

CR. APP. 5/2011

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

SARAH FINDA BENDU	-	APPELLANT
AND		
THE STATE	-	RESPONDENT

CORAM

HON. JUSTICE P.O. HAMILTON J.S.C.

HON. JUSTICE V.M. SOLOMON J.A.

HON. JUSTICE S.A. FOFANAH J.

SOLICITORS

E.E.C. SHEARS-MOSES ESQ. AND S.K. KOROMA ESQ. FOR THE APPELLANT

C.T. MANTSEBO ESQ. AND M. SAMBA (MS.) FOR THE RESPONDENT

JUDGMENT DELIVERED ON THE 25th DAY OF August 2011

HAMILTON J.S.C.

This is an Appeal against the Judgment of Honourable Justice N.C. Browne-Marke J.A. delivered on the 10th of February, 2011.

The Appellant was jointly charged with one Hamzza Alusine Sesay on a TEN (10) Counts Indictment with various offences under the *Anti-Corruption Act, 2008* (ACT No.12 of 2008). The Appellant was acquitted and discharged on NINE (9) Counts and convicted on ONE (1) Count which was Count 7 "Willfully failing to

comply with the laws, procedures and guidelines relating to the procurement of property tendering of contracts and Management of funds contrary to *Section 48(2)(b) of the Anti-Corruption Act, 2008*". The Appellant was found guilty and sentenced to a fine of Le30,000,000/00 (Thirty Million Leones) or Three (3) years imprisonment. The Appellant being dissatisfied with her conviction and sentence has now appealed to the Court of Appeal.

However, before considering the arguments and submissions made by both solicitors in their respective synopsis and oral submissions, a brief background of the facts would be of great assistance in this appeal.

The background of the case can be briefly summarized as follows:

A committee to look into the problem of traffic congestion in Freetown was set up by the Ministry of Transport and Aviation hereinafter called "MTA" which committee then decided that there was the need to purchase Tow Trucks to help ease the traffic congestion within the Freetown Area so as to create a free flow of traffic.

Prior to the setting up of this committee the Sierra Leone Road Transport Authority hereinafter called "SLRTA" had already budgeted in the 2008 budget for one (1) Tow Truck and Twenty (20) wheel clamps. However the MTA suggested the purchasing of four (4) Tow Trucks and one hundred (100) wheel clamps. The Sierra Leone Transport Authority had decided at first to acquire two tow trucks and 100 wheel clamps. The process for the purchasing of these vehicles were to be conducted by "the Procurement Committee of the SLRTA" headed by the Appellant, Mohamed Tejan Kella the Head of Finance who was PW3 at the trial and

also a member of the Procurement Committee and it was he who signed the contract with Mabella Industries Ltd. The Ministry through its Permanent Secretary gave its approval for the procurement of the first Tow Truck and twenty (20) wheel clamps and urged the Appellant to use "her good office to fast track this programme so as to enhance road safety". By an earlier letter from the Ministry dated 20th April, 2008 the Appellant was asked for "strict adherence to procurement procedures" which letter the appellant said she never received.

On 23rd April, 2008 PW2 Kelfala Ahmed Yansaneh the current Acting Executive Director then Acting Deputy Executive Director was asked by the Appellant to provide specifications for the purchase of a Tow Truck which he submitted to her. When the two (2) Tow Trucks arrived at the Quay he inspected them and prepared a report and took photographs of them. The contract between SLRTA and Mabella Industries Ltd. was signed on 23rd April, 2008 and on this day the sum of Le419,2000,000/00 for one Tow Truck and twenty (20) wheel clamps was made to Mabella Industries Ltd. by Mohamed Tejan Kella the Head of finance who was PW3 at the trial.

There was a correspondence between 12th and 13th May, 2008 between SLRTA and Mabella Industries Ltd. relating to the procurement of a second hand Tow Truck and Eighty (80) wheel clamps and based on the Appellant's letter of 12th May, 2008 addressed to Mabella's Director for the purchase of a minimum of four (4) Heavy Duty towing Vehicles and one hundred (100) wheel clamps "which letter only gave approval for the purchase of Heavy Duty Towing Vehicle and wheel clamps".

The payment for the second order of additional Tow Trucks and Eighty (80) wheel clamps in the sum of Le606,400,000/00 was made on 14th May, 2008. There were three quotations received which were considered at a Management meeting where it was decided to award the contract to Mabella Industries Ltd. being the "Most responsive".

The Procurement Procedure at SLRTA was explained by a retired Procurement Procedure Officer Pius Joseph Mbawa who was not involved in the procurement of these Two Trucks and Alfred Herbert Kandeh the Chief Executive Officer at the National Public Procurement Agency spells out the manner in which procurement involving large sums of money is carried out but the procurement of these Tow Trucks were not referred to his agency. On the view of the Appellant the procurement procedure was regular and no criminality was involved in the supply of second hand Tow Trucks and not new ones.

Count seven (7) upon which the Appellant was found guilty and convicted out of ten (10) counts reads:

STATEMENT OF OFFENCE

Willfully failing to comply with the laws, procedures and guidelines relating to the procurement of property, tendering of contracts and management of funds, contrary to *Section 48(2)(b) of the Anti-Corruption Act, 2008*.

PARTICULARS OF OFFENCE

SARAH FINDA BENDU being the Acting Executive Director of SLRTA , on a date unknown between 18th September, 2008 and 18th September, 2009 at Freetown in

the Western Area of Sierra Leone willfully failed to comply with the laws, of procedures and guidelines relating to the procurement of property, tendering of contracts and management of funds, to wit: she failed to comply with the provisions of the *Public Procurement Act, 2004* and the Regulations there under, in awarding the contract for the purchase of the towing trucks to MABELLA INDUSTRIES LTD.

The Statement of Offence refers to the contravention of *Section 48(2)(b) of Anti-Corruption Act, 2008*. The date in the Particulars of Offence refers to 18th September, 2008 and 18th September, 2009 willfully failing to comply with *Public Procurement Act, 2004 and Regulations of 2006* and referred specifically to the contract signed on 23rd April, 2008. There is discrepancy in the date of the contract and the Particulars of Offence, that is, 23rd April, 2008 and 18th September, 2008, respectively. The particulars of the offence had a specific date that is 18th September, 2008. This date falls outside the date of the contract. How can the Appellant fail to follow Procurement within 18th September, 2008 to 18th September, 2009 when the contract was awarded on 23rd April, 2008? Procurement definitely starts before contract and not after. (*Emphasis mine*)

However, it is the conviction and sentence of the Appellant on this Count 7 that she has now appealed against on the following grounds of appeal:

1. *That the Learned Trial Judge erred in law in finding the Appellant guilty on Count seven (7) when in fact at the time of procurement of the two (2) trucks and wheel clamps was made it was not a criminal offence in Sierra Leone not to follow procurement procedure and guidelines.*

2. *That the Learned Trial Judge erred in law in finding the Appellant guilty when in fact the entire Act complained of were for and on behalf of the SLRTA by Management.*
3. *That the Learned Trial Judge failed to set out when the procurement process was commenced and completed.*
4. *That the Learned Trial Judge misdirected himself on the issue of whether Section 48(2) can be given retrospective effect. He had this to say "In April and May, 2008 the fraudulent making of payment or an excessive payment for substandard or defective goods was not an offence nor a proscribed act. And since the Act is not retrospective, whatever may be factual evidence probative of the 2nd Accused" guilty of the offence charged she cannot be convicted on count 3, 4, 5 and 6. The same analysis does not however apply to counts 1, 2, 7, 8 and 10.*

It must be noted here that following a ruling on the 11th August, 2011 on the preliminary issue raised by C.T. Mantsebo Esq. Counsel for the Respondent on the determination of Section 28(3) of the Constitution of Sierra Leone 1991 the preliminary issue was overruled and an Order made that the Appeal proceeds.

E.E.C. Shears-Moses Esq. Counsel for the Appellant and C.T. Mantsebo Esq. Counsel for the Respondent both relied on their synopsis and also made oral submissions.

GROUND 1

On the first ground of appeal Counsel for the Appellant submitted that the Learned Trial Judge held that failure to follow Procurement Procedure was a wrongful act and that the *Anti-Corruption Act, 2008* prescribed the punishment for the contravention of the *Procurement Act and Regulations* and that as of 2004 it was unlawful not to follow procurement procedure. Counsel further submitted that the Learned Trial Judge failed to distinguish between a wrongful act and a criminal offence, therefore to fail to follow procurement rules and regulations may have been a wrongful act but it was not criminal before the passing of the *Anti-Corruption Act, 2008*, (hereinafter called "*The Act*") which was enacted on 5th August, 2008.

The Learned Trial Judge in his judgment at Page 167 lines 19-26 had this to say:

"..... Willfully failing to comply with procurement laws was not punishable by fine or imprisonment prior to 2008 but was clearly proscribed by the Public Procurement Act 2004 and 2006 Regulations. It was clearly a wrongful act. What in my respectful opinion the 2008 Act has done is to prescribe a punishment for the contravention of the 2004 Act and the 2006 Regulations. As of 2004 it was unlawful to willfully do an act or omit to an act thus contravening the provisions of the Public Procurement Act, 2004."

The Learned Trial Judge did state as above that it was the *Anti-Corruption Act, 2008* that prescribed the punishment for the contravention of the *Act of 2004 and the Regulations of 2006*. Counsel for the Appellant submitted that this is not the case because under the *Procurement Act, 2004 and the 2006 Regulations* a procuring unit, bidder or supplier that fails to follow procurement procedure shall

be subjected to sanctions provided under the Act applied by the Independent Procurement Review Panel pursuant to *Section 65(5) of the Procurement Act, 2004* which sanction include prohibiting the procuring entity from acting or deciding in an unauthorised manner or from following the correct procedure, reversing the decision, awarding cost etc.

Counsel for the Respondent submitted that the Learned Trial Judge acted correctly in law when he held that the failure to comply with procurement procedures and guidelines in contravention of *Section 48(2)(b) of the Anti-Corruption Act, 2008* was prior to the commencement of the said Act proscribed conduct Constituting a wrongful act which is a criminal offence and that the *Anti-Corruption Act, 2008* merely made provision for the punishment of such conduct.

With due respect to learned Counsel for the Respondent, it is our humble opinion that the finding by the Learned Trial Judge that failure to follow procurement procedures and guidelines was an offence before the passing of the *Anti-Corruption Act, 2008* and that it was the Act of 2008 that came to prescribe the punishment is totally incorrect since the existence of the Independent Procurement Review Panel under the *Act of 2004* clearly had power to provide remedy by sanctions for the violations of Procurement Procedure is well defined.

Counsel for the Respondent further argued that what the Appellant has taken issue with is the use by the Learned Trial Judge of the word "Wrongful acts" which is absent in both the Act and the Regulations but went further to contend that the Appellant's wrongful conduct in failing to comply with the applicable procurement procedures and guidelines is criminal can be found by reference to the Government

Budgeting and Accountability Act, 2005 Section 77(1). This sub-section need not be quoted and with due respect to Counsel for the Respondent I do not agree with him when in his synopsis and oral submissions he submitted that *Section 77(1) of the said Act* establishes the fact that in addition to the offence of failing to comply with procurement procedures and guidelines, the acts and omissions of the Appellant also constitutes the offence referred to in *Section 77(1)*. It is clear that the Appellant was never charged under *Section 77(1) of the Government Budgeting and Accountability Act, 2005* nor is it an alternative to *Section 48(2)(b) of the Anti-Corruption Act, 2008*. I hold that it is completely irrelevant.

Counsel for the Appellant submitted that the act of the Appellant was not willful and it was not voluntary since she was under pressure thereby negating the willfulness of the offence which is an essential element of the offence which is the *mens rea* of the offence. Counsel for the Respondent submitted that there is a distinction between motive and desire and submitted that the acts of the Minister should not be mistaken with the intention of the Appellant.

The Learned Trial Judge at Page 189 said:

".....Exhibit 20, the 2nd accused explains in vivid language the pressure which was being exerted on her by the then Minister of Transport, Mr. Kemoh Sesay. He threatened her, he was harassing her to go through with the contract with the minimum of delay". She herself admits at Page 102 of exhibit 20 that "..... with this time frame given it was impossible to go the procurement procedures as stipulated in the NPPA Act, hence limited bidding". She chose to give in to the unlawful pressures, and aet herself into trouble. (Emphasis mine)

With due respect to the Learned Trial Judge, he did make it clear in his judgment that the Appellant chose to give into the unlawful pressure of the Minister and got herself into trouble. This in my humble opinion clearly negative her act being willful and deliberate thereby *mens rea* which is an essential element of the offence was not proved beyond reasonable doubt which the prosecution failed to do by leading evidence to the contrary.

GROUND 2

In arguing this ground, Counsel for the Appellant raised a first question as to whether the Appellant was acting in her personal capacity by herself or was acting in a group in her capacity as head of the SLRTA Management. PW3 Mohamed Tejan Kella under cross examination said:

"The management team comprised of 2nd Accused, Yansaneh, Head of Licence Department, Mrs. Alice Pratt, the Head of Human Resources, Mohamed L Deen the Acting head of transport, Ibrahim Sangary, myself as head of finance, the head of Internal Audit Albert Sambie. The team took the decision collectively to award the contract to Mabella Industries Ltd."
(Emphasis Mine)

This same witness said at Page 48 of the records said:

"I was involved in the procurement of the towing vehicles by SLRTA".

Counsel then submitted that it was not disputed that it was Management of SLRTA that acted as the Procurement Committee and decided to award the contract to Mabella Industries Ltd., and that if Procurement Procedures were not satisfied and an award is then made, in law therefore, it was wrong to hold the Appellant

personally liable for the acts and omissions of the SLRTA Management. If procurement procedures are not followed the management should be held responsible and not the Appellant.

Counsel for the Respondent submitted that the Appellant falls into *Section 48(2) of the Anti-Corruption Act, 2008* and if a body commits an offence under the Act one person may be prosecuted and the others treated as witnesses since it is irrelevant whether the Appellant acted in concert with others as her liability is not collective regardless of what the other members of the management team may have done.

With due respect to Counsel for the Respondent it is clear that the *Anti-Corruption Act 2008* makes provision for the indictment of corporate bodies or management *Section 129(a) of the Anti-Corruption Act, 2008* provides:

"Where an offence under this Act is committed by a body of persons. If the body of persons is a body corporate, every director or officer of that body shall be deemed to have committed the offence".

The *Criminal Procedure Act 1965 (Act No.32 of 1965) Section 207* provides in clear terms:

"A corporation may be charged either alone or jointly with another person with an offence triable on indictment or triable summarily before a Magistrate Court".

In my humble opinion, since the decision to award the contract was done by management and procurement procedures have not been followed the SLRTA

Management should have been charged in accordance with *Section 129(a) of the Anti-Corruption Act, 2008*. The Learned Trial Judge with due respect was mistaken in holding that the Appellant willfully failed to comply with procurement procedures since it was management that decided on awarding the contract, and not the Appellant unilaterally.

GROUND 3

This ground of appeal relates to the commencement and conclusion of the procurement process. Counsel for the Appellant submitted that the Learned Trial Judge failed to explain the bid process, its financial evaluation and the amount of contract. He further submitted that the procurement process end with the signing of the contract (exhibit 7) on the 23rd April, 2008 by PW3 for and on behalf of the Acting Executive Director on behalf of the Authority at which time *Section 48 of the Anti-Corruption Act, 2008* was in applicable.

Counsel for the Respondent argued that the commencement and determination of the procurement procedure does not end at the signing of the contract since the contract deals with what the parties intended to do. Procurement he submitted relying on *Section 2 of the Public Procurement Act 2004* starts well before the signing of the contract and continues well after the signing of the contract. He then submitted that procurement is complete when the goods or services are delivered whether accepted or not as it is a continuous process and in this case in October, 2009 when the *Anti-Corruption Act, 2008* was operative.

In my humble opinion the procurement procedure ends as at the signing of the contract on 23rd April, 2008 since what follows there after (contract

administration and modifications) are mere modalities intended at executing the contract since if the goods or services are undelivered due to supervening events there are other legal processes available for its enforcement. As at 23rd April, 2008 the Anti-Corruption Act, 2008 was inoperative.

GROUND 4

This fourth ground of appeal raised by the Appellant is that the *Anti-Corruption Act 2008* is not retrospective and that at the time the offence was committed (*Section 48*) it was not an offence. Counsel for the Appellant submitted and I agree with him that it is a presumption in law that a statute is not retrospective unless it is so provided in the statute itself. However, nowhere in the *Anti-Corruption Act, 2008* is it stated that the Act is retrospective.

The *Anti-Corruption Act 2008 (Act No.12 of 2008)* became operative as at 5th August, 2008 and has a repeal and saving clause but with no retrospective effect. *Section 144(4) of the Anti-Corruption Act, 2008* provides:

"All investigations, prosecutions and other legal proceedings instituted or commenced under the Act hereby repealed and which have not been concluded before the commencement of this Act, shall be continued and concluded in all respects as if that Act has not been repealed".

Counsel for the Appellant stated in his synopsis that the offence of failure to follow procurement procedures and making excessive payment for sub standard goods were not in the *Anti-Corruption Act, 2000 (the repealed Act)* but a creation of the 2008 Act.

The Learned Trial Judge failed to explain whether failure to follow Procurement Procedures was an offence before the passing of the *2008 Act* or whether it was just a wrongful act for which there are sanctions provided by *Section 65(5) of the Public Procurement Act, 2004*.

Counsel for the Appellant then submitted that the Learned Trial Judge erred in holding that count 7 could not be in the same position as Counts 3, 4, 5, and 6.

With due respect to the Learned Trial Judge, the procurement process came to an end on the signing of the contract (exhibit 7) as by *PART X Regulations 140-146 of the Public Procurement Regulations, 2006* what happens after the signing of the contract are "Contract Administration and contract modifications". The acts and conduct of the Appellant before the passing of the *Anti-Corruption Act, 2008* were neither criminal nor was it in any way an offence, and for such wrongful acts there is *Section 20 (Independent Procurement Review Panel)* that can provide a remedy pursuant to *Section 65(5) of the Public Procurement Act 2004* unless the complaint is dismissed.

Finally Counsel for the Respondent has urged this Court to hold in any event, that there are cogent and valid basis upon which the Appellant's conviction could be upheld relying on *Section 58(2) of the Courts Act, 1965* which provides:

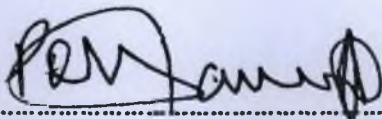
"On an appeal against conviction the Court of Appeal may, notwithstanding that they are of opinion that the point raised in the Appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."

As Ogunlade JSC of the Nigerian Supreme Court in the case of Solomon Adekunle v. The State (2006) 6 S.C.N.J. 275 at 290 said:

"Miscarriage of justice is a failure of justice. It means failure on the part of the Court to do justice. It is justice misapplied. It is an ill conduct on the part of the Court which amount to an injustice. (Emphasis mine)

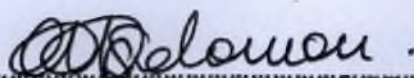
In my humble opinion there is no stretch of imagination in which it can be said in this case that there was no miscarriage of justice. The absence of *men rea* even makes it clear that the conviction should not stand. Similarly, considering the Learned Trial Judges various contradictions in his judgment makes it a proper case in which an application of the provision of *Section 58(2) of the Courts Act 1965* would not be right and I would therefore quash the conviction.

For all the above reasons, the Appellant's appeal is allowed. Her conviction and sentence are hereby SET ASIDE and an ACQUITAL AND DISCHARGE be substituted. Accordingly if the fines imposed was paid by the Appellant I hereby order that it be refunded.



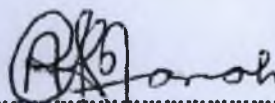
HON. JUSTICE P.O. HAMILTON J.S.C.

I AGREE:.....



HON. JUSTICE V.M. SOLOMON J.A.

I AGREE:.....

 25-8-2011

HON. JUSTICE S.A. FOFANAH J.