THE STATE vs ALHAJI ALIE BADARA SESAY

S P SEMALEMBA Esq for the State

R B KOWA Esq for the Accused person

JUDGMENT

1. The accused person is charged on a two Count Indictment with the respective offences of Soliciting an advantage contrary to Section 8(1)(a) of the Anti-Corruption Act,2000; and with Accepting an Advantage contrary to the same Section of the same Act.
2. The short facts as gleaned from the evidence of PW1, are that on 19 March,2008 PW1, Samuel Kargbo went to the Immigration Department for a passport for his niece, ADAMA KARGBO. He met a young man who told him he had one to sell. He led him to the Accused. The accused demanded the sum of Le350,000 for the passport; PW1 pleaded that he only had Le150,000 on him; on leaving the accused's office, he went to the ACC where he reported the matter. He was told he would be given the money to take to the accused. On 2 April,2008 the ACC gave him the sum of Le300,000. He took the money to the accused at his office. He first gave him a copy of his passport, which had earlier been requested by the accused; the accused told him "you are late." He demanded the sum of Le300,000. PW1 continued to beg him; he searched his drawer, and brought out the passport. It had no receipt in it. PW1 inspected the passport. Accused told him that if he had not got the money he should return the passport. PW1 refused to return it. There was another young man in the office; PW1 gave the sum of Le250,000 to the accused. Accused handed the money to the young man to count. At this stage, an ACC Officer entered the office. PW1 tendered the passport as "A" and a copy thereof as "A1". These are the principal facts relating to the commission of both offences.
3. PW2 ALICE KAMARA testified that the issue of the passport was irregular; several particulars were not included in the application form; there was some discrepancy in the dates it was alleged payment was made for the same. She tendered the Application form as "B1-4." PW3 ABDUL KARIM BANGURA also confirmed the irregularity in the issue of "A". PW4, MOHAMED SESAY, who said the accused was like a father to him, testified that on 2 April,2008 he was in the accused's office, and that accused asked him to count some money which was on his table. He

counted Le266,000. PW6, EMMANUEL AMARA, an ACC Officer, searched both accused and PW4, and found the sum of Le266,000 on the person of PW4. Earlier that day, he had given the total sum of Le300,000 to PW1 after photocopying the notes. He also tendered in evidence, the recorded interview of the accused as "C".

4. At the close of the prosecution's case, MR KOWA made a no-case submission. He said Count 2 of the Indictment should fail because it charged the accused with accepting the sum of Le250,000 as an inducement to perform an act, whereas the evidence in support of this charge showed quite clearly, that the act proscribed, had been done or completed before the money was handed over. This is quite true, and I agree with him: but the matter does not end there.
5. His next complaint was about the inconsistency in PW1's evidence. PW1 spoke about the respective sums of Le300,000 and Le350,000: the charge in Count 1, alleges that the sum involved was Le300,000. It is my view that, this being so, the difference in the amount alleged to have been solicited does not really matter. I am also entitled, as a Judge sitting alone, to accept without more, the evidence of PW1 that some amount of money was solicited by the accused, be it Le300,000 or Le350,000. The absence from the witness box, of persons who may have been present when this transaction was being done between the accused and PW1 does not detract from the strength of the prosecution's case. It does not necessarily follow that, because other persons were present in the same room, that these persons were paying rapt attention to what was going on between the accused and PW1.
6. MR KOWA drew the Court's attention to the fact that the money recovered by the ACC had not been tendered in evidence. It is true that the money has not been tendered in Court, though I accept the evidence of PW6 that it was recovered. Again, I do not believe this detracts from the strength of the prosecution's case. In "C", the accused admits, at page 6, that money was found on his person: at page 9, he admits that "*I gave a passport to the said gentleman, but I neither asked for nor received money from him. I had paid for the passport out of my own pocket.*" There is evidence, which if believed at the end of the day, suffices to prove that the money given to PW1 by PW6 was the money found on the person of the accuses and/or PW4.
7. MR KOWA has referred me to the case of THE STATE v AVRIL CUMMINGS. There, there was some discrepancy in the evidence of both

PW1 and PW3 as to whether the accused had actually solicited the sum of Le1m from PW3. The failure of the prosecution to call a MR JOHNSON, who it is claimed was present when PW3 was with the accused, was treated by the Judge as of material importance , though he reminded himself at page 16 of his Judgment, that "*I am far from saying that the Court cannot convict on the evidence of one witness.*" In that case also, the discrepancy that arose, was not only in the evidence given by the complainant PW3 and his employee, PW1; but also between both PW1 and PW3 on the one hand, and the accused on the other, as to what transpired when all three of them were in the accused's office. In this case, the prosecution has only tendered in evidence, one version of what transpired in the accused's office: the version narrated by PW1; the other version is what the accused himself says in "C". ADEMOSU,J himself agrees the Court can convict on the evidence of one witness alone.

8. As regards MR KOWA's reliance on that passage of ADEMOSU, J's Judgment where the Learned Judge cites ARCHBOLD on the criteria to be adopted in testing the credibility of a witness, one of them being the disinterestedness of the complainant-witness, my short response would be that I know of no case in English Common Law jurisprudence, where the Complainant in any matter has not been a competent witness for the prosecution. Indeed, save in the case of Murder, where the victim is dead, it would be well-nigh impossible to find any other case in which the complainant does not give evidence. The absence of the complainant's evidence would, in my view, render most prosecutions ineffective. What I believe ADEMOSU.J meant there was that PW3 had an interest to serve: this is why at page 16 he says: "*.. here is a case in which the Managing Director of a company which has not been submitting their audited accounts and in arrears of their tax obligations, was given a tax clearance.....alleges that the accused solicited an advantage from him as an inducement to prepare and issue the tax clearance. It is reasonable to conclude that because he wanted trouble for the accused. he went and reported (her) to ACC.*" There is no evidence before me, that other than the need for a passport for his niece, PW1 had had previous dealings with accused, nor that he required any other favour from him, which he, the accused, was reluctant to give.
9. When a No-Case submission is made at the conclusion of the prosecution's case, the burden imposed on the prosecution is less than that imposed on

it at the end of the trial. To quote what I said in THE STATE v BAUN and others:" *At this stage, the true test to my mind, is that set out by LORD LANE, LCJ in the Court of Appeal Criminal Division in GALBRAITH [1981] 1 WLR 1039 at 1042B-D: "....If there is no evidence that the crime alleged has been committed by the Defendant, there is no difficulty. The Judge will of course stop the case.....where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.....where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury....*" The Learned Editors of BLACKSTONE'S CRIMINAL PRACTICE 2002 Edition have succinctly summarised the position at paragraph D14-27 page 1431. "*if there is no evidence to prove an essential element of the offence a submission must obviously succeed; if there is some evidence which - taken at face value - establishes each essential element, then the case should normally be left to the jury. The Judge does however, have a residual duty to consider whether the evidence is inherently weak or tenuous.....*"

10. GALBRAITH has been further explained by the Privy Council in DALEY v R [1994] 4 All ER, 86 per LORD MUSTILL at page 94 g&h: "*a reading of the judgment in R v Galbraith as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job.*"
11. Our Court of Appeal in a Magisterial Appeal, SIAKA STEVENS & ANOR v COMMISSIONER OF POLICE [1960-61] Vol 1 SLLR 208 at 212 per AMES,P has held that where there is just a mere scintilla of evidence, the accused person should be acquitted on a No -Case Submission." In this case, as in the BAUN case, I am of the view that at the close of the prosecution's case, there is more than a scintilla of evidence probative of

the matters which the prosecution has to prove in both Counts 1 and 2 of the Indictment, save for certain reservations in respect of Count 2.

12. In Count 2, it is clear that the amount allegedly handed over to the accused, was in the circumstances of the case a reward, and not an inducement: the passport had already been prepared. It follows that as it stands, Count 2 is defective. Section 148(1) of the Criminal Procedure Act,1965 provides that: " *Where, before trial upon Indictment or at any stage of such trial, it appears to the Court that the Indictment is defective, the Court shall make such order for the amendment of the Indictment as the Court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice. All such amendments shall be on such terms as to the Court shall seem just.* I have said the charge is defective; it is clear that the charge has to be amended to meet the circumstances of the case. The evidence led, if believed by the Court at the end of the day, shows that the money was handed over to the accused, before the passport was handed over to PW1. It is my considered judgment that the accused will not, in these circumstances, suffer any injustice or prejudice, if the amendment were allowed, without recalling any of the witnesses who have testified.

13. Though I am trying this case as a Judge alone, I have taken into consideration, and I consider myself bound by the guidelines and principles set out in the three cases cited above. My assessment of the case so far, is that, in its totality, and subject to the particulars of Count 2 being amended, the prosecution has led evidence to establish the elements of the offences with which the Accused is charged, and which could be, at this stage, probative of the Accused person's guilt. Taken at its highest, it is evidence upon which a jury properly directed could convict. Whether a jury properly directed would certainly convict, is a matter which I have to decide at the end of the case, and not at this stage.

14. I would therefore allow the prosecution to amend the particulars in Count 2 by the deletion of the words in line 4 thereof: "*..an inducement to perform..*" and the substitution therefor of the words: "*...a reward for performing..*"

15. Count 2 as amended shall be read out to the accused and his plea taken. Thereafter, I shall call upon the accused to present his case in accordance with the provisions of ~~the~~ Section 194 of the Criminal Procedure Act,1965 if he so desires.

N C BROWNE-MARKE

Justice of Appeal

9 February,2009.