110

CR. APP. 10/2010

IN THE COURT OF APPEAL FOR SIERRA LEONE

CRIMINAL JURISDICTION

BETWEEN:

HAJA AFSATU OLAYINKA EBISHOLA KABBA - APPELLANT

AND

THE STATE - RESPONDENT

CORAM

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

HON. JUSTICE E.E. ROBERTS J.A.

HON. JUSTICE A. SHOWERS J.A.

SOLICITORS

J.B. Jenkins-Johnston Esq. for the Appellant

Abdul Rahman Mansaray Esq. for the Respondent

JUDGMENT DELIVERED ON THE 29TH DAY OF November, 2013

HAMILTON J.S.C.

The Appellant was tried in the High Court presided by the Honourable Justice S.A. Ademosu J.A. (of Blessed Memory) on a seven (7) Count Indictment and on the 12th October, 2010 was found guilty on Counts 1 to 5 and not guilty on Counts 6 and 7.

Counts 1 to 5 charges the Appellant with Misappropriation of Public Funds contrary to *Section 36(1) Anti-Corruption Act, 2008 (Act No.9 of 2008)* and in Counts 6 and

7 with the Offence of Abuse of Office contrary to *Section 42(1) Anti-Corruption Act, 2008 (Act No.9 of 2008).*

By this appeal, the Appellant seeks to set aside the conviction and sentence on Counts 1 to 5 on various grounds. The background of this Appeal can be very briefly summarised as follows:

The Appellant was Minister in the Ministry of Fisheries and Marine Resources when on or about 27th and 28th October, 2009 she gave verbal instructions that State House needed Le300 million according to PW^3, PW^4 and PW^5. All these prosecution witnesses agreed that the instruction was verbal and was not in writing and that the Appellant's signature appears in none of the documents used to withdraw the money from the Marine Fines Account at the Bank of Sierra Leone (BSL): PW^5 the Director of Fisheries authorized the payment of all five (5) cheques and signed all of them.

The authorization, verification and preparation of the five (5) cheques were between PW^2, PW^3, PW^4 and PW^5 of which the Appellant signed no document. The purpose stated in the five (5) Counts such as rehabilitation work undertaken at Tombo, Gbondapi and Bonthe or sensitization workshop management at Suliama Pujehun, or the holding of preparatory training for a Frame Survey Workshop, or the holding of a Community Based Monitoring Control or surveillance Training Workshop etc. etc. were all false as contained in all five (5) counts. The total amount of Le310 million collected was taken to the Appellant at Parliament by PW^3 which money was handed over to the driver and security of the Appellant.

It was against this very brief background that the Appellant was charged on a five (5) count indictment of Misappropriation of Public Funds contrary to *Section 36(1) Anti-Corruption Act 2008 (Act No.9 of 2008)* that she was found guilty, convicted and sentenced.

It is against this conviction and sentence that the Appellant has now appealed to the Court of Appeal on the following:

(1) That the Ex-Parte Order for Protection Measures made by the High Court on the 19th of April 2010 pursuant to *Section 83(1) of the Anti-Corruption Act No.12 of 2008* was Irregularly Obtained, in that the State did not file a proper Notice of Motion supported by an Affidavit contrary to the Practice of the Court; and that in any event, the said measures were not consistent with the rights of the Accused as set out in *Section 83(2) of the Anti-Corruption Act No.12 of 2008,* and were also contrary to the Provisions of *Section 23(3) of the Constitution Act No.6 of 1991.*

(2) That the Indictment dated 16th April, 2010 which was served on the Accused was defective, bad in law and irregular, in that it was contrary to *Section 89(4) of the Anti-Corruption Act No.12 of 2008* which states that,

> *".....An Indictment preferred under this Section shall be filed and served on The Accused together with the summary of evidence of the witnesses which the Commission relies on for the proof of the charge contained in the Indictment and the*

names of such witnesses shall be listed on the back of the indictment....."

But that the said Indictment had only the name of one (1) out of fourteen (14) Witnesses listed at the back thereof, rendering the whole trial to be a nullity.

(3) That the prosecution singularly failed to prove beyond reasonable doubt any *mens rea* on the part of the Accused, or any *actus reus* on the part of the Accused, nor did they prove by evidence the coincidence of both *mens rea and actus reus* of the Accused at the same time as they were obliged to do in order to secure a conviction, and the Learned Trial Judge was totally wrong to have convicted the Accused in such circumstances.

(4) That the Learned Trial Judge was totally wrong, and it was improper and prejudicial for him to have commented adversely on the failure of the Accused to testify at the trial, in such a way as to suggest that her silence amounted to evidence against her, or that her failure to give evidence was inconsistent with innocent, or that the only reasonable inference was that the Accused was guilty.

(5) That the Learned Trial Judge serious erred in law and in fact by trivializing the numerous and pervasive inconsistencies between the statement made by the Witnesses at the Anti-Corruption Commission, and their testimonies in Court.

(6) That the Learned Trial Judge failed to consider that the Statements of PW^2, PW^3, PW^4 and PW^5 were obtained under duress and that much weight should not be attached to them.

(7) That the Verdict is unreasonable and cannot be supported having regard to the Evidence.

In considering the grounds of appeal, it is intended to deal with grounds 1, 2, 3 and 4 separately and grounds 5, 6 and 7 together.

GROUND 1

Counsel for the Appellant in his synopsis of argument in relation to this ground which was an Order made to conceal the identities of the witnesses whose names were listed as A-M at the back of the Indictment, he submitted that the words "may apply *ex parte* to a Judge" means that such application must be by summons to a Judge, supported by an affidavit giving reasons for the said application and not *viva voce* or orally since if there is no proper application with reasons how can the Judges be in a position to determine whether the alleged security measures are consistent with the rights of the Appellant's position.

Counsel for the Respondent agrees that the measures ordered was consistent with the rights of the Appellant in that the trial ought to be held in public subject to the provision of *Section 23(3) of the Constitution 1991 (Act No.6 of 1991)* and submitted that in the present case the Judge who made the Order of 19th April, 2010 and the Learned Trial Judge were entitled on the information available that the publicity and disclosure of the identities of some of the witnesses would

prejudice the interest of Justice in so far as the security of the witnesses were concerned.

In my humble opinion the Judge rightly made the Order in accordance with the provisions of *Section 83(2) of the Anti Corruption Act 2008* which provides:

> *"A Judge may, on his own motion, or at the request of either party, or the witness concerned, order appropriate measures to safeguard the privacy and security of the witness, provided that such measures are consistent with the rights of the accused person". (Emphasis Added).*

The Judge's action was in full respect of the right of the appellant in that the names and statements of the protected witnesses were fully disclosed to the Appellant and her Solicitors in time for the preparation of the Appellant's case.

Counsel for the Appellant did finally submit that the Order of 19th April, 2010 was obtained in an irregular, unlawful and unconstitutional manner. Counsel did make an application to revoke or rescind the Order of 19th April, 2010 pursuant to *Section 83(5) and (6) of the Anti-Corruption Act, 2008* on the ground that the measures were not consistent with the rights of the Appellant which application was refused by the Learned Trial Judge Ademosu J.A. (of Blessed Memory) at page 53 to 54 of the records. In my humble opinion, he was right not to interfere with the discretion of another Judge of equal jurisdiction.

GROUND 2

Counsel for the Appellant agreed on this ground that the indictment which was served on the Appellant on 19th April, 2010 was bad in law and irregular being

contrary to *Section 89(4) of the anti-Corruption Act, 2008* as it did not contain names of all witnesses excepf one and further contend that it was served on the Appellant before the Order of 19th April, 2010 was made as such the trial was a nullity. Counsel cited those cases in support *R.V. Heane 4B&5 492, R.V. James 12 Cox 127 and R v. Thompson (1914) 2 K.B. 99.*

In my humble opinion these three cases cited by Learned Counsel are not relevant to the present case which concerns witnesses not named at the back of the indictment.

Section 133(1) and (2) of the Criminal Procedure Act 1965 (Act No.31 of 1965) provides as follows:

> *133(1) "Eevery person by pleading generally the plea of "not guilty" shall without further form, be deemed to have put himself upon his trial ....."*
>
> *133(2) "After a plea of not guilty it shall not be open to an accused person except with the leave of the Court to object that he is not 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".*

The Learned Trial Judge after quoting the above Section at *Page 239 lines 11-20* had this to say to which I agree:

> *"It is trite to say that the arraignment is complete after the prisoner had pleaded. You don't wait until after the accused has pleaded not guilty and*

expect to be heard to complain that the accused is not properly on his or her trial ....."

In my humble opinion the trial proceeded on the ground that the Order made on 19th April, 2010 did make adequate provision for the disclosure of the identities and statements of the witnesses to the Appellant and her Solicitors.

GROUND 3

Counsel for the Appellant submitted on this ground that if the trial was not a nullity then the evidence brought forth by the prosecution was woefully inadequate to support the indictment.

Counsel for the Respondent in his synopsis submitted that the allegations made were without any specific substance for this appeal and what Appellant's Counsel is seeking to do is to re- argue the submissions made at the trial which are insufficient on appeal.

What Counsel for the Appellant is alleging in this ground is that the prosecution failed to prove beyond reasonable doubt any *actus reus or mens rea* on the part of the Appellant not coincidence of both *actus reus and mens rea*, therefore the trial judge was wrong to have convicted the Appellant.

The Learned Trial Judge in his judgment *at pages 239-283* of the records did not carefully look at the entire evidence before him in order to determine whether the *actus reus and the mens rea* did exist and coincided before drawing his conclusion.

GROUND 4

In this appeal, this is the most important ground of appeal of all the grounds raised. Counsel for the Appellant argued that it was improper for the Learned Trial Judge to have commented adversely on the failure of the Appellant to testify in such a way as to suggest that her silence amounted to evidence against her, or that her failure to give evidence was inconsistent with innocence and the only reasonable inference was that the Appellant was guilty.

Counsel for the Respondent in his submission disagreed with Counsel for the Appellant in that the Learned Trial Judge did not suggest or assert that the Appellants refusal to testify and to remain silent amounts to guilt.

I am aware of and recognize the right of the Appellant to remain silent throughout the trial, leaving the burden of proof of his guilt beyond reasonable doubt to the prosecution. In other words the Appellant is presumed innocent until she is proved guilty. There is therefore no question of her proving her innocence. This is because for the duration of the trial an accused person may not utter a word. She is not bound to say anything. It is her Constitutional right to remain silent. The duty is on the prosecution to prove the charges against her as I said earlier beyond reasonable doubt. After wards an accused person is not a compellable witness. *See: The Queen v. Sharmpal Singh (1962) 2 WLR. 238.*

The Learned Trial Judge at *page 26 at lines 1 to 9 said*:

> *"In my humble opinion instead of the defence placing their reliance only on what I would call meretricious arguments they could have save the Accused the embarrassment and instead of giving the impression that there was nothing calling for an answer when she could have remained in the dock to*

make an unsworn statement. This is because the accused made no statement anywhere in answer to the allegations leveled against her. She would not have been cross-examined by the Prosecution or questioned by me and she would have explained herself in her own words from the dock. I have already indicated my views on the evidence of the witnesses and it is enough for me to say that in the peculiar circumstances if this case and the nature of the offence, I have no alternative but to find the accused guilty ....."

It must be noted that the accused has an absolute right to remain silent and it is improper for the Learned Trial Judge to comment adversely on her failure to testify in such a way that such silence amounts to evidence against her. In *R v. Pratt (1971) Crim L.R. 234 at 240* the Judge in directing the jury said:

"..... You must have thought that the accused would have gone into the witness box and told you what he had been doing and explained his actions ..... and seen fit to give his version on oath and to allow you to have the opportunity to seeing him cross-examined so that you could assess his evidence ..... <u>He chose not to do so. So have not heard from the accused and he has not seen fit to answer the evidence in this case</u>. It is a matter for you what inference you draw". (Emphasis Mine).

The Court of Appeal quashed the conviction and acquitted and discharged the Appellant because the effect of such direction to the jury implies quilt because the Appellant did not give evidence.

The Learned Trial Judge at *Page 264 lines 10 to 12* had this to say:

"In this matter the accused did not utter a word in answer to all the various and very serious allegations made against her ....."

Immediately after this statement by the Learned Trial Judge, *Archbold Criminal Pleadings Evidence and Practice in Criminal Cases 2001 Edition at Paragraph 4-378* under the rubric "on defendant's failure to testify" was quoted. It must be noted that this was dealt with by the learned Authors in relation to *Section 35 of the English Criminal Justice and Public Order Act, 1994* and it was by way of guidance. This Act has no application in this jurisdiction. This being the case, the Learned Trial Judge ought not to have considered it not even included it in his judgment. In my humble opinion the Learned Trial Judge's preoccupation was that the Appellant did not utter a word in answer to the charges and so drew inferences on which he then concluded that the Appellant was guilty.

In this Appeal the Learned Trial Judge was sitting both as a judge and jury (that is as judge of law and fact) and in this regard ought to be careful in his judgment. In my humble opinion the Learned Trial Judge in this particular matter went too far than that of *R v. Hall Supra* as to even suggest that the Appellant could have made an unsworn statement from the Dock where she would not have been cross-examined apart from giving evidence on oath. These comments are contrary to her right to remain silent as already stated and leave the prosecution to prove its case which comments were indeed adverse. This ground of appeal which is the most important succeeds and is upheld.

GROUND 5, 6 AND 7

As regards these three grounds of appeal a consideration of it will not be too detailed as the most important ground which is ground 4 has been exhaustively dealt with.

Counsel for the Appellant in arguing these grounds together whilst relying on his address to the lower Court submitted that the Learned Trial Judge seemed to be preoccupied with the fact that the Appellant has said nothing in answer to the charge made against her and was prepared to allow any and everything to go against the Appellant in order to arrive at a conviction.

Counsel further submitted that the inconsistencies in the testimonies of the prosecution witnesses did not matter to the Learned Trial Judge as long as the Appellant did not explain in her own words were prejudicial and fatal to the Appellant's conviction.

Counsel for the Respondent submitted that the argument of the Appellant amounted to a challenge of the factual findings of the Learned Trial Judge and an attack on the credibility of several of the prosecution witnesses and the reliance of the Learned Trial Judge on their evidence. Counsel further submitted that the Learned Trial Judge was in the best position to assess the reliability and credibility of the witnesses and was entitled to accept or reject their testimonies.

The Learned Trial Judge at *page 265 lines 13 to 17* of the records said:

> *"The defence has done no more than draw the Courts attention to what they called inconsistencies, contradictions and improbability in the testimony of*

the prosecution witnesses. In my candid opinion most of what the defence capitalised on were immaterial inconsistencies in the testimonies of PW[3] the Accountant, PW[4] the Permanent Secretary and PW[5] the Director of Fisheries".

Reading through the entire evidence of PW[2], PW[3], PW[4] and PW[5] as contained in the records there are material divergences in their evidence on oaths and their statements to the Anti-Corruption Commission which were tendered in evidence. In my opinion the inconsistencies and discrepancies are "not minute" as the Learned Trial Judge called them.

It is clear that there were material inconsistencies in the witnesses to the Anti-Corruption Commission and their evidence in Court especially that of PW[2], PW[3], PW[4] and PW[5] which the Learned Judge ought to have fully considered in his judgment as they were of material importance in relation to the defence. The Learned Trial Judge at *page 261 line 12 to 15* had this to say:

"In my opinion, having seen the witnesses physically and watched them when they were testifying I would be prepared to attribute the discrepancies and variations in their previous statements and their evidence as a result of defect of memory ....."

It is evident and clear from the opinion of the Learned Trial Judge that indeed there were discrepancies and variations but failed to accept that they were of such magnitude as to affect the defence. The Learned Trial Judge was mainly preoccupied with the fact that the Appellant did not testify on oath nor did she

make an unsworn statement from the dock when it was her right to remain silent and so considered the discrepancies and variation as "minute" to quote him.

In the final result and for all the reasons stated above this Appeal succeeds. The decision of the lower Court is set aside. Consequently the Appellant's conviction in the lower Court should not be allowed to stand but must be quashed. I accordingly quash the conviction and sentence of the lower Court. Accordingly, if the fines imposed was paid, I hereby order that it be returned.

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

AGREE:.....

HON. JUSTICE E.E. ROBERTS J.A.

I AGREE:.....

HON. JUSTICE A. SHOWERS J.A.

Ref: POH/HJ