C R. APP. 1/2016

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

ROBERT PAINE - APPELLANT

AND

THE STATE - RESPONDENT

CORAM:

HON. MR. JUSTICE J. B. ALLIEU – JA.- PRESIDING

HON. MRS. JUSTICE J.E.L. KING - JA.

HOM. MR. JUSTICE S.A. BAH – JA.

REPRESENTATIONS:

I. KANNEH ESQ. FOR THE APPELLANT

C. MANTSEBO ESQ. FOR THE RESPONDENT

JUDGMENT DELIVERED THE 18th DAY OF JUNE 2020

HON. MR. JUSTICE JOHN BOSCO ALLIEU, JA. – PRESIDING

I

This is an Appeal against the Judgment of the Hon. Mr. Justice Alusine S Sesay J. A. (Now J.S.C) dated 2nd February 2016.

Counsel for the Appellant being dissatisfied with the said Judgment lodged 4(four) Grounds of Appeal in a Notice of Appeal dated 2nd August 2016 containing Particulars of Misdirections (See Pages 827-830 of the Court Records).

Counsel for the Appellant stated in the said Notice of Appeal that the Judgment of the Learned Trial Judge dated 2nd February 2016 is unreasonable and cannot be supported by the evidence adduced at the trial.

Counsel for the Appellant relied on his synopsis of arguments dated 12th February 2019 and 16th February 2020, respectively.

Counsel for the Respondent relied on his synopsis of arguments dated 26th June 2019 and 9th December 2019, respectively.

II

In Ground 1 of his Appeal, Counsel for the Appellant submitted that the Learned Trial Judge misdirected himself in reaching his decision against the 2nd Accused (the Appellant herein) in that he substantially relied on the testimony and statement of his co-accused (the convicted 1st accused, who didn't appeal against his conviction).

Counsel for the Appellant referred this Hon. Court to page 24 of the judgment dated 2nd February 2016 (found in page 243 of the Court Records Vol.1) as containing the misdirections of the Learned Trial Judge.

Counsel for the Appellant submitted that it is the principle of law that statements made by one accused person either to the police or to any other authority are not evidence against the co accused except if the co-accused either expressly or impliedly adopts the statement.

He further submitted that in the trial below, the Learned Trial Judge, sitting alone, relied solely on the statement of the 1st accused (the convict) to convict the 2nd accused (the Appellant herein). He invited this Honourable Court to peruse the statements of the 1st accused (the convict) and the statement of the 2nd accused (Appellant) found in pages 622 to 626 and in pages 706 to 728 of the Court Records, respectively.

According to Counsel, the Appellant denied his involvement in the alleged Criminal enterprise and that the prosecution failed to point at any other evidence apart from the 1st accused's (convict) statement against the 2nd accused (the Appellant herein).

The statement of the 1st accused (convict), according to him, which the Learned Trial Judge substantially relied upon to convict the 2nd accused (the Appellant herein) was controverted by the said 1st accused (the Convict) at the trial.

Counsel for the Appellant relied on the cases, of:

1. The State Vs. Ahmed S. D. Turay & Others S.C. CR. APP. No. 2/81 (unreported)
2. R.V. Rudd (1948) 32 CR. APP 138

Counsel for the Respondent, on the other hand, submitted that the Learned Trial Judge, in his judgment dated 2nd February 2016, did not convict the Appellant merely on the statement made by the 1st accused (convict) but that donor funds were transferred into the account of the Appellant and referred to pages 370-375 of the Court records. Further reference was made by Counsel, to pages 623, 565 and 713 of the said records.

Counsel for the Respondent submitted that the Appellant did not raise any factual issues with regards to the Donor funds that were deposited in his accounts. No other sources were referred to except the ones deposited by the Political Parties Registration Commission (P. P. R. C).

Counsel for the Respondent also referred to the case of The State Vs. Ahmed S. D. Turay and others S. C. Cr. App. No. 2/81 relied upon by Counsel for the Appellant and submitted that the Learned Chief Justice Livesey Luke, drew a distinction between cases before a Jury and those before a Judge sitting alone. He went on to say that the prohibition of a court relying on a statement of a co-accused to convict an accused only exists in relation to jury trials.

He, too, referred to the judgment of the Learned Trial Judge dated 2nd February 2016 (found in page 243 of the Court Records vol.1) in which the said Trial Judge stated that he could not rely on the admissions of the 1st accused (convict) to convict the Appellant.

Counsel for the Respondent further submitted that in line with pages 719-720 of the Court Records, the Learned Trial Judge correctly found that the explanations of the Appellant were inadequate and unclear and that he rightly placed reliance on the statement of the 1st accused (convict) in accordance with the dicta of the Learned Chief Justice in the case of The State Vs. Ahmed S. D. Turay & Others S. C. CR. APP. 2/81. He reiterated that the 1st accused (convict) stated in his statement that he withdrew the total amount of Le10,400,000 (Ten Million, Four Hundred Thousand Leones) from the P.P.R.C. accounts and deposited same into the appellant's personal bank account and it is the same sum of money that was

withdrawn by the Appellant and utilised for some purposes other than those authorised by the Donor.

In relation to this argument, Counsel for the Respondent submitted that the Learned Trial Judge correctly convicted the Appellant, that no miscarriage of Justice has been occasioned to the Appellant and that the conviction ought to stand.

Counsel for the Respondent relied on the cases of:

1. The State vs. Ahmed S. Turay & Others S.C. CR. APP. No. 2/81 (unreported).
2. The State vs. Herbert George Williams and 8 Others (Unreported) – Judgment delivered by the Hon. Mr. Justice J. B. A. Katutsi on 10th August 2012.

III

In relation to the Ground of Appeal contained in paragraph II hereof and the arguments submitted by the respective counsel, I will first and foremost refer to the statements made to the ACC investigators by the 1st accused (convict) commencing 26th August 2013 and that of the Appellant commencing 22nd August 2013.

The 1st accused (convict) in his statement made to the ACC Investigators, in pages 622 to 627 of the Court Records mentioned that he deposited certain sums of money into the Appellant's account at Rokel Commercial Bank.

The Appellant in his statement made to the ACC Investigators, pages 706 to 728 of the Court Records, denied the allegations of the 1st accused (convict) levied against him. He denied that he requested for the sum of Le10,400,000/00 (Ten Million, Four Hundred Thousand Leones) from the 1st Accused (convict) on behalf of management as kickbacks and challenged the ACC investigators to cross check with the other management staff (about 5 in number) as to whether or not it is true. He further denied knowledge of the sum of Le46,630,000/00(Forty Six Million, Six Hundred and Thirty Thousand Leones) payable to the 1st accused (convict) and that he is only seeing for the first time, documents relating to same when showed to him by the ACC Investigators. He claimed malice on the part of the 1st accused (convict).

The Appellant however admitted that monies were deposited by the 1st accused (convict) in his personal accounts at Rokel Commercial Bank but that those monies deposited were for family transactions. He went further to explain the use of Le10,400,000/00) deposited by the 1st Accused (convict) in his personal accounts at Rokel Commercial Bank.

The Learned Trial Judge in his Judgment dated 2nd February 2016 at page 24 thereof (the same found on page 243 of the said records) had this to say:
"...The 1st Accused again admitted on 23rd October 2013 to the ACC after the PPRC's internal audit and interviews that he could not use the funds as expected because he had to honour the 2nd Accused request for money meant for the said project. **I again reiterate that such an admission by the 1st Accused cannot be evidence against the 2nd accused except where the 2nd Accused cannot give a proper Account of the monies paid into his Account by the 1st Accused...." (Emphasis mine)**

Further, on page 25 of his judgment dated 2nd February 2016 (the same found on page 244 of the records) the Learned Trial Judge had this to say:
".....from the 2nd Accused own account of the monies transferred into his personal Account at RCB and the Exhibits tendered to wit: the deposit slips and the Statement of Account, **there are very contradictory and conflicting explanation by the 2nd Accused regarding the amounts transferred into his account. The Defence have failed in their attempt to controvert that Prosecution evidence...." (Emphasis mine)**

I am to determine whether the Learned Trial Judge misdirected himself particularly in relation to the emphasis as highlighted and underlined above.

It is worthy to note the principle of law that: a statement made by an accused against a co-accused is evidence against the accused himself only, is well settled, as was held by this Court of Appeal in the case entitled **Kamara Vs. Regina (1967-68) A.L.R. SL. 109, (1967) CR. APP. No. 34/66**, when it did consider whether there has been a misdirection on the question of the admissibility of the statements of the co-accused against the Appellant. **Dove-Edwin J. A.** had this to say at page 111:

> **"... We think that in dealing with the Statement of each Co-Accused the Learned Judge, with respect, was in error. We think that he should have made it clear to**

the Jurors, particularly when he was going to give them the Statements when they retired to consider their verdicts, that each accused's statement was only evidence against himself and no other person, particularly in this case where the Statements were not made in the presence of the Appellant nor was he given a copy of them and did not have an opportunity of Cross Examining any of the makers of the Statement."

The Appeal was allowed as the Justices of the Court of Appeal held that there was a misdirection by the Learned Trial Judge on the Statements and which were fatal to the conviction.

Additionally, in the case of **The State Vs. Ahmed S. D. Turay & Others S. C. CR. APP. No. 2/81, a** Supreme Court judgment delivered on the 13th July 1982, and relied upon by the respective Counsel in this case, **Livesey Luke C. J.** in referring to the case of R. V. Rudd (1948) 32 CR. APP. 138 acknowledged that:

".... There is no doubt that it is a fundamental rule of evidence that Statements made by one Accused person either to the Police or to others (other than Statements, whether in the presence or absence of a Co-Accused, made in the course and pursuance of a joint criminal enterprise to which the Accused was a party) are not evidence against a Co-Accused unless the Co-Accused either by expressly or by implication adopts the Statements and thereby makes them his own..." (Emphasis mine)

In further support of the above principle of law, the Learned Chief Justice made reference to the case of R. V. Genewardene (1951) 35 CR. APP. R. 80.

Counsel for the Respondent had already submitted that the Learned Chief Justice in the case of The State Vs. Ahmed S D Turay and Others S.C. CR. APP No. 2/81 (unreported) made a distinction between trials by Judge and Jury and trials by Judge alone and that prohibition of a Court relying on a Statement of a Co-Accused to convict an Accused only exists in relation to Jury trials. Therefore, in relation to trials by Judge alone (as in the Court below), he submitted that the Learned Trial Judge rightly placed reliance on the Statement of the 1st Accused (convict) in accordance with the dicta of the said Learned Chief Justice in the case referred to.

Let me at this stage, refer to other relevant portions in the Judgment of the Learned Chief Justice in the said case of The State Vs. Ahmed S D Turay & Others S. C. Cr. App No. 2/81 (unreported). One of the issues to be determined by the Learned Justices of the Supreme Court was whether there is an obligation on a Trial Judge sitting without a Jury to warn himself that the oral or written statement of one accused person is not evidence against a co-accused. In relation to the said issue, the Learned Chief Justice had this to say:

> **"... and if it is ascertained that a Judge sitting alone so relied on a statement of an Accused person, that irregularity can be remedied by an Appellant Court..."**

The question which now arises for determination is whether the Learned Trial Judge relied on the Statement of the 1st Accused (convict) to convict the Appellant.

Counsel for the Appellant had submitted that the Learned Trial Judge substantially relied on the statement of the 1st Accused (convict) to convict the Appellant.

Counsel for the Respondent, in paragraph 4 of his supplemental synopsis dated 9th December 2019, stated as follows:

> **"....not only was the Learned Judge alive to the impropriety of relying on the sole evidence of the 1st Accused to convict the 2nd Accused, he referred to other evidence upon which he based his conviction..."**

In effect, Counsel for the Respondent conceded that the Learned Trial Judge relied on the Statement of the 1st Accused (convict), though not solely, to convict the Appellant.

I am to reiterate that a Statement made in the absence of an accused person by one of his co-accused **(as is the practice in obtaining statements from Accused persons – Emphasis mine)** is not and cannot be evidence against him – see paragraph 1128 page 424, Archbold Pleading, Evidence and Practice in Criminal Cases, 36th Edition, Butler and Garsia, 1995 Reprint, WM.W. Gaunt & Sons Inc.

The Learned Trial Judge had reiterated on page 24 of his judgment dated 2nd February 2016 where he stated " ... **I again reiterate that ... an admission by the 1st Accused cannot be**

evidence against the 2nd accused <u>except where the 2nd Accused cannot give a proper Account of the monies paid into his Account by the 1st Accused</u>...." (Emphasis mine). This in effect is suggesting that the statement made by the 1st Accused can be evidence against the 2nd accused where the 2nd Accused cannot give a proper account of the monies paid into his Account by the 1st Accused.

Therefore, there is a clear misdirection on the part of the Learned Trial Judge to have relied on the Statement of the 1st Accused (convict), whether solely, partly or substantially to secure a conviction against the Appellant.

Further, Counsel for the Respondent had submitted that the Trial in the Court below, being a trial by Judge alone, the Learned Trial Judge rightly placed reliance on the Statement of the 1st Accused (convict) in accordance with the dicta of the Learned Chief Justice in the case of The State V. Ahmed S. D. Turay & Others S. C. Cr. App. No. 2/81 (unreported).

This submission is at variance with what the Learned CJ held in the aforementioned judgment at page 30 thereof, where he had this to say:

"**Admittedly, all the cases relied on by the Learned Justice acknowledged the fundamental rule stated above to the effect that the statement of one accused person is not evidence against the co-accused. The first three cases also acknowledged the duty of the trial judge to explain and impress that rule upon a jury. But with respect to the learned Justice, none of the cases lays down any rule that a judge sitting alone should impress that rule upon himself. It is perhaps relevant to note that all the cases relied on by the learned justice were cases of trial by jury. There are many good reasons why it is necessary to impress the rule upon juries. Apart from being laymen, jurors do not give reasons for their verdicts. So it is not possible to know whether the jury has taken into consideration the statement of one accused person to convict a co-accused. But in the case of a judge sitting alone the position is different. He gives reasons for his decision. And it could be ascertained by a perusal of his judgement whether he relied on the statement of one accused person in convicting a co accused.**"

I therefore hold that the irregularity of the Learned Trial Judge in the Court below be remedied and to be remedied in accordance with the tenets of the principles of the Criminal

Law and in conformity with all the authorities cited that a statement made by one accused person to the police or to investigators cannot be evidence as against the co-accused unless the co-accused either expressly or by implication adopt that Statement and makes them his own.

I will now comment on the rest of the submissions made.

First and foremost, Respondent's Counsel Submitted that the Appellant was convicted, not merely on the Statement made by the 1st accused (Convict) against him, but that donor funds were transferred into his Accounts and he referred to pages 370-375 of the Court Records in support of his submissions. He made further references to pages 623, 565 and 713 of the said records.

Having carefully perused pages 370-375 of the Court records, I observe that the submission made by Counsel is quite misleading. Donor funds were deposited into the Accounts of the PPRC – RCB Account No. 02—04-1101269-01 in the sum of Le46,630,000/00 (Forty Six Million, Six Hundred and Thirty Thousand Leones).

At no material time were donor funds deposited into the Accounts of the Appellant. An RCB Cheque No. 01199826 dated 15th March 2013 was drawn from the PPRC's Account No. RCB 02-04-1101269-01 in the sum of Le46,630,000/00 (Forty Six Million, Six Hundred and Thirty Thousand Leones) by the 1st Accused (convict).

Had the Learned Trial Judge relied on this additional piece of evidence to convict the Appellant, then with the greatest respect to him and Counsel for the Respondent, he misdirected himself.

Again, page 623 of the Court records referred to by Counsel for the Respondent as further relied upon by the Learned Trial Judge to convict the Appellant, is the Statement of the 1st Accused (convict) made to ACC Investigators. This Honourable Court had already held that the Learned Trial Judge misdirected himself to have relied on the Statement made by the 1st Accused (convict) to convict the Appellant herein.

I will now advert my mind to page 565 of the Court Records referred to by Respondent's Counsel that the Learned Trial Judge relied upon to convict the Appellant. The details referred to therein is the personal Account bank details of the Appellant – RCB Account No. 136122269-01 that covers the period 1st November 2012 to 30th November 2012. Proper

perusals of the said records reveals that cash deposits were made into the said account by several people including the 1st Accused (convict).

Counsel for the Respondent had submitted in paragraph 8 of his supplemental synopsis dated 9th December 2019 that the sum of Le30, 000,000/00 (Thirty Million Leones) was deposited into the PPRC Kenema Bank Account and together with other amounts donated by UNIPSIL. And the 1st Accused (convict), in his Statement, stated that it was from these funds that he withdrew the respective amounts of Le8, 000,000/00 (Eight Million Leones) and Le2, 400,000/00 (Two Million, Four Hundred Thousand Leones) which he deposited into the Appellant's personal bank Account. And this is the same money that was withdrawn by the Appellant and utilised for some purposes other than those authorised by the donor.

The above submission warrants me to refer to page 713 of the Court Records which is part of the statement made by the Appellant to the ACC Investigators. The Appellant admitted that the 1st accused (convict) deposited into his personal accounts monies in the sum of Le10, 400,000/00 (Ten Million, Four Hundred Thousand Leones) for family transactions. He gave a detailed Account of how those monies deposited by the 1st Accused (convict) into his Accounts were disbursed – see page 14 of the Appellant's Statement made to the ACC Investigators found in page 719 of the Court records.

The Appellant only dealt with funds deposited into his personal accounts in accordance with the instructions of the 1st Accused (convict) who deposited the said funds. Could it be said that the appellant knew that those cash deposited on diverse days into his accounts by the 1st accused (convict) were UNIPSIL funds having being deposited into the Kenema region PPRC accounts?

The Learned Trial Judge having failed to consider the explanations made by the Appellant, in the disbursements of the funds deposited into his Accounts by the 1st Accused (convict), coupled with the fact that, the Appellant lacked knowledge that those monies deposited into his Accounts were donor funds from the Kenema PPRC donor Accounts, the Learned Trial Judge nevertheless, relied on the additional piece of evidence contained in the Statement of the 1st Accused (Convict) that he deposited the amount of Le10,400,000/00 (Ten Million, Four Hundred Thousand Leones), to convict the Appellant.

IV

I will now proceed to consider as to whether or not there were misdirections in the Judgment of the Learned Trial Judge dated 2nd February 2016 in the following portions:

1. **"...except where the 2nd Accused cannot give a proper account of the monies paid into his Account by the 1st Accused ... (Page 24 of the Judgment).**

2. **"...there are very contradictory and conflicting explanations by the 2nd Accused regarding the amounts transferred into his account". (Page 25 of the Judgment)**

3. **"The Defence have failed in their attempt to controvert that Prosecution evidence ..." (Page 25 of the Judgment).**

All the aforementioned portions were referred to in paragraph 3 of this Judgment.

In all of the above portions of the said Judgement of the Learned Trial Judge, it is observed that the onus of proof was on the shoulders of the Appellant herein.

The General rule in the Criminal Law is that the burden of proof of guilt lies upon the Prosecution, and it is not for the Defence to prove innocence – see the observations of Sankey L.C. in Woolmington V. D.P.P. (1935) A. C. 481-482;25 Cr. App. R. 95-96.

It is therefore for the Prosecution to prove its case against the Accused beyond reasonable doubt and the Accused is not obliged to prove his innocence.

"Apart from any provision to the contrary", the burden of proof lies on the shoulders of the Prosecution – See paragraph 1001, page 361, Archbold Pleading, Evidence & Practice in Criminal Cases, 36th Edition, Butler and Garsia, 1995 Reprint, WM.W. Ganut & Sons. Inc.

Known exceptions to the rule of burden of proof lying on the shoulders of the Prosecution are where the Accused raise the Defence of Insanity in which case the onus of establishing it lies upon him – See paragraph 40 page 17, Archbold Pleading, Evidence & Practice in Criminal cases, 36th Edition, Butler & Garcia, 1995 Reprint, WM.W. Gaunt & Sons. Inc.

Also, though not applicable in our Jurisdiction, where the Accused raise the Defence of Diminished Responsibility under See 2 of the English Homicide Act, 1957, the onus of proof lies upon him.

In the instant Appeal, Counsel for the Appellant had agreed with the rule relating to the burden of proof.

Counsel for the Respondent had submitted that:

> **"the Appellant did not raise any factual issues with regards to the donor funds that were deposited in his accounts"**

In effect, his above submission supports the decision of the Learned Trial Judge at page 25 of his Judgment thereof to wit:

> **"The Defence have failed in their attempt to controvert that Prosecution evidence ..."**

Counsel for the Respondent relied on the case of The State Vs. Herbert Akiremi George Williams & 8 Others (unreported), Judgment delivered on 10th August 2012 by the Hon. Mr. Justice J. B. A. Katutsi.- a High Court decision.

In convicting the 6th Accused, Franklyn Garber, the Learned Trial Judge had this to say:

> **"...the 6th Accused's caution Statement did not address how he spent the sum of Le9,225,000 withdrawn from the F.C.C. Account by him.**
>
> **The Prosecution proves its case through Garber's failure to account".**

In further convicting the 7th Accused, Alimamy Turay, the Learned Trial Judge had this to say:

> **"... Yet still, the 7th Accused refrained from commenting on the audit conclusion which was adverse to his case. Where the evidence is adverse to the Accused and where he does have evidences, he should provide his own account, his right to silence notwithstanding. Since the 7th Accused did not account for ticket books issued to him, he is deemed to have caused the FCC to be deprived of revenue."**

However, in relation to the above case, since we do not know whether or not the 6th and 7th Accused (convicts) have Appealed on grounds of misdirections by the Learned Trial Judge, I will refrain from commenting as a caution against prejudice by the Appellate Court as and when that matter comes on Appeal, that is, if at all.

I strongly note that Section 94 of the Anti-Corruption Act 2008, Act No. 12 of 2008, places the burden of proof, for offences charged under the Act, on the Accused where a Defence of

"Lawful Authority" or "Reasonable Excuse" is raised. But the Appellant did not raise such Defences in the Court below.

I am therefore of the considered view that the Learned Trial Judge in pages 24 and 25 of his Judgment dated 2nd February 2016 shifted the burden of proof on the Appellant and I maintain that the burden of proof does not shift except in the circumstances as aforementioned.

And the Learned Trial Judge having shifted the burden of proof on the Appellant in the Court below where the Appellant did not raise the Defence of "Lawful Authority" or "Reasonable Excuse" in accordance with Section 94 of The Anti-Corruption Act 2008, Act No. 12 of 2008, misdirected himself.

V

In Appealing against his conviction, Counsel for the Appellant submitted that the Learned Trial Judge in his Judgment dated 2nd February 2016 did not consider the unsworn Statement of the 1st Accused (convict) from the dock. According to him, the unsworn Statement of the 1st Accused (convict) in the Trial below vindicated the Appellant and referred to page 557-8 of the Court records. He submitted that the Learned Trial Judge having omitted to refer to the unsworn Statement of the 1st Accused amounts to misdirection and the Appellant's conviction should be quashed. He referred to the case of R. V. Frost and Hale (1964) 48 Cr. App. R. 284 where it was said:

> **"What is said in such a Statement is not to be brushed aside..... The Jury should be invited to consider the Statement in relation to the evidence as a whole...."**

Counsel for the Respondent submitted that it is normal to regard an unsworn Statement made in the dock as evidence, only that it remains untested by Cross-Examination.

Counsel for the Respondent further submitted that it is for the Trial Judge to determine whether or not to rely on the unsworn Statement of the convicted 1st Accused.

References were made to the case of Joseph John Coughlan (1976), Judgment delivered on 10th June and 13th July respectively and also D.P.P. Vs. Leary Walker (1974) 1 WLR 1090.

I have read all the Authorities referred to. The Principles laid down is that wherein an Accused makes an unsworn statement from the dock, the Learned Trial Judge should invite

the Jury to consider such statements when considering the evidence in the case and what weight should be attached to it. They are not to be disregarded.

In the instant case, the Learned Trial Judge, at page 50 of his Judgment dated 2nd February, 2016, found in page 269 of the Court records had this to say:

> **"...The 2nd Accused gave unsworn statement in the dock. I shall attach no weight to his explanation which is very much inconsistent with his response in his Statement to the Commission...." (Emphasis mine).**

It is significant to note that at the close of the prosecution's case, the accused is required to open his Defence in one of the following forms:

a) To make a Sworn Statement from the witness box.
b) To make an unsworn Statement from the dock
c) To rely on his Statement made to the Police/Investigators.

In any of the above instances, the accused, if he so desires, can call witness in support thereof to testify in the witness box.

For the position set out in b), relating to unsworn statement, which we are now concerned with, please see the mandatory requirements of the Courts as contained in Section 192-194 of The Criminal Procedure Act 1965, Act No. 32 of 1965.

Whether it is a Trial by Judge and Jury or by a Judge sitting alone, when it comes to the Defence to open his case, it is incumbent on the Judge to put the abovementioned options to the Accused and from which he should choose one thereof, whether or not he is calling witnesses on his behalf.

I am therefore of the considered view that an unsworn statement by an accused from the dock forms an integral part of his Defence which ought to be taken into consideration in the case by the Judge sitting alone or by the Jury in considering their verdict. The only requirement for the Judge sitting alone or the Jury is to consider the weight that is to be attached to such unsworn Statement.

In the instant case, the Appellant, in the Court below, made an unsworn Statement from the dock. The Statement forms part of his defence. The Learned Trial Judge in his Judgment dated 2nd February 2016 attached "**no weight**" to it.

What is contained in the Court records, page 557-8 thereof is the unsworn Statement of the 1st Accused (convict) which vindicated the Appellant herein but the Learned Trial Judge brushed it aside.

Therefore, the Learned Trial Judge, in this Judgment dated 2nd February 2016 having failed to attach "**no weight**" to the unsworn Statement of the Appellant would mean that he failed to consider the Defence raised by the Appellant.

I hold that the Learned Trial Judge misdirected himself when he held that **"no weight"** should be attached to the Appellant's unsworn Statement made from the dock.

VI

In Ground 3 of the Appeal, Counsel for the Appellant stated that the Learned Trial Judge erroneously sentenced the Appellant in Count 4 of the Indictment when he was neither charged nor convicted in respect of the said Count.

Counsel for the Respondent conceded but stated that the sentencing of the Appellant in Count 4 of the Indictment is an error and invited this Honourable Court to correct the error in a manner that it deems fit and proper.

Having perused the indictment on page 221 of the Court records, it is observed that the Appellant was not charged in relation to Count 4 but the Learned Trial Judge went on to sentence him thereof – See page 277 of the Court Records.

I therefore hold that the Appellant was erroneously convicted in Count 4 of the Indictment and that conviction cannot hold.

VII

Closely related to the submissions made in the preceding paragraph, I am to consider whether there was an error on the part of the Learned Trial Judge to have failed to impose Sentences on the Appellant although he found him Guilty in Counts 9 and 11 of the Indictment.

Counsel for the Respondent had submitted that they were genuine errors and that those errors can be corrected by this Honourable Court in the manner that it deems fit and proper.

The respective Counsel did not provide any authorities in respect of this limb of arguments for our consideration.

The above notwithstanding, Sec 203(3) of The Criminal Procedure Act 1965, Act No. 32 of 1965 is relevant in this aspect.

It states as follows:

> **"If the Accused is found guilty, the Judge shall pass Sentence on him according to Law"**

From the above provision, it is the Trial Judge that passed the Verdict of Guilty who is obliged to impose Sentence on the convict.

In the instant case, the Learned Trial Judge, in his Judgment dated 2nd February 2016 at page 53 thereof (page 272 of the Court Records) returned a Verdict of Guilty against the Appellant in Count 9 and 11 of the Indictment.

However, in imposing his Sentences at pages 57 and 58 of his Judgment (pages 276 and 277 of the Court records), the same was imposed on the 1st Accused (convict) and not the Appellant who was found Guilty in respect of Count 9 of the Judgement.

Furthermore, the Learned Trial Judgement totally omitted to impose any Sentence on the Appellant in relation to Count 11 of the Indictment. In fact, the Learned Trial Judge omitted to address the issue of Sentence in respect of the said Count.

The Judgment was delivered on 2nd February 2016. The Appeal first came up for hearing on 16th October 2019 a period of 3(three) years after delivery of the Judgement. The Respondent as well as the Appellant and his Co-Accused were represented by Counsel who were present at the time the Learned Trial Judge delivered his Judgement. Counsel for the Respondent cannot now be heard to say that they didn't realise that there were errors on the part of the Learned Trial Judge in imposing his Sentence accordingly. Yet, they made no move or took any action to correct the said errors by an Application before the Learned Trial Judge after he had delivered his Judgement. In fact, they did not indicate to the Learned Trial Judge that there was an error in his failure to impose Sentence after he had delivered the said Judgment. This has been the position for 3 (three) years until the Appellant has now come before this Honourable Court to have his conviction quashed. Now, Counsel for the Respondent wants this Honourable Court to consider those errors as genuine and to correct them in the manner that we deem fit and proper.

It is my view that the said errors in the Judgment are fundamental and not clerical. The errors are so fundamental that any attempt to correct them will put the Appellant in jeopardy

I therefore hold that the errors on the part of the Learned Trial Judge by failing to impose Sentences on the Appellant found Guilty in Counts 9 and 11 of the indictment are so fundamental in nature that this Honourable Court is constrained to correct them.

VIII

Based on all the foregoing, I am of the considered view that the Judgment of the Learned Trial Judge dated 2nd February 2016 are so fraught with misdirections and errors that I have no option but to uphold the Appeal.

The Appeal is allowed and the conviction is hereby quashed which, of course, means that the sentence is also quashed.

HON. MR. JUSTICE JOHN BOSCO ALLIEU, JA. (PRESIDING) .....

HON. MRS. JUSTICE J.E.L. KING, JA. **(I AGREE)** .....

HOM. MR. JUSTICE S.A. BAH, JA. **(I AGREE)** .....