

**The Attitudinal Behavioural Case/The State v. Philip Conteh, Allieu Kamara, Lansana Zanto Kamara
before Hon. Mr. Justice N.C.Brown-Marke
19 May 2011**

FACTS: The ABC was set up by the President to pursue the "agenda for change" and funded partly by the GOSL through the Ministry of Information and Communications (MOIC). Conteh was its Executive Director, Allieu Kamara its Programme Manager and Zanto Kamara, Regional Co-ordinator. All Accused denied all the charges brought under the ACA 2008. Counts 1 and 2 charge Conteh and Allieu Kamara with willful failure to comply with the rules on the management of donations under s. 48 (2) (b) ACA. Count 3 charges Zanto under s. 37(1) ACA with misappropriating Le 2 million meant for payment of rent at Lunsar, while count 4 charges Zanto with abuse of office under s. 42(1) ACA by *improperly conferring an advantage on himself* in the form of that Le 2 Million. Count 5 charges Zanto with abuse of position under s. 43 ACA *by failing to perform an act in the discharge of his duties* i.e. by not using the entire Le 6 million for the Lunsar rent. Counts 6 through 12 charge Conteh and Allieu Kamara with misappropriation of Roger's (the ABC's Bo District Focal Person's) salary between May to November 2010. Count 13 charges Conteh and Allieu Kamara with abuse of office for *improperly conferring advantages on themselves*, i.e. Roger's salary, while count 14 charges them with abuse of position by *failing to pay* Rogers. Count 15 charges Conteh with obstructing justice under s. 127 (1) ACA, by failing to provide the 2 sureties required by the ACC. Counts 16 and 17 charge Conteh with failing to attend ACC interviews thereby obstructing justice under s. 127 (1) and failing to comply with a requirement under the ACA, s. 130 (1) ACA.

The ABC received funds from the GOSL and donors. A credit deposit slip from 2009 shows that Le317, 275, 000 was paid into the ABC's account (funding source undisclosed in judgment). In 2010, Le149, 800,000 was allocated to the ABC from the Ministry for Finance (MOFED) through the MOIC, to be provided quarterly for non-salary budgetary requirements. Additionally, the evidence is that ABC staff were paid for 4 months from the GOSL's consolidated fund and that the ABC received a monthly imprest of Le 1 million from the GOSL. However, in March 2010, Allieu Kamara met London Mining's (LM) Managing Director (MD) in Lunsar, then later in Freetown, Allieu Kamara and Conteh spoke with LM's CEO. The Accused claimed they sought LM's help to pay salaries.¹ However, the GOSL schedule for salaries indicates payments to ABC staff for September to December 2010. In April 2010, Conteh sent LM a draft budget for June to August 2010 for \$88,660 inclusive Le 8 million for rent. LM's letter of 12 June 2010 to the ABC confirmed it would provide \$85,000. The MOIC had a general Bank of Sierra Leone (BOSL) account, but it was the ABC's Sierra Leone Commercial Bank (SLCB) account that was so credited on 22 and 25 June 2010. The ABC did not apply through the Accountant General to open a new/separate bank account, neither did the ABC report periodically to their Ministry's Permanent Secretary (PS) upon receipt of funds; both binding protocols on MDAs. LM paid additional sums of \$10,000 and \$8000; this \$18,000 went towards the salaries of 2 persons in August and September 2010. In total, LM donated \$113,000 to ABC. Conteh's letter of 27 September 2010 to LM suggests ABC tried to claim salaries for Roger's for August 2010 twice. Comium also donated Le150 Million to the ABC, evidenced by ABC's bank statement, a copy of Comium's cheque and a receipt from Conteh. Also in evidence were 89 cheques drawn from ABC's account to which Conteh and Allieu Sesay were signatories in 2009 and at one point only Conteh was signatory.² 5 of these cheques mentioned in passing were from 2009 and 2010.³

Regarding Counts 1 and 2, Conteh says that he knew nothing of the relevant regulations. Regarding counts 3 through 5, the Lunsar landlord confirmed that he leased the property to Zanto was for 1 year from July 2010 for Le 4 Million. Zanto argued it was a biannual lease, and that the Le 4 million was a tentative payment. He claimed they'd envisaged a bi-annual rent of Le 6 million for Lunsar hence the cheque for Le 6 million and that Conteh and Allieu Kamara authorized him to retain the Le 2 million till given the balance. Zanto claimed he gave that Le 2 million to a woman in Lunsar to keep. Regarding counts 6 through 14 concerning

¹ The **ABC** Judgment, pp. 12-13, statement of Philip Conteh, exhibit 1; "We never received monies from GOSL for salaries since the establishment of the ABC secretariat. That is the reason for the backlog."

² "The first (specimen signature) card is dated 13 March 2009. The mandate is for 2 signatures; that of the 1st Accused (...) and (...) 2nd Accused (...) The second card (...) is undated, but it gives the mandate to sign cheques, unusually to 1st Accused alone"; The **ABC** Judgment, p. 18.

³ The **ABC** Judgment, p. 13.

Rogers' salary, Conteh and Allieu Kamara were responsible for paying salaries. They denied retaining Rogers' salaries for May through November 2010, during which he received no monies, despite the fact that they had secured his signature on payment vouchers for August and September 2010. According to Conteh salaries were paid in full for May to July 2010 and therefore Rogers was paid, but vouchers to verify the recipients of these payments are factually absent. ABC's salary records for August and September 2010 show that salaries were paid, but these records do not indicate the precise dates of these payments.⁴ Conteh attributes informational gaps to losing records during a burglary of computers and documents on August 2010, but admits to a *financial system generally indifferent to basic accounting principles; there was poor record keeping, including neglect of the use of vouchers and staff simply signed for salaries received.* PW9⁵ tendered the MOIC schedule of payments of salary⁶ made to ABC staff for September to December 2010 and testified that the 3 Accused and Rogers received salaries from the GOSL in arrears for September to December 2010; which would mean a periodic overlap with the provision of LM funds for the same period. However, Rogers' name is not on this schedule. Regarding counts 16 and 17, a s. 63(1) ACA notice, was served on Conteh and he allegedly failed to comply by providing 2 sureties, initially refusing to be interviewed and being uncooperative during interviews.

JUDGE'S REASONING: ABC was a public body. It was set up by the President, initially housed in the Office of President, State House, before moving to the MOIC, the Accused used the SL coat of arms and GOSL letterhead in their correspondence and received monies from the consolidated fund. All Accused as members of ABC's management were public officers. Regarding counts 1 and 2, the applicable regulations were regularly flouted with expenditures in the 89 cheques not being documented; Conteh and Allieu Kamara were the signatories on the specimen signature cards for the ABC's SLCB account and the cheques made mostly payable to "cash", were signed by the 1st or 2nd Accused on the back and so must have been encashed by either one of them. In the absence of vouchers, it's near impossible to track the reasons for expenditures. Conteh and Allieu Kamara do not explain the absence of supporting documents; vouchers, invoices. Despite the burglary, if such documents existed, donors should have had copies. However, Conteh would send the MD of LM reports of these expenditures with a table of activities but no supporting documents. Regarding counts 3 to 5, the handing over Le 2 million given in one's official capacity to someone who had nothing to do with one's office is unjustifiable; Zanto should have returned the money to the ABC. The landlord repeated without being asked, that the rent paid by Zanto was for one year and that Zanto consented to payment without haggling, suggesting that Zanto wanted to retain the balance. The Prosecution bore no obligation to investigate whether Le 2 million was with Mamusu or not. The complaint against Zanto supporting the charges under ss. 42(1), 43 and 37(1) ACA is the same; the Accused is alleged to have misappropriated a certain sum and he abused his office and position by misappropriating that sum. The sentences imposed recognize that ss. 42 (1) and 43 ACA are alternatives to the charge in s. 37(1). Regarding counts 6 to 14, Rogers is considered a truthful witness and his evidence trumps. However, since it is unclear that the Accused received monies for salaries for Rogers for October and December 2010, they are given the benefit of the doubt. Further, counts 13 and 14 bunch up several offences in a single count and so are duplicitous; they allege that several transactions concerning Rogers \$1050 were committed "*on a date unknown between May and November.*" This phrasing deprives the Court of jurisdiction. Regarding counts 15 to 17, the ACC need not rely on the Court to punish suspects since it can arrest uncooperative suspects. It was not evident that Conteh was uncooperative. Although he did not immediately oblige the ACC's invite on 23 November 2010, he turned up 2 days later, cooperated with the 5 day interview and surrendered documents. J. Brown-Marke expressed a preference for not being bound by the Le 30 million minimum fine for a guilty verdict in respect of ss. 37, 42 and 43 ACA.

VERDICT: Conteh and Allieu Kamara were convicted on count 1 and fined Le 30 million each with an alternative 3 year imprisonment term. Although convicted of count 2, they were only cautioned and discharged of it, in view of sentence in count 1. Both were convicted on count 6 and fined Le 30 million each, with an alternative 3 year imprisonment term. Although convicted of counts 7-10, they were only cautioned and discharged on those counts in view of the sentence in count 6. Both were acquitted on count

⁴ The ABC Judgment, p. 22; "*Exhibit 4 is the salary record for August 2010 (...) Exhibit 5 is that for September 2010.*"

⁵ Allanson Moriba, the MOIC Accountant.

⁶ The ABC Judgment, p. 23; "*Exhibit 37 (...) This document (which) is headed GOSL -MOIC-ABC Secretariat - Schedule of Salary for the months of September-December 2010.*"

11 and simply discharged on counts 13 and 14. Zanto was convicted of count 3 and fined Le 30 million, with an alternative 3 year imprisonment term. Zanto was also convicted of counts 4 and 5, but in view of the sentence in count 3, he was only cautioned and discharged on those counts. Conteh was acquitted on counts 15, 16, 17. Fines were cumulative, while imprisonment was to run concurrently.

APPLIED LAW: The Prosecution bears the burden of proof on a standard of proof beyond reasonable doubt for every element of every offence charged. The Accused only sometimes bears the evidentiary and not the legal burden; i.e. proving or disproving a piece of evidence and only a balance of probabilities. No particular words are absolutely necessary in establishing this burden of proof: *Koroma v. R (1964-66) ALR SL 542 at 548 LL4-5*. The legal burden never shifts except where the Accused relies on the defence of insanity. Where the Prosecution fails to prove its case beyond reasonable doubt, even a weak Defence's case will be given the benefit of the doubt. Despite a joint trial, each Accused's case/evidence must be treated separately. Evidence inculcating one Accused should not be treated as necessarily inculcating another. Where there is no direct or circumstantial evidence establishing an Accused's guilt, independent of the evidence against their co-Accused, he is entitled to an acquittal.

Misappropriation of donor funds under s. 37 (1) ACA only requires the Accused to be part of the management of a private/ public organization managing property donated for the benefit of the people of Sierra Leone. Although dishonesty is not stated as an element of this offence, it is nonetheless required. A dishonest act is one which the Accused recognizes is dishonest by the standards of reasonable and honest people; *Ghosh [1982] 2 QB 1053*, so that his genuine belief that he was morally justified in so acting is irrelevant. Misappropriation is the adverse interference with, or usurpation of an owner's rights; *Morris [1983] 3 All ER 288*. The fact of an adverse interference is not necessarily nullified by consent; *Lawrence v. Metropolitan Police Commissioner [1971] 2 All ER 1253*, and *R v. Gomez [1993] 1 ALL ER 1*. A manager's dishonest appropriation of an employer's property is seriously incompatible with their duty; *Sinclair v. Neighbour [1966] 3 All ER 988*.

Willful or negligent failure to comply with the applicable procedures under s. 48(2) ACA only requires the Accused to have access to or control of public property not necessarily to be a public officer. It sets out various modes of access including administration and management, areas subject to compliance with regulation. Under s. 48 (4) ACA public property includes public funds and public funds are defined in s. 1 ACA as including donations for the benefit of Sierra Leone. The Prosecution alleged willful failure, but its mention of negligent failure in its closing address was dismissed by the Judge. The applicable rules were the FMR 2007,⁷ and the GBAA 2005.⁸ The FMR was enacted to enhance the efficiency of the GBAA.⁹ Reg. 1 FMR 2007 articulates the FMR's applicability to MDAs. Re the circumstances of the ABC case, the applicable law is as follows: Regs. 44 (1), 69 (3), 73 (1), 129 (1) FMR. Reg. 44 (1) prohibits the use, lending/borrowing of public monies by public officers. Reg. 69 (3) requires donations made to government projects to be notified to the responsible department and the Accountant General, and brought to account. Reg. 73 (1) stipulates that all disbursements of public money shall be properly supported by payment vouchers. Reg. 129 (1) FMR requires the authority of the Accountant General to open a bank account for the deposit, custody or withdrawal of public or other moneys for which a public officer is responsible.

S. 43 ACA on abuse of position makes it an offence for a public officer to knowingly do or omit to do something in the discharge of his functions, thereby contravening the law. S. 42 (1) ACA on abuse of office makes it an offence for a public officer to use his office to improperly confer an advantage on himself or any other person. The act or omission must be intended and could be the facilitating or causing of a monetary payment to someone to whom it is not due. The intention of s. 42(1) is to cover the dishonest abuse of any position of financial trust/ responsibility but it is not confined to fiduciary relationships¹⁰ and extends to

⁷ Financial Management Regulations 2007.

⁸ Government Budgeting and Accountability Act 2005.

⁹ The FMR was enacted under s. 82 GBAA which states; "The Minister may make regulations generally for carrying out the purposes of this Act."

¹⁰ Refer to also to discussion on "fiduciary relationships" in work by this author; Hudroge A., (2015), *The Sierra Leone Anti-Commission Case Law Reports*. The relevant authority is, *The State v. Alimu Bah*, The High Court of Sierra Leone, Hon. Justice M.M.Y.Sey, 17 June 2010; see specifically the **Critique** at p. 364.

fraudulent acts of employees that cannot be prosecuted as theft; *The State v. Fofanah and Mans* 18 January 2011. Under s. 1 ACA, advantage includes monetary payments and a public officer is a member of a public body, including a person holding or acting in an office in any of the three branches of government, whether appointed, elected, permanent, temporary, paid, unpaid. S.1 also defines public body as one set up partly or wholly out of public funds, whether from the consolidated funds or otherwise.

S. 130 (1) ACA makes it an offence to fail to comply with any requirement under the ACA for which no offence is specifically created and the ensuing penalty is a fine of no less than Le 5 million. S.127 (1) (a) criminalizes the obstruction or hindrance, without justification or lawful excuse, of a person acting under the ACA. The ensuing penalty under s. 127 (2) is a fine of no less than Le 5 million or imprisonment term of a minimum of 3 years, or both this fine and imprisonment term.

ANALYSIS: I. Circumstantial evidence: The Prosecution's compelling evidence notwithstanding, no mention is made of the fact that the Defence did not call the individual whose word, that he paid an annual rent of Le 3 million, influenced their expectation of the rent.

II. Potentially erroneous legal findings: A judicial reference to the rule that doubt regarding the Accused's guilt in respect of a charge should compel an acquittal on that charge, erroneously expresses the standard of doubt as "any" doubt,¹¹ whereas it should be "reasonable" doubt.¹²

III. Precedential consistency: For the definition of *misappropriation* and of *willfulness*, J. Brown-Marke refers to his statements in prior ACC judgments; *The State v. Hamzaa Sesay and Bendu*, 10 Feb 2011, culled from his prior statements in *The State v. Manneh and Anor*, 20 May 2008. On the burden and standard of proof, he refers to his prior ACC judgment in *The State v. Fofanah and Mans*, 18 January 2011. Although he does not expressly cite *The State v. Philip Lukuley*, 11 July 2011, the latter is adhered to by statements here, in **ABC**, that the ACC has coercive powers including arrest to secure the compliance of the suspect and that the Court should not be the primary resort for sanctions against the Accused for uncooperative conduct.¹³

IV. Re Governance: Reg. 69 (3) FMR requires donations made to government projects to be notified to the responsible department and the Accountant General. Funding modalities should be standardized across MDAs, with grant seeking being thoroughly formalized and centralized, meaning channeled through and with prior authorization of either department, the Ministry or GOSL, with all major stakeholders copied in and not simply conducted on personal initiative. This would result in donations being made directly to the department as a collective and not to a "project" within it, avoiding the need for the communication in Reg. 69 (3). Other areas concerning funding that should be standardized and made starkly clear as much as possible if not across, at least within MDAs, are the modes of communication/interaction between project/programme stakeholders, methods of project implementation and modes of accessing funds. This is so that illegitimacy can be promptly identified through deviancy. Conteh says that the GOSL never funded salary payments, and that LMC helped address the backlog¹⁴ but the evidence contradicts this.¹⁵ Although LMC appeared to concede liberty to ABC in the employ of its donations, the appropriateness of relying extensively on LMC for the payment of staff salaries is questionable; as is the fact that a new public body should be established without funding for the payment of salaries having been secured/worked out. It was held that since the Accused were the ABC account signatories **and** since their signatures were on the back of the cheques, they encashed the cheques they made out to themselves. This indicates a need for a systemic check against the signatories to an MDAs exclusive account being drawn exclusively from members of its management/staff able to exercise the dual powers of issuing cheques to, and for encashment by, themselves. The tendency to do the latter might be heightened by management/signatories also being programme/project implementers. It's worth considering how these functions might be suitably broken down.

¹¹ The **ABC** Judgment, p. 30.

¹² The **ABC** Judgment, p. 31.

¹³ See p. 5 of snapshot **II. Diligent Case Preparation**, heading 2; **The Defective Framing of Charges**. Specifically, **2.B. Inappropriate Channel for Enforcing Compliance**.

¹⁴ The **ABC** Judgment, pp. 12 and 13.

¹⁵ See FN 6 above.

V. Knowledge/Information Management: ABC's management did not from inception institute a practice of thorough documenting of expenditure. Conteh confirmed that ABC's financial system was a *financial system generally indifferent to basic accounting principles; there was poor record keeping, including neglect of the use of vouchers and staff simply signed for salaries received. "Its vision on paper about behavioral change said nothing about financial probity."*¹⁶ This is a point well worthy of consideration and further development as the review evinces IM/KM as a critical factor in the commission of corruption offences. The mass of documentary evidence in ABC, came from the private sector (e.g. LMC) which although evidently more adept at information management, did not demand proof of expenditure of its donations from the ABC.¹⁷ Conteh and Allieu Kamara maintained no supporting documents for expenditures of cheques which they issued and encashed. However, Reg. 73 (1) requires that vouchers accompany the disbursement of public funds. Those records that *were* being generated were arguably ineffectual; the ABC judgment and others reviewed highlight a tendency for cheques¹⁸/ payment vouchers¹⁹ to be made payable to "cash," instead of being payable to an actual named payee/beneficiary. Also, the MOIC Accountant was to obtain receipts for all monies the MOIC budget Committee paid to the ABC, but instead kept a notebook (not in evidence) of these payments to the ABC and only had receipts for the sum of Le 6 million. Conteh attributed the fact of ABC having scanty records of its financial activities to an office burglary in August 2010 when most PCs and documents were stolen. This loss could have been mitigated by maintaining duplicates of records in alternative loci²⁰; saved in a secure location on a central network or share drive for all ABC staff or the MOIC intranet or network, or on a hard drive in a safe. *"The only reason why proper and adequate records of expenditure were not kept, was to use the monies donated for purposes other than those for which they were meant."*²¹ This principle appears to be gaining the status of a rebuttable presumption and given ABC preceded Daoh, it may well have influenced the Prosecution's case theory there, although there was no precedential citing of it in Daoh. If indeed it motivated the prosecution of Daoh, then the Prosecution erred in not proffering a more appropriate charge for the analogous facts of Daoh; failure to comply with applicable law under s. 48 (2) (b) ACA. The ABC appears to have only maintained salary records for August and September 2010.²²

MEDIA REVIEW: ABC was launched in 2008, its agenda articulated by State House Reps. published in the Patriotic Vanguard. In 2009 prior to trial, Conteh was criticized by the media regarding Fyfe at his home. Openly satirical papers provided less factual coverage of the trial. Conforming to the general trend, media coverage was likely to contextualize the verdict against other ACC trial verdicts especially the preceding and the succeeding trial verdicts, with intense and opinionated coverage at the indictment and verdict stage, but more factual than polemic coverage during trial. Here, at the indictment and verdict stages, *Nassit ferrygate* reared its head; *Awoko* exclaimed the ABC indictments were a publicity ploy to divert attention away from *ferrygate* and *CARL* raised *ferrygate* at the verdict stage. Against the backdrop of *ferrygate*, the ABC sentences caused the Press generally to lament fines in favour of custodial sentences saying fines were paid off by the political establishment. Cumulative and concurrent terms and fines tend to be misunderstood and misrepresented. There was spin off press coverage on Conteh's failure to surrender his official car 2 months post-verdict, on continuing allegations of corruption and infighting at the ABC under different leadership, and on ABC's continued failure to pay Rogers, denied by the ABC. In 2012, ABC got cozy with African Minerals (AM) and expressed a desire to partner up with AM. In 2014, ABC signed an MOU with the ACC for closer collaboration to fight corruption through educational and research ventures.

¹⁶ The ABC Judgment, p. 21.

¹⁷ The ABC Judgment, p. 29; *"Even if this were so (thefts), the donors would have been favoured with copies of such documents (...) When one is dealing with monies which are not one's own, but which are intended for specific purposes, the least one is expected to do would be, in my judgment, to let the persons who made these monies available, aware of how they were spent."*

¹⁸ See FN 3; regarding the 89 cheques, the 5 that are mentioned in passing are mostly made payable to "cash."

¹⁹ The ABC Judgment, pp. 20-21; LMC vouchers here, specifically exhibits 25 to 28.

²⁰ See FN 17.

²¹ The ABC Judgment, p.29.

²² Unclear whether these are even specifically ABC records; *"Exhibit 4 is the salary record for August 2010(...) Exhibit 5 is that of September 2010."*

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