IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE, HELD AT ACCRA, ON TUESDAY, THE 12TH DAY OF MAY, 2020 BEFORE HIS LORDSHIP, ERIC KYEI BAFFOUR, ESQ., JUSTICE OF THE COURT OF APPEAL SITTING AS AN ADDITIONAL JUSTICE OF THE HIGH COURT

SUIT NO. CR/904/2017

THE REPUBLIC

VRS

1. **EUGENE BAFFOE BONNIE**
2. **MATTHEW WILLIAM TETTEH TEVIE**
3. **DR. OWUSU ENSAW**
4. **ALHAJI SALIFU MIMINA OSMAN**
5. **GEORGE DEREK OPPONG**

JUDGMENT

"…the Pegasus as well known is a Greek mythical immortal winged horse endowed with supernatural powers that served as a breakthrough to freedom. My Lord, everybody wants freedom and the name itself suggests that it has very powerful capabilities, that is the Pegasus system"

Per the 4th Accused, Alhaji Salifu Mimina Osman on the 18th day of February, 2020 at

page 6 of the proceedings on that day. Indeed Pegasus, the offspring of the Olympian god Poseidon is captured in the image of a visible pure white horse in Greek mythology. He was caught by Bellerophon and was ridden on to defeat chimera. In an attempt to reach mount Olympus, this winged horse was transformed into a constellation in the northern sky.

The manufacture and sale by an Israeli company by name NSO Group Technologies Ltd (NSO) of a modern equipment, named after this Greek mythical figure having the functionalities, among others, of monitoring phone calls, including those of Whatsapp (see page 2 of the proceedings on the 7th of February, 2020): as to whether or not the Board of the National Communications Authority (NCA) approved the use of its monies for the purchase of such an equipment or that there was no need for such an approval at all, whether the accused persons did benefit personally as officers of the public or otherwise in the purchase, whether the National Security Council Secretariat (NSCS) had made a request for US$8 Million for such an equipment, are among some of the issues that are at the heart of the seventeen charges preferred by the Republic against the accused persons.

The accused persons were arraigned before the court on the 22nd of December, 2017 on seventeen charges. A1 was charged with eight counts. A2 with eight counts as A1. A3 with six of the counts. A4 with seven of the counts whilst A5 on the other hand was charged with six of the counts. The charges range from conspiracy to wilfully cause financial loss to the State, wilfully causing financial loss to the State, conspiracy to steal, stealing, using public office for profit, contravention of the Public Procurement Act, Money laundering, intentionally misplaying public property, all contrary to sections 23(1) and 179A(3)(a), 124(1), 179C(a) all of the Criminal Offences Act, 1960, Act 29, sections 92(1), 14(1)(a), 15(1) of the Public Procurement

Act, 2003, Act 663, sections 1(1)(c) of the Anti-Money Laundering Act, Act 749, 2007 and finally section 1(2) of the Public Property Protection Act, 1977, SMCD 140, respectively.

The facts as recounted by prosecution is that the first accused, a former chairperson of the Board of NCA, 2nd accused, the former Director-General of NCA, third accused, a Board member and chairman of the Finance sub-committee of the NCA and the fourth accused, being also a Board member and the former Deputy National Security Coordinator until December, 2016, all without any provision having been made in the budget and supplementary budgets of NCA in 2015 and 2016 for the purchase of a cyber-surveillance equipment, and with the NCA not having discussed and approved the use of NCA's money for the purchase of such equipment, A5 was engaged by A1 for A2 to sign an agreement with A5 for the latter to be a reseller of a Pegasus equipment to NCA. That in the process all the accused persons agreed to act together to steal and cause the various offences for which they have been charged wherein A4, being the Deputy National Security Coordinator authored a letter purporting it to have emanated from the National Security Council Secretariat (NSCS) requesting for an amount of $US8 Million as institutional support for the NSCS for the purchase of a cyber-surveillance equipment. That by this letter generated by A4, the Finance Director of NCA was made to act under the directions of A1 and A2 to transfer an amount of $US4 Million into the account of Infralocks Development Ltd, (IDL) controlled by A5, when there had also not been any necessary required processes for selection of such an entity as required by the Procurement laws of the country for IDL to undertake such purchase of goods. That upon receipt of the monies, A5 transferred an amount of $1 US Million to an Israeli company, NSO Group Technologies for the purchase of a Pegasus equipment. That the $3 US Million was kept for the personal use of the Accused persons, who upon the matter coming to light, an amount of $I US

Million was retrieved from A5.All the accused persons pleaded not guilty for which reason by law prosecution had to lead evidence against them to establish the charges.

With the Accused Persons having pleaded not guilty to all the charges, prosecution called six witnesses in support of its case. And these in order of their appearance before the court were Pw1 – Abena Kwarkoa Asafo–Adjei, Head of Legal and Secretary to the Board of National Communications Authority, (NCA), Pw2 – Dr. Isaac Yaw Ani, Director of Finance, NCA, Pw3 – Col. Michael Kwadwo Opoku, Director of Operations – National Security Council Secretariat, Pw4 – Henry Aplehe Kanor, Director-General, Technical Operations, NCA, Pw5 – Duncan Opare, Deputy National Security Coordinator, and Pw6 – D/C/Inspector Michael Nkrumah, a Police detective attached to the Bureau of National Investigations (BNI).

At the close of the case of prosecution, all the accused persons made submissions of no case to answer. The court in a ruling delivered on the 23rd of May, 2019 dismissed all the submissions and invited the accused persons to open their defence with the exception of A3 who the court found that the prosecution had not been able to establish a *prima facie* case against him in respect of counts 1, 2, 7 and 17 out of the six counts. The court invited A3 to open his defence only in respect of counts 3 and 14. The Court of Appeal on the 25th of March, 2020 in a ruling delivered in respect of an appeal by the 3rd Accused disagreed with the court on its invitation to A3 to open his defence on the two remaining counts and accordingly acquitted and discharged A3 on the two remaining counts. A3 therefore is not part of the proceedings for the evidence that was led for and against him to be considered in this judgment.

BURDEN OF PROOF

It is apt before I proceed to evaluate the evidence led during trial that I set out the

burden that prosecution bears in a criminal case of this nature. Section 11(2) of the Evidence Act, NRCD 323 states that in a criminal action the burden on the prosecution of facts essential to guilt requires the prosecution to produce sufficient evidence so that the court can find the guilt of the accused proved beyond reasonable doubt.

And section 13(1) states as follows:

> *'in any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt'.*

And there seems to be a further emphasis under section 22 of the Evidence Act which states that:

> *'in a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond reasonable doubt…'*

As far as the standard of reasonable doubt is concerned there is no room for an accused to be convicted on the basis that the charges or the allegations against him might be true. If there is such a possibility then what it means is that prosecution has not made out a case or has not proved its case beyond reasonable doubt. There could be a doubt only that the doubt should not affect a reasonable person's belief regarding the guilt of an accused. It is on that score that Lord Denning notes in **MILLER v MINISTER OF PENSIONS** [1947] ALL ER 372 @ 373 that it is needless for prosecution to attempt to proof the guilt of the accused beyond a shadow of doubt

since that standard will be impossible to attain and were the law to allow that there will be the admission of fanciful possibilities to deflect the course of justice. In effect and in simple language the standard expected of prosecution by reasonable doubt means that by the end of the trial prosecution must prove all the elements of the offences charged and the explanations offered by the accused must be one that is not reasonable probably. See Justice Brobbey in his work Essentials of Ghana Law of Evidence at pages 48-55. Lord Chief Justice of the King's Bench from 1822 - 1841, Charles Kendal Bushe put what is reasonable doubt in a much more elegant language as follows:

> *"... the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as upon a calm view of the whole evidence a rational understanding will suggest to an honest heart the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice or subdued by fear".*

See also **OSEI v THE REPUBLIC** [2009] 24 MLRG 203, CA; **ABODAKPI v THE REPUBLIC** [2008] 2 GMJ 33; **REPUBLIC v UYANWUNE** [2013] 58 GMJ 162; **TETTEH V THE REPUBLIC** [2001-2002] SCGLR 854**; DEXTER JOHNSON v THE REPUBLIC** [2011] 2 SCGLR 601; **FRIMPONG A.K.A IBOMAN v REPUBLIC** [2012] 1 SCGLR 297.

Accused however is not under any obligation to prove his innocence as the burden of proof is on the prosecution throughout the trial. All that an accused is required to do when invited to open his defence is to raise reasonable doubt regarding his guilt. It is only when the defence raised is not reasonably probable that an accused would be

convicted. The Supreme Court aptly put it in the case of **MALLAM ALI YUSIF v THE REPUBLIC** [2003-2004] SCGLR 174 that:

> *"the burden of producing evidence and the burden of persuasion are the components of 'the burden of proof.' Thus, although an accused person is not required to prove his innocence, during the course of his trial, he may run a risk of non-production of evidence and/or non-persuasion to the required degree of belief, particularly when he is called upon to mount a defence"*

With the burden of proof satisfied only when it has been proved to the standard required by law by the prosecution in mind, I proceed to an examination of the evidence led in respect of each of the counts against the accused persons.

COUNTS ONE AND TWO ON THE CHARGES OF CONSPIRACY TO WILFULLY CAUSE FINANCIAL LOSS TO THE STATE AND WILFULLY CAUSING FINANCIAL LOSS TO THE STATE AGAINST A1, A2, A4 AND A5.

A1, A2, A4 and A5 are charged with the offence of conspiracy to wilfully cause financial loss to the State under count one. They have also been charged under count two for wilfully causing financial loss to the State. Ghana has reshaped the meaning and scope of its law on conspiracy through the new formulation as set out by the Statute Law Revision Commission and as affirmed by Dotse JSC in the case of **FRANCIS YIRENKYI v THE REPUBLIC** Suit No J3/7/2015. In the new formulation of conspiracy under section 23(1) of the Criminal and Other Offences Act, Act 29, 1960 it has been restated as follows:

> *"Where two or more persons agree to act together with a common purpose for*

or in committing or abetting a criminal offence, whether with or without previous a concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence".

What used to be rendered as two or more persons agreeing or acting together with a common purpose has now been changed to one of agreement to act together. For prosecution to be deemed to have established a prima facie case, the evidence led without more, should prove that:

i. That there were at least two or more persons
ii. That there was an agreement to act together
iii. That sole purpose for the agreement to act together was for a criminal enterprise.

The new rendition no doubt has narrowed the scope of the law of conspiracy in Ghana. It is however no defence for an accused to claim when found acting together with others to contend that it cannot be used as evidence of a prior concert or deliberations. For any interpretation that appears to ignore the latter part of section 23(1) of Act 29 to the effect that "… *whether with or without any previous concert or deliberation",* would have missed the import of the offence of conspiracy. Indeed under illustrations to the section 23(1), the subsection (1) illustration is still maintained to the effect that *"if a lawful assembly is violently disturbed (section 204), the persons who take part in the disturbance have committed conspiracy to disturb it, although they may not have violently committed any violence and although they do not act in pursuance of a previous concert or deliberations"*. As the illustration cannot be deemed to be part of the law, as a common law principle of interpretation, it points to a better appreciation and illumination of our understanding of the provision under

consideration, the explanation provided as quoted above shed light on the ambit of the law on conspiracy. The Supreme Court has thrown a more searching light to illuminate ones appreciation of the new law on conspiracy in the case of **FAISAL MOHAMMED AKILU v THE REPUBLIC** [2017-2016] SCGLR 444 dated 5th July, 2017 wherein Yaw Appau JSC stated on conspiracy under current Ghanaian law as follows:

> *"From the definition of conspiracy as provided under section 23(1) of Act 29/60, a person could be charged with the offence even if he did not partake in the accomplishment of the said crime, where it is found that prior to the actual committal of the crime, he agreed with another or others with a common purpose for or in committing or abetting that crime… However, where there is evidence that the person did in fact, take part in committing the crime, the particulars of the conspiracy charge would read; "he acted together with another or others with a common purpose for or in committing or abetting the crime". This double-edged definition of conspiracy arises from the undeniable fact that it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. Conspiracy could therefore be inferred from the mere act of having taken part in the crime where the crime was actually committed. Where the conspiracy charge is hinged on an alleged acting together or in concert, the prosecution is tasked with the duty to prove or establish the role each of the alleged conspirators played in accomplishing the crime".*

In that respect, notwithstanding the removal of the word *'or'* persons found to have committed or committing a crime together would be deemed to have had previous concert or deliberations to commit the crime because of the words "*whether with or*

without any previous concert or deliberation" which is still part of the definition of criminal conspiracy. Was there an agreement to act together for a common criminal purpose for which each of the persons was a party to? As the scope of our law on conspiracy must require a proof by prosecution of agreement to act together, it would be needful that I set out the ingredients and scope of the substantive offence of causing financial loss to the Republic to discuss the conspiracy and the substantive offence together. The substantive offence states under section 179A (3) (a) of Act 29 as follows:

> *"A person commits a criminal offence through whose wilful, malicious or fraudulent action or omission – (a) the Republic incurs a financial loss"*

Afreh JSC stated the ingredients of the offence of causing financial loss to the Republic in the case of **REPUBLIC v ADAM & OTHERS** [2003-2005] 2 GLR 661 to be "(a) financial loss (b) caused to the State (c) caused through the action or omission of the accused (d) that the accused (i) intended or desired to cause loss or (ii) foresaw the loss as virtually certain and took an unjustifiable risk of it or (iii) foresaw the loss as the probable consequence of act and took an unreasonable risk of it; or (iv) if he had used reasonable caution and observation it would have appeared to him that his act would probably cause or contribute to cause the loss"

Baddoo JA (as he then was) in the case of **THE REPUBLIC v SELORMEY** [2001-2002] 2 GLR 429 at 430 in also dealing with the offence of causing financial loss to the State stated as follows:

> *"In plain ordinary language, it means any deliberate act or omission of any person which results in a financial loss to the State constitutes an offence.*

Therefore for the prosecution to succeed in proving this charge against the accused person they must show that: (a) the accused person took certain actions, and (b) those actions resulted in a financial loss to the State"

"Loss" as an ingredient of the offence has been interpreted in the Ibrahim Adam's case as *"damage, deprivation, detriment, injury or privation*" whiles willful has been interpreted broadly in the case of **TSIKATA v THE REPUBLIC [2003-2004] SCGLR 1068** by Modibo Ocran JSC to cover both intentional reckless acts that end in financial loss to the Republic of Ghana as well as acts with such consequences done with a bad or evil motive. It is not necessary, though, for prosecution to demonstrate any evil or bad intent on the part of the accused persons. It is still willful as long as the act was done intentionally or deliberately even if the accused persons did not foresee or intend or desire the consequences of their actions as willfulness connotes an act that is done on purpose or intentionally or knowingly and bring into being the mental element of *mens rea* that must be established to find a person guilty of an offence in criminal proceedings. The learned Judge concludes on the word '*willful'* as follows:

"in a criminal statute, the word 'willful' could, as a matter of law, cover cases in which a public officer voluntarily engages in a course of conduct which in fact injures the state financially, whether with an evil or malicious intent to injure the state, or simply actuated by a reckless and persistent disregard for laid down corporate and statutory rules, or as a result of sheer obstinacy, or as part of a bureaucratic culture of financial unaccountability. But it is also true that 'willful' may be used to describe an act which is done not only deliberately or intentionally, but in circumstances where the doer must also have intended or at least foreseen the probable consequences of their non-action. We are of the view that the first interpretation of "willful" puts more teeth into the effort to

reduce corporate lawlessness and lessen the potential incidents of financial loss to the state".

Indeed the exposition on the word wilful by the Supreme Court is consistent with what Stroud's Judicial Dictionary of Words and Phrases (5th Ed) defines willful as:

"Willful ... as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent and that what he has done arises from the spontaneous action of his will. It amounts to nothing more than this that he knows what he is doing, and he is a free agent"

See also **RE YOUNG & HARTSON** 31 CH D. 174; **LOMAS v PECK** [1947] 2 ALL E.R 547 @575. The elements were what prosecution was under duty to prove beyond reasonable doubt under counts one and two against the accused.

The substance of the testimony of Pw1, Abena Asafu-Adjei wherein she tendered among others Ex 'B', the budget of NCA for the year 2015 where no item was captured by way of institutional support to the NSCS for cyber surveillance or any form of security assistance. She also tendered the various minutes of the Board of NCA during the relevant period as Ex 'C' and 'D' series and nothing seems to have ever been discussed by the Board by way of support in whatever amount to NSCS. Exhibit 'E' series also captures the budget for the year 2016 with nothing combing through that document that shows any industry support for NSCS. It is from this background of the Board not having discussed or approved any monies by way of institutional support that Ex 'S' was signed by A2 on behalf of NCA and A5 for and on behalf of Infralocks Development Ltd. (IDL) a company which A5 is the managing

director. Ex ‘S’ was signed on the 17th of December, 2015. IDL was to be a reseller for NSO Group Technologies Ltd of Israel of the cyber intelligence equipment by name Pegasus system to NCA, which was described in the document as the ender user of the equipment but not NSCS.

Prosecution further contended that it was in pursuance of this contract which A2, though the Director-General then of NCA signed Ex ‘S’ but which was beyond his approval threshold of Gh₵100,000 that made A1 and A2 to invite Pw2, Dr. Yaw Ani, the Deputy Director - Managerial Operations but at the relevant time was the Director of Finance, to the office of A2 where A1, who was present, told him that National Security needed to procure a cyber-security equipment and NCA was to support the purchase of the equipment with US$4Million. That it was at that moment in the early February, 2016 meeting that Pw2 claim he requested for the specific letter from NSCS for the support. That A2 impressed on him to proceed with the processing whiles steps were taken to procure the letter from NSCS. The transfer letter was what was admitted as Ex ‘F’ and the request that was then deemed to have come from NSCS was Ex ‘G’. Based on that, a transfer of an amount of US$4 Million was accordingly made to the account of IDL, where upon receipt US$1 Million was transferred to NSO Technologies Ltd. Ex ‘G’ is signed by A4 on behalf of the National Security Coordinator and is dated the 24th of February, 2016. Pw3, Col. Michael Opoku had claimed in his evidence that there was no trace of Ex ‘G’ at the NSCS and the dispatch book of the NSCS also had no trace of such a letter having left the NSCS and with the serial No 4240 assigned Ex ‘G’ being actually the number for a letter sent to NCA from NSCS to deploy a transceiver at the Independence Square.

By this prosecution had linked or hooked all the four accused persons to diverse roles for the amount of US$4 Million paid from the account of NCA to IDL. Prosecution

further in its case through Pw4, Henry Kanor, Deputy Director, Technical Operations also adduced evidence that sometime in April, 2016 he was invited by A2 to a meeting where A1, A4 and A5 were present and as by law NCA was mandated to inspect all communication equipment imported into the country, he claim that he was tasked to oversee the inspection of the equipment and the site of installation when the equipment that he was told belonged to NSCS arrives. See page 4 of the proceedings of 15th of January, 2016. He supported this claim with Ex 'M', the way bill that provides the consignees as the National Security Adviser and the 5th Accused. That it was A1 who later called to inform him that the equipment had arrived in the country and A5 would call him for clearance and inspection and that A5 indeed did so as he accompanied A5 to CEPS office at AFGO DHL together with one colonel. Besides that when the equipment was cleared and sent to the house of Baba Kamara for installation by six Israelis, the equipment after its installation was confirmed to him by A1 that it was successful.

Prosecution's 5th witness in the person of Duncan Opare, the Deputy National Security Coordinator testified to the fact that the inventory of equipment at the Secretariat did not show that it had such an equipment for cyber security not having received any handing over notes. D/Inspector Michael Nkrumah attached to the BNI crowned the case of the prosecution by testifying as to the extent of his investigations and the documents that came into his custody which he tendered all before the court.

EVALUATION OF THE EVIDENCE ON COUNTS ONE AND TWO IN RELATIONS TO FIRST ACCUSED

As the accused persons are not required by law to prove their innocence, the question is would a critical evaluation of the evidence adduced during trial be sufficient enough to establish the charge of conspiracy to cause and causing financial loss to the Republic against the accused persons**.** But how is A1 connected with the first two

counts? As counsel for A1 submit that being a Board chair who does not hold any managerial position in NCA, he was not involved in the management of the affairs of the entity. That is true that A1 as a Board chair is not involved in the management of the affairs of NCA. For an examination of Ex ‘S’ or ‘T’ or ‘U’ will show that A1 did not sign them and they were all signed by A2. PW2, Dr. Yaw Ani, he it was in his evidence that first brought into the equation the involvement of A1 as he testified on the 16th of October, 2018. See page 9 of the proceedings on that day. That it was A1 that told him that there was an urgent need for National Security to procure cyber security equipment and NCA was supposed to support the enterprise with an amount of US$4 Million. That it was as a result of that engagement that later produced Ex ’G’. That found corroboration in the evidence of Pw4, Henry Kanor that he was invited to a meeting by A2 where A1, A2, A4 and A5 were present and told of the Pegasus system that was to arrive in Ghana and what he Pw4 was to do by way of inspection. Further roles played by A1 was also recounted by Pw4. See pages 3 and 4 of the proceedings on the 15th of January, 2019. Much more corroborative evidence was adduced before the court by PW6, D/Inspector Michael Nkrumah and supported his testimony with Exhibits ‘Z’, ‘AA’, ‘BB’ that were admitted without any objection. Ex ‘PP’ series that were also admitted after a careful evaluation upon the conclusion of a *voire dire,* A1 made confessions and provided details of his involvement in the whole deal.

In Exhibit ‘Z’ A1 claim that NCA could not meet the request of Yaw Donkor but he was copied on a second request after a series of terrorists attacks for which he had verbal discussions with A4 wherein a deal was struck for the US$8 Million request to be shared equally between NCA and National Security. That there was no official response to National Security besides the verbal discussions. Further that the US$4 Million was paid directly to IDL. Exhibit ‘Z’ series written by A1 alone provides

enough evidence of the level of involvement of A1 and the claim in the submission of learned counsel for A1 that A1 played no role is not a reflection of what is on record. So is the cross examination of PW1 on the 23rd of January, 2018 at page 15 of the proceedings that A1 as Board could not have known of Exhibit 'S' as he was not the one whose signature appears on the document. Being aware of the processes leading to how NCA was to pay US$4 Million, it cannot be said that A1 was not aware of Exhibit 'S'. In Exhibit 'AA', A1 states how NSO was selected based on a team decision. Without more it was indeed a correct call made by the court when A1 was invited to open his defence in respect of the first two counts.

DEFENCE OF FIRST ACCUSED

When it comes to the defence of an accused the court is guided by the three pronged approach laid down by the Supreme Court in the case of **LUTTERODT v COMMISSIONER OF POLICE** [1963] 2 GLR 429 where the court in relying on the old case of **REGINA v ABISA GRUNSHIE** (1955) 11 W.A. L.R 36 noted at page 439 of the report as follows:

"Where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages:

(1) Firstly it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the court should acquit the defendant;

(2) If the court should find itself unable to accept, or if it should consider the explanation to be not true, it should then proceed to consider whether the

explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and

(3) Finally quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e., prosecution and defence together, and be satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if not, it should acquit.

See also **AKILU v THE REPUBLIC** [2017-18] 1 SCGLR 444. And I think with this guide in mind that would be the approach of the court in testing the counts and the evidence led by prosecution and the defence put up by the accused persons.

Did A1 raise reasonable doubt regarding his guilt in respect of the first two counts applying the test set out in LUTTERODT case supra? In his evidence A1 claim that at the 33rd meeting of FINCOM, it dealt with the request being Ex '6' and that with the Board's decision on the request for a contribution of US$4 Million, management executed that decision and he played no role in the payment. Exhibit '1' is clear on how FINCOM treated the request contained in Exhibit '6' written by Mr. Yaw Donkor. FINCOM is only a committee of the Board but not the Board itself. It does not operate independent of the Board and all it does is to deliberate on financial matters and make the appropriate recommendations to the Board. FINCOM never approved NCA's monies to be disbursed to NSCS. And any attribution of a provision of a green light for payment to either FINCOM or the Board is not only untrue, incorrect but also not reasonably probable.

Besides, in yet the same breath A1 claim that the decision to pay monies to IDL was made on the basis of Exhibits 7, 8, 9 and 10. Exhibit '7' is the 41st minutes of

FINCOM held on the 19th of August, 2016. Exhibit '8' is a letter of invitation to members of FINCOM to attend its 42nd meeting which was held on the 18th of November, 2016. Exhibits '9' and '10' are the NCA's management accounts, revenue and expenditure report for the quarter ended 30th June, 2016 and 30th September, 2016. As to how mere letters for meeting and management accounts could be the basis of approval was exposed as totally no answer to the charge against A1 in the cross examination done by the DPP on the 16th of January, 2020 at page 6 of the proceedings for that day as follows:

"Q: You also said that Exhibits 7, 8, 9 and 10 were the basis of payment to IDL. Is that right?

A: Yes that is what I said. My Lord I might have misspoken on Exhibits '7' and '8' but I was referring to Ex '9 and '10' which were management accounts, revenue and expenditure report.

Q: From Ex '9' and '10' can you demonstrate to the court, why the payment of US$4 Million was made to IDL.

A: Once again I might have misspoken. What I tried to refer to was the amount that was captured on page 4 of the management account (page 4 of Exhibit '10') which has Infralocks Development Ltd – GhȻ15,498,000 being captured as part of industry support and development.

Q: It is right that the revenue and expenditure report which you have just referred to (Ex '10') is a narration of the revenue and expenditure of the NCA and for Exhibit '10' it reflected revenue and expenditure for nine months ending the 30th of September.

Is that right?

A: That is right".

The exchanges above accordingly exposed the claim of A1 which he had made on the 10th of December, 2019 at page 3 of the proceedings on that day that management executed the approval of the request in Ex 6 and '1' and that Exhibits 6, 7, 8, 9 and '10' are to that effect completely missed the point and made the defence not reasonably probable. Exhibits '9' and '10' that he claim only captured revenue and monies that had gone out and cannot be used to support a defence of an approval having been granted by the Board for the disbursement.

Again, in responding to Exhibit 'G', A1 claim that NCA took a decision to pay half of the amount. Nowhere has the court been led by A1 to know in the minutes of the Board how the Board took the decision to pay half of the amount and that claim made on the 14th of January, 2020 is also found not to be reasonably probable. The cavalier response of A1 to the charge of causing financial loss to the Republic that he was not part of the purchase process or the payment of the money is certainly not borne out by the evidence on record. I intend to leave the weightier evidence of his own confessions in Exhibit 'PP' series and the lame attempt to recant them and the impact it had on the credibility of his defence to a consideration of the stealing related offences. Suffice to say that contrary to the submission made by his learned counsel that A1 having recanted Ex 'PP' series in subsequent statements such as Exhibits 'Z', 'AA' and 'BB' together with his denial in court, the court is bound to make a finding that A1 had recanted his statement. What is at stake is the implications of inconsistent statements but not A1 having recanted his confession. For that is clear from exhibits 'Z', 'AA' and others that A1 at a point recanted what he confessed. The law is that

inconsistencies in unsworn statements of an accused as against his sworn testimony, does not inure to his benefit. The accused must be able to reasonably account for the inconsistencies. Did he do that? A1's claim in court as to how Ex 'PP' series were taken is exhaustively dealt with infra. However, the inconsistencies, contradictions and ambiguities did his case no good and completely destroyed his credibility as a witness. That was the net effect of Ex 'PP' series he wrote when he came from the comfort of his home with his lawyer to write those confessions and having later realized the damage it had done to him turned round to sing a different tune that he was in custody without the necessaries of life. I am satisfied that the evidence led in totality by prosecution proved the first two charges against A1 beyond reasonable.

THE EVALUATION OF THE EVIDENCE AGAINST SECOND ACCUSED

First, that an amount of US$4 Million was caused to be transferred by Pw2 to IDL is not in dispute. See Ex 'F' being the transfer letter and Ex 'H' being the statement of account of NCA's dollar account which shows a transfer of US$4 Million on the 11th of March, 2016 to IDL. If this amount was not lawfully ordered to be transferred from NCA dollar account, then all persons who deliberately or intentionally played diverse roles, in the absence of an explanation that must be reasonably probable stands in danger of conspiracy to cause and causing financial loss to the Republic. From the record before the court was there any approval for the disbursement of such monies and if there had to be approval, who or what body was mandated to give that approval? The Director of Finance who had worked with NCA for over eighteen years at the time he testified claim that there were approval limits at NCA and for a Director General of NCA, he could only authorize payment from the coffers of NCA when the money involved was not more than Gh₵100,000.00. This claim of an approval threshold limit of Gh₵100,000 for the Director-General has stoutly been challenged by learned counsel for A2 that with prosecution not having produced

before the court any document in a form of regulations or policy of NCA that document approval levels means that A2's right as the Director General to spend NCA's monies was not fettered. See page 20 of the written submission of learned counsel.

It is true that prosecution is under a duty to prove its case beyond reasonable doubt and merely stating that there were approval limits without the necessary policy or regulations from NCA would not suffice to establish that claim. However A2 himself admit or concede that the expenditure within his limit was only in respect of small ticket items like fuel, papers, toners and for big spending items he needed Board approval before making expenditure of that nature. For this was A2's own admission under cross examination from prosecution on the 30th of January, 2020 at page 12 of the proceedings that:

"Q: As Director-General, can you tell the court what your approval limit was when were at NCA?

A: I did not have a specific approval limit. So long as I got the green light from the Board, the transactions would take place. I cannot show you a particular document which says that the approval limit for the Director-General was 'x' amount of cedis.

Q: This would mean that you as Director General could spend with the approval of the Board

A: The Board has to give me directive to spend before I could spend. But for expenses like medical bills, fuel and other miscellaneous items like paper and toner for the printers, I could approve these ones. But for big ticket items I needed explicit approval

from the Board".

From the above I hold that the claim that A2 as Director-General could spend as much as he wanted of the funds of NCA is not correct. For A2 was only limited to spending in small ticket items to ensure the daily running of the administration of NCA but when it came to spending big amounts like the one in contention, A2 definitely needed the approval of the board. What is more, defence tendered through PW2, Exhibit '6' being a letter from the then National Security Coordinator, Mr. Yaw Donkor for institutional support of US$34 Million. The procedure that was used in treating the request at Exhibit '1' provides a deep introspection as to how request for huge sums of money are treated at NCA. The manner that Exhibit '6' was treated is adequately captured in Exhibit '1' also tendered through Pw2. At page 2 of Exhibit '1' it notes the Finance Committee (FINCOM) acknowledgement of Exhibit '6' from Yaw Donkor for financial support for NSCS. The meeting decided that acceding to the demand for US$34 Million was not feasible and management was to take a look at figures that were feasible and capture it in its future budget. From this I am safe to find as a fact that request for support would first be referred to FINCOM. And after its deliberations if same is approved, the Board would be notified of the recommendations of FINCOM for its blessings before any spending of huge amount is made.

Exhibit '6' was shelved by FINCOM on the 8th of June, 2015. However, without any evidence that there had been another request for support for such request to have been deliberated upon by FINCOM for its recommendations to have gone to the Board for approval or rejection, or any evidence that the financial standings of NCA had improved for it to have captured the request in Ex '6' in its future budget for disbursement of monies to NSCS, A2 on the 17th of December, 2015 signed Ex 'S' for NCA to part with US$8 Million of NCA's monies. There is nothing like conditional

approval as A2 sought to impress upon the court in Ex '6'. It was rejected with a caveat that if the finances of NCA improves in the future, that may be considered and captured in the future budget of NCA. The budget for the year 2015 as seen in Ex 'B' did not capture any expenditure for NSCS and neither did Ex 'E' series being the 2016 budget capture any such expenditure. And where a budget can be implemented it has to first go before the Board for its approval. A few instances on record will suffice. In Exhibit 'C' at page 5 under item 4.4 the Board approved NCA's budget for the year 2015, in Exhibit 'C2', the Board approved some recommendations made by the Management and Projects Management Committee, at page 5 of the same exhibit the Board approved recommendations by FINCOM for sitting allowances, accountable impress and budget for purchase of equipment for the administration of the Electronic Communications Tribunal (ECT). I could go and on into other items as well as Ex 'D' series to validate this claim that A2 needed the explicit approval of the Board as he himself admitted and not even just the FINCOM to proceed to spend NCA's monies.

Without more, it could be seen that by the time Exhibit 'G' arrived, in March, 2016 it was only due to the that PW2 as the Director of Finance had requested for such a letter without which for best financial practices he would not have acted. The processes for spending of NCA's money had been initiated but it was not the one based on which A2 acted in Exhibit 'S' as A2 could not have acted on the basis of a non-existent letter for support for US$8 Million. An examination of the investigative cautioned statement of A2 would provide further illumination. In Exhibits 'DD', 'EE' and 'FF' admitted with any objection, being a statements given by A2 wherein he claimed that approval was given by the Board for monies to be paid to help fund equipment to combat counter terrorism. With the relevant minutes of the Board in evidence and no such letter or request having come to the attention of the Board for its deliberations and approval as prosecution have shown, I think the onus therefore fell on A2 to discharge the claim

that the Board approved monies of either US$4 Million being monies paid out or US$8 Million, if one were to go by Exhibit ‘S’ for spending on a standard that is expected to be one of reasonable probability.

Besides, in the three exhibits just referred to, that is Exhibits ‘DD’, ‘EE’ and ‘FF’, A2 noted that A4 brought the request. And that request can only be Ex ‘G’ authored on the 24th of February, 2016, more than two months after A2 had signed Ex ‘S’ to commit NCA to the payment of not US$4 Million as he claim but US$8 Million from Exhibit ‘S’. There is heated controversy on Exhibit ‘G’ regarding its origin as it was not recorded in Exhibits ‘L’ and ‘K’. In view of the fact that the admitted author is A4, I intend to suspend further evaluation of Exhibit ‘G’ to revisit and deal with it when I am assessing the evidence for and against A4. It was on the gamut of a consideration of all these evidence and factors evaluated that I felt impelled to call on A2 to open his defence in respect of the charges of causing financial loss to the Republic as monies belonging to NCA, and therefore the Republic had been paid and constituted a loss to the Republic.

DEFENCE OF SECOND ACCUSED ON THE FIRST TWO COUNTS

A2 in his defence as found at pages 3 and 4 of the proceedings on the 23rd of January, 2020 claim that before he took over as Director-General at NCA, a letter had been sent to NCA by NSCS for help to combat threats from the cyber space. And because of that request the NCA decided to go into the market to look for vendors who could provide the solutions they were looking for. And it was that when they (NSCS) wrote again that he was invited to NSCS to watch some demonstrations. That NCA told NSCS that NCA was not in a position to give out all the monies it had requested but would provide half of the amount. A2 further claim that there were minutes of the Board that showed the discussions about the purchase of the Pegasus equipment. In fact there is

no such discussions captured in any Board minutes of NCA. The request in Exhibit '6' did not even get to the Board as FINCOM dealt with it and shelved it for future consideration depending on the improved finances of NCA. Those claims accordingly are found not to be reasonably probable defence to the charge.

As Director-General, he wrote on Exhibit 'G' to PW2 to pay the monies by noting that the Board chair had approved. If it was true that Board chair approved, then again as Director-General he knew that A1 alone could not in his position as Board chair make any such approval without same having gone to the Board. And the claim that Board chair approved is contrary to Exhibits "DD", "EE" and "FF" that he wrote that the Board gave approval. Another claim that FINCOM approved the purchase is also not only untrue but not reasonably probable. The defence of conditional approval granted in Exhibit '1' is wholly factually incorrect and not borne out of Exhibit '1'. Whatever source Exhibit 'G' came from, the way Exhibit '6' was treated should have been the same way, Exhibit 'G' should have been treated. The claim that there could also be variations in the budget as it is not cast in iron and stone is correct only that anytime there was variation, management would come up with a supplementary budget or that kind of spending would receive the necessary ratification from the Board. There is no such supplementary budget made to accommodate the use of such monies by NCA for payment to IDL for cyber security equipment as shown in Exhibits 'B' and 'E'. And there is nowhere in the minutes as captured in Exhibits 'C' and 'D' series that the Board ever met to engage in any form of ratification.

Again, A2 as part of his defence of causing financial loss to the State claim that NCA gave a number of support to institutions such as the Ministry of Communications, the Ghana Broadcasting Corporation (GBC), Attorney-General's Office to help fund some State-Attorneys to undertake courses in England and other places. That NCA and the

Attorney-General's Office worked together on the Global Action Against Cybercrime (GLACY) and that there was another workshop that was attended in Strasburg. That is not in dispute. It was in that line of defence that Exhibits such as Exhibits '33' '34' were put in. I have taken a careful look at Exhibits '33' and '34' and they are totally irrelevant as an answer to the case against A2. A2 himself admit and state that when the various agencies communicate their needs to NCA, they are all tabled before the Board at a meeting as he A2 alone cannot approve same. See the record at page 3 of the proceedings on the 28th of January, 2020. The forwarding in January, 2020 by one Etta Mensah of official correspondences between NCA and the Attorney-General acting by the DPP has no probative value at all and that also should not have been the manner an employee working for NCA should have acted in providing any information if any to the accused persons if any needed such information. The procedure is now obvious given the decision of the Supreme Court in this case on disclosure. The dragging of the name of the DPP and the Attorney-General's office on conferences on GLACY in Strasbourg and other places were all no answer to the first two counts as they failed to raise reasonable doubt as to the guilt of A2. Prosecution proved the first two counts against A2 to the standard of reasonable doubt required by law.

EVALUATION OF THE EVIDENCE ON COUNTS ONE AND TWO IN RELATION TO FOURTH ACCUSED

A4 was first introduced in the evidence of the prosecution in the testimony of PW2 when he claimed he requested for a letter from NSCS as an authorization to enable him effect the transfer of US$4 Million. What was brought to him dated the 24th of February, 2016 was Exhibits 'G' which was authored by A4 wherein a request for US$8 Million was sought. The letter sought for funding to be given some companies that were in a position to support NSCS. For this is what paragraph 5 of the letter

requested:

> *"...we wish to solicit the support of the National Communications Authority (NCA) to provide funding to selected companies, which have the capacity to support the NSCS to develop the capability to ensure the safety of Ghana's cyberspace".*

Pw4 also testified that in a meeting for which he was invited and instructed about the Pegasus that he said had been bought and was to arrive, he met A4 in the company of the other accused persons. With the evidence of investigations that Pw3, Col Michael Opoku claim to have conducted regarding how Exhibits 'G' was generated that there is no such record of that document at NSCS and the reference number provided Exhibit 'G' is for a different letter not related to a demand for monies as Exhibits 'L' and 'K' being extracts from the ledger book that record all correspondence to and from NSCS had no record of Exhibit 'G', a case was made for A4 to answer to the claims made. Pw5, Duncan Opare being the current Deputy National Security Coordinator having claimed that the inventory taken at NSCS did not reveal any Pegasus system as having been handed over. What is more Pw6, as an investigator threw further light on Exhibit 'G' on the 26th of February, 2019 that there was no record of Exhibit 'G' at NSCS registry, that the file number exist but the reference number correspond with another letter. Also that the inventory of the equipment of NSCS did not show that the NSCS was in possession of any cyber security device in the form of Pegasus. Further that Exhibit 'V' series being exchanges between BNI and NCA show that there was no trace of any such transaction in NCA. It is in that light that PW6 claimed to have elicited Ex 'W' from Mr. Yaw Donkor, the former boss of A4, where Mr. Yaw Donkor makes a claim that he was not aware of any such equipment. The admission of Ex 'MM' series, being out of court investigative

statements of A4 made it legally imperative for A4 to have been invited to raise reasonable doubt as to his involvement in a conspiratorial enterprise with A1 and A2 to cause financial loss to the Republic.

And did he do that? In his defence, A4 claim that he was in charge of all National Security Council operations and represented it on Boards and organizations. And one of such was the Joint Intelligence Committee (JIC) and it was during that time that there were emergence of cyber security issues not only of national in character but global in nature coupled with threats off terrorism from the Sahel countries. The solution to A4 was to create a cyber- surveillance space to confront the problems. And because of an earlier request by Yaw Donkor, then his boss from NSCS to NCA for which NCA agreed to help if its finances improved, it had deep throat intelligence of the amazing surveillance that the state of the art technology of NSO of Israel was doing and they had to follow up. That he was enthused and contacted NCA officials who bought into the idea. A4 claim he had further discussions with Yaw Donkor and some security bosses at the Presidency, the top management of NSCS for the purchase. That NCA being an independent institution fitted what NSO wanted as the host of the equipment. And it was in that context that a lady called him from NCA that the Director of Finance, being Dr. Yaw Ani had requested for a support letter for an institutional support of US$8 Million to NSCS and that is how he authored Exhibit ‘G’ on behalf of Yaw Donkor. He also claimed that NCA had the mandate to transact on behalf of NSCS and there was no need for the money to have been sent through the Ministry of Finance or government budgetary allocation nor was NCA acting for NSCS required to go through procurement processes as Yaw Donkor had exemption from Public Procurement Authority in respect of procurement by NSCS.

First, I accept the claim that the then National Security Coordinator was fully aware of

the threats of terrorism, cyber security in the sub region and discussions on how to combat it in Ghana. And that claim is wholly found to be reasonably probable. Second I reject the claim by A4 that NCA as far as this transaction was concerned had the mandate of NSCS to transact on its behalf. Merely stating that in court would not be enough to meet the threshold standard of reasonable probability and there is no scintilla of evidence before the court to that effect or anywhere including the National Communications Authority Act, 2008, Act 769. All the claims including what is on the face of Exhibits 'S', 'T' 'U' as well as even Exhibit 'G' itself shows that NCA was not acting as a conduit for NSCS. For NCA to act as a conduit for NSCS cannot only exist in the mind of A4. One Sheini of NSCS, who was present during the demonstration by NSO cannot be taken as the evidence that NSCS knew of this transaction as the demonstration was only a display engaged in by NSO as a seller to whet the appetite of potential entities interested in its product. As to a defence of a blanket immunity granted by Public Procurement Authority (PPP) to NSCS which invariably clothed NCA with the mandate not to undertake any procurement would be appropriately dealt with when I come to the procurement charges.

But was Yaw Donkor, the boss at NSCS at the time aware of the specific demand contained in Ex' G' to NCA. In view of the stout challenge to the authorship of Exhibit 'W' as not being the signature of Yaw Donkor more especially when compared with Ex '6' which is widely acknowledged as his signature, and given the remarkable difference between the signatures on the two documents coupled with the fact that with such a challenge, the presence of Yaw Donkor in court to authenticate Exhibit 'W' would have been the right path that prosecution should have travelled on. Exhibit 'W' has been attacked especially by counsel for 2nd and 4th Accused persons as being hearsay evidence. Being an out of court statement of a person who did not appear in court to testify may or may not be hearsay depending on the circumstances.

If Exhibit ‘W’ was offered as evidence of the truth of the contents of that statement, then the author not having testified in court would be a hearsay statement. However, if it was offered as evidence only in proof that the statement was made, irrespective of it being true or false, then the statement is admissible. See section 116 (c) of the Evidence Act, NRCD 323. Pw6 under cross examination on the 4th of April, 2019 at page 12 of the proceedings admitted that as an investigator he believed in the truth of the contents of Ex ‘W’. Even though I admitted the document but will place scant probative value on Exhibit ‘6’ as that document for the reason for which it was tendered was to show the truth of its contents.

I however do not find attractive the defence that it should have been Evelyn Akrasi Sarpong who should have come to court to tender Exhibit ‘G’ and speak to matters on Exhibits ‘L’ and ‘K’. Pw3 as Director of Operations, I find was competent to speak to the documents and Evelyn Akrasi Sarpong was not such a material witness where in the absence of her testimony in court, the claim regarding Exhibits ‘G’, ‘L’ and ‘K’ should collapse. What is important is the relevance of the testimony of the witness and as to whether it meets the standard of proof beyond reasonable doubt required by the court. If that were not so then it would mean that if such a particular person was no longer in the employment of NSCS or was unavailable due to sickness or any other tragedy, prosecution will not be able to tender those documents. Witnesses are weighed and never counted. See **G/CORP VALENTINO GLIGAH v THE REPUBLIC** [2010] SCGLR 870; **TETTEH v THE REPUBLIC** [2001-2002] SCGLR; **DEXTER JOHNSON v THE REPUBLIC** [2011] SCGLR 60.

In evaluating whether Exhibit ‘G’ did emanate from NSCS and whether A4 raised reasonable doubt with his claim that he was not responsible for assigning serial numbers to dispatches at NSCS and could not be blamed as to why there is no record

of Ex ‘G’ at the registry, a recourse to Exhibit ‘MM’ tendered by Pw6 being statements of A4 would be material in the resolution. In Exhibit ‘MM’, A4 claim that in his capacity as the representative of National Security at NCA Board, he in 2016 initiated the process for acquiring tracking equipment for National Security for counter terrorism. That he initiated the process through NCA by requesting for institutional support. In Exhibit ‘MM1’, A4 recounts how in a sub-committee meeting of the Board of NCA, in an informal discussion, the name of the Israeli company came up as dealing in counter terrorism. And that is when he expressed interest to meet the company for a presentation for which A1 and A2 liaised for such presentation at NSCS. So the demonstration that was done by NSO cannot be used as evidence that Yaw Donkor and other high ranking officials of NSCS knew of the purchase as A4 provided a detail reason why NSO came to do the demonstration. For this is what A4 further wrote in Exhibit ‘MM1’ at page 2:

> *“I was enthused and expressed the need for it. In a later discussion between me and the NCA Board chairman and the Director-General in my office that same day, it came out that I could write to NCA requesting for institutional support since an earlier request was one sent to them but could not be met”.*

Again from this the conspiracy in the purchase of the equipment is stated. A4 as a representative of NSCS on the Board of NCA was not to take unilateral decisions without recourse to National Security Council Secretariat. The letter being Exhibit ‘G’ emanated or was generated because A4 had discussions with A1 and A2 as he himself stated in Ex ‘MM1’, I so find and hold. The claim made by prosecution that the letter could not be traced at the Registry of NSCS, would be found to be very credible and I reject the defence in court of A4 that he was not the one that could explain as to how a copy of the letter cannot be traced at NSCS. It could not be traced because per Exhibit

'MM1' the idea for the request for US$8 Million did not even come from NSCS but the meeting of these triumvirate on the very day NSO did their demonstration. A4 in Ex 'MM1' claim that he left a copy of the letter, being Exhibit 'G' on float and that is the only reason he can say that it could be taken that his boss, Yaw Donkor saw it. That means he never discussed the contents of Exhibit 'G' with Yaw Donkor before it was written and after it was written. Just by claiming a copy was left on float, Yaw Donkor might have seen it, does not answer or raise reasonable doubt to the claim of prosecution. It is also at variance with his own evidence in court that Yaw Donkor knew of Exhibit 'G' and all those that mattered in security knew of it as A4 claim in his answers to questions on the 20th of February, 2020. See pages 7, 8, 9, 10, 11 and 13 of the proceedings on that day.

The rule as reiterated by Brobbey JA (as he then was) in the case of **ODUPONG v THE REPUBLIC** [1992-93] VOL 3 GBR 1028 that:

> *"The law is now well settled that a person whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn, is* ***not worthy of credit*** *[emphasis mine] and his evidence cannot be regarded as being of any probative value in the light of his previous contradictory statement unless he is able to give a reasonable explanation for the contradiction".*

See also the case of **GYABAAH** v **REPUBLIC** [1984-86] 2 GLR 461; **STATE v OTCHERE** [1963] 2 GLR 463. The attempt made by defence that Exhibit 'J' also emanated from NSCS but had no serial number to my mind is misconceived. Exhibit 'J' is not a letter or a correspondence but an inventory of items taken. It was not addressed to a recipient in the manner characteristic of a letter. And the claim based on

Exhibit ‘J’ that there are letters without serial numbers that leave NSCS registry is neither here nor there. I accordingly make an emphatic finding of fact that Ex ‘G’ was solely generated by A4 following the discussions in his own office as narrated in Exhibit ‘MM1’. And the non-tracing of a copy at NSCS registry and the assignment of a different serial number can directly be attributed to A4 due to the revelations he willingly made in Ex ‘MM1’. The claim also in the submission of learned counsel for A4 that the finances of NCA improved and A4 as a Board member was made aware that NCA was proceeding to support NSCS and hence called for another letter is also not borne out from the record. There is nowhere that it was captured in the budget of any support for NSCS. And the claim also in the address that it was needless for approval to have been given by the Board is also not a reflection of the right procedure for approval and disbursement of huge monies at NCA. FINCOM never approved any money and no matter how one stretches Ex ‘1’ it fails to meet any claim of approval for any of the accused to stand on to argue that it was right for monies to be disbursed.

One more matter on A4 before I deal with A5. A4 tendered Exhibit ‘36’ being the handing over notes he claim he left behind in his attempt to raise reasonable doubt that there was no evidence of the Pegasus system when he left office. Observing Exhibit ‘36’ and the evidence of A4 at page 11 of the proceedings on the 18th of February, 2020, at first glance may easily lead one to conclude that it is reasonably probable that A4 left Ex ‘36’ behind and it might have been lost. But that is not so. Handing over is not done with the items listed on paper for the paper to be left in an office whiles the items stated on the paper are left in the hands of private persons. For in Exhibit ‘36’ under Items in Custody are listed ZTE Gotta phones, vehicles and special equipment for cyber security operations. I do not think that Exhibit ’36’ was handed over with ZTE Gotta phones and vehicles left in the house of A4. The Pegasus system remained in the house of Baba Kamara until the day they were taken to the warehouse of PSB

belonging to one Boateng on the very day that A4 was made to lead a team to retrieve the equipment. That cannot be said to be hand over and I find the claim of prosecution that there was no trace of evidence of the existence of this equipment as the property of National Security credible. Or was A4 saying when he stated items in custody he meant not the custody of NSCS but his personal custody having possessions of state property when he was not in office? That cannot affirm a claim of having handed over. I also find A4 guilty on counts 1 and 2.

THE EVALUATION OF THE EVIDENCE ON COUNTS ONE AND TWO IN RELATIONS TO FIFTH ACCUSED.

A5 is not a public servant but a private businessman. The ambit of section 179 (3)(a) under which he has been charged together with the rest in respect of counts 1 and 2 is wide enough is to cover him as long as there is proof of financial loss committed to the Republic by a willful act of the accused through which the Republic is deprived of finances due it. And therefore one's position as being in the employment of the Republic or not may not be material. What is material to establish the offence is the ingredients that have been distilled supra before the discussion of the evidence in relation to each accused person. What evidence was adduced against A5 by the prosecution? Pw2 only said in his evidence that that by Exhibit 'F' signed by himself and A2 he was made to transfer an amount of US$4 Million to IDL. The next witness whose evidence involved A5 was Pw4 who claimed that when he was invited in April 2016 to an ongoing meeting he met all the accused persons including A5 there. He spoke of how A5 contacted him after the arrival of the equipment and the steps that were taken to clear the equipment. That the way bill being Ex 'M' had the National Security Adviser and A5 as consignees of the equipment. It was in the evidence of Pw6 that further flesh was provided by prosecution as to the level of involvement of A5. That Exhibit 'S' was signed between A2 and A5 at a time when nothing had been

done for the engagement of any reseller for an equipment by NCA. And so also was Exhibit 'T' on the 17th of December, 2015 and Exhibit 'U' dated the 25th of January, 2016. That Exhibit 'QQ' shows how the US$4 Million was paid to IDL on the 11th of March, 2016 after which US$1 Million was transferred to NSO Technologies with the rest withdrawn over a period of time and spent by A5. That A5 had no intention of making any further payment to NSO with the massive withdrawals that he did. Further that A5 was in league with the other accused persons in committing the crime. The statements of A5 and that of A1 were also put in to show the use of the US$4 Million. That A1 in his statement claimed that A5 was introduced into the transaction because he was a trusted party and such a person was needed due to the sensitive nature of the transaction. Besides, that A1 further in his statements in Exhibit 'PP' series makes admissions of how the monies paid to IDL was shared among the accused and how A5 also came to show appreciation to him.

A5 in both Exhibit 'NN' and his defence in court insisted that he entered into a valid contract with NCA by Exhibit 'S' and with NSO in Exhibit 'T' to be the reseller for the supply of the Pegasus system. And duly received the US$4 Million into the accounts of IDL. That with the transfer of the US$1 Million, NCA needed to provide him with the custom documentations for his Bankers, being Ecobank to effect next payments but that was not done by NCA. And as IDL was not a special purpose vehicle (SPV) with its account not being escrow account for the transaction he was not estopped from making withdrawals from the account. With the money being payment to IDL for it to supply NCA with the equipment and with the equipment having been supplied, A5 argues that it was entirely left to him to ring fence the US$4 Million received in the manner that it deemed fit to meet his obligations to NSO.

A look at Ex '28' being an addendum to Ex 'T' will show that the schedule of payment

from IDL to NSO was for a payment of US$1 Million to NSO as first installment. The next installment was to be US$3 Million after written notice that first commissioning of the equipment had been done among which Ecobank Ghana to receive written confirmation signed by the end user confirming that the hardware equipment had been delivered together with assurance that NSO had performed the deployment, software set-up, installation and configuration services. It is on record that A5 first attempted to cause a transfer of an amount of US$3 Million to NSO as reflected in Ex '27' but was not successful due to some correspondence that went on between NSO and Ecobank where Ecobank requested for some documentations in compliance with the Foreign Exchange Act. That resulted in Exhibit '28' for only US$1 Million to be sent as the initial payment and therefore I think not having effected US$3 Million payment at a go on the IDL account cannot be used as evidence that A5 was in league with the other accused persons to cause financial loss to the State.

I find A5 from evidence to be a businessman who was engaged as a reseller of the equipment. He might not have gone through any procurement process but that cannot be used as a basis to find him guilty of the first two counts. A5 not being an employee or a member of the Board of NCA was not in a position to know the internal processes and procedures that NCA had undertaken before NCA embarked on the quest to procure the cyber equipment. And businessmen will ordinarily in the course of engagement for contracts not proceed to demand from entities offering them contracts if the said entity had gone through the right internal channels before offering the contract to them. Ex '50' shows a contract IDL entered into with AGGURA wherein there is an admission that it was AGGURA who introduced IDL to NSO Group Technologies Ltd. A consideration for that introduction is stated to be US$100,000. The monies paid to AGGURA, being US$50,000 as part payment for the engagement of IDL makes me prefer the version of A5 to prosecution's one that A5 was first

engaged by Pninat Yanney who caused A5's introduction to A1 rather than the other way round. For if it was not Pninat Yanney who brokered the deal for IDL, then IDL would not have found any legal basis to make payments to AGGURA in the sum of US$50,000 which company Pninat has major interest.

For the claim of A1 in Exhibit 'PP' series and the other statements he made that after the transaction, A5 came to show appreciation to him are binding on A1 alone but not A5 as the latter rejected what A1 stated in that statement. And in the absence of any corroborative evidence, same cannot be used against A5. Again A5 by proceeding to enter into contract with NCA pursued what he believed to be his legitimate claim even when A1 and A2 were no longer in office and that is not consistent with the conduct of a person who was brought into a deal to take part in a conspiratorial plot to cause loss to the Republic and dissipate the resources of the State. He had no idea as to the reckless throwing to the wind sound bureaucratic practices and corporate procedures that A1, A2 and A4 had upon. With these findings, it appears to me now to be a stale legal submission to engage in as to whether A5 could be personally liable or it should be that of his company, IDL. Save to say that learned counsel for A5 in his written submission relied on sections 18 and 19 of the Companies Act, 2019, Act 992. Just for purposes of clarity, the events under which the conduct of A5 is being measured against took place in 2015 and 2016 when Act 992 was not in existence, same having come into operation on the 2nd of August, 2019. The right provisions of the law for which learned counsel should have had recourse to if he was minded to advance that argument are the provisions of the repealed Company's Act, Act 179. This is due to section 34 of the Interpretations Act, 2009, Act 792 which states as follows:

"(1) Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

(a) revive an enactment or a thing not in force or existing at the time at which the repeal or revocation takes effect;

(b) affect the previous operation of the enactment that is repealed or revoked, or anything duly done or suffered under the enactment;

(c) affect a right, a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked".

As retroactive application of legislations is an exception to the rule and not done unless the law specifically states that, Act 179, now repealed should have been referred to rather than Act 992. And in any case I find the defence of A5 reasonable probable and find him not guilty on counts 1 and 2.

COUNTS THREE AND FOUR ON CONSPIRACY TO STEAL AND STEALING CONTRARY TO SECTIONS 23(1) AND 124 OF ACT 29.

In Count 3 all the four accused persons face conspiracy to commit stealing whiles in count 4, it is only A5 that has been charged with the substantive offence of stealing. The discussion of the offence of conspiracy under conspiracy to causing financial loss to the State will apply, *mutatis mutandis*, to the offence of conspiracy here as well. I can only discuss the elements of stealing and link conspiracy and stealing to the facts so far led to draw a conclusion as to whether prosecution has established the guilty of the accused persons beyond reasonable doubt.

Section 125 of Act 29 defines stealing as:

> *"a person steals if he dishonestly appropriates a thing of which he is not the owner".*

This definition encompasses the common offences of burglary and larceny. The law calls for proof of both the *actus reus* and the *mens rea*. The appropriation will constitute the *actus reus* whiles the dishonesty will form the *mens rea.* The elements of stealing has been set out in a number of cases such as **THE REPUBLIC v HALM & ANOR** (1969) CC155 CA; **LUCIEN v THE REPUBLIC** [1977] 1 GLR 35; **AMPAH v THE REPUBLIC** [1977] GLR 404; **BAAH v THE REPUBLIC** [1991] GLR 483 as one, appropriation of a thing, two the appropriation must be a dishonest one, three, that the accused must not be the owner of the thing.

Appropriation as an element of stealing has been defined under section 122(2) of Act 29 to include any of the following: moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that some person may be deprived of the benefit of his ownership or the benefit of his ownership or the benefit of hos right or interest in the thing or its value or proceeds or any part thereof. Where the accused deals with the property with intent to deprive the owner of the use of the thing, it amounts to appropriation.

It is worthy of note that by sec 122(4) there is no need to find trespass or conversion of the property to establish appropriation as long as there is found a dishonest appropriation. Under the same section there is no need to establish that the property stolen was found in the possession or custody of the accused. This provision is enough to take care of theft that may take place electronically either through emails, telephony or any internet related crimes. As in those crimes, the presence of the accused for the completion of trespass over the property may not be established even though the crime has taken place.

Appropriation must be accompanied with a dishonest intent. Section 120 of Act 29 gives one a clue as to what constitute dishonest appropriation. If the appropriation is

done with intent to defraud or made without a claim of right or the appropriation if known by the actual owner will be without his consent. Intent to defraud connotes or import dishonesty which is better explained in **ANANG v THE REPUBLIC** [1984-86] GLR 458, Taylor J. (as then was) held that dishonesty in the ingredient of stealing connotes a moral obloquy and the act must be such that it must cast a slur on the character of the accused revealing him as a person lacking in moral integrity or a plainly dishonest person.

What amounts to intent to defraud is found under sec 16 of Act 29. An intent to cause by means of forgery, falsification or any unlawful act, any gain capable of being measured in money or its possibility to any person at the expense or to the loss of another. There must be evidence that the accused intended to cause some loss, economic or otherwise to the owner or the person entitled to the use of the property.

On the other hand, a claim of right is one that is made in good faith under section 15 of Act 29. So here there would have to be evidence to show that A5 and also the other accused persons were not entitled to moving or carrying away or any of the other means of appropriation of the monies of NCA to IDL or A5 or its transmission or part of it to NSO. A claim of right is inconsistent with dishonesty where there is present a claim of right by an accused, the charge may not stand.

The thing prosecution claim has been stolen is $4 Million. Beginning with A5 who is charged with both conspiracy and stealing. I have found that as a businessman he proceeded to act under the assumption that he had entered into a contract with NCA acting by its then Director-General. There is evidence that based on that contract for which he was a reseller of the equipment, he also entered into a contract with NSO for which the equipment was delivered into the country. A5 had initially ordered Ecobank

to transfer US$3 Million to NSO by an email dated the 14th of March, 2016 to one Kingsley Adofo Addo as contained in Exhibit '27'. It was only when one official of NSO by name Naor contacted Ecobank for the money that Ecobank stated the documents that it needed for the transfer in Exhibit '27B'. The back and forth led to Ecobank producing the Foreign Exchange Act for NSO and the procurement of an advance payment guarantee which specified maximum payment that could be transferred as US$1 Million. See Exhibit '27H'. Under that circumstance, I think that A5 cannot be faulted for the transfer of only US$1 Million to IDL through Ecobank.

As to why monies were withdrawn in a piecemeal manner by A5 as seen in Exhibit 'QQ', the explanation of A5 when he opened his defence that that particular account was not an escrow account for the transaction and IDL being a going concern it was entitled to make withdrawals for its business as it had hopes for monies coming in from government contracts it had undertaken for the Republic. Exhibit '39' series that A5 tendered shows a contract of IDL with government under the National Electrification Scheme where some of the monies that IDL was expecting even as at August, 2016 was over GH₵13,000.000. In that respect if A5 claim that he withdrew them not for any ill motive to squander the further payments to IDL but expected monies from other sources to come in and more so as the custom documentations from NCA which Ecobank needed for further payment was delaying despite saying the sum in another breath was a profit, I find this to be reasonably probable. That the non-performance of any form of competition to select IDL to undertake the exercise should be used to conclude that A5 was acting with public officials to steal may also not be accurate. It is true that A5 knew or should have known that being a contract with an entity of the Republic, IDL should have gone through some form of procurement processes. However, I think that that alone should not be a basis to conclude that there was a form of dishonesty on the part of A5. Business thrives on

opportunity and taking chances that comes one's way. The moral virtue that a saint is imbued with which would have made such a saint ask for the laid down procedures leading to his selection or otherwise turn down the contract cannot be attributed to a businessman whose greatest asset necessary for his survival in a tempestuous and unstable sea of business is his predatory instinct. The claim also by A1 in his statements that he decided to bring in A5 because he knew him as a trusted friend, in the face of the denial by A5 makes such statements not binding on A5 but only the maker of those statements being A1. For the court has noted in the case of **NKOAH & OTHERS v THE REPUBLIC** [1997-1998] 2 GLR 746 that:

> *"...the settled position of law was that an extra-judicial statement made to the Police by an accused person in which he incriminated himself and a co-accused as to the offence charged jointly against them bound only the confessor and not the non-confessing co-accused; and it did not matter that they had been charged with conspiracy".*

From the analysis therefore, I find A5 not guilty of the offences of conspiracy to steal and the charge of stealing. He is acquitted on those two counts as well.

A4 is only charged together with the others only under count three for conspiracy to steal. From the evidence led by prosecution it is only in the statements of A1 that A1 stated that he told Nana Owusu Ensaw to collect monies from A5 for distribution. This was admitted by Pw6 when he came under cross examination from the counsel for A4, Baffour Assasie-Gyimah, Esq on the 9th of April, 2019 at pages 13 and 14 of the proceedings for that day. For just the following one question and answer will suffice:

"Q: So apart from the statement of 1st Accused, you and your entire team, you do not have any other evidence of payments made?

A: That is correct".

As A4 flatly denied receiving monies from any source in connection with the purchase of the Pegasus system, the claim by A1 in the face of the vehement denial by A4 cannot be considered as proof of A4 having agreed to act together with any person to commit stealing. I find A4 not guilty of the charge under count 3.

In respect of A2 who is similarly charged together with the others in a charge of having agreed to act together to commit stealing. A2 denied the offence in his out of court statements as well as in his evidence before the court. To William Tevie what hit him so much was the stealing related charge. When Pw6 again under cross examination regarding whether A2 agreed to act together with any person to commit stealing, this is what transpired on the 9th of April, 2019 at pages 7 and 9 of the proceedings for that day:

"Q: Is there anywhere on the face of Ex 'QQ', where money was paid or transferred to the 2nd Accused

A: No My Lord

…….

Q: Sir, I will also be correct to say, that you did not find any transfer on the account of the 2nd Accused from the 3rd Accused

A: That is correct, there is no transfer.

Q: In fact, I will be correct to say, that the Bank statement of the 2nd Accused that you obtained through the assistance of FIC, there was no payment from any of the Accused persons here into that account

A: That is correct

Q: And in fact there is also no narration on the Bank statement of the 2nd accused that, the 3rd Accused in fact paid physical cash into the account, I will be correct to say that

A: That is correct

Q: As you are testifying now, you have no evidence that in fact the 2nd Accused received money from any of the Accused persons

A: That is correct".

From the above exchanges, I am safe to conclude that A2 raised reasonable doubt as to the third count of having agreed together with other persons to steal US$3 Million.

Regarding A1, prosecution produced confession statements that were admitted after a mini trial wherein three statements that A1 made without any independent witness present on the day they were taken were all rejected by the court despite an alleged validation of those statements subsequently by A1. On the other hand, the court found that Ex 'PP' series were voluntarily given in the presence of an independent witness.

In these Exhibits, A1 gives a detail account of how he directed monies to be collected from A5 for distribution. For the accused persons who were mentioned having refuted those allegations, or not having manifested an adoption of those statements, it is trite that the confessions of A1 was not binding on them. The statements of the confessions only bind the maker, being A1. See **LAWSON v THE REPUBLIC** [1977] 1 GLR 63; **FRIMPONG v THE REPUBLIC** [1980] GLR 574. Knowing the damage to his own case that his confession statements had made, a great deal of time of the defence of A1 was solely focused on his confession statements of benefitting in the sum of US$200,000 by polishing the entirety of his evidence at the mini trial. All those claims of having been intimidated and taken to BNI office in Kawukudi, left in a humid office, having been denied food and water for a long time, one Osei Owusu being aggressive to him, having been kept in cells and only writing what he was told to write are all factually incorrect and also not reasonably probable. Exhibit 'PP' series were taken on the 21st of June, 2017. A1 drove from his house in Abla Adjei, near Abokobi on that day in the company of his lawyer to the BNI office but was not kept in cells the night before he wrote those statements as he claimed. He willingly in the presence of Lloyd Baidoo with his own lawyer sitting with him throughout for him to write those statements. For the learned DPP totally nailed it in the following exchanges with A1 on the 21st of January, 2020 at page 3 of the proceedings:

"Q" The fact that A5 came to show his appreciation to you could only have come from you yourself, because it actually took place and could not have been a statement that the investigator forced on you

A: My Lord, I have said on that day, given the circumstances, I was willing to say anything to save my life

Q: When you wrote Ex "PP" you came from home with your lawyer about a month after you had given earlier statements, and there was no way you could have stated that A5 showed appreciation to you without it being true, because you were with your lawyer.

A: Yes My Lord, I was with my lawyer…"

The claims therefore that somebody dictated to him what to write in the presence of his lawyer, was found at the mini trial to be some weird tails conjured by A1. In the same Exhibit "PP" series A1 states how he benefitted from the transaction to the tune of US$200,000. Despite the overwhelming evidence on record, I cannot convict A1 of stealing as he was only charged with conspiracy to steal. A1 is not charged with the substantive offence of stealing. With all the other accused persons having been discharged and acquitted on the conspiracy charge and A5 having also been acquitted on the substantive offence, it means that the charge against A1 cannot hold without any indication from the charge sheet that A1 conspired with persons other than the ones listed on the counts. See **REPUBLIC v BOSSMAN** [1968] GLR 595; **BLAY v THE REPUBLIC** [1968] GLR 1040; **DOE v THE REPUBLIC** [1999-2000] 2 GLR 32. A1 is accordingly acquitted on count 3.

COUNTS FIVE, SIX, EIGHT AND NINE ON USING PUBLIC OFFICE FOR PROFIT CONTRARY TO SECTION 179(C) (a)(b) OF ACT 29.

A1 is charged under count five, A2 under count six, A4 under count eight and A5 under count nine with the offence of using Public office for profit. The section 179(C)(a) of Act 29 states as follows:

"A person commits a criminal offence who

(a) While holding office corruptly or dishonestly abuses the office for private profit or benefit; or

(b) Not being a holder of a public office acts or is found to have acted in collaboration with a person holding a public office for the latter to corruptly or dishonestly abuse the public office for private profit or benefit".

From the offence creating section above two scenarios arise by which a person can be said to have used a public office for profit. The first is under section 179(C)(a) that is when a person whiles holding public office dishonestly or corruptly abuses that office of public nature for a private gain. So for A1, A2 and A4 that have been charged under counts five, six and eight respectively, the ingredients that are to be proved are:

1. That the accused persons holds or held office
2. That the office held is or was of public nature
3. That the accused corruptly or dishonestly abused the office.
4. And the abuse of the public office was in respect of the promotion of the accused person's private benefit or profit.

The second instance under which a person may be charged under this offence arises where the accused does not hold a public office but is found to have acted in collaboration with a public office holder for the purposes of the public office holder corrupting or abusing his office for the private benefit or gain of the person who does not hold public office. This is under section 179C (b). See Justice Dennis Adjei in his work '**Contemporary Criminal Law in Ghana'** at pages 354-355.

From the charges A1, A2 and A4 should have been public officers at the time for which the Republic claim that they used the office for private gain and that A5 not being a public officer acted in collaboration with them for A1, A2 and A4 to corrupt or dishonestly abuse that office for private gain. Section 3 of the Criminal Offences Act, Act 29 states as follows:

> *"The expression "public officer" shall be construed by reference to the definition of "public office" in article 295 of the Constitution, and for the purposes of this Act, includes a person holding an office by election or appointment under an enactment or under powers conferred by an enactment".*

Article 295 of the Constitution, on the other hand defines public office as:

> *"public office" includes an office the emoluments attached to which are paid directly from the consolidated Fund or directly out of moneys provided by Parliament and an office in a public corporation established entirely out of public funds or moneys provided by Parliament".*

A1 was the Board chair of NCA, a body that owes its existence by law to the National Communications Authority Act, Act 769, 2008 and was appointed as Board chair by virtue of section 6 of the NCA Act. That means he was a public officer. So also was A2 who was the Director-General of NCA as well as A4 who was a Board member. An element of dishonesty which is also an ingredient in stealing must be established before an accused can be found guilty in terms of having personally benefitted by the use of the office of public nature. That has exhaustively been dealt with under count three and four which I need not repeat here.

Exhibit 'PP' series that I referred to supra, and my finding that it was not written by A1 himself under any hostile atmosphere more so when his able lawyer was with him on that day, having slept in the comfort of his house the night before he gave that statement. And where in Ex 'PP' series A1 notes how A5 came to show appreciation to him for the contract he secured with NCA. That appreciation is a personal benefit by the use of public office. In Ex "PP1", A1 gave a road map of repayment of the financial benefit he got out of the transaction by stating that:

> *"I wish to state further that I will make an initial payment of $40,000 on the 17th of May, 2017 and thereafter in a couple of weeks will attempt to settle the remaining amount. I will organise the rest of the team to repay the remaining amount ... due. The intended date to settle the remaining amount of $160,000 is 31st of May, 2017".*

So also is another confession statement contained in Ex 'PP2'. I admit that A1 made a volte face from this statements in Ex 'PP' series and gave a different account in Ex 'Z' as to his level of involvement in the deal without any claim of benefit to him. So also is Ex 'AA', given on the 4th of October, 2017, where he claim that he protected the resources of the State. In Ex 'BB' he denied liability for any criminal offence and so also is Ex 'CC'. As to how there were remarkable contradictions between Ex "PP" series on the one and Ex "AA", "BB" and "CC" of the other hand was open to A1 to explain. The explanation as to how he gave Ex "PP" series have been found by me not to be reasonably probable. On the application of the rule applied by the Court of Appeal in the **ODUPONG** case supra, where contradictory statements between unsworn statements and sworn evidence, in the absence of a reasonable explanation, destroys the credibility of one's evidence making the evidence not worthy of credit, I find A1's evidence as not credible enough to raise any reasonable doubt in the case of

prosecution. The circumstances under which Exhibit 'PP' series were taken is a far cry from what A1 sought to portray in court. A1 used the public office he occupied to enrich himself to the tune of US$200,000. He is found guilty on count five.

No dishonesty in terms of having benefitted personally was found by the court on the part of A2 in the payment of the monies to IDL. The evidence of his benefit largely came from A1 which A2 disputed. So also was A4 where there was no evidence that he personally took monies from anyone. Under those circumstances therefore A2 and A4 are not found guilty of counts six and eight respectively and are acquitted in respect of those counts.

Regarding section 179(C)(b) under which A5 has been charged there ought to be evidence that A5 not being a public officer has acted in collaboration with public office holder(s) for the public office holder to abuse his office for his private gain.
Having found that A5 only pursued his interest as a businessman in entering into a contract, and A5 having rejected the claims of A1 which were not binding on A1, I find it safe to rule that A5 raised reasonable doubt in the case of the prosecution with respect to count nine and I find him not guilty of the offence.

COUNTS TEN AND ELEVEN ON CONTRAVENSION OF THE PUBLIC PROCUREMENT ACT CONTRARY TO SECTIONS 92(1),14(1)(a), 15(1) OF THE PUBLIC PROCUREMENT ACT, 2003 (ACT 663)

Under Counts ten, A1, A2 and A4 are charged with contravention of the Public Procurement Act contrary to sections 92(1) and 14(1)(a) of Act 663. Section 92(1) is the offences creating section and states as follows:

"Any person who contravenes any provision of this Act commits an offence and where no penalty has been provided for the offence, the person is liable on summary conviction to a fine not exceeding two thousand penalty units or a term of imprisonment not exceeding five years or to both".

Whiles section 14(1)(a) states as follows:

"(1) This Act applies to
(a) the procurement of goods, works and services, financed in whole or in part from public funds except where the Minister decides that it is in the national interest to use a different procedure"

What it therefore means is that this section 92(1) which is captioned offences relating to procurement must be taken in consonance with other provisions in the law that requires procurement either of goods or services of a public nature for which the resources of the Republic would be deployed to conform. And it is therefore necessary to probe further whether sections 14(1)(a) and 15(1) to see if the law provides a specific way or manner for procurement and the accused persons have so breached it. It has been advanced before me that there is no such provision as section 15(1)(a). It is indeed true as one can only find section 15(1) and this obviously as conceded by prosecution was a slip and this arid technical flaw is incapable of defeating the charge.

As it has been contended which is quite true that section 14(1)(a) on its own does not create any offence at all. It is titled scope and application. The heading of a provision of an enactment by section 15 of the Interpretations Act, Act 792 is intended for convenience of reference only but may also be as an aid to construction of the enactment. So therefore section 14(1) does not create any offence at all but rather

defines and circumscribe the scope and application of the Procurement Act. That in short, among others, spells out the processes and procedures under Act 663 are supposed to be employed when the goods or services being procured is out of the finances, either wholly or partly from the public funds. What is public funds has been defined under section 98 of the law as:

> *"public funds" include the Consolidated Fund, the Contingency Fund and such other public funds as may be established by Parliament"*

What goods is also defined in the same section as:

> *""goods" means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves"*

It is therefore my view that one would have to relate section 92(1) quoted by prosecution to section 14(1) to distil the import of the charges levelled in relation to procurement. That what prosecution claim was bought by the named accused persons was bought by the funds of the Republic and the item that was bought was within the definition of goods, being specifically equipment and was within the scope of the items of goods whose procedure for purchase must conform to the form in Act 663

Under count eleven, by section 15(1) of Act 663 as amended by the Public Procurement (Amendment) Act, Act 914, 2016 states that:

"The Minister in consultation with the Board may, by notice in the Gazette, declare an entity, subsidiary or agency of an entity or a person to be a procurement entity"

That by section 92(1) and 14(1) and 15(1) prosecution posit that an offence has occurred that the named accused persons in so far as one, there was purchase of goods being equipment, two that the named persons used public funds in the purchase, three, that the necessary processes spelt out under the Procurement Act were not followed, four that the entity is a procurement entity for which the board of PPA had approved for a different method to be employed for the purchase of the goods. On this learned counsel for A1 has strongly submitted that the accused persons have not committed any offence known to Act 663. He proceed even to spell out by quoting the specific offences under section 92(2) of the Act and concludes that the accused persons have not been charged with any such offence. I appreciate the ingenuity in that submission but with due deference, that argument misses the point. The whole Act spells out the processes and procedure for procurement of goods and services and works for entities in the public sector that have not been granted by the Board of PPA. And in the course of the said procurement where any of the steps spelt out either being in the procurement plan, invitation to tenderers, tendering process, tender evaluation, selection of tenderer etc any offence in terms of collusion with a tenderer, any form of influence in the process to gain unfair advantage, alteration of documents, insertion of documents etc takes place, then it is an offence.

However, here prosecution claim that none of those specific offences stated under section 92(2) is applicable at all because the accused persons did not deem it fit to even have had a semblance of regard to the Act 663 for one to judge its action by any of those specific offences. That they completely side stepped the procedures. In that respect can one say if a public entity that is subject to the processes under the

procurement law decides to jettison it, that such an entity has not committed any offence contrary to Act 663 simply because such entity found the procedures too cumbersome to subject itself to let alone open itself up for violations. I think such an interpretation would work to defeat the very existence of the law such that entities who think they know better may undertake purchases with impunity by acting as if there is no such law at all in existence in Ghana to guide them. It would be monstrous a conclusion to come to that when an entity undertakes procurement but does it by not following the steps under Act 663, it is guilty but when it does not undertake any procurement procedure at all in the purchase no offence has been committed and the entity should be applauded. I find that the offences quoted by counsel for A1 comes to the fore when an entity in undertaking procurement, breaches any of those rules but where an entity becomes a god unto itself and act as if there is no laws on procurement when it has no exemption, then in my humble view that the sections 92(1) can be marched to sections 14(1)(a) and 15(1) against such persons that acted.

By leading evidence to show the procurement plan of NCA wherein Ex 'A; which was tendered by Pw1, Abena Asafo Adjei that the purchase of the Pegasus did not go through any such plan and with prosecution further claiming there is no record of how IDL was selected for the signing of Ex 'S' for IDL to deal with NSO Group of Israel and with funds of $US4 Million transferred for the purchase which is public funds, I deemed it right to have invited A1, A2 and A4 to have opened their defence. How did they respond to meet the standard of reasonable probability?

A1 had claim that as a Board chairman not being part of management the claim of procurement breaches does not arise at all as he had zero participation in payment. And when asked on the 10th of December, 2019 as to procurement processes, A1 claim that NCA plays no role in procurement as far as that exercise was concerned. In

Exhibit ‘AA’, A1 claim that the Public Procurement Authority (PPA) was not consulted due to the highly sensitive security reasons. A1 even though a Board chair did not confine himself to his assigned task as Board chair but decided to micro manage the process from discussions to purchase the equipment to the time the equipment arrived to its installation as seen even in the evidence of PW4. He it was that confirmed to Pw4 that the testing by the Israeli engineers had been successful. He knew the procurement processes but decided that the equipment was a highly security sensitive and decided to side step the steps Act 663 even though there had not been any exemptions.

On A2, the evidence was that he signed Ex ‘S’ when there was no processes for the selection of IDL. His counsel claim in page 63 of his written submission that the item belonged to NSCS and therefore there was no need for procurement. Before dealing with who the equipment belonged to I need to deal with this issue of an exemption in procurement for NSCS. It was A4 that claim that during the days of Mr Yaw Donkor there was a letter from PPA that granted immunity to NSCS from procurement processes. The question is where is the said letter on record if indeed one existed? The law under section 16 of the Act makes it clear that a procurement entity may undertake procurement in accordance with established private sector or commercial practices if one, the procurement entity is legally and financially autonomous and operates under commercial law; two, it is beyond contention that public sector procurement procedures are not suitable, considering the strategic nature of the procurement; and three that the proposed procurement method will ensure value for money, provide competition and transparency to the extent possible, the Board may give approval for such an entity to proceed. Where is the evidence that the Board granted immunity to NSCS or NCA, a blanket one or a specific one, in relations to this purchase? I therefore reject and find as a fact that there is no evidence of any

blanket immunity for NSCS not to undertake procurement in the purchase of goods, works and services.

A2's claim also that NSCS is the owner of the equipment is found not to be reasonably probable. Why? Ex 'S' that A2 himself signed shows that NCA is the end user. Ex 'Q' being the End User Certificate produced before the court appears that NCA is claimed to be the end user of the equipment and not National Security. Ex 'Q' must be noted to have been authored by A2 himself who set up a different story from what he signed up to in Ex 'Q'. For he wrote in paragraph 3 of the said Exhibit as follows:

> *"That I certify that we are the end user for the item/product listed above, for the sole purpose of the use of the National Communications Authority, Republic of Ghana".*

Even by the application of the conclusive presumption of estoppel by conduct under section 26 of the Evidence Act, NRCD 323, it lies not in the mouth of A2 to turn round to claim that what he himself wrote and signed should not be relied upon. A2 has actually caused the whole world to believe that the equipment was for NCA. Ex 'S' he signed also attest to the fact that it was NCA. It is only the way bill being Ex "M" that it was stated that National Security was one of the consignees. In plain and simple, A2 who signed Ex 'S' totally abandoned all the processes spelt out for procurement.

A4 had also noted in his response to procurement charges that the equipment being a wonder machine, a new creation of the century, and a clandestine equipment that is not what is done in the intelligence world. With deep respect, if that were to be so, an

application would have been made for the Board to have granted an exemption to conform to the clandestine operations in the intelligence world. On the whole prosecution led enough evidence to establish the guilt of A1, A2, and A4 beyond reasonable doubt on counts ten and eleven and I find them guilty.

COUNTS TWELVE, THIRTEEN, FIFTEEN AND SIXTEEN ON CHARGES OF MONEY LAUNDERING CONTRARY TO SECTION 1(1)(c) OF THE ANTI MONEY LAUNDERING ACT, 2007, ACT 749.

A1, A2, A4 and A5 face charges of money laundering on counts twelve, thirteen, fifteen and sixteen respectively. Section 1(1)(c) states as follows:

"(1) A person commits an offence of money laundering if the person knows or ought to have known that property is or forms part of the proceeds or unlawful activity and the person

(a) converts, conceals, disguises or transfers the property.

(b) conceals or disguises the unlawful origin of the properly. Or

(c) acquires, uses or takes possession of the property.

(2) For the purpose of this Act, unlawful activity means conduct which constitutes a serious offence, financing of a terrorism, financing of the proliferation of weapons of mass destruction or other transnational organised crime or contravention of a law regarding any of these matters which occurs in this country or elsewhere".

The slight modification in section of Act 749 was made and substituted by the Anti-Money Laundering (Amendment) Act, 2014, Act 874. For the offence of money laundering under section 1 to be established the prosecution must demonstrate that the

accused knew or ought to have known that the property which is the subject matter of the crime is or forms part of the proceeds from unlawful activity, that the accused has converted, concealed, disguised or transferred the property or has concealed the unlawful origin of the property or has acquired or taken possession of same.

And prosecution in pursuit of its task of proving that the monies form part of the proceeds of unlawful activity, is required to show that they were begotten out of a serious offence or was meant to be used to finance terrorism or was in contravention of a law. Section 51 of the Act 749 defines what a serious offence as:

> *"serious offence" means an offence for which the maximum penalty is death or imprisonment for a period of not less than twelve months".*

Unlawful activity also used is a term of art and means any of the following: any act which constitutes a serious offence, financing of terrorists act or financing of the proliferation of weapons of mass destruction or other organised transnational crime or any act in contravention of a law regarding any of these matters which occur in Ghana or elsewhere.

Under counts 12, 13, 15 and 16, the questions relevant for my determination is whether A1, A2, A4 and A5 took possession of monies stated in the respective counts, knowing such sums to be proceeds of an unlawful activity? And two whether they individually converted or concealed or disguised the origin of the sums for their individual use or acquisition or possession. Against A1, I have found the offences of causing financial loss to the Republic as well as count five on the charge of having used his offence for profit. The sum of US$200,000 he confessed in the presence of his own lawyer in Exhibit 'PP' series to have received which he drew a payment plan but has since failed to abide by that commitment would then be proceeds of the crimes whose origin as proceeds of crime was concealed. I have noted how A1 recanted the

glaringly dangerous confessions to his own case in subsequent statements like Exhibits 'Z', 'AA' and others. However, I have made a finding of fact supra relying on cases such as **ODUPONG** supra, **OTCHERE** supra of the damage that the contradictory statements and his sworn testimony caused to his credibility making his evidence unworthy of raising reasonable doubt in the case of the prosecution. The sums retained makes A1 guilty under count twelve.

For under counts thirteen and fifteen, even though I found A2 and A4 guilty under counts 1 and 2 and the subsequent dishonest charges did not prove how the two personally benefited from the losses caused. And so in as much as the offence of causing financial loss to the Republic may amount to a serious offence under section 51 of Act 749, it is my view that without evidence to show how a personal benefit in terms of the proceeds of the crime accrued to A2 and A4, which they had converted or concealed the origin of such monies, would make the charge of money laundering fail against them. I accordingly find A2 and A4 not guilty on those counts. For A5 not having found him guilty of any of the predicate charges, the money laundering charge against him also fails.

COUNT 17 ON A CHARGE OF INTENTIONALLY MISAPPLYING PUBLIC PROPERTY CONTRARY TO SECTION 1(2) OF THE PUBLIC PROPERTY PROTECTION ACT, 1977, SMCD 140.

A1, A2 and A4 in the last count face the charge of intentionally misapplying public property contrary to section 1(2) of the Public Property Protection Act, SMCD 140. And here prosecution claim that the four misapplied an amount of 4 Million Dollars being a property of the public.

Section 1(2) of SMCD 140 states as follows:

"Any person who intentionally misapplies or causes loss of or damage to public property commits an offence and is liable on conviction to a term of imprisonment not exceeding five years or to a fine not exceeding one thousand penalty units or to both the fine and the imprisonment".

The ingredients that prosecution is required to establish in this offence is first the *mens rea* of intention, two, misapplication or loss or damage that is caused to an item which should be a property and three that it is a property of the Republic. And public property has been described broadly under section 8 to encompass:

"money and any other property owned by or held in trust for the Republic, the property of any State enterprise, statutory corporation or local authority, and any other property specified by the Attorney-General by an executive instrument to be public property for the purposes of this Act".

Certainly the intentional act of using monies belonging to the Republic to purchase the equipment in an informal meeting held between the three when a request by NSCS or support in the sum of US$34 Million had been rejected, the payment of monies under a letter generated by A4 alone to give some semblance of credibility to the Finance team of NCA, the deployment of the equipment without the knowledge of the relevant persons in a private residence, the keeping of such equipment there to gather dust long after its purchase if truly it belonged to NSCS, would have been handed over, there being no legal frame mandating spying and intrusive invasion of the private space of citizens in the name of fighting terrorism, among others, leads me to the conclusion that the three accused charged under the count are guilty.

CONCLUSION

By way of summary, A1 is found guilty and convicted of the following charges – count 1, 2, 5, 10, 11, 12 and 17. A1 is however found not guilty and acquitted and discharged on count 3. For A2 he is found guilty and convicted on counts 1, 2, 10, 11 and 17. He is found not guilty and acquitted on counts 3, 6 and 13. A4 is found guilty and convicted on counts 1, 2, 10, 11 and 17. A4 is found not guilty on counts 3, 8 and 15. A5 is found not guilty on all the counts. He is acquitted and discharged.

RECOMMENDATIONS FOR LAW REFORMS

Before I receive submissions from learned counsel in respect of mitigation, I find it necessary to place on record some lessons emanating from this suit by way of guidance for future possible reforms of the Ghanaian criminal jurisprudence. The suit which commenced in this court on the 22nd of December, 2017 has taken about two years five months to complete. Part of the delay was the necessity for a reference to the Supreme Court for an interpretation of article 19(2)(e)(g) of the 1992 Constitution. The guidance provided no doubt will shape our criminal trials in this country for a long time to come. However, the greater part of the delay in this trial was the persistent interlocutory appeals that were filed. No one can be grudge any party that intends to test the rightfulness or otherwise of a decision or a ruling by a trial Judge more so when the rules do not frown on them. Due to that there were numerous appeals with its attendant applications for stay of proceedings before me and on refusal before the Court of Appeal. A great deal of these appeals related to the decision of the court to admit some documents especially Ex ‘G’, ‘L’ and ‘K’.

What dawn on me was that in a simple trial there could be as much as one thousand interlocutory appeals as any decision to admit or reject a document or any decision to allow or overrule a question being asked in examination in chief or cross examination

can be a subject of interlocutory appeal with its attendant applications for stay of proceedings. Admission or rejection of a document does not mean that a substantial miscarriage of justice has occurred. A document may be admitted alright but may have little or scant probative value. And if under section 31 of the Courts Act, Act 459, where even there has been a conviction or acquittal and there is an appeal, the appellate court is enjoined to dismiss the appeal unless the Appellant can demonstrate that any technical defect or the point being canvassed was weightier enough to have occasioned a substantial miscarriage of justice. I posit that a decision by a trial court to admit or reject a document or admit or overrule a question at the trial, its impact on the outcome of the case in either sustaining a conviction or acquittal is very difficult to determine at that stage. And if that cannot be determined at that stage, it is suggested that the Attorney-General and the Law Reform Commission should seriously consider the introduction of a possible amendment in the Courts Act or the Evidence Act to make a trial proceed with minimum interruptions and only grant a limited widow of an appeal in respect of an interlocutory matter such as submission of no case to answer. For it is when after judgment, an appeal is lodged that a party can bring up the call of the trial court on a document that was admitted or rejected and how that call has affected the outcome of the case by resulting in a substantial miscarriage of justice.

Any claim of any serious fight against public sector corruption would be an uphill task for the nation if the rules that we operate moves at a snail's pace. The citizens of Ghana in whom the sovereignty of the nation resides will continue to mourn that the poor without lawyers are tried within a short time but the rich and powerful who are able to afford the best of lawyers use the rules to drag cases in court *ad infinitum*. With case management conference now introduced in criminal cases, such an innovation as I have proposed, if added will give full meaning to the Constitutional provision under

article 19(1) of the Constitution that a person charged with a criminal offence shall be given a fair hearing within a reasonable time.

Two, the necessity for pre-trial disclosures and inspections that emanated from this case as decided by the Supreme Court, to my mind calls for an urgent need for a complete overhaul of the both Act 29 and Act 30 as the decision of the Supreme Court makes the procedure under Act 30 now anachronistic. If these necessary amendments are effected to take away interlocutory appeals on admission or rejection of documents with the sole purpose to cause enough delay and stultify criminal trials when there is no evidence to demonstrate how such a ruling has occasioned a substantial miscarriage of justice, that would send cold shivers down the spine of corrupt public officials that when their misdeeds come to light and are arraigned in court, their fate would be known in not more than six months' time, such persons would definitely be deterred from corrupt acts. These are the innovations needed for public officials to know that public funds are not meant to be used as personal property.

SENTENCE

I have carefully considered the plea of *allocutus* in the the *viva voce* submissions for mitigation by the defence lawyers. To aid a court in applying mitigating and aggravating factors in sentencing, I would first need to have regard to three main principles being the crime committed, the criminal and the community. What I mean by the crime committed is basically the nature of the offences and the circumstances under which the crimes were committed. US$4 Million of Ghana's money has been wasted with only US$1 Million recovered on what they claimed was an equipment to fight crime at a time when popular protest from the media and Ghanaians have compelled Parliament to shelve the Interception of Postal Packets and Telecommunications Messages Bill, also referred to as the Spy Bill, on the basis that it

had the capacity to invade the private space of citizens. The intendment of that law was for the noble act of fighting terrorism and organised crime and the impunity and recklessness with which the convicts acted by acting in a manner as if whether there were laws or no laws they care less and purchased such an equipment. There is no indication that it has ever been of use to this nation having been parked and forgotten in a private residence.

In dealing with the convict themselves, I take into consideration that they are first time offenders but certainly not young offenders. For youthfulness itself induces leniency in the eyes of the law as there are lessons to be learnt by persons of young age. But these are experienced men of the world and lessons to be learnt by the youth are well known to them. As persons who were in positions of trust they completely failed in the discharge of their duties. In that circumstance, an exemplary and deterrent punishment is necessary to send the right signals to public office holders that if they fail to be good custodians of the resources of the nation, they would not be left off the hook by the law. A1 has been found to have personally benefitted from the transaction in a whopping sum of US$200,000. In passing sentence the role played and the benefit that personally accrued to each must be made to reflect in the sentence. Besides, I must also take into consideration, the fact that A2 in particular is not in the best of health and the trial had to proceed by taking account of his health needs.

Punishment examined from the angle of the community and its laws, means every punishment must fit the crime committed and the wanton dissipation of the resources of the State with the consequent benefit that accrues to the actors have reached alarming proportions in the eyes of the public. Just as hard won personal resources are usually not wasted by level headed persons, so do the citizens of this nation expect their taxes not to be thrown away by public officials placed in a position of trust. I am

further guided by the wisdom in a plethora of judicial decisions on sentencing such as **KWASHIE v THE REPUBLIC** [1971] 1 GLR 488; **DICKSON MANU v REPUBLIC** [2013] 55 GMJ 176 COA; **DABLA v THE REPUBLIC** [1980] GLR 501; **ABU v THE REPUBLIC** [1980] GLR 294; **ADU BOAHENE v THE REPUBLIC** [1972] 1 GLR 70.

Accordingly the mitigating factors that come up for consideration are the health conditions of some of the convicts, being first time but not young offenders, A2 and A4 having been found not to have personally benefitted. The aggravating factors include the sheer recklessness of their conduct, the unrepentant and unremorseful attitude of the convicts, the benefit that accrued to A1 and his unpreparedness to restore his ill-gotten booty to the Republic, the convicts being experienced men of the world who have abused their positions of trust, the inappropriate nature of non-custodial sentence as they are not indigent or impecunious men. They can easily afford to pay any fine imposed on them and that will send the wrong signal to the public that for the rich they can use their riches to avoid jail for their criminal acts.

With the aggravating factors preponderating against the mitigating factors and being guided by the utilitarian concept of deterrence of both the convicts themselves and public office holders in a position of trust in general, and in the exercise of my discretion according to law but not private opinion, I proceed to sentence you as follows: A1, A2 and A4 are sentenced to five years imprisonment each with hard labour on count one (1). On count two (2), each of the convict is sentenced to five years imprisonment with hard labour. Having benefited by the use of his public office for his personal profit coupled with his obstinate conduct not to return the ill-gotten wealth to the Republic, I sentence A1 to six (6) years imprisonment with hard labour on count five (5). On count ten I sentence each accused convict to three (3) years

imprisonment with hard labour. Each convict is sentenced to another three years imprisonment with hard labour under count eleven. For having laundered US$200,000, I sentence A1 to six years imprisonment with hard labour on count twelve (12). And finally on count seventeen (17), each convict is sentenced to three years imprisonment with hard labour. All the sentences are to run concurrently.

I further proceed to make a consequential order under section 6(1)(a) of SMCD 140 as I find it necessary to make an order for the seizure and forfeiture to the Republic of any asset of the convicted persons to the tune of US$3 Million with US$1 Million out of the US$4 Million having been recovered. The Attorney-General is to take steps to enforce this order of the court.

Eric K. Baffour, Esq.

(Justice of Appeal)

Representations:

Yvonne Attakora Obuobisa, DPP with Evelyn Keelson, CSA, Stella Appiah, PSA, for the Republic present.

Abu Juan Jiagara, Esq. with Nicole-Marie Poku, Esq. for Thaddeus Sory, Esq. for Accused present

Godwin Temakloe, Esq with Reindorf Twumai Ankrah, Eq. for A2

Baffour Assasie-Gyimah, Esq. with Kodwoe Yankson, Esq for A4

Andrew Appau Obeng, Esq. for A5