CR APP 52/10

IN THE COURT OF APPEAL OF SIERRA LEONE

ALIMU BAH - APPELLANT

V

THE STATE - RESPONDENT

COUNSEL:
N D TEJAN-COLE ESQ for the Appellant
R S FYNN JNR for The State

CORAM:
THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL
THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL
THE HONOURABLE MS JUSTICE V SOLOMON, JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 6th DAY OF MAY,2014.

THE APPEAL

1. The Appellant has appealed against his conviction and sentence in the High Court on 27th July,2009, The Honourable Mrs Justice M Sey, presiding. He originally filed 5 grounds of appeal, and by Notice dated 13 December,2011, he added another 3 grounds, making 8 in all. They are as follows:
   i. The Trial Judge erred in Law by not establishing on whom the legal is for the implementation of the project when the Appellant is just a conduit for receiving and transmitting correspondence of the Sierra Leone Football Association. (SLFA)
   ii. The Trial Judge erred in Law to have inferred that PW3 was under employment of SLFA when exhibits D & F clearly show that PW3 was not employed as education officer.
   iii. The Trial Judge erred by not adverting her mind to the case of Lewis v Lethbridge [1987] Crim L R 59 '*that defendant need not have been under an obligation to deal with the particular monies or property handed over: 'it is sufficient that he is under an obligation to keep in existence a fund equivalent to that which he has*

received' even though it is clear in the evidence that a single foreign exchange account is being operated.

iv. The Trial Judge erred in Law by not verifying in whose name the draft cheque no. 2967 was written to ascertain who had the legal obligation to implement the project.

v. The Trial Judge erred in Law by not distinguishing the cases referred to of Davidge v Bunnett (1984) Crim L R 297 and Lewis v Lethbridge (supra) in reaching a decision and only stated "*we are told in the judgment that the justices clearly preferred Davidge v Bunnett (1984) Crim L R 297 to Lewis v Lethbridge (Supra) which is the case relied on by defence Counsel.*"

vi. The Learned Trial Judge erred in law when she convicted the Appellant of the offence of *Misappropriating of Funds* (sic) donated to the Sierra Leone Football Association by the Confederation of African Football. On that date of the alleged commission of the offence, the money was not the fund of the confederation.

vii. The Learned Trial Judge was wrong to apply, decide and to convict the Appellant based on the construction/interpretation of dishonesty of subsection 3 of section 5 of the Theft Act,1968, an Act of Parliament inapplicable in Sierra Leone. The Laws of Sierra Leone are contained in Section 170 of the Constitution of Sierra Leone,1991 – vide pages 65-68 of the Record.

viii. The Learned Trial Judge failed to advert her mind to the doctrine of virement which the Sierra Leone Football Association exercised or executed or used.

2. The original grounds of Appeal were settled and filed by Mr Africanus Sesay, whilst the additional ones were settled and filed by Mr Tejan-Cole. It appears that the original grounds were filed in a hurry by Learned Counsel. The language used is imprecise in some instances, and clearly, the grounds are of mixed fact and law, rather than of Law alone. This same criticism applies to Ground 8, filed by Mr Tejan-Cole. Also, Mr Sesay omitted the courtesy of referring to the trial Judge as the Learned Trial Judge. We would urge Counsel to adhere to the cordiality usually extended to the Presiding Bench in the lower Court, by addressing the occupant of that Bench as the Learned Trial Judge, rather than the casual expression, trial judge.

THE INDICTMENT

3. The Indictment on which the Appellant was tried was dated 15 July,2009 and reads as follows:

COUNT 1

STATEMENT OF OFFENCE

Misappropriation of Donor Funds, contrary to Section 13 of the Anti-Corruption Act,2000 (as amended)

PARTICULARS OF OFFENCE

ALIMU BAH on a date unknown between 13th December,2006 and 31st December,2008 at Freetown in the Western Area of Sierra Leone, being the General Secretary of the Sierra Leone Football Association dishonestly appropriated the sum of USD5,200 being funds donated to the Sierra Leone Football Association by the Confederation of African Football.

THE TRIAL

4. The Trial was by Judge alone as Ordered by the Learned Trial Judge on 17 August,2009 on the written Application of the then Attorney-General & Minister of Justice, dated 14 July,2009 and on the oral Application of Prosecuting Counsel, C M Mantsebo esq. The Trial commenced before SEY,J on 17 August,2009. The prosecution called four witnesses to testify on its behalf. The Appellant gave evidence on his own behalf, and called one witness, Mr Nahim Khadi, the then President of the SLFA. At the end of the trial, then Counsel for the Appellant, A S Sesay esq submitted a written closing address at pages 31-34 of the Record, and Mr Mantsebo submitted one for the prosecution, at pages 35-56 of the Record. The Learned Trial Judge's Judgment is at pages 58-70 of the Record. After reviewing the evidence led by both sides, she made several findings.

LEARNED TRIAL JUDGE'S FINDINGS

5. At page 62, she found as follows: "*Having carefully considered the evidence adduced by the defence, I must state that I find significant inconsistency and contradictions in the testimony of the accused and his witness, DW1. For instance DW1 said they spent USD3,988 on the equipment, yet the accused told the Court that out of the USD4,000 withdrawn, it was USD3,500 that was used to purchase the equipment.*

Also, DW1 stated that the USD4,000 was used to purchase office equipment immediately after he left for the UK but the accused maintained that the equipment was purchased much later. Again they differ with regard to the items purchased. The accused said only a laptop and an overhead projector were purchased, whereas DW1 stated that in addition to these two items, a camcorder and a camera were also purchased. As regards the amount given to PW3 as allowances, the accused on the one hand said that PW3 was paid USD500 out of the USD4,000 withdrawn on the 3rd January,2007 for his trip to Cairo but later the accused contradicted himself by stating that the USD500 was taken from the President of SLFA to pre-finance PW3's trip. It is also noteworthy that even though the accused and DW1 have stated that they did not regard PW3 as the Education Officer they nonetheless gave him allowances to attend conferences at Cairo and Tunisia in that capacity."

6. Her findings in this respect were quite correct, as she had quoted the evidence led by both sides, quite correctly. She had chosen to review the Appellant's case first, perhaps because, his came after the prosecution. Usually, a trial Judge begins with the case for the prosecution, and ends with that for the defence, but there is no hard and fast rule about the sequence. So long as the Judge bears in mind that the legal burden of proof rests on the prosecution at all times, save in the exceptional case where statute imposes it on the accused, this approach cannot be seriously challenged. The duty of the trial Judge is to assess the facts of the case fairly, and to apply the Law to the facts as found.

LEARNED TRIAL JUDGE'S HANDLING OF PROSECUTION'S CASE

7. She began, as recorded at pages 1-2 of the record, by setting out succinctly and clearly, the case for the prosecution. She said: "*Briefly put, the prosecution's case is that the accused dishonestly appropriated the sum of USD5,200 which was part of the sum of USD6,000 that had been donated to the SLFA by CAF. The instructions given by CAF were as per exhibit C to the effect that the amount should be used as follows:"3000 US Dollars to buy office equipment such as LCDs, laptops, beamers, overhead projectors, CDs and DVDs etc..... - 3000 USdollars to cover 50% of the salary of your Education Director Mr Alphan S. Coker for the period from 1st July,2006 to 30th June,2007. The prosecution has argued that there was a legal obligation on the accused and the SLFA to utilize the funds from CAF for their intended purposes."*

EXHIBIT C - LETTER DATED 13TH DECEMBER,2006 FROM CAF

8. We must find out whether she had quoted the evidence correctly. Exhibit C, is at page 80 of the Record. It is dated 13th December,2006 and is addressed to the SLFA, and in particular, its General Secretary, which the Appellant was at the relevant point in time. It reads in part: "*In the frame of the implementation of the program 'Contract with Africa', we have the pleasure to send you here-enclosed a draft cheque No.2967 amounting to 6,000 USdollars. This amount should be used as follows: - 3,000 USdollars to buy office equipments such as laptops, LCDs, Beamers, overhead projectors CDs, and DVDs etc.....; - 3,000 USdollars to cover 50% of the salary of your Education Director Mr Alphan S Coker for the period 1st July,2006 to 30 June,2007. The remaining 3,000 US dollars to cover the remaining 50% of the salary of your technical director for the above mentioned period will be sent to you at the beginning of 2007 upon presentation of all pro—formas and documents related to the purchase of the office equipments as well as the payments made to your director of education, for approval by CAF finance division.....*"
9. Specific instructions were given by the donor agency as to how the funds remitted, were to be used. And it was expected that the recipient would render an account of how the funds were utilised, after they had been disbursed. There was no room for deviation from these instructions; nor was there an avenue for re-interpretation of what CAF meant. It must have seemed to the Learned Trial Judge, and this is evident in her judgment, that if these funds were used or appropriated other than for their intended purposes, and such use was dishonest, then the person charged would be guilty of the offence charged. And this is the conclusion she came to at the end of the day.

MR TEJAN-COLE'S ARGUMENTS

10. At paragraph 4 of his written argument, Mr Tejan-Cole, Learned Counsel for the Appellant agreed with this explanation of the elements of the offence with which the Appellant was charged. But he added, that the prosecution must go on to prove that the funds misappropriated must belong to a public body as defined in the 2000 Act; and that the donation must be in the name or for the benefit of the people of Sierra Leone or a section thereof in order to comply with Section 13 of the Act. In this respect, Mr Tejan-Cole is quite right. Where he went wrong, was the

conclusion he drew based on these elements of the offence. At paragraph 5 of his synopsis, Learned Counsel, Mr Tejan-Cole argues that the Learned Trial Judge did not advert her mind to the essentials of a company limited by guarantee, which the SLFA was; and that the Appellant's authority and control over the donation to the SLFA was wrongly determined by the Learned Trial Judge. Obviously, Mr Tejan-Cole had not read the statutory provision with that acuity and perspicuity which are his peculiar characteristics and for which he is renowned.

SECTION 13 OF THE ANTI - CORRUPTION ACT,2000.

11. Section 13 of the Anti-Corruption Act,2000 reads as follows: "*Any person who, being a member or an officer or otherwise in the management of any organization which is a public body, dishonestly appropriates anything, whether property or otherwise, which has been donated to such body in the name of, or for the benefit of the people of Sierra Leone or a section thereof is guilty of an offence.*"

PUBLIC BODY

12. A "*Public Body*" *is defined in Section 1 of the Act. It includes: ".....(h) any organization, whether local or foreign, established to render any voluntary social service to the public or any section thereof or for other charitable purposes, which receives funds or other donation for the benefit of the people of Sierra Leone or a section thereof.*" The Appellant at page 22 of the Record, while giving evidence in his defence states that "*I am the General Secretary of the SLFA. I have been General Secretary since September,1996. My responsibilities are that I supervise the secretariat through mandate given to me by the SLFA. In 1996 I was elected and four years afterwards it became an appointed office and subsequently I was appointed on a permanent basis. As General Secretary I receive correspondence on behalf of the Association. I am not part of the Executive. I am a paid employee.*" At page 24, under cross-examination by Mr Mantsebo, the Appellant said: "*My duties as General Secretary were to supervise, to receive and write correspondence on behalf of the Football Association and I act as Secretary for the Standing Committee or I delegate someone and I also sit on as ex-officio AT Committee meetings to discharge directives of the committee. Yes, I do supervise activities of the Finance Officer although at times direct instructions come from the President.*"

13. Clearly, the Appellant was a member of the management of the SLFA. We do not think the Section requires that the person accused must in all cases, have some degree of control or authority over the Public Body. It is sufficient if the accused is a member or officer or otherwise in the management of that Public Body.

14. The SLFA was and is a Public Body in the sense defined in Section 1 of the Act as it renders a service to the people of Sierra Leone irrespective of whether it is a company limited by guarantee or otherwise, and it also receives funds from donors, such as CAF, for its purposes. Whether these purposes benefit the people of Sierra Leone or a section thereof, depends on the inference to be drawn from proven facts. The Learned Trial Judge came to the conclusion, and we think, rightly so, that this was an inference she could readily draw on the facts of the case. In addition, though it is the Learned Trial Judge's duty in all criminal trials to deal with all legal issues whether in favour of, or against the interests of an accused person, the issue of whether the SLFA was a Public Body or not was never canvassed before her.

ELEMENT OF DISHONESTY - WHETHER OWNER'S CONSENT MATTERS

15. Having held that the SLFA was a Public Body in the sense intended in Section 1 of the 2000 Act, we must go on to examine whether there was evidence beyond a reasonable doubt that the Appellant had dishonestly appropriated the total sum of USD5,200. The Learned Trial Judge followed the direction given by LORD LANE, LCJ in GHOSH [1982]QB 1053. She quoted the relevant passage from his Lordship's Judgment, quite correctly, at page 67 of the Record. This explanation of what "*dishonesty*" means in the 2000 Act has been accepted by the Courts in this country when trying offences brought under the Act. We emphasise the following words, spoken by LORD LANE in GHOSH: "*...It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.*" As to the issue of whether consent matters in the circumstances of this case, in that the alleged acts of appropriation were committed while the Appellant was carrying out his authorised functions as General Secretary of the SLFA, and as such was acting on the authority and with the consent of the SLFA, we are of the view that the owner's consent is not a defence to a charge brought under this Act, as LORD KEITH repeatedly stated in the case of GOMEZ

[1993] 1 All ER 1 HL at page 9 para h, page 12j, page 13b,g,h, and LORD BROWNE-WILINSON at page 39c and page 40j. In sum, LORD KEITH said "*.....Indeed, Lawrence's case is a clear decision to the contrary since it laid down unequivocally that an act may be an appropriation notwithstanding that it is done with the consent of the owner. It does not appear to me that any sensible distinction can be made in this context between consent and authorisation.*" This conclusion is as relevant to the provisions in the 2000 Act as it is to those in the English Theft Act,1968 under which it was reached. It is therefore not quite true as canvassed in Mr Tejan-Cole's synopsis that the Learned Trial Judge imported into Sierra Leone jurisprudence concepts which were not applicable in our Courts. We are not bound by the decisions of the Courts in England and Wales, but their decisions are of persuasive authority as we all know and have accepted down the ages.

THE ACTUS REUS OF APPROPRIATION

16. We have considered the submissions made by Counsel for the Appellant in the Court below and in this Court that "*the Appellant need not have been under an obligation to deal with the particular monies paid into the SLFA's account in a particular way, and that it was sufficient if he is under an obligation to keep in existence a fund equivalent to that which he has received.*" This argument seems not unlike the one where one side argues that yes, the defendant took the money without authority, but he used it for another lawful or authorised purpose, or, he has returned it. We suspect that most lawyers, steeped in the Law of Larceny, where the essential elements include, the mens rea of the property being taken without the consent of the owner, and the intention to permanently deprive the owner of the property stolen, have not come to terms with the concept of dishonest appropriation. Appropriation in our view, is the same as it is in the English Theft Act,1968 as amended. Exercising the rights of the owner over property, would, where the required mens rea is present, amount to dishonest appropriation under the 2000 Act. An unequivocal act of taking and carrying away is no longer relevant in cases of dishonest appropriation. The actus reus in cases falling within Section 13 of the 2000 Act, is the appropriation of property of any and all descriptions; and the mens rea, is a dishonest intention to so appropriate.
17. In this respect, the dictum of SELLERS,LJ in the civil case of SINCLAIR v NEIGHBOUR[1966] 3 All ER 988 at 989 paras C-D is quite instructive.

There, the Respondent was dismissed because of dishonest appropriation of money. In considering the right test to apply in these circumstances he said, inter alia, "*it was sufficient for the employer, if he could, in all the circumstances, regard what the employee did as being something which was seriously inconsistent-incompatible with his duty as a manager in the business in which he was engaged. To take money out of the till in such circumstances is on the face of it incompatible and inconsistent with his duty.*"

18. In the case of THE STATE v EDWARD YAMBA KOROMA & OTHERS, H.C., Judgment delivered 26 November,2012, the Court considered the issue of an employee doing something which was quite inconsistent with his official duties. At paragraph 14 of his Judgment, the Learned Trial Judge in that case said: "*I shall later in my Judgment have to consider whether authorising the debiting of one's employer's account or balance in the books, without authority, amounts to conduct incompatible with the terms of one's employment. Of course I fully realise that much more than incompatibility and inconsistency are required in determining the guilt or otherwise of the accused persons in a criminal trial.*" That Court concluded that such conduct was incompatible with the accused person in question's duty as an employee, and he was convicted.
19. The issue of whether the appropriation of USD5,200 by the Appellant was incompatible with the terms of the Appellant's employment with the SLFA was clearly considered by the Learned Trial Judge. His duty, once the remittance of USD6,000 had been accepted by the SLFA, was to disburse the funds remitted in the manner stipulated by the donors. The facts of the case revealed also, that not only did the Appellant not apply the funds to the need identified by CAF, but that they were not used to purchase the very items the Appellant had claimed he had purchased, as was found by the Learned Trial Judge at the bottom of page 68 to the top of page 69 of the Record. She concluded that the Appellant had told untruths about how the money had been spent, and that such untruths were probative of his guilt, bearing in mind the directions given by the English Court of Appeal in R v LUCAS [1981] QB 720, 73 Cr App R 159. Her conclusion was supported by the evidence of PW2 &PW3 at pages 12-18 of the Record. We do not therefore think that Mr Tejan-Cole is right in his paragraph 9 where he argues that the Learned Trial Judge did not give reasons for rejecting the Appellant's version of events, though he is right in arguing that "*lies on their own do not make a positive case of any*

crime.....". The Learned Trial Judge clearly accepted the evidence of PW2, Abu bakarr Kamara, Administrative Officer at SLFA, at pages 12-15 of the Record, that he collected the various sums of money from the Sierra Leone Commercial Bank Ltd, and handed the same over to the Appellant, and that no office equipment was bought with that amount of money. Also, PW3, Alphan Koker whose evidence is recorded at pages 15-18 of the Record, testified that the remittance made to the SLFA as stated in exhibit C, the letter dated 13 December,2006, was never paid over to him. On his return from Egypt, he spoke to the Appellant about this. All that the Appellant said to him was that they would talk about it. Whether or not the Appellant and DW1 believed that PW2 was not formally or properly appointed to the office as Education Officer, or whether he worked as such, is immaterial. What matters is that monies were remitted to the SLFA, part of which were to be paid over to PW2, but nothing was actually paid to him by the Appellant or DW1. On the other hand, the said monies were debited from SLFA's account at the Bank, and used by the Appellant for purposes which were not clearly disclosed at the trial. If, as both the Appellant and DW1 have contested in the Court below, that PW3 had not at that point in time been appointed Education Officer, why did they not make this plain to CAF? Why was the remittance from CAF accepted without objection? In her findings, the Learned Trial Judge must have come to the conclusion that the only reason why this was not done was because, the Appellant, maybe together with DW1, had decided to utilise these funds for other purposes.

GROUNDS 4 & 5; LEWIS v LETHBRIDGE & DAVIDGE v BUNNETT

20. We shall lastly, turn our attention to Grounds 4 and 5 of the Grounds of Appeal. These Grounds deal with the Learned Trial Judge's manner of dealing with the two case of LEWIS v LETHBRIDGE [1987] Crim L R 59 and DAVIDGE v BUNNETT [1984] Crim L R 297. The key issue in the LEWIS case is that the person charged is under no duty to retain particular monies. To quote the exact words of the summary of the Divisional Court's judgment in that case as reported, "*...It is sufficient that he is under an obligation to keep in existence a fund equivalent to that which he has received.*" This passage alone, sufficiently distinguishes that case, from the facts of this case. In the instant case, the sum of USD5,200 was debited from the SLFA's account. It was not used for the purpose for which it had been remitted by CAF to SLFA; that total sum

was not a debt owed by the Appellant to the SLFA; it was money which had to be applied in a particular manner and for a particular purpose. The Appellant was not free to use that money as he pleased, as was the case in LEWIS. The facts in the DAVIDGE case, and the conclusion reached by the Divisional Court, show that what is of essence in cases of dishonest appropriation, is the duty or obligation imposed on the Appellant. There, the Appellant had used the sum of £100 given to her for the purpose of paying a joint gas bill, on Christmas presents. As is reported at page 298 of the summary of the Judgment, the Court held that *"...D was under an obligation to use the cheques or their proceeds in whatever way she saw fit so long as they were applied pro tanto to the discharge of the gas bill...."* Further, the Appellant in this case, did not, in any event, keep in existence a fund equivalent to what he had received. This is the conclusion reached by the Learned Trial Judge in her Judgment , as recorded at the middle of page 68 of the Record. She is supported in this respect by what the Appellant himself said under cross-examination as appears at page 24 of the Record: "*Yes, exhibit C was addressed to me for my attention. I receive correspondence on behalf of the Association. Yes, that letter explained to me the purpose for which the $6,000 should be utilized. Yes, I fully appreciated that the money was to be used specifically for the contents of the letter.*" He said on the same page, "...Yes, we used the $3,500 to buy equipment.....It was bought at a later date. But at page 13 of the Record, PW2 had said that no equipment was bought, and this explanation remained unchallenged by any other evidence until the end of the trial.

CONCLUSION

21. Having exhaustively reviewed the evidence led at the trial, the legal issues raised, and the manner in which they were dealt with by the Learned Trial Judge in her Judgment, we have come to the conclusion that the verdict of guilty she arrived at was the right one. The appeal is therefore dismissed for lack of merit.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

THE HONOURABLE MR JUSTICE E E ROBERTS, JUSTICE OF APPEAL

THE HONOURABLE MS V S SOLOMON, JUSTICE OF APPEAL