

CR APP 3/2010

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN: SHEKU TEJAN KOROMA - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL
THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL
THE HONOURABLE MR JUSTICE S A ADEMOSU,
JUSTICE OF APPEAL(deceased)

COUNSEL:

C.F. EDWARDS ESQ (with him, H M GEVAO, ESQ) for the Appellant
C T MANTSEBO ESQ for the Respondent

JUDGMENT DELIVERED THE 17th DAY OF DECEMBER, 2012.

INTRODUCTION

1. This is an appeal brought by the Appellant, Mr Sheku Tejan Koroma, against his conviction by SEY,J on 11 March,2010 on a 3 Count Indictment charging the offences of Abuse of Office contrary to Section 42(1) of the Anti-Corruption Act,2008; Abuse of Office contrary to Section 43 of the same Act; and Wilfully 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 same Act. The appeal against conviction, purports to be on a question, or rather, questions of law, only; but Grounds 4& 5 seem to us to be more of questions of fact than questions of law. On conviction SEY,J sentenced the Appellant to fines of Le50million in respect of each Count, totalling Le150million, with the alternative of a term of imprisonment of 5 years in respect of each Count, the terms of imprisonment to run concurrently. On the same day, SEY,J Ordered that pursuant to Section 233 of the Criminal Procedure Act,1965, payment of the total fines would be

deferred for a fortnight with effect from that date, i.e. 11 March, 2010. The Appellant also appeals against this sentence.

GROUND OF APPEAL

2. The Notice of Appeal is dated 25 March, 2010 and was filed in this Court's Registry, the same day. The grounds are as follows:

- (1) The Learned Trial Judge erred in Law in holding that the charges as laid in counts 1-3 inclusive were in conformity with the respective sections namely: Sections 42(1) 43 & 48(2) of the Anti-Corruption Act, 2008, and therefore fulfilled the legal requirements.
- (2) *Me* The Learned Trial Judge erred in Law 'when she' (these two words are missing in the Notice) overruled the defence submission that Count II is bad in law by the omission of the mens rea requirement in the word "knowingly" as enshrined in the statute.
- (3) The Learned Trial Judge erred in Law (as she) did not consider the mens rea requirements in all three counts against the Appellant, thereby reaching the wrong judgment against the Appellant.
- (4) The Learned Trial Judge erred in Law in ignoring the evidence given by defence witnesses, particularly the evidence of DW2 Edmond Koroma, which said testimony was highly material to the success of the defence.
- (5) The Learned Trial Judge in evaluating the evidence allowed herself to be carried away by exhibit(s) M and N to the extent that she lost sight of the distinction between a Notification of Award Letter and an award letter which form the basis of the Action, thereby reaching the wrong conclusion (judgment). These words are also added though not numbered (6) : In coming to the conclusion that the prosecution case has been proved as required by law, on the basis of prosecuting counsel's submission implying that the Learned Judge shut her eyes to the defence of the accused contained in exhibit "C" and also contained in the testimony DW1 and DW2 upon which the defence relied. These grounds are certainly not good examples of clarity. They exhibit obfuscation and confusion of thought. Further, in case Mr Edwards has

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no grounds made

forgotten, there is action which is involved: there is a cause or matter. An action, pertains to civil proceedings.

3. No grounds of appeal against sentence have been provided by the Appellant. The effect of this is that if the appeal is dismissed, the sentence will remain unchanged. I suspect that Counsel may have been in a desperate hurry when he settled the grounds of appeal - thus the many errors in grammar and syntax and the several ellipses. The Appellant asks that his conviction and sentence be set aside and an acquittal be substituted in their place; and, for such further or other Orders to be made by the Court in furthering justice. What this last bit means, is not quite obvious. This is a criminal appeal, and you can only get what you ask for. The Appellant did indicate that these grounds would be amended or added to, but until the appeal hearing was completed, no additions, nor amendments, had been made to them.

THE INDICTMENT

4. I shall now set out the Indictment in extenso:

Count 1

Statement of Offence: Abuse of Office contrary to Section 42(1) of the Anti-Corruption Act, 2008

Particulars of Offence: SHEKU TEJAN KOROMA on a date unknown between March, 2009 and May, 2009 at Freetown in the Western Area of Sierra Leone, being the Minister of Health and Sanitation, and being a Public Officer, abused his office as Minister in respect of the award of a contract for the supply of medical consumables and reagents to the Ministry, by improperly awarding the said contract to the Cardinal Investment Limited, instead of to the Health Care Pharmacy, as the lowest and most responsive bidder based on the recommendations of the Technical Evaluation Committee of the Ministry.

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Count 2

Statement of Offence: Abuse of Position contrary to Section 43 of the Anti-Corruption Act, 2008

Particulars of Offence: SHEKU TEJAN KOROMA on a date unknown between March, 2009 and May, 2009 at Freetown in the Western Area of Sierra Leone, being the Minister of Health and Sanitation, and being a Public Officer, abused his position as a Minister, in respect of the award

of a contract for the supply of medical consumables and reagents to the Ministry, by contravening the provisions of the Public Procurement Act, 2004, through the improper award of the said contract to the Cardinal Investment Limited, instead of to the Health Care Pharmacy, as the lowest and most responsive bidder based on the recommendations of the Technical Evaluation Committee of the Ministry.

Count 3

Statement of Offence: Wilfully 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: SHEKU TEJAN KOROMA on a date unknown between March, 2009 and May, 2009 at Freetown in the Western Area of Sierra Leone, being the Minister of Health and Sanitation, and being a public officer, wilfully failed to comply with the provisions of the Procurement Act, 2004 and the Regulations set out there-under relating to the procurement of property, tendering of contracts and management of funds, in respect of the award of a contract for the supply of medical consumables and reagents to the Ministry of Health and Sanitation, through the improper award of the said contract to the Cardinal Investment Limited, instead of to the Health Care Pharmacy, as the lowest and most responsive bidder based on the recommendations of the technical and evaluation committee of the Ministry.

CASE FOR THE PROSECUTION

5. The case for the prosecution at the trial was that the Appellant was Minister of Health, a part of the Government of Sierra Leone, and was therefore a Public Officer within the terms of the Anti-Corruption Act, 2008 - ACA, 2008. In December, 2008, the Ministry invited bids for the supply of drugs and medical consumables. Health Care Pharmacy of 4 Wilberforce Street, (hereafter HCP) submitted a Tender on 6 October, 2008. The Bid documents were tendered collectively by PW1, as exhibit A, pages 83-86 of the Record. The Bids were apparently opened on the same 6 October, 2008, according to the Ministry's Bid Opening documents, tendered collectively as exhibit B, by PW1 also - pages 87-90

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of the Record. Exhibit B item 3 on page 87 shows that in respect of Lot 8, HCP's Bid was the least in terms of cost.

6 On 15 October, 2008, PW1 wrote a minute to the Appellant - exhibit D, page 92 of the Record - in which he informed the Appellant that the bids would be evaluated by the Technical Evaluation Committee (TEC), and that thereafter a Report will be submitted to the Procurement Committee (PC) to review. The TEC did the review as evidenced by the minutes of its deliberations dated 31 December, 2008, tendered as exhibit E - pages 93-101 of the Record. At page 99, the TEC clearly recommended the acceptance of the bid submitted by HCP in respect of Lot 8.

7. On 5 January, 2009 PW1 wrote a minute to the Appellant, exhibit F - page 102 of the Record - forwarding there-under a copy of the TEC's Report, and informing him that the PC would have to review the recommendation, and that the recommendation would require his consideration. What followed, according to PW1 whilst giving evidence at pages 13-14 of the Record, was this: "*When I submitted the Technical Evaluation Report in a minute to the Minister he out-rightly objected to the recommendation of Health Care Pharmacy as winner of the bid notwithstanding price differential between the two. He did not do his objection in writing. He did it verbally and kept on insisting that we should not sit as a committee to confirm the recommendation. By me I mean the Procurement Committee membership. He simply demonstrated his preference for cardinal investment but he did not give us any reasons. But we saw it difficult to go by that given the differential in prices and it was contrary to procurement rules. After his objections, as a committee, we waited for his approval and he wanted to ensure that we complied with his instructions that Cardinal Investment should be awarded the contract. When we finally met as a procurement committee and due to the pressure we were getting from the Minister the committee agreed that Cardinal Investment be awarded the contract for Lot 8. After the Committee had agreed I presented a minute to him dated 8 March, 2009....produced and tenderedas exhibit G.*" Exhibit G is actually dated 9 March, 2009. It is at page 103 of the Record. Part of this minute reads as follows: "*.... The Committee was faced with a difficult task in taking a decision on Lot 8.....in respect of which the Technical Evaluation had recommended*"

Health Care Pharmacy who offered the best evaluated bid price of USD666,407.38, but which you saw differently and on a number of occasions you gave verbal instructions that that decision should be reversed in favour of Messrs Cardinal Investment who offered a higher bid price of USD689,575.50 with emphasis that you would not settle for anything short of that. In compliance with your instructions as the boss, the Procurement Committee therefore had to recommend that Lot 8 be awarded to Cardinal Investment...."

8. In the interim, the National Public Procurement Agency - NPPA, had addressed a letter to PW2 on 16 March, 2009 - exhibit P, pages 187 & 188 of the Record, requesting the Ministry to reverse the award of Lot 8 to Cardinal Investment Limited. On 30 April, 2009 PW2 responded by letter, exhibit Q, page 189 of the Record. In this letter PW2 stated that the Ministry's PC of which he was head, had agreed to resubmit the bid made by HealthCare Pharmacy for Lot 8, for approval by the NPPA
9. According to PW2, once his minute of 9 March, 2009 was sent, the contract was awarded to Cardinal Investment. The National Public Procurement Committee (NPPA) did not approve of this as evidenced in the letter dated 14 May, 2009 addressed by the Agency, to PW2 - exhibit H - page 104 of the Record, and copied to the Appellant. According to PW2, the Minister was out of town at the time, and on 18 May, 2009 he minuted this letter to the acting Minister, as appears on page 107 of the Record. The Acting Minister minuted back on 19 May, 2009: "*Seen and hope you will take the necessary action needed.*"
10. The NPPA remitted the matter to its Independent Procurement Review Panel - IPRP - for determination. This was as a result of a letter of complaint dated 7 May, 2009 - see pages 110 & 190 of the Record - sent to it by Health Care Pharmacy. The IPRP's Ruling dated 22 May, 2009 on the complaint, was tendered as exhibit J - pages 108 - 113 of the Record. It was forwarded to the Appellant by PW2 under cover of his minute dated 26 May, 2009 - exhibit K page 114 of the Record. The IPRP had ruled that in accordance with the provisions of the Public Procurement Act, 2004 and the Regulations made thereunder in 2006, the contract for lot 8, should be awarded to Health Care Pharmacy, and it was to be done within 14 days of 22 May, 2009. In exhibit K, PW2 sought the Appellant's approval to implement the decision of the IPRP. The Appellant evidently, did not give

the required approval. His thoughts could be deduced and his actions could be determined from the contents of his letter dated 27 May, 2009 addressed to The Manager, Cardinal Investment Limited, exhibit M pages 117-118 of the Record. There, he said, inter alia, *"I refer to your Bid for the supply of Laboratory Reagents (Lot 8) and to inform you that the Ministry of Health and Sanitation, acting for and on behalf of the Government of Sierra Leone, has approved the award of the contract to your company.....You are requested to contact the office of the Minister of Health and Sanitation at your earliest convenience to sign the requisite contract documents..."* The date of the letter, and its contents are of immense significance, given the arguments advanced by Appellant's Counsel during the course of the appeal. Less than a month later, the Appellant executed the contract on 23 June, 2009 - exhibit N pages 120-150 of the Record.

Ⓚ. As to why the contract was signed by the Appellant, PW3 Mohamed Kallon, Acting Procurement Manager in the Ministry said at page 19 of the Record, *"...The award letter was signed by the Minister and the contract was also signed by the Minister. Usually, it is not the Minister who signs the award letters. For Lot 8 it was the Minister who signed the letter and the contract. I have got a copy of the contract..."* At pages 30 and 31 of the Record, the Appellant, whilst giving evidence in his own behalf, agreed that he signed exhibit M. In answer to Q30 in his recorded interview, exhibit O, at page 167 of the Record, the Appellant identified the signature on exhibit M, as his. In answer to Q56 at page 180 when asked whether the contract for Lot 8 had been awarded, he said: *"Yes, it has been verbally awarded to Cardinal Investment Limited."* Also, on pages 31 & 32 of the Record, the Appellant admitted that he awarded the contract to Cardinal Investment Limited, though he did not explicitly admit, signing the contract exhibit N which bears his signature. Significantly, at the end of his testimony, SEY, J at page 34 of the Record, put these three questions to him, and he gave the answers following each question: *"What is the date on exhibit M; 27th May, 2009; What is the date on exhibit N; 23 June, 2009; Apart from these two documents were there any other letters of award to Cardinal Investment? No."*

Ⓛ These were the facts which the prosecution alleged, and were successful in proving, that the Appellant had abused his position and his office, and

had wilfully failed to comply with the laws and regulations applicable to the award. The Learned Trial Judge accepted, and relied on these pieces of evidence in her judgment. In his closing address, Mr Edwards, Counsel for the Appellant submitted that there ^{was} no written evidence to support PW2's allegation of pressure. The Learned ^{KT} Trial Judge rejected this submission, and we think she was right in doing so. She heard PW2 give evidence, and also heard the Appellant testify in his own defence. She was in a position to decide whether PW2's allegation was true or otherwise. However, Mr Edwards conceded that the Appellant signed exhibits M & N though he argued, that mens rea could not be implied on the part of the Appellant by this official act. nllw

GROUND 1

123 We shall now proceed to deal with the grounds of appeal seriatim: In Ground 1, the Appellant submits that: "*The Learned Trial Judge erred in Law in holding that the charges as laid in counts 1-3 inclusive were in conformity with the respective sections namely: Sections 42(1) 43 & 48(2) of the Anti-Corruption Act, 2008, and therefore fulfilled the legal requirements.*"

SECTIONS 42(1), 43 & 48(2)(B) OF THE ACA, 2008

123 We have set out Counts 1-3 above. We shall now set out the relevant Sections. They read as follows: "*Section 42:(1) A Public Officer who uses his office to improperly confer an advantage on himself or any other person commits an offence; (2) A Person guilty of an offence under subsection (1) shall on conviction be liable to a fine of not less than Le30million or to imprisonment for a term of not less than 3 years or to both such fine and imprisonment. Section 43: A Public Officer who knowingly abuses his position in the performance of failure to perform an act, in contravention of any law, in the discharge of his functions or duties commits an offence and shall on conviction be liable to a fine not less than Le30million or to imprisonment for a term not less than 3 years or to both such fine and imprisonment. Section 48(2)(b): A Person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property commits an offence if he - (a).....(b) wilfully or negligently fails to comply with any law*" nllw

*or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures:**

15. Regrettably, in his synopsis filed on behalf of the Appellant, Mr Edwards has not addressed this Ground of Appeal. In fact, what he describes in that synopsis as "*the issues in this appeal*" do not in any way correspond with the grounds of appeal. However, we shall deal with this ground for what it is worth. The law applicable to Count 1 was dealt with by the Learned Trial Judge at pages 66-67 of the Record. She spelt out the requirements for a conviction quite adequately.

GROUND 2

15. As regards Count 2, she also did the same, and went on to say that even though ~~in~~ the word "*knowingly*" had been omitted from the particulars of offence, mens rea was still required for a conviction. She was quite right in saying that its absence did not render the Indictment bad in Law. She referred to the unreported English case of HALL(1983). We will content ourselves by relying on the provisions in Rule 3 of the Criminal Procedure Rules in the First Schedule to the Criminal Procedure Act, 1965 - CPA, 1965. "*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.*" This is the minimum duty of the prosecutor. If all of the words in the section creating the offence are used, so much the better. But where, as in this case, the Learned Trial Judge has made it clear, that mens rea was requisite to ground a conviction, we do not think she was wrong to have overruled Mr Edwards' submission. What she meant was that she would not convict the Appellant unless she was satisfied beyond a reasonable doubt that he had the requisite mens rea. As regards Count 3, she adequately and competently set out the elements of that offence as well at pages 67-69 of the Record. This Ground of Appeal has no substance, and therefore fails.

16. We think the Learned Trial Judge rightly found as she stated at page 75 of the Record, that PW1's withdrawal of his Firm's bid by letter dated 10 August, 2009, exhibit C - page 91 of the Record, came three months after exhibit M, and two months after exhibit N; and that Mr Edwards' submission that the contract came after it had been cleared by the

Ministry of Finance, was untenable. PW1's letter had no effect on the award of the contract to Cardinal Investment Limited.

17. At page 75 also, the Learned Trial Judge expresses her disbelief of that part of the Appellant's testimony where he had said that he would sign anything put before him by his Permanent Secretary. We think there were ample grounds for her disbelief, as she explained on page 76 of the Record. As she stated further down that same page, Appellant's witness, DW2, Edmund Koroma held conversations with Appellant during which he, DW2 tried to prevail upon Appellant to give up on his insistence that the contract ~~was~~ should be given to Cardinal Investment.

DISTINCTION WITHOUT A DIFFERENCE

18. Mr Edwards, has in his synopsis, drawn a spurious distinction between the letter confirming the award, exhibit M, and the contract, exhibit N. Firstly, contrary to his argument on page 2 of his synopsis, it is untrue that the Appellant did not award the contract: exhibits M & N provide clear evidence, which was accepted by the Learned Trial Judge, that he did so. Secondly, it is untrue that the award was made after HCP had withdrawn its bid. The Pharmacy only withdrew its bid on 10 August, 2009 - see exhibit C, page 91 of the Record. The learned Trial Judge was therefore right, in the words of Mr Edwards, to "lay premium" on exhibits M & N.
19. Moving on to Ground 2 of the Appellant's appeal, that "*the Learned Trial Judge erred in Law (when she) overruled the defence submission that Count 2 is bad in Law by the omission of the mens rea requirement in the word "knowingly" as enshrined in the statute*", we have stated our position and our view, that we do not think the omission fatal to a conviction. The omission would have been fatal had the Learned Trial Judge not reminded herself that she could not convict the Appellant unless there was proof that he had knowingly abused his position as she did at page 67 of the Record. The Mens rea of "knowingly" could be inferred from the evidence led: That the TEC and the PC had recommended that the award should go to Health Care Pharmacy; but the Appellant, in defiance of all procedural guidelines laid down in the Public Procurement Act and the Regulations made thereunder, and the remonstrations of PW1, his Permanent Secretary, the NNP and the IPRP, had insisted, and had himself made the

award to Cardinal Investment. The Learned Trial Judge had all of these matters in mind when she concluded that the Appellant was guilty of the offence charged in Count 2 of the Indictment.

GROUND 3

20. In Ground 3, the Appellant contends that "*The Learned Trial Judge erred in Law (as) she did not consider the mens rea requirements in all three counts against the Appellant thereby reaching the wrong Judgment against the Appellant.*" We have gone through the Record, and, as we have said above, we believe that this accusation is also groundless. This Ground also fails for want of merit.

GROUND 4

21. Ground 4 states that: "*The Learned Trial Judge erred in Law in ignoring the evidence given by defence witnesses, particularly the evidence of DW2 Edmond Koroma which said testimony was highly material to the success of the defence.*" Mr Edwards has not substantiated this accusation. He deals with it in only 5 lines in his synopsis, 4 of which are a repeat of the ground itself. He refers us to pages 35-37 of the Record. He has not highlighted any particular portion or portions of this testimony which, he has implied, would have exonerated his client, if it or they had been considered by the Learned Trial Judge. We do not know why Mr Edwards has chosen to rely on this witness' testimony as we do not believe it supports the Appellant's case. Part of what he said at pages 35&36 of the Record, is as follows: "*...I called the CEO of the NPPA to understand the issues of lot 8..he brought to my office a copy of the Ruling by the IPR Panel in which one of the parties had complained about the procuring process. With that information and documentation before me, I called the Minister and advised him that on the basis of the Ruling if the company to which the contract had been awarded proceeded to supply then Government cannot pay because it is not legal..... Thereafter I held subsequent meetings with the accused to let the law prevail in this matter.....*" The Learned Trial Judge referred to this portion of his evidence in her judgment at page 76&78 of the Record. The witness was of course, here referring to the decision of the IPRP which we have dealt

with above, and the Appellant's insistence, that notwithstanding this Ruling, the award should be made to Cardinal Investment Limited.

22. The other witness, DW3 Yaya Alvi Conteh, did not really say much. He merely said that he had never heard the Appellant say anything to PW2 about the contract, even though, according to him, he was in the office of the Appellant most times. As he could not possibly be in the office of the Appellant all the time, his presence there on some occasions does not necessarily detract from what PW2 had said about the Appellant's verbal instructions to him. In any event, PW2 wrote down his misgivings about the Appellant's conduct as has so amply been demonstrated above. In sum, the Learned Trial judge dealt adequately with the evidence led by and for the defence.

GROUND 5 (& maybe GROUND 6)

23. We move on to Ground 5 which states: "*The Learned Trial Judge in evaluating the evidence allowed herself to be carried away by exhibits M and N to the extent that she lost sight of the distinction between notification of award letter and an award letter which form the basis of the action, thereby reaching the wrong conclusion (judgment) in coming to the conclusion that the prosecution case has been proved as required by law, on the basis of prosecuting counsel's submission implying that the Learned Trial Judge shut her eyes to the defence of the accused contained in exhibit C and also contained in the testimony of DW1 and DW2 upon which the defence relied.*" We find some parts of this ground disturbing: the turgidity of the language used by the Appellant, or perhaps suggested to him by his Solicitor and Counsel; the use of colloquial expressions such as 'a judge being carried away'; 'shut her eyes'; and 'lost sight'. We do not think these are appropriate expressions to be used when referring to a Judge of the Superior Court of Judicature. We do not think this the appropriate language of a lawyer. Solicitors and Counsel should be very mindful of the expressions they use in papers filed in Court. We are also Judges, and we register our strong disapprobation of the use of such expressions. As it is, the ground is completely baseless. His arguments in support of this ground on pages 4 and 5 of his synopsis are worthless and without any merit whatsoever. They show that he did not study the evidence properly before putting pen to paper.

Moreover, as we have said above, he has tried to draw a distinction without a difference: between an award, a letter of award and the award of a contract. The evidence led is that the Appellant signed both exhibits M & N. He did so notwithstanding the Ruling of the IPRP, the letters addressed to him by the Head of the NPPA, the Memoranda addressed to him by PW2, and his own witness, Mr Koroma's ~~kindly intervention~~. And, *nlh* contrary to Mr Edwards' assessment of the evidence of PW2 and PW3 on page 5 of his synopsis, their individual testimonies were not weak. They spoke to the point: that the Appellant was obstinate and insistent that he would not abide by the decisions of the TEC, the PC, the NPPA and the IRPR. This was the same finding the Learned Trial Judge made. And we agree entirely with her in this respect.

24. Unlike Mr Edwards, we do not believe that throughout the trial, evidence was wrongly admitted; nor, that the Court below acted on wrong principles. We therefore see no reason why the Appellant's convictions should be quashed. Mr Edwards has unfortunately, not explained the reference he has made at the bottom of his page 5 to the cases he has cited. We do not believe any or all of them support any of the points he has canvassed in this appeal.

25. We have gone through the synopsis submitted on behalf of the Respondent. We think we have dealt adequately above with all the points of argument which have arisen in this appeal, and we do not find it necessary to comment on his arguments.

26. In the result, the Appellant's appeal against his conviction and sentence is dismissed.

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THE HONOURABLE MR JUSTICE N C BROWNE, JUSTICE OF APPEAL

E E Roberts

THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL