THE REPUBLIC

vs.

HAJIA HAWA NINCHEMA, SUMAILA EWUNTOMAH ABUDU, ALEX VADZE, ALHAJI ABDUL-MUMUNI JESEWUNDE, MARY-STELLA ADAPESA, MUMUNI YAKUBU NAMBE AND MAHAMA AYARIGA

[HIGH COURT, ACCRA]

SUIT NO. FT/012/2019 DATE: 7TH MAY, 2021

COUNSEL:

MR. MICHAEL BAAFI FOR THE REPUBLIC PRESENT

MR. ANTHONY LARTEY FOR A1 PRESENT

MR. ALI GOMDAH ABDUL-SAMAD FOR A2 ABSENT

MR. ADIA ABDUL LATIF PRESENT FOR MS. RITAKUNKUTI ALI FOR A3

MR. TASSA TAPHA TASSA FOR A4 PRESENT

DR. EMMANUEL MAURICE ANKRAH FOR A5PRESENT

MR. CHARLES QUANSAH PRESENT HOLDING THE BRIEF OF DR. PETER ATUPARE FOR A6

MR. GODWIN TAMEKLO FOR A7 PRESENT

CORAM:

HER LADYSHIP JUSTICE AFIA SERWAH ASARE-BOTWE (MRS.)

RULING

This is a Ruling on whether or not the Accused Persons have a case to answer at the close of the Prosecution's case.

The antecedents of the case are that on the 5th of May 2019, the Office of the Special Prosecutor filed a charge sheet in which the accused persons are being held for the following offences;

1. There is under Count **One, a charge of** Conspiracy to Contravene the Procedure for Request for Quotation Contrary to Section 23(1) ofthe Criminal Offences Act, 1960(Act 29) and Sections 43(1) & 92(1) Of The Public Procurement Act, 2003(As Amended), Act 663, against**A1, A2, A3, A4, and A6**.

2. Under Count two, the named accused persons, **Sumaila Ewuntomah Abudu (A2), Alex Vadze (A3), Alhaji Abdul-Mumuni Jesewunde (A4), and Mary-Stella Adapesa (A5)** are charged with Abetment to Contravene the Procedure for Request for Quotation Contrary to Sections 20(1) of the Criminal Offences Act, 1960 (Act 29) and 43(1) & 92(1) of the Public Procurement Act, 2003(AsAmended) Act 663.

3. Under Count three, **Hajia Hawa Nichema (A1), Sumaila Ewuntomah Abudu(A2), Alex Vadze (A3), Alhaji Abdul-Mumuni Jesewunde (A4), and Mary-Stella Adapesa(A5),** are charged with Contravention of the Procedure for Request for Quotation Contrary to Sections 43(1) and 92(1) of the Public Procurement Act, 2003(as amended), Act 663.

4. Under Count four, **Mumuni Yakubu Nambe(A6),** is charged with Using Public Office for Profit Contrary to Section 179(C) of the Criminal Offences Act, 1960(Act 29).

5. Under Count five, **Mahama Ayariga (A7**), is charged with Abetment to Contravene the Procedure to Request for Quotation Contrary to Section 20(1) Of The Criminal Offences Act,1960(Act 29) and Sections 43(1) & 92(1) of the Public Procurement Act,2003(as amended) Act 663.

Under Count six, **Mahama Ayariga (A6),** is charged with Using Public Office for Profit Contrary to Section 179(C) of the Criminal Offences Act, 1960(Act 29).

6. Under Count seven, **Mumuni Yakubu Nambe (A7)** is charged with Transfer of the Foreign Exchange from Ghana Through an Unauthorized Dealer Contrary to Sections 15(3) And 29(1) (A) of theForeign Exchange Act 2006, Act 723.

FACTS:

The facts of the case as attached to the charge sheet and presented at thecommencement of the trial are that the 1st, 2nd, 3rd and 4th accused persons are the Municipal Chief Executive Officer, former Municipal CoordinatingDirector, the Procurement Officer and the Municipal Finance Officerrespectively of the Bawku Municipal Assembly.

The 5th accused is the Municipal Health Director of Bawku while the 6th accused is an Assembly Member for South Natinga electoral area of Bawku Municipal Assembly. The 7th accused is the Member of Parliament for Bawku Central. The 1st, 2nd, 3rd, 4th and 5th accused persons are members of the Procurement Entity of Bawku Municipal Assembly.

Sometime in February, 2018, the Bawku Municipal Assembly and the Bawku Municipal

Health Directorate acting through A1 and A5 respectively discussed with the 7th accused the need to secure an ambulance to assist in health care delivery in the municipality. After the discussion, it was agreed that the MP's common fund meant for the

Assembly and the Health Directorate's National Insurance Fund be used for the purchase of the ambulance. It was further agreed that for purposesof tax exemption, the purchase shall be in the name of the Municipal Assembly.

Without following any procurement process, the 7th accused instructed the 6th accused person to import the ambulance in the name of the Municipal Assembly. On receipt of this instruction, the 6th accused transferred the dollar equivalent of about Ninety-Two Thousand Ghana Cedis (GH¢92,000.00) to a vendor in the Netherlands and imported into the country Mercedes Benz, Sprinter ambulance with CHASSIS No, WDB90666331S200601. The 1st accused after the vehicle had arrived in Ghana, wrote to the Minister of Finance and requested for tax waiver on the ambulance which same was granted. Based on the tax waiver, the 6th accused cleared the vehicle from the port. On the arrival of the ambulance at Bawku, the 7th accused in his quest to score political points from his constituents and for his private benefit, caused it to be branded with the inscription, "DONATED BY: HON. MAHAMA AYARIGA MP FOR BAWKU CENTRAL TO THE PEOPLE OF BAWKU" and handed the same over to the Assembly. A7 further wrote to A5 and directed her to pay A6 Sixty Thousand Ghana Cedis (GH¢60,000.00) from the National Insurance Fund of the Health Directorate which she obliged.

When the 1st, 2nd, 3rd, 4th and 5th accused persons realized that they couldbe in trouble should it be uncovered that the importation of the ambulance was done without complying with any procurement procedure, they immediately wrote a letter calling for submission of price quotation, backdated same and submitted it to the 6th accused. The 6th accused in turn immediately submitted to the Assembly three different false quotations in three different companies' name. On receipt of the price quotations from the 6th accused, the 3rd accused purporting to have held a tender evaluation meeting forged the signatures of George Anaba, he Municipal Works Engineer and Sachibu Leyawdeen (deceased) the Assistant Development Planning Officer of the Assembly recommending that the contract be awarded to the 6th accused.

The 1st, 2nd, 3rd, 4th and 5th accused persons then forged a purported Tender Committee Minute and awarded the contract for the procurementof the ambulance to J. P. JOZEBA TRADING LIMITED, a company owned by the 6th accused. The 2nd accused therefore wrote to the 6th accused and informed him about the award of the contract.

Investigations however showed that no procurement process was followed before the contract for the procurement of the ambulance was awarded tothe 6th accused person's company. The investigations further showed that all the procurement documents with regard to the purchase of the ambulance were forged weeks after the ambulance had already been procured by the 6th accused at the instance of the 7th accused. The investigations again found that the Bawku Municipal Assembly paid Forty Thousand Ghana Cedis (GH¢40,000.00) out of the Assembly's common fund to add up to that paid by the Health Directorate for the purchase of the ambulance. It is based on these facts that the accused persons have been arraigned before you for trial.

THE LAW ON SUBMISSION OF NO CASE TO ANSWER

Before dealing with the question of whether or not the Accused persons have a case to answer, I must comment in the new development in Criminal Procedure that came into effect from the 1st day of November, 2018.

The **PRACTICE DIRECTION (DISCLOSURES AND CASE MANAGEMENT IN CRIMINAL PROCEEDINGS)** dated the 30th of October, 2018, states at Section 5(2)(a);

"At the close of the case for the Prosecution, the Court shall, on its own motion or on a Submission of No Case to Answer, give a reasoned decision as to whether the Prosecution has, or has not, led sufficient evidence against t the Accused person as to require the Accused person to open his defence."

(Emphases mine)

This means that the Court ought to set out reasons for its conclusion onthe matter of whether or not the Accused persons have a case to answer. For the above reason, although it is in the discretion of the court todetermine the Submission of No Case

to answer, the Court is required todeliver a reasoned Ruling and cannot just make a bare statement or Rulingon the matter.

From the tenure of that section of the Practice Direction, this reasoned decision ought to be given whether the Accused person makes a formal submission or not.

I shall now assess the law and the evidence in this case to determine whether the Accused persons have a case to answer or not.

Section 173 of the Criminal and other Offences (Procedure) Act, 1960 (Act30) provides;

"173. Acquittal of accused when no case to answer

Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require the accused to make a defence, the Court shall, as to that particular charge, acquit the accused."

Many decided cases regarding this particular provision are available by way of judicial interpretation. The well-known *locus classicus* is **STATE v. ALI KASSENA [1962] GLR 44 SC.**

In that case, it was held at page 148 that;

"A submission that there is no case to answer may properly be madeand upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.

Apart from these two situations, a tribunal should not in general becalled upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it."

(**See also APALOO v. THE REPUBLIC [1975] 1GLR 156.)**

THE STANDARD OF PROOF FOR AT THE CLOSE OF THE PROSECUTION'S CASE:

In the case of **TSATSU TSIKATA v. THE REPUBLIC [2003-2004] SCGLR**

1068, SC, it was held at Holding 5 that on a submission of no case, the judge's function was essentially to determine whether there was a genuinecase for trial i.e. whether there were any genuine factual issues that could properly be resolved only by a finder of fact because they might reasonablybe resolved in favour of either party. The enquiry had to focus on the threshold question whether the evidence presented sufficient disagreement to require a full trial, or whether it was so one-sided that one party must prevail as a matter of law. Therefore, where reasonable mindsdiffer as to the import of the evidence presented in a submission of no case, that motion should not be upheld. If, on the other hand, there couldbe but one and only one reasonable conclusion favouring the moving party, even assuming the truth of all the prosecution had to say, the judgemust grant the motion. Where the submission was rejected and the casewent to trial, it was then that the judge or jury as appropriate, being the trier of facts, would be called upon to determine whether or not the guilt of the accused had been proved beyond reasonable doubt. In this instantcase, it was very difficult for anyone who had studied the record of the caseagainst the trial High Court and the Court of Appeal to conclude that therewas no evidence upon which the trial judge or jury could hang either of the led on all the essential elements of all crimes charged was a possible result: a reasonable doubt or no reasonable doubt. Whether satisfactory evidence had been led on all the essential elements of all the crimes charged, was an open matter at that point.
His Lordship, Prof. Ocran stated, delivering the majority decision;

"Indeed, if the submission of no case is made just at the close of theprosecution's case and the cross-examination of its witnesses, how could one seriously speak of proof beyond reasonable doubt when the defence has not had a full chance of punching holes in the prosecution's case to possibly raise reasonable doubt in the minds of the trier of facts, by calling its own witnesses and presenting thecounsel's address? It seems…we have to look for a lower proof at this preliminary stage in the criminal proceedings.'

It is clear then that the decision as to whether or not the prosecution's case has been proved beyond reasonable doubt should be made after the end of the entire trial, i.e. after the consideration of the case of the prosecution and that of the defence.

(See also **S.A BROBBEY: PRACTICE &PROCEDURE IN THE TRIAL**

COURTS &TRIBUNALS OF GHANA 2nd Edition @Paragraphs 276 -282)w

Furthermore, from the above authorities, this Court is not expected to do anything beyond a determination of whether or not a *prima facie* case has been made against the accused persons.

In doing so, one has to consider whether or not the evidence so far adduced has been so discredited as a result of cross-examination that it would be unreasonable to continue with the trial, or whether an essential ingredient or element of the charges against the accused persons has not been established by the evidence so far adduced.

In the case of **ATSU v. THE REPUBLIC** [1968] GLR 716 @719 CA, it was said;

"As a general rule, evidence from the defence is not taken until the court has held that the prosecution has established a prima facie case. This is based upon the well-known principle that it is the prosecution which has an onus to prove the guilt of the person they accuse of an offence, and not the accused who should establish his innocence, the accused should therefore not show his hands until the need arises."

At this stage, the Court need not consider whether the prosecution has proved its case beyond reasonable doubt, but whether a prima facie case has been made against the accused persons.

What then would be a prima facie case?

Prima facie evidence is evidence, which on its face or first appearance, without more, could lead to conviction if the accused fails to give a reasonable explanation to rebut it. It is evidence that the prosecution is obliged to lead if it hopes to secure conviction of the person charged.

(See **KWABENA AMANING @TAGOR v. THE REPUBLIC [2009] 23 MLRG 78, C.A (pages 129-30) PER APPAU J.A.**

To conclude then on the matter of the duty of the prosecution at this stage of the trial, I will again quote the learned S.A. Brobbey in the Essentials of the Ghana Law of Evidence at page 55;

"The law is well-settled that at the end of the case for the prosecution, only a

> ***prima facie case can be made against the accused. This principle was well articulated in the case of TheState v. Sowah and Essel ([1961] GLR 743) where it was held atpage 745 that:***
>
> ***"It is wrong therefore to presume the guilt of an accused merely from the facts proved by the prosecution. The case for the prosecution provides prima facie evidence from which the guilt of the accused may be presumed, and which therefore calls foran explanation by the accused."***

I have gone on this tangent to discuss the law as is because, clearly, the standard of the law at this stage of the trial, i.e., at the end of the prosecution's case is not as high as that which is required at the end of the full trial. It is, to quote the learned Prof. Ocran JSC, "***a lower proof at this preliminary stage in the criminal proceedings.'***

The bottom line, one must determine was restated in the more recent decision of the Supreme Court in the case of **MICHAEL ASAMOAH & ANOR VRS. THE REPUBLIC (Criminal Appeal No. J3/4/2017 dated 26th July, 2017**, in which it was stated inter alia;

"...The grounds under which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trialor trial by indictment may be restated as follows:

> *a) there had been no evidence to prove an essential element in thecrime….*
>
> *b) the evidence adduced by the prosecution had been so discredited as a result of cross-examination; or*
>
> *c) The evidence was so manifestly unreliable that no reasonable tribunal could safely convict upon it.*
>
> *d) The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt, and one with innocence.*

See **Tsatsu Tsikata v. The Republic [2003-2004] SCGLR; Kofi alias Buffalo v The Republic [1987-88] 1 GLR 250; Gyabaah v. The Republic [1984-86] 461 C.A Moshie Alias Adama v. The Republic [1977] 1 GLR 186-190; Apaloo v. The Republic [1975] 1GLR 156 C.A."**

In his recent publication, **CRIMINAL PROCEDURE AND PRACTICE IN GHANA,** the learned Dennis Dominic Adjei JA states at page 275 inter alia;

> *"…The underlying factor in fair trial is that an accused is presumed tobe innocent until he/she is proved or has pleaded guilty. Where the prosecution fails to prove an essential element of the offence chargedand the court calls upon the accused to open its defence, the court breaches a constitutional provision by in substance saying that the accused shall open his/her defence o prove innocence. Therefore, the courts are duty bound to ensure that whenever prosecution fails to establish a prima facie case against an accused at the close of the case of the prosecution, it stands to reason that the prosecution has failed to meet the constitutional requirement imposed on it by paragraph (c) of clause (2) of article 19 of the Constitution which provides thus:*
>
> *(2) A person charged with a criminal offence shall –*
>
> *(c) be presumed to be innocent until he is proved or has pleadedguilty."*

THE LAW IN THE LIGHT OF THIS CASE

I will now assess the law as discussed above in the light of the evidence adduced to prove the respective charges to determine whether or not the accused person has a case to answer.

In the matter of the submission of no case which was ruled upon by this Court, in the case of **THE REPUBLIC v. AARON KWESI KAITOO(HC)(SUIT NO. FTRM/198/ 2014 dated 23rd May, 2017)** the
Accused/Appellant, raised the issue of the failure of this Court to deal with the charges individually (or failing to address the charges in accordance with each count) in assessing the case among others in an interlocutory appeal regarding the decision of this Court directing him to open his defence. The Court of Appeal (Her Ladyship Mariama Owusu JA, as she then was, presiding) unanimously held that there was no such need whenthe charges are inter-related.

(See the decision of the Court of Appeal in the case of THE REPUBLIC

v. AARON KWESI KAITOO in Suit No.H2/25/2017 dated the 26th of April, 2018)

In any case, there are many reported and unreported Judgments in our books and on our electronic portals. There has never been a requirement that each count in a criminal case, be dealt with piecemeal, count by count. Such an approach would be tedious and burdensome.

I therefore will not be discussing the law and the evidence on a piecemeal basis by discussing the charges count by count.

I shall discuss the elements of the offences brought against the accused persons and determined whether the Prosecution have established prima facie in this case and then cursorily discuss the issues raised in the in the submissions made by the respective lawyers for the Defence the responsesthereto.

The approach would be to discuss the elements of the offences as contained in the charge sheet and what the prosecution ought to have established prima facie in this case and then cursorily discuss the issues raised in the in the submissions made by the lawyers who have filed theirrespective submissions if necessary.

I shall deal with similar offences as couched in the charge sheet together. I shall therefore deal with the charges as follows;

a) Counts one, two, three and five together, having to do with the offence Contravention of the Procedure for Request for Quotation and its inchoates of Abetment and Conspiracy.

b) Counts four and six on Using Public Office for Profit; and then,

c) Transfer of Foreign Exchange from Ghana Through an UnauthorizedDealer.

ON COUNTS ONE, TWO, THREE AND FIVE TOGETHER: HAVING TO DO WITH THE OFFENCE OF CONTRAVENTION OF THE PROCEDUREFOR REQUEST FOR QUOTATION AND ITS INCHOATES OF ABETMENT AND CONSPIRACY TO COMMIT AN OFFENCE.

The substantive offence will be discussed and dealt with before determining whether the other accused persons have a burden to open their defence in respect of the inchoates of conspiracy to commit and abetment of, the offence of contravention of the procedure for request for quotation.

The relevant count under this head would be Count three.

Count three:

Contravention the procedure for Request for Quotations Sections 43(1) and 92(1) of the Public Procurement Act, 2003 (Act 663) as amended.

Those Particulars of Offence are as follows:

Hajia Hawa Ninchema, Municipal Chief Office-Bawku Municipal AssemblyAged 62 Years **(A1),** Sumaila Ewuntomah Abudu, Former Municipal Coordinating Director-Bawku Municipal Assembly Aged 50 Years **(A2),** Alex Vazde, Procurement Officer-Bawku Municipal Assembly, Aged 38 years **(A3),** Alhaji Abdul-Mumuni Jesewunde, Municipal Finance Officer- Bawku Municipal Assembly, Aged 57 years **(A4)** and Mary-Stella Adapesa,Municipal Health Director-Bawku, Aged 59 Years **(A5**): Acting in your capacity as the Procurement Entity of Bawku Municipal Assembly sometime in April 2018 at Bawku in the Upper East Region did award to **Mumuni Yakubu Nambe's Company, J.P. Jozeba Limited**, the contract to procure one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No. WDB9066331S2200601V at the cost of one hundred thousand Ghana cedis GH¢100,000.00) for the Bawku Municipal Assembly without requesting for at least three different suppliers.

Sections 43(1) and 92(1) of the Public Procurement Act, 2003 (Act 663) as amended by Act 915 state;

43. Procedure for request for quotation

"(1) The procurement entity shall request for quotations from as many suppliers or

contractors as practicable, but shall compare quotations from at least three different sources that should not be related in terms of ownership, shareholding or directorship and the principles of conflict of interest shall apply between the procurement entities and their members and the different price quotation sources.".

***92.** Offences relating to procurement*

A person who contravenes a provision of this Act commits an offence and where a penalty is not provided for the offence, that person is liable on summary conviction to a fine not exceeding two thousand five hundred penalty units or a term of imprisonment not exceeding five years or to both the fine and the imprisonment.

From the particulars of offence, and the tenure of the law under Act 663, A1, A2, A3, A5 and A5 who are charged with the substantive offence are to be shown;

a) To be the procurement entity,

b) To have failed or neglected to request for quotations from as manysuppliers or contractors as practicable,

c) To have failed to compare quotations from at least three differentsources,

d) To have had suppliers or sources of the quotations should not berelated in terms of ownership, shareholding or directorship and/or;

e) To be in conflict of interest where the sources of the quotations areconcerned.

ON WHETHER A1, A2, A3, A4 AND A5 ACTED IN THEIR CAPACITY OF THE PROCUREMENT ENTITY OF THE BAWKU MUNICIPAL ASSEMBLY

Section 98 of Act 663 defines **procurement entity** thus;

"means any entity conducting public procurement under this Act".

Section 15 of the Public Procurement Amendment Act, 2016 (Act 915)states further;

Declaration of procurement entity

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

entity.

Section 33 of the Local Governance Act, 2016, Act 936 also states;

Procurement powers and tender procedures of District Assembly

33. The procurement powers and tender procedures of a District Assembly shall be in accordance with the relevant procurement laws.

In this matter then, since the matter of who would constitute the Procurement Entity of the Municipal Assembly is of relevance, it is quite fundamental that evidence be led to prove, prima facie that the persons sonamed were actually acting in such capacity.

The testimony of PW1, Mr. George Anaba even goes to actually corroboratethis point. In his evidence-in-chief before this Court on the 12th of November, 2020, PW1 indicated, not only that he did not execute the purported Tender Evaluation Report as was being alleged, but also that he was even not part of the Procurement Entity as far as the procurementof the ambulance in question is concerned.

His duties at the Assembly, per paragraph 4 of the Witness Statement filedon his behalf, which has been adopted as his evidence-in-chief, "are to provide Technical Advice in relation to buildings and Civil Works as well as to supervise the execution of contracts awarded to contractors by the Assembly." From his evidence, the procurement of a vehicle was not in hispurview as the Municipal Works Engineer. That witness was not even partof the Procurement Entity even though he was purported to have signed the Tender Evaluation Report.

In cross-examination of PW1 by Mr. Quansah for A6, the following transpired on12th November, 2020 in part;

Q: In paragraph 4 of your witness statement you have indicated that youprovide technical advice in relation to building and civil works as well as to supervise the execution of contract awarded to contractors by theAssembly, what do you mean when you say that?

A: I mean when the contracts are awarded to Contractors, it is the duty of the Works Engineer to take them to the site and show them the works until the works are completed and handed over to the Assembly.

Q: So, your supervision in this sense does not include contract awarded for the purchase of items for the Assembly, is that correct?

A: That is correct. I do not supervise goods. I supervise works and not goods.

Q: This also means that you do not have any knowledge in respect ofprocurement

A: There is a procurement officer in charge of procurement.

***Mr. Quansah**: Please answer the question.Mr. Anaba:*
Repeat the questions

Q: This also means that you do not have any knowledge in respect ofprocurement?

A: I do have knowledge of procurement.

Q: Can you tell this court the procedure involved in general procurement of items of the Assembly?

A: I can only tell you procurement on works……

With regard to the A1(Hajia Hawa Ninchema) PW1 stated further in cross-examination by Mr. Lartey for A1 on the same day,

Q: I put it to you that A3 also confessed that he forced the signature of A1 on the tender evaluation report

A: The Tender Evaluation Report contains three signatures and A1's signature is not on the report.

The evidence offered by PW2, No. 40635 D/SGT Mansur Mohammed as far as the capacities of the A1,A2, A3, A4 and A5 are concerned as is contained in paragraph 4 of his witness statement which was adopted ashis evidence-in-chief is as follows;

" I know the accused persons in this case. The first accused is the Municipal Chief Executive Officer of the Bawku Municipal Assembly. The second accused is the former

Municipal Coordinating Director of the Bawku Municipal Assembly and currently the District Coordinating Director of the Talensi District. The third Accused is the Procurement Officer of the Bawku Municipal Assembly. The fourth accused is the Mucipal Finance Officer of the Bawku Municipal Assembly. The fifth accused is the Municipal Health Director of Bawku. ……"

There is no actual evidence of a Gazette Notification declaring any of the accused persons under this head, being A1, A2, A3, A4 and A5 as the Procurement Entity as stated in Act 915.

In the alternative, if one should or would consider the Evaluation Team which is supposed to have authored the report which is in evidence as Exhibit N, then the document would show that the Team was made up of;

- George Anaba (PW1)
- Sachibu Leyawadeen and
- Vadze Alex(A3)

In respect of that document, PW 1 has said in his evidence in chief and cross-examination that A3 admitted in his presence and in the presence of the Coordinating Director for the time being that he, Alex Vadze (A3) falsified the entire document that was used in the evaluation of the purported tender.

This is further corroborated by the unchallenged statement of A3 which isin evidence as Exhibit V. The statement of A3 was to the effect inter alia that;

"…. My name is Vadze Alex employed as procurement officer in 2013and practicing as procurement officer till now. I have been working for the six years now coordinating all procurement and procurement related activities in the Bawku Municipa(lity) Assembly. [sic] I was giving [sic] three invoices requested by my Coordinating Director to evaluate and report to him for action to be taken which I did but for itto be more transparent and accountable, I constituted a panel to alsolook at it before submitting it. The two addition [sic] panel were the planner in the person's [sic] of Sachibu Leyawadeen and the Works Engineer , Mr. George Anaba, but as at the time of submitting the report for review, Mr. Sachibu Leyawadeen and Engineer were not around so I signed on their behalf without their knowledge with the intension [sic] of getting the Tender Committee also to review because they have the authority to approved [sic] the report.In actual fact I did the

evaluation alone without the knowledge of Sachibu and Engineer,Mr. George Anaba, but I made the report, that is, the evaluation report to look as if Mr. Sachibu Leyawadeen Mr. George Anaba but that wasnot the case. The Managing Director of Jozeba Enterprise was recommended for the award base [sic] on the invoices submitted. The said managing Director was Hon. Nambe Yakubu which I got to knowlater …….

I wish to state that the Tender Committee did not know I did the evaluation single-handedly even though I put a document to indicate there was a team. The lesson learnt here is I did not do well by preparing a report…which was not the true reflection and I hope not to repeat that in my subsequent report.

In his further statement dated 23rd November, 2018 (Exhibit V1), A3 stated that the ambulance was actually procured before the documents were actually executed and further that he prepared evaluation report, the letter requesting for quotation and minutes covering the purchase of the ambulance.

These are the same minutes of the challenged Municipal Tender Committee Meeting held on the 12th of February, 2018 which is in evidence as Exhibit P. In her statement (Exhibit T), A1 has said that she neither attended any such meeting nor executed any document. The same matterwas raised in the course of the trial. The Court ordered that the signature having been challenged, same be submitted for forensic examination in its original form. Unfortunately, the original document has not been made available for forensic examination and the Prosecution, which has the burden of proof has made no effort to procure it for the examination to beproperly carried out.

Bearing in mind that PW1 has testified that the Tender Evaluation Report which contained his purported signature and that of Mr. Sachibu Leyawadeen was forged, and the fact that A3 has in his statement indicated that he did all the documentation himself, the least the prosecution ought to have done was to establish a prima facie case to the effect that the other signatories to the document, i.e. A1, A2 and A5 actually signed the document is question.

The bottom-line is, not only is this Court not seised with any actual Gazette Notification of the declaration of any procurement entity for the Bawku Municipal Assembly, but there is the added unfortunate situation of the accused persons and even the first prosecution witness denying their signatures. Furthermore, there is the fact of A3 admitting to having falsified the documents on which the prosecution relies. Finally, on this point, the prosecution has also not brought any scientific or forensic evidence to independently prove that A1, A2 and A5 actually signed thosedocuments, neither has it

produced any witness to corroborate their claim of these accused persons having executed the said documents.

With regard to A4, there is no actual evidence that he was a part of any of the meetings which culminated in both Exhibits N and P. He might be before the Court by reason of the fact that he was the Municipal Finance Officer, but even then, there is no *prima facie* evidence before the Court to justify his inclusion under this particular count.

In all these discussions, the only accused person whose conduct seems to be blame-worthy would be A3, who has actually confessed to it. Without a doubt, a confession can properly found a criminal conviction if all the other elements are found to be present. In other words, a confession does not absolve the prosecution to produce evidence to prove the guilt of the accused, element by element.

Please see: STATE v. OWUSU AND ANOTHER [1967] GLR 114

However, it is clear that the investigation to establish this element independently was not properly carried out.

I therefore hold under this head that the prosecution has been unable to show prima facie, that A1, A2, A4 and A5 acted in their capacity as the procurement entity of the Bawku Municipal Assembly.

By reason of his own confession and obvious involvement, A3 may have a case to answer if the other elements under this head are found to be present.

I shall deal with the next three elements together since they are different sides of the same coin.

ON THE CHARACTER OF THE COMPANIES WHICH SUBMITTED BIDS

The next elements to be dealt with are relative to whether A1, A2, A3, A4 and A5 have been shown *prima facie* to have;

- failed or neglected to request for quotations from as many suppliers or contractors as practicable,

- failed to compare quotations from at least three different sources,

- had suppliers or sources of the quotations which related in terms of ownership, shareholding or directorship.

It is the case of the prosecution that the three companies which submitted bids for the procurement of the ambulance at the centre of this case were related by way of beneficial ownership, and that they are all owned by the 6th Accused, Mumuni Yakubu Nambe who is the Assembly Member of the South Natinga Electoral Area, apparently of the Bawku Municipal Assembly.

The Companies whose invoices were submitted are;

i. Jozeba Trading Company Limited,

ii. Tanko Company Limited, and

iii. Jobas View Enterprise.

The cardinal question to be determined is whether, per the evidence before this Court, these companies are interrelated in any way or have the same beneficial ownership. There is no question, as far as the evidence adduced is concerned, that A6 owned, or may have partly owned, or may have had something to do with Jozeba Trading Company Limited by reason of the fact that he signed Exhibits Q1 and Q2 accepting to supply the vehicle. That said however, it is clear that very little was done by way of independent investigation and actually producing evidence before the Court to prove the actual beneficial ownership information on Jozeba Trading Company Limited, such as documentation from the Registrar of Companies.

In cross-examination of PW2, the investigating Officer, Mr. Mansur Mohammed, on the 20th April, 2021, the following transpired in part;

Q: Did you conduct a search at the Registrar General's Department about Jozeba Trading Company Limited during your investigations?

A: Yes my lady and the report indicated that Mumuni Yakubu Nambe is the owner of Jozeba Trading Company Limited.

Q: When you say owner, what do you mean?A: He is the Director.
Q: Is Mumuni Yakubu Nambe the only director of Jozeba Trading Company Limited?

A: My lady I do not know……..

It continued;

Q: Did you as part of your investigation conduct a search at the RegistrarGeneral's Department as to who are the directors and theshareholders of Messr Tanko Company Limited?

A: No my lady because investigations revealed that all the tenders were from the 6th accused person.

Q: When you say that he tendered, is it your case that he (i.e. A6) is a director or shareholder of Tanko Company Limited?

A: No my lady. The whole transaction is a sham one which they all agreed to prepare document to look as if it exists.

Q: As you testified today as the investigator in this matter, you do not know who the shareholder, director of Tanko Company Limited?

A: That is true.
Q: In fact, you also do not know the shareholder and directors of Jobaz View Limited, is that correct?

A: That is true. As I said earlier, those documents were provided by the6th accused person to look as if the whole transaction existed.

In my view, to demonstrate that the transaction was a sham as the prosecution seeks to put forward, the least the prosecution should or couldhave done was to have produced evidence a search from the Office of the Registrar of Companies indicating that these two other companies were non-existent or owned by the same person, on the record.

It is trite learning that in any case (whether civil and more so in criminal matters), the quality of the witnesses and the evidence they offer must actually prove to the legal standard what is required. This evidential burden is not discharged by merely entering the witness box and repeatingclaims or averments on oath, but by offering positive proof of the claims.

See:

KWAME NKRUMAH @ TASTE v. THE REPUBLIC (SC) Criminal Appeal

No. J3/6/2016 dated 26th July 2017 (Reported [2020] Criminal Law Report of Ghana 295.

Please see also:

- **FRIMPONG ALIAS IBOMAN v. THE REPUBLIC [2012] 1 SCGLR297**

IN RE WA NA ISSAH BUKARI (SUBST. BY MAHAMA BUKARI &ANOR) v. MAHAMA BAYONG & ORS [2012-2014] 2 SCGLR 1590.

- **TAMAKLOE & PARTNERS UNLTD. v. GIHOC DISTELLERIES CO. LTD (SC) per Amegatcher JSC (Civil Appeal No. J4/70/2018 dated 3/7/2019 (available on the online portal dennislawgh as [2019] DLSC 6580;**
- **AYEH & AKAKPO v. AYAA IDDRISU [2010] SCGLR 891 @ Holding5;**
- **AKUFO-ADDO v. CATHELINE [1992] 1 GLR 377**
- **ASAMOAH v. SETORDZI [1987-88] 1 GLR 67;**

To conclude under this head, I hold that the prosecution has been unable to put forward prima facie evidence that A1, A2, A3, A4, and A5

- **failed or neglected to request for quotations from as many suppliers or contractors as practicable,**
- **failed to compare quotations from at least three differentsources,**

- **had suppliers or sources of the quotations which related in terms of ownership, shareholding or directorship.**

ON CONFLICT OF INTEREST

I shall finally deal with the final element of conflict of interest where the sources of the quotations are concerned.

The expression "conflict of interest" is not defined in the Public Procurement Act as amended, but, it is quite clearly explained in **Article 284 of the 1992 Constitution**

A public officer shall not put himself in a position where his personal interestconflicts or is likely to conflict with the performance of the functions of his office.

What the prosecution has to prove under this head is that A1, A2, A3, A4and A5, are public officers and have put themselves in a position where their personal interest conflicts or likely to conflict with the performance of their office.

On the evidence, the only person who may have fit into this category wouldhave been A6 who has been demonstrated to have had something to do with Jozeba Company Limited, the supplier of the ambulance, but, he has not been charged under this head. Even if the prosecution had so charged him, not a scintilla of evidence on how the performance of A6 as an Assemblyman would be affected by the fact of his contract to supply the ambulance, particularly when A6 is not a member of, or has not been shown to be part of, the procurement entity.

I therefore draw the inevitable conclusion that the prosecution has been unable to show any conflict of interest on the part of A1, A2, A3,A4 and A5.

To conclude, I hold that the prosecution has not adduced prima facieevidence against A1, A2, A3, A4 and A5 on **Count Three.**

They shall accordingly not be required to answer to that count.

ON CONSPIRACY AND ABETMENT

The inchoate offences in respect the offence Contravention the procedurefor Request for Quotations Sections 43(1) and 92(1) of the Public Procurement Act, 2003 (Act 663) as

amended are laid under in counts oneand two.

The relevant counts state;

Count one:

Conspiracy to contravene the procedure for Request for Quotations Contrary to s. 23(1) of the Criminal Offences Act, 1960(Act 29) and Sections 43(1) and 92(1) of the Public Procurement Act, 2003 (Act 663) asamended.

The Particulars of Offence are as follows:

Hajia Hawa Ninchema, Municipal Chief Office-Bawku Municipal Assembly Aged 62 Years **(A1),** Sumaila Ewuntomah Abudu, Former Municipal Coordinating Director-Bawku Municipal Assembly Aged 50 Years **(A2),** Alex Vazde, Procurement Officer-Bawku Municipal Assembly, Aged 38 years **(A3),** Alhaji Abdul-Mumuni Jesewude, Municipal Finance Officer- Bawku Municipal Assembly, Aged 57 years **(A4)** and Mary-Stella Adapesa, Municipal Health Director-Bawku, Aged 59 Years **(A5**): Acting in your capacity as the Procurement Entity of Bawku Municipal Assembly sometime in April 2018 at Bawku in the Upper East Region did agree to act together with a common purpose to contravene the Public Procurement Procedure by requesting for three quotations from only one source, Mumuni Yakubu Nambe, in the procurement of one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No. WDB9066331S2200601V at the cost of one hundred thousand Ghana cedis GH¢100,000.00) for theBawku Municipal Assembly.

Count two is in related terms;

Count Two

The Statement and particulars of offence are reproduced hereunder;

Abetment to Contravene the Procedure for Request Quotation Contrary to Sections 20(1) of the Criminal Offences Act, 1960 (Act 29) and 43(1) and 92(1) of the Public Procurement Act, 2003 (663) (asamended).

The Particulars are;

Mumuni Yakubu Nambe, Assembly Member of Bawku Municipal Assembly Aged 40 years **(A6);** Sometime in April, 2018 at Bawku in the Upper East Region did abet Hajia Hawa Ninchema, Sumaila Ewuntomah Abudu, **Alex** Vazde, Alhaji Abdul-Mumuni Jesewude, and Mary-Stella Adapesa**,** in their capacity as the Procurement Entity of Bawku Municipal Assembly to contravene the procedure for request for quotations in the procurement of one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No. WDB9066331S2200601V at the cost of one hundred thousand Ghana cedis GH¢100,000.00) for the Bawku Municipal Assembly by procuring for them three false quotations.

Then comes the substantive offence;

Count five:

Abetment to Contravene the Procedure for Request Quotation Contrary to Sections 20(1) of the Criminal Offences Act, 1960 (Act 29) and 43(1) and 92(1) of the Public Procurement Act, 2003 (663) (asamended).

The Particulars of offence under this Count are;

Mahama Ayariga,**(A7)** Member of Parliament for Bawku Central, Aged 43 years, Sometime in April, 2018, at Bawku in the Upper East Region did abet Hajia Hawa Ninchema, Sumaila Ewuntomah Abudu, Alex Vazde, Alhaji Abdul-Mumuni Jesewude, and Mary-Stella Adapesa**,** in their capacity as the Procurement Entity of Bawku Municipal Assembly to contravene the Procedure for request for quotations from at least three different suppliers in the procurement of one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No. WDB9066331S2200601V at the cost of one hundred thousand Ghana cedis GH¢100,000.00) for the Bawku Municipal Assembly by instigating and encouraging the purchase and importation of the vehicle without the Procurement Entity requestingfor quotations.

What the prosecution is to prove would be outlined and discussed in the light of the evidence before the Court to determine whether same would reach the threshold of a *prima facie* case.

ON THE CHARGE OF CONSPIRACY TO COMMIT CRIME NAMELY: CONTRAVENTION OF THE PROCEDURE FOR REQUEST QUOTATION;

It is a well-known fact that there has been a new formulation of the law onwhat would constitute Conspiracy under section 23 of Act 29 which now reads;

> *"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 any previous concert or deliberation, each of them commits a conspiracy to commit or abet the crime."*

In **AGYAPONG v. THE REPUBLIC (2015) 84 GHANA MONTHLY**

JUDGMENTS 142 HL Korbieh JA discussed the new formulation in the following terms at page 149 of the Report;

> *"Quite Frankly, this Court must confess that it has a problem with thenew law…..The problem stems from the wording of section 23(1) itselfand the illustration that follows the definition of conspiracy. It is difficult to see how two or more persons can agree to act together without previous concert or deliberation. Would they have reached theagreement by telepathy? This Court therefore finds the formulation of the law on conspiracy so contradictory that it is almost meaningless. In the opinion of the court, it is contradictory to talk of two or more persons agreeing to act together and yet say that they need not havehad a previous concert or deliberation."*

The troubling illustrations alluded to by the Court of Appeal are;

Illustrations

Subsection (1)(a) If a lawful assembly is violently disturbed (section 204), any persons who take part in the disturbance are guilty of conspiracy to disturb it, although they may not have personally committed any violence, and although they do not act in pursuanceof any previous concert or deliberation.

(b) A. and B. agree together to procure C. to commit a crime. Here A. and B. are both guilty of conspiracy to abet that crime.

The Court of Appeal concluded that the new formulation of the law on conspiracy in section 23(1) of the Criminal Offences Act required the prosecution to prove an

agreement to act together for an unlawful purpose and since the prosecution had failed to so prove, the conviction could not stand.

Subsequent to the decision in the **Agyapong Case** cited above, the Supreme Court, whose decisions are binding on all courts below it, in the case of **FAISAL MOHAMMED AKILU v. THE REPUBLIC (SC) Criminal Appeal NO. J3/8/2013 dated 5th July, 2017 (Reported in [2020] Criminal Law Report of Ghana)** has also discussed what would constitute conspiracy**.**

The learned Justice Appau JSC stated **at page 290 of the Report**;

> "**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. In such a situation, the particulars of the charge normally read: *"he agreed together with another or others with a common purpose for or in committing or abetting the 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."**

From the above then, it would seem that there would be no confusion regarding what the Prosecution is expected to prove and the dilemma of the Court of Appeal seems to have been resolved.

What would constitute the offence conspiracy to contravene the procedure for request for quotation (and the related substantive charge of contravening the procedure for the request of quotation)?

In her book, **THE GENERAL PART OF CRIMINAL LAW - A GHANAIAN CASEBOOK (VOL. 2),** the learned Prof. HJAN Mensa- Bonsu (now Justice of the Supreme Court) discusses very extensively all the inchoate offences including conspiracy.

At page 386 of the book, she states;

"***The constituent elements of the crime are: Plurality of minds, i.e. two or more persons;***

Agreeing to act together with a common purpose; and Acting together for a common unlawful purpose."

She continues at page 393;

"The agreement may be referable to a particular time or place, as when a meeting is organised (Azametsi). It may also take place at different times and places, as when a plan is discussed with several people. There may also be occasions when there is no such previous deliberations at all although the parties are acting in concert. In such situations, it is sufficient for the purposes of this crime that the alleged conspirators have been found acting together for a common unlawful purpose (Kambey). Thus, as long as it can be established that the alleged conspirators were united in their intentions to achieve an unlawful purpose, they would be guilty of conspiracy.

The law as stated above is clearly in consonance with what was expressed by the learned Appau JSC in the **Faisal Mohammed Akilu** case cited supra.

The prosecution in this case, is expected to prove, in relation to the Conspiracy charge that A1, A2, A3, A4 and A5 had acted in consonance to breach the procurement procedure set out in the particulars in of offence, contrary to the Public Procurement Act, 2003 as amended.

The law also enjoins the prosecution, in furtherance of their duty, to show, at this stage, *prima facie*, the role each of the alleged conspirators played in accomplishing the crime.

Clearly, the discussion of the law and the evidence under Count three has shown that there is no evidence of a plurality of minds between the relevant accused persons, A1, A2, A3, A4 and A5.

Without going into much detail, the conclusion to be drawn is that in the light of the failure of the charge in the circumstances of this case, it wouldbe impossible to hold that there is evidence of an agreement to act or indeed that was an acting together to commit the crime of Contravention of procedure for request for quotation.

A1, A2, A3, A4 and A5 are acquitted and discharged on Count one.

ABETMENT OF CRIME, NAMELY *CONTRAVENTION OF THE PROCEDURE FOR REQUEST QUOTATION*

What are the elements that the prosecution had to prove and the evidentialissues to be dealt with?

In proving abetment of any crime, in this case, contravention of the procedure for request quotation, the law to be borne in mind is Section 20(1) of the Criminal Offences Act, 1960 (Act 29) which states as follows;

20. Abetment of a criminal offence

***(1)** A person who, directly or indirectly, instigates, commands, counsels, procures, solicits, or in any other manner purposely aids, facilities, encourages, or promotes, whether by a personal act or presence or otherwise, and a person who does an act for the purposes of aiding, facilitating, encouraging, or promoting the commission of a criminal offence by any other person, whether known or unknown, certain, or uncertain, commits the criminal offence of abetting that criminal offence, and of abetting the other person in respect of that criminal offence.*

In the Introduction to Chapter 6 of her book, **THE GENERAL PART OF CRIMINAL LAW- A GHANAIAN CASEBOOK VOL. 2**, at Page 489 on
Inchoate Offences and accessorial liability in relation to abetment, Prof. Henrietta J.A.N. Mensah – Bonsu (JSC) explains the concept of abetment very succinctly. The concept cannot be explained in a manner better thanthe learned author and jurist put it;

> ***"The crime of abetment is committed when a person renders assistance to another for the purpose of committing a crime, and thereby makes a contribution to the doing of a criminal act. At the inception of the commission***

of an offence, various actors may be involved although only one person i.e., the principal may be found to have actually performed the actus reus of the offence. Such a person, i.e., the principal actor would be punished for that activity. Such punishment would however, not affect those who actually may have made the commission of the offence possible. Therefore, without the rules on the liability of accessories, all such important personalities in the criminal enterprise would escape punishment. For instance, in a scheme to rob a bank, there would be several participants, i.e. the master- brain who devised the whole scheme; the insider who provided information vital to the robbery; the person who provided the plans of the premises to be robbed; the carpenter who manufactured the special ladder to be used, the driver of the get- away car; the watchman who agreed to be absent on that day to facilitate the operation; the look-out whose job it was toensure that the principals would be warned if the policeapproached the scene; and those who purported to provide thespiritual strength to the scheme such as the pastor or jujuman or mallam who blessed the scheme or provided potions to guarantee the success of the scheme; all of whom would be linked by common design to commit one crime. Rules on accessorial liability thus ensure that each of these people would be liable for the assistance rendered, for perhaps, without their individual contributions, the principals maynever have attempted the crime."

She continues at pages 490-491 by stating in respect of S.20(1) of Act 29;

"This is a long list of acts that could render one an accessory to a crime. As long as one shares the mens rea of the offence, no act is harmless if done to further the objects of the criminal enterprise."

From the above principles and the tenure of the section, the prosecution is expected to prove that **A6**, Mumuni Yakubu Nambe and **A7,** Mahama Ayariga, directly or indirectly, instigated, commanded, counseled, procured, solicited, or in any other manner purposely aided, facilitated encouraged, or promoted, whether by a personal act or presence or otherwise, and was a person who did an act for the purposes of aiding, facilitating, encouraging, or promoting the commission of a criminal offence by the other person, in this case, Hajia Hawa Ninchema, Municipal Chief Office-Bawku Municipal Assembly Aged 62 Years **(A1),** Sumaila Ewuntomah Abudu, Former Municipal Coordinating Director-Bawku Municipal Assembly Aged 50 Years **(A2),** Alex Vazde, Procurement Officer- Bawku Municipal Assembly, Aged 38 years **(A3),** Alhaji Abdul-Mumuni Jesewude, Municipal Finance Officer-Bawku Municipal Assembly, Aged 57

years **(A4)** and Mary-Stella Adapesa, Municipal Health Director-Bawku, Aged 59 Years **(A5**).

See also the decision of this Court in **REPUBLIC v. PHILIP ASSIBIT & ABUGA PELE (Suit No. FTRM 122/14) dated 23rd February, 2018** (Affirmed by the Court of Appeal per Anthony Oppong JA His Lordship Senyo Dzamefe JA Presiding) in respect of the Abetment and other Offences in the case of **ABUGA PELE v. THE REPUBLIC** in **suit No. H2/7/19 dated 26th November, 2020).**

In discussing the law and the evidence under count three, it is quite evident that some relevant matters under this head have also been dealt with.

In addition to that, the evidence before the Court i.e. the cautioned statement (Exhibit Z) is that A7, Mahama Ayariga, being the Member of Parliament of the Bawku Municipal Assembly took steps to procure an ambulance for the Constituency from his shares of the Common Fund and the National Health Insurance Fund. He says that he directed Mumuni Yakubu Nambe to assist in that regard and that he was later told that the ambulance had been procured. I have studied the entire evidence of PW1and PW2, and see no evidence of any of the elements of abetment , showing that there was any interaction or communication, whether verbal or written, showing that A7 directly or indirectly, instigated, commanded, counseled, procured, solicited, or in any other manner purposely aided, facilitated, encouraged, or promoted, whether by a personal act or presence or otherwise, any person, including A1, A2, A3, A4 or A5 to circumvent or contravene the procedure for request for quotation.

In the same vein I see no evidence adduced to show any such abetment onthe part of A6, Mumuni Yakubu Nambe.

Counts two and five would accordingly fail for failure to adduce primafacie evidence to merit A6 and A7 being called upon to open their defence on that score.

I shall now deal with Counts four and six.

ON USING PUBLIC OFFICE FOR PROFIT

All the accused persons charged under these counts.

The relevant charges and their particulars are;

Count Four

Using public office for profit Contrary to section 179(C)(b) of the CriminalOffences Act, 1960 (Act 29) as amended.

Particulars of Offence:

Mumuni Yakubu Nambe, Assembly Member of Bawku Municipal Assembly aged 40 years, sometime in April, 2018 at Bawku in the Upper East Region did act in collaboration with Hajia Hawa Ninchema, Sumaila Ewuntomah Abudu, Alex Vazde, Alhaji Abdul-Mumuni Jesewude, and Mary-Stella Adapesa acting in their capacity as the procurement entity of Bawku Municipal Assembly to corruptly and dishonestly abuse their respective offices for your private profit and or benefit by awarding your company, Jozeba Trading Limited, the contract to procure one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No WDB9066331S200601 at the cost of one hundred thousand Ghana cedis (GH¢100,000)for the Bawku Municipal Assembly without requesting for quotations from at least three other suppliers.

And

Count six

Using public office for profit Contrary to section 179(C)(b) of the CriminalOffences Act, 1960 (Act 29) as amended.

Particulars of Offence:

Mahama Ayariga, Member of Parliament for Bawku Central, aged 43 years, sometime in April, 2018 at Bawku in the Upper East Region did dishonestly use your office as a public officer for your private benefit by branding one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No WDB9066331S200601, the property of Bawku Municipal Assembly, as being donated by your good self knowing very well that the vehicle was procured by the use of public funds.

Section 179C of Act 29 under which A6 and A7 are charged states;Section 179C—Using Public Office for Profit.
Any person who—

> **(a) while holding a public office corruptly or dishonestly abusesthe office for private profit or benefit; or**
>
> **(b) not being a holder or a public office acts or is found to have acted in collaboration with a person holding public office for the latter to corruptly or dishonestly abuse the office for private profit or benefit, commits an offence.**

From the above, the elements to be proven are in the first instance under

(a) that;

i. The Accused person, a public office holder

ii. Has corruptly or dishonestly abused such office

iii. For private benefit

And/or (b) that;

i. The Accused person, not being a public office holder,

ii. Acts by himself or in collaboration with the public office holder,

iii. For the latter (i.e. the public office holder),

iv. To abuse the public office for private benefit.

Justice Dennis Adjei in his work '**CONTEMPORARY CRIMINAL LAW IN GHANA'** explains the charges very clearly at pages 354-355.

He sums up thus;

> **"While section 179C(a) of Act 29 is committed by a person holding public office who corruptly or dishonestly abuse the office for private profit or benefit; an offence under 179C(b) is committed ny a person who is not holding public office but acts or is found to have acted in collaboration with a person holding public office for the said public officer to corruptly or dishonestly abuse the public office for private profit or benefit."**

See also:

- **THE REPUBLIC v. EUGENE BAFFOE-BONNIE & OTHERS (HC) SUIT NO. CR/904/2017 (dated 12th May, 2020) per HL Justice Eric Kyei-Baffour (as he then was).**

In this case, per the particulars of the offence and case before the Courtwith regard to A6, Mumuni Yakubu Nambe, and which forms the gravamen of the particulars of evidence is that he acted "in collaboration with Hajia Hawa Ninchema, Sumaila Ewuntomah Abudu, Alex Vazde, Alhaji Abdul-Mumuni Jesewude, and Mary-Stella Adapesa acting in their capacity as the procurement entity of Bawku Municipal Assembly to corruptly and dishonestly abuse their respective offices for your private profit and or benefit by awarding your company, Jozeba Trading Limited,the contract to

procure one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No WDB9066331S200601 at the cost of one hundred thousand Ghana cedis (GH¢100,000)for the Bawku Municipal Assembly without requesting for quotations from at least three other suppliers."

This charge against A6 will fail for the following reasons;

In the first place, it has been discussed under previous heads, therefore not requiring repetition that the prosecution has adduced no evidence to show, to the required standard of proof, being *prima facie*, that there wasany sham tendering by non-existent enterprises, or companies having the same beneficial ownership in the person of A6. That would have in itself been a basis of the failure of the charge.

Secondly, the tenure of the provision does not have in its sights the private person, who by collaboration with the public officer profited.

Rather, the law is geared towards private persons collaborating with publicofficers for the latter (i.e. the public officer) to corruptly or dishonestly abuse the public office for private profit or benefit. Thus, to accuse A6, who is not a public officer, of collaborating with public officers for his (A6's) private benefit is to charge him under a non-existent law.

On the part of A7, he is being accused of using his public office for his private benefit in that he branded one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No WDB9066331S200601, the property of Bawku Municipal Assembly, as being donated by him (A7) knowing verywell that the vehicle was procured by the use of public funds.

As stated supra, A7's explanation is that they were to apply his shares of the Common Fund and the National Health Insurance Fund to purchase an ambulance for the Bawku Municipality. Having given this explanationin his statement on caution, it is my view that a fair and candid investigator would have taken steps to verify whether or not these facilities,
i.e. the MP's Common Fund and MP's National Health Insurance Fund did exist and could be so applied, but alas, as is characteristic of this case, no steps were taken. The moment the prosecution saw the cheque issued bythe Municipal Assembly, it drew its conclusion, without ascertaining any element of the hypothesis, that A7 has used public

funds for acquiring theambulance and had branded it to his benefit.

The result is that the prosecution has failed to meet the evidential burdenof producing evidence to back the charges raised.

I therefore draw the inevitable conclusion that the prosecution has been unable to produce sufficient prima facie evidence to substantiate counts four and six of the charge sheet.

A6 and A7 would accordingly be acquitted and discharged on thatscore.

I shall now deal with the final charge.

ON TRANSFER OF THE FOREIGN EXCHANGE FROM GHANA THROUGH AN UNAUTHORIZED DEALER

Count seven

The statement of offence is quoted below;

Transfer of the Foreign Exchange from Ghana Through an Unauthorized Dealer Contrary to Sections 15(3) And 29(1) (A) of the Foreign Exchange Act 2006, Act 723

The Particulars of offence are;

Mumuni Yakubu Nambe, Assembly Member of Bawku Municipal Assembly aged 40 years, sometime in April, 2018 at Bawku in the Upper East Region did transfer Foreign Exchange from Ghana to the Netherlands for the purchase of one used Mercedes Benz Sprinter 315CD1 Ambulance with Chassis No WDB9066331S200601 through an unauthorised dealer.

One has to ascertain the ingredients of the offence from the tenure of theenactment.

Sections 15(3) and 29(1) of Act 723 state;

15 (3) Each transfer of foreign exchange to or from Ghana shall be made through a person licensed to carry out the business of money transfers or any other authorised dealer.

29. (1) A person who

(a) **engages in the business of *dealing* in foreign *exchange without* a licence issued under section 5(1);**

(b) **contravenes or fails to comply with a restriction imposed under section 6;**

or,

(c) **contravenes or fails to comply with any of the terms or conditions required to carry out the business of foreignexchange transfers commits an offence and is liable, on summary conviction, to a fine of not more than seven hundred penalty units or a term of imprisonment of not more than eighteen months or both.**

The elements the prosecution has to prove, given the tenure of thelegislation, are that the accused person, in this case, A6, Mumuni YakubuNambe, has;

i. Made a transfer of foreign exchange

ii. To or from Ghana and,

iii. Made same without utilizing a person licensed to carry out thebusiness of money transfers or any other authorized dealer.

The same charge, from the quotation of section 29(1) of Act 723 which has to do with dealing in foreign exchange without authority also demands under the said section 29 (1) that the prosecution adduces evidence to show that A6;

i. has engaged in the business of *dealing* in foreign *exchange without* a licence issued under the Act,

ii. *has contravened* or failed to comply with a restriction imposed under the Act,
iii. contravened or failed to comply with any of the terms or conditions required to carry out the business of foreign exchangetransfers.

Clearly, the drafting of the statement of offence is problematic because there are too many offences quoted in it. What exactly is the accused person being held for?

Is it that he made a transfer of foreign exchange without utilizing a person licensed to carry out the business of money transfers or any otherauthorised dealer, in which case one must show the method not only thatthe transfer was made, but also that the transfer was made outside of theapproved channels?

Or, is he being held for being the one who made the transfer himself or dealing in the foreign exchange himself without licence?

Has he failed to comply with a restriction imposed under a portion of the Act?

Has he failed to comply with some terms or condition required to carry outthe business of foreign exchange transfers?

Without being condescending and with utmost due respect and deferenceto the Office of Special Prosecutor, it would not be expected that such a cumbersome drafting would emanate from there.

It is a well-known fact of the drafting of criminal charges that the offence- creating section of the law is what is quoted in the statement of offence. The offence-creating section, for ease of identification, is the section of thelaw with the penalty for breach.

Please see:

- **A.N.E. Amissah; CRIMINAL PROCEDURE IN GHANA at pages 76-77**

- **BOATENG v. THE REPUBLIC (1969) C.C.20**

Further, it is improper to put together two distinct offences as one count unless one is

an inchoate, such as abetment, conspiracy, attempt, or preparation, of the other. It is also not expected that the offence-defining section would be the one quoted in the statement of offence.

Sir Dennis Adjei JA in his work **CRIMINAL PROCEDURE AND PRACTICE IN GHANA** gives a clear explanation of what would constitute duplicitous charges at pages 221 to 222 thus;

> **"The law is that where two or more distinct offences are put together as one count, it is referred to as a charge bad for duplicity. Basically, there are three tests which are used to determine whether two or more distinct offences are put together in one count to suggest that they constitute one offence. The first test is whether an offence provided under different sections of an enactment are found in one count. This test does not affect the charge where one of the offences put together as one was an inchoate offence and the other one was a substantive offence "**
>
> - **Please see also section 109 of the Criminal and Other Offences Procedure Act, 1960 (Act 30)**

Thus, in in this case, the penalty for contravening section 15 of Act 723 is contained in the same section at subsection (4) of Act 723 which states;

> **15 (4) An exporter who fails to repatriate proceeds from merchandise exports, through an external bank, commits an offence and is liable on summary conviction to a fine of not more, than five thousand penalty units or to a term of imprisonment of not more than ten years or to both.**

It would even seem that that part of the legislation is targeted at exporters and not importers**.**

Further, the penalty for the breach of section 29 is therein contained and concludes that section in the following words;

> "….**commits an offence and is liable, on summary conviction, to a fine of not more than seven hundred penalty units or a term of imprisonment of not more than eighteen months or both.**"

Thus, in this case, we have the untenable situation of A6 being charged with an offence

which carries two different penalties due to a drafting error.

Such a charge, by law, is unsustainable and would constitute a substantial miscarriage of justice in that should he be convicted, this

Court would be hard-pressed to determine under which law he would bepenalized.

A second matter of relevance to the determination of this charge is the issue of the mandate of the Office of Special Prosecutor.

In a Ruling of this court dated the 17th of June, 2019 in **THE REPUBLIC v. MAHAMA AYARIGA AND KENDRICK AKWASI MARFO SUIT NO. MSFT/23/2019**, this Court had occasion to discuss the mandate of the Office of Special Prosecutor. This Court determined that the mandate of the Office is very proscribed. A part of the Ruling would be relevant for ourpurposes;

"To settle this matter, recourse will have to be had to the legislationunder which the Special Prosecutor functions.

Sections 2 and 3 of the Act on the object and the functions of the Office state:

Object of Office

2. ***The object of the Office is to***

a) ***investigate and prosecute specific cases of alleged or suspected corruption and corruption-related offences;***

b) ***Recover the proceeds of corruption and corruption-relatedoffences, and***

c) ***Take steps to prevent corruption.***

Functions of Offence

3. *(1) To achieve the objects, the Offence shall*

a) *investigate and prosecute cases of alleged or suspected corruption and corruption-related offences under the Public Procurement Act, 2003 (Act 663);*

b) *investigate and prosecute allegations of corruption and corruption-related offences under the Criminal Offences Act, 1960 (Act 29) involving public officers, politically exposed persons and persons in the private sector involved in the commission of the offences;*

c) *investigate and prosecute alleged or suspected corruption andcorruption-related offences involving public officers, politicallyopposed persons and persons in the private sector involved in the commission of the offence under any other relevant law;*

d) *recover and manage the proceeds of corruption;*

e) *disseminate information gathered in the course of investigation to competent authorities and other persons the Office considers appropriate in connection with the offences specified in paragraphs (a) and (b),*

f) *co-operate and coordinate with competent authorities andother relevant local and international agencies in furtheranceof this Act;*

g) *receive and investigate complaints from a person on a matter that involves or may involve corruption and corruption-relatedoffences;*

h) *receive and act on referrals of investigations of alleged corruption and corruption-related offences by Parliament the Auditor-General's Office, the Commission on Human Rights and Administrative Justice, the Economic and Organized Crime andany other public body; and*

(i) Perform any other functions connected with the object of the Office.

Further, section 79(c) of the Act, interprets "corruption and corruption related offences to mean;

(a) Sections 146,151, 179C, 239,252,253,254,256,258 and 260 of

the Criminal Offences Act, 1960 (Act 29);

(b) *Section 92(2) of the Public Procurement Act, 2003 (Act 663); and*

(c) *Existent offences under enactments arising out of or consequent to offences referred to in paragraphs (a) and (b).*

Under the Act, "politically exposed person" includes

(a) *A person who is or has been entrusted with a prominent publicfunction in this country, a foreign country or an internationalorganization including*

(i) *a senior political party official, government, judicial ormilitary official;*

(ii) *a person who is or has been an executive in a foreigncountry or a state-owned company;*

(iii) *a senior political party official in a foreign country; and*

(b) *An immediate family member or close associate of a person referred to in paragraph (a).*

(Emphases mine).

…Without going to any great detail as this is a very preliminary stage of this case, it must be unequivocally stated that the mandate Office of the Office of the Special Prosecutor is, as can be gleaned from thelong title of Act 959 is;

> *…to establish the Office of the Special Prosecutor as a specialized agency to investigate specific cases of alleged or suspected corruption and corruption-related offences involving public officers and politically exposed persons in the performance of their functions as well as persons in the private sector involved in the commission of alleged or suspected corruption and corruption-related offences, prosecute these offences on the authority of the Attorney-General …..*

From the mandate under sections 2, 3 and 79 of Act 959, the Office may exercise its mandate under the specific Acts quoted therein in addition to "any other relevant law" so long as they are corruption

or corruption-related. Clearly then, when charges are laid, the Particulars of Offence must show that the offence arises out of "corruption or corruption-related" circumstances or same must fail.

In this case, I have entirely reproduced all offences contained in thecharge sheet for ease of reference. The drafting of Particulars of Offence under Counts one(1), three(3) four(4) and five(5), do not make any reference to any part of those offences having been allegedly perpetrated in furtherance of corruption and/or a corruption-related enterprise.

That is a drafting error, which, in my candid opinion, has the effect of exceeding the mandate of the Office of the Special Prosecutor."

In this case, I have noted the drafting of the charge and the particulars in support thereof, as well as the evidence so far put before the Court. Thereis nothing to suggest that this offence is corruption and/or corruption related and as such is not mandated by Act 959.

I shall finally deal with the very quality of the evidence put before the Court, and determine whether is would amount to the required standard being *prima facie*.

Paragraph 47 of the witness statement of PW2, the investigating officer states;

> *"My Lord, in the course of our investigations, it was found that the sixth accused person transferred from Ghana to Netherlands the US Dollarequivalent of Ninety-Two Thousand Ghana Cedis (GH¢92,000) for the importation of the ambulance. The foreign money for the payment of the supplier in Netherlands was however not transferred through any bank or licensed dealer."*

Beyond this bare assertion, no evidence is offered to show if any transfer was made and through whom it was made for the prosecution to draw theconclusion that the transfer was made through some illegal channel.

Since the nature of the evidential burden of the prosecution has been discussed under previous heads, there will no need to repeat it here.

A study of Exhibit Y, the investigating cautioned statement of A6 would show that in it, he does not volunteer any information of how he came to get the funds transferred to the Netherlands where the ambulance is saidto have been imported from.

In Exhibit AF, his charged cautioned statement, he simply states;

"I deny all the charges level [sic] against me."

Our principles of law are clear that an accused person has a right not to incriminate himself, and the burden is always on the prosecution to proveits case, at the very least to merit an accused person being called upon to answer to it. There is no burden on an accused person in our jurisprudence, to prove his innocence, or assist in investigations.

The prosecution should not expect that the evidence to prove their case would be sourced from the accused person. Clearly, once the accused person did not put forward the evidence needed, there was no effort to independently establish the modus used by A6 to transfer the funds for the ambulance, if at all.

In my view, the non-existent evidence to prove this charge against A6, evenif it had been properly laid, would compel a finding of not meeting the evidential standard.

Count seven would also fail on grounds of;

a) Duplicitous drafting of the charge,

b) Lack of mandate and

c) Lack of evidence.

To conclude I hold that the accused persons are all acquitted and discharged on all counts.

POST SCRIPT:

I must register my disappointment and displeasure with the Counsel for the Prosecution and A4 for failing or refusing to file their written addresses as directed to assist the Court.

At the close of the Prosecution's case, the Court gave directions inter alia that;

"…. in accordance with section 5(2)(a) of the Practice Direction Disclosures, and Case Management in Criminal Proceedings, dated 30th October, 2018, this case is adjourned

> *to 7th May, 2021 for Rulingon whether or not the accused persons have a case to answer on the charges preferred against them. Should any of the lawyers wish to do so, they are to file any legal arguments they may have by 10 a.m. on30th April, 2021."*

Lawyers for A2 and A6 filed their arguments on the 29th of April, 2021.

Lawyers for A1, A3, A5 and A7 also filed their submissions on the 30th of April, 2021. They are truly appreciated.

This Court is however not unaware that counsel is perfectly entitled to waive the right to file addresses.

In the case of **MRS VICENTIA MENSAH SUING PER HER ATTORNEYS 1. BONIFACE LUMOR 2. JOHN LARYEA SUBSTITUTED BY BEATRICE TSOTSO ADJETEY VRS. NUMO ADJEI KWANKO II** (Civil Appeal No. H1/185/2013) (12th March, 2015), the Court of Appeal, where His Lordship Marful J.A (as he then was) presiding stated at page 4 of the Judgment;

> *"I do not think that the mere fact that the Court did not receive written addresses of counsel for the appellant rendered that judgment irregular…...*

(See also **AMERLEY v. OTINKORANG (1965) GLR 658)**

The accused persons are acquitted and discharged on all counts.

(SGD)
AFIA SERWAH ASARE-BOTWE (MRS.)
(JUSTICE OF THE HIGH COURT)