wilful failure to comply, could only be committed by a public officer not private companies. Further, the partnership between Cee Dee and First Fidelity is legitimate and not itself evidence of collusion. The PPA 2004 does not expressly prohibit a parent company and its subsidiary from bidding for the same contracts and the principles of free enterprise allow this; the tendering for the same contract by Cee Dee, First Fidelity and Tabod does not infer a conspiracy by the 3 and these companies performed their contractual obligations.

Count 10 and 11 concerning knowingly misleading the ACC fail; although Mr. Sesay's letter said that the NRA service providers database did not contain the name of Mrs. Sesay, a subsequent letter from Charm did disclose to the ACC that Mrs. Sesay's name was indeed in the NRA database (Count 10). Further, Mr. Sesay never said that the NRA service providers' database did not contain the name of any business in which Mrs. Sesay had an interest, but that the NRA transacted not with individuals but with companies and exceptionally with landlords (Count 11). Count 12 charging Mr. Sesay with misleading the ACC by failing to disclose that FAE, *an entity in which Mrs. Sesay had an interest did transact business* with the NRA also fails since the Prosecution adduced no evidence that Mrs. Sesay had an interest in FAE, that FAE transacted business with the NRA or that the name FAE was in the database.¹ Count 49, the conflict of interest charge fails, since Mr. Sesay and Charm testified that Mr. Sesay disclosed to the NRA that FAE was owned by his wife but he had no financial interest therein, that she should not be treated preferentially.

¹ However, see *Sesay* Judgment, p 71; "Abuse of Office Contrary to S. 42 (1)... There is irrefutable evidence that FAE supplied all the items required to the NRA at various times for which payments were approved by the 1st Accused and others who deputised for him." Further, the evidence supporting the Judge's finding on Count 49 contradicts the Judge's findings on Count 12. See **Analysis** below, specifically point **III. Erroneous legal, factual findings.**



Counts 13 to 38, the FAE charges fail. The Prosecution made no attempt to prove that Mr. Sesay a public officer knowingly abused his office in the performance of an act and the charges hinge solely on the testimony of Labor. Further, Mr. Sesay cannot be criminally liable for these awards, since they were *actually done by Labor*. Mr. Sesay and Charm testified that the PU handled contracts below Le15 Million without referring to Mr. Sesay; he is not responsible for the conduct of subordinates. Any exercise of undue influence on Labor would be a Tort, not a crime. Counts 50, 51, 52 and 53 on offering and accepting an advantage and counts 54, 55, 56 and 57 on peddling influence, all concerning the money transfers to Belgium fail. Mrs. Sesay would not reward Mr. Sesay with \$12000 about Le48 million when the contracts were worth Le55 million. Money transfers are not uncommon among spouses; the ACC has abused the presumption in s. 97 ACA. ACC investigators themselves testified to not knowing Mr. Sesay's explanation (supported by documentation), that funds were wired to Belgium to buy a car. The Prosecution admitted having no evidence that the transfers were made as rewards.

The Prosecution relied inordinately on the dubious self-contradictory Labor dismissed for his involvement in the procurement process. He says he was Mr. Sesay's confidant but was constantly coerced by Mr. Sesay with dismissal threats, that Mr. Sesay minuted the PC to follow strictly the procurement rules yet secretly instructed him to bend those rules, that Mr. Sesay wanted complete control and told him to ensure that the Asycuda contracts were given to Cole, Pratt and Gabisi as listed on a paper which he could not produce at trial. His preparation of fake minutes suggests he was corrupting the PU.

VERDICT: All Accused were acquitted and discharged on every count.

APPLIED LAW: The law on conspiracy does not criminalize intent among two or more, but rather an agreement between them to do unlawful act by unlawful means; *R v. Mulcahy 1868 L.R. 3HL 306*. The prohibited act is the agreement itself and the prohibited mindset is the intention to play a role in the agreed scheme; *R v. Anderson, 1986 AC 27 H.L.* Mere association without participation in a common design is not enough. The test is whether the parties had a common purpose; *The State v. Boahene (1963) 2 G.L.R. 554*. Acts clearly proved against some defendants may used against all the defendants, as evidence of the nature and objects of the conspiracy; *R v. Stapylton Esdaile and Brown (1857) 8 Cox 69*. An agreement can be inferred from the circumstances. The Accused benefits from the presumption of innocence; the Prosecution must prove the Accused's guilt beyond a reasonable doubt; *Woolmington v. DPP (1935) A.C. 402*. A reasonable doubt is a rational or conscientious doubt free from influence, prejudice or fear. The Accused needs prove nothing but to raise a reasonable doubt; *Chan Kan alias Chan Kai v. R. (1952) A.C. 206*; *John Brown Akosa v. the C.O.P (1950) 13 WACA 43*; *George Kwaku Danso & Anor v. The King (1950) 13 WACA 16*; *R v. Hepworth and Farnley (1955) 2 Q.B. 606*. The standard of proof, if the burden is shifted on to the Defence is the balance of probabilities; *R v. Carr-Briant (1943) 29 Cr. App. R. 76 CCA* and the presumption in s. 97 ACA does effect such a shift. The Prosecution must adduce all evidence on which it intends to rely as probative of guilt of the Accused before the close of its case. The Prosecution must behave with exemplary fairness in securing the conviction of the right person; *R v. Dwyer, (1925) 2 K.B. 799 CCA*. Suspicious no matter how numerous and grave do not make for proper charges. The corporate veil can be lifted where used to cloak violations of the law; *Tesco Supermarket v. Natrass (1972) A.C. 153 H.L.*, but not just because someone is a member of more than one company since a company is a distinct entity from its members; one can lawfully be a member/shareholder in as many contracting companies as possible. Under s.127 (1) (b) ACA, the Accused was charged with knowingly misleading the ACC, meaning to intentionally lead into error of thought or action. Knowledge may be proved by an irresistible inference from all the evidence; *R v. Cohen (1951) 1 K.B. 505*, *R v. Iregbu 4 WACA 32*. The Prosecution's supporting authority on the term, *wilful*, in the context of wilful failure to comply with procurement procedure is *The State v. Sheku Tejan Koroma, 11 March 2010* which cites *Sheppard (1980) 3 All ER 899*, but J. Ademusu distinguished that case from the present, saying *wilful* usually concerns a positive action, but in *Sheppard*, it meant a wilful omission/negligence.

ANALYSIS: Statements that the ACC sought to "capitalize" on Sesay's clumsily worded reply to its notice, that it was on a "fault finding spree," that Labor simply "surrendered himself to intimidation," appear to have no judicial value. The judge's reasoning did however stress lack of investigative and prosecutorial diligence.

I. Case preparation: *1. Investigator witnesses' unfamiliarity with crucial case data;* A. Investigators



admitted ignorance of focal points of the trial: the PPA and PPR, the NRA, of Mr. Sesay being the vote controller *and* head of NRA, and were also ignorant of his per diem when travelling, that he was in Belgium in 2009 and admitted having no specific evidence supporting the reward allegations. 2. Non-exhaustive investigative/prosecutorial techniques A.) Investigative failure to confront the Accused with the charges/suspect circumstances, necessary as most Accused simply rely on their statements; B.) not clarifying Mr. Sesay's statement that he directed *generally* that EPC recommendations be acted upon C.) not clarifying from Mr. Sesay the portions of the letters where he claimed that he so directed D.) not clarifying from Mr. Sesay what his understanding was of the ACC notice around which he framed his obscure reply E.) not clarifying the significance of his asking that the database should be renamed from suppliers to potential suppliers upon including FAE F.) not pointing out the compatibility of a car purchase account with their reward theory G.) saying "other persons unknown" in the conspiracy charge, when a sufficient number of parties were identifiable H.) not countering the perception that, "the Prosecution places too much reliance" on Labor, by demonstrating that Counts 1-9 were supported not just by Labor's evidence but instead by cumulative circumstantial evidence (below).

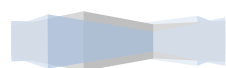
II. Cumulative circumstantial evidence indicating a flawed procurement; 1. Demby testified that the EPC's actions points did not come back to it. 2. Demby testified that Vagg who should have awarded the contracts ended up asking him who awarded the contracts. 3. Ganda, an EPC member said that he learnt of the awards before he had even assessed bid proposals. 4. Three NRA employees named on the evaluation report denied authorship. 5. Lavalay, a PC member describes the Evaluation Report as incomplete. 6. Charm testified that the DFID reps. queried why ICT providers were not included in the short list for the ICT contract. 7. MP traders and Choithrams denied bidding docs. purporting to be theirs. 8. The NRA-Taria contract requiring written amendments for any contractual changes was not complied with. 9. The evaluation committee and the EPC notwithstanding, it was Mr. Sesay who informed TS Koroma of the approved change to Media ACs indicating his direct line of communication with Taria. 10. Vagg testified certain shareholders misrepresented their addresses in bidding documents, noted in the Evaluation Report. 11. Mr. Sesay admitted Labor *could not enter into contract* and was subject to his disciplinary powers and that the PC was answerable to him, yet asserted that it was not his responsibility to ensure contracts were not awarded to sham companies.

III. Potentially erroneous legal, factual findings: Contradicting the finding that Mr. Sesay could only be vicariously liable, 1. Mr. Sesay signed the Asycuda contracts, affirmed by Mr. Sesay, Labor and Cole, indicating personal responsibility for awarding them. 2. Mr. Sesay also signed cheques for FAE. 3. Contradicting the findings, *there was* evidence of the NRA transacting business with FAE in the form of bank payment slips and there was evidence that Mrs. Sesay had an interest in FAE via Mr. Sesay's letter to HR conceding the same. 4. Contradicting the finding that Mr. Sesay *did not fail* to disclose the details sought by the ACC, about whether his wife's name or the name of her business was in the NRA service providers' database or the fact that the NRA did transact business with FAE, note that the letter which discloses these details to the ACC is from Charm responding to the 2nd ACC notice, Mr. Sesay having failed to so disclose in response to the 1st ACC notice.

IV. Precedential consistency: Judge's reference to ACC judgment of *The State v. Sheku Tejan Koroma, 11 March 2010*, where J. Sey cites the UK case *Sheppard 1980* in construing the term, wilfully.

V. Re Governance: Shortlists for restricted bidding could be more transparently compiled in the midst of any of the procurement organs and the reasoning behind their choices subject to an obligation to publish.² Pratt said that although First Fidelity had never before done IT installation, it would have subcontracted this work, had it won either of the 2 contracts for which it bid. The fact that ICT providers were not included in the short lists for the ICT contracts troubled DFID reps. The PPA 2004 does not expressly exclude bidders lacking the technical expertise, but does list it among the (optional) criteria for consideration in determining the award of contracts: s. 21 (1) PPA 2004; *criteria set by the procuring entity, may include – professional and technical qualifications*. The Parliamentary review of the PPA could create a more compelling obligation or procuring entities could adhere more closely to the intent inherent in this provision. A single channel of information between the Vote Controller and the PC/PU (Sesay-Labor) appears ill-considered.

² See Snapshot **III. Conspiracy and Procurement**, p. 18 and Findings and Recommendations.



MEDIA REVIEW: Prior to investigations, the press appeared to recognise Sesay's professional competence, but by the investigations phase, the press was divided with some criticism of his allegedly opulent lifestyle and connections with the political establishment, allegedly impeding investigations. The judgment was contextualised against longstanding allegations of NRA corruption, prior ACC NRA prosecutions, the then imminent FCC case and the preceding Lukuley case. The judgment mostly aroused shock with allegations of political interference, legal analyses on its dangerous precedent for conspiracy and contestations of concepts like; conflict of interest, vicarious liability, and corporate liability. The press struggled with conveying the facts, since the judge's reasoning appeared to misconstrue the Prosecution's arguments. Media dissatisfaction with the judgment gave rise to personal attacks on the ACC and its personalities, bemoaning PR prosecutions lacking sufficient evidence. Post-Sesay, allegations of NRA corruption continued to be reported especially the undocumented disbursing of Le 1 billion from the NRA SLCB account in 2011 and alleged attempts to repress an internal audit. Some press called for Sesay's reinstatement and reported Sesay's receipt of an award from NRA staff for winning his case.

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***THE SLMA CASE
(LUKULEY)***



The SLMA Case/The State v. Philip Lukuley before Hon. Mr. Justice Nicholas Brown-Marke
11 July 2011

FACTS: Lukuley was the Executive Director (ED) of the Sierra Leone Maritime Association (SLMA). Count 1 charged him with misappropriation under s. 36 (1) ACA of Le 69, 954, 960 paid to the Sierra Leone Shipping Agency in 2010 and count 2 charged him with abuse of office under s. 43 ACA in relation to that same payment. Counts 3 to 6 charged him with fraudulent acquisition under s. 48 (1) (a) ACA of Le 145, 920, 000 of public funds, in the form of leave and rent allowance, contrary to his employment terms. Counts 7 to 8 also based on the aforementioned rent and leave allowances, charged him under s. 48 (2) (b) ACA with willfully failing to comply with the relevant procedures for management of funds. Counts 9 to 12 also based on the rent and leave allowances charged him with misappropriation and counts 13 to 16 also based on the rent and leave allowances charged him under s. 42 (1) ACA with abusing his office by improperly conferring an advantage on himself. Counts 17 to 27 were based on allegations against Lukuley of calculating in excess his per diem travel allowance. Regarding this, specifically counts 17 to 19 charged him collectively with misappropriation of \$7883, counts 21-23 charged him with willful failure to comply with applicable procedures, counts 24 to 27 charged him with abuse of office. Count 20 charged him under s. 128 (1) ACA, with conspiring with other persons unknown to willfully miscalculate this per diem. Count 25 replicated the facts of count 27, but merged elements of the charge of abuse of office with willful failure to comply with procedure. Regarding remuneration to the Board of Directors, counts 28 to 160 charge Lukuley with willful failure to comply with procedures, while counts 161 to 169 charged him with offering a monetary advantage to the Board under s. 35 (2) ACA. Counts 170-173 are based on the reparation of allegedly Lukuley's private cars, by Dokkal Ents. Counts 170 and 171 charged Lukuley with misappropriation by paying Dokkal a total of Le3, 442, 800. In relation to the sum specified only in count 171, count 172 charged Lukuley with willful failure to comply with procedure and count 173 charged him with abuse of office. Counts 175 to 176 charged him with conspiracy to commit misappropriation (*presumably in relation to the Dokkal payments*).¹ Count 174 charged Lukuley under s. 130 (1) ACA, with failing to comply with a requirement under the ACA 2008. Counts 177 to 184 were based on allegations of the supply of fuel to Lukuley's private vehicles and generator; counts 177 to 182 charge him with misappropriation of altogether Le 2, 932, 000 by supplying fuel to his private vehicles including for his wife's private trip to Guinea. Count 183 describes the Guinea trip as an abuse of office whilst count 184 treats it as an abuse of position under s. 44 (1) ACA. Counts 185 to 194 charge misappropriation of public funds for disparate payments to members of parliament, provincial authorities, etc. under the vague budget headings of "*Facilitation and Protocol*" and "*Community Relations*."

JUDGE'S REASONING: The SLMA was a public body since it received a government subvention of Le 960, 192, 100 outside its budget in 2009, so that GBBA 2005 and FMR 2007 apply. Therefore the Accused was a public officer. Public money under S.1 (1) ACA 2008 includes money held by, in or paid out of the consolidated fund, as is the case here. Subject to the approval of the board, the ED was responsible under s. 15 SLMA Act 2000 for the SLMA's daily management which would include the administration of funds by subordinates. The SLMA had no internal auditor but had been audited by *Bertin and Bertin* in 2008 who confirmed that all transactions recorded were within the budgetary provisions. However, it takes special and not general audits to expose fraud.

The Prosecution must avoid overloading the indictment (since it makes proving and assessing the elements strenuous and prolongs trial), and instead proffer charges that stand a strong chance of being proven and are in the interests of justice; *Novac (1976) 65 Cr App R 107* and *Blackstone's Criminal Practice, 2007, p. 60, para. D10.60*. "*Overloading*" is acceptable where the evidence is uncertain and juries are involved. Counts 1 and 2 fail since Lukuley was not responsible for the tardiness incurring demurrage payment; the tardiness may have been careless/negligent, but was not willful and dishonest as required by misappropriation.² Counts 3 to 16 on the rent and leave allowances fail; Lukuley's conditions of employment were fixed by the Board under s. 14 (2) SLMA Act 2000. The SLMA budget was compiled by departmental heads, decided upon by

¹None of the references to counts 175-176 in the *Lukuley* Judgment; para. 1, p. 5, para 56, p. 25 and para. 131, p. 52 expressly indicate that the misappropriation alleged by these charges relate to the Dokkal payments.

² Although not articulated in the Judgment, the natural conclusion is that since the ED could not have misappropriated the demurrage payment, he did not confer that sum upon himself as an advantage as required for the offence of abuse of office.



Management and under s. 20 (3) SLMA Act 2000 finalized and submitted to the Board by the ED for its approval. Subsequently, it was submitted to Parliament for its approval also. As ED, Lukuley only approved the physical act of paying. There was no evidence that he dishonestly induced the Board or Parliament to authorize certain sums as leave and rent allowances or PW1³ to pay him in excess of fixed sums, or fraudulently sneaked in an increase into the budget post-its Board approval. In the same vein, counts 28 to 160, alleging that payments to the Board failed to comply with the procedure for management of funds, also fail. These payments complied with the relevant procedures; the SLMA Act, the GBAA 2005 and FMR 2007. The Prosecution argued but failed to prove that payment of *sitting fees* fell outside of the "remuneration and allowances" authorized by s. 6 SLMA Act 2000, for the Chairman and members of the Board and did not question PW12⁴ about this. Counts 160-169, offering advantage to a public officer through the Board payments, also fail for the same reasons. Although these counts implicate the Board warranting charges against them, the Prosecution did not seek to elicit evidence from Board members, treating them as innocent agents in the fraud practiced to their benefit. Counts 160-169 are also duplicitious charging more than one offence in a count in contrast to counts 28 to 160 which itemize the board payments.

Counts 17 to 27, the per diem charges, fail. Lukuley argued he included travelling time in calculating his per diem at 8 days. The Prosecution argued that travelling time included, the per diem should still have been for 4-5 days, but they did not adduce evidence, (e-ticket/counterfoils) to prove this. The Prosecution failed to contradict PW1's testimony that Lukuley calculated his per diem at the government approved rates of \$500; they failed to question PW12 on this, suggesting his evidence was unfavourable to them. Lukuley is discharged on count 25 which replicates count 27 and merges 2 offences. Since the substantive per diem charges fail, count 20, the conspiracy charge on per diem also fails.⁵ Counts 161 to 169 were abandoned since they are duplicitious by charging as offences, largely, the same acts itemized in counts 28-160, in only 9 counts. The Court must acquit where a single charge alleges different acts within an extended temporal frame to prevent prejudicing the Accused's defence, especially as misappropriation (161-169) is a single act, not a continuous and intermittent offence.

Count 170, one of the car repair counts succeeds but Lukuley was simply cautioned and discharged.⁶ Counts 171 – 173 failed since although Lukuley approved payments to Dokkal for car repairs in December 2008 totaling Le 2, 204, 000, the car's life-card indicates it belonged by then to the SLMA. Count 174 succeeds since he'd been in possession of an ECOWAS passport since August 2010. Lukuley was acquitted on counts 175-176 since the prosecution offered no further evidence in its closing address. Counts 177 to 182 the fuel charges fail for duplicity by charging the commission of a non-continuous offence between two stated dates *instead of* alleging the offence was committed "on a day unknown" between two dates; *Amos v. DPP [1988]R T R 198, DC*. They allege that upon the completion of fuel requisition forms by drivers authorized by PW1, the ED and the senior administrative officer, 25 gallons were collected weekly from NP. This fuel should have been for the ED's 2 SLMA cars, but it was alleged that the petrol chits from NP showed that Lukuley's private cars were supplied twice in early October 2009, once in November 2009 and once in January 2010. Drivers testified that even fuel supplies logged as official were actually made to his private cars; that he used an SLMA car officially fueled to campaign in April 2008 in Potoru, Pujehun by-election. Lukuley argued that his private car was only officially fueled for official use. He said he lent his car to the SLMA to transport visiting dignitaries, but according to the testimony of PW1, this was for 4 days in January 2011 and does not explain the logs showing his private car was fueled in October 2009, November 2009, January 2010. Count 183, on the Guinea trip, succeeded. A driver testified to using an SLMA car officially fueled in October 2009 to drive Mrs. Lukuley to the Guinea border to buy cattle, proving that Lukuley abused his position as ED by improperly conferring an advantage on his wife. Since, guilty of count 183, he is discharged on count 184, a redundant charge.

³ Mrs. Vania Yannie, Accountant at the SLMA.

⁴ Mr. Ballah Kamara, Chairman of the Board. He did testify that he and other members of the Board were entitled to monthly remuneration and were also paid sitting fees. *Lukuley* Judgment, para. 122, p. 47.

⁵ This is because the Prosecution defined its conspiracy theory here/the agreement, as strictly dependent on proof of the alleged substantive acts of misappropriation. That is to say, the Prosecution appears to have had no evidence supporting its conspiracy charge i.e. to willfully miscalculate per diem, other than the evidence supporting the substantive offence of misappropriation, which also supports the substantive charges of, willful failure to comply and abuse of office.

⁶ Presumably because the two cars with which Count 170 was concerned were demonstrably Lukuley's, although this rationale is not articulated in the judgment.



Counts 185 to 194, the *disparate payment* charges succeeded. Lukuley requested from PW1 several sums under the budget headings "*Facilitation and Protocol*", later "*Community Relations*" approved by Parliament. Funds allocated to this budget heading more than doubled from 2007 to 2008; it appeared to be a "pig's trough" from which Lukuley could draw on a whim without accounting. Parliament's approval of this budget heading did not extend to unaccounted for/undocumented expenditures under it. In 2008, Lukuley's duty to account for expenditure from the SLMA coffers was grounded in his common law fiduciary position. After 2008, this duty took the statutory form of ss. 231-234 of the Companies Act 2009, and Regs. 11, 12 and 73 (1) FMR.⁷ The disbursements under this heading span 2008 to 2010; the supporting evidence consists mainly of payment vouchers mostly without the requests for funds, a cheque and a funding request without receipts. The purposes Lukuley proffers for these expenditures; entertainment, feeding, transport, honoraria, urgent national matters and "*shake hand fees*" could not have been envisaged by the budget heading; "*Facilitation/Community Relations*." Several of these payments were made to Parliamentary committees, sub-committees, Law Officers Dept. in connection with statutory and budgetary reviews, some were made to traditional leaders. Lukuley admitted to expending these funds without personally handling any of them, contradicted by PW1 who said she handed them to him, but received no receipts for them from him. It was held that due to his experience and stature, Lukuley must have received them. PW10,⁸ PW1, PW9⁹ and PW3¹⁰ testified that when the ACC requested all payment vouchers for 2007 to 2010, the latter 3 removed those for "*Facilitation*"¹¹ on Lukuley's instructions. PW1 testified that she purposefully left some vouchers, informing the ACC upon their enquiry when handing the files over to them, of what had transpired; although this could have made her an accomplice *in the removal of documents*, she was not so charged. Re the *disparate payments*, she only followed the ED's instruction so that s. 96 ACA 2008 would proscribe charges for accomplice liability.¹² Misappropriation requires proof of a dishonest intention to appropriate; these documents were removed because they were incriminating. Although Parliament approved the SLMA budget heading of "*Facilitation/Community Relations*," it did not consent to the manner in which Lukuley expended these funds.¹³ Lukuley is guilty of misappropriation by failing to account for monies disbursed under these headings. Sentences were imposed for counts 185, 188, 192 and 194, but he was discharged and cautioned for the rest of the *disparate payments*.

Count 174 succeeds. PW2¹⁴ testified that the Accused was invited during investigations for interview, but due to his health complaints not coerced. In response to a s. 57 (1) ACA notice for surrender of his travelling documents to prevent travel hindering the investigation, he surrendered his SL passport, but he held on to his ECOWAS passport. Swifter investigations would avoid this scenario and alternative means to ensure compliance with ACC investigations should be pursued instead of Court remedies. The CIO¹⁵ could have demanded the withdrawal of the ECOWAS passport and the ACC could have arrested Lukuley.

VERDICT: Lukuley was acquitted on counts 1-160, but specifically discharged on count 25 as bad for duplicity, and discharged on counts 161 to 169, also bad for duplicity. Lukuley was found guilty of count 170, a *Dokkal* count, but cautioned and discharged for this. He is acquitted on counts 171 – 173, acquitted and discharged on counts 175-176. Lukuley was discharged on almost all the fuel charges, counts 177 to 182 and 184, since they are bad for duplicity. He was found guilty of count 183 i.e. the Guinea trip, but cautioned

⁷ These statutory provisions are discussed below in the **Applied Law** section.

⁸ Lukuley's Confidential Secretary, Ms. Enid Faux.

⁹ Mariama Jalloh, Accounts Officer I at the SLMA.

¹⁰ Carlton During, Accounts Officer II at the SLMA.

¹¹ Confirmed by PW3 at *Lukuley* Judgment, para. 101, p. 44 and by PW9 at *Lukuley* Judgment, para. 119, p. 46.

¹² Discussed below in the **Applied Law** section.

¹³ This appears to contradict statements in the judgment suggesting that Parliamentarians understood that payments made under that heading would revert to them. see *Lukuley* Judgment, para. 75, p. 32; "*In fact in doing this (flouting regulations), the Accused has left himself open to a more serious charge, offering inducements to Parliamentarians to get them to approve the budget requirements of the SLMA (...) If what he says is true (that he entertained Parliamentarians), in effect, he will be saying that Parliamentarians have to be fed and feted before they could work!*" See also para. 86, p. 37; "*It would appear that, in order to get his budget approved, the Accused had to spend some part of the previous year's approved budget on those who were to give their approval to the new budget!*"

¹⁴ Joseph Bockarie Noah, ACC Investigator.

¹⁵ Chief Immigration Officer.



and discharged of it.¹⁶ He was convicted of count 174 re his passport and fined Le 5 million or 3 years. He was found guilty of counts 185 through 194, on the disparate payments. He sentenced to a Le 30 million fine or a 3 year imprisonment term for each of the following counts respectively; 185, 188, 192 and 194, but cautioned and discharged for the rest of the *disparate payments* counts. The fines were cumulative, but sentences concurrent. He was ordered to "refund" Le139, 478,000 in 4 weeks in addition to being fined in total Le 120,000,000.¹⁷

APPLIED LAW: The Prosecution must proffer charges that stand a strong chance of being proven and not overload the indictment; *Novac (1976) 65 Cr App R 107* and *Blackstone's Criminal Practice, 2007, p. 60, para. D10.60*. Charging more than one offence in a count is bad for duplicity. Single offences can be continuous and intermittent so that they do not have to take place once and for all; *Chiltern D C v. Hodgetts [1983] 1 All ER 1053 HL*. Misappropriation however is not a continuous offence; it is a single act occurring when the money leaves the coffers of the public body. For single act, non-continuous offences, especially where the date of commission of the offence is unknown and the temporal frame is extended, firstly, each criminal act should be charged in a separate count. Secondly, the offence must also be charged to have been committed "on a day unknown" between two dates; *Amos v. DPP [1988] R TR 198, DC*. These two drafting bright lines operate so that there is no lack of clarity about whether the Accused committed several acts on one day or on several days. The Prosecution must prove every element of every offence charged and if it fails to meet this burden, the Defence is given the benefit of the doubt even where its account is not particularly convincing. The Defence, except where it has pled insanity, never bears the burden of proof; *Koroma v. R [1964-1966] ALR SL 542*.

An appropriation is an act adversely interfering with or usurping the owner's right over the thing appropriated; *Morris [1983] 3 All ER 288 HL*. Proof of misappropriation requires the Accused to have acted willfully and with dishonest intention to deprive the public body of public funds; *Gomez [1993] 1 All ER 1 HL* and *Gosh [1982] 2 All ER 689*. Where the Accused acts in the realization that his act would be considered dishonest by reasonable and honest people, then he acts dishonestly; *Gosh [1982] 2 All ER 689*. Any belief by the Accused that he is morally justified in his action is irrelevant to the question of dishonesty; *Gosh*. Acting willfully means to act with intent or recklessly; *Sheppard [1981] AC 394*. The more recent case of *G [2003] 4 All ER 765 HL* defines recklessness against an objective standard, whereas *Sheppard* defines recklessness against a subjective standard. An intention on the part of the Accused to return public property which he has misappropriated does not nullify his misappropriation; *Velumyl [1988] Crim LR 299*. The owner's express or implied consent to the taking does not in and of itself nullify misappropriation; this is because it is possible to procure an owner's consent dishonestly; *Gomez [1993] 1 All ER 1 HL* and *Lawrence v. Metropolitan Police Commissioner [1971] 2 All ER 1253*. Consent relates to purpose and end use and relevant in this regard is s. 28 (2) GBAA 2005, which states that when an appropriation for a budgetary agency has been approved, it shall be used only in accordance with the purpose described and within limits set by the different classifications within the agency's estimates.

Regarding the fraudulent acquisition of public funds, *Archbold's 2003* defines "fraudulently" as dishonestly prejudicing or taking the risk of prejudicing another's right, knowing one has no right to do, or dishonestly inducing a public servant to act in ways contrary to his duty because he is misinformed, thereby risking injury to the state. Conduct can qualify as fraudulent even where it does not concern a risk of economic loss and need not include deceit; proffering false information to substantiate a genuine claim does not negative an intention to defraud.¹⁸ S. 42 ACA 2008 on abuse of office, aims at covering the dishonest abuse of any position of financial trust or responsibility, including that of a trustee, company director or executor, but is not confined to fiduciary relationships¹⁹ and includes acts committed by employees that cannot be prosecuted as theft. Regarding abuse of position, s. 44 (2) ACA 2008 creates a presumption where a public officer takes any decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or

¹⁶ It is curious whether the different outcomes of count 182 and 183 result from differential forms of drafting, i.e. that while count 82 may have been duplicitous, count 83 was not so drafted.

¹⁷ *Lukuley* Handwritten Sentencing Judgment, p.2. This appears to be the word "refund". Cumulative fines would however appear to total Le 125,000,000?

¹⁸ *Lukuley* Judgment, para. 47, p. 20.

¹⁹ See p. 3, FN 10 of the *ABC* judgment summary.



indirect interest, that he made use of his office/position for an advantage. S. 44 (3) (a) and (b) ACA 2008 state that the presumption shall not apply to a public officer who as a representative of a body corporate, acts in that capacity in the interest of that body corporate.

S. 11 (1) - (5) SLMA Act 2000, empowered the SLMA to control its revenue and finance itself. The SLMA amendment Act 2007 required SLMA revenue from charges to be paid into the consolidated fund; the SLMA was to be financed mainly by its parliamentary approved budget; s. 21 (a) SLMA AA 2007, although much later in September 2008, responsibility for the freight levy collection was reinstated for the SLMA (provision not cited).²⁰ S. 20 (3) SLMA Act 2000 states that the annual budget prepared and finalized by the ED shall be submitted at least 3 months before the beginning of the financial year to the Board for its approval. S. 14 (2) SLMA Act 2000 states that terms and conditions of the ED's employment are fixed by the Board, with the approval of the Minister. S. 6 SLMA Act 2000 states that Parliament determines the remuneration /allowances of the Board Chairman and Board members. Duties to account for public funds stem from s. 15 (2) (e) SLMA Act 2000 which accords the ED overall leadership in the conduct and management of daily activities, (in conjunction with)²¹ Reg. 73 (1) FMR which states that all disbursements of public money shall be properly supported by payment vouchers and Reg. 73 (3) FMR which says vouchers shall contain full particulars of the service for which payment is made. S. 11 (3) GBAA also states that, every person who collects or receives any public moneys shall keep a record of receipts and deposits thereof (...).²² Reg. 11(1) FMR requires accuracy in budgetary expenditure estimates/predictions, whereas Reg. 12 (1) FMR requires that the purposes underlying and services comprising budgetary heads be explained in a preamble to the head and Reg. 12 (2) requires that no expenditure be charged to the head unless aligned with that preamble. Duties to account for public funds also stem from common law fiduciary duties such as, for e.g., the duty of Directors not to make a secret profit, not to act against the interest of the corporate body, not to exceed the mandate and powers given to the corporate body by its incorporating statute, in this case s. 3 (1) and (2) SLMA 2000 which make it a body corporate with legal personality. The SLMA's obligations regarding public funds are *implicit* in rules/provisions of Company law, concerning employees, executive and board members, and specifically, Lukuley's obligations stemmed from ss. 231-234 of the Companies Act 2009 on Directors' duties and powers.²³

S. 96 ACA proscribes witnesses in ACA trials from being regarded as accomplices, *where the only implicating act* is their payment/delivery of an advantage to, or receipt of such, from the Accused. S. 57. (1) ACA states that the Commissioner may require the person in charge of any public body, to produce to the ACC, notwithstanding any enactment to the contrary, any document or copy thereof, certified by the person in charge of any such document, which is in his possession or under his control. In sum, S. 87 (f) (ii) of the CPA 1965 provides that an Accused can be a witness for the Defence at every stage of the trial, but that s/he should not be asked/required to answer any question tending to show prior criminal history or bad character unless, the Accused/his Defence raised the issue of his own good character, in his evidence or when examining a prosecution witness or raised the issue of the Prosecution witness' own character.

ANALYSIS: I. Case preparation: 1. Non-exhaustive investigative/prosecutorial techniques:
Overloading of the indictment, i.e. multiple charges based on the same facts (duplicitous) is criticized here. The Court recommends that only those offences which sit best with the facts be charged, referencing this point made in *The State v. Philip Conteh & Ors 19 May 2011*; "*They are different offences but the complaint in all of them is essentially the same.*"²⁴ Count 27 is also erroneously drafted, since it replicates the particulars in count 25 and then merges two offences; the Accused is therefore discharged on it. Even the manner of duplicating charges seems inconsistent; for e.g. certain acts are criminalized as different offences, but others which also could easily be are not e.g. the Dokkal charges where count 171 but not 170 generates 3 other

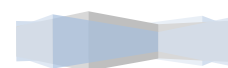
²⁰ *Lukuley* Judgment; para. 38, p. 15.

²¹ Author's insertion.

²² The *Lukuley* Judgment states at para. 75, p. 32; "The obligations under Regulations 11, 12 and 73 of the 2007 Regulations were clearly flouted by the Accused." It is questionable whether s. 11 GBAA which appears more relevant is not what is actually meant.

²³ The Companies Act 2009: s. 231; *Duties of Directors*, s. 232; *Duty of Care and Skill*; s. 233; *Directors as Trustees and Agents of Company* and s. 234; *Exercise of Directors' Power*. In 2014, the Companies Amendment Act was passed, which by s. 45 amends s. 231, obligating Directors to disclose conflicts of interest and directors of the Board to publish it.

²⁴ *Lukuley* Judgment, para. 50, p. 22.



subsequent charges and count 182 on the cow purchase which generates 3 counts, whereas the other fuel counts do not. Duplicity also refers to a situation where more than one offence is contained in an individual count; here, this resulted in some counts being struck down. The issue of the Prosecution not adducing the level of evidence required for proof remains consistent. It led evidence on counts 175 and 176, the conspiracy to misappropriate charges, then attempted to withdraw these charges in its closing submissions. The Accused was therefore not discharged on counts 175 to 176, but acquitted on them. The Prosecution also was not diligent enough re willful failure to comply on the per diem, counts 21 to 23, since it did not adduce evidence showing what the rates should have been in 2009-2010.²⁵ The Prosecution failed to examine key witnesses, Board Chairman, on pivotal issues so that the presumption of the examining party avoiding eliciting evidence unfavourable to its case arises. Similarly, in relation to s. 35 (2) ACA, the Prosecution doesn't ask Board members what the advantages it alleges they were offered by the ED, were in exchange for. The receipt of allegedly excess payments normally should have engendered awareness by the Board that they were excessive, so that the allegations against the ED imply the complicity of the Board. This should have necessitated a more targeted inquiry into their role or mindset in line with the elements of the offence. Lastly, it may not be necessary to frame the conspiracy charges as having been committed with "other parties unknown" where there are already identifiable co-conspirators.

II. Cumulative circumstantial evidence: Unlike the *Daoh*, *Sesay* and *Al-Jazeera* cases, where this study suggests that the collective significance/weight of circumstantial evidence may not have been captured and expressed in a succinct and cohesive analysis to the Court, here, key pieces of circumstantial evidence were pivotal to the verdict concerning counts 185-194. The convergence of PW3 and PW9 and PW10's testimony on the point that Lukuley was in his office while vouchers relating to "facilitation" payments were being removed, rendered discrepancies in their accounts, regarding who summoned who to the ED's office and who was the last person to leave the office inconsequential. Their concurrence on this fact made it irrefutable. It was circumstantial evidence of the fact that the discovery of the vouchers would have led inevitably to the discovery of Lukuley's criminal acts.²⁶ This evidence clearly supported a charge of attempting to pervert the course of justice (not brought). S. 87 (f) (ii) CPA 1965 mitigates reliance on circumstantial evidence, which pertains to personal character/history. As per the review, based on references to s. 87 (f) (ii) CPA 1965 in the *Lukuley* judgment, and the potential for such evidence to descend into *low blows*, the Prosecution tends to avoid including such circumstantial evidence in any aggregation, underlining and piecing together of other pieces of circumstantial evidence, for the benefit of the judge. Hence, although here the Defence while cross examining PW4, did not relent in seeking to elicit evidence about his past professional wrongdoings, in spite of being warned by the Judge that doing so might entitle the Prosecution to do likewise, the Prosecution apparently did not follow suit.

III. Precedential consistency: *The State v. Fofanah and Mans*; *The State v. Philip Conteh & Ors* (the No-Case Submission Judgment)²⁷ are referred to in confirming that Abuse of Office applies where a Public Officer uses his office to improperly confer an advantage on himself or on any other person. *The State v. Philip Conteh & Ors*; *The State v. Sesay & Bendu* are referred to, (the latter is not cited, which would have been preferable), in discussing the charge, Failure to Comply with Applicable Procedures. The circumstances of *Sarah Bendu*,²⁸ i.e. of the Accused referring ACC investigators requiring an interview to the Minister, are referred to, specifically in relation to the subject of Accused who are less than cooperative with the ACC. As in *Conteh*, the point is made in *Lukuley* that suspects should endeavour to comply with ACC requests, and that rather than bring charges for uncooperative conduct, alternative means of ensuring compliance with ACC investigations should be pursued. 5 of the 8 cases reviewed involve charges for misappropriation where the facts evinced failure by the Accused to provide documentation supporting expenditures they made. In the *ABC* judgment of May 2011, J. Brown-Marke stated that; "*The only reason why proper and adequate records of expenditure were not kept, was to use the monies donated for purposes other than those for which*

²⁵ *Lukuley* Judgment, para 53, pp. 23-24.

²⁶ *Lukuley* Judgment, para. 119, p. 46.

²⁷ *Lukuley* Judgment, para. 50, p. 21; "I adopt what I said in my Judgment (?) on the No-Case Submission at para. 7."

²⁸ Responses furnished by the Former Director of Prosecutions, ACC, Mr. Reginald Fynn, 5 June 2015; "I can only conjecture based on hints during trial (remember I tried this one) that it was a reference to the Sarah Bendu case. I was not involved in the latter so I cannot be absolutely certain."



they were meant."²⁹ Nearly 2 months later, in the Lukuley judgment of July 2011, an approximate statement was made by the same judge; "The only reason he could have flouted these regulations was because he needed to cloak the purpose of the expenditures with the clothing of benevolence to Parliamentarians."³⁰ This suggests the Accused violated FMR obligations to account with accuracy for expenditures by claiming the expenses were for Parliamentarians, as the claim is unsubstantiated by payment vouchers/receipts made out to them. The essence of this statement is that undocumented expenses often hide illegitimacies. Both statements suggest the emergence of a tacit yet compelling inference/rebuttable presumption of misappropriation where the facts are as such, as do the ABC and Lukuley verdicts and the verdicts in the FCC and Ken Gborie cases. This principle may well have influenced the Prosecution's case theory in the Daoh judgment of October 2013 where the Prosecution's argument that; *the circumstances indicated dishonesty since there is no other reasonable explanation of why senior officials will with such impunity avoid accounting for funds*³¹ was dismissed by judges, for reasons relating to prosecutorial diligence.³²

V. Re Governance: Firstly, pragmatism should dictate that budget headings be lucid and unambiguous and have annotated, clarification of terms and descriptions of activities that fall thereunder. Reg. 12 (1) FMR requires this, stating that the purposes of expenditure and the services to be provided under each head shall be outlined in a preamble to the head called; "The Ambit of the Vote." Reg. 12 (2) FMR also states that, no expenditure shall be charged to the head unless it falls within the ambit of the vote. The information in the judgment does not clarify how "Facilitation and Protocol" and "Community Relations" were explicated upon in the budget. The judgment suggests that the SLMA budget, especially the headings of "Facilitation" and "Community Relations" were approved because the interests of Parliament's members were catered for therein and that Parliament was cajoled into passing SLMA related laws.³³ The judgment necessarily implies the involvement of Parliamentarians in corruption by framing this case's facts (only implicitly), within the definition of corruption in s. 1 (1) ACA, since it juxtaposes the offer of an inducement as against budget heading approvals, essentially the exchange element in a corruption offence. S. 1 (1) ACA states; "Corruption means ... (a) any conduct whereby in return for an advantage, a person performs or abstains from performing any act in his capacity as a public officer." The scenario described by the judgment,³⁴ might well have been triable as an offence under the following ACA charges, the most fitting of which would have been, (in observance of the overloading principle), s. 34, ACA; Bribery of or by Public Officer to influence decision of public body, s. 46 ACA; Treating of public officer and s. 33; Corrupting a Public Officer. Other offences such as, s. 28 ACA Offering, soliciting or accepting advantage, s. 31; Peddling Influence, s. 35; Soliciting, accepting or obtaining advantage for public officer and s. 47; Receiving gift for a corrupt purpose, might also apply. The elements of offence for these charges appear to be very generally consistent with each other, i.e. an advantage is either offered or promised as an inducement or reward for an act/omission of a public officer, or sought by or on behalf of the latter for his act/omission. Only ss. 31 and 28 ACA make the coalescence of the offence contingent upon the offering or acceptance of an advantage which is without lawful authority or reasonable excuse. In this vein, Parliamentarians had already legitimized their receipt of advantages for statutory reviews and amendments that may have favoured the SLMA, so that any contestation of Parliament's corruption needs to be antecedent to the inception of legitimacy. In other words, the contested corrupt act here should ideally be Parliament's approval of a vague but promising budget heading. To avoid all this, vague budget headings should be struck out completely or alternatively, not construed to the benefit of Parliamentarians.

Secondly, note that under s. 11 (1) - (5) of the SLMA Act 2000, the SLMA controlled its own revenue and could self-finance. The SLMA amendment Act 2007 changed this by requiring that SLMA revenue be paid into the consolidated fund with the SLMA to be financed mainly by a parliamentary approved budget. However, in September 2008 responsibility for the freight levy collection was reinstated to the SLMA.³⁵ If however, the aforementioned vague budget headings made it past Parliament from 2008-2010, query the

²⁹ The ABC Judgment, p.29.

³⁰ Lukuley judgment, p. 32.

³¹ Daoh judgment, p. 24, para. 31.

³² See ABC case summary, V. Knowledge/Information Management, pp. 4-5.

³³ See FN 13.

³⁴ See FN 13.

³⁵ See FN 20.



SLMA's autonomous capacity for transparency/accountability if left to fully manage its own revenues, in the absence of any externally sourced procedural check. Thirdly, query the practice of indicating on payment vouchers that the payee is "cash" instead of naming the individual/institution, for the purposes of attributing responsibility.

VI. Information/Knowledge Management: Firstly, PW1's testimony that, she simply followed instructions from the ED, dutifully carrying out transactions on the items he put forward as long as they had been approved and that she had not got the power to challenge the ED, raises the need for a starker understanding by MDA staff members of the formal/official demarcation of their roles, responsibilities and those of colleagues with whom they directly interact. Secondly, PW1 acknowledged that the professional standards of an accountant applied to her position, but said she could not apply them in the peculiar situation in which she found herself. The question is then how to prepare staff to respond to situations where they are aware of the appropriate standards but feel their hands are tied and they cannot apply them.³⁶ Thirdly, s. 15 (2) (d) SLMA Act 2000 which makes the ED responsible for SLMA staff training and development based on guidelines approved by the Board also raises the question as to how practical provisions of this sort are, in situations where the very Vote Controller seeks to overstep his bounds, or co-opt the assistance of subordinates in his commission of corrupt acts. Lastly, as evinced by the review, the existing rules mostly address the issue of information management but are simply not being adhered to; for e.g., Lukuley failed to account for the disparate payments in spite of the requirement in s. 11(3) GBAA 2005 that every person who collects or receives any public moneys shall keep a record of receipts and deposits thereof in such form and manner as the Accountant General may determine.

MEDIA REVIEW: Coverage of the proceedings were factual and detailed. Opinionated coverage peaked at the indictment and verdict stages and the verdict was contextualized against preceding and succeeding ACC verdicts. The Lukuley verdict was deemed good PR against the Sesay public disappointment. In 2010, the press had reported of corruption involving Lukuley including his avoidance of procurement procedure to purchase an allegedly dilapidated search and rescue boat for Le 4.1 million. It was also reported that he had been earmarked by APC as an election candidate for Pujehun District in 2012, that he used Le 80 million to campaign under APC for Pujehun, that the Jetty project was being used for political campaigning and that he stole massive amounts of SLMA fuel. It was alleged that his political establishment connections helped veil his corruption, as with other corrupt civil servants, giving rise to politicized trials; contextualizing this again, against Nassit *ferrygate*, the Sesay and Kabba judgments, and the by then, investigations into the FCC Mayor and Administrator.

PRESS ARTICLES REVIEWED:

Unnamed, (2011), *Philip Lukuley convicted on 13 counts charge*, The Patriotic Vanguard; <http://www.thepatrioticvanguard.com/philip-lukuley-convicted-on-13-counts-charge>

Tam Baryoh D., (2010), *Who Will Tell the President the Truth?*, Newstime Africa; <http://www.newstimeafrica.com/archives/12176>

John S., (2011), *Lukuley Granted Le500m bail*, Awoko; <http://awoko.org/2011/02/04/lukuley-granted-le500m-bail/>

Kamara A., (2011), *First witness testifies in Lukuley case*, Awoko; <http://awoko.org/2011/03/07/first-witness-testifies-in-lukuley-case/>

Unnamed, (2011), *Where is Philip Lukulay of Maritime fame?*, Sierra Express Media; <http://www.sierraexpressmedia.com/?p=25075>

Unnamed, (2010), *President Koroma Caught in his Own ABC Trap*, Silaspunch's Blog, <https://silaspunch.wordpress.com/page/2/>

³⁶ See Snapshots: Section I., on IM and KM, which refers to the possibility of staff training via use of role playing exercises.



*THE FCC CASE (FCC
MAYOR)*



The Freetown City Council (FCC) Case/The State v. Herbert Akiremi George Williams, Bowenson Frederick Philips, Sylvester Momoh Konehni, Arthur Kwesi-John, Desmond Thomas, Franklyn Garber, Alimamy Turay, Aiah Brimah, Mohamad Allie Shaaban before Hon. Mr. Justice JBA Katutsi
10 August 2012

FACTS: Count 1 charged Williams, the FCC Mayor and Philips the Chief Administrator under s. 128 ACA 2008, with conspiring with persons unknown, to misappropriate Le744,450,000 by hosting a 2 day musical concert. Counts 2 to 7 charged Williams, Philips, Konehni, the acting treasurer, Kwesi-John, Deputy Chief Administrator under s. 48 (1) ACA with failing to pay PAYE tax to the NRA totalling Le 430,412,642 in 2009 and 2010 and charged the four for failing to pay NASSIT¹ contribution for FCC staff of Le106,627,188 in 2010. Counts 8 to 9 are charges of misappropriation under s. 36 (1) ACA. Count 8 charged Williams, Philips and Thomas, head of Cashier's office, with misappropriation of market dues of Le55, 589,100 in 2009. Count 9 charged Williams, Philips and Thomas with misappropriation of municipal licences fees of Le24, 317, 300 in 2009. Count 10 charged Turay, FCC Municipal Trade Officer, with misappropriation of market dues of Le22, 470,000 in 2009 and 2010. Count 11 charged Williams with misappropriating Le10, 000,000 from FCC's *Skye Bank* account in 2010, purporting to be payment "in respect of" *Morgan Heritage* Concert. Count 12 charged Brimah, the Development Planning Officer with misappropriating in May 2009 Le9, 800,000 purporting to be payment for councillors' needs assessment. Count 13 charged Garber, FCC civil engineer, with misappropriating in 2009, Le9, 225,000 purporting to be payment for rehabilitation work at Hargan Street. Count 14 charged Brimah with misappropriating Le2, 815,000 purported to be DSA for participants at a retreat. Count 15 charged Williams, Philips and Thomas with misappropriating Wharf Landing fees of Le2, 063,400 between October and December 2009. Count 16 charged Williams, Philips and Kwesi-John with misappropriating Le400, 000,000 purporting to be NPA payment for electricity, in 2009. There is no indication of count 17.Count 18 charged Williams with misappropriating \$9000 purporting to be payment for *Morgan Heritage's* excess baggage between 2010 and 2011. Count 19 charged Williams with misappropriating \$10,000 drawn from FCC's Sierra Leone Commercial Bank (SLCB) account, claimed to be payment for the *Morgan Heritage* concert. Count 20 charged Williams, Philips and Konehni with misappropriating Le79, 980,000 supposedly for relocation of evictees from the site for a shop centre, Fisher Street. Count 21 charged Shaaban, a businessman, with misappropriating Le800, 000,000, purported payment for construction of the shop centre, Fisher Street. Count 22 charged Williams and Philips of misappropriating in 2009, Le13, 442,500 purporting to be payment made to Zenobean Enterprises for swivel chairs. Count 23 charged Williams and Philips of misappropriating in May 2009, Le7, 640,000 purporting to be payment made to one Ibrahim Kamara as incentive for the Revenue Enforcement Team. Count 24 charged Williams, Philips, Konehni, and Kwesi-John under s. 48 (2) (b) ACA with wilfully failing to comply with the procurement procedure for services in contracting the services of *Morgan Heritage* for \$130,000 for a 2 day concert. Count 25 mirrors 24, but only concerns Williams and was for the services of *Rugged Musical Set* contracted for \$35,000.

JUDGE'S REASONING: Count 1 is dismissed since conspiracy charges must not prejudice the Defence; *Verrier v. DPP (1967) 2 AC 195*, likely to occur here since the Prosecution admitted to charging conspiracy under the wrong section. They argued that was remediable under s. 148 (1) CPA which permits the Court to order amendments *but since the section charged never did create an offence, it could not now be amended to introduce an offence never part of the committal proceedings.*² It's also inadvisable to charge a conspiracy where the supporting evidence is simply evidence of the actual commission of substantive offence (s) charged; *State v. Foday Bangura Mohammad.*³

Counts 2-7, the NRA and NASSIT charges fail since ACC prosecutions are not part of the enforcement mechanisms in their governing statutes. S. 48 (1) (d) ACA criminalizes failure to pay taxes, levies, charges, which NASSIT *social security* contribution does not qualify as. Re PAYE tax, the ACC only need become

¹ National Social Security and Insurance Trust.

² On a direct counterpoint to this angle of reasoning, see Snapshot **III**, p. 1, notably, heading **1. Conspiracy: A. Pleading**, for the findings in *Ken Gborie* and *Katta*, (where the same drafting error was made), that the ACA simply imported preexisting Common Law offences, that the Accused was not prejudiced in his Defence since he must have understood the charge of Conspiracy in order to have pled to it and that s. 148 (1) CPA1965 makes such amendments possible.

³ *Ibid*, for a direct counterpoint. See notably, pp. 2-3.



involved where there is corruption and would need to establish the Accuseds' responsibility for payment of taxes and failure to pay, due to fraudulent or unlawful reasons. The governing statutes⁴ do impose an obligation on the "employer", here the FCC, to remit sums withheld from employees. The employer is a legal person acting through human agents, but all 4 Accused could not simultaneously have been agents. There had to have been one agent whose responsibility it was to act. However, like other MDAs, the FCC, had set up a payment plan with the NRA in 2011 due to financial constraints so that failure to pay was not unlawful or fraudulent. Further, no evidence indicates that the monies withheld from FCC staff salaries left the FCC coffers. Therefore, the FCC appears to have been selectively targeted for prosecution.

Count 8-9 and 15, the charges of misappropriation of market dues, municipal licences and wharf landing fees fail. The procedure is for revenue collectors to normally take cash to audit dept. for verification resulting in a stamped analysis form, before paying money at the cashier's, where receipts are issued to them. An internal audit revealed that the receipts issued by the cashier's office for market dues and municipal license tallied with the daily collection analysis form, but the audit identified discrepancies worth Le2, 630,400 between monies collected⁵ and paid into cash office *and* the amount registered by the cashier in the cash and deposit register, concluding that this was due to the cashiers and revenue collectors. It recommended frequent, on the spot checks to ensure transparency in the cash office and that Williams and Philips ensure that the money be retrieved from the parties concerned, but the FCC did not act on these recommendations. The audit report's author⁶ agreed it was a draft. The external audit found inadequate control over revenue collection and reporting, and a discrepancy of Le 60,748,000 between daily market dues collection sheets/record of the supervisor and receipts for the period of January to December 2009, later stated to be Le60, 821,700, but made no findings on municipal licence fees and wharf landing fees. The FCC responded to the external audit saying that its finding could be due either to leakages in revenue collection, or to duplicative calculations. The Court reasoned that Williams as Mayor had nothing to do with the collection of all these fees. His duties under s. 11 (3) (E) Local Government Act (LGA) 2004, to "*ensure that the financial affairs of the local council are properly managed and controlled*", cannot extend to revenue collection and discrepancies in financial records. Philips, Chief administrator under s. 31 (4) (a) LGA was "*responsible for financial and resource management and daily administration*" and under s. 31 (5) LGA, was to "*ensure accountability and transparency in the management and delivery of the local council's service.*" Under s. 33 (2) LGA, FCC staff were responsible to him. Philips was not however interviewed about market dues, municipal license fees or wharf landing fees. He played only administrative roles in revenue collection and although he did sit on the external auditors' recommendation, it is not beyond a reasonable doubt that this inaction was covered by s. 36 (1) ACA. The Prosecution contended that Thomas, as Head Cashier was responsible for collecting revenue from revenue collectors, but since PW11 admitted to inconsistencies in his report⁷ and stated that the receipts for market dues and municipal licenses tallied with the daily analysis form, Thomas is given the benefit of the doubt.

Count 10 is upheld against Turay. Uncontroverted evidence showed that ticket books worth Le22, 470, 000 were issued to him and the internal audit found that they were not recorded into the market fees issue ledger. Yet still, Turay refrained from commenting on the audit conclusion which was adverse to his case. Where the evidence is adverse to the Accused and where he does have evidence, he should provide his own account, his right to silence notwithstanding. Since Turay did not account for ticket books issued to him, he is deemed to have caused the FCC to be deprived of revenue.

Count 11 is dismissed. The relevant cheque was signed by Williams, Philips and Konehni, but no expenditure voucher was drawn up for it. The Accused's evidence was uncontroverted and supported by

⁴ The NRA and NASSIT Statutes.

⁵ Presumably, the records employed here to indicate the amount collected, would be the daily collection analysis form and the receipts issued by the cashier, since these are the sources of data the internal audit first refers to and since the judgment mentions no other such record employed by the internal audit; the FCC case, p.18. See also Snapshot IV, pp. 27 and 28. Notably, heading 2. Modes of Control: G. Audits.

⁶ PW11, Abdul Karim Fofanah.

⁷ PW11 may have admitted to inconsistencies in his report but never admitted that the two of his findings discussed by the Court contained inconsistencies or were inconsistent with each other. See also Snapshot IV, final para., p. 30. Notably, heading 2. Modes of Control: G. Audits.



PW7's testimony that, Williams spent the Le10, 000,000 that she handed to him on the hiring of a crane, fuel and local artists. PW2⁸ confirmed Williams' evidence that PW2 was given money to pay for a generator; Le800, 000 according to PW2. Also, there was a fuel receipt for Le 1,760,000 in the ACC's possession.

Count 12 is upheld against Brimah. Apart the cheque and the payment voucher, other supporting documents were not provided to Audit Service SL upon its request for all unsupported payments relating to this sum. FCC management told auditors that the absence of supporting documents may have been due to inappropriate archiving system and movement of documents. Brimah's witness⁹ was deemed of dubious credibility since he testified to being paid public money without signing for it.

Count 13 is upheld against Garber. His withdrawal of Le9, 225,000 from the FCC account is evidenced by a cheque in his name supported by a payment voucher but there are no documents supporting further expenditures. Audit Service SL asked for supporting documents for this and other unsupported expenditures, but received none. Garber's caution statement does not address how it was spent. The Prosecution proves its case through Garber's failure to account.

Count 14 fails. Brimah withdrew Le46, 672, 000 from the FCC account evidenced by a cheque in his name with ID attached, from which according to the budget for the "*sectoral planning retreat*", Le26,025,000 was meant for DSA for 78 participants for 3 days. The ACC contends that the list of participants who signed for the receipt of DSA indicates that Brimah only spent Le23, 210,000 on DSA, with an unspent Le2, 815,000 going unaccounted for. The Court queries the accuracy of this, given the ACC investigator's¹⁰ misstatement that Le46, 672,000 was meant as DSA. Since there was no other independent evidence of an auditing nature to support the ACCs claim, the Prosecution fails to meet its burden of proof.

Counts 16 and 17 fail. They were not withdrawn on the Prosecution's request, (in their realization that they were unsubstantiated), given the late phase of the proceedings and interests of justice.

Count 18 the excess baggage charge fails. The contract stated that *Morgan Heritage* should be reimbursed upon presentation of airline receipts for excess luggage. The Defence did not tender these receipts in Court but instead tendered a chit written and signed by Albert Cook¹¹ on behalf of *Morgan Heritage* claiming \$9000 as payment for "*backline rental*" and excess baggage. The Prosecution adduced a copy of a BMI audit coupon for \$480 for excess baggage issued in the name of Mr. M. Morgan for flights from Freetown to eventually Miami on 1 January 2011. PW3 testified that M. Bah, an FCC official told him that he'd personally paid Cook the equivalent of \$9000 and gave him a receipt allegedly signed by Cook, which the ACC contends is fake but fail to prove beyond reasonable doubt. All the Defence has to do is to raise the issue warranting reasonable doubt.¹² The Prosecution failed to call the FCC Accountant, listed as its witness, entitling the Court to presume that his evidence was adverse to the Prosecution. Since the Prosecution fails to prove its case, the Accused have simply been given the benefit of the doubt.

Count 19 the charge against Williams of misappropriating \$10,000 fails since the cumulative effect of the evidence on record does not conclusively point to William's guilt and he is entitled to the benefit of the doubt. Williams explained that he paid \$4000 for *Rugged Musical set*, \$5000 to Albert Cook and another \$1000 as per diem to *Morgan Heritage*; expenditures unsupported by documentation. In testifying, Williams said PW7¹³ gave him the proceeds of the request for payment, a fact that she, PW7 confirmed. She said that from this, \$4000 was paid to *Rugged*, \$5000 was paid to Cook for a mini-concert held at Lagoonda, since PW8¹⁴ could not pay then, although he later repaid the FCC. PW8 himself confirmed this saying it was the FCC treasurer who made the payment. PW3 identified the receipt from PW8 allegedly issued by Cook for the \$5000 but said he couldn't tell whether or not that \$5000 came from the \$10,000 allegedly

⁸ Suleiman Bah.

⁹ Alusine Allieu. The *FCC* case, p. 21: "*the Accused had elected to give evidence, when it came to his turn he changed his mind.*"

¹⁰ PW3, Maada Konneh, ACC Investigator.

¹¹ Cook received payments made out to *Morgan Heritage* but there's no description of his role in relation to *Morgan Heritage*, except to say that he collected payment, "*on behalf of Morgan Heritage*"; the *FCC* case, p. 25.

¹² A reasonable doubt as to the Accused's guilt is raised here by the Defence adducing evidence of a chit signed by Cook purporting he was paid \$9000 for *Morgan Heritage*.

¹³ Fatmata Mamadi Kanneh, Senior Administrative Officer.

¹⁴ Mr. Emile Carr, presumably of Lagoonda.



misappropriated by Williams. The Court reasoned that PW3 simply ignored a very important document that he was confronted with and that it was unclear why he did so. Williams claimed that a receipt addressed to him for \$11,000 paid to *Rugged* includes \$4,000 sourced from the \$10,000, the subject of count 19.¹⁵ The receipt indicates the \$11,000 was itself part payment for hire of musical equipment totalling \$35,000 for the concert and indicates a balance of payment remaining of \$24,000. The Court reasoned that this detailed receipt was not followed up by the ACC.

Count 20, the relocation charge fails. The Ministry of Trade and Industry provided the FCC with Le879,980,000 for constructing a shop centre at Fisher Street. Le800,000,000 was given to *Waka Fasta* Construction company, out of which Le40,000,000 was income tax. Le 79,980,000 was meant for paying squatters. The ACC argued that Williams, Philips and Konehni were the signatories to all FCC accounts but unable to explain what happened to the Le79, 980, 000 suggesting that the Accused had the burden of proving their innocence. In contrast, Williams testified that the Le79, 980,000 was never withdrawn from the FCC account and the FCC account statement of 1 April to 30 November 2010 showed no withdrawal of Le79, 980,000.¹⁶ PW3 said tenants and squatters still occupied the market, that construction had not yet commenced and that although the Ministry of Lands had to provide land for relocation, the evidence indicated that the FCC did not pay the Ministry of Lands for squatters. Count 21, the *Waka Fasta* charge, fails. Shaaban was paid Le800 million as advance payment from a contract worth Le3.4 billion, and which was inclusive of Le40 million as withholding tax. At the time these charges were preferred, Shaaban had not constructed the shop center because the site was still occupied by squatters and tenants. The ACC misappropriation charge here even comprised the tax deduction. A minister's ordering Shaaban to return the money including tax is unlawful and violates the spirit of *laissez-faire* since the latter was simply engaging in lawful business. This incident concerns the law of building contracts and does not concern the ACC.

Count 22, the swivel chair charges fail. The local purchase order in evidence was worth Le14,150,000 but ACC claim the chairs were never purchased or delivered. PW6¹⁷ testified that on his assumption of duty he received no records of goods supplied to the FCC before he started, but that he eventually found the items in the store, of which he identified photos. The ACC could also have used s. 56 (1) (A) ACA to summon staff of Zenobean Enterprises to confirm this supply.

Count 23, the incentive charge fails. The cheque and payment voucher indicate payment to Ibrahim Kamara¹⁸ as incentive for Revenue Enforcement team, but the ACC claim this was a scheme for misappropriation and that Williams was obligated under s. 11 (3) (e) LGA, to properly manage and control the FCC's financial activities including revenue collection. Ibrahim Kamara's interview statement to PW3 confirmed that the FCC decided to give incentives to revenue collectors and PW3 testified that the list of recipients' signatures¹⁹ indicated the money was an incentive. Both PW7 and PW11, a Prosecution witness deemed credible by the Court, confirmed that the FCC decided to provide incentives for revenue collectors. PW11 says he signed the document for receipt of Le100,000. Hence, the Prosecution witnesses' testimonies favoured the Accused. Even PW3 admitted that there was no evidence supporting count 23.

Count 24, the procurement charge concerning *Morgan Heritage* succeeds against Williams, Philips and Konehni and fails against Kwesi-John. Count 25 the procurement charge concerning *Rugged* succeeds against Williams. The *Morgan Heritage* concert was to provide revenue for buying school buses but it ended up losing Le744,450,000 of taxpayers' money. Procurement activities are daily administered by the FCC procurement unit (PU), under which is found the procurement committee (PC)²⁰ and the procedure for procuring services depends on the threshold. In an emergency, a written request justifying the urgent provision of the services sought, is made to the NPPA²¹ to waive the standard methods. Muhamad John

¹⁵ Exhibit DD1-2 is a request for payment of the \$10,000, although the Court does not make clear whether this request spells out the use to which the requested funds would be put to; the *FCC* case, p. 26.

¹⁶ A more recent statement does not appear to have been adduced; judgment delivered in August 2013.

¹⁷ Sahr John Allieu, FCC Store Keeper.

¹⁸ FCC employee, Member of Team of Revenue Collection Officers; the *FCC* judgment pp. 30-31.

¹⁹ Although Ex QQQ 1-5 is not described in so many words in the judgment, PW11 states at the *FCC* judgment p. 31: "*This is Ex QQQ (...) I am looking on page 1 (...) There is my signature next to my name, yes I signed acknowledging receipt of Le100, 000.*"

²⁰ The *FCC* judgment, p. 32.

²¹ National Public Procurement Authority.



Musa²² confirmed that he told the FCC that the *Morgan Heritage* Concert was a service. Yet, Williams and Philips, despite knowing of the FCC procurement process, ignored it in actively procuring the services of *Morgan Heritage*. The head of the FCC PU²³ testified that the PU was not consulted for either the *Morgan Heritage* or *Rugged* contracts. Philip's letter told Williams that the FCC could not afford to pay \$91,000 to *Morgan Heritage* and to revert to their deposit at Crown Agent Bank, UK for this and to refund that account upon receipt of sponsorship funds. It is beyond a reasonable doubt that *Morgan Heritage* was invited by Williams and Philips and that neither the FCC PC nor NPPA were involved in this venture. Konehni is implicated since along with Williams and Philips, he signed the request addressed to Crown Agents for them to transfer \$91,000 to the FCC. Further, Williams single-handedly secured the *Rugged* Contract costing \$35,000. The Prosecution proved its case against all but Kwesi John against whom there was insufficient evidence.

VERDICT: Williams is convicted on counts 24 and 25 and fined Le 170 million. Philips and Konehni were both convicted on count 24 and fined Le 120 million each. Garber is convicted on count 13 and fined Le10 million. Turay is convicted on count 10 and fined Le25 million. Brimah is convicted on count 12 and fined Le 10 million. Failure to pay all fines within 1 month would result in a prison term of 3 years. Kwesi-John and Shaaban are acquitted of all charges. All other counts fail.²⁴

APPLIED LAW: S. 36 (2) (74) of the Court's Act No. 31 of 1965 provides that subject to the provisions of the Constitution of Sierra Leone and any other enactment, the Common Law, the doctrine of Equity and the state of general application in force in England on the 1st day of January 1880, shall be in force in Sierra Leone. The essence of conspiracy is an agreement between two or more persons to carry out their criminal scheme; *Mulcahy v. R (1868) L.R. 3 H.L. S. 148* (1) CPA permits the Court to order an amendment of charge at any stage of the proceedings. A charge should not be amended/"included" if it leads to unfairness to the defence; *Verrier v. DPP (1967) 2 AC 195*. It's inadvisable to charge a conspiracy where the supporting evidence is simply evidence of the actual commission of substantive offence (s) charged; *State v. Foday Bangura Mohammad*.²⁵

The Prosecution carries the burden of proof beyond reasonable doubt with a few exceptions. This burden means that proof need not reach certainty, need not be beyond the shadow of a doubt, but must carry a high degree of probability and "doubt" does not accommodate remote possibilities in favour of an Accused; *Miller v. Minister of Pensions (1947) 2 ALL E.R. 332*. Doubt warranting an acquittal must be rational and not stemming from timidity, passion or influence.²⁶ The Accused does not bear the burden of proving his innocence. He who alleges must prove that which he alleges. The Prosecution must stand or fall by its own case so that where its own witnesses provide evidence adverse to its own case it is particularly salient.²⁷ If a party fails to call a witness they would have otherwise called, the Court can presume that that witness was not called because its evidence was adverse to that party.

Misappropriation under s. 36 (1) ACA occurs where a public body is deprived of any revenue, funds or other financial interest or property belonging to it by the wilful act of a public official acting by himself or with or through another person. The state of mind required by the law, wilfulness, should be directed at that particular act that constitutes the crime. The Prosecution therefore must prove intent and actual commission of the intended act.

The effect of s. 48 (2) (b) ACA is to criminalize the non-observance of rules governing the disposal and general treatment of public revenue/property by persons whose functions entail the exercise of various modes of access to, and generally control of, such public revenue/property. The Accused under this section must be a person whose functions concern a.) The administration b.) The custody c.) Management d.) Receipt e.) or Use, of any part of public revenue/property. This provision also criminalizes the non-

²² NPPA Member/Employee.

²³ Fudie Jangah Komeh.

²⁴ The *FCC* judgment, p.19 states that Thomas is acquitted; however, p. 34 states that he is convicted of count 8. He appears to have been acquitted since there is no mention of him in the Sentencing Judgment, 15 August 2012.

²⁵ See **Judge's Reasoning** above at p. 1 for a discussion of the law on Conspiracy.

²⁶ The *FCC* judgment, p. 11.

²⁷ The *FCC* judgment, p. 21; "Prosecution must stand or fall by the evidence of their own witness."



observance of applicable procurement procedures. This non-observance should be accompanied by a wilful or negligent frame of mind. Re counts 2-7, charged under s. 48 (1) (d) ACA, note that "*fraudulently*" means to dishonestly take the risk of prejudicing another's right and that "*unlawfully*" means acting without lawful justification or excuse.

ANALYSIS: I. Case preparation: *1. Non-exhaustive investigative/prosecutorial techniques:* Out of the 25 counts/charges here, 6 succeeded against 7 of the 9 Accused. 19 charges were brought against Williams, with 2 succeeding, counts 24 and 25; 15 charges against Philips, with 1 succeeding, counts 24; 6 against Konehmi, with 1 succeeding, count 24; 6 against Kwesi-John, which all failed; 3 against Thomas, which all failed,²⁸ counts 8 and 2 against Turay, with 1 succeeding, count 10. The *FCC* case perhaps best exemplifies the finding "*Non-exhaustive investigative/prosecutorial techniques.*" Botched outcomes apparently stemmed from the pre-trial phase. But for 3 instances of mainly legal defects (Conspiracy, NASSIT and NRA charges), all failed counts inhere evidential lapses. Analysis of these lapses as per the count through the dual prisms of failures to exercise investigative and prosecutorial diligence would be repetitive; both are present across most of the failed counts. For clarity, the lapses may be analysed via 4 cross-cutting factors; 1.) the preferment of charges with little or no supporting evidence; 2.) the preferment of charges with some evidence which failed to meet the reasonable doubt standard; 3.) the provision by prosecution witnesses of evidence supporting the Accused; 4.) apparent imperfect sculpting of the charges. *All 4* categories underline that investigative and evidence analysis methods apparently tended to be inadequate while the 4th category bears pertinently on the drafting of the charges and crafting of the prosecution case theory.

Counts 2-7, 16-17, 20-23²⁹ falls into category 1; it's puzzling how charges could have been proffered in such circumstances especially where even ACC investigators testify in support of this void, see PW3's testimony under counts 20 and 22. Counts 8-9 and 15, 14, 18, fall into category 2. Re categories 1 and 2, query the Prosecution's yardstick for pre-trial evaluations of the sufficiency of evidence for trial, against what is known of the Defence case.³⁰ Re category 2, the failure to meet the standard of proof appears to result from failure to diligently investigate/pursue all discernible leads:³¹ in counts 8-9 and 15 the Prosecution did not pre-empt queries about the discrepancy between the audit findings, it did not adduce audit findings supporting count 14, did not call as witnesses persons appearing to have crucial information on count 18 and made no attempts to disprove the receipt authenticating the contested expenditure. Re category 3, the failure to uncover that its witnesses had evidence supporting the Accused despite interviewing them inheres a lack of both prosecutorial and investigative diligence, seriously calling into question the adequacy of witness prepping by the Prosecution.³² Category 4 can be further subdivided into; A.) Flawed drafting; B.) Inexhaustive conceptualisation of the applicable law.³³ Count 1 clearly falls into group A. Counts 2 to 7 fall into category 1 and into both groups A and B of category 4. Counts 8 - 9 and 15 fall into group B. Inexhaustive conceptualisation of the underlying legal groundwork and mechanics for prosecuting certain acts, may tend to lead to category 2 situations; a case with *some* supporting evidence, but failing to meet the reasonable doubt standard.

- **On Category 4**

Counts 8-9 and 15 charged Williams, Philips and Konehmi with misappropriation for shortfalls in revenue collection. On a general, practical level, these charges raise the following issues: "*indirect perpetration*" of a crime, which in turn raises issues of superior responsibility/liability, causation/attribution of fault, the existence of obligations to act, (which could have been fleshed out by referring to Due Diligence (DD)

²⁸ Some haziness here. The *FCC* judgment, p. 19, says Thomas was acquitted whereas p. 34 says he was convicted, but the FCC Sentencing Judgment does not mention him.

²⁹ Reference **Judge's Reasoning** section above for clarification.

³⁰ See also Snapshot **II**. Notably, heading **1. Non-Exhaustive Approaches to Securing Evidence A. General**, see, 1st para. p. 3, making the point that a prosecution should not be brought where there is no reasonable prospect of a conviction. The Prosecutor must objectively assess whether the evidence disclosed a prima facie case i.e. was of such sufficiency, admissibility, substantiality, credibility, reliability that a judge would conclude that the Accused was guilty beyond a reasonable doubt. Reference sources making this point at, FN 9 of p. 3, Snapshot **II**.

³¹ See Snapshot **II**. Notably, heading **1. Non-Exhaustive Approaches to Securing Evidence A. General**, see specifically pp. 1-2.

³² See **II. 1. Non-Exhaustive Approaches to Securing Evidence B. Inadequate Witness Preparation**, p. 4.

³³ Both limbs of Category 4 correspond to Snapshot **II. 2. The Defective Framing of Charges** and **3. The Failure to Hone in on the Crux/ Potential Trial Clinchers**, pp. 4-6.



notions)³⁴ and a failure to perform them/omissions. Primarily, the Prosecution must on the basis of at least the most fundamental/rudimentary facts, properly conceptualise the legal basis of the case. Based on logic and intuition, legal concepts are selected that would frame the circumstances as clearly criminal. It's submitted that exhaustively conceptualising the case, may mean understanding the correlation and interaction between relevant, possibly different sources and concepts of law inter se and in relation to the facts. The Prosecution naturally fits legal concepts together appropriately to produce the desired/most plausible case theory; "good law." Doing so enables evidence seeking efforts to be channelled productively and not dispersed disparately to support the legal limbs of the case as identified. Naturally, the conceptual/legal basis of case is progressively re-crafted where the evidence anticipated is absent or the evidence uncovered affects and alters the conceptualisation.³⁵ In sum, 1.) The case must be clearly and it submitted exhaustively conceptualised 2.) The conceptualisation must be clearly articulated between all relevant team members (investigators, prosecutors etc.) 3.) The conceptualisation should be committed to memory as far as is possible, as a step-by-step process and reiterated, so that it serve as an overall guide to efforts. It is submitted that although the verbal economy required at trial may not accommodate the employ of conceptual aids (see below) in Prosecution submissions, the use of such aids may well be helpful to the Prosecution in the interests of clarity of vision and the re-assessment of its own tack.

▪ **Conceptual Scheme I:** Here, presumably the Accused, not the direct perpetrators, were charged for challenges in identifying the direct perpetrators and/or for policy reasons, including the promotion of efficient organisational management. The exercise of establishing criminal culpability is threefold;³⁶ the establishment of a legal obligation, a breach of that obligation and the clear identification of fault on the part of the Accused causing that breach. There is no doubt that the obligation to not dishonestly deprive a public body of public funds exists, evidenced in the fact of any contrary conduct being criminalised; s. 36 (1) ACA. The breach/the existence of a fact contrary to that obligation, is in the (dishonest) loss/deprivation to the public body of public funds. Here, efforts to prove the loss/deprivation may have evinced lapses; the Prosecution, true to its burden, could have pre-empted the Court's contestation of the lack of direct correspondence between the audit findings it adduced indicating losses in revenue collection, by explaining their interrelation and background.³⁷ Diligent prepping *might* also have prompted explanations that the inconsistencies in PW11's report did not affect its findings. Proving fault/responsibility for causing the loss/deprivation, means proving that the Accused committed the unlawful act³⁸ with an unlawful frame of mind;³⁹ Misappropriation is defined as acting willfully and with dishonest intention to deprive a public body of public funds.⁴⁰

⇒1.) Possession of the Unlawful Frame of Mind: Fault/responsibility for causation bears most pertinently on the unlawful frame of mind.⁴¹ The unlawful frame of mind for misappropriation under s. 36 ACA is wilfulness which as per case law comprises both intention and recklessness. However, since case law also requires the Accused to have acted with dishonest intention to deprive the public body of public funds, it is submitted that the recklessness limb of wilfulness cannot apply to misappropriation. The requirement for a dishonest intention best encapsulates the illegitimacy of the Accused's act/omission, since dishonest

³⁴ Due Diligence may have differing statutory definitions, but under Common Law is generally the exercise of a standard of reasonable prudence, responsibility, consistency, vigilance, advertence, thoroughness, attentiveness or care that would avoid a claim of negligence. It is a *fair attempt* that is expected from, and ordinarily exercised by, a reasonable and prudent person under the circumstances, or the verifications and precautions taken to prevent foreseeable risks; *Perry v. Cedar Falls, 87 Iowa, 315, 54 N. W. 225; Dillman v. Nadelloffer, 1G0111*. It operates in both civil and criminal negligence cases. As to why DD obligations (in Negligence) could be referred to, see the arguments below.

³⁵ See Snapshot II. Notably, heading 1. Non-Exhaustive Approaches to Securing Evidence A. General, last para., p. 3.

³⁶ Reference Superior Responsibility in International Criminal Law, see. art. 28 ICC Statute which sets out a similar 3 step procedure to establishing liability; obligation/authoritative position of Accused, actual or constructive knowledge about the misdeeds of subordinates and omission to take necessary and reasonable measures to prevent/ punish these subordinates.

³⁷ Part of the basic, "know your facts!" obligation.

³⁸ See Lukuley judgment interpreting s. 36(2) ACA and citing in support, *Gomez [1993]1 All ER 1 HL* and *Gosh [1982] 2 All ER 689*: "acting (...) to deprive (...)." In other cases, this requirement for dishonest intent is expressed in the requirement for dishonest appropriation.

³⁹ Ibid; "(...) Willfully and with dishonest intention (...)."

⁴⁰ Ibid.

⁴¹ "The most culpable mens rea elements (are...) foresight and desire on a subjective basis"; Unnamed, (2016), https://en.wikipedia.org/wiki/Criminal_negligence. In other words, intent and knowledge.



intention suggests that the misappropriation is done (maliciously) to the personal benefit of the Accused or another.⁴² Although the Accused's omission here may have effected a deprivation to the public body of public funds and may have amounted to an unlawful interference with public body's rights over public funds, the judgment showcases no evidence of the Accused's omissions inhering a dishonest intention. Although not addressed by the Court, this determination would ordinarily have been the clincher; a factor which if well-considered may have altered prosecutorial emphasis.

Insights into constructs of personal liability would have revealed the need for *focusing more on proving dishonest intent*. To have framed the charges in terms of criminal omission/s, stemming from obligations to act so as to avoid undesirable outcomes, mirrors similarly framed DD obligations.⁴³ Yet, DD is a defence countering allegations of Negligence (failure to exercise a duty of care to avoid the materialisation of obvious risk), by asserting that the Accused did exercise a reasonable standard of care (take all reasonable steps/precautions to avoid...) Negligence, (i.e. conduct which is carried out in spite of/in ignorance of a risk which would have been obvious to the reasonable person), parallels one form of recklessness, *Caldwell recklessness*, acting while failing to see a risk which the reasonable person would have.⁴⁴ Contemplating these concepts would have underlined that the Prosecution's case was structured so as to meet the recklessness limb in the wilfulness requirement in s. 36 ACA, rather than the requirement for *dishonest intent*, which it is submitted is the rightful standard, articulated in key authorities on misappropriation;⁴⁵ **thinking of the law in these terms would have driven home the critical need to adduce evidence of dishonest intent.**

For both recklessness and intention, it would have been necessary to trace/chart the hierarchy/chain from direct perpetrator to Accused and *evidentially*, the nature of the *relevant* interaction between all the offices in between, to understand the *informational flow*. It may be more practical to try more "nearly situated" superiors, since the more removed a superior is from the direct perpetrator, the more arduous the evidential burden. Recklessness⁴⁶/intention could also be proved by adducing evidence of "good", legitimate, longstanding and standard practices obtaining under the Accused's predecessor/s, which may have obtained under the Accused also and which align with their legal obligations. This would establish legitimate expectations regarding the Accused's conduct and the obvious nature of the risk regarding which they were inadvertent, or which they must have intended. Recklessness/intent require proof that the Accused had the opportunity to gain knowledge and to act. Secondly, the knowledge requirement is necessarily twofold; 1.) The awareness of the Accused that he should exert control/supervision over subordinates 2.) The awareness of the Accused of risk/likelihood of shortfalls in revenue collection if he did not.⁴⁷ Recklessness/intention could however possibly be disproved by uncovering an information block, absolving the Accused of any culpable mindset. Inasmuch as the evidence adduced in support of intent tends also to lend itself to support of recklessness, the two frames of mind are clearly distinct. Further, dishonest intent goes beyond an intent to effect the circumstances intrinsic to the crime, since it involves an intent to act dishonestly. **Exhaustive conceptualisation would have meant contemplating these concepts and employing them if necessary as cognitive points of reference.**

⇒ 2.) The Unlawful Act: The Prosecution did not allege that the superiors' positive act caused the offence, but alleged the Accused's failure to exercise the requisite level of what was essentially, *control and supervision* over the activities of subordinates, (i.e. an omission), grounding the Accused's obligations to act in the LGA 2004. Therefore, the Prosecution had to prove that the offence of misappropriation was committed/caused through *the mode* of an omission, a failure by the Accused to fulfil the aforementioned

⁴²By analogy Fraud under US law is an offence characterised not by negligence but by intent; Pickholz M. G. and Pennisi M. C., (2012), *Defining and Re-Defining Due Diligence: In Search of a Standard*, NYSBA Inside, Vol. 30, Issue 38, http://www.duanemorris.com/articles/static/pickholz_pennisi_nysba_win12.pdf

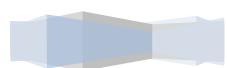
⁴³ See FN 34 above.

⁴⁴ *R v. Caldwell [1982] AC 341*. The contrasting objective standard of recklessness is Cunningham Recklessness; *R v. Cunningham [1957] 2 QB 396*.

⁴⁵ Ibid at FN 40; "Acting wilfully and with dishonest intention to deprive."

⁴⁶ For the purposes of this argument, recklessness and negligence are both conceived of in terms of inadvertence of obvious risk.

⁴⁷ Negligence standards for example require simply the exercise of precaution sufficient to prevent the foreseeable; *R v. Steinberg's Ltd. (1976)*, 26 C.P.R. (2d) 109.



obligations. Again, it is submitted that although this was neither a civil or criminal negligence claim,⁴⁸ **simply contemplating DD notions**⁴⁹ would have guided the Prosecution in more precisely defining the Accused's obligations to act by identifying concrete actions, beyond the broadly and vaguely framed LGA provisions; "ensuring proper management and control of financial affairs," "responsibility for resource and daily management," "ensuring accountability and transparency in the management and delivery..."⁵⁰ The ACA is not any more explicit about the actions the Accused should have taken since it is a charging statute, criminalising certain conduct/acts and mainly empowering the Prosecution to bring charges. It gives basic definition to corrupt acts, with the majority of concepts underlying the ACA offences needing to be defined by reference to some other source of law; common law/statute.⁵¹ Aside the charging statute, it is submitted that the Accused's obligations/the law on the mode of liability/the form of commission of the offence, would have benefited from greater precision. At the very least, thinking in terms of DD notions would have signalled the need for the collective construal of the LGA in conjunction with secondary regulatory instruments such as internal policy documents⁵² to flesh out the Accused's obligations in concrete and practical terms, revealing exactly what should/could have been done in the circumstances i.e. the legitimate expectations. As a conceptual aid, note that the test for whether DD was exercised was not just that of a reasonable person, but that of a reasonable "practitioner" in an area of specialized skill, knowledge or ability.⁵³ On another note, since causality can only be established where the omission is alleged to have effected the unlawful outcome (here, the deprivation), there must be at least more than one incidence of said omission; the allegations in FCC do align with this view.⁵⁴

In instances where the contested corrupt act appears to inhere an exchange element, there are a number of charges that may be proffered. Where this is not the case, yet the Prosecution still contests that the Accused's conduct was illegitimate and corrupt, the Prosecution is cautioned against habitually resorting to charges of misappropriation as fall-back, catch-all, default provisions enabling prosecution of seemingly illegitimate acts; Misappropriation is a legal term of art, not a lay term. The cases reviewed make apparent a latent/tacit presumption of misappropriation for failure to provide supporting documentation; misappropriation was charged in these circumstances in the ABC, Lukuley, Magbity, Doah, and FCC cases, (note however, that specifically in counts 8 ,9 and 15 the charges of misappropriation in the FCC case do not concern missing documentation). The charges of misappropriation based on absent documentation were upheld in all but the Doah case, the latter distinguishing itself on the basis of the lack of investigative diligence regarding existing documentation and the nature of the funds in question.⁵⁵ The closest thing to a fallback charge in the ACA is s. 48 (2) (b)⁵⁶ since failure to comply with applicable procedure/law is a more malleable/plausible argument in most circumstances.

II. Potentially erroneous factual findings: In weighing the evidence against Turay for count 10, the Court appears to ground its view mostly on PW11's evidence,⁵⁷ which is self-contradictory on the fact of Turay having received the ticket books. PW11 states at one point that, "Market tickets (were) issued to (...) Mr. Turay";⁵⁸ and that "A7 was a Municipal Trade Officer – receipts issued to him were not recorded in the

⁴⁸ Criminal/gross/aggravated negligence involves very high levels of negligence resulting in personal injury or loss of life. Criminal negligence in an organisational context tends to involve allegations concerning occupational/work health and safety against individual supervisors and corporations.

⁴⁹ DD and reasonable diligence are the same thing, and the test for reasonableness is a question of fact; *R v Centre Datson Ltd.*, 29 CCC 2d 78 (1975). What amounts to DD is a question of fact; *Canada Steamship Lines, Ltd. v. Scottish Metropolitan Assurance Co. Ltd.*, 46 Quebec KB 305 (1928). See also FN 53 below.

⁵⁰ Refer to para. 2, p. 2 above for applicable sections of the LGA.

⁵¹ Note that even the s. 36 (2) ACA itself does not comprehensively define Misappropriation since interpretations of wilfulness and unlawful appropriation are derived from case law.

⁵² For example, employees' manual/handbook, best practices manual etc.

⁵³ *R v Centre Datson Ltd.*, 29 CCC 2d 78 (1975). DD is not measured by any absolute standard, but depends on the relative facts of the special case; *Perry v. Cedar Falls*, 87 Iowa, 315, 54 N. W. 225. It is the degree of care required in a given situation; *Soper v. Canada*, [1998] 1 FCR 124. Therefore, DD obligations differ depending on the context which determines the referential sources; the relevant subject matter, the individual's office/designation, the concerned body, etc.

⁵⁴ Count 8 re market dues is for all of 2009, count 9 re municipal licences is for all of October 2009 through all of December 2009 and Count 15 re wharf landing fees, is for all of October 2009 through all of December 2009.

⁵⁵ See Snapshot **IV. Control and Management of Public Funds**, p. 14.

⁵⁶ See Doah case summary, para. 3, p. 3.

⁵⁷ The FCC judgment, p.19; "What can be deduced from the above evidence is..."

⁵⁸ *Ibid.*



market fees ledger."⁵⁹ PW11 however later states that, "*I have no evidence that the books were received by the Accused.*"⁶⁰ Apparently based on PW11's evidence, the only evidence discussed here, the Court found that the contested ticket books were "*uncontrovertibly*" issued to A7⁶¹ and that they evaporated into thin air, so that the Accused was convicted of this count.⁶² The Court did not explain how it resolved this contradiction.

III. Re Governance: Note that the FCC benefited from loans and overdraft from First International Bank and Rokel Commercial Bank (RCB) with the latter providing on January 2011, a loan worth Le5, 000,000,000. The FCC internal auditor testified that the FCC could not meet its obligations to NASSIT and NRA because of financial constraints affirmed by the FCC senior admin. officer. J. Katutsi describes the FCC as being in the financial doldrums and Williams testified that before he left office in November 2011, the FCC balance at RCB was in the negative. Query then how the FCC could have made the ill-advised *Morgan Heritage* decision using its "rainy day" stash in an unfeasible venture. The Accused were able to access the reserve account easily raising the question of the choice and pairing of signatories to such accounts and the permissible financial thresholds for access by such signatories.⁶³ In the *Sesay* and *FCC* cases, concern is expressed over anti-corruption becoming stifling to common and legitimate business practices, in recognition of the integrality of free enterprise to liberal economies.⁶⁴ In the *FCC* case, the order of a cabinet minister for the Accused to return a contractual advance payment was pronounced unlawful and in violation of the *laissez-faire* principle. Here the ACC was clearly advised to "*steer clear from this type of interference*" and for business disputes to be resolved via other forms of commercial law.⁶⁵ In *Sesay*, the judge opined that a conjoined relationship between bidders for the same contract/s should not *without more*, be taken as evidence of collusion, referring to the absence of any such prohibition in the PPA 2004⁶⁶ and that to infer as much would greatly curtail investment opportunities and investor's rights violating the principle of free enterprise.

IV. Re Information Management: Again, the need for thorough record keeping at every level is buttressed by PW6's evidence, that on assuming his post he received no ledger for goods previously received at the store. There's a host of FMR provisions on this scenario;⁶⁷ including Reg. 188 (1) which requires an accurate stores' ledger to be kept for every store, Reg. 22 (1) which requires Vote Controllers to ensure that whenever one officer relinquishes his responsibilities to another for any store, the stocks and store ledgers are properly examined so that there is no doubt about what is handed over and Reg. 221(3) which says that the officer taking over shall check the accuracy of the stores records as against stock. Also, note that the FCC management attributed the absence of supporting documents for the expenditures giving rise to Count 12 to an *admitted* inappropriate archiving system and movement of documents.

MEDIA REVIEW: Williams had been in the press before this. In 2010 his agenda and achievements were noted *but he complained about revenue collection being insufficient for administering the FCC*. Reports on the FCC Mayor et al. affair are sparse online and exhibit the same tendency as other cases to err on technical details where the charges and defendants are numerous; the errors concern the number of indictees/convicts, the actual details of the convictions and a blurring of the details of the convictions and allegations. In August 2012, *Africa Review* reported on the case in the context of "*proportional ethnic representation*." The public was likely misinformed about the convictions, since the Press itself reports that the public was irate at Williams' being fined Le170 million compared to the 1.2 Billion he "*embezzled*." Both sides seemed to claim a victory in the press. Otherwise there is sparse factual coverage of the pre and actual trial process online. CARL reported on the trial's efficiency and expeditiousness but was concerned about proliferate

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² The *FCC* judgment, p.20.

⁶³ See Snapshot **IV. Control and Management of Public Funds**, the ante-penultimate paragraph, p. 21.

⁶⁴ The *FCC* case, p. 29, where very strong statements are made to this effect.

⁶⁵ The *FCC* case, p. 29.

⁶⁶ Public Procurement Act 2004.

⁶⁷ Snapshot **I. Information/Knowledge Management**, p. 3, FN 8.



charges. Swit Salone reported that the view of one CSO, *Network Movement for Democracy and Human Rights*, was that this judgment should affect the FCC's approach to taxation and increase transparency.

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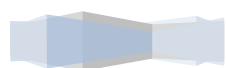
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***THE AL-JAZIBIRA
CASE***



The Al-Jazeera Case/The State v. Momoh Konte before Hon. Mr. Justice Abdulai Charm
24 May 2013

FACTS: Momoh Konte, CEO of Transtech International Ltd. and Alex Mansaray, CEO of African Sunshine Ltd. were charged under s. 35 (1) ACA 2008 with 2 counts of soliciting; count 1, for soliciting \$50,000 for the Vice President (VP), Chief Alhaji Samsumana for the latter's assistance in lifting a ban on timber exports in favour of Taybar Services and count 3 for soliciting \$1000 for the Director of Forestry, Ministry of Agriculture, Food and Forestry (MAFF), for expediting a timber export license for Taybar. Both Accused were charged with peddling influence contrary to s. 31 (3) ACA, under count 2, for soliciting \$100,000 in exchange for their influence to obtain assistance in lifting the timber ban re Taybar. Both Accused were charged with conspiracy contrary to s. 128 ACA¹ based on the facts supporting the soliciting and peddling counts, i.e. that they conspired with other persons unknown to, firstly, under count 4, "give" an advantage of \$1000 to the Director of Forestry, for expediting a timber export license, and secondly, under count 5, to solicit an inducement for the performance of an act in relation to the affairs of the VP, holding themselves out to be agents of the VP. The offences were allegedly committed on a date unknown between 1st October 2011 and 31st December 2011. The monies were allegedly sought to have been obtained from Aljazeera journalists who secretly taped the exchanges, pretending to be foreign investors seeking to export timber under Taybar, a nonexistent company.

The Prosecution's evidence consisted of the video documentary, transcripts of verbal exchanges therein, witness testimonies and Taybar's memorandum and articles of association. The Prosecution alleged that Konte and Mansaray were involved in a scheme in which Konte was to entice the investors, stressing his disinterest in any reward, while Mansaray was to ask for money. The Prosecution's theory was that there was a common purpose between the two, evident in Konte's introduction of Mansaray to the journalists and that Konte solicited the amounts indirectly through Mansaray. This theory was based on statements made by the two in the documentary. Konte told the journalists that; *he was not asking them for a dime for himself or any other person for his assistance given, that they should develop a relationship based solely on mutual trust and respect and that, he intended to assist them without any expectation of a reward.*² **However,** Konte also told the journalists to *take care of the Director of Forestry so as to secure his support, to arrange something for the VP and Director of Forestry.*³ The documentary showed the journalists initially offering to show appreciation "to some people" by sending \$15,000, to which **Mansaray** counter-suggested that they give \$50,000 instead to the VP, that they should provide \$100,000 for all the introductions, and upon their enquiry, that he would talk to the VP for them. In the absence of Mansaray, Konte was prosecuted on the collective basis of his generalized suggestive entreaties and Mansaray's statements.

Konte relied only on his ACC statement, where he denied asking the journalists to give money to the VP or to the Director of Forestry. PW2/Samura⁴ testified that he and three journalists; Mike Healey, Annas Arameyaw Annas and Bilal⁵ produced the documentary entitled "*Sierra Leone Timber*", although he also stated Abdul Seyram, Bilal and Annas are the same person.⁶ On the other hand, PW4⁷ testified that Konte and two men, one in Arabian garb visited his office in October. The judgment itself also often refers to the group of journalists/investors as consisting of PW5/Annas and Bilal.⁸ PW2 admitted they were deceitful to unearth corruption, filming secretly and openly. PW5 testified that there was a ban on logging timber in SL, that he contacted Konte from Ghana, that they agreed on a meeting in SL and for Konte to take them to the VP. PW5 and Konte had 7 meetings to arrange a meeting with the Director of Forestry and the VP in order to

¹ Cited as stated in the Al-Jazeera Judgment, although more specifically the crime of conspiracy under the ACA 2008 is captured in s. 128 (1) ACA.

² Al-Jazeera Judgment, p.16, J. Charm quoting from the documentary transcripts. However, no such statement is discernible from the broadcasted documentary, reviewed from Youtube: <https://www.youtube.com/watch?v=DDisMlwISgk>

³ Al-Jazeera Judgment, p.15, J. Charm quoting from the documentary transcripts. However, no such statement is discernible from the broadcasted documentary, reviewed from Youtube.

⁴ Sorious Samura.

⁵ Al-Jazeera Judgment, p. 6.

⁶ Al-Jazeera Judgment, p. 8.

⁷ Sheku Mansaray, Director of Forestry, MAFF.

⁸ Al-Jazeera Judgment, pp. 1, 2, 3, 4, 5, 6, 14, 15, 16, 17 and in counts 1, 2, 3 and 5. The actual documentary viewed on Youtube describes Annas as being a journalist from Ghana and Bilal as being a journalist from Jordan.



secure political protection in the timber business; the one meeting at the VP's office with Mansaray (Konte not featured), and the 2 held in Konte's office were secretly filmed. The most important aspects of the footage were compiled on one film; the editing involved PW2 doing the voice over/narration. PW2 said that Konte never requested money for himself or anyone else, except for \$2000 as part payment for the \$10,000 for registering Taybar and "to clear the way",⁹ which PW5 provided. However, PW1's¹⁰ search at the Registrar-General's office did not reveal that Taybar had been registered.

JUDGE'S REASONING: The Prosecution must not only prove beyond a reasonable doubt that Konte solicited an advantage but that he solicited \$50,000 and \$1000 respectively. Konte's conduct could not support the charges of soliciting since he never asked for anything for himself or another except the registration fee.¹¹ Mansaray's requests for monies can only be imputed to Konte where the conspiracy is proved meaning the soliciting counts mainly depended on the success of the conspiracy charges. Yet, there is no evidence that Konte approved or even knew about Mansaray's alleged solicitation. There was no proof of an agreement between Konte and Mansaray for the latter to request money; the fact of Konte introducing Mansaray to the journalists was not in itself proof of a conspiracy between them. Conspiracy can be proved against one conspirator, Konte, through the admission of the acts/words of a co-conspirator, i.e. Mansaray's statements, but Mansaray needs to have acted in furtherance of a common design/plan between himself and the Accused conspirator, Konte. Since Mansaray's words do not indicate the pursuit of a common plan/purpose between himself and Konte that Mansaray should seek money from the "investors", they cannot be admitted as evidence against Konte of a conspiracy. Even if, Mansaray's statements disclosed a common plan/purpose, other independent evidence of a conspiracy would have been necessary; *R v Hater* (2005) UKHL 6. Re this requirement for other independent evidence, note the Prosecution tendered the unedited documentary footage through PW5 but failed to, *at that point*, have it played in Court like the edited/public version. Its later oral submission to show the unedited version to highlight unpublicized footage was denied, being tardy and depriving the Defence of the opportunity to cross-examine PW5 on it. By failing to establish conspiracy, the Prosecution also failed to establish the charge of soliciting and peddling influence against Konte.

Further, Mansaray did not solicit the amount alleged from PW5 since he did not initiate the request; it was the journalists that offered to show a token of appreciation for "*some people*", whom the Prosecution would want us to believe were the VP and Director of Forestry.¹² Mansaray only negotiated the amount to be given. Had Mansaray initiated the request in furtherance of a common design between himself and Konte, his acts would have been admissible as evidence against Konte. Since this was not the case, his acts are inadmissible against Konte. Count 5, the charge of conspiracy to solicit an inducement for performing an act in relation to the affairs of the VP, required the Prosecution to prove both the solicitation of moneys from the journalists and that Konte and Mansaray held themselves out as agents of the VP. There is no such evidence; it was PW5 who contacted Konte raising the issue of access to the VP.¹³ The Prosecution sought to rely on *The State v. Baum & Ors. 2009, Unreported* in support of the soliciting counts. The distinction between Baun and Konte is that, although the Accused in Baun denied soliciting the monies, he admitted receiving them, whereas Konte denied both the asking and receiving money from anyone, except funds paid for the registration of Taybar.¹⁴ Specifically, regarding peddling influence, the Prosecution must prove that influence/undue influence was used by the Accused to secure favours for another and for which the Accused

⁹ Al-Jazeera Judgment, p.8, J. Charm on the evidence of PW2. However, no such statement is discernible from the broadcasted documentary, reviewed from Youtube.

¹⁰ Felix Lansana Tejan Kabba, Chief Investigations Officer, ACC.

¹¹ J. Charm reasons as such at Al-Jazeera Judgment, p. 15. However, note PW2's testimony that Konte requested \$2000 not just for partial payment of registration but also to "clear the way"; Al-Jazeera Judgment, p. 8. The documentary available on Youtube refers to a \$2000 registration fee; at 17.59.

¹² J. Charm reasons as such at Al-Jazeera Judgment, p. 16. See however, **Analysis** section on Mansaray's mention of the VP and "Forestry guys", at that point in time.

¹³ See the **Analysis** section on how access to the VP was arranged for the team.

¹⁴ See FN 11 above.



received reward.¹⁵ However, Konte had categorically told the journalists that he was not helping them out for any expected reward.

VERDICT: The ACC failed to prove conspiracy under counts 4 and 5, soliciting under counts 1 and 3, and peddling influence under count 2. Konte was acquitted and discharged on all five counts.

APPLIED LAW: The Prosecution's application under s. 144(2) of the Criminal Procedure Act, Act No. 32, 1965, as replaced by s. 3 of the Criminal Procedure Amendment Act, Act No. 11, 1981 for the Accused to be tried by judge alone rather than by judge and jury was granted. The Prosecution must prove every element of the offence charged beyond reasonable doubt; *Woolmington v. DPP 1935 AC 462* and *Kargbo v. R (1968-69) ALR SL*. Offences that are not strict liability offences do not require the Accused to prove his innocence. Conspiracy is an agreement between two or more persons to do an unlawful act by unlawful means. In principle, since the offence is grounded on the agreement, there can be convictions even where there are no overt acts. For a conspiracy conviction, the acts and statements of the co-conspirator are admissible against a Co-Accused if done in furtherance of the common design even where the latter is absent, to prove the nature and scope of the conspiracy; *nonetheless*, there must be some independent evidence to show the existence of the conspiracy and that the other conspirator was a party to it; *R v. Hater* (2005) UKHL 6.

Under the ACA 2008, a person solicits an advantage if he, or any other person acting on his behalf, directly or indirectly demands, invites, asks for or indicates willingness to receive, any advantage, whether for himself or for any other person.¹⁶ An advantage includes; *any gift, loan, fee, reward, discount, premium or commission, consisting of money or of any valuable security or of other property or interest in property of any description, or other advantage other than lawful remuneration.*¹⁷ A conviction for soliciting an advantage requires the Accused or another on his behalf, to have asked and/or accepted a gift, fee, reward, etc. in the performance of a function.¹⁸ "*Soliciting...is to invite, or to importune, or to request earnestly, or to seek*"; as per J. Brown-Marke, in *The State v. Baum Ors., 2009, Unreported*. Saying you're broke and asking for help with a specified sum, while performing an official but unpaid function amounts to soliciting; **Baun**. Influence peddling is the illegal practice of using one's influence in government or connections with persons in authority, to obtain favours or preferential treatment for another, usually in return for money.

ANALYSIS: The judgment does not reveal the whereabouts of Co-Accused, Mansaray, not being tried.

I. Case preparation: *1. Non-exhaustive investigative/prosecutorial techniques.* Although the ACC interviewed Konte after obtaining the documentary and transcripts, he was not confronted with the allegations of soliciting \$2000,¹⁹ \$50,000, \$1000 and \$100,000 from the journalists. During direct-examination, PW1 testified to not knowing whether statements had been taken from PW5 and Bilal, but by the time he was being cross-examined, he appeared to have informed himself.²⁰ The Defence raised the issue of editing affecting the documentary's credibility; PW2 admitted to doing the voice over/narration, saying the documentary contained a few montages, *techniques used to put shots together/introduce scenes*. He admitted that he "*was determined/it was his goal to expose those responsible for illegal logging in SL.*" **Admitted journalistic predispositions in these circumstances do not help**, since arguably they may influence editing; this was not caught out by witness prepping. Clearly, unedited video footage in itself is the captured/bounded experience of its author; witness testimony especially of its author, seeks to adduce wider surrounding circumstances not captured. It's here submitted that edited videos are arguably subjective interpretations of events and that the admission of exclusively the edited and not the unedited version of a documentary is akin to the absence of the original source of evidence in hearsay scenarios, where such evidence is generally

¹⁵ It may have been more accurate on these facts to say: *for which the Accused solicited reward*, see. s. 31 (4) ACA.

¹⁶ ACA 2008, Part I, Preliminary, Interpretation, s. 1 (2). For the purposes of this Act (b) a person solicits an advantage if he, or any other person acting on his behalf, directly or indirectly demands . . .

¹⁷ Part I, Preliminary Interpretation, s. 1 (1); In this Act, unless the context otherwise requires –"advantage" includes (a) any gift, loan, fee. . .

¹⁸ ACA 2008, s. 28 (2); Offering, Soliciting or Accepting Advantage.

¹⁹ *Al-Jazeera* Judgment, p.8; PW2 testified that PW5 gave Konte \$2000, which the latter requested both as part payment for registering Taybar and "*to clear the way.*"

²⁰ PW1 testified during Cross, that at that point no statements had been obtained from Bilal, Abdul Seyram and PW5.



inadmissible for issues concerning reliability. Against this backdrop, the ACC's tardy motion to adduce the unedited version appears a critical indiscretion. Prosecutors and investigators must engage in well coordinated team work with comprehensive communication and conjoint evaluation of the weight of evidence prior to trial to assess evidential strengths and weaknesses. As such, it's unclear why the Prosecution did not examine PW5 on the unedited documentary at the point when it was entered into evidence through him. This is especially so, since the core of the evidence relied upon by the Prosecution in the edited version was less than compelling specifically regarding Konte.

J. Charm states that Mansaray did not actually ask for money from PW5 since he did not initiate the request; it was the journalists that offered to show a token of appreciation "to some people, who the Prosecution would want us to believe were the Vice President and the Director of Forestry."²¹ In response to Annas' question; "How much do you think?", **Mansaray audibly says**; "Like the VP if you throw in 50,000 first, it will be fine..."²² Here the judgment states that Mansaray mumbles **inaudibly**, then suggests 50,000.²³ On the other hand, it's unclear how the Prosecution arrived at the breakdown in figures in counts 2 and 3; count 3 alleged that \$1000 was solicited for the Director of Forestry, but Mansaray suggests \$20/30,000 for the "forestry guys". What Konte received as per the testimony of PW2 was \$2000; if the link to the Director is the fact that part of this was, as Konte allegedly stated, "to clear the way", this is not clearly set out by the Prosecution. Although the judgment states that Mansaray did not actually ask the journalists for money, Mansaray's statements cumulatively strongly suggest otherwise. Mansaray brags about the political influence he and Konte have,²⁴ he counter-suggests 50,000 for the VP to the journalists' proposed 15,000 and he is emphatic about money; "Annas: Ok, we do Veep 15,000. Alex: \$50, 000 (author's omission) But those types of things, you have to come up with the money **and give to him**. You have to come with the money, **like here you go veep**. Come with the money say thank you for the last time. Annas: Ok. Alex: **You don't have cash, you don't talk. Money talks in Africa**."²⁵ **Although the judgment cites Mansaray's entire emphatic speech it omits his references to Samsumana and does not seem to interpret it as soliciting**²⁶ Mansaray also suggests a budget of 100,000 and willingly volunteers for the responsibility of talking to the VP for the investors. A simple token of appreciation not qualifying as a kickback/bribe would need to have been accepted without negotiation.²⁷ Also, query the judgment on the point that to prove count 5, i.e. conspiracy to solicit an inducement for the performance of an act in relation to the affairs of the VP, the Prosecution must prove the (actual) solicitation of moneys.

The success of the soliciting charges depended *mainly* on the success of the conspiracy charges. Therefore, evidential presentation should have lucidly and cogently spelled out this nexus and the relevance of particular kinds of evidence in demonstrating this nexus. Thirdly, the conspiracy charges as the pivotal case theory should have been the central focus of investigative and preparatory diligence including the need to seek evidence outside of the journalistic enterprise. Although elaborate case theories as this require hardier efforts to ensure tight links where holes cannot be poked,²⁸ no other evidence was adduced to substantiate the offence of conspiracy other than the documentary and witness testimony directly concerning the events featured in it.

²¹ J. Charm reasons as such at *Al-Jazeera* Judgment, p. 16.

²² **Youtube reading**; at 0.35-0.42 and also at 21.18-21.25.

²³ *Al-Jazeera* Judgment, p. 16; Excerpt of transcript: "Annas: How much do you think is? Is there...Alex:(inaudible) 50,000? First it would be fine." **Youtube reading**: "Annas: How much do you think is? Is there...Alex: Like the VP if you throw in 50,000 first, it will be fine..." at 21.18-21.25

²⁴ **Youtube reading** at 17.24-18.21.

²⁵ **Youtube reading** at 21.30-22.03.

²⁶ *Al-Jazeera* Judgment, p. 17; Excerpt of transcript: " But those types of things, you have to come up with the money and (~~give to him~~) then.... You have to come with the money-(~~like here you go veep~~), come up with the money. You come and say thank you for the last time."

²⁷ Unnamed, (2016), Wikipedia. **Kickback (bribery)**. https://en.wikipedia.org/wiki/Kickback_%28bribery%29; "A kickback is a form of negotiated bribery in which a commission is paid to the bribe-taker as a quid pro quo for services rendered. Generally speaking, the remuneration (money, goods, or services handed over) is negotiated ahead of time. The kickback varies from other kinds of bribes in that there is implied collusion between agents of the two parties, rather than one party extorting the bribe from the other."

²⁸ Tanford J. A., (2002), *The Trial Process: Law, Tactics, and Ethics*, 3rd Edition, LexisNexis; Chapter 2, Preparing for Trial, S. 2.01 Introduction.



Charges should be framed in terms that are strictly necessary and reflective of the evidence secured; see Lukuley advocating compactly drafted indictments.²⁹ The offences of conspiracy here are framed in terms that indicate they were committed, with persons unknown, but the evidence, liberally interpreted, does not implicate persons in the alleged scheme other than the 2 Accused and the VP, and 2 conspirators suffice for a conspiracy charge. This aspect of the charge may further encumber the Prosecution. The same is true of count 5, which charges conspiracy to solicit an inducement for performing an act in relation to the affairs of the VP. The allegation that Konte *put himself out as being an agent* of the VP in count 5 is superfluous. In like scenarios, authorities could be amassed on the fact that deception used to uncover corruption does not in itself affect the credibility of the evidence/witnesses³⁰ for the Prosecution's ease of reference, to counter any contrary authorities.

II. Cumulative circumstantial evidence: Perhaps more of an emphasis on adducing more than one principal source of evidence and laying out the cohesiveness of circumstantial evidence, where the latter predominates? To this end, the Prosecution could have paraphrased PW2's popular narration querying the legitimacy of the events. His narration underlined the attempt to set up a major long term timber exporting business with environmental implications despite an existing ban on the export of timber. PW5 testified that he sought political protection in the timber industry through Konte. Konte by arranging a meeting with the VP against the context of the ban and by his statements clearly understood this to be the crux of the assistance sought from him; Konte requested the journalists to *take care of the Director or Forestry so as to secure his support*, and, *to arrange something for the VP and Director of Forestry*.³¹ By actively helping the investors seek a timber export licence, and to this end facilitating a meeting with the VP a day before the permanent export ban was reinstated,³² Konte gave the impression that he would help bypass the ban. PW2 alleged that within 24 hours of this meeting they were completing the paperwork for their logging company, something that normally took weeks. He says that one of the Vice President's close advisors said that the VP has already put the wheels in motion for their business, with the advisor on the board as one of the major shareholders.³³ Konte said that he reported to the VP on their meeting where docs were presented.³⁴ PW2 testified that Konte said he would need \$2000 as part payment to "*clear the way*" and it appeared that there was never any registration done of Taybar, despite partial payment for this to Konte (some media sources exculpate Konte from blame for this).³⁵ The emphasis should be on the collective weight of these facts, highlighting illegitimate endeavours at the most, dubious ones at the least.

III. Potentially erroneous legal, factual findings: Soliciting as per the ACA is wide and although the provision is cited ad verbatim, i.e. that it includes, indirectly indicating a willingness to receive, the application of the law to the facts does not appear test this indirect standard against Konte's collective contested suggestive entreaties. Also, note that peddling influence is defined here as using one's influence, to obtain favours for another, "*usually*" in return for money whereas peddling influence surely always requires an exchange element, i.e. one's influence is traded against something of value, a reward of some sort.

²⁹ See Snapshots, specifically **Section II. Diligent Case Preparation**; p. 2. The relevant heading is; 2. The Defective Framing of Charges, A. General.

³⁰ PW5 said that they had to use hidden cameras because the people they were investigating would not talk freely if they used conventional cameras; Al-Jazeera Judgment, p. 10. Refer to also to discussion on "*Entrapment*" in work by this author; Hudroge A., (2015), *The Sierra Leone Anti-Commission Case Law Reports*. The relevant authority is, *The State v. Edward Mohamed Allieu*, The High Court of Sierra Leone, J. S.A. Ademusu, 6 June 2008; see specifically the **Notes** section at p. 159 -160 and the **Critique** at pp. 164-167.

³¹ See discussion below at; **IV. Precedential Consistency**.

³² Youtube reading at 17.24-17.44: "*Annas and Bilal (...) they've been told that the best way of doing this discretely is via the office of Sierra Leone's Vice-President, Samuel Samsumana.*" Youtube reading at 17.55-18.06: "*But before they can see him they are told they have to pay a \$2000 registration fee and they also have to go through several meetings with 2 of his closest aides.*" Youtube reading at 19.13- 19.19: "*Annas and Bilal finally get the go ahead from one of the aides to meet the Vice-President in person.*"

³³ Youtube reading at 22.50- 23.04. Not explicit that by "*advisor*" here, PW2 means Konte, although Konte is featured at that point.

³⁴ Youtube reading at 23.05-23.18.

³⁵ Blyden S.O., (2011), *Soriosis Samura, Al Jazeera Rubbish Sierra Leone & the House Slaves*, Awareness Times; <http://news.sl/drwebsite/exec/view.cgi?archive=9&num=22806>; According to Blyden, although Samura said he registered his Timber company in SL in just days, the journalists got from Konte after they paid \$2000, only a proposed Memorandum & Articles of Incorporation for their proposed company named Taybar. They left SL before signing the actual registration papers for forwarding to the Administrator & Registrar-General's Offices; the registration process was incomplete. Her sources are undisclosed.



IV. Precedential consistency: *The State v. Baun Ors, 2009, Unreported* is an ACC case. Whether it has been applied to its maximum effect here, is doubtful. In *Baun*, the Accused said that he was broke and that the Accuser should help him with Le500, 000 when the latter went to collect his C48 form from him. It was held that this suggestive entreaty could amount to soliciting, i.e. indirect solicitation. *Baun* underlined that solicitation in our cultural context is often indirect. However, this standard does not appear to have been tested against Konte's vague statements to *take care of the Director or Forestry so as to secure his support*, and, *to arrange something for the VP and Director of Forestry*. Like Konte, the Accused in *Baun* also denied asking for money other than for legitimate payments, but the judgment distinguishes the two in that *Baun* unlike Konte *admitted receiving them*. It is submitted that a more salient distinction lies in the fact that Konte, unlike *Baun*, never specified any amount. However, according to PW2, Konte requested monies to not only pay partially for registration but to also "*clear the way*." *Baun* appears not to have been applied to Konte's more questionable comments collectively.

V. Re Governance: Pandering to public opinion is an inappropriate motive for bringing charges. Here, the broadcast may have pressured the ACC into taking action, but action could have been limited to investigations/inquiries that only result in the release of press statements that disclose their findings and the fact that the standard for trial was not met. The making of such press statements at which the ACC is adept, can identify inappropriate/dubious conduct warranting warnings and can announce that investigative journalism/entrapment necessitates contacting the ACC with potential evidence prior to broadcast to avoid marring a potentially revelatory investigation even through use of the same means. PW2 narrates re Samsumana that; "*To me the very fact that he is even meeting with timber exporters, sends the message that Sierra Leone is for sale.*"³⁶ On being told that the investors are interested in logging business, the VP tells them, he will be meeting with the Minister of Agriculture later that day and that the ban would be postponed for a while.³⁷ Samsumana in his letter to Al-Jazeera admitted to knowing Mansaray and Konte, but said they did not work the GOSL and were not as claimed his advisor and campaign manager, that Mansaray was acting solely on his own accord. He said he had no knowledge of the registration of the timber company and that he offered to speak to the Ministry of Agriculture on their behalf because it handled all matters relating to forestry. The judgment holds Konte's conduct to be legitimate and does not expressly recognize Mansaray's conduct as illegitimate. Still, query however whether political protection in these circumstances is a testament to good governance practices.

MEDIA REVIEW: Konte was largely lauded as an entrepreneur-philanthropist, but PW2's credentials were attacked, his film deemed unprofessional, deceitful through editing and not credible enough for prosecution. Insubstantial evidence was noted as a recurrent ACC problem. Internationally, the press appeared to endorse the film, contextualizing the episode against wider corruption. Supportive national press coverage also contextualized the episode, tending to express pre-verdict allegations as facts (but for CARL), due to the ACC's reliance on a purported visual record of events, a yet contestable piece of evidence. They described how APC financiers for the 2007 election, (mostly businessmen such as Konte), were either rewarded with ministerial positions or sought to recoup their investments through association with the GOSL. This theme re-emerged in 2014 when State House Chief of Staff, Richard Conteh was tried by the State Prosecutor for relaxing the timber ban. The VP's role was subject to more criticism than Konte's, with the Press accepting a non-trial but seeking an inquiry/impeachment, an idea apparently supported by the some US lawmakers concerned with his other business dealings. Some sources talked about the VP being framed by the SLPP or President Koroma who'd welcomed PW2. Witness testimony was well covered and PW2's skipping trial mid-cross was widely reported as suggestive of dishonesty. The issue of strong whistle blower protection under the ACA was also raised. Generally, the public was embarrassed by the broadcast and feared its impact on international investments. The verdict was mostly welcomed with public confidence ebbing in the ACC.

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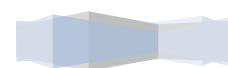
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***THE GAVI FUNDS
CASE #1 (DAOH)***



**The GAVI Funds case/The State v. Kizito Daoh, Alhassan L. Sesay, A.A. Sandy, Edward Bai Kamara,
Duramani Conteh before Hon. Mr. Justice Abdulai Charm
24 October 2013**

FACTS: Each Accused was charged with 4 counts of misappropriation of donor funds contrary to s. 37(1) ACA 2008, allegedly committed in Freetown between 2008 to 2011. All Accused were staff of the Ministry of Health and Sanitation (MOHS). Daoh, the Chief Medical Officer was charged with misappropriating twice the sum of Le 4,368,000 and twice the sum of Le7,894,466. Sesay, the Director of Primary Health Care was charged with misappropriating thrice the sum of Le4, 368, 000 and once the sum of Le5, 803,267. Kamara, Permanent Secretary was charged with misappropriating thrice the sum of Le4, 368,000 and once the sum of Le7, 894,466. Conteh, Director of Hospital and Laboratory Services was charged with misappropriating twice the sums of Le4,368,000 and twice the sums of Le5,803,267. Sandy, Director of HR and Nursing Services was charged with misappropriating twice the sum of Le4,368,000 and twice the sum of Le5,803,267.

The GAVI Draft Audit Report 2012 on the GAVI Grant for 2008 to 2011, required the MOHS to ensure that all recipients of funds, provide the *Health System Strengthening*¹ Finance Officer (FO), within 2 months after the activity, with a technical activity report containing detailed expenditure and supporting documentation; including fuel invoices, signatures of per diem/DSA² recipients and proof of location visited. There could be no forthcoming funds without these docs. Domestic sources of written obligations on accounting for expending public funds are the Financial Management Regulations 2007 (FMR) and Government Budgeting and Accountability Act 2005 (GBAA) which require the retirement of public funds, but not the submitting activity reports. The GAVI Draft Audit found that undocumented expenditures of its grant tallied at \$442,078, unjustified disbursements at \$556,487, overcharged procurement tallied at \$100,872 and diversion of assets at \$ 43,386. The GAVI Audit demanded these findings be investigated. A meeting of senior MOHS management including Daoh, Sesay and Conteh was held. Together they sought to get the docs. needed. On arrival, the GAVI team reduced the figures from \$ 1,143,000 to \$523,303 due to some documentation but there was still no documentation for supervision activities, fuel purchases and training etc.

All Accused admitted requesting, receiving and signing for funds for monitoring work in the provinces. Requests would state the purpose, have a budget, payment voucher, names and signatures of the requesters. Sandy asserted that in two of the situations alleged, he did not sign for the funds. Daoh provided no receipts, retirement for funds or report saying it was instead the Project Managers' responsibility. Sesay and Sandy claimed they submitted reports to the DPI, Sandy's in the form of his actual work products. Kamara argued he was not responsible for such reports. The central issue was the identification of the Accused's obligations concerning the funds received and this turned on the categorization of the funds. Regulatory instruments require imprests (lump sums) for the implementation of an activity to be retired, but not per diem, although imprests could include per diem. **The ACC argued** that the Accused were obliged to retire the funds as *they were* imprests and that even if the sums were DSA for team members, the obligation to retire still held; the Accused's failure to submit activity reports to the Directorate of Planning and Information (DPI), MOHS and to retire funds indicated misappropriation, since it could not be verified that they expended the funds as they alleged. Their admission to taking these funds in the absence of documentation meant there was dishonest misappropriation; there were no provincial visits. **The Defence argued** that the ACC's evidence did not meet the standard of proof beyond reasonable doubt of every element of every offence charged. The relevant regulations required only imprests and not per diems be retired. The Prosecution had failed to investigate and to disprove the Accused's assertions that the work was done and to disprove Sandy and Sesay's contentions that they submitted reports. **The evidence** demonstrated that the requests submitted by the Accused for GAVI funds, mentioned not imprests but fuel money and DSA for the Accused and their drivers.

JUDGE'S REASONING: Failure to retire funds or submit reports does not necessarily negate project implementation or equate to misappropriation. The Prosecution's evidence does not demonstrate a requirement to "*retire*" per diem for self or team members although it does indicate an obligation on the Accused to submit an activity report to the DPI within a deadline, (source GAVI Audit). Imprests, not DSAs

¹ MOHS' GAVI supported HSS programme.

² The terms per diem, Daily Subsistence/Living Allowance (DSA/DLA) are used interchangeably.



are subject to retirement, except if expressly so provided. The recommendation in the GAVI Draft Audit does not say that DSA should be "retired." What matters is that a DSA recipient performs the activities for which it is given. Since the amount provided for the trips was calculated on the mileage to be covered, it could not have been an imprest and hence was not subject to retirement. Had the fuel been paid for from an imprest given, there would have been an obligation to retire the entire imprest and provide receipts for fuel. The Prosecution has to prove every element of each count alleged; it did not attempt to disprove Sandy's assertions that what he submitted to DPI were his reports by calling for witnesses from DPI, nor to disprove the trips by calling on site witnesses and drivers to prove that they did not go to. Since the Prosecution does not seek to clarify which Accused attached some receipts to implementation requests, the Court could not take it upon itself to do so. As the evidence does not establish guilt beyond a reasonable doubt, the Court must acquit. Costs are awarded to the Defence pursuant their application under s. 138 ACA.

VERDICT: All Accused are acquitted on all charges with costs awarded from the consolidated fund.

APPLIED LAW: The Accused were charged jointly but face individual charges of misappropriation, so that the evidence against each is considered separately. For the charge of misappropriation of donor funds under s. 37(1) ACA to hold, one does not have to be a public officer or affiliated with a public body, but only needs to be part of an organization which receives donations for the public. J. Charm applies misappropriation in a sequence slightly altered from the usual,³ by firstly considering the issue of proof of access by the Accused to public funds/property, and secondly whether the Accused used these for himself or unauthorized purposes. He determined the GAVI funds were public funds and all Accused, public officers. S. 138 ACA (a reimbursement provision), applies on an acquittal, where the Accused have suffered loss of self esteem and incurred financial loss for legal representation, and where a careful analysis of the evidence would have revealed that it was too tenuous for the Prosecutor to press charges.

ANALYSIS: I. Case preparation: Lack of investigative/prosecutorial diligence deprives the Prosecution of legitimately contesting the Court's reasoning. *1. Prosecution witnesses' and Investigator witnesses' unfamiliarity with crucial case data:* This is highly detrimental since it suggests an ill-motivated prosecution. Testimonies of Prosecution witnesses evince the lack of an anticipatory approach to likely Defence examination strategies. Investigators are expected to grasp not just the fundamentals (case theories, key legal concepts, common facts) but also crucial data on which the case hinges, tending to concern bureaucratic processes and concepts not evident in the ACA 2008, since ACC prosecutions are based on implicit/explicit breaches of these; knowing the suitable standards for adherence is vital to clearly identifying breaches. ACC Investigator, PW1⁴ could not differentiate between DSA and an imprest, yet testified that the retirement of DSA depended on the instructions. He did not know the hierarchical structure of the MOHS. PW2⁵ testified inaccurately that both the FMR and GBAA provide for the retirement of per diem. Similarly, PW3⁶ testified that the requirement to retire applies to both imprests and per diem, but self-contradicts by stating that there is no regulation requiring retirement of DSA. He testified that he was unaware of the charges against the Accused.

2. Non-exhaustive investigative/prosecutorial techniques: Investigations appear to have been less than tightly knit; key issues were not verified. PW1 testified that mission sites were not investigated. DPI reps. were not interrogated/examined about a retirement Sesay claimed to have made, nor about the report he claimed to have submitted, nor about the 2 activity reports Sandy claimed he submitted. Also *not verified* were the receipts appended for fuel purchase to certain fund requests, Conteh's claimed retirement to the DPI, and the channel for reports and receipts as described by Conteh. Although Sandy submitted 2 reports to the ACC, the ACC contended that Sandy submitted no activity reports. Sandy's claim of not receiving/signing 2 requests was not investigated/countered. If case preparation had involved levels of planning, moving from the general to the specific at every trial phase, more targeted evidence could have been factored in and adduced to counter denials; re Sandy for e.g.; Forensic Document Examiners, Handwriting Experts etc. With regards

³ See below at Analysis, **III. Precedential consistency.**

⁴ Felix Lansana Tejan-Kabba, then ACC Chief Investigations Officer.

⁵ Joseph Teckman Kanu, Permanent Secretary (PS), Ministry of Social Welfare, Gender and Children's Affairs, former PS, MOHS.

⁶ Lawrence Sawber Caulker, then Deputy Accountant General, MOFED.



to not probing/calling relevant evidential sources, J. Charm here reconfirmed⁷ a principle of the FCC, Lukuley, and Ken Gborie⁸ cases; the Court may infer their evidence is unfavourable to the party who fails to do so.

When PW1 is confronted by a retirement of funds submitted by Sesay, he retorts that what was required from Sesay was the submission of a report not retirement, although he then admits that Sesay submitted 2 reports to him. Here, knowing in advance the circumstances which operate in favour of an Accused, allow for sculpting clear and precise responses which incorporate their existence yet demonstrating their insufficiency to meet clear legal prescriptions. The Court alerted the Prosecution to the need for a precision driven approach including clarifying which of the Accused attached receipts to project requests. This clarification may have skillfully underlined the existence of the obligation as against non-compliant Accused and helped emphasize that the Draft Audit Report did indeed source the obligations of providing fuel invoices and a list of signatures for DSA recipients which were not met with by other Accused; obligations never overtly acknowledged by J. Charm. The obligations in the GAVI Draft Audit postdated the implementation of these activities, but query their likely reference to any preexisting understanding/agreement between MOHS and GAVI (?), an avenue not explored here. Identifying and addressing contentious areas, including the interaction between domestic law and donor instructions should trump obvious aspects of the case.

Charges centering on the Accuseds' alleged omissions do not negative the Prosecution's positive obligation to adduce sufficient evidence to support its allegations. Here, the sum of the Prosecution's evidence of misappropriation, was the alleged fact of a material void i.e. the absence of receipts/reports in the face of alleged obligations to provide them. The Prosecution did not adduce evidence in support of this alleged fact of an omission, but sought to employ a vacuum as evidence in itself of misappropriation. Logically, this could not meet the standard of proof in relation to each element of the offence; prosecutorial proof of a case cannot exist by default and the Accused bears no burden to prove their innocence. The Prosecution should not build its case on its perceived absence of evidence favourable to the Accused, or on the omission of the Accused, unless, this is what the elements of the offence clearly require. The omissions alleged are not enlisted in the ACA as modes of commission of the crime of misappropriation without more. In fact, failure of financial accountability through documentary evidence is not listed at all as a mode of commission under s. 36 (1) ACA. Indeed, as J. Charm notes, the Prosecution approached the issue as a strict liability offence by automatically equating the failure to account as misappropriation - quite a leap! Strict liability offences simply require the commission of the prohibited act (the required mental frame is inferred), so that the burden of proof is reversed and placed on the Accused. The Prosecution stated that; "*the circumstances indicated dishonesty since there is no other reasonable explanation of why senior officials will with such impunity avoid accounting for funds.*"

Construing breaches of other sources of obligations (e.g. GBAA, FMR, GAVI Audit Report etc.) with offences under the ACA is doable where the provisions correlate; a prohibited act under, or breach of another instrument could be used to flesh out, either forms of commission of an offence under the ACA (co-relate more directly with the actus reus) or to buttress/flesh out the requisite attitude (co-relate more directly with the mens rea). S. 48 2 (b) ACA, for failure to comply with procedures, however is a catch all for maladministration in general; the challenge is in construing the latter as criminal. Charging a breach of s. 48 here, would have provided a better framework for channeling prosecutorial efforts so that in the process of uncovering relevant information about how and why the Accused failed to comply, any discerned motivations might then be adducible as evidence supporting a charge under s. 36(1) ACA.

II. Potentially erroneous legal findings: J. Charm states that "any" doubt will be resolved in favour of the Accused, but later refers to the accurate "reasonable doubt standard."

III. Precedential consistency: See above⁹ on drawing the inference that evidence not called by a party does not favour them. A departure from the usual sequence in applying the law on misappropriation, i.e. the tests

⁷ Citing *The State v. Anita J. Kamanda*, Unreported, 10 July 2013; *Fox v. Police*, 12 WACA 215, *Awosile v. Sotunbo* (1986) 3NWLR (PT, 29) 471; *NSC (Nig) Ltd. v. Inns-Palmer* (1992) INWLR (PT. 218) 422 and *Obor v. Rivers State Housing and Property Development Authority* (1997) 9 NWLR (PT. 521) 425.

⁸ Citing *R v. Howell* (2003) Crim. L.R. 405; *R v. Argent* (1997) 2 Cr. App. R. 27; *R v. Dervish & Anori* (2001) EWCA Crim. 2789.

⁹ See under heading 2. Non-exhaustive investigative/prosecutorial techniques.



for dishonesty and standard for misappropriation, as an unlawful usurpation of ownership rights (see Applied Law section in other cases reviewed).

IV. Re Governance: One queries why the MOHS internal audit unit appears to not have uncovered the issues concerning the GAVI grant sooner. The Accuseds' explanations here, the review and the murkiness surrounding bureaucratic procedure apparent in witness testimonies indicate that such failures to account could be attributable to a generalized practice/culture of non-reporting, where the weight of reporting is not adequately reinforced through reiteration. Requests for funds for project activities are normally submitted with the Permanent Secretary MOHS for approval and upon his approval, the relevant programme Finance Officer/Accountant (FO) prepares cheques which are signed by the requesters/project implementers;¹⁰ FOs are advised to make it standard practice to put in writing pre-and post implementation clarifications made to programme implementers *of the requisite forms of retirement attached to specific types of funds.*

V. Knowledge Management: As with other cases reviewed, the Accused, the ACC and other involved parties were unfamiliar with the precise obligations attaching to particular roles re certain spheres of activity. Here, that unawareness concerned the nature of obligations to account for certain types of budgetary allocations; the extent of the obligation to retire funds or submit reports, the documentary source of such responsibility/ies, the obligation to observe more specific donor instructions.

MEDIA REVIEW: *Daoh* was covered intensively locally, regionally and internationally, recognizing acute corruption within the health sector. The reporting trend is to contextualize ACC cases, *here*, against other *GAVI* cases, the acquittals in Sesay, the mere imposition of fines in FCC, with concern expressed over the more frequent imposition of fines as compared to jail terms and over how penalties are simply "buffeted" by the "political establishment." The Judiciary is implicated in the ACC's failings. Coverage tends to be opinionated at the indictment and verdict stage, more factual during trial except for CARL which throughout legally/technically evaluates procedural rectitude. Some criticism of the ACC's failure to prosecute the Finance Minister, a "relative" of President Koroma's later appointed Foreign Minister. International coverage expressed concern over the potential impact of the prosecutions of many top health care officials on the health system, noted donors' reaction and noted the GAVI episode went beyond documentation failure to actual squandering. Recent international and national coverage of Ebola related corruption harkens back to the GAVI episode, stressing the commonplace nature of fraud in the MOHS and recognizing record keeping gaps as a major facilitator for corruption. Indictees as times miscounted.

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***THE NRA CASE #2
(KATTA)***



**The NRA Case/The State v. Solomon Katta, Idrissa Fornah, Elizabeth King, Momoh Turay,
Emmanuel Sesay, Catherine Katta, Santigie Kargbo before Hon. Mr. Justice M.A. Paul
3 April 2014**

FACTS: Mr. Katta was an NRA customs officer, Fornah a revenue officer at the Makeni NRA Office, King an NRA employee, Turay, Sesay and Mrs. Katta were Ecobank employees, King and Kargbo, at large, were not tried. All Accused were charged with count 1 under s.128 ACA 2008 i.e. conspiring together and with other persons unknown between May and June 2013 to cause loss to the NRA of PAYE tax from Addax Company of Le392,238,864. Count 2 charged Mr. Katta under s. 36 (1) ACA with misappropriation of Le200 million paid to the NRA by Addax. Count 3 mirrors count 2, but concerns Le60 million. Count 4 charged King with misappropriation of Le45 million paid to the NRA by Addax. Count 5 charged Turay and Sesay with misappropriation of Le40 million paid to the NRA by Addax. Count 6 through 13 charged Mr. Katta with misappropriation of taxes paid by Addax to the NRA; Le9 million, Le1 million, Le8 million, Le 3 million, Le 6. 5 million, Le 4 million, Le 3 million and Le 2 million respectively. Count 14 charged Mr. Katta under s. 27 (1) (b) ACA with being in control of pecuniary resources disproportionate to his present official emoluments i.e. le Le2, 015,967,465. Count 15 charged Mr. Katta under s. 122 (c) ACA with failing to give information required by an ACC asset declaration form regarding an Ecobank account. Count 16 charged Mr. Katta under s. 45 (3) ACA with failing to disclose in writing a direct interest of 60% ownership in Magsons' between 2012-13. Count 17 charged Mr. Katta under s. 49 (1) ACA with dealing with suspect property, by receiving Le45 million into his Magsons' account in May 2013, as payment for awarding a contract to Dwight Doherty, knowing it was the result of corruption. Count 18 charged Mr. Katta with misappropriation of Le28, 713,406 paid to the NRA. All Accused pleaded not guilty on all counts. There were no defence witnesses and only Turay and Sesay testified. All Accused relied on their statements.

From 2011, the NRA required its staff to not accept cash/cheque from taxpayers, who were to pay at Ecobank which maintained taxes in a suspense account then transferred them to the consolidated account, Central Bank. The payees should present the paying in slip at the NRA office for an NRA receipt. The NRA keeps copies of that receipt and supporting documents. In May 2013, Fornah accepted payment of Le 392,238,864 of staff PAYE taxes from the Addax Manager, signing the cheque and issuing a signed receipt to the Manager. The NRA retained copy of this receipt bore the same number and date as that given to the Manager, but was made out to "Mohamed Bah" for payment of Le 60,000. Fornah said the Addax cheque went missing on the day it was paid, but that he recorded neither its receipt nor loss in the NRA record books, daily collections reports nor reported the fact to a superior. King later gave this cheque to Turay, Assistant Manager,¹ Head of Retail Operations, Ecobank.² An internal audit in June 2013 revealed that the Addax cheque was diverted from the NRA to Magsons' account by Turay and Sesay, and revealed certain *internal control lapses*. On discovering the diversion, the Bank's departmental heads called a meeting with Turay and Sesay where Turay admitted to authorizing the conversion of the cheque to a banker's cheque as requested by King, implicated Sesay in inputting the cheque into Magsons' account and confessed to both of them receiving Le 20 million each for this.³ Turay denies in his testimony and statement that he and Sesay were paid for the crediting of the Magsons' account. PW6 testified that Sesay also confessed his role to her.

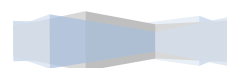
Turay's instruction to PW5⁴ to prepare a banker's cheque was unusual, standard procedure being for a written signed request to precede from the customer to the Head of Operations and Technology, Bank Manager, or Relationship Officer. Turay testified that as one of the departmental heads in the Operations Department, he could instruct conversion of the cheque and the payment. Turay informed the bank's Addax relationship officer of the conversion. Turay admitted that no written instructions from Addax were attached to this cheque, arguing that the cheque in itself, King's instructions and the email sent to the relationship officer sufficed as a request for conversion. PW5 complied with Turay's request for the preparation of a banker's cheque since the NRA would continue to be payee and since Turay was then the most senior colleague around, the Head of Operations and Technology being absent. The conversion meant that the

¹ *Katta* handwritten judgment, p. 63; Turay testified that he was a "career level of assistant manager."

² *Katta* handwritten judgment, pp. 42, 63, 74, 75.

³ PW4, Allie Mohamed Sillah, Head of Operations and Technology, Ecobank; PW6, Olabisi Turner, Human Resources Manager, Ecobank.

⁴ PW5, Emmanuel Ngegba, Treasury Officer, Ecobank.



monies were paid into the banker's account, allowing for withdrawals from it, enabling later payment into the Magsons' Account.⁵ PW5 gave King the banker's cheque on Turay's instruction. Turay testified that there was a letter from King authorizing payment of the banker's cheque into the Magsons' account and that King's boss authorized this over the phone. Turay said he was Sesay's supervisor and that Sesay paid the banker's cheque into the Magsons' account. An electronic analysis of transactions confirmed that Turay was the authoriser and Sesay was the inputter. A phone call log of Ecobank staff shows that the Ecobank Accused communicated frequently between the date of the conversion i.e. the 28th, and date of payment into the Magsons' account, 30th May 2013. Prior to this, their communications were infrequent. Payment was followed by series of withdrawals. PW7⁶, a cashier, testified that when he needed confirmation from Ecobank senior staff to process a cheque presented by a Mr. Doherty for Le 45 million from the Magsons' account, he called up Mrs Katta to secure her approval since she was a signatory.⁷

JUDGE'S REASONING: The Defence's argument that, since count 1 was charged under s. 128 ACA, instead of s. 128 (1), it was defective and vague, was dismissed. Similarly, the Defence contestations that the Prosecution's evidence disclosed several rather than one conspiracy and that there was no point charging a conspiracy where the supporting evidence was the same, supporting the substantive offences of misappropriation, were also dismissed. Use of phrases such as; "*it is an offence*"/ "*commits an offence*", is unnecessary to create an offence and not specifying the relevant subsection does not make count 1 uncertain and defective, since the Accused must have understood its nature and substance to have pled to it. Count 1 was sufficiently clear to enable the Accused to prepare his defence. His defence is not prejudiced by the amendment to add subsection 1 to s. 128. The Accused should have objected to perceived defects in the charges before even pleading to them, not waiting till final addresses to do so, so that they could have been immediately amended; S. 133 (1) and (2) CPA 1965.⁸ The ACC is entitled under s. 148 (1) CPA to amend the charges at any stage; *The State v. Herbert Akiremi George Williams*. S. 128 does indeed create an offence of conspiracy; *The State v. Alphajor Bah and Ors*, 23 October 2012 Unreported, *The State v. Mustafa Amara and Ors*, 7 June 2013 Unreported, *The State v. Dr Magnus Ken Gborie and Ors* CRN 7/13 10 January 2013, Unreported. A statute should be construed in conformity with common law and the rules of law, unless there is a contrary intention; *The State v. Dr. Magnus Ken Gborie and Ors*, 24 May 2013 Unreported. Therefore, the ACA must be construed as importing the Common Law Offence of Conspiracy. Had the ACA not included conspiracy, the Common Law offence of conspiracy would still work in conjunction with ACA corruption offences. Conspiracies and substantive offences may be charged on the same facts since general conspiracy counts may more accurately reflect the reality than just charging the substantive offences subsumed within it.

The criminal purpose of the conspiracy, the diversion of the cheque into the Magsons' account, determined Fornah's handling of the Addax cheque, since despite his 10 years at the NRA he received it, contrary to permitted practice, thereby *demonstrating motive*. He failed to report the missing cheque to his superior or Addax to stop its encashment, failed to log receipt of the cheque into office records, logged the number of the receipt issued to Addax into the cashbook and daily collection report form, but altered the name and amount. Where there are no contrary suggestions, a conspiracy may be inferred from the natural consequence of the Accused's actions. Although the above acts are not direct evidence of a conspiracy, one may infer based on them that a reasonable man in Fornah's position would have intended to participate in a conspiracy, and that Fornah sought to hide his participation in it. The ACC has proven conspiracy against Fornah beyond reasonable doubt and he is guilty of Count 1.

Turay's testimony and demeanor evinced lack of credibility and reliability. He talked about the request for cheque conversion/misposting, and the request for payment into the Magsons' account/a 3rd party transaction

⁵ *Katta* handwritten judgment, pp. 81-82, as per the reasoning of J. M.A. Paul. However, it's submitted that this routing was undertaken to mask the payment into the Magsons' account, from Addax Company itself, who would not easily be able to track their monies beyond payment into the Ecobank Manager's account.

⁶ PW7, David John, Cashier, Ecobank.

⁷ *Katta* handwritten judgment, p. 104; "*I needed a confirmation from a senior staff of the ECOBANK before I could pay...I recognised that my colleague staff is a signatory to the account...I had to explain to her...that I need confirmation to OK the amount.*" See also, p. 23 of Snapshot **IV. Control and Management of Public Funds: 2. Modes of Control: D. Banks**: "*David John is unclear about the capacity in which he contacted Mrs. Katta to confirm payment.*"

⁸ See Application of Law section.



(where the payee endorsed payment into someone else's account). The payee/NRA lacked a proper account and signatory rights so could not have requested a cheque conversion. Similarly, it could not have requested a 3rd Party transaction. Addax manager testified that Addax did not request a cheque. Turay argued his authorization of the conversion without the usual instrument of formal authorization from the payee was lawful. He said that he emailed the Bank's customer relationship officer to inform him of the Addax request for a conversion, but also says this was to seek the officer's confirmation. The email was framed to suggest Addax had already requested a banker's cheque; the Addax cheque attached for confirmation of its authenticity. Given his position and awareness of the MOU between NRA and Ecobank for taxes to be transferred to the central bank, he should have known that the NRA could not have authorized payment of tax into a 3rd party account. Further, 3rd party transactions can only be approved by the Manager of Operations and Technology or his designate,⁹ yet in his absence Turay authorized both conversion and payment, asserting that superior approval of the payment was unnecessary. Turay said that King returned the banker's cheque to him 2 days after she'd received it, asking him to pay it into Magsons' account for clearing and forwarding services and that she presented such a request from the NRA Finance Director on an NRA letterheaded document. Turay claimed to have confirmed the payment over the phone with King's boss, who said he'd spoken with an Ecobank director. Turay said that he personally spoke to Ecobank director/s whom he now did not recall. Turay says he filed the NRA letterheaded document but by then had no superior to whom he should minute it, although there was no evidence that PW4 was absent on that day. Since Turay failed to produce this authorization document, it is held that it was nonexistent.

Turay's motives had to be sinister, given his experience, position and knowledge of the implications of his actions. He denies in his testimony to confessing to PW6 and PW4, but they could not otherwise have known of King, a name consistent with PW5's testimony. Turay's request to the Police when detained to settle the matter amicably implies guilt. His testimony is inconsistent on how he got to know King and on the authorization for conversion. His statement contradicts his testimony on *why* he emailed the relationship officer and on whether he spoke to any Ecobank superior for payment to Magsons', nullifying the reliability of either source; *Egboghonome v. The State (2001) 2 ACLR 262*; *Owie v. State (1985) 1 NWLR (PT.3) 470*. His role in the conspiracy is evident from his overt acts and omissions which **breached all known bank procedures** to ensure the diversion of NRA cheque into the Magsons' account, the criminal purpose of the conspiracy. The case of conspiracy against Turay is established beyond reasonable doubt and he is guilty of Count 1.

Sesay testified that he inputted the NRA cheque into the Magsons' account upon Turay's instructions which were minuted on an NRA letterheaded document, but neither Turay's evidence nor Sesay's own statement corroborate this fact. Sesay said he returned the banker's cheque to Turay. Sesay's statement sometimes contradicted his testimony robbing either source of credibility and reliability; *Egboghonome* and *Owie*. Sesay knew the implications of his actions, admitting this was improper practice, yet still did it. He was dishonest since an ordinary honest person would not pay a tax agency's cheque into a private account without proper explanation. His argument of blind obedience is dismissed. His failure to challenge the allegation that he received Le 20 million, is held to be an admission to it; *Parkes v. R (1976) 1 WLR 1251*. It is reasonably inferable from Sesay's conduct that he became part of the conspiracy to divert the Addax cheque. He is therefore guilty of count 1.

Turay and Sesay were guilty of misappropriation under Count 5 since their acts were deliberate and well calculated, hence wilful and clearly intended to deprive the NRA of Addax taxes. Authorising the cheque's conversion and paying the cheque into the Magsons' account constituted misappropriation since it interfered with the NRA's right to determine the purpose of the money in the cheque, since it was done to the use of another (The Kattas) and since it was done to their own benefit. They were dishonest; honest persons in their stead would not have so acted. Neither the bank's lapse of internal control procedures nor its repayment of the Addax payment, nor its efforts to retrieve its funds from its insurance brokers negates the misappropriation.

Mrs. Katta relied on her statement. She was acting branch manager of Ecobank, Waterloo and held 60% shares of Magsons'. The account opening application bears the Kattas' photos and signatures as co-

⁹ *Katta* handwritten judgment, p. 78.



signatories to the Magsons' account and the account mandate also had their signatures. These signatures matched those on the cheques withdrawn from the Magsons' account after the payment. Mrs. Katta admitted to being signatory, but denied all these signatures. However, admitting to being signatory, meant she indirectly adopted these signatures as hers, even if Mr. Katta's assertion that he had always signed for her were true. Ecobank breached procedure by not securing the required references for the account application because Mrs. Katta was a bank employee and Mr. Katta had a pre-existing account¹⁰ and by making Mrs. Katta a signatory without a board resolution.¹¹ As a bank insider, the bank tended to refer to her for transactions carried out on the account. She denied knowing about the payment into the Magsons' account or being consulted for subsequent withdrawals although cheques above Le 5 million required both signatures. Mrs. Katta must have known the account was stocked since although there was only Le7, 545,402 in the Magsons' account prior to the payment (and there being overdraft facility), she nonetheless authorised Le200 million to Santigie Kargbo and Le 45 million to King. Inconsistencies between PW7's statement and testimony on the exact sequence of persons he contacted in seeking to process the Doherty payment are immaterial; he ended up noting Mrs. Katta's confirmation on the cheque. Her phone conversations to PW7, and to Turay and Sesay on the dates of the conversion and payment, her endorsement of cheques, were the many little things that altogether corroborated the overarching conspiracy to divert the cheque, showing that she was party to it; *Kuwait Oil Tanker Co. SAK v. Al Barder & Ors (2000) All ER (Comm) 271*. Conspiracy is proved beyond reasonable doubt against Mrs. Katta.

Mr. Katta was the initiator and centre of the Conspiracy, holding 60% shares in Magsons'. He said that King was his friend and a freelance clearing and forwarding agent, but she was actually his NRA colleague. King's motivation to ensure the cheque diversion was the Le 45 million and their relationship. Katta denies knowing of the NRA payment but only started withdrawing from the Magsons' account after it was made, knowing that it held only Le7, 545,402 before this. He contradictorily said that the signatures were his and his wife's, but later said he signed for her.¹² His asking for 6 months to 10 years to repay the misappropriated monies, is an admission of his complicity in the overarching conspiracy. Further, the state's evidence proved beyond reasonable doubt that Katta was guilty of counts 6 – 13 since within 11 days of the payment, he had authorised the withdrawal of Le339, 500,000 from the Magsons' account, intentionally and illegally assuming the right of the NRA as owner of the Addax taxes. Mrs. Katta should also have been charged with misappropriation since all but 2 of these withdrawals were jointly authorised. The Prosecution established beyond reasonable doubt that Katta is guilty of count 14, being in control of pecuniary resources disproportionate to his official emoluments. He was paid Le252, 421 monthly as an NRA collection assistant. His total salary and emoluments for his entire employment with the NRA from 1 September 2003 to June 2013 amounted to Le77, 285,612.¹³ However, his bank statements show one of his Ecobank leone account by June 2013 had Le2, 015, 967,465.61; his other Ecobank leone account by June 2011 had Le627, 531,658. One dollar account by June 2013 had \$ 47,108 and another dollar account by June 2011 had \$ 220,340. The ACC also established that he was guilty of count 15, failing to make sworn declarations under s. 119 (1) to the ACC of his incomes, assets and liabilities without reasonable cause/explanation. His asset declaration form for 2011 declared the contents of only his Sierra Leone Commercial Bank account i.e. Le 900,000 and not his Ecobank accounts and his failure to comply with the legal obligation to explain this disproportion was compelling.

The Prosecution has a discretion about who to call to prove its case; *R v. Yeboah (1954) 14 WACA 484* and *R v. Mansu (1947) 12 WACA 113* and must simply place before the Court all available and relevant evidence; *R v. Kuree (1941) 7 WACA 175*. It need not call all witnesses listed at the back of the indictment to meet its burden of proof; *R v. Edwards (1848) 3 Cox CC 82*. The Court often repeated that the Accused, (Mr. Katta,

¹⁰ *Katta* handwritten judgment, pp. 96-97, as per PW4's testimony.

¹¹ The fact of the necessity for a Board Resolution in this respect, comes in the form of a Defence submission, the veracity of which appears to have been accepted by the Court; "*The absence of such a board resolution which appears to be a breach of the bank's procedure...*"

¹² *Katta* handwritten judgment, p. 104; "*The 1st Accused did indeed say in his cautioned statement that he signed all cheques for himself and on behalf of the 6th Accused, his wife.*" At p. 117; "*The 1st Accused admitted in his cautioned statement that...the signatures described as specimen signatures are those of him and his wife...*" At p. 118; "*The 1st Accused turned summersault on his answers regarding the 6th Accused's signature.*"

¹³ As per a record produced by the NRA's Commissioner-General, Director of Finance and Budget, and Deputy Director of Administration and Human Resources; *Katta* handwritten judgment, p. 131.



Mrs. Katta, Fornah), in spite of their right to silence, should in the face of incriminating evidence, provide a credible explanation to create reasonable doubt. It reiterated that in reaching its conclusion, it can only consider the evidence before it; *R v. Sharmal Singh (1962) 2 WLR 238*. It did not address the Defence argument that the offence of, conspiring to "cause loss of revenue to the GOSL" was nonexistent.

VERDICT: Katta is convicted on count 1 and sentenced to 6 years imprisonment, convicted on counts 6 through 14 *and per each of these counts*, sentenced to a fine of Le200 million and 6 years imprisonment, convicted on count 15 and sentenced to 6 years imprisonment. All sentences were concurrent. He is discharged on counts 16,17 and 18 for which the state conceded to leading no evidence. Fornah is convicted on count 1, fined Le70 million and sentenced to 4 years imprisonment. Turay was convicted on count 1, fined Le 40 million and sentenced to 3 years imprisonment, convicted on count 5 for which he was fined Le 40 Million and sentenced to 3 years imprisonment; both sentences were concurrent. Sesay was convicted count 1 for which he was fined Le 40 million and sentenced to 3 years imprisonment and convicted of count 2 for which he was fined Le 40 million and sentenced to 3 years imprisonment; both sentences were concurrent. Mrs. Katta was convicted of count 1 for which she was fined Le 70 million and sentenced to 3 years imprisonment. The Accused were to remain in prison if by the end of their imprisonment terms they failed to pay their respective fines.

ANALYSIS: I. Case preparation: *1. Non-exhaustive investigative/prosecutorial techniques:* The Prosecution ended up conceding to having led no evidence for counts 16, 17 and 18. It should have been clarified, whether by the parties or the Court, what technical terminology such as; "system maker", "system checker", "system input authorizer" "inputter," "authorizer," "posting," meant.

II. Potentially erroneous legal, factual findings: The contention that there is no substantive offence in the ACA of "causing loss of revenue to the GOSL" which can be conjointly charged with conspiracy goes unaddressed while the charge is upheld in relation to all the Accused. It is never clarified that this offence alleged can easily be construed as misappropriation. The Court ignored that the emphasis of the Defence's argument against the pleading of s. 128 was less that the Accused misunderstood this charge, but that the charge was founded on nonexistent/bad law. Addressing Defence contentions head on means preempting their being raised as grounds of appeal and as general/press criticism.

IV. Precedential consistency: "This Court has held repeatedly that s. 128 ACA creates the offence of conspiracy"¹⁴ referring to similar situations in; *The State v Alphajor Bah and Ors, 23 October 2012, Unreported; The State v Mustafa Amara and Ors, 7th June 2013, Unreported; The State v Dr Magnus Ken Gborie and Ors, CRN 7/13, 10th January 2013, Unreported*. Amending s. 128 to 128 (1) under s. 148 (1) CPA is permissible at any stage of the trial referring to; *The State v Herbert Akiremi George Williams and Ors, 10 August 2012, Unreported*. Note that key evidential principles stated in other cases here reviewed are repeated in *Katta*. One such principle is that the Court can only draw inferences based exclusively on the evidence before it and cannot speculate outside of this; the fact of the Accused not testifying denies the Court of the opportunity of assessing his demeanour and the credibility of his account and exercising a choice; *R v. Sharmal Singh (1962) 2 WLR 238*.¹⁵ Likewise, choosing not to testify means the Accused's case stands or falls with the Prosecution's case; *Akinyemi v. State 2001*. Inconsistencies between investigative statements and testimony nullify the reliability of either; *Egboghonome v. The State (2001) 2 ACLR 262* and *Owie v. State (1985) 1 NWLR (PT.3) 470*. Failure by an Accused during testimony to challenge an allegation is an admission to it; *Parkes v. R (1976) 1 WLR 1251*. The Defence must not wait till closing addressees to object to defects in charges, later confirmed in; *The State v. Dr. Magnus Ken Gborie and Ors, 24 May 2013, Unreported*.

V. Re Governance: Of relevance is J. Paul's statement that the most relevant theory of punishment to misappropriation is deterrence not reformation and that the public's welfare should be the preoccupation of the Court given the frequency of these incidents at the NRA. The *Katta* incident and others like it, (the disappearance of another Addax cheque, paid at the same NRA office in March 2013), were enabled by

¹⁴ *Katta* handwritten judgment, pp. 20-21.

¹⁵ *Katta* handwritten judgment, pp. 27-28.



failure to exercise due diligence¹⁶ and to follow established procedure at the NRA and Ecobank. The Court openly recognised that the conversion and the payment were made "in breach of all banks' laid down procedures."¹⁷ The circumstances make clear therefore that; standard procedures must be known, their observation characterized by due diligence and must inhere an in-built guarantee of their own observance in order to be watertight. The NRA directive 2011 prohibiting the direct receipt of tax which aimed precisely to avoid situations such as that in Katta was breached. The MOU between Ecobank and the NRA that tax should be transmitted to the government's consolidated account, central bank was also directly contravened by Ecobank staff. Additionally, the bank breached its own internal procedure by not demanding the provision of references in setting up the Magsons' account for its staff member and by appointing her signatory without the necessary board resolution. The Katta scenario therefore raises the question of awareness; public awareness of NRA customer related policies, and staff awareness of key policies of their employer institution. The issue of diligence is also manifest in the customer relationship officer's being duped by Turay's email into believing the request for conversion had already been made so that he simply confirmed the payment of the cheque without asking to see the actual formal request for conversion as was the standard procedure. Secondly, it may be necessary for banks to clearly articulate the extent to which the practice of bankers' of confirming significant transactions with customers by telephone¹⁸ is appropriate, if only to avoid its being employed as a legitimating defence. PW7's securing of Mrs. Katta's confirmation over the phone for processing a Le45million cheque drawn on the Magsons' account was accepted by the Court. Similarly, Turay explained that he sourced authorization for a nearly 400 million Leones payment over the phone from King's boss and his own supervisors. However, this was rejected as beyond acceptable, because it was a 3rd party transaction and since he could not identify them by name. Fourthly, these instances raise again the issue of awareness, here specifically of the bounds of one's roles/responsibilities and those of colleagues, and the need to question the unlawful exercise of authority. Here, note that PW5 complied with Turay's request for conversion despite recognising that standard procedure, in the form of the requisite supporting documents, was absent and that the request was not sourced from or addressed to the appropriate parties. PW5 said he complied partly out respect for Turay the most senior staff around on that day. Similarly, Sesay complied with Turay's request despite knowing this was improper practice,¹⁹ pleading superior instructions.²⁰

V. Knowledge/Information Management: Little can be done by way of logging information when parties are intent of not doing so, in order to effect the crime. This fact underscores the importance of rigorously maintaining modes of IM, since any departure from the norm would help trigger detection alarms. For e.g., Fornah was set on not logging any details about the Addax cheque. Note that although the original of the Addax company cheque was tendered in court,²¹ only copies of the banker's cheque could be produced at trial,²² being retained as part of standard procedure, as should also have been the original banker's cheque upon payment. However, this original was irretrievable.²³ After PW5 gave King the banker's cheque, she returned it to Turay, who then gave it to Sesay to credit the Magsons' account. Although Sesay says he returned it to Turay after this, Turay could not explain its loss and said that it was supposed to be in Sesay's work. Also, Turay said he filed the NRA letterheaded document from the NRA Finance Director authorizing the payment, but he did not produce it at trial. In Katta, modes of IM were used to detect the crime. PW4 used "flex cube" the bank's "core application" to investigate the Addax cheque. The app. allowed for field-based queries such as, "system maker/checker/system input authoriser", for both transactions; the conversion and the payment. It also enabled print outs of transaction reports/lists. In this way, PW4 uncovered the involvement of Sesay as inputter, and Turay as authorizer. Also, the analysis of the Africell call logs of staff "virtual private network lines" enabled detection of frequent communications between Mrs. Katta, Turay and Sesay on the critical dates.

¹⁶ Katta handwritten judgment, (Sentence), pp. 145-146.

¹⁷ Katta handwritten judgment, p. 109.

¹⁸ Katta handwritten judgment, p. 107; judicial notice is taken of this practice.

¹⁹ Katta handwritten judgment, p. 91; "improper practice."

²⁰ Katta handwritten judgment, p. 92; "...acted in the normal course of his employment as one who takes and executes instructions from his superior."

²¹ Katta handwritten judgment, pp. 43-44; tendered by PW4 as Exhibit M.

²² Katta handwritten judgment, p. 44; Tendered by PW4 as exhibits N and N2 respectively.

²³ Katta handwritten judgment, p. 44; "PW4 said the original banker's cheque could not be located from the 5th Accused, Emmanuel Sesay..." At p. 84; "The original of Exhibit 'N' (the Manager's cheque) had been deftly thrown away."



APPLIED LAW: The Defence must not wait till closing addresses to object to defects in charges. S. 133(2) Criminal Procedure Act 1965 makes it impossible, except with leave of the Court, for the Accused after he has pleaded to the charges, to object that his trial has been improper due to defects, omissions or irregularities relating to the depositions or committal or any other matter out of the preliminary investigation. S. 133 (1) CPA states that by pleading not guilty to charges, an Accused had obliged the trial process. Rule 3(4) (b) in the 1st Schedule to the Rules made under s. 50 CPA provides that it shall be sufficient if only the words of the section of the enactment creating the offence are set out in the particulars of the offence.

S. 128 ACA creates the offence of conspiracy; *The State v Alphajor Bah and Ors*, 23 October 2012, Unreported; *The State v Mustafa Amara and Ors*, 7th June 2013, Unreported; *The State v Dr Magnus Ken Gborie and Ors*, CRN 7/13, 10th January 2013, Unreported. Amending charges, including s. 128 to 128 (1) under s. 148 (1) CPA is permissible at any stage of the trial; *The State v. Herbert Akiremi George Williams and Ors*, 10 August 2012, Unreported. A statute should be construed in conformity with common law and the rules of law, unless there is a contrary intention: *The State v. Dr. Magnus Ken Gborie and Ors*, 24 May 2013 Unreported, *R v. Morris (1867)LR 1CCR 90*; *Lord Eldon v. Hedley Bros (1935) 2 KB1 24*; *R v. Thomas (1950) 1 KB 26*. S.74 of the Courts Act 1965 makes common law part of the existing laws of Sierra Leone.

It is difficult to detect corruption in public service since participants consciously cover their tracks; *Public Prosecutor v. Yuvaraj (1970) AC 913*. The actual offence in a conspiracy is the agreement between 2 or more persons to do an unlawful act. Conspiracies come in different forms, with roles of varying significance. Conspirators need not know each other, neither do they need to have simultaneously started the conspiracy, it can be joined tacitly; *Kuwait Oil Tanker and Ali Barder and Ors (2000) 2 All ER (Comm) 271*, and at a later stage; *R v. Meyrick and Ribuff (1929) 21 Cr. App. R. 94*. A conspirator is deemed to have joined the conspiracy at a later stage where he is aware of all the essential facts of the conspiracy and entertains the same object. The unlawful act is the act done in pursuit of that criminal purpose and the unlawful frame of mind is the intention to do the unlawful act.²⁴ These can rarely be proved through direct evidence, but are inferable from the acts or omissions of the parties. Very often, the act is the only proof of conspiracy. Circumstantial evidence combined with other evidence are thus relied upon to demonstrate the agreement to participate or commit the crime and the commission of the crime itself. Complicity in a conspiracy may be corroborated by varying/disparate pieces of evidence; *Kuwait Oil Tanker Co. SAK v. Al Barder & Ors (2000) All ER (Comm) 271*. In proving conspiracy, the words/acts or omissions of an Accused conspirator in furtherance of the common design, made in the absence of the other Accused conspirators, may be admitted in evidence against these other conspirators; *R v. Luberg (1926) 19 Cr. App Rep. 133*; *R v. Boulton (1871) 12 Cox CC 87*; *R v. Cooper and Compton (1947) 2 All ER 701*.²⁵ This is determined on an individual case basis.

The Court in reaching its conclusion can only consider and draw inferences based exclusively on the evidence before it and cannot speculate outside of this; *R v. Sharnpal Singh (1962) 2 WLR 238*. The Accused in spite of their right to silence, should in the face of incriminating evidence, provide a credible explanation to create reasonable doubt. Choosing not to testify (relying exclusively on their statements), means the Accused case stands or falls with the Prosecution's case; *Akinyemi v. State (2001) 2 ACLR 32*. Where a witness's statement contradicts his testimony, either source is robbed of credibility and reliability; *Egboghonome v. The State (2001) 2 ACLR 262*; *Owie v. State (1985) 1 NWLR (PT.3) 470*. Failure by an Accused during testimony to challenge an allegation is an admission to it; *Parkes v. R (1976) 1 WLR 1251*. Requests by the Accused to be allowed to make good losses he is accused of imply admissions of guilt; Turay requested an amicable settlement in his statement,²⁶ and Katta requested in his statement a grace period of between 6 months, 5 -10 years to repay the diverted money.²⁷ There's is no need to call an expert where the Court can form its own conclusions of the facts; expert opinion is relevant and admissible where it

²⁴ *Katta* handwritten judgment, pp. 28- 29.

²⁵ However, see Snap **III. Conspiracy and Procurement: 1. Conspiracy: B. Evidence:** p. 2, para. 1; the *Al Jazeera case* made it clear that although the acts of the Co-Accused may be admitted to prove involvement in a conspiracy, of the Accused, the Co-Accused's act sought to be admitted should be in furtherance of a common plan between himself and the Accused/it should indicate the pursuit of a plan between them and even where this criterion is met, other independent evidence implicating the Accused in the conspiracy is needed. Therefore, evidence of the Co-Accused's conduct by itself does not suffice.

²⁶ *Katta* handwritten judgment, pp. 84-85; Such requests often imply admission of guilt.

²⁷ *Katta* handwritten judgment, p. 118; It was held that Katta's statement was "in the nature of an admission of guilt."



provides scientific or technical information unknown to the judge; *R v. Rickard (1918) 13 Cr App Rep 140*; *R v. Turner (1974) 60 Crim. App. R. 80* and *DPP v. Jordan (1977) AC 699*.

The Prosecution bears the burden of proof beyond reasonable doubt for the elements of all the offences against the Accused; *Woolmington v. DPP (1935) AC 462*. Proof beyond reasonable doubt need not reach certainty, but must carry a high degree of probability. A remotely possible but highly improbable doubt operating in favour of the Accused is not a reasonable doubt; *Miller v. Ministries of Pensions (1947) 2 All ER 372* and *Nasiru v. State (1999) 2 NWLR (PT. 589) 87*. The Prosecution has a discretion about who to call to prove its case; *R v. Yeboah (1954) 14 WACA 484* and *R v. Mansu (1947) 12 WACA 113* and must simply place before the Court all available and relevant evidence; *R v. Kuree (1941) 7 WACA 175*. It need not call all witnesses listed at the back of the indictment to meet its burden of proof; *R v. Edwards (1848) 3 Cox CC 82*. . To prove Katta violated s. 27(1) (b) ACA, the Prosecution must make out a prima facie case that Katta was a public officer, and that the amount of his pecuniary resources was disproportionate with the amount of his total official emoluments up to present. Establishing these ingredients of the offence, reverses the burden of proof, placing it on the Accused, who must proffer an explanation, on a balance of probabilities, to satisfactorily show that the pecuniary resources came from legitimate sources. The Accused's right to silence is affected since reticence in these circumstances indicates that the Accused has something to hide. S. 119 (1) ACA requires public officers to make sworn declarations of their incomes, assets, liabilities to the ACC, within 3 months of becoming a public officer and in each succeeding year not later than 31 March. Therefore, under s. 122 (c) ACA, failing to give information required by the ACC, specifically its asset declaration form in s. 119 (1), the Prosecution must prove that the Accused was a public officer, that he was obligated to make yearly assets declarations and failed without reasonable cause to do so.

An act done in pursuit of an unlawful design does not stop it being a misappropriation. Under s. 36 (1) ACA, misappropriation is the intentional, illegal use of public property/funds for one's own use, or to the use of another unlawfully, or other unauthorised purposes. Misappropriation requires the owner of the property appropriated to be public body. The NRA, a public body created by a Parliamentary Act was the owner of the money in the Addax cheque. An owner has a package of rights, one of which was to authorise that cheque be used for the purpose for which it was made; a misappropriation involves doing an act expressly or impliedly unauthorised by the owner, amounting to an adverse interference with those rights; *R v. Morris 1983 All ER 288*; *R v. McPherson (1973) Crim L.R. 191* and *Anderton v. Wish (1980) 72 Cr. App. R. 23*. The misappropriation must be wilful. Wilfulness in itself imports elements of dishonesty; *The State v. Kasha Wellington and Anor (unreported)*; *R v. Ghosh (1982) 2 QB 105*.

MEDIA REVIEW:

Reports amply covered the trial facts, investigative, prosecutorial phases, gradual streamlining of the 17 mainly NRA and Ecobank suspects, the 2 resultant ACC cases (*Lavalé and Ors.*) and King's arrest in Banjul. The trial, the verdict, sentencing stages, reaction of the court audience, and positive public reception, were vividly captured; the public were actively present during the trial. This 1st mandatory custodial sentence in an ACC case (1st imposition of a combined sentence of fines and imprisonment), was meant to reflect the gravity of the offences and send a stark message to similarly placed persons. The Sierra Leone Telegraph claimed this sanction was prompted by journalistic activism and debated whether this was an instance of selective justice. Katta's and Fornah's fines were presented at times as cumulative, at others as concurrent; the ACC Media Unit's press release and The Sierra Leone Telegraph calculated cumulatively. Awoko's references to responses and rejoinders as "*bites*" highlight a need for knowledge of basic legal terminology. It was misreported that the Accused were also convicted of conspiracy to commit Felony, of *various* forms of conspiracy, that Katta was paid Le 680,000 monthly and in possession of Le 2.6 billion, (see contrary Facts above). Ecobank's lapses of internal procedure were reported, but it asserted its non-collusion and strengthening of its control systems. Commissioner Kamara described the conviction under s. 27 (1) (b) ACA as historic and a default charge of sorts.



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***THE GAVI FUNDS
CASE #2 KEN GBORIE***



The GAVI Funds Case/The State v. Dr. Magnus Ken Gborie, Dr. Edward Magbity and Lansana S.M. Roberts, before Hon. Mr. Justice M.A. Paul, 24 May 2013

FACTS: GAVI¹ gave the GOSL \$23,152,974 for 2008-2011. The DPI², MOHS³ was responsible for implementation of the GAVI programme. The DFR⁴ was to disburse these funds on request from implementers. However, the GAVI draft audit (07.12.12) identified the non-involvement of the DFR and a lack of accountability in financial management: deficient procurement, weak internal financial controls, weak record management and weak external audit work. These irregularities totalled \$1,142,823. Donor funds including the GAVI grant were mixed in the MOHS' EPI⁵ account held at the Sierra Leone Commercial Bank (SLCB). Dr. Ken Gborie, the DPI Director and a signatory to the DPI's Union Trust Bank (UTB) account, had to approve GAVI and other donor funded projects. Dr. Magbity was the DPI's Principal M&E⁶ Officer and a signatory to the DPI account. Roberts was the owner of *Rolaan Enterprises*. To implement donor program activities, the DPI would request funds from the CMO⁷ and PS⁸, MOHS.⁹ On approval, funds would be transferred to the DPI account. Standard procedure was for the FO¹⁰ to draw up the cheque according to the instructions in the approval, submit it to the signatories for endorsement, then cash it, and for expenditures to be documented.

All 3 Accused pleaded not guilty to all offences. Count 1 charged Ken Gborie and Roberts under s. 128 with conspiring with other persons unknown to misappropriate Le46, 237,500 in 2009. Count 2 charged Roberts under s. 37(1) ACA with misappropriating Le51, 375,000 in 2009. Count 3 charged all 3 with misappropriating Le242, 400,000 in April 2011. Count 5 through 14 charged Magbity with misappropriating funds totalling Le446, 820,000 through 2008 and once in 2012. Counts 4, 15 and 16 charged Ken Gborie with misappropriation totalling Le161, 570,000 in 2012. Count 17 charged Ken Gborie and Magbity under s. 48 (2) (b) ACA with wilfully failing to comply with procurement law when contracting *78 Enterprises* for car hire in 2012. Counts 18 and 19 charged Ken Gborie and Magbity respectively under s. 28(2) (a) ACA with accepting an advantage as a reward in 2012 in the sum of Le 62.5 million and Le47.5 million respectively from "78" for awarding a vehicle rental service contract to it. The Accused did not testify or call evidence, but relied on their unsworn statements.¹¹

JUDGE'S REASONING: The Court overruled the Defence arguments of no case to answer, that the ACC Commissioner was not a Law Officer and lacked the legal capacity to sign the indictment, and that s. 128 ACA did not provide an offence of conspiracy. It held that the Prosecution's evidence warranted responses from the Defence, that the ACC Commissioner was competent to sign ACC indictments, (referring to *Francis Fofanah Komeh & Anor v. The State, Cr. App. 1/2011 of 27th November, 2012, (Unreported)* which determined that he could), held that based on the uncontroverted appellate decision of *The State v. Alphajor Bah & Ors, of 23/10/12, (Unreported)*, s. 128 ACA did create the offence of conspiracy and that the ACC could regardless charge conspiracy under the Common Law, which under s.74 of the Court's Act 1965 and ss. 176 and 177 of the 1991 Constitution was part of the laws of Sierra Leone. The Court denied the application for permission to appeal so that a case would be stated on these issues before the Court of

¹ The Global Alliance for Vaccines and Immunization.

² The Directorate of Planning and Information, MOHS.

³ Ministry of Health and Sanitation.

⁴ The Director/ate of Financial Resources, MOHS.

⁵ The Expanded Programme for Immunisation, MOHS.

⁶ Monitoring and Evaluation Officer.

⁷ Chief Medical Officer.

⁸ Permanent Secretary.

⁹ *Ken Gborie* judgment; pp. 52 and 64, as per the evidence of Ken Gborie. Also see p. 43, as per the evidence of ACC Investigator, Musa Jamiru Bala Jawara, PW1.

¹⁰ Finance Officer. *Ken Gborie* Judgment, pp. 53 & 64; Ken Gborie's evidence suggests FOs were attached to units, but he also refers to an "FO (...) for the GAVI Project Fund," at p. 52. Magbity also suggests that FOs were attached to units at p. 90. In fact, FOs are attached to programmes, although a single accountant may act as FO to several small programmes simultaneously and so appear to be attached to a unit. See pp. 22-25 of Snapshot **IV. Control and Management of Public Funds; 2. Modes of Control; E. Finance Officers (FOs)**.

¹¹ *Ken Gborie* Judgment, p. 33; "(...) the accused persons neither gave nor called evidence (...) They made interview statements to the Anti-Corruption investigators, upon which they rely, for their defence. They are unsworn extra-judicial statements containing (...) denials."



Appeal. Defence counsel then kept filing motions calling for the recusal of J. Paul, whom he alleged was biased. It was held that the application for case stated should not be lodged with a Court after it had determined the very questions intended to be stated. Subsequently, Defence counsel, "*in clear abuse of process*," filed an application before the Supreme Court seeking a review of these already determined questions. Defence counsel was absent without an explanation on both dates given for filing a closing address. Instead the Court received a request from Defence counsel for it to stay/halt proceedings pending the Supreme Court's review pursuant to their application. J. Paul cautioned Defence counsel¹² against being held in contempt, referring to his warning to another counsel in *Hassan Mansaray v. The State, Misc. App. 445/13 of 25th November, 2013* where he employed *Rondel v. Worsely (1967) 1 Q.B. 443* to define the duties of an advocate.

The Defence argued that the particulars of the counts prejudiced the Accused by not giving reasonable information regarding the nature of the charge as required by s. 51(1) CPA 1965 and the rules in the 1st schedule made under s. 50 CPA 1965.¹³ This was because Ken Gborie and Magbity were referred to respectively in all the particulars of offences as, "*Director of Planning and Information and Principal M & E Officer of GAVI HSS support project with MOHS*"¹⁴ and because certain counts concerned activities funded by donors other than GAVI. These arguments were held to be late and without merit, since the Accused had conceded to being tried upon the indictment by pleading not guilty: s. 133 (1) CPA; *The State v. Solomon Hindolo Katta & Ors. of 3/4/14, (Unreported)*; *Oba Kpolor v. The State (1991) INWLR (PT. 165) 113*; *Ikomi v. State (1986) 3 NWLR (PT. 28)*. Their plea and non-objection during the trial to the form of the indictment signalled they understood the charges and were not prejudiced. Consequently, they could now only object to the form of the indictment with the leave of the Court; s. 133 (2) CPA.

Defective charges must prejudice an Accused's defence for a conviction to not be affirmed at appeals. Rule 3(4) (b) of the 1st Schedule made under s. 50 CPA 1965 only requires the particulars of offence to mirror the provisions of the statute creating the offence; this was met by the impugned counts, since they clearly state "*misappropriation of donor funds*" and are offences in law. As such, the Prosecution complied with s. 51(1) CPA 1965 as the charges provided the particulars necessary for giving reasonable information. Regarding the Accused's rightful designations, note that misdescriptions in the indictment regarding the Accused's occupation/residence do not prejudice the Accused where the particulars of offence and the summing up are sufficiently clear on the crime alleged and where the evidence proved that offence against the Accused; *R v. Ayres (1984) AC 447*. The Accused did occupy the alleged positions in the DPI and were involved in the implementation of GAVI and other donor funded programmes implemented by the DPI with funds in the DPI's UTB account, to which they were signatories. Omissions in the particulars of offence to mention the specific donor are merely technical defects and do not render the indictment a nullity. The ACC investigation looked at donor projects other than GAVI¹⁵ and all counts identified the specific programme so that the donor was identifiable. Whether the allegations of misappropriation related to GAVI funded activities or not, the evidence supported charges of misappropriation. Defence submissions recognised that certain counts concerned activities funded by donors other than GAVI.¹⁶ The Accused admitted to signing the cheques *and* being directly involved in the implementation of donor programmes, so they did know some cheques and charges pertained to donor funds other than GAVI's and could identify those donors. They were as such not prejudiced by the charges.

¹² "*Defence counsel*" here is used more specifically to refer to Counsel for Roberts; C.F. Margai & Associates represented by Charles F. Margai and R.B. Kowa. The Court notes that Defence Counsel in the appeal of *Francis Fofanah Komeh* was R.B. Kowa.

¹³ This is of course to ensure that an Accused fully appreciates the nature of the allegation against him to sufficiently prepare his defence. Refer to Applied Law section below.

¹⁴ HSS means Health System Strengthening.

¹⁵ *Ken Gborie* judgment pp. 22, 28, 48; PW1 testified that the ACC investigation included other donor projects/programmes.

¹⁶ *Ken Gborie* judgment pp. 22; Counsel for 1st Accused submitted that count 3 relates to the (SARA) activity funded by Global fund, and that counts 4 and 18 related to an activity funded by the World Bank. Counsel for the 2nd Accused submitted that counts 6 to 14 related to activities funded by Global Fund and WHO. *Ken Gborie* judgment pp. 29; Such information could only have come from the 2nd Accused, who knew the difference having been involved in matters to which they relate. Learned counsel could only have come by such information though the 1st Accused and not necessarily through assumptions from exhibits tendered by the Prosecution.



The ACC investigation and the GAVI draft audit found that the DFR's function of effecting payments to implementers of donor funded projects was usurped by Ken Gborie, Magbity and M. Amara.¹⁷ In late 2011, the senior PS, MOHS addressed a request to EPI and DPI that *financial management* of health projects/programmes not managed by fiduciary agents should be centralized within the DFR.¹⁸ The evidence is that Ken Gborie, Magbity and A. Amara "financially managed donor funds." Ken Gborie said funds for programme activities were disbursed by the FO, DPI, but he did not know the latter's name suggesting he only ever bypassed him. It was instead M. Amara who presented them with the cheques relating to counts 3, 4 and 5 which correspond to counts 17 and 18.¹⁹

Regarding count 2, the facts are that on 24 March 2009, the DPI submitted a request for Le127, 870, 000 to be transferred to the DPI account for the assessment of the impact of the new *HMIS* form²⁰ under the GAVI programme, scheduled for between 5 and 19 April 2009. Roberts owner of *Rolaan* was paid Le 51, 375 000 for vehicle hire²¹ out of the transferred funds. Ken Gborie and Magbity could not produce the relevant impeachable documentation. Robert's said that he received Le51, 375, 000 from the DPI for hire of 10 vehicles which he said he sourced from elsewhere.²² There were no documents with the car registration numbers as required. The fuel receipts attached showed that more than half of the fuel was bought from one location, whilst the activity was to be carried out simultaneously in 13 districts.²³ The GAVI draft audit's forensic analyses found that these fuel invoices were falsified. MOHS produced *Rolaan's* tax clearance certificate and proforma invoice which although they should have been submitted prior to payment are dated 4 September 2009 and 20 April 2009 respectively. The receipt of 7 May 2009 also post-dated the activity. Both the ACC investigation and the GAVI draft audit noted these discrepancies; that the receipt, proforma invoice and tax clearance post-dated the activity as indicated by DSA vouchers. Roberts claimed not to be able to remember the names of persons from whom he sourced his vehicles, and although he said he maintained business records for 2 years, searches of his office and home revealed no records with these car providers. Further, this activity budgeted for motorbikes not car hire. All this and his lack of cooperation during interview underlined his dishonesty, and underlined that he knowingly received money for which he provided no service. Although s. 94 ACA obligates Roberts to explain on a balance of probabilities the legitimacy of this payment, he provided no credible answers.²⁴

Regarding count 3, Ken Gborie and Magbity signed a cheque for Le242, 400,000 to Roberts for car hire for the SARA activity funded by Global Fund scheduled for April 2011. *Rolaan* provided a receipt dated 14 April 2011 for leasing out and fuelling of 16 cars for 15 days. This receipt predated the very cheque for payment, dated 15 April 2011.²⁵ Strangely, the receipt bears the same date as the proforma invoice which did not mention vehicle registration numbers. The coincidence of the date of the proforma invoice and receipt mean that Roberts' could not have been paid Le242, 400, 000 since the proforma would have factored in that M. Amara and Magbity provided most of the vehicles on that date.²⁶ Although Ken Gborie admits signing this cheque, he says he cannot recall what it was for, or what *Rolaan* was. Ken Gborie and Magbity should not have signed this cheque presented by M. Amara, (not an FO but an alternate signatory to the DPI account), should have insisted on adherence to procurement procedure and verified the relevant supporting documents. Ken Gborie provided no evidence of the supporting documents on which he signed the cheque and the DPI has no evidence that the approved procurement procedure was followed. The Court held that the

¹⁷ *Ken Gborie* judgment pp. 41, 42, 62; per the evidence of PW1.

¹⁸ *Ken Gborie* judgment pp. 62-63; Letter from Senior PS, MOHS 26 October 2011; "Transfer of Management of GAVI Fund and other accounts to the DFR, MOHS." The SPS requested for all documents relevant to the operations of the GAVI Fund and other accounts to be immediately submitted to the DFR.

¹⁹ See immediately below on these counts. There is no mention in the judgment of M. Amara preparing the cheque for payment of Le51, 375,000 to Roberts as per count 2, or the cheque pertaining to counts 6-14.

²⁰ *Ken Gborie* judgment pp. 40-41; This was "an assessment of the impact of newly harmonised forms, on data quality and timeliness of reporting."

²¹ *Ken Gborie* judgment, p. 41; See letter from the Director of Transparency and Accountability with GAVI Alliance saying the sum of Le51,375,000.00 was in connection with the GAVI HSS activity for which Le127,870,000 was paid into the DPI account.

²² *Ken Gborie* judgment, p. 45.

²³ *Ken Gborie* judgment, pp. 41-42; as per the evidence of PW2, ACC Investigator, Felix Lansana Tejan Kabba. The claimed location of fuel purchase was No.1 Camp Lane, Tankoro, Kono District.

²⁴ See Applied Law section below on s. 94 ACA.

²⁵ *Ken Gborie* judgment, p. 56. Note the typo that the proforma invoice submitted by the 3rd Accused to DPI is dated 14 April 2014.

²⁶ *Ken Gborie* judgment, p. 57.



Prosecution could not be expected to do more than it did; it provided every document the MOHS submitted and tried to secure relevant documents from Roberts. Only the Accused's provision of evidence would have better facilitated clarity. The Accused despite the clear public interest in doing so, did not provide a credible account to possibly create a reasonable doubt. Although Roberts claimed he kept his business records for 2 years, the fact that he could provide no relevant document proves he hired no vehicles out to DPI for SARA. He claimed he paid the cheque into his bank account, then gave M. Amara and Magbity part of the Le242, 400, 000 to pay them for providing cars/other car providers.²⁷ He claimed not to remember the contact details and the amount paid to other car providers he dealt directly with. Consequently, investigators could not contact them. Roberts claimed not to be able to recall the breakdown in figures of the allocations of the Le242,000,000. His uncooperativeness during his interview and the murkiness of his evidence infers conscious impropriety/ dishonesty. The Court must draw its conclusions based on the evidence before it; *R. v. Sharmal Singh*. It can be inferred from the conduct of the 3 Accused that the Le 242, 400, 000 routed through *Rolaan* and given by Roberts to M. Amara *was* for the personal benefit of Ken Gborie and Magbity. They are therefore convicted of count 3.

Counts 4, 5, 17, 18 and 19 concern a WB funded PBF²⁸ monitoring project for which Le995, 000, 000 was transferred to the DPI account by MOFED²⁹ upon Ken Gborie's request. Ken Gborie and Magbity signed cheques prepared by M. Amara worth Le180, 180,000 on 2 April 2012 and worth Le235, 420,000 on 17 May 2012, made out to Gbao/"78" for car hire. Although all procurements must be done within institutional procurement structures³⁰ (institutional head, PC,³¹ PU,³² and Evaluation Committee), the head of MOHS' PU was unaware of the "78" contract. This particular contract did not go through the national competitive process as it should have. S. 1(c) of the 1st Schedule to the PPA 2004 requires contracts above Le 300 million to be published. Regs. 45 (1) and (2) PPR³³ and s. 46 (2) PPA³⁴ state that the PC must first approve the sole-source procurement method and s. 46 (1) PPA states that sole-source procurement is permitted only when the service/provider is exclusive, a continuation of prior service, or for an emergency. Contrary to these rules, M. Amara simply called Gboa over the phone to submit a proforma invoice. In fact, to cloak this award with legitimacy, 2 proforma invoices were submitted with no other supporting documents. Ken Gborie argued that it was M. Amara, the FO and Magbity who directly procured "78." However, there was no evidence of the FO procuring "78" and the FO's evident un-involvement here, suggests illegitimacy. Ken Gborie requested funding for this activity, signed the cheques to "78", benefited Le62.5million from the contractual award, and bypassed the FO by dealing directly with M. Amara. Therefore, he wilfully ignored procedure in procuring the services of "78". Magbity argued that he could not be charged with s. 48 (2) (b) ACA since procurement was not part of his duties. However, he was directly involved in procuring "78" by signing the cheques with Ken Gborie. If he simply signed the cheques unquestioningly, he may have been negligent (blind eye dishonest), but still criminally liable under s. 48 ACA. However, no honest person who was a signatory accountable for donor funds, with his level of intelligence and experience as Principal M & E Officer, and knowledge of procurement law, would sign such cheques, without asking questions. To do so indicates he was dishonest and wilfully failed to comply with procurement law. Ken Gborie and Magbity were motivated from the outset to ignore procurement law because of the benefit they derived from doing so. They are therefore guilty of count 17.

This benefit was in the form of payments made by Gbao after he received his cheque, to Ken Gborie and Magbity, on the instruction of A. Amara. Ken Gborie benefited Le47.5 million and Magbity benefited Le 62.5 million These payments were according to Ken Gborie and Magbity, for the hiring of cars from other sources, since, they claim, most of Gbao's cars were faulty. However, Ken Gborie and Magbity gave inconsistent accounts of Gbao's suggestion on replacing cars. Ken Gborie said that Gboa assigned the responsibility of securing 12 vehicles to the DPI and said he would repay DPI. Magbity said that Gbao asked

²⁷ *Ken Gborie* judgment, p. 55; "*Michael Amara and Edward Magbity (...) brought some vehicles so I gave some money to them for that.*" Roberts also says at p. 55 that he gave M. Amara money :"*(...) so that he can pay the owners.*"

²⁸ Performance Based Financial Monitoring.

²⁹ Ministry of Finance and Economic Development.

³⁰ *Ken Gborie* judgment, p. 55; Unless donors specify other procedures, which must still be within the National Procurement System.

³¹ Procurement Committee.

³² Procurement Unit.

³³ Public Procurement Regulations 2006.

³⁴ Public Procurement Act 2004.



that car owners be referred to him directly, so that he referred *Letto Car Rental Services* directly to Gbao, although payment, he claimed was routed through him. It was out of place for Ken Gborie, Director DPI and principal signatory to the DPI account to act as go-between for payment of 4 hired vehicles. Although the two Accused claimed they did pay the car providers, the monitoring returns did not contain the payment voucher Ken Gborie claimed they signed, nor the receipt Magbity claimed they provided. They are therefore guilty of counts 18 and 19.

These payments to Ken Gborie and Magbity were not legitimate "kickbacks" as argued by the Defence. In *The State v. Michael Amara, 19 September, 2013* "kickbacks" sourced from legitimate payments were held not to be misappropriation. However, the Gbao's payments to the Accused were sourced from illegitimate payments, so could not be legitimate kickbacks.³⁵ The fact that M. Amara prepared the cheques, then instructed Gbao to pay Ken Gborie and Magbity suggests that the cheques were prepared with their interests in mind. Prior to the Le 62.5 million being paid into Ken Gborie's SLCB account, it on 30 May 2012 contained Le 1, 963, 305. Still, he withdrew Le 10, 250, 000 and Le 5 million on 4 June 2012 and Le 45 million on 5 June, 2012 from it. Magbity withdrew the Le 47.5 million purportedly meant for payment to *Letto Car Rental* and paid it into his savings account. The fact that "78" was used as a conduit to misappropriate the sums in counts 4 and 5 is clear evidence of dishonesty. All this impropriety surrounding the payments to "78" exposed a scheme by Ken Gborie and Magbity to misappropriate the Le 62.5 million and Le 47.5 million sourced from donor funds. They are therefore guilty of counts 4 and 5.

Counts 6 to 14 concern 9 DPI UTB cheques Magbity cashed as evidenced by attached copies of his ID,³⁶ and bank statements reflecting these withdrawals. Magbity, who was not a programme implementer says he could not recall why he cashed them. MOHS did not provide any documentation supporting these withdrawals, despite the ACC request for records of disbursements (receipts, payment vouchers) regarding GAVI funding. It was held that Magbity was experienced, knowledgeable and intelligent, so that he could not claim to not remember why he withdrew a total of Le399,320,000 from the DPI account, especially since most withdrawals took place within short intervals. Magbity as Principal M & E Officer led the drafting GAVI HSS project proposal and agreed with management on use of the pre-existing MOHS' GAVI EPI account for payment of GAVI HSS funds. His role involved coordinating the setting up of information systems to help monitor and assess the MOHS programmes. He therefore knew when the GAVI funds came through/were paid in. Although he identified the role of FO as disbursing funds for supervision and identified various persons who'd held the office, he admitted that the FO was uninvolved in these withdrawals. He identified the DPI account signatories before he was added as an alternate signatory from 17th November 2008 as Dr. Clifford W. Kamara, former Director DPI, and Dr. Duramani Conteh³⁷ later Ag. Director DPI. Based on the consistency of handwriting, the 9 cheques were written and signed by Dr Duramani Conteh and also signed by Dr. Clifford Kamara. Magbity as the beneficiary gave no credible explanation about these withdrawals, but remained silent to shield himself, Drs. Kamara and Conteh who signed the cheques without lawful authority, suggesting they colluded with Magbity to use him as a conduit for funds for themselves.³⁸ The public interest in Magbity's account trumped his right to silence. His evasiveness in light of his intelligence and experience evinces dishonesty. All circumstances concerning counts 6 to 14 collectively indicate Magbity's guilt so that he is convicted on those counts.

Although the Accused were not compellable witnesses, testifying, calling evidence or even making unsworn statements in Court, might have provided credible explanations creating reasonable doubt. Their failure to do so suggests they have no credible justification for their conduct, especially not one that would have stood up to questioning. Not calling M. Amara as a witness raises a presumption against them that his evidence would not have been in their favour; *The State v. Anita Kamanda, (Unreported), 10th July, 2013*.

VERDICT: Ken Gborie was convicted of counts 3, 4 and 17. He was sentenced to 6 years imprisonment per each count. He was fined Le80.8 million on count 3, fined Le62.5million on count 4 and fined Le100 million

³⁵Note however, that popular understandings of the term kickback is simply the same as an ordinary bribe. See https://en.wikipedia.org/wiki/Kickback_%28bribery%29. See also; <http://www.merriam-webster.com/dictionary/kickback>.

³⁶ *Ken Gborie* judgment, p. 84; copies of his identity card and driver's license number.

³⁷ *Ken Gborie* judgment, p. 90; Dr. Conteh was a medical statistician in the MOHS, who became Ag. Director, DPI and consequently signatory to the DPI account.

³⁸ *Ken Gborie* judgment, p. 90.



on count 17. Magbity was convicted of counts 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 17. He was sentenced to 6 years imprisonment per each of these counts. He was fined Le 80.8 million on count 3, Le 47.5 million on count 5, Le 30 million on count 6, Le 60 million on count 7, Le 65 million on count 8, Le 45 million on count 9, Le 53 million on count 10, Le 30 million on count 11, Le70 million on count 12, Le 30 million on count 13, Le 30 million on count 14 and Le 100 million on count 17. Roberts was convicted of counts 2 and 3. He was sentenced to 6 years imprisonment per each count and fined Le51, 375,000 on count 2 and Le80.8million on count 3. The Accused were discharged on counts 1, 15 and 16, conceded by the Prosecution. Since convictions were secured on counts 4 and 5, counts 18 and 19 were dismissed. For all the Accused, imprisonment terms were concurrent. They were to remain in prison until payment of the cumulative fines.

ANALYSIS: I. Precedential consistency: The Court referred to the sentence in *The State v. Solomon Katta and Ors*, Unreported, 3 April 2014, to make the point that the sentence should reflect the gravity of the offence where the Accused are public officers that have breached the public trust. It referred to *The State v. Francis Gabiddon & Ors*, Unreported, 9 June 2009 where the Supreme Court held that in all circumstances the public interest outweighed that of the Accused. J. Paul also referred to his own prior ruling in *Hassan Mansaray v. The State*, Misc. App. 445/13, 25 November, 2013, where he reminded another Counsel of *Rondel v. Worsely (1967) 1 Q.B. 443* on the duties of an advocate; although not replicated in *Ken Gborie*, he immediately prior to referring to *Rondel*,³⁹ had stated that Counsel should realise that their paramount duty is to the Court and to promote justice, not to treat the Court contemptuously.⁴⁰

II. Re Governance: In reaching its sentence, the Court factored in the value of the Rule of Law (equality before the law), the clear public interest and the fact that the 1st and 2nd Accused are public officers who betrayed the public trust. It elaborated on the deplorable conditions of the SL health care system, and how the Accused's acts of misappropriation of grants, meant to alleviate the suffering of the populace, would only exacerbate this state of affairs and serve as a disincentive to donors. It appears to have factored in Prosecution Counsel's submission that sentences should serve as a deterrence given the state of corruption nationwide,⁴¹ possibly his submission on restitution evidenced by the imposition of fines. The Court ignored Prosecution Counsel's submission concerning the Court's powers under s. 131 ACA to, in addition to any other penalty, ban convicts under the ACA from pursuing the activity giving rise to the commission of the offence.

APPLIED LAW: An indictment must be properly framed before arraignment; *R v. Newland 87 Cr. App. R. 118*. Any ruling by a Court to amend the indictment is binding until set aside by an appellate Court.⁴² The ACC Commissioner is competent to sign ACC indictments; *Francis Fofanah Komeh & Anor v. The State*, Cr. App. 1/2011 of 27th November, 2012, (Unreported). The Defence must not wait till its closing submissions to object to defects in the indictment,⁴³ or even to object to amendments to the indictment.⁴⁴ An Accused concedes to being tried upon an indictment by pleading to its charges; s. 133 (1) CPA and *The State v. Solomon Hindolo Katta & Ors. of 3/4/14*, (Unreported); *Oba Kpolor v. The State (1991) INWLR (PT. 165) 113*; *Ikomi v. State (1986) 3 NWLR (PT. 28)*. An Accused who pled to the charges, can only object to not being properly upon his trial by reason of some defect, omission or irregularity relating to the depositions or committal or any other matter arising out of the preliminary investigation with the leave of the Court; s. 133 (2) CPA.⁴⁵ An appeals court may hold that a trial which proceeded upon a defective indictment, inherited an irregularity resulting in an unsafe conviction; *R v. Ayres (1984) AC 447*. No conviction can stand based on particulars of offence that disclose no criminal offence or charge an abolished offence; *R v. Ayres (above)*. Misdemeanors in the indictment regarding the Accused's occupation/residence do not prejudice the Accused where the particulars of offence and the summing up are sufficiently clear on the crime alleged and where the evidence proved that offence against the Accused; *R v. Ayres (above)*. A conviction is unsafe only

³⁹ *Ken Gborie* Judgment, p. 17.

⁴⁰ *Ken Gborie* Judgment, p. 16.

⁴¹ *Ken Gborie* Judgment, p. 106, as per Prosecution Counsel, Mr. Kanu and sentence at p. 108.

⁴² *Ken Gborie* Judgment, p. 11.

⁴³ *Ken Gborie* Judgment, p. 23.

⁴⁴ *Ken Gborie* Judgment, p. 11.

⁴⁵ *Ken Gborie* Judgment, p. 23-24 directly quotes s. 133 (2) CPA and further contextualises it at p. 23 as being here, an objection against a perceived formal defect in a charge.



where the particulars don't support a conviction for that offence; *R v. Thompson (1918) 1 Cr. App. R. 252*. A conviction will not be quashed simply because of a departure from good practice; *R v. Graham (1997) 1 Cr. App. R. 302*. A defective indictment, which describes an offence known to law and does not prejudice an Accused's defence is not a nullity; *R v. McVitie (1960) 44 Cr. App. R. 201*; *R v. Nelson (1977) Cr. App. R. 119*. S. 4 of the Indictments Act 1915 aimed to prevent the quashing of a conviction upon a mere technicality which caused no prejudice. Since s. 5 of the Indictments Act 1915 concerned the same subject matter as s. 51 CPA 1965, it should inform its interpretation.⁴⁶ S. 5 Indictments Act (not cited in the judgment) empowers the Court to order the amendment of a defective indictment before or at any point during trial unless to do so would incur an injustice. S. 51 (1) CPA 1965 requires that the particulars of an offence in a count must give reasonable information as to the nature of the charge. This would ensure that an Accused fully appreciates the nature of the allegation against him to sufficiently prepare his defence. Rule 3(4) (b) of the 1st Schedule to the rules made under s. 50 CPA 1965 states that the particulars of offence need only mirror the provisions of the statute creating the offence.

Under English law, no statute shall be construed to have retrospective operation unless that statute clearly states so, or unless it arises by necessary and distinct interpretation; Maxwell on the Interpretation of Statutes.⁴⁷ **Therefore**, an Accused may be charged under a new law for committing an act/offence, but the act must have been an offence when it was committed; *The State v. Adel Osman & Ors, SC Misc. App. 1/88 of 13/4/88 (unreported)*; *Lowe v. Dorling (1906) 2 KB 772*; *Rex v. Wright (1758) 1 Burr 543*. Hawkin's Pleas of the Crown (1824 Ed.) p. 239 states that, where a statute incorporates an already existing criminal offence and nothing in the more recent law excludes the operation of the prior law, both laws can be used to prosecute an Accused. S. 18(1) (e) of the Interpretation Act 1971 states that, "*The repeal or revocation of an Act, unless a contrary intention appears, shall not affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Act had not been repealed(...)*" S.141 (1) ACA 2008 repeals the ACA 2000, but misappropriation existed under the ACA 2000 continues to exist under the ACA 2008. *The State v. Alphajor Bah & Ors, of 23/10/12, (Unreported)* held that s. 128 ACA (without more) did create the offence of conspiracy. S.74 of the Court's Act 1965 and ss. 176 and 177 of the 1991 Constitution make the Common Law part of the laws of Sierra Leone. In reality, s. 176 in sum says that the rules and instruments pre-existing the 1991 constitution as part of the laws of Sierra Leone, carry over. S. 177 (1) similarly says that the existing law continues to exist under the 1991 constitution and should be construed accordingly.⁴⁸ S. 28(2) (a) ACA makes it an offence for a public officer to solicit/accept/obtain for himself without lawful or adequate consideration, (or agree/attempt to do so), an inducement/reward, for an act/omission in his official capacity. J. Paul states that s. 1 ACA defines a public body as a body which performs public/statutory duties for the benefit of the public, not for private profit, *DPP v. Holly (1977) 1 All ER 316*. In reality, the more generic parts of s. 1 ACA, on "public body" define it as — (j) a body established by an Act of Parliament or out of moneys provided by Parliament or partly or wholly out of public funds; (n) established to render any voluntary social service to the public (...), which receives (...) donations for the benefit of the people of Sierra Leone.

The Accused's unsworn extra-judicial statements which were not put to cross-examination had no evidential value.⁴⁹ Exclusive reliance on such statements meant the Accused relied exclusively on the Prosecution's case; *Akinyemi v. State (2001) 2 ACLR 32*. Exclusive reliance on the Prosecution's case prejudices the Defence since the factual issues it depends on will have to be proven in this way; *Nwede v. The State (1985) 3 NWLR 444*. An Accused by opting not to testify deprives the Court of the opportunity of listening,

⁴⁶ Note that the Court erroneously states at p. 27 that it is s. 4 Indictments Act 1915 that covers the same subject matter as s. 51 CPA.. However, s. 51 CPA addresses the sufficiency of the information contained in charges and expresses very generally the circumstances under which objections to the form or content of the indictment will be overruled, i.e. where they fail to comply with the rules under the CPA. Related is s. 5 of the Indictments Act 1915 which deals with the Court's power to amend the indictment. On the other hand, s. 4 Indictments Act like s. 52 CPA addresses "*Joinder of Charges*," a complete non-issue here.

⁴⁷ *Ken Gborie* Judgment, p. 84; "The law looks forward not back."

⁴⁸ Ss. 176 and 177 of the 1991 Constitution are not directly quoted in the judgment; *Ken Gborie* Judgment, pp. 13 and 14.

⁴⁹ *Ken Gborie* Judgment, p. 33; "(...) to be acted upon by the Court must form part of the sworn evidence of the defence (...)"



weighing his account against the Prosecution's and of assessing his demeanour/credibility.⁵⁰ The Court draws inferences from and bases its conclusions on the evidence adduced, it cannot be dissuaded from reaching a firm conclusion by speculating upon what the Accused might have testified; *The Queen v. Sharnpal Singh (1962) 2 WLR 238*. A party who fails to call as a witness, a person whom it alleges was closely connected with the facts raises a presumption against itself that that potential witness' evidence was adverse to its case; *The State v. Anita Kamanda, (Unreported), 10th July, 2013*.

S. 37(1) ACA criminalises the dishonest appropriation of donations made to a public/private organisation for the benefit of the people of Sierra Leone, by a person in the management of that body. The Prosecution must prove that 1. the Accused was a member/officer in the management of a public/private organization; 2. that property was misappropriated; 3. that the misappropriated property was donated to that body for the benefit of the people of Sierra Leone; 4. that such misappropriation was undertaken dishonestly.⁵¹ An appropriation itself is the act of taking control of something meant for another. In misappropriation, the unlawful act is the use of the property/funds of another person for ones' own use or other unauthorized purpose, including to the use/benefit of another. An owner has "a package of rights" including the right to authorize the use of the property. Misappropriation means doing an act expressly or impliedly unauthorized by the owner which may individually or collectively amount to an adverse interference with, or the usurpation/assumption of the rights of the owner; *The State v. Anita Kamanda, (Unreported), 10 July 2013*; *R v. Morris (1983) 3 All ER 288 at 293*; *R v. McPherson (1973) Crim L R 191*; *Anderton v. Wish (1980) 72 Cr. R. 23*. The owner's consent is irrelevant; *Lawrence v. Metropolitan Police Commissioner (1971) 2 All ER 1253*; *R v. Gomez (1993) 1 All ER 1*. The unlawful frame of mind is dishonesty. Dishonesty is conscious impropriety, not carelessness. However, dishonesty is sometimes difficult to distinguish from incompetence; *Manifest Shipping Co. Ltd. v. Uni – Polaris Insurance co Ltd (2003) 1 AC 469*. Dishonesty is not determined on a subjective moral standard. The Accused's genuine belief that his conduct did not fall below the standard of honest conduct is irrelevant; *Barnes v. Tomlison (2006) EWHC 3115*. Honest conduct is a question of fact determined on the basis of the Accused's subjective attributes (experience, knowledge, intelligence and motivations), against an objective standard of honesty; *R v. Feely (1973) Q B 550*; *R v. Gilks (1972) 3 All ER 280*; *R v. Ghosh (1982) Q B 1053*; *R v. Roberts (1987) 84 Cr. App. R. 117*. The Court bases that objective standard of honesty on the standard of lay and ordinarily decent people.⁵² Dishonesty means an awareness of things that ought to have been questioned but were not, and deliberately turning a blind eye to facts which one suspects. The test therefore is whether the Accused knew that his acts would be recognized as dishonest by lay men and ordinarily decent people. "Kickbacks" sourced from legitimate payments do not amount to misappropriation; *The State v. Michael Amara, 19 September, 2013*. S. 37 (1) ACA does not require the Accused to be a member of a public body.

An advocate's duties to the Court including to promote justice and to not treat the Court contemptuously are stated in; *Hassan Mansaray v. The State, Misc. App. 445/13, 25 November, 2013*; *Rondel v. Worsely (1967) 1 Q.B. 443*. The Prosecution carries the burden of proof beyond reasonable doubt throughout the trial; *Woolmington v. DPP (1935) AC 462*; *Nasiru v. State (1999) 2 NWLR (PT. 589) 87*. Reasonable doubt does not mean beyond all iota of doubt; *Solomon Hindolo Katta case (supra)*. Reasonable doubt need not be certain but must be highly probable; *Miller v. Minister of Pensions (1947) 2 All ER 372*. Reasonable doubt is the sort of doubt one employs in dealing with matters of importance in one's own personal affairs; *R v. Walters (1969) 2 AC 26*. All doubts must be resolved in favour of an Accused.⁵³ Where the Prosecution has established a prima facie case, the evidential burden shifts to the Defence which must ensure on a balance of probabilities that there is sufficient evidence before the Court to require the Prosecution to disprove the defence beyond reasonable doubt. The Defence tends to shoulder the evidential burden where the disclosure of certain facts lie peculiarly within the knowledge of the Accused.⁵⁴ Where a defence is based on any exception or qualification, the Accused bears the burden of proving that the exception applies; See *R v. Edwards (1975) Q.B. 27*. Under certain common law exceptions, e.g. the insanity defence under the

⁵⁰ *Ken Gborie* Judgment, p. 34.

⁵¹ *Ken Gborie* Judgment, p. 36.

⁵² *Ken Gborie* Judgment, p. 37.

⁵³ *Ken Gborie* Judgment, p. 38.

⁵⁴ *Ken Gborie* Judgment, p. 30.



M'Naghten Rules,⁵⁵ the Accused bears the burden of proof on a balance of probabilities. The Court stated that s. 94 and s. 97 "are couched in reverse – burden terms" and held that that s. 94 ACA obligated the Accused to explain on a balance of probabilities the legitimacy of the payment he received. In fact, s. 94 says that the burden of proving a Defence of lawful authority/reasonable excuse lies on the Accused for any offence under the ACA. What the Court seems to suggest is in fact that s. 94 and s. 97 work conjunctively to shift the burden of proof to the Accused. This is because it is s. 97 that states that where proved that the Accused accepted an advantage, a rebuttable presumption operates against the Accused that the advantage was an inducement/reward unless the contrary is proved.

Corruption offences are very often incapable of proof by direct evidence since the perpetrators operate covertly; *Public Prosecutor v. Yuvaraj (1970) AC 913*. Direct evidence of an offender's mental state is often unavailable, it would have to be inferred from objective facts. Circumstantial evidence is important for inferring the commission of corruption offences. A case may be based on circumstantial evidence alone. Circumstantial evidence constitutes a network of facts cast around the Accused; they may be unsubstantial, salient but not cohesive enough, or salient, coherent and cohesive leaving the Accused with no plausible argument or alibi. The Court must consider the cumulative effect of all the facts before it, and determine whether they leave no other reasonable inference but the guilt of the Accused. Many, varied circumstances all pointing in the same direction and independent of one another, may cumulatively be overwhelming proof of guilt, although each on its own incurs an innocent interpretation; *R v. Dickman (1910) Crim App. R. 320*; *R v. Tapper (1952) A.C. 480*. The Accused although tried jointly must have the case against each of them treated separately. Evidence which is only applicable to or which inculcates only one Accused cannot be treated as evidence against the other Accused. An Accused is entitled to an acquittal if there is no evidence direct or circumstantial, establishing his guilt, independent of the evidence against his co-Accused.⁵⁶

S. 48(2) (b) ACA makes it an offence for persons having access to and or some amount of control of public revenue and public property to wilfully or negligently fail to comply with the rules on procurement. S. 48(4) ACA defines public property as real or personal property, public funds, and money consigned to a public body. Public funds are any monies that are meant to benefit the people of Sierra Leone and under s.1 ACA they can be donations or loans. Under s. 48(2)(b) ACA, the Prosecution need not prove that the Accused is a public officer only that he had access to and/or some control over the property, in the forms of management or disposal thereof and that the Accused wilfully or negligently failed to comply with the law relating to procurement procedure. S. 2(c) of the 1st schedule to the PPA provides that shopping procedures shall be used when the estimated value of the procurement of services is below Le60 million. S. 3(c) of the 1st schedule states that national competitive bidding shall be used when the estimated value of the procurement of services is below Le 300 million. Regs. 45(1) and (2) in Part 4 and 8 PPR 2006 treat sole-source procurements. S. 1(c) of the 1st Schedule to the PPA 2004 requires contracts above Le 300 million to be published. Regs. 45 (1) and (2) PPR and s. 46(1) and (2) PPA state that the PC must first approve the sole source procurement method. Reg. 45 (1) PPR and s. 46 (1) PPA state that sole-source procurement is permitted only when the service/provider is exclusive, a continuation of prior service or for an emergency.

There is no need for an expert when an opinion can be formed on the facts; *R v. Rickards (1918) 13 Cr. App. Rep. 140*; *R v. Turner (1974) 60 Cr. App. R. 80*; *DPP v. Jordan (1977) A C 699*. Practising his right to silence, (even against the clear public interest in his giving his own account to create a reasonable doubt in his favour), may give rise to adverse inferences; *R v. Howell (2003) Crim. L.R. 405*. An adverse inference can be drawn where an Accused remains silent on a fact relating to/a charge; *R v. Dervish & Anori (2001) EWCA Crim. 2789*; *R v. Argent (1997) 2 Cr. App. R. 27*. Circumstances to be taken into account in drawing an adverse inference of the Accused's guilt include; the Accused's age, experience, knowledge, personality, mental capacity, state of health, sobriety and legal advice; *R v. Howell (2003) Crim. L.R. 405*.

The State v. Solomon Katta and Ors, Unreported, 3 April 2014 affirmed that the sentence should reflect the gravity of the offence where the Accused are public officers that have breached the public trust. *The State v. Francis Gabiddon & Ors, Unreported, 9 June 2009* affirmed that re sentencing, the public interest

⁵⁵ *M'Naghten's Case*, 8 Eng. Rep. 718 (1843); The central issue of this definition may be stated as; "Did the defendant know what they were doing, or, if so, that it was wrong?"

⁵⁶ *Ken Gborie* Judgment, p. 38.



outweighed that of the Accused in all circumstances. The Court under s. 131 ACA can in addition to any other penalty it imposes, ban convicts under the ACA from pursuing the activity giving rise to the commission of the offence.

MEDIA REVIEW: The press widely clamored for international pressure in demanding accountability and to maintain scrutiny of the process and later recognized that national and international pressure was effective in securing the suspension of funds and prompting the ACC investigation. The media recognized that the investigations covered other international donations. *Ken Gborie* was contextualised against the other GAVI fund trials, all totalling 29 indictees. Coverage was more opinionated at the indictment and verdict phases with widespread demands at these phases for accountability at the ministerial level, particularly for investigations into the Finance and Health Ministers. The verdict was lauded, but also contextualized against the ACC's loss of other GAVI fund trials, with fines being lamented as usually much lower than the total loss. The ACC used the verdict as a PR opportunity to showcase its progress and tactfully laud the judiciary's recognition of the gravity of corruption offences by convicting on a number of charges. The media homed in on pivotal justice issues; inter-investigative collaboration (GAVI, ACC, UN (Z. Bangura)), covering testimony on the procurement process, J. Paul's complaint about pressure from high places to frustrate the judgment,⁵⁷ and the public's concern that this event might discourage donors. Some factual errors on the reporting on indictees, saying all Accused were National Health Service Senior Personnel, errors on the charges, errors on how GAVI and ACC investigations informed each other. Unlike the judgment, the media reported that the audit uncovered shell accounts.⁵⁸

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⁵⁷Brima N.,(2014), *For Misappropriating Public Funds...6-Year Jail, Le 1 Billion Fines for GAVI Criminals*; <http://newswatchsl.com/article/misappropriating-public-funds%E2%80%A66-year-jail-le-1-billion-fines-gavi-criminals>; "Justice Paul noted that (...) there was tremendous effort from high places(...) to frustrate him from delivering the judgment, which he tactfully braved through."

⁵⁸ Unnamed, (2013), *Over its handling of Donor Funds*, Salone Post; <http://salonepost.com/sp/news/articles/article161.asp>.



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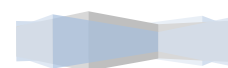
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