

IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN
THE STATE
V
JOSEPH SEDU MANS
AND
YEABU M.D. KAMARA

BEFORE THE HONOURABLE JUSTICE MIATTA MARIA SAMBA, J.S.C.
DATED THE 5TH DAY OF AUGUST 2021

Counsel:

C. Mantsebo Esq for the State

A. R Kamara Esq and M. Sesay Esq for the 1st Accused

I.S. Yillah Esq for the 2nd Accused

Judgment

The matter before this Court commenced by way of an indictment dated the 29th day of December 2018 for the various offences hereinafter stated:

COUNT 1

STATEMENT OF OFFENCE

Engaging in a project without prior planning contrary to Section 48(2)(C) of the Anti-Corruption Act No. 12 of 2008

PARTICULARS OF OFFENCE

JOSEPH SEDU MANS, of Mans Lane, Sussex, Freetown in the Western Area of the Republic of Sierra Leone and YEABU M. D KAMARA, of No. 14, 3rd Road, Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone and being the Director General and the Chairperson of the Board of Trustees, respectively, of the National Social Security and Insurance Trust (NASSIT) and being persons whose functions concerned the administration, management and use of public funds, on dates unknown between the 1st August 2016 and the 31st December 2017, engaged in a project without prior planning to wit: engaged in a project with SISIMI MEDICAL FOUNDATION Inc. for the development, construction and delivery of an urgent care delivery service system for the provision of quality medical services in Sierra Leone, without prior planning.

COUNT 2

STATEMENT OF OFFENCE

Conspiracy to commit a corruption offence contrary to Section 128(1) of the Anti-Corruption Act No. 12 of 2008

PARTICULARS OF OFFENCE

JOSEPH SEDU MANS, of Mans Lane, Sussex, Freetown in the Western Area of the Republic of Sierra Leone and YEABU M. D KAMARA, of No. 14, 3rd Road, Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone and

being the Director General and the Chairperson of the Board of Trustees, respectively, of the National Social Security and Insurance Trust (NASSIT), at Freetown on diverse dates between the 1st August 2016 and the 31st December 2017, conspired together with other persons unknown, to commit a corruption offence, to wit: conspired together and with other persons unknown, to engage in a project without prior planning contrary to Section 128(1) of the Anti-Corruption Act No. 12 of 2008.

COUNT 3

STATEMENT OF CLAIM

Willfully failing to comply with the law relating to the tendering of contracts, contrary to Section 48(2)(b) of the Anti-Corruption Act No. 12 of 2008.

PARTICULARS OF OFFENCE

JOSEPH SEDU MANS, of Mans Lane, Sussex, Freetown in the Western Area of the Republic of Sierra Leone and YEABU M. D KAMARA, of No. 14, 3rd Road, Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone and being the Director General and the Chairperson of the Board of Trustees, respectively, of the National Social Security and Insurance Trust (NASSIT), on diverse dates between the 1st of August 2016 and the 31st December 2017, at Freetown in the Western Area of the Republic of Sierra Leone, willfully failed to comply with the law relating to the tendering of contracts, to wit: failed to comply with the provision of the Public Procurement Act, 2016 in entering into a Joint Venture Agreement with SISIMI MEDICAL FOUNDATION INC, for the development, construction and delivery of an Urgent Care Delivery System for the provision of quality medical services in Sierra Leone, contrary to Section 48(2)(b) of the Anti-Corruption Act, No. 12 of 2008.

COUNT 4

STATEMENT OF OFFENCE

Conspiracy to commit a corruption offence contrary to Section 128(1) of the Anti-Corruption Act No. 12 of 2008

PARTICULARS OF OFFENCE

JOSEPH SEDU MANS, of Mans Lane, Sussex, Freetown in the Western Area of the Republic of Sierra Leone and YEABU M. D KAMARA, of No. 14, 3rd Road, Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone and being the Director General and the Chairperson of the Board of Trustees, respectively, of the National Social Security and Insurance Trust (NASSIT), at Freetown, in the Western Area of the Republic of Sierra Leone on diverse dates between the 1st August 2016 and the 31st December 2017, conspired together with other persons unknown, to commit a corruption offence, to wit: conspired together and with other persons unknown, to enter into a Joint Venture Agreement with SISIMI MEDICAL FOUNDATION INC, for the development, construction and delivery of an Urgent Care Delivery System for the provision of quality medical services in Sierra Leone, without complying with the provisions of the Public Procurement Act, 2016.

COUNT 5

STATEMENT OF OFFENCE

Misappropriation of public funds contrary to Section 36(1) of the Anti-Corruption Act No. 12 of 2008.

PARTICULARS OF OFFENCE

JOSEPH SEDU MANS, of Mans Lane, Sussex, Freetown in the Western Area of the Republic of Sierra Leone and YEABU M. D KAMARA, of No. 14, 3rd Road, Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone and being the Director General and the Chairperson of the Board of Trustees, respectively, of the National Social Security and Insurance Trust (NASSIT), at Freetown, in the Western Area of the Republic of Sierra Leone misappropriated public funds, to wit: on or about the 27th September 2016, at Freetown, in the Western Area of the Republic of Sierra Leone authorized and facilitated the disbursement and payment of the sum of Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and Ninety Thousand Leones) being the equivalent of \$1,000,000.00 (One Million United States Dollars) to SISIMI NASSIT MEDICAL PROJECT, a Joint Venture Special Vehicle created, ostensibly, for the provision of an Urgent Care Delivery Service System to provide quality medical services in Sierra Leone, thereby depriving the National Social Security and Insurance Trust (NASSIT) of the said amount.

COUNT 6

STATEMENT OF OFFENCE

Conspiracy to commit a corruption offence contrary to Section 128(1) of the Anti-Corruption Act, No. 12 of 2008.

PARTICULARS OF OFFENCE

JOSEPH SEDU MANS, of Mans Lane, Sussex, Freetown in the Western Area of the Republic of Sierra Leone and YEABU M. D KAMARA, of No. 14, 3rd Road, Off Regent Road, Hill Station, Freetown in the Western Area of the Republic of Sierra Leone and being the Director General and the Chairperson of the Board of Trustees, respectively, of the National Social Security and Insurance Trust (NASSIT), conspired together with other persons unknown, to misappropriate public funds, to wit: conspired to misappropriate the sum of Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and Ninety Thousand Leones), being the equivalent of \$1,000,000.00 (One Million United States Dollars) by authorizing, facilitating and making payment to SISIMI MEDICAL PROJECT, a Joint Venture Special Project Vehicle created ostensibly for the provision of an Urgent Care Delivery System to provide quality medical services in Sierra Leone, thereby depriving the National Social Security and Insurance Trust (NASSIT) of the said amount.

This matter was first mentioned by this Honourable Court on the 19th day of January 2018 with both Accused persons present and represented by their respective Counsel. Charges on the Indictment dated the 29th day of December 2018 were put to the Accused persons as they applied to each of them. The 1st Accused pleaded 'not guilty' to Counts 1 through 6 of the Indictment read out to him in open Court; the 2nd Accused (hereinafter referred to as A2) pleaded 'not guilty' to Counts 1 through 6 of the

Indictment read out to her in open Court. On applications made pursuant to Section 79 of the Criminal Procedure Act No. 32 of 1965, by their respective Counsel on the 16th day of January 2019 when this matter was first mentioned, bail was granted to both Accused persons on the conditions as they appear on page 4 of the Judge's notes on file. The Prosecutor was asked to disclose and serve all documents and other evidence obtained during the investigations, exculpatory and otherwise on Counsel for the Accused persons. The Court is satisfied that the Court's direction was complied with by the Prosecutor as confirmed by each Counsel for both Accused persons.

Pursuant to an Instrument dated the 29th day of January 2019 under the hands of the Attorney General and Minister of Justice, an application was made by the Prosecutor pursuant to Section 144(2) of the Criminal Procedure Act, No. 32 of 1965 as repealed and replaced by Section 3 of the Criminal Procedure Amendment Act, No. 11 of 1981, that this matter be tried by Judge alone. There being no objection by any of the Counsel for the Accused persons to the said application, same was granted by this Honourable Court. The Court was informed on the 20th day of June 2021 that the A1 (hereinafter referred to as the deceased) passed away on the 20th day of June 2021.

Burden of Proof

This Court sits both as a tribunal of fact and as a tribunal of law. I must therefore keep in my mind and in my view at all times, that in all criminal cases it is the duty of the prosecution to prove every element of the offence or offences charged beyond a reasonable doubt.

If there is any doubt in my mind, as to the guilt or otherwise of the any of the Accused persons, in respect of any or all of the charges on the Indictment, I have a duty to acquit and discharge the said Accused person of that charge or charges. I must be satisfied in my mind so that I am sure that the Accused persons have not only committed the unlawful acts charged in the Indictment, but that each or any of them did so with the requisite *mens rea*.

I am also mindful of the principle that even if I do not believe the version of events put forward by the Defence, I must give it the benefit of the doubt if the Prosecution has not proved its case beyond a reasonable doubt. The Prosecution must establish the guilt of the Accused beyond a reasonable doubt. *'No particular form of words is sacrosanct or absolutely necessary'* as was pointed out by Sir Samuel Bankole Jones, P, in the Court of Appeal case of *Koroma V R* (1964-66) ALR SL 542 at 548 LL4-5. The Court refers to the case of *Sahr Mbambay V The State* App. 31/74 CA (unreported)-the cyclostyled judgment of Livesey Luke, JSC at pages 11-13 especially at Page 12, where Luke JSC referring to *Waalmington V R* said, that *'if at the end of the whole case, there is a reasonable doubt created by the evidence given either by the Prosecution or the prisoner ... the Prosecution has not made out the case and the prisoner is entitled to an acquittal'*.

I must also bear in mind and keep in view at all times that though the Accused persons are tried jointly, the case against each of them must be treated separately. At no time must I treat evidence which is only applicable to, or which inculpates only one Accused

person against the other Accused person. Each Accused person is entitled to an acquittal if there is no evidence, direct or circumstantial, establishing his guilt, independent of the evidence against his co-Accused.

The Court notes that after the Prosecution's case, upon being put to their election separately and as required by Section 194 of the Criminal Procedure Act No. 32 of 1965, both Accused persons chose to testify on oath which they did separately in their defence. I must state that an Accused person needs not give evidence on his or her own behalf but when he or she does, the Court takes it into consideration and accords to it such weight as it thinks appropriate in the circumstance. The Accused does not bear the burden of disproving the case of the Prosecution, nor of proving his or her own innocence. What will be considered by the Court is whether the explanation given by either of the Accused raises a reasonable doubt in my mind. If it does, the Accused is entitled to an acquittal.

I thank the Prosecutor for the Final Address submitted on behalf of the State and both Defence Counsel for the Final Addresses submitted on behalf of their clients. The Addresses helped ease my research and they made interesting read. Now I will deal with the proofs of evidence or otherwise, based on the law and evidence, documentary and/or otherwise before the Court, starting with the law in respect of the substantive offences as in Counts 3, 1 and 5 and Counts 4, 2 and 6 relating to the offence of statutory conspiracy after which I shall deal with the evidence proper.

The Law

Count 3

Section 48(2)(b) of the Anti-Corruption Act, 2008 reads:

(2) 'A person whose functions concern the administration, custody, management, receipt or use of any part of ... public property commits an offence' if he-:

(b) 'willfully or negligently fails to comply with any law or applicable procedures and guidelines relating to the tendering of contracts, management of funds or incurring of expenditures;'

Section 48(4) of the Act provides that 'public property' means real or personal property, including public funds, and money of a public body, or under the control of, or consigned or due to, a public body.

The Accused, *whose functions concern the administration, custody, management, receipt or use of any part of ... public property* must have willfully or negligently failed to comply with the applicable procedures and guidelines, in the instant case, of the Public Procurement Act, 2016 in entering into a Joint Venture Agreement (hereinafter called the JVA) with SISIMI MEDICAL FOUNDATION INC, for the development, construction and delivery of an Urgent Care Delivery System for the provision of quality medical services in Sierra Leone. In Sierra Leone, save for funding by donor agencies which have their own procurement rules, in all other respect, procurement is governed by the National Public Procurement Act.

Count 1-Section 48(2) (C) of the Anti-Corruption Act, 2008 reads:

(2) *'A person whose functions concern the administration, custody, management, receipt or use of any part of ... public property commits an offence if he'.*

(C) engages in a project without prior planning.

The Accused, *whose functions concern the administration, custody, management, receipt or use of any part of ... public property* must have engaged in a project without prior planning, in the instant case, in entering into a JVA with SMF Inc. What prior planning entails in light of Section 48(2)(c) of the Anti-Corruption Act, 2008 will be elaborated upon in the body of this judgment.

Count 5

Section 36(1) of the Anti-Corruption Act, 2008 reads:

Section 36(1): *A person who misappropriates public revenue, public funds or property commits an offence.*

Section 36(2): *A person misappropriates public funds or property if he willfully commits an act, whether by himself, with or through another person by which a public body is deprived of any revenue, funds or other financial interest or property belonging or due to that public body.*

It is therefore incumbent on the Prosecution to prove that:

- a. A public body was deprived of funds due to the act of misappropriation.
- b. The funds misappropriated must belong to that public body.
- c. That what was misappropriated was public funds.
- d. That the act of misappropriation was willful.

Counts 2, 4 and 6

Conspiracy-Section 128(1) of the Anti-Corruption Act No.12 of 2008

Conspiracy is a common law offence, in this situation, made statutory by Section 128(1) of the Anti-Corruption Act of 2008. The term is used here to describe the offence of conspiracy to commit criminal offences under the Anti-Corruption Act of 2008, contrary to Section 128(1) of the said Act.

Statutory conspiracy, as in this case, is committed when a person agrees with one or more persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intention, will necessarily amount to or involve the commission of any offence or offences by one or more of them; such agreement has been held to be sufficient to found a conviction for conspiracy.¹ The agreement can be inferred; it needs not be specifically proven.² Also, it is settled law that a

¹ *O'Connell v R* 1844 5 St. Tr.(NS).

² *R v Brisac* (1803) 4 East 164 as per Archbold.

conspiracy may be sufficiently proved where the circumstances are such that the overt acts which are proved against some Defendants may be looked at as against all of them, to show the nature and the objects of the conspiracy.

The evidence needs not include evidence of some tacit agreement on their part to commit any crime. It is enough that it can be safely inferred that the role of each of the Accused persons show that they were part of a larger scheme.

Mens rea is important in conspiracy as it is in any crime. However, with conspiracy, proof of *mens rea* is found in the Accused' willingness to perform his own part of the plot. The Accused may know full well that the entire enterprise would involve the commission of offence(s) by one or more of the conspirators. Older authorities have suggested that the Prosecution need not prove that the party to the conspiracy had knowledge of the illegality of the acts to be done.³ However, where proof is available, it is sufficient that the Accused knew that there was going to be the commission of some offence.⁴ In Counts 2, 4 and 6 as charged therefore, the Court needs to be satisfied by the Prosecutor's case that based on the evidence including documents and the testimonies of witnesses, it is proven or that it can be inferred that both Accused persons met and agreed together and or with other persons unknown, to commit a corruption offence, to wit:

Count 2 - Conspired to engage in a project without prior planning.

Count 4 – Conspired to enter into a JVA with SMF Inc. for the development, construction and delivery of an Urgent Care Delivery System for the provision of quality medical services in Sierra Leone without complying with the provisions of the Public Procurement Act, 2016.

Count 6 – Conspired to misappropriate the sum of Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and ninety Thousand Leones), being an equivalent then of \$1,000,000.00 (One Million United States Dollars) by authorizing, facilitating and making payment to SISISMI MEDICAL PROJECT, a Joint Venture Special Project Vehicle created ostensibly for the provision of an Urgent Care Delivery System to provide quality medical services in Sierra Leone, thereby depriving the National Social Security and Insurance Trust (NASSIT) of the said amount.

Evidence

The lead investigator in respect of the matter herein was Andrew Demby, PW 1 a Senior Investigation Officer at the Anti-Corruption Commission. The witness told the Court that as a result of Exhibit A(1-26), he received the following documents from the NASSIT:

Exhibit B(1-5) a Memorandum of Understanding dated 17th August 2016;

³ See para. 4075 of Archbold, 36th Edn.

⁴ *R v Siracusa* 90 Cr. App. R. 340 cited favorably in Archbold 2001 Edn p 2641.

Exhibit C(1-12) copy of a Joint Venture Agreement dated 24th October 2016 between NASSIT and Sisimi Medical Foundation (SMF);

Exhibit D(1-7), copy of document titled "File notes of meeting held with cross-section of members of SMF on Tuesday, 30th August 2016";

Exhibit E, copy of a document titled "Extract of decisions of Board of Trustees held on the 2nd September 2016";

Exhibit F(1-2), copy of document titled "Extracts of special session decisions of the Board of Trustees held on Saturday 27th May 2017";

Exhibit G(1-5), copy of document titled "Affidavit and Statement of Dr. Rashid Abassi";

Exhibit H(1-10), copy of document titled "Notice Agenda and Papers for the 108th General Meeting of Board of Trustees to be held on Thursday 21st December 2017";

Exhibit J(1-4), copy of minutes of extra ordinary Board of Trustees Meeting held on Saturday, 3rd June 2017 at the Conference Room of the South Regional Office in Bo";

Exhibit K, copy of Review of Terms of Reference for the NASSIT/Sisimi Joint Medical Project from BDO Audit Firm to Dr. Joseph Mans;

Exhibit L(1-2), copy of Letter to the Country Manager SMF JV Agreement signed by Michael P. Mami Esq dated 10th April 2017;

Exhibit M(1-2), copy of letter from Dr. Joseph S. Mans Jnr. To Rashid Abassi, MD, JVA executed between NASSIT and SMF;

Exhibit N(1-6), copy of letter from Dr. Rashid Abassi to the DG, NASSIT, dated 14th June 2017;

Exhibit O(1-54) copy of document titled "Special Purpose Vehicle Sisimi/NASSIT Medical Project" minutes of meeting held on Thursday 18th August 2016;

Exhibit P(1-4), copy of letter from the Director of Legal Affairs and Board Secretary dated 2nd December 2016 to the DB, NASSIT;

Exhibit Q(1-3), copy of document titled "Emergency meeting" held on 26th September 2016 held in the Deputy DG's office;

Exhibit R(1-24), copy of document titled "Updated Suppliers' List 2016-2017";

Exhibit S(1-5), copy of SMF Bank Statement; Distribution and Supplies receipts; Letter from the SLCB to the Anti-Corruption Commissioner;

Exhibit T(1-13), copy of Letter of 14th November 2016 from the SLCB to Mohamed Kanu; Letter dated 11th September 2015 from FCC to SMF and a specimen signature card of Davida Kamara, SLCB; information page of the passport of Amara Kuyateh; specimen signature from the SLCB of Amara Kuyateh; national Identity Card of Mr. Dauda Kamara; Board Resolution of SMF of 10th October 2016; Certificate of Business Registration of SMF of 18th September 2015 and a Certificate of Incorporation of SMF dated 18th September 2015;

Exhibit U(1-5), copy of document titled "Update on JV with SMF in the Health Care Industry" with an attendance list titled "58th Emergency Board Meeting" and a memo titled "Excerpts of decisions of the Board of Trustees 58th Emergency Meeting of the Board of Trustees held on Friday 2nd September 2016; document titled "minutes of 58th Emergency Meeting of the Board of Trustees held on Friday 2nd September 2016".

Exhibit V(1-2), copy of an internal memo titled "Sisimi/NASSIT Status Report – 5th April 2017;

Exhibit W(1-7) copy of letter from NASSIT to the Operations Manager, Union Trust Bank dated 27th September 2016 titled "Transfer of Le. 6,510,290,000/00 to Sisimi/NASSIT Medical Project Account; internal memo from the Director of

Investment and Project at NASSIT to the DG of NASSIT dated 19th September 2016 "NASSIT initial capital Sisimi/NASSIT Medical Project"; memo from the Deputy DG of NASSIT to the Acting Director of Finance of NASSIT dated 13th September 2016 "NASSIT initial capital contribution from UTB Foreign Funds transfer routing slip Account No. 004001215049302119 and Account Name: Sisimi/NASSIT Medical Project".

Exhibit X(1-2), copy of letter from Mr. Amara Umarr Kuyateh, Deputy DG of NASSIT to Mr. Joseph Mans, Jnr, DG of NASSIT, same dated 7th February 2018 "Forwarding of documents Sisimi Medical Project";

Exhibit Y(1-3), copy of document titled "Sisimi/NASSIT Status Report of 26th March 2017" from Dauda Kamara, Country Director SMF to the DG of NASSIT;

Exhibit AA(1-7), copy of letter dated 26th May 2017 to the Operations Manager, UTB Ltd Re: Transfer for payment to Sisimi NASSIT Medical Project Account with memo dated 9th May 2017 from the DG of NASSIT to the Chairman Board of Trustees NASSIT Status Report Sisimi NASSIT; letter to the Director of Finance, NASSIT dated 26th May 2017 from Dauda Kamara Jnr Re: Sisimi NASSIT Medical Project, Country Director SMF; letter from GEO Mining Consultancy Co. SL Ltd dated 21st March 2017 to the Chairman Board of Directors, SMF;

Exhibit BB(1-6), copy of Bank Statement from UTB for Sisimi NASSIT Medical Project Account No. 004001210049302192 with signature card for Dauda Kamara and Amara O. Kuyateh as signatories; a copy of Amara Omar Kuyateh's Passport No. 000000006651; a copy of national Identity Card No. SL. 00310858 for Dauda Santigie Kamara;

Exhibit CC, copy of a memo dated 22nd November 2016 from the Director of Investment and Project at NASSIT to the DG of NASSIT Re Concerns on NASSIT Sisimi JVA;

Exhibit DD, copy of letter Re: Forwarding Documents SMF of 8th November 2017 from the DG of NASSIT to Mr. Amara O. Kuyateh, Secretary SPV, SM Project;

Exhibit EE, copy of a memo to the DG of NASSIT from the deputy Director General Operations of NASSIT dated 15th November 2017 "Re Forwarding of documents SMF" with a Gmail extract from Dauda Kamara to Mr. Kuyateh;

Exhibit FF, copy of memo dated 9th May 2017 from the DG of NASSIT to the Chairman Board of Trustees NASSIT Re: Status Report Sisimi NASSIT;

Exhibit GG(1-52), Voluntary Caution Statement of the 1st deceased;

Exhibit HH(1-10), copy of letter from the Bank of Sierra Leone to the Commissioner, Anti-Corruption Commission dated 16th July 2018 in respect of Account No. 003001119412110163 and Account No. 003001119412110260 with the Bank Statement of SMF Account at the SLCB; a letter each from the SLCB and UTB with Bank Statement.

The statement of the deceased was read out in open Court and the deceased confirmed same to be his statement made to the Anti-Corruption Commission in respect of the allegations herein. He tendered Exhibits A(1-26) to Exhibit HH(1-10).

In answer to questions put to him in cross examination by Counsel for the deceased, PW1 told the Court that it was his understanding that it was SMF which approached NASSIT with a proposal for running a medical center in Sierra Leone. He said the

proposal was presented to the Management of NASSIT and that the deceased and A2 were not members of the said Management. The Management approved the proposal and forwarded same to the Board Investment Committee which also approved the proposal and forwarded same to the Board of Trustees which also approved same.

He was referred in cross examination to Exhibit C1-12 to which he said NASSIT was represented by Amara O. Kuyateh and Franklyn Gerald Coker. He said deposits towards the JVA were made in the SMF account and the JV account maintained at the SLCB and the UTB to which he said the deceased was not a signatory.

He said the deceased raised concerns as to how the JV was managed and that he addressed his concerns to Mr. Amara O. Kuyateh who was a signatory to the said SMF/NASSIT account. He was referred to Exhibit K and he told the Court that the deceased instructed that an audit exercise be initiated on the JV which said exercise was done. PW1 was referred to Exhibit E, excerpts of the decisions of the Board of Trustees, paragraph 1.4 thereof and told the Court that Le. 6,510,290,000.00 was actually paid into the JV account at the UTB based on Exhibit W1-7.

Counsel for A2 objects to a witness statement allegedly being that of A2, being tendered to form part of the evidence of A2 on the basis that there is nothing in the said statement that shows that PW1 really did interview the A2 or recorded her statement. Upholding Mr. I.S. Yillah's objection to tendering the statement on the grounds that his client's fundamental rights to fair trial was breached, not having been cautioned as a suspect at the time of obtaining her statement and Mr. Mantsebo not objecting to the inadmissibility of the said statement, the document referred to as a statement in respect of the A2 was not admitted as part of the evidence of the A2 by this Court.

Count 5

Misappropriation contrary to Section 36(1) of the Anti-Corruption Act, 2008:

For the status of NASSIT, I refer to the interpretation Section of the Anti-Corruption Act 2008, page 9 thereof for the definition of a 'public body' which the Court notes includes:

j. A company or other body or organization established by an Act of Parliament or out of moneys provided by Parliament or otherwise set up wholly or partly out of public funds;

I also refer to Section 6 of the NASSIT Act, No. 5 of 2001 which provides that:

The Trust shall have a fund into which shall be paid;

- a. Moneys appropriated by Parliament for the purposes of the Trust;*
- b. The contribution of employers and workers and self-employed persons required to be paid to the Trust by this Act*

I hold that NASSIT is indeed a public body which is subject to the laws governing the management of public funds which it receives.

The moneys allegedly misappropriated must be public funds. The definition section of the Anti-Corruption Act 2008 defines public funds to include:

- c. Any moneys, loans, grant or donation for the benefit of the people of Sierra Leone.

I have referred to 'a' and 'b' of the NASSIT Act 2001 in respect of moneys in the custody of NASSIT. Certainly, it cannot be disputed that moneys transferred from the NASSIT account Numbered 01.210.15393-01 at the UTB based on Exhibit W dated 27th September 2016 into NASSIT/Medical Project Account numbered 004001215049302119 at the UTB are public funds.

In the instant case, the Prosecution allege that both the deceased and A2, in their respective capacities as Director-General and Chairperson of the Board of Trustees, authorized and facilitated the disbursement and payment of the sum of Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and Ninety Thousand Leones) being the equivalent of \$1,000,000.00 (One Million United States Dollars) to SISIMI NASSIT MEDICAL PROJECT, a Joint Venture Special Vehicle created, ostensibly, for the provision of an Urgent Care Delivery Service System to provide quality medical services in Sierra Leone, thereby depriving the National Social Security and Insurance Trust (NASSIT) of the said amount

As to whether there was misappropriation, in that a willful act was committed by both or either of the Accused persons which resulted in NASSIT being deprived of funds, I have looked at the evidence very closely and considered the testimonies of all Prosecution witnesses and the testimonies of the deceased and A2, as to how Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and Ninety Thousand Leones) being the equivalent of \$1,000,000.00 (One Million United States Dollars) laid on the Indictment was misappropriated as alleged.

To me, misappropriation is synonymous to dishonest appropriation in the sense that dishonest appropriation constitutes misappropriation. So it is certain that the act of misappropriation must be done willfully and dishonestly. What makes appropriation misappropriation is the willfulness of the act and the dishonest intention to deprive the public body of those funds. In essence, the act of depriving the public body, NASSIT of Le. 6,510,290,000.00 must have been committed willfully or dishonestly.

The approach to dishonesty in criminal courts for the past 35 years was governed by the decision of the Court of Appeal Criminal Division in *R V Ghosh* (1982) QB 1053. In *Ivy v Genting Casinos (UK) (trading as Cockfords Club)* (2017) UKSC 67; (2018) AC 391, the Supreme Court in a carefully considered lengthy obiter dictum delivered by Lord Hughes explained why the law had taken a wrong turn in *Ghosh* and indicated, for the future, that the approach articulated in *Ivy* should be followed. The test for dishonesty in *Ghosh* articulated a two-stage test namely (a) was the Defendant's conduct dishonest by the standards of reasonable people? If so, (b) did the Defendant

appreciate that his conduct was dishonest by those standards? The second leg of the test in *Ghosh* was disapproved by *Ivy*.

Referring to Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* (1995) 2 AC 378 and Lord Hoffmann in *Barlow Clowes* (2006) 1 WLR 1476, Lord Hughes said:

.... When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence ... going to whether he held the belief but is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to the facts is established, the question whether his conduct was dishonest is to be determined by the factfinder by applying the objective standards of ordinary decent people. There is no requirement that the Defendant must appreciate that what he has done is, by those standards dishonest.

So, the Supreme Court proposed an alternative two stage test: (a) what was the Defendant's actual state of knowledge or belief as to the facts; and (b) was his conduct dishonest by the standards of ordinary decent people? The test for dishonesty in all criminal cases remains that which is established by *Ivy*, a test of the Defendant's state of mind-his or her knowledge or belief-to which the standards of ordinary decent people are applied. It is dishonesty being assessed by reference to society's standard rather than the Defendant's understanding of those standards.

Counsel for the deceased argues in his final address that the Prosecution cherry-picked the evidence submitted before the Court leaving out critical pieces of documentary evidence which he says, have the potential of exonerating the deceased. The Court notes that it was the order of this Court, on the 16th day of January 2019 that the Prosecutor serves all material that got into the custody of the Prosecution during investigations, exculpatory and otherwise, on Counsel for both the deceased and A2. Counsel must understand that though the Prosecutor has a duty to disclose, which in the instant case he did, the Prosecutor's duty is to tender evidence relevant to his case. The Court is satisfied that it admitted documentary evidence served on and tendered by the Defence which said evidence were not tendered by the Prosecution. I note therefore that the deceased was in no way disadvantaged.

Counsel for the deceased asked himself two (2) questions in analyzing whether or not the deceased misappropriated public funds to wit:

- a. "Did A1 commit an act whether by himself or through other persons which resulted in the loss or deprivation of revenue, funds or other financial interests belonging to the trust?"
- b. Was A1 dishonest in misappropriating public funds"?

The first question will be dealt with in the proof of the elements of a Section 36(1) offence. For the second question, I refer to Counsel's reference to a quotation by Lord

Justice N.C. Browne-Marke in his Lordship's analysis of the *Gomez* (1993) 1AER case thus:

"As I have stated repeatedly in the past cases I have adjudged, I will not convict an accused person of the offence of misappropriation of public funds, if the prosecution has not led evidence from which it could be inferred that the accused person was dishonest, notwithstanding the absence of the word, dishonest from the definition in Section 36(2). What makes an appropriation a misappropriation is the dishonest intention to appropriate".

I have said that what makes appropriation, which is, taking, misappropriation, is the dishonest taking and assumption of the right of another. We shall see how the evidence unfolds.

Counsel for A2 asks the Court to consider whether A2 'acted willfully to deprive the State of public funds in approving the transfer of the said sum into the SPV Board account'. I have dealt with the law as it relates to willfulness.

Counsel argues that the A2's 'role as far as those moneys were concerned ceased to exist once the transfer had been done to the account of the board of the SPV....' Counsel argues that 'because the A2 did not have control over the funds either as board member of the JV or as a signatory to the joint account of the Board, the A2 could not have had the opportunity or means to convert to her own use monies which were meant for projects indicated in Exhibit B1-10'.

I believe the Particulars of Offence in Count 5 of the Indictment herein and the evidence before this Court is that the A2 and the deceased authorized and facilitated the disbursement and payment of the sum of Le. 6,510,290,000.00. The misappropriation must be willful and must have caused loss to a public body, in the present circumstance, NASSIT.

PW7, Elizabeth Cole was Head of Corporate Law Division during the period covered by the indictment. She told the Court that the Board of Trustees approved the fund for the NASSIT/SMF project and that the Board is not responsible for the transfer of moneys; that the Finance Division, upon the instructions of Management is responsible for the transfer of funds.

PW7, referred to Exhibit U1-5 of 2nd September 2016 and told the Court that A2 in her capacity as Board Chair approved the payment of \$1,000,000.00, an equivalent of Le. 6,510,290,000.00 to the SPV for preliminary works. She said the A2 also advised that the established name of the JV account be changed to NASSIT/Medical Foundation Project Account.

Again, PW7 referred to Exhibit AA1-7 of 26th May 2017, especially Exhibit AA2, from the deceased to A2 seeking approval for transfer of Le. 1,180,000,000.00 (One Billion One Hundred and Eighty Million Leones) into the JV account which according to the deceased, will be "retroactively approved in the next Board of Trustees meeting". The

Court notes that this transfer requested by Exhibit AA2 is in furtherance of the equivalent of \$1,000,000.00 already transferred to the JV account on 26th September 2016. I refer to Exhibit BB2, the transaction and transfer on 26th May 2017 of Le. 1,180,000,000.00 from the NASSIT account upon instructions from the deceased to A2 by letters dated 9th and 26th May 2017 as in Exhibits AA1-3. The Court however takes note of the date in Count 5 of the Indictment, 'about 26th September 2016'. I also refer to Exhibit BB1-6 and the transaction thereon on the 28th September 2016 for Le.6,510,290,000.00 and I note that, that is the transaction covered in Count 5 of the Indictment. I shall therefore not countenance the transaction on 26th May 2017 for Le. 1,180,000,000.00 because same falls outside the indictment period.

PW15 was Dauda Santigie Kamara, one of the members of the SPV and a signatory to the NASSIT/SMF project Account No. 004001210049302192 at the Union Trust Bank, SL Ltd. He referred to Exhibit BB1-6, the Bank Statement of the NASSIT/SMF project account above referred to and he told the Court that on 14th October 2016, Le. 712,425,000.00, being part payment of \$825,000 was transferred to Laurel Design from the joint project account.

He referred to Exhibit S1-5, which is the Sierra Leone Commercial Bank statement of SMF. which he described as statement held on behalf of SMF reflecting the following payments:

Laurel Designs:

18th October 2016 – Le. 1,102,500,000.00

24th November 2016 – Le. 755,000,000.00

Tropical Environmental Design Associate:

4th November 2016 – Le. 906,750,000.00

Mr. James Bangura-Cadastral

4th November 2016 – Le. 483,000,000.00 to Mr. James Bangura.

PW16 was the Assistant Accountant-General of the Accountant-General's Department, Sorie Kamara. He told the Court that the procedures for use of public funds is guided by the Public Financial Management Act, 2016 and the Public Financial Management Regulations 2018. He referred to Section 15(2) of the Public Financial Management Act 2016 and told the Court that the Vote Controllers include Permanent Secretaries, Chief Administrators of Local Courts, Managing Director or Executive Directors or other Heads of any State owned Enterprise or Head of a Government Department, Agency or Commission. He referred to Section 1 of the Financial Management Act, 2016 which describes Social Security Fund as any entity which satisfies the following conditions:

- a. Principal activity – to provide social benefit;
- b. Either of the following criteria is fulfilled by the entity.



He referred to Section 86(3) of the Public Financial Management Act and to Section 86(3)(f) of the Financial Management Act and told the Court that NASSIT is a Social Security Fund. He said the words 'general government' in Section 9(2)(g) of the Financial Management Act, 2016 includes central and local government, sub-vented agencies and Social Security Funds under which he said NASSIT falls. I have held that NASSIT is no doubt a public body.

I have looked at Exhibits U1-5, BB1-6 and S1-5 which are the approval for the transfer of the equivalent of \$1,000,000.00, the UTB Bank Statement for the Sisimi NASSIT Medical Project and the SLCB Statement for SMF. I refer to Exhibit BB1-6, the joint project account, in respect of transaction dated 28th September 2016 when Le.6,510,290,000.00 was credited from NASSIT account 210015393-01.

On the 14th October 2016, Le. 712,425,000.00 was transferred from the Joint account in favour of Laurel Design Alliance. On 16th and 23rd December 2016, Le. 564,945,600.00 and Le. 570,671,400.00 respectively were transferred from the said Joint account in favour of Laurel Design Alliance. On the 14th day of October 2016, Le. 3,250,000,000.00 was transferred from the Joint account to the Sierra Leone Commercial Bank in favour of SMF as is reflected in Exhibit S1-5. I shall look at how Le. 3,250,000,000.00, public funds transferred into a SMF's private account was used.

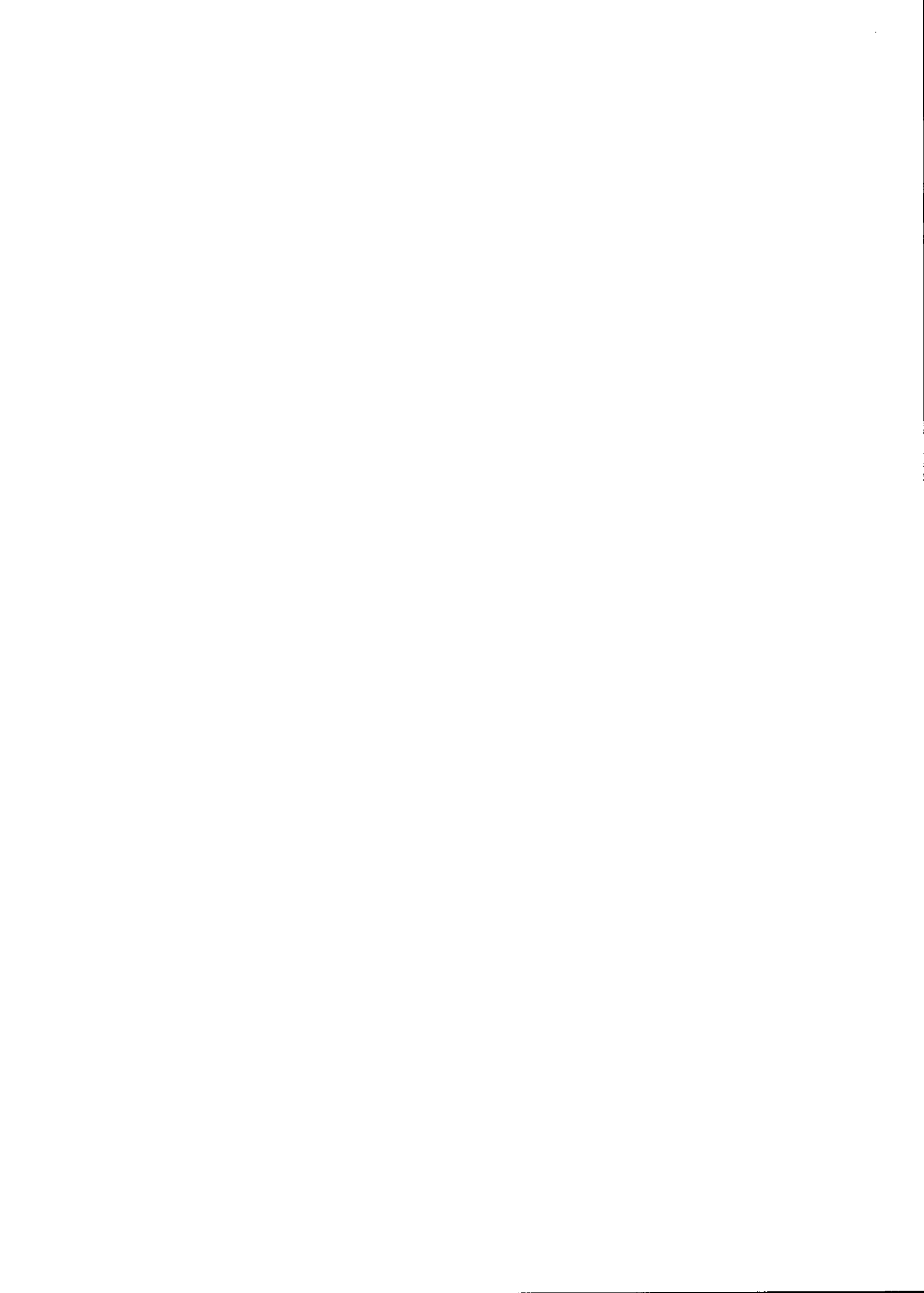
I refer to the several payments and transfers made on 18th October 2016 through 8th December 2017 from the SMF account as in Exhibit S1-5 reflecting particularly payments made in favour of Laurel Design Alliance, Tropical Environmental Design Associate and Mr. James Bangura. But for these said transfers and bank charges, I have not found payments or withdrawals made otherwise. This is not to say that it was correct to have transferred public funds into a private account.

I have said that *mens rea* is an important element of the offence of misappropriation. Having seen how these transfers hereinbefore referred were made, in favour of Laurel Design Alliance and to the three local contractors, could it be said that A2 had any intention to misappropriate public funds?

To assist me in answering this question, I have looked at the testimonies of the local contractors, PW9, PW10, PW11 and PW12.

PW9 was James Morlai Bangura, a Licensed Surveyor. He told the Court that he inspected the proposed site and did the job for which he was contracted. He acknowledged receipt of Le. 483,000,000.00 which was 70% of his contract price and a further 30% of the said contract price for receipt of a total of Le. 690,000,000.000.

PW10 was Gibril Foday Koroma, Managing Partner at Tropical Environmental Design Associates; he is a trained Architect. He acknowledged receipt of Le. 906,750,000.00 for work done for which his office was contracted, though the EPA License up to the date of his testimony before the Court on 29th July 2019 had not been issued.



PW11 was Salim K. Sillah of Geo Mining Consultancy and he is a Mining Geologist. he said he completed his job and submitted a report. He acknowledged full payment of an equivalent of \$350,000 for work done.

PW12 was Dr. Abdul Ahmed Koroma, a Consultant for Geo-Mining who told the Court that he was paid in full by Geo-Mining as his contract was with Geo-Mining.

These payments were made from public funds, part of the said Le. 6,510,290,000.00 as is seen from the Bank Statements hereinbefore referred to. I also take specific note of transfers made to Laurel Design Alliance from the joint project account and from the SMF account at the SLCB. The Court notes that the Prosecution did not present the conversion rate of the US dollars to the Leones for the period covered by the indictment. The only evidence led during the trial as to conversion is \$1,000,000,000.00 which the Court notes was converted at Le. 6,510,290,000.000.

The Court is not in a position to say exactly how much of \$825,000 contract price was when converted in Leones at the period covered by the indictment and how much of that converted amount was actually paid to Laurel Design Alliance. The Prosecution has not said moneys less than \$825,000 at its converted rate was paid to Laurel Design Alliance. I refer to the testimony of PW11, Salim K. Sillah, a Mining Geologist who told the Court acknowledged full payment of \$350,000 for work done. The Court takes note of transfers made in Exhibits BB and S and states that there is no way payment of \$350,000 can be determined from Exhibits BB and S because as said, the conversion rate of the US dollars to the Leones at the period concerned does not form part of the evidence before the Court.

A2 said in answer to questions put to her in cross examination by the Prosecutor at page 182 of the Judge's notes that *"The local services had been done and the reports are there"* I take note of the testimony of PW15 when he told the Court that the Design finally submitted by Laurel Design Alliance was sub-standard. To my mind therefore as indeed the evidence shows, payments were made to Laurel Design Alliance and the 3 local contractors hereinbefore referred to. The charges on breach of procurement procedures and entering into a contract without prior planning put aside, could it really be said that A2 willfully misappropriated public funds, whether by herself or through any other person? I think not.

Count 6

I have stated the law as it relates to conspiracy. There must be an agreement to misappropriate or it must be inferred from their conduct that there was in fact an agreement to misappropriate. I have said that like other criminal offences, there must be proof of an intention to conspire to commit a corruption offence, to wit misappropriation in the instant case. The Prosecution has not proven that there was an agreement between the deceased and the A2 and with other persons unknown to misappropriate public funds and I have found it difficult to make any such inference.

Count 3

I have stated the law in respect of Count 3, failure to follow procurement procedures. Having held that the Le. 6,510,290,000.00 hereinbefore referred to is public funds, what the Prosecution needs to prove is that both the deceased and A2s' functions concerned the administration, custody, management, receipt or use of any part of public revenue or public property during the period covered by the indictment; in the instant case, the management of Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and Ninety Thousand Leones) being the equivalent of \$1,000,000.00 (One Million United States Dollars).

The Court is guided by the judgment delivered by the the Hon. Mr. Justice N.C. Browne-Marke JA as he then was in the case of *The State Vs. Hamzza Alusine Sesay & Sarah Finda Bendu*⁵ with respect to proving the capacities in which both the deceased and the A2 acted.

The deceased in his statement to the Anti-Corruption Commission described himself as the then Director-General of NASSIT. Making his testimony before the Court he described himself as a public officer. His functions during the period under consideration concerned administration, management and use of public funds acting in his capacity as Director-General and Chairperson of NASSIT procurement committee. I refer to page 4 of the Voluntary Caution Statement of the deceased and to his testimony on oath before the Court at page 138 of the Judges notes where he stated his roles and responsibilities as Director-General of NASSIT and at page 154 where he told the Court that between 2002 and 2018, having served as head of administration and human resources, Director of administration and human resources, Deputy Director and Director General and vote controller, he had the requisite experience in the management of public funds. The deceased told the Court that legally, being head of the entity, he was the Chairman of the Procurement Committee of NASSIT.

A2 in her testimony on oath told the Court that she was Chairman of the Board of Trustees during the period covered by the indictment. With the Board, she approved budgets and policies initiated by Management. The Board, she told the Court, was a non-executive Board and her functions did not concern the management of public funds; but she did say that her function and that of the Board was limited to the approval of use of public funds. To my mind, that function did cover management of public funds.

It is clear to the Court that both the deceased and A2 had functions that involved the management of public property to wit: the equivalent of \$1,000,000.00, being public funds for which they were, during the period under consideration, obliged to ensure that the laws, procedures and guidelines relating to tendering of contracts were complied with.

⁵ (Unreported) paragraph 15 lines 7 & 8

The Particulars of the Offence under Count 3 of the Indictment and the allegation is specifically for failure to comply with Procurement Procedures in entering into a JVA with SMF Inc. for the development, construction and delivery of an urgent medical care delivery system for the provision of quality medical services in Sierra Leone. I have looked at Exhibit C1-12, a JVA dated **21st October** 2016 between NASSIT and SMF registered with the Office of the Administrator and Registrar-General. I refer to Exhibit C10 in particular and note that the said JVA was executed by the deceased and A2 in their respective capacities as Director-General and Chairman, Board of Trustees of NASSIT on the one hand and Kola Aina and Rashid Abassi, MD in their respective capacities as Chairman, Board of Trustees and Founder/Chief Medical Director of SMF on the other hand.

The National Public Procurement Act 2016 is an Act to *'regulate and harmonise public procurement processes in the public service, to decentralize public procurement to procuring entities, to promote economic development ... by ensuring value for money in public expenditures and the participation in public procurement by qualified suppliers, contractors, consultants and other qualified providers of goods, works and services'*

The National Social Security and Insurance Trust Act, 2001 is an Act *'to establish the National Social Security and Insurance Trust and a Social Security Scheme to provide retirement and other benefits to meet the contingency needs of workers and their dependents'*

The objective behind setting up both Acts, to my mind, is separate and distinct.

I refer to Section 1 of the 2016 Procurement Act which provides for the Act to apply to the procurement of goods, works and services, including any procurement financed in whole or in part from public or donor funds by bodies or organisations including *state-owned enterprises, which utilize public funds; ... universities, colleges, hospitals, companies and other institutions which are wholly owned by the State, or in which the State has at least 25% interest; ...state owned enterprises which utilize public funds and any entity in the private sector which is given the responsibility of carrying out activities using public funds.*

I reiterate that in Sierra Leone, save for funding by donor agencies which have their own procurement rules, in all other respect, procurement is governed by the National Public Procurement Act.

I refer to Section 56 of the NPPA 2016 which relates to the award of contracts. I also refer to Section 40 (1) and (3)(a-f) and to the First Schedule of the National Public Procurement Act 2016, paragraph 4 (b) and (c) and note that where the estimated value of procurement, in the case of contracts for the procurement of works, exceeds Le. 900,000,000.00 (Nine Hundred Million Leones) and in the case of contracts for the procurement of services, exceeds Le. 600,000,000.00, 'International Competitive Bidding shall be held'. I have referred to this said provision particularly in the award of contract to SMF under the guise of a JVA with NASSIT in total disregard of the

National Public Procurement Act, which said Act must be complied with by all public bodies, including NASSIT. The same provision must be considered in the award to contract to Laurel Design Alliance for a contract cost of an equivalent of \$825,000.00 and the contract to the three local contractors.

Evidence & analysis

PW7, the then Acting Legal Officer during the period under consideration told the Court that the entire cost of the project was \$20,694,000.00 (Twenty Million Six Hundred and Ninety-Four Thousand United States Dollars). The method of award of the contract for the construction of an Urgent Care Delivery System ought to have followed the procedure of International Competitive Bidding appreciating the provisions of Section 40(2) of the National Public Procurement Act, 2016.

Being that a different procedure was used, there was no invitation to bid nor were there any bidding documents; there was no publication of any invitation to bid, let alone it being published anywhere at all or in any newspaper of wide international circulation as the Act provides; because there was no publication, no time was allowed for submission of bids; no security documents were submitted as required by the NPPA Act 2016.

I refer to paragraph 2 of the Address on behalf of A2 and state that even if the procedure followed was sole-sourcing, the several procedures outlined in Sections 46 and 47 of the Procurement Act were not complied with. If the sole-sourcing procedure was complied with and SMF identified as the contractor for the project herein, having complied with the procurement procedures, a JVA could then still have been executed between the parties. This was not the case here. The fact that other such investments were in the past undertaken in non-compliance with procurement procedures does not make the conduct of the Accused herein in respect of this project correct. The Accused could also have applied for and obtained a 'no objection' from the National Public Procurement Office for the award of contract to SMF and thereafter enter into a JVA in the manner as they then desired.

It is also clear to the Court in respect of the local contracts that based on testimonies, the contract for designs in respect of the project herein referred to was executed between the Chairman of SMF, USA branch and Laurel Design Alliance, an American Company based in the United States of America, even though the contract cost of an equivalent of \$825,000.00 was in fact paid from public funds belonging to NASSIT. It is the Court's understanding that this particular contract had to do with local contractors whose services, according to testimonies were solicited by one Mr. Gerald Cole, an Engineer who was then, a member of the SPV representing NASSIT.

It is pertinent to note that NASSIT, during the period under consideration, had a Procurement Unit and a Head of Procurement in the person of Mr. Jonathan Kamanda. Mr. Gerald Cole was not a member of the NASSIT Procurement Unit. It appears to the Court, based on evidence that the method of procurement used for the award of contracts to local contractors was sole-sourcing, by the SPV as noted and not the

procuring entity of NASSIT but even at that, the procedures to be followed were not complied with.

I refer to Section 46(1)(a-e) of the NPPA Act 2016 and note that there is nothing before the Court to show that the Procurement Committee of NASSIT approved of the procurement method used by the SPV.

The evidence before the Court is that the local contracts were published in the national newspapers by the procuring committee of the SPV rather than by NASSIT. There is nothing before the Court in writing by the procuring entity of NASSIT, describing the needs or any special requirements as to quality, quantity, terms and time of delivery; there is no request for submission of bids and/or proposals in writing; the procuring entity of NASSIT had no opportunity to negotiate with the sole bidders, all in breach of Sections 46 and 47 of the NPPA Act 2016.

I have also looked at Sections 41 and 42 of the NPPA Act, 2016 relating to restricted bidding. There is nothing in evidence that suggests that the local contracts herein referred could only have been performed by the three local contractors herein or that the time or costs of considering a large number of bids would have been disproportionate to the estimated value of the procurement. Further, it is a requirement, even where restricted bidding applies under the circumstances referenced in Section 42(b) for the procuring entity to secure bids from a minimum of 5 bidders, if possible. The procedures for bidding under Part V of the Act was also not complied with. All of the above procedures could only have been performed by the Procurement Committee of NASSIT which I dare say was not involved in the procurement of the services of the said local contractors.

PW3 was Jonathan Joana-Kamanda, Senior Procurement Officer and Deputy Head of the Procurement Division of NASSIT during the period under consideration. He said his duties include facilitating and ensuring that the procurement of goods, works and services are consistent with the Public Procurement Act 2016. He told the Court that the NASSIT/Sisimi Medical Project was two-fold:

- a. The geotechnical survey phase;
- b. Development of design for development of the survey.

He said, neither him nor the Procurement Committee of NASSIT were involved in the Geotechnical or design process of the project. He referred to Exhibit R(1-24) which he said is a list compiled by NASSIT each year, of pre-qualified vendors to participate in procurement activities at NASSIT and that there are readily available vendors in the event that there is need for restricted tenders.

PW3 told the Court that he was informed that a Special Purpose Vehicle was put in place to carry out the JVA; that the SPV by the JVA was responsible for execution of its mandate but that even with an SPV, the project must have been in compliance with the National Public Procurement Act. To this I fully agree. Why else will there be established a Procurement Unit at the Institution?

PW4 was Hassan Musa Bangura, Director of Internal Audit who told the Court that he was asked on the 12th April 2017 by the deceased to audit the local procurement process of the three (3) local contractors, the Geotechnical, Topographical and Environmental Impact Assessment. He said he used the 2004 and 2016 NASSIT Acts and found that no pre-qualification exercise was done as ought to have been done for restrictive bidding. I remind myself that the JVA had already been executed as in Exhibit C1-12 of 21st October 2016 and that the local contractors and the Laurel Design Alliance had been contracted long before the deceased instructed PW4 to audit the local procurement process of the three Local Service Providers.

PW5 was Nasir Ahmad Alie Kamanda-Bongay, a member of the NASSIT Board of Trustees during the period covered by the indictment. He referred to Exhibits J1-4 of 3rd June 2017 and H1-10 of 21st December 2017; he told the court that he was present at the meeting held in Bo on the 3rd June 2017 and at the 108th meeting of Trustees on 21st December 2017 when Management and A2 informed the Board of Trustees that the deceased in his capacity as Director General of NASSIT, in a meeting, expressed concerns in respect of the procurement processes adopted by the Joint Venture and that the deceased had ordered an internal audit exercise to be conducted. Again, I remind myself that the dates of 3rd June 2017 and of the 108th meeting of Trustees on 21st December 2017 were well after the execution of the JVA in October 2016 and after the procurement of the services of Laurel Design Alliance and of 3 the local contractors hereinbefore referred to.

I must also note for the records that the said procurement referred to by A2 at paragraphs 4.0 – 4.6 of Exhibit J1-3 was that undertaken by the SPV and not the procuring entity of NASSIT. The charges on the Indictment and evidence led, must be understood in that light. In any event, as stated in part of paragraph 4.4 of Exhibit J, PW5 told the Court that 'there was no evidence on file that the procurement of the services of all three consultants was undertaken by means of advertised bidding process, to which equal access could have been provided to all eligible bidders without discrimination'. PW5 told the Court that the process adopted by the Committee was not consistent with the National Public Procurement Act. He told the Court that the contract with SMF ought to have been by International Competitive Bidding.

PW7, Elizabeth Cole, Head of Corporate Law Division during the period concerned agreed with PW5, Kamanda-Bongay's concerns in respect of paragraph 4.4 of Exhibit J1-4, that the procurement process was not in compliance with procurement laws. She agreed that the funds used to pay service providers was itself NASSIT funds.

PW7 told the Court at page 61 of the Judge's Notes that procurement was not done legally. She said '... considering the amount involved, it was not done in compliance with the NPPA. The procurement itself was not undertaken by NASSIT even though the funds for payment to service providers was provided by NASSIT'. In answer to questions put to her in cross examination by Counsel for the A2, PW7 told the Court at page 65 of the Judge's notes that the SPV was responsible for procurement through the procurement committee unit of NASSIT.

PW8 was, during the period covered by the Indictment, the Director of Legal Affairs Division of NASSIT. He told the Court that in respect of the contract between SMF and NASSIT, the procedure for the award of the contract was done by sole-sourcing at the prerogative of the then President, Ernest Bai-Koroma and the then Director-General of NASSIT, the deceased. With \$1,000,000.00 for a contract, the Procurement Act certainly does not provide that the procedure to be followed must be sole-sourcing. Besides the procurement of the services of SMF was not done by the NASSIT Procurement Committee.

I have looked at Exhibit D1-7 minutes of meeting held on 30th August 2016, especially Exhibit D5 at paragraph 2.28 where it is stated that ‘.... Representatives from SMF met with the President, His Excellency Dr. Ernest Koroma on 29th August 2016 and requested for a JVA with NASSIT. The Chairman, Board of Trustees, NASSIT and the Director General were instructed by the President to have a JVA done now....’

PW8 referred to Exhibit H1-10 dated 21st December 2017, paragraph 5.1.4 thereof, (which I must note was written after the execution of the JVA as in Exhibits C1-12) which reads “in this regard therefore the Investment Committee recommended that an opinion on the National Public Procurement Act be proffered by the Legal Affairs Division of NASSIT for the attention of and decision of the Committee” in which regard PW8 told the Court that because there was an aggregate of issues on the legality of Exhibit C1-12, the JVA, there was need for further legal opinion.

He referred to Exhibit J1-4 and spoke on the A2’s concerns mentioned at an Extra Ordinary meeting of the Board of Trustees on Saturday, 3rd July 2017, in respect of the procurement process for pre-engineering activities undertaken by an entity other than the procuring entity. A2’s concerns raised at the meeting of 3rd July 2017 was after the execution of the JVA in October 2016, after the execution of the contract between SMF and Laurel Design Alliance after the award of contracts to the 3 local contractors, all dealing with public funds.

PW8 told the Court in no uncertain terms that it was the Steering Committee/SPV which procured the services of the three Consultants “outside the purview of NASSIT”, he said. Like PW7, he confirmed that the contracts awarded were inconsistent with the National Public Procurement Act.

In answer to questions put to him in cross examination for A2, PW8 referred to Section 8(1) of the NASSIT Act and he told the Court that ‘without prejudice to the NASSIT Act, the Trust is bound by other legislations’.

I note that PW8’s testimony with reference to Exhibit J1-4, minutes of the Extra Ordinary Board Meeting held in Bo on 3rd June 2017 was well after the execution of the JVA as in Exhibit C1-12 of 21st October 2016. One must not forget Exhibit D5 paragraph 2.28, so whether or not the deceased was dissatisfied with serious breaches of the procurement process under the SPV, as stated in paragraph 4.1 of Exhibit J1-4 is of no moment to Count 3 on the indictment.

PW9 was James Morlai Bangura, a Licensed Surveyor, to whom a contract was awarded for the surveying of a 20 acres plot of land at Gloucester for the construction of the health facility as referred to in Exhibit C1-12 for a service fee of Le. 690,000,000.00 (Six Hundred and Ninety Million Leones). He told the Court that other than the fact that his name and details of his profession was on the NASSIT data base and his dealings with Mr. Gerald Cole who the Court notes was the Project Coordinator under the SPV created by Exhibit C1-12, he cannot recall ever meeting with the NASSIT Procurement Committee.

PW10 was Gibril Foday Koroma, Managing Partner of Tropical Environmental Design Associate (TEDA). He said in 2016, his office, TEDA received a Request for Proposal Form from NASSIT, having updated its registration with NASSIT in June/July 2016. TEDA submitted its technical and financial proposal specifically to Mr. Gerald Cole in respect of environmental studies. He negotiated the project duration with Mr. Gerald Cole on 21st October 2016. He told the Court that TEDA received a notification of the award letter on 26th October, 2016 for a service fee of Le. 1,511,250,000.00 (One Billion Five Hundred and Eleven Million Two Hundred and Fifty Thousand Leones). Le. 906,750,000.00 of the said contract price, he said, was paid into the TEDA account by SMF. PW10 told the Court that TEDA had nothing to do with the NASSIT Procurement Committee.

PW11 was Salim K. Sillah, Director and Share Holder of Geo Mining Consultancy, Sierra Leone, himself a Geologist. In November 2016, his office was awarded a contract to undertake the geological and hydrogeological studies for the NASSIT/SMF project. He said none of his staff nor himself met with any NASSIT officer during the course of tendering; he said his office did not meet with NASSIT Procurement Committee.

I refer to the testimony of PW13, Franklin Gerald Cole, Resident Engineer at NASSIT between 2006 and February 2019. He told the Court that all minutes and excerpts of meetings were forwarded to the Director General, the deceased. PW13 told the Court that the SPV was funded by moneys provided by NASSIT. In respect of procurement processes undertaken for the local contractors, PW13 told the Court that the SPV collected information on service providers whose details were already on the NASSIT data base system.

PW15 Dauda S. Kamara represented SMF. He told the Court that though money in respect of the construction of a modern medical facility in the tune of over \$1,000,000.00 was provided by NASSIT, the services of Laurel Designs and the local pre-engineering contracts were awarded by a set of individuals under the SPV and not in compliance with laid down procurement laws.

The testimonies of PW9 to PW15 as to their having nothing to do with the NASSIT Procurement Unit was not disputed by the Defence. There is no evidence to show that the Procurement unit of NASSIT applied for and obtained a 'waiver' or a 'no objection' from the National Public Procurement Office to do without procurement methods provided for in the NPPA 2016.

I have looked at Exhibit O4-17 and Exhibit O29-34 which is the contract between SISIMI-NASSIT Medical Project and Laurel Design Alliance signed by Rasheed Abassi all of which I note predate the JVA hereinbefore referred to in so far as the said contract with Laurel Design Alliance is dated 26th September 2016 whereas the JVA itself is dated **October** 2016.

Counsel for the defence seem to be concerned about the deceased and A2 not being members of the SPV or part of the procurement committee or signatories to the project account. Both the deceased and A2, in their respective capacities knew about each of these contracts. PW15 told the Court that he was so dissatisfied that he informed Management and the deceased and A2 about the manner in which the contracts to Laurel Designs Alliance Inc in particular was awarded. He said to the Court, "I expected a general consensus and I expressed my concern in respect of an agreement signed just between Laurel Design and Dr. Abassi". Dr. Abassi was a stranger entering into a contract for NASSIT, using public funds. The Defence never disputed PW15's testimony.

In any event and for clarity, I must note that the Prosecution never alleged that the deceased and/or A2 were members of the SPV or signatories to the project account. The offences laid on the Indictment are clear and unambiguous. I want to believe that Counsel for both Accused persons will agree that their clients need not have been members of the SPV or signatories to the project account for proof of allegations of Sections 48(2)(b) of the Anti-Corruption Act, 2008. What the Court is concerned about in respect of especially Count 3 as laid on the Indictment is whether procurement procedures were followed in the award of the contracts herein. I have stated the capacities in which the deceased and the A2 acted.

I have no doubt on my mind that the equivalent of \$1,000,000.00 used in respect of this particular project was indeed public funds. Both Counsel have not said otherwise. In his letter dated 10th April 2017 as in Exhibit L1&2, PW8 as then Director of Legal Affairs of NASSIT to the Country Manager, SMF and copied Chairman, Board of Trustees, that is A2, the deceased, the then Director-General, agrees at paragraph 5 that 'the initial sum of \$1,000,000.00 were provided by the Trust using public funds'.

The deceased in Exhibit M1&2 of 22nd June 2017 to Rasheed Abassi, MD of SMF referenced PW8's Exhibit L1 & 2 and had this to say to the said Abassi; '*.... The Trust expressed serious concerns pertaining to the award of contracts and the amounts involved, mindful that the monies spent was solely provided by the Trust and by law, must comply with the Procurement laws of Sierra Leone and its Regulations*'. The deceased said in paragraph 1 of the said Exhibit M that '*... the Trust as a party to the JV and provider of the funds is engaging the services of an external auditing firm to audit the conduct of the regularity of the procedure of the procurement of the services of Laurel ... whilst the Trust's internal auditor was charged with the responsibility of looking into the domestic contracts awarded by the SPV.*' I must note that Exhibit M was well after the fact. The procurement procedures on all fronts had already been breached.

I refer to Exhibit NN1&2 of 16th March 2017 from the deceased to the then Deputy Director General, Amara Kuyateh especially Exhibit NN1 paragraphs 2 and 3 where he said *".... I would like to know whether appropriate procurement methods and procedures were undertaken; advertisements, bid opening, evaluation report and the composition of evaluation team(s).... I have perused the documents including the signed contracts I also discerned from the submissions that a contract was awarded to Laurel Design Alliance to which the sole signatory to the contract is Dr. Abassi of SISIMI Foundation. Considering the amount involved in the said contract, was the bid amount brought to the notice of management for input of our Legal Division? I could also not understand how such a contract is accepted and honoured with the signature of the other partner"*

I refer also to Exhibit QQ1&2 of 30th March 2017, minutes of meeting with the deceased and A2 present especially QQ2 paragraphs 8.3 and 8.4 where it is stated, *"It is noted that the Director General further expressed concern over the procurement process as adopted by the JV. He noted that \$825,000 was allocated to production of designs.... The Chairman in her contribution, it is noted queried the sum of \$825,000 allocated for designs"*

The above, to my mind, as said, came late in the day; the execution of Exhibit C1-12 in October 2016 by the deceased and A2 on behalf of NASSIT, creating a Joint Venture with an SPV to carry on the works of the NASSIT Procurement Unit in breach of the Public Procurement Laws is the foundation of the deceased's and A2's late concerns. A2 at page 183 of the Judge's notes told the Court that *".... I agree that I ought to have entered into the contract as per the Public Procurement Act, especially Section 56 but what we entered into with SMF was a Partnership"* I am saying that the procurement laws ought to have first been complied with by adopting international competitive bidding or seeking and obtaining a 'no objection' to the use of the service of SMF before any other agreement, Partnership or otherwise with SMF could have been executed.

The evidence in respect of none compliance with procurement rules is overwhelming. It is clear to the Court that the deceased and A2, persons whose functions during the period covered by the Indictment concerned the administration and management of public funds failed to comply with laid down procurement rules as provided by the Public Procurement Act, 2016, in entering into a JVA with SMF Inc.

Count 4

I refer to paragraph 15 of Exhibit G where Raheem Abassi, MD said that *"Laurel Designs Alliance is a member of the American Institute of Architects Due to the enormous cost of the medical equipment that will be involved and the type of facility proposed, it was **agreed** during the proposal presentation that only International Firms with extensive expertise in the construction of such multi-specialty facility should be considered"*. This piece of evidence was never controverted. The evidence before the Court is that both the deceased and A2 were present during presentations made by SMF in their capacities as Director-General and Chairman of the Board of Trustees at

NASSIT. They knew that part of the contract will be implemented by an International Firm in furtherance of which procurement rules were breached.

I must reference paragraph 4075 of *Archibold*, 36th Edition and state that the Prosecution needs not prove that the Accused had knowledge of the illegality of the acts of breach of procurement rules in the execution of a contract for a successful prosecution in respect of a conspiracy charge.

It is clear to the Court that the methods of procurement, (in none compliance with procurement laws) were already agreed upon even before the execution of the Joint Venture Agreement. Exhibit O(1-29) was a mere formality. My reasoning is supported by my understanding of Exhibit Q1&2. Minutes of meeting dated 26th September 2016 where under paragraph 4.0 "Issues Discussed" it is stated "The Deputy Director-General informed members in the meeting that the State House has established a Special Purpose Vehicle ... that is going to carry out the activities of the SISIMI project. He further stated that all arrangements and activities are now far gone but wish to inform members about the progress that contacts have been made to consultants for quotations ... which have been evaluated". I must note again that Exhibit Q1&2 predates the JVA which was executed by both the deceased and A2.

Count 1

(2) 'A person whose functions concern the administration, custody, management, receipt or use of any part of ... public property commits an offence if he'.

(C) engages in a project without prior planning.

I have held in Count 3 that the functions of the deceased and A2 in their separate capacities then as Director-General and Chairperson of NASSIT during the period under consideration concerned administration and management of public funds including the administration and management of Le. 6,510,290,000.00 (Six Billion Five Hundred and Ten Million Two Hundred and Ninety Thousand Leones) being the equivalent of \$1,000,000.00 (One Million United States Dollars) laid on the indictment, which I have said is public funds.

Section 48(4) of the Act provides that 'public property' means real or personal property, including public funds, and money of a public body, or under the control of, or consigned or due to, a public body. What the Prosecution needs to prove for a conviction on a Section 48(2)(C) charge is that the deceased and A2 engaged into a project with SMF without prior planning.

I have read the ruling on a no case submission in the case, *The State v Sheka Sahid Kamara, Victor B. Foh, et al*^b delivered by the Honourable Mr. Justice R.S. Fynn, J.A, in respect of a Section 48(2)(c) charge, in which Counsel for the defence submitted that "the words 'prior planning' should be given their everyday ordinary meaning as provided for by the literal rule of interpretation". In that case, the Prosecution

^b 11th October 2019 High Court of Sierra Leone

preferred the use of the mischief rule of interpretation or the purposive approach. Referring to and applying the dictum in *Odgers to wit*:

“General statutes will be prima facie presumed to use words in their popular sense ... the grammatical and ordinary sense of the words must be adhered to, unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the instrument ...” his Lordship Fynn J.A held that the Statute being clear, there was no need ‘to stretch the meaning of the words or foraging around the pillars of Parliament’s intentions for the meaning of the words used in a Statute’. His Lordship therefore held, to which I agree, that ‘to plan’ involves to prepare and to lay the groundwork for the intended project. He went on to say that *‘planning could also involve meetings, minutes, committee, sub-committees, budgets, reports, inspections and a complex web of activities Planning can and does reside within such a wide ranging spectrum of possibilities and the literal meaning will embrace the whole of that range’*.

Applying the literal rule, Counsel for the A2 argues that there was prior planning before the award of the contract to SMF in the sense that, as Counsel submits at pages 10 and 11 of his final address, *“the Board followed due process leading to the approval of the project and in this respect, the various minutes of Board meetings show that there was a presentation of the project Due diligence was carried out by members of the administration”* Counsel referred to and relied on the minutes of the Investment Committee meetings of 19th October 2015, the Report of the Board of Trustees and Investment Committee members of 30th October 2015, minutes of the investment committee meeting of 19th December 2015, minutes of Board of Trustees meeting of 17th December 2015 and minutes of the Board of Trustees meeting of 6th June 2016’.

His Lordship Fynn, J.A, rightly held in the *Sheka Kamara et al* case that the literal rule will make absolute nonsense of the provision in Sec. 48(2)(c). I have read the three (3) Kenyan cases referred to by my Learned Brother Fynn, J.A, to wit: *S v KOSKEI KIMOSOP ACEC MISC. NO 33 OF 2019; THE REPUBLIC v BENEDICT MAURICE OMOLLO OLWENYO Criminal Appeal No. 8 of 2018 and REPUBLIC v DIRECTOR OF PUBLIC PROSECUTIONS and ABDI SAHAL ALI, MOHAMUD H. MOHAMED and DR. SOFIA MOHAMED (being interested Parties)* <http://www.kenyalaw.org/caselaw>. The learned Fynn said in his judgment that his reference to these three Kenyan cases was solely for purposes of specificity in the indictment. His Lordship did say at page 5 at paragraph 26 of his judgment that *‘The cases do not address the question of “prior planning” nor do they lay out what the Prosecution must establish to prove this offence’*

Application of the literal rule in the instant case, to my mind, will lead to absurdity and it will not achieve the purpose of the legislation. It is my considered view that the purposive or mischief rule of statutory interpretation as adopted in *Heydon’s case*⁷ ought to be considered in the interpretation of Section 48(2)(c) of the Act because Parliament could have legislated only for purposes of bringing about an effective

⁷ (1584) 3 Co. Rep. 7a; B1.Com. Ed. Hargrave, p87

result.⁸ It is pertinent to consider what the mischief was that the drafters of the Anti-Corruption Act, 2008 tried to cure by drafting Section 48(2)(c).

The Learned Trial Judge, Fynn, J.A noted in the *Sheka Sahid Kamara et al* case that the offence in Sec. 48(2)(c) is framed as one of omission rather than one of commission and that proving a negative can be a very difficult task. I shall look at the evidence before the Court therefore to find out whether the Prosecution succeeded in proving that the deceased and A2 engaged in the award of a contract for the construction of a modern medical facility to SMF *without prior planning*.

PW8 told the Court that the SMF approached the Board and proposed the contract for the construction of a medical facility. I have held in respect of Count 3 that Procurement laws were not complied with in entering into a JVA with SMF Inc. I have also held that procurement laws and procedures were not complied with in the award of the three local contracts nor in the award of contract to Laurel Design Alliance. Clearly, had there been any prior planning, the deceased and A2 whose functions concerned the administration and management of public funds would have realized that being that Le. 6,510,290,000.00 was public funds, the contract with Laurel Design Alliance Inc. ought to have been executed with NASSIT not SMF. Had there been any prior planning, the deceased and A2 would have realized that the National Public Procurement Act ought to have been complied with in the award of contracts to the three local contractors hereinbefore referred to.

PW8 told the Court that in his capacity as Director of the Legal Affairs Division then, he sent out a questionnaire of 300 questions in order to determine the legal status of SMF so that Management and the Board would determine, by the answers to those 300 questions, whether SMF was an entity worth dealing with. He said SMF responded to only few of the questions in the questionnaire and that some of the answers given were vague, before the execution of Exhibit B1-10; he told the Court that he raised further questions in his due diligence Report and that the due diligence was still ongoing when Exhibit B1-10 was executed.

I refer to Exhibit P1-4 of 2nd December 2016 especially Exhibit P1 at paragraph 3 where the Director of Legal Affairs and Board Secretary, PW8 said “... *I have substantially placed reliance on the Due Diligence exercise conducted by the Legal Division on SISIMI, exercise of which was not fully carried out; however, whilst I was away on leave in August 2016, when I came back I met an executed JVA*”.

PW8 told the Court that financial and technical due diligence was undertaken but that the legal due diligence was not complete before Exhibit C1-12 was executed. In this regard, he corroborates the testimony of PW7, Elizabeth Cole. Had there been prior planning, legal due diligence would have been completed before the execution of Exhibit C(1-12) by the deceased and A2.

⁸ Per Lord Simon, L.C in *Nokes v Doncaster Amalgamated Collieries* (1940) A.C. 1014, 1022

At pages 121-122 of the Judge's notes, on 19th October 2019, PW15 had this to tell the Court:

"When the design team came to Sierra Leone in February 2017, (by which time the moneys hereinbefore referred to had been transferred to Laurel Design Alliance' account), the A2 chaired the meeting for the scope of the project to be rearranged because the amount was a large amount; \$825,000.00; so she wanted that amount to include the project management to completion. This was agreed at the meeting. It was agreed that this new suggestion by A2 will be included in the Agreement with Laurel Design but this never happened and I was frustrated".

To my mind, the above defeats the Accused' argument that there was prior planning. Had there been any prior planning, A2 would not have had to suggest a different contract for designs in 2017 after the payment of an equivalent of \$1,000,000.00 in 2016 and transfer therefrom into the account of Laurel Designs Alliance Inc. The agreement that \$825,000 represents the project amount to completion never happened. Why? Money had already been paid before any proper contract was executed, obviously because there was no prior planning before execution of Exhibit C(1-12) by the deceased and A2 with SMF.

I see pages 55 and 58 of the Judge's notes where PW7, Elizabeth Cole told the Court that she advised at a meeting on 30th August 2016 as in Exhibit D that it was premature to have a JVA because things which ought to have been done under the MOU, example, geotechnical testing of the land etc as provided for in Exhibit B had not been done. She reiterated that the MOU had not been complied with and that due diligence had not been completed before the execution of Exhibit C(1-12). This testimony corroborates Kamanda-Bongay's position at paragraph 4.4 of Exhibit J.

It is my considered view that the evidence shows that both the deceased and A2, whose functions respectively concerned the administration and management of public property including public funds engaged in a project with Sisimi Medical Foundation for the construction of an ultra-modern medical facility *without prior planning*.

Count 2

I adopt my reasoning in respect of Count 4 herein and hold that the deceased and A2 whose functions respectively concerned the administration and management of public property including public funds conspired to engage and did engage in a project with Sisimi Medical Foundation for the construction of an ultra-modern medical facility *without prior planning*.

In light of the above, I now return the following verdict:

A2

Count 1- Guilty

Count 2- Guilty

Count 3- Guilty

Count 4- Guilty
Count 5- Not Guilty
Count 6- Not Guilty



.....
Hon. Jst. Miatta Maria Samba, J.S.C

