The Fight against Corruption in Sierra Leone

Challenges and Opportunities in the Jurisprudence

Michael Imran Kanu[*]

Abstract

The fight against corruption in Sierra Leone gained momentum, at least in terms of policy direction, following the enactment of the Anti-Corruption Act 2000 and the Amendment Act in 2008. It is considered to be one of the most robust anti-graft laws in the world and its promulgation is in recognition of the international and national resolve to fight the menace, owing to its devastating effects, especially in the Least Developed Countries (LCDs) of the world. The Anti-Corruption Act of 2000, though viewed as a tremendous move towards curtailing corruption, was riddled with shortcomings. Practitioners viewed the Act as limited in the number of proscribed offences created, coupled with the lack of independence signified by the absence of prosecutorial powers. With the enactment of the Amendment Act in 2008, it is crucial to examine the opportunities it has created to eradicate corruption. Critical also to the national and global resolve is the consideration of challenges that may have sprouted. This paper will examine some of the opportunities and challenges in the jurisprudence in the fight against corruption in Sierra Leone, with the aim of providing an avenue for reflection as well as a prompter for legislative reforms or change in judicial approach.

Keywords: Accountability, corruption, judicial approach, jurisprudence, reforms.

1 Introduction

The purposeful national and international resolve to eradicate corruption and corrupt practices is herein dubbed the fight against corruption in Sierra Leone. The symbolism of the fight against corruption was popularized by the declaration of a new war by the Government of Sierra Leone (GoSL) and the ordinary people, the fight against corruption with regard to which the political leadership pledged

* Department of Legal Studies, Central European University. Email: Kanu_Michael@phd.ceu.edu.

nobody would be above the law.[1] This resolve to fight corruption emanated from a background in which Sierra Leone in the 1990s represented what political scientists described as a failed state.[2] The small West African State was ravaged by rebel war from 1990-2000, leading to a complete breakdown of all governance institutions, including the judiciary.[3] Thus, any improvement in the fight against corruption, whether jurisprudential or otherwise, ought to be taken as a significant step forward. The governmental policies synergized with that of the international donor community's determination to fend off graft led to the enactment of the Anti-Corruption Acts in the 2000s.[4]

It was a generally accepted proposition that the Anti-Corruption Act 2000 (ACA 2000) was riddled with several shortcomings, not least of which was the Anti-Corruption Commission (the Commission) lack of prosecutorial powers. This undesirable status was aptly captured in the memorandum of objects and reason to the 2008 Anti-Corruption Bill, which argued thus:

> The Anti-Corruption Act 2000 [...] was enacted to prevent corrupt practices. The Act, since its enactment has been the subject of many criticisms. One of such criticisms is that the Act did not go far enough in its provisions especially when viewed against the United National Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption and Related Offences, both of which Sierra Leone has ratified. Another criticism was that the Anti-Corruption Commission did not have powers to prosecute offences under that Act and relied on a three member Committee established by the Law Officers (Prosecution of Anti-Corruption Cases) Instructions, 2005 to make decisions as to whom to prosecute under that Act, the constitutionality of which remains doubtful. The object of this Bill is therefore to plug the holes in the Anti-Corruption Act 2000 whilst adopting the provisions in the two conventions.[5]

1 Former President Ahmed Tejan Kabbah, at the inauguration of the Anti-Corruption Commission (ACC) on 6 February 2000, declared thus: "My government and the ordinary people of Sierra Leone now have a new war to wage. This is the war against corruption. And in this fight, nobody will be above the law, including myself." David Tam-Baryoh, 'Corruption in Sierra Leone – Worldpress.org' (15 January 2002) <www.worldpress.org/Africa/352.cfm> accessed 23 September 2016; President Ernest Bai Koroma, in his maiden speech to Parliament, re-emphasized his government's 'zero tolerance' to corruption, aptly symbolized by his 'no sacred cows' declaration. 'Sierra Leone Web – President Ernest Bai Koroma – Address at the Opening of Parliament, 5 October 2007', 5 October 2007, <www.sierra-leone.org/Speeches/koroma-100507.html> accessed 23 September 2016.

2 *See* Sierra Leone and Truth and Reconciliation Commission, *Witness to truth final report of the truth and reconciliation commission*, Graphic Packaging 2004, <www.aspresolver.com/aspresolver.asp?HURI;2589149> accessed 22 February 2016; in W. Reno, *Corruption and State Politics in Sierra Leone*, Vol. 229, Cambridge University Press, Cambridge 1995, Reno, in investigating the political economy of Sierra Leone, put forward the 'shadow state' argument. He posited that corruption and illegal economic activities perpetrated by the political leadership and foreign businesses created a 'shadow state' that enslaved the political economy.

3 *See* Sierra Leone and Truth and Reconciliation Commission, *supra* note 2.

4 *See* the Anti-Corruption Act, 2000; the Anti-Corruption Act, 2008.

5 A. Serry-Kamal, the Anti-Corruption Bill, 2008, p. 87.

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Recognition of these failings and enactment of a new statute to remedy the defects represented a symbolic concretization of an often political rhetoric, which is purposefulness in fighting corruption in Sierra Leone. Following such political postulations and legislative action, periodic assessments are necessary and expedient, especially with regard to the jurisprudence in order to guide future political discourse, policymaking and possible legislative reforms.

With reference to the focus on jurisprudence, it is interesting to note that the word jurisprudence is not generally used in other languages as in the Standard English or legal connotation. In French, however, it signifies 'case law'.[6] The French connotation fits this paper's central theme, and therefore the analysis of the opportunities and challenges in the fight against corruption in Sierra Leone will be focused primarily on the case law. It follows that the discourse will be based primarily on doctrinal analysis of relevant statutes and cases, starting with the opportunities and thereafter the challenges in the jurisprudence.

2 Opportunities in the Anti-Corruption Jurisprudence

Having narrowed our consideration to case law, we need to note that prior to the passing of the ACA 2000, the only legislation that was operative and singularly set apart for corruption-related offences was the Prevention of Corruption Ordinance 1907.[7] The Ordinance, which was in actual fact a two-pager, was obsolete and proved to be fundamentally inadequate in addressing corruption and its pervasive practices. It was left in a state of disuse, as it was effective and convenient for public officers to be charged with the offences of embezzlement and/or larceny by servants under the Larceny Act 1916.

The ACA 2000 brought about watershed changes to the anti-graft legal landscape. It was, however, saddled by major weaknesses, some of which have been highlighted above. It was these frailties that prompted the amendment in 2008. The Constitutional Amendment[8] and the Anti-Corruption Act 2008 (ACA 2008) introduced significant changes, not least of which was an increase in the number of proscribed corrupt practices penalized by a uniform minimum sentencing regime.[9] With over 15 years of combined cases law under the ACAs 2000 and 2008, anti-graft practitioners are in a good position to weigh in on opportunities in the fight against corruption that the jurisprudence has created.

6 M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 6th edn, Sweet & Maxwell, London, 1994. I am sure it is this meaning the Fourah Bay College Law Society had in mind in coining the topic for the consideration of the panel.

7 Prevention of Corruption Act 1907, which was part of the received laws in Sierra Leone; *see* the consolidated text, Cap 33 of the Laws of Sierra Leone 1960. Cap 33 was amended by the Prevention of Corruption Act No. 35 of 1965.

8 The Constitution of Sierra Leone (Amendment) Act, 2008. This amendment limited the powers of the Attorney-General and Minister of Justice in prosecuting all criminal offences in Sierra Leone by excluding corruption offences under the Anti-Corruption Act 2000. This constitutional step allowed for investigative and prosecutorial autonomy of the Anti-Corruption Commission.

9 *See* the Anti-Corruption Act, 2008, *supra* note 4.

2.1 Shifting of the Evidential Burden and Presumptions

The first issue for consideration under the opportunities section is the delicate issue of the shift of the evidential burden on certain issues to the accused, backed by further statutory presumptions of law. As part of settled law, it is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt. This was famously referred to as the 'golden thread' in criminal law by Lord Sankey LC, who declared: "Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to... the defence of insanity and subject also to any statutory exception."[10] This is the legal burden that never shifts. However, there also exists the notion of the 'evidential burden' or 'reverse legal burden', hinted at by Lord Sankey LC in the *Woolmington* case.[11]

At common law, the evidential burden hardly shifts to the accused, except for example where the defence of insanity is raised.[12] The burden is discharged by the accused on a balance of probabilities.[13] Statutory law may provide and has provided numerous instances for the shifting of the evidential burden to the accused on specific issues. This is a common legislative practice in traffic offences, for example. In other cases the courts may conclude that Parliament must, by necessary implication, have intended to impose such a reverse burden, even where it has not done so expressly.[14] The Commission noted in its submission in the *State vs. Hebbert Akiremi George-Williams & Others*[15] that provisions that purport to reverse a burden of proof may be construed differently where they would otherwise be incompatible with the Constitution and the right to fair trial.[16]

10 *Woolmington v. DPP [1935] UKHL 1* (UKHL [1935]); *See Koroma v. R* [1964] ALR SL 542, where the Court of Appeal in Sierra Leone accepted the opinion of Lord Sankey as sacrosanct per Sir Samuel Bankole Jones. Also *see* the corruption cases: *S v. Baun and Others* [2009] SLHC 18 (High Court) and; *S v. Kalokoh* [2009] SLHC 3 (High Court).

11 *Woolmington v. DPP [1935] UKHL 1, supra* note 10.

12 *See Woolmington v. DPP [1935] UKHL 1, supra* note 10; *Bratty v. Attorney General of Northern Ireland [1961] UKHL 3* (UKHL [1961]) (non-insane automatism).

13 *Bratty v. Attorney General of Northern Ireland [1961] UKHL 3, supra* note 12. *See also* R v Carr-Briant (1943) KB 607; *See also* the judgment of N.C. Browne-Marke JA (as he then was) in *S v. Archula* [2009] SLHC 21 (High Court), where he listed a line of Sierra Leone case authorities.

Where the prosecution has not made out the case and the prisoner is entitled to an acquittal. *See Kargbo v. R* [1968-69] ALR SL 354 CA. per TAMBIAH, JA at 358 LL3-5: "The onus is never on the accused to establish this defence any more than it is upon him to establish provocation or any other defence apart from that of insanity!" There, the accused pleaded self-defence. *See* further: *Bob-Jones v. R* [1967-68] ALR SL 267 per SIR SAMUEL BANKOLE JONES, P at 272 LL21-39; *Seisay and Siafa v. R* [1967-68] ALR SL 323 at 328 LL20-23 and at 329 LL12-18; and *Samuel Benson Thorpe v. Commissioner of Police* [1960] 1 SLLR 19 at 20-21 per BANKOLE JONES, J as he then was. The point was again underscored by AWOONOR-RENNERJSC in *Franklin Kenny v. The State Supreme Court* Cr App 2/82 (unreported) at pages 6-7 of her cyclostyled judgment.

14 *R v. Oliver* [1944] KB 68, 29 Cr App Rep 137, CCA; *Nimmo v. Alexander Cowan & Sons Ltd* [1968] AC 107, [1967] 3 All ER 187, HL; *R v. Edwards* [1975] QB 27, 59 Cr App Rep 213, CA; *R v. Hunt (Richard)* [1987] AC 352, 84 Cr App Rep 163, HL.

15 *State v. Hebbert Akiremi George-Williams & Others* [2012] SLHC (High Court).

16 J.F. Kamara *et al*., 'Prosecution Final Address in the State vs. Hebbert Akiremi George-Williams & Others', 2012. *State v. Hebbert Akiremi George-Williams & Others, supra* note 15.

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Several sections of the ACA 2008 may be construed to have the effect of reversing the evidential burden of proof. Some of the sections are listed as follows: First, section 26(2) regarding the presumption that property held by a person has been in the control of the accused. Second, section 27 on the presumption of corruption in relation to the possession of unexplained wealth. Third, section 28(4) and (5) dealing with the presumption that the purpose of an offer or solicitation of advantage, etc. was bribery. Fourth, section 39(6) and (7) on the presumption of agency in relation to matters relating to the business of government. Fifth, section 44(2) on the presumption that a public officer made use of his office or position for an advantage. Sixth, section 92(1) (b) on the presumption that advantage was given or solicited as a reward. Seventh, section 92(2) on the presumption that the accused is in possession of property held by another. Eighth, section 93 on the presumption of validity of certificates of emoluments. Ninth, section 94 on the burden of proving lawful authority or reasonable excuse.[17]

In addition to the above sections, it is instructive to reproduce section 94 of the ACA 2008, which imposes an overriding evidential burden on an accused relying on the 'defence of lawful authority or reasonable excuse' in any proceedings under the Act. This takes away the burden on the prosecution to disprove lawful authority or reasonable excuse, which could have been tricky. Justice Ademosu JA had opined that where the burden of proof is placed on the accused, the standard is 'less than' that required of the prosecution.[18] The effect (rather the opportunity afforded the Commission) is shifting of the onus to prove matters that could render nugatory all attempts to prosecute corrupt practices. In the *State vs. Solomon Hindolo Katta & Others*[19] the Commission succeeded for the very first time in securing a conviction on the difficult charges of possession of unexplained wealth and false assets declaration under sections 27 and 122 respectively of the ACA 2008, relying on the shift of the evidential burden.

2.2 Admissibility of Evidence (Digital/Electronic and Mode of Acquisition)

In the common law adversarial system, it is generally said that a lawyer is as good as her case, and a case can be won or lost based on the quality of the evidence admitted by the court. In Sierra Leone tendering evidence generated electronically or digitally is a legal minefield. It represents a gap in the law, caused mainly by the age of Criminal Procedure Act (CPA),[20] which was enacted in 1965, long before the proliferation of technological advancement prevalent in this era (21st century). The law on admissibility of evidence generally in criminal trials is settled. Once the relevance of the evidence is established or undisputed, the author-

17 The Anti-Corruption Act, 2008, *supra* note 4. *See also* sections 97, 98(1) and 129.

18 *State v. Allieu Sesay & Others* [2011] SLHC (High Court) 59 and 69.

19 *State vs. Solomon Hindolo Katta & Others* [2005] SLHC (High Court).

20 The Criminal Procedure Act, 1965.

ship, custody and originality become *prima facie* the key prongs to satisfy before being admitted by a court.[21]

As previously noted, electronic or digital evidence presents enormous challenges to parties given the age of the CPA and constant technological advancements. It is almost an impossible task under the current CPA to introduce such evidence, especially when a trial may have not been envisaged during its creation, and the chain of custody; hence, evidence preservation rules are often ignored. This is evinced in the case of *the State vs. Abdul Aziz Carew*,[22] where the defence tried unsuccessfully to introduce and tender a 'CD plate' purportedly containing a previous inconsistent statement of the first prosecution witness (the victim) in a bid to impugn his testimony. Justice N.C. Browne-Marke JSC (then JA) had this to say: "During the course of the defence case, Counsel for the accused persons tried by various means to put in evidence a CD plate said to contain a recording of [the first accused] interview. I refused to admit the CD plate [...] I stand by that decision."[23]

Justice Brown-Marke's decision was based on the break of the custody chain, unavailability of the original digital material destroyed by the maker relying on sections 4 and 5 of the CPA 1865.[24] This Act, he said, is applicable in Sierra Leone as part of the received laws in the reception clause. Whether a statute of general application in England is still applicable in Sierra Leone under section 170(1) and (4) of the Constitution of Sierra Leone 1991[25] (the Constitution) and section 74 of the Courts' Act, 1965 when there exists a specific statute in Sierra Leone, that is, the CPA 1965, is an interesting legal discussion point albeit out of the scope of this paper. However, suffice it to say the issue is less problematic or non-existent for prosecution of corrupt practices. The ACA 2008 has avoided this problem by a combination of useful provisions therein. Generally, admitting a document is considered routine and can easily meet the legal threshold. Hence, a document is defined in the Act to include: "a tape or video recording, disc or any form of computer input or output and any other material, whether produced mechanically, electronically, manually or otherwise".[26]

The inclusion of a tape or video recording, disc or any form of computer input or output and any other material in the definition of document is supplemented by the mode of acquisition provision under section 73 of the ACA 2008. It states:

> Anything, including the contents thereof, provided by a person pursuant to a requirement or obtained on a search of any person or premises under this

21 *S v. Conison and Others* [2005] SLHC 2, where Shuster J. considered the issue of admissibility and the English cases of *Myers v DPP 2 ALLER* 881, *Patel v. Comptroller of Customs* 3 ALL ER 1965 593, Abdul Hamid Ibrahim Patel (1981) CA JANUARY 16 & 26, *R v. Kearley* (1992) 2 ALL ER 345, while considering the admissibility rules under the Bankers Books Evidence Act 1879.

22 *The State v. Aziz Carew and Abdul Quee* [2012] SLHC 1 (High Court).

23 *Ibid*., 9.

24 Criminal Procedure Act 1865 s 4 and 5; *The State v. Aziz Carew and Abdul Quee, supra* note 22, 9-10.

25 The Constitution of Sierra Leone, 1991.

26 The Anti-Corruption Act, 2008, *supra* note 9, s1.

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> Part, may be taken and retained by the Commission for such time as is reasonable for the purposes of the investigation concerned and is admissible in evidence in a prosecution of any person, including the person who produced it or from whom it was obtained, for an offence.[27]

This provision has made it easy for the Commission to tender anything in its possession received during the investigation of a case, notwithstanding its origin or status. The combination allowed for the video evidence showing the accused persons soliciting from a contractor in the case of the *State vs. Michael Seiwoh & Idrissa S. Kamara*,[28] which was the principal piece of evidence that led to the accused persons' convictions. The provision of section 73 of the ACA 2008 appears to be a statutory confirmation of the ratio on admissibility even of illegally obtained evidence in the case of *Kuruma, Son of Kaniu v. The Queen*,[29] which is still a good law in Sierra Leone.

2.3 Fair Trial – Prosecutorial Disclosure & Delay

Protection of the law is guaranteed under section 23 of the Constitution, which, inter alia, means an accused faced with a criminal trial must be afforded a "fair hearing within a reasonable time by an independent and impartial court established by law".[30] With respect to corruption cases, 'fair hearing' is the most significant benchmark owing to the thin perceptive line between prosecution and accusations of persecution and political witch-hunting. A crucial tool to achieve a fair hearing within the notion of the presumption of innocence is for the accused to be informed of the allegations and be provided with evidential proofs to permit adequate defence preparation.[31]

Prosecutorial disclosure in a criminal trial is crucial for the conduct of a fair trial, doing away with the repressive tactics of 'trial by ambush'. The CPA, which remains the principal procedure legislation for criminal trials, including corruption cases,[32] makes provision for limited disclosure. The CPA only requires the Sheriff or Deputy Sheriff to serve the accused the 'indictment' and 'notice of trial' between three and seven days at least before the date of trial or even less time for good reasons.[33] For criminal trial following a preliminary investigation, the accused is allowed to cross-examine prosecution witnesses but with no prior disclosure requirement placed on the prosecution during the preliminary investigation.[34]

The narrowness of the procedural law on constitutional guaranteed right is understandable given that the CPA is *ex ante* the Constitution. The disclosure obligations on the prosecution in corruption trials, however, were expanded and

27 *Ibid*., s73.
28 *State v. Michael Seiwoh & Idrissa S Kamara* [2010] SLHC 315 (High Court).
29 *Kuruma v. The Queen; PC 8 Dec 1954* [1955] AC 197 (Privy Council).
30 The Constitution of Sierra Leone, 1991, *supra* note 25, s23.
31 *Ibid*., s23(5).
32 *See* the *State v. Adrian F Fisher* [2009] Supreme Court 2, SLSC.
33 The Criminal Procedure Act, 1965, *supra* note 20, s140.
34 *Ibid*., s111.

improved upon in the ACA 2008, which is *ex post* the Constitution. The ACA 2008 provides that: "An indictment preferred under [...section 89] shall be filed and served on the accused together with the summary of the evidence of the witnesses which the Commission relies on for the proof of the charge contained in that indictment and the names of such witnesses shall be listed on the back of the indictment."[35] The witness summary and proofs have been interpreted to include implicating and exculpatory evidence within the Commission's possession or control.[36]

On delay of trials, it must be noted that one of the main challenges of criminal justice in Sierra Leone is chronic delays, from arraignment to judgment in the trial court, let alone appeal processes.[37] This is a problem caused by lack of resources and exacerbated by cumbersome procedure, especially the continuing practice of conducting a preliminary investigation for most indictable offences.[38] Notwithstanding the provision of section 135 of the CPA, which gives a State Counsel priority before the High Court, systemic logistical constraints make the provision all but phantom. The Commission is protected from the cumbersome committal procedure by law deeming a corruption indictment to be preferred by the consent of a judge in writing, and the extract of findings deemed sufficient for the preferment of the indictment.[39] The Commission is further given priority in court save for trials on indictment for treason, murder or other capital offence.[40] On average, corruption cases are tried within a reasonable time often without undue delay, owing to the pragmatic curtailment of an otherwise convoluted and elongated criminal procedure.

35 The Anti-Corruption Act, 2008, *supra* note 9, s84(9).

36 *See State v. Dr. William Konteh, Yeniviva Sisay-Sogbeh and Victor Cole* [2013] SLHC (High Court Ruling) per A.H. Charm CJ, (then Judge), where the application by the defence for the Commission's 'Investigations Work Plan' to be tendered was refused on the basis of privilege. The Commission enjoys the usual exceptions to disclosure and also could rely on the confidentiality and secrecy provision under section 14 of the 2008 Act.

37 N. Thompson and M. Pa-Momo Fofanah, 'In Pursuit of Justice: A Report on the Judiciary in Sierra Leone', Commonwealth Human Right Initiative and Sierra Leone Bar Association 2002, p. 23.

38 *See* The Criminal Procedure Act, 1965, *supra* note 20, s136; an indictment can be preferred only in the circumstances set out in section 136 of the CPA, which are committal for trial after a preliminary investigation, a coroner's inquest or a Judge's consent in writing.

39 The Anti-Corruption Act, 2008, *supra* note 9, s89(2) and (3).

40 *Ibid*., s89(6).

2.4 Whistle Blowing[41] *and Witness Protection*

As with organized crime and white collar fraud, grand corruption can hardly be prosecuted without creating the enabling environment for whistle blowing and guaranteeing witness protection. Business and the political leadership, often with access to public resources, are uninterested in reporting corruption or corrupt practices, and this disinclination to report corrupt practices stems from the lack of protection in view of the need to maintain market prospects for business or livelihood for public officers. This survival instinct reinforces the incentives not to blow the whistle, leading to the self-propagation of the vice.[42] The United Nations Convention against Corruption recognizes this dilemma and therefore obligated the state parties to implement a novel approach to facilitating the disclosure of information via the necessary reporting person protection; and general witnesses protection.[43]

The ACA 2008 complies with UNCAC's Articles 32 and 33 provisions by providing the necessary legal protections for reporting persons (whistle blowers) and witnesses.[44] The said Act provides:

> Where the Commission receives information in confidence to the effect that an act constituting a [corruption offence under the Act], that information and the identity of the informer shall be held secret between the Commission and the informer, and all matters relating to such information shall be privileged and shall not be disclosed in any proceedings before any court, tribunal or other authority.[45]

To this effect, the confidentiality or privileged nature surrounding reports and the Commission's internal documents is protected by the practice of the Commission and the courts.[46]

Witness protection is not emphasized in the CPA, and the inherent jurisdiction of the court is often the instrument relied on for witness protection, punishable by escheating bail in circumstances where interference is proven to have

41 *See* The United Nations Convention against Corruption; "Whistleblowing refers to the disclosure of information by a privy party" (K. Soltes, 'Facilitating Appropriate Whistleblowing: Examining Various Approaches to What Constitutes Fact to Trigger Protection under Article 33 of the United Nations Convention against Corruption Comment', *American University International Law Review*, Vol. 27, 2011, p. 925); "A whistleblower is an employee, former employee, or organization member who reports workplace misconduct. Employees should be able to report violations without fear of retaliation through a confidential whistleblowing mechanism. A company's compliance program and internal controls should be updated after an internal investigation takes place. Different countries establish different degrees and forms of protection for whistleblowers in the private and public sectors." (GAN Integrity Inc, 'Corruption Dictionary | Business Anti-Corruption Portal | GAN' <www.business-anti-corruption.com/corruption-dictionary> accessed 24 September 2016.)

42 *See* T. Søreide, 'Beaten by Bribery: Why Not Blow the Whistle?', *Journal of Institutional and Theoretical Economics*, Vol. 164, 2008, p. 407.

43 The United Nations Convention against Corruption, *supra* note 41, Arts. 33 and 22, respectively.

44 The Anti-Corruption Act, 2008, *supra* note 4 s81-83.

45 *Ibid*., s81.

46 *See State v. Dr. William Konteh, Yeniviva Sisay-Sogbeh and Victor Cole, supra* note 36.

been done by the defence. Recent criminal law legislations have incorporated witness protection, the Sexual Offences Act 2012, for example.[47] Witness protection guaranteed in section 82 of the ACA 2008 (effected by an *ex parte* application in section 83) came to the fore in the case of the *State vs. Haja Afsatu Kabba*,[48] where it was famously utilized in the proceedings notwithstanding strong objections from the defence. The same protective measures were utilized in the case of the *State vs. Momoh Konteh*,[49] to protect the facial identity of Anas Arameyaw Anas in the case prompted by an 'Africa Investigate' story aired by Al Jazeera Television.[50]

2.5 Post-Trial Issues: Sentencing, Fines and Bail Pending

Given the high-profile nature of corruption offences, the mandatory sentencing regime in the ACA 2008 and often official statuses of the accused-cum-convicted persons, post-trial procedures have been heavily explored in recent times. Convicts with the wherewithal to pursue or exploit all legal provisions or grey areas to stay out of prison have led to the development of the jurisprudence in a once murky part of the criminal procedure in Sierra Leone. There is a conspicuous imbalance between the plethora of post-trial applications relating to sentencing, bail pending appeal and payment of fines in corruption cases compared with the occasional application in other areas of criminal law.

2.5.1 Sentencing and Payment of Fines

Sentencing for offences under Part IV of the ACA 2008 is uniform and mandatory. A finding of guilt for an offence within Part IV obligates a mandatory fine of not less than Le 30,000,000.00 or to imprisonment for a term not less than 3 years or to both such fine and imprisonment.[51] The uniformity, this paper argues, not only serves to demonstrate the equally reprehensible nature of all corrupt practices, but was also was a precautionary measure aimed at maintaining the deterrence posture in the fight against corruption following phony sentencing under the ACA 2000. One of the sham sentencing cases involved the punishment imposed by Taju-Denn J. in the *State v. Harry Will & Others*, which subsequently led to the charge of corrupt acquisition of wealth against the judge and his conviction for the same in *State v. the Hon. Mr. Justice M.O. Taju-Deen Judge*.[52] The man-

47 The Sexual Offences Act, 2012. In the *State v. Mamoud Tarawali*, the accused, a former Deputy Minister of Education, was accused of rape, and section 40 of the Act was used to provide special protective measures for the victim, deemed as a vulnerable.

48 *State v. Haja Afsatu Kabba* (2010) II SLHC 351 (High Court); the accused was the serving Minister of Fisheries and Marine Resources and a popular politician. Her trial attracted enormous public and political attention, leading to the Commission's application for witness protection, particularly non-disclosure of the witnesses' personal details. *See* p. 353.

49 *The State v. Momoh Konteh* [2013] SLHC 65 (High Court).

50 'Sierra Leone: Timber!', Al Jazeera English, <www.aljazeera.com/programmes/africainvestigates/2011/11/201111231343403489 60.html> accessed 24 September 2016; Anas' professional persona requires the protection of his facial identity, since he is mostly engaged in undercover investigative journalism.

51 *See* The Anti-Corruption Act, 2008, *supra* note 5, Le 30,000,000.00 is the equivalent of two-and-a-half years' total of the minimum monthly wage in Sierra Leone.

52 *State v. the Hon Mr Justice MO Taju-Deen Judge* SLSC 1999.

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datory minimum sentencing is being applied without a sentencing guideline though judges have refused to follow the strict requirements, thereby watering down the deterrence effect.[53]

Regarding payment of fines, one novelty that arose out of a corruption case was the exercise of some form of dispensation by trial judges in affording convicts the courtesy to pay the imposed fines on a later date or in instalments. The CPA 1965 allows for payment in instalments only when a fine is imposed and not when a fine is an alternative to custodial sentence.[54] The practice of allowing payment of fines in instalments when imposed as an alternative punishment started in the *State v. Francis Gabbidon*,[55] per Mary Sey J. It has been followed in subsequent cases; but in *Hassan Mansaray v. the State*,[56] M.A. Paul J., while ruling on an application for further extension of time to pay the fine imposed, held that the automatic default in payment of the fine triggers the alternative custodian sentence. The Court of Appeal per P.O. Hamilton JSC, however, overruled Justice Paul but failed to give reasons. While this scenario provided an opportunity for the further examination of the limits of the CPA, the same Court of Appeal in *Michael Amara vs. the State*[57] compounded the situation by holding that although the practice is not based on law, it conceded to give further extension of time, since the trial judge had done so initially.

2.5.2 Bail Pending Appeal

The importance of highlighting this issue is to point out how corruption cases are pioneering discussions on post-trial issues not usually explored in other criminal cases. The Court of Appeal in *Ishaka Sylvester Menjor v. the State*[58] ruled that the leading case on bail pending appeal was its decision in *Taju-Deen*, upheld by the Supreme Court. The *Taju-Deen* decision followed the principles enshrined in *R v. Theophilus Adenuga Tunwashe*[59] requiring exceptional circumstances for an application for bail pending appeal to be granted. Justice Fynn JA opined:

> There is no contention that S. 67 (2) of the Courts Act of 1965 gives this court a discretion to grant bail pending appeal "if it seems fit" nor is it disputed that the burden is on the appellant to show that circumstances exist that make his situation unlike any other – exceptional. Until the applicant does so this court will not "seem it fit" to grant bail pending appeal.[60]

53 *See*, for example, *The State v. Mustapha Amara, Joseph Tewuleh and Bob S Peterson* [2013] SLHC 85 (High Court); *The State v. Philip Conteh & Others* II SLHC 500 (High Court); *The State v. Mark George* [2012] SLHC 48 (High Court).

54 The Criminal Procedure Act, 1965, *supra* note 20, s233.

55 *The State v. Francis Gabbidon* (2009) I SLHC 32 (High Court).

56 *The State v. Hassan Mansaray and Abdul Aziz Bangura* SLHC 94 (High Court).

57 *Michael Amara v. the State* [2014] Cr App (Court of Appeal).

58 *Ishaka Sylvester Menjor v. the State* [2015] SLHC2 (Court of Appeal).

59 *R v. Theophilus Adenuga Tunwashe* [1930-33] WACA 1.

60 *Ishaka Sylvester Menjor v. the State, supra* note 58.

However, Justice Fynn's opinion conflicts with the view of Justice Browne-Marke, whose Court of Appeal panel partially departed from the *Tunwashe* case in *Mustapha Amara vs. the State*,[61] wherein he alluded to his opinion in *Ibrahim Bah v. the State* thus:

> The Tunwashe case was cited by the Court solely in relation to the argument as to whether the Appellant in that case would have served a substantial portion of his sentence before the appeal was heard. [The previous test has been firstly] that bail will not be granted pending an appeal save in exceptional circumstances or where the hearing of the appeal is likely to be unduly delayed.[62]

The test as understood from the case of *Ibrahim Bah vs. the State* and *Mustapha Amara vs. The State* as per Justice Browne-Marke rested on the literal reliance on the express wording of section 67(2) of the Courts Act 1965, that is, 'if the court seems it fit' read together with substantial service of the sentence in *Tunwashe*. Special circumstance, according to him, was made obsolete by the Courts Act or until the Supreme Court deems otherwise. Justice Fynn, however, insisted in *Ishaka* that *Taju-Deen*'s exceptional circumstances as confirmed by the Supreme Court (in his view) is the leading case in Sierra Leone.

The jurisprudential issues and tools that the ACA 2008 has afforded the criminal justice process do reflect the resolve to fight against corruption in some effective sense. The utilization of the corruption Acts demonstrates that they are much more than phantom legislations. For the Commission, the provisions examined herein appear to provide avenues to easily discharge their duties and prosecutorial burden. Ordinarily discharging the burden in the strict sense would be almost impossible, as recognized by Shuster J in the *State v. Fatmata Marrah*,[63] when although agreeing to the defence argument on the need to prove a particular fund in a commingled account, noted the impossibility of such a burden, and further noted that modern law only requires the prosecution to show the accused stole one of the funds.[64] Corruption and related offences are often particularly difficult to prove, given the 'victimless' nature of the crime, direct evidence may well be unavailable. Indeed, as the cases of *R v. Sole*[65] and *R v. Acres International*[66] illustrate, the perpetrators of the offences may well go to extreme lengths in an attempt to cover up their wrongdoings. Therefore flexibility is needed in the application of the ACA 2008 and other relevant legislation in fighting corruption.

61 *Mustapha Amara v. the State* [2013] Cr App 4 (Court of Appeal).
62 *Ibrahim Bah v. the State* [2012] Cr App 1 (Court of Appeal). Quotation marks omitted.
63 *The State v. Fatmata Marrah* (2006) I SLHC 1 (High Court).
64 *Ibid*., 15.
65 *R v. Sole and Others* (CRI/T/111/99).
66 *R v. Acres International* (CRI/T/2/2002).

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3 Challenges in the Anti-Corruption Jurisprudence

There is hardly a perfect statute, notwithstanding how robust it may appear at the time of enactment. The implementation of the provisions of a new statute often exposes it to varying interpretations and levels of appreciation. In examining law within the context of legal transplants, for example, Pierre Legrand argued that legal interpretation involves appreciating a law within the prism of the interpreter's historical, epistemological and cultural values.[67] Therefore, legal interpretation may vary, giving rise to contradictions and may lead to dysfunctional outcomes. The ACA 2008 was enacted with the problem-solving mindset, and it is vital to examine the case law to examine whether by means of legal interpretation the Act or provisions therein are in danger of becoming dysfunctional.

3.1 Uncertainty in the Law – the Offence of Misappropriation

One of the biggest challenges for the Commission relates to the difficulty in ascertaining the *chapeau* requirements of the offence of misappropriation, a key corruption offence. The difficult emanates from the uncertainty in the varying interpretations of the offence by various courts, thereby diluting prosecutorial predictability. The doctrine of binding precedent is adopted in the judicial process in Sierra Leone, as enriched in the Constitution, which provides:

> The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears right so to do; and all other Courts shall be bound to follow the decision of the Supreme Court on questions of law[68] [...] the Court of Appeal shall be bound by its own previous decisions and all Courts inferior to the Court of Appeal shall be bound to follow the decisions of the Court of Appeal on questions of law.[69]

The doctrine of judicial precedents ensures certainty and predictability of the law among other things. The application of this doctrine vis-à-vis prosecution under the Anti-Corruption Acts requires consideration.

Since 2000 there seem to be divergent interpretations as to what the *chapeau* elements are at the trial level (High Court); although the majority of judges appear to converge towards similar conclusions. One key interpretative issue is the introduction of the element of dishonesty as a constituent element of the offence of misappropriation in the ACAs 2000 and 2008. In relying on the *Ghosh*

67 *See* P. Legrand, 'The Impossibility of Legal Transplants', *Maastricht Journal of European and Comparative Law*, Vol. 4, 1997, p. 111.

68 The Constitution of Sierra Leone, 1991, *supra* note 25, s122(2).

69 *Ibid*., s128(3).

test,[70] the judges have likened the offence to the elements of appropriation under the Theft Act 1968 in England, which is not applicable in Sierra Leone.[71] With decisions of a High Court judge only persuasive before another, the situation has not been helped by a lack of direct analysis of the elements of the offence by the Court of Appeal.[72]

It is interesting to note that in one breath the Court of Appeal appears to have implicitly accepted the importation of the element of dishonesty based on the test in *R v. Ghosh*,[73] and the reasoning of some trial judges when addressing the elements of misappropriation. In *Francis Fofanah Komeh and John Mans vs. the State*, Justice P.O. Hamilton (JSC) in rendering the court's unanimous decision merely noted: "[T]he Learned Trial Judge did at Pages 231 to 232 of the records at paragraph 49-59 of his judgment fully dealt with the legal issues."[74] This is an implicit agreement with the reasoning therein, including that of the analysis of the chapeau elements done by the trial judge.

The same Court of Appeal, however, frowned on the importation of foreign (English) jurisprudence developed from statutes that by reason of section 74 of the Courts' Act 1965 are not applicable in Sierra Leone. In the *Haja Afsatu Kabba's* appeal, Justice P.O. Hamilton again had this to say:

> Immediately after this statement of the Learned Trial Judge,[75] Archbold Criminal Pleadings Evidence and Practice in Criminal Cases 2001 Edition at Paragraph 4-378 under the rubric 'on defendant's failure to testify' was quoted. It must be noted that this was dealt with by the learned Authors in relation to section 35 of the English Criminal Justice and Public Order Act, 1994 and it was by way of guidance. This Act has no application in this jurisdiction.

70 The Anti-Corruption Act, 2000, *supra* note 4, s12; The Anti-Corruption Act, 2008, *supra* note 4, s36; *State v. Ibrahim Smart Kamara* (2007) I SLHC 18 (High Court) per Shuster J., who referred to the dishonesty test in *R v. Ghosh* in a charge of misappropriation under s12(1) of the repealed Anti-Corruption Act 2000; Sey J., in *State v. Francis Gabbidon* (2009) I SLHC 32 (High Court), said thus: "Though dishonesty is not specifically stated to be an element of the offence under Section 12(1), I am of the considered opinion that it would be inconceivable to convict the Accused of this offence in the absence of proof of dishonesty". She followed the line of reasoning in her s36 of the Anti-Corruption Act 2008 cases, including *State v. Aiah Chrispin Ngaujah and Samuel Kainde Huggins* (2010) I SLHC 200; *see also State v. Ibrahim Khalilu Manneh and Charles Jaya Kpaka* [2008] SLHC (High Court) per Brown-Marke (JA as he then was), with all the judges relying on the *Ghosh* test decided under a statute not applicable in Sierra Leone.

71 For an in-depth discussion on the examination of the elements of the offence of misappropriation under the Anti-Corruption Acts, *see* M.I. Kanu, 'Fighting Corruption in Sierra Leone: The Offence of Misappropriation of Public Funds, Revenue and Property Examined', *Maiden General Legal Council (Sierra Leone) Law Journal*, 2016, p. 43.

72 *See Fofanah Komeh and John Mans v. the State* [2012] SLCA (Court of Appeal).

73 *R v. Ghosh* (EWCA [Crim]) 2.

74 *Fofanah Komeh and John Mans v. the State, supra* note 72, 12, the legal issues on the specific references dealt with circumstantial evidence and the law on alibi, following which the trial judge proceeded to juxtapose the 'legal issues' with his analysis of the elements of the offence.

75 In *State vs. Haja Afsatu Kabba, supra* note 47, 264, Justice Ademosu JA in the line referred to had said: "In this matter the Accused did not utter a word in answer to all the various and very serious allegations made against her".

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> This being the case, the Learned Trial Judge ought not to have considered it not even included it in his judgment.[76]

This lack of clarity and the prevarications on this important question of applicable law breed uncertainty in the jurisprudence. The issues raised herein appear to be settled for now given the consolidation of the dishonesty importation view pushed forward by Justice Browne-Marke in the Court of Appeal judgment in *Alimu Bah v. the State*,[77] another unanimous decision. Being the major proponent of the dishonesty school and *Ghosh* test (if it could be described as that), he was very clear in adopting analysis that he had used in several High Court cases.[78] Until the Supreme Court weighs in, the trial courts may have to contend with contradictory views of the Court of Appeal on this issue. One way to resolve this impasse could be legislative reforms.

3.2 Uncertainty in the Law – Inchoate Offences (Conspiracy)

In continuing with the theme of uncertainty in the corruption jurisprudence, one of the most troubling provisions of the ACA 2008 has been the 'inchoate offences creating' section.[79] The phrase 'inchoate offence creating' is used cautiously as the courts have been divided on the question of whether section 128(1) of the ACA 2008 creates any offence at all. The issue hinges on the question of legality, the *nullum crimen sine lege* ('no crime without law') principle recognized in section 23(7) of the Constitution. Section 128(1) of the ACA 2008 states:

> Any attempt or conspiracy to commit a corruption offence or aiding, abetting, counseling, commanding or procuring the commission of a corruption offence shall be punishable as if the offence had been completed and any rules of evidence which apply with respect to the proof of any such offence shall apply in like manner to the proof of conspiracy to commit such offence.[80]

The discussion on section 128(1) aforementioned is focused on conspiracy since the Commission has mostly preferred conspiracy charges and the judicial interpretations so far are limited to it. The dilemma associated with section 128 is twofold. First, there is the prevailing contradictory case law from the High Court on whether section 128 creates an offence. The second challenge relates to the principle of fairness in preferring charges for conspiracy together with the substantive offence in the same indictment.

On the question of whether section 128(1) creates a statutory conspiracy offence among others, the High Court has been split in the middle. In *State v. Hebbert Akiremi George-Williams & Others*, Katusi J. addressed this issue on the

76 *Haja Afsatu Kabba v. the State* [2013] SLCA (Court of Appeal) 264.

77 *Alimu Bah v. the State* 52/2010 SLCA (Court of Appeal).

78 *See State v. Ibrahim Khalilu Manneh and Charles Jaya Kpaka, supra* note 70, where the original dishonesty reasoning was introduced by Browne-Marke (then JA).

79 The Anti-Corruption Act, 2008, *supra* note 4, s128.

80 *Ibid*., s128.

back of the Commission (prosecution) conceding to the defence argument that section 128 (1) does not create an offence.[81] Justice Katusi therefore ruled that the count was invalid and a nullity.[82] The concession by the Commission in the aforementioned *Hebbert Akiremi George-Williams* case was preceded by the examination of section 128 (1) by Brown-Marke in the *State v. Hamza Sesay and Sarah Bendu*[83] without questioning whether the section created an offence or otherwise. The Learned Justice was more concerned about the fairness argument. Justice E.E. Roberts JSC in the *State v. Alpha Y. Bah and Others*[84] convicted for conspiracy proscribed by section 128 (1) of the ACA 2008, thereby holding that the section does create an offence of conspiracy.

In *Hebbert Akiremi George-Williams*, the Commission did not only concede to the inadequacy of section 128(1) in terms of creating an offence, it unprecedentedly sought an amendment of the conspiracy count to read conspiracy contrary to common law.[85] Justice Katusi refused the application on the ground that the count (indictment) is invalid. In the *State v. Mustapha Amara and Others*, he dismissed the conspiracy contrary to common law count since the ACA 2008 is only dealing with statutory conspiracy.[86] It appears the Commission shot itself in the foot by conceding to the argument that section 128(1) of the ACA 2008 creates no offence notwithstanding the case law; and the shooting of the other foot was done by Justice Katusi in dismissing the idea of preferring a conspiracy charge contrary to common law.

On the fairness to prefer a count for conspiracy with the substantive offence in the indictment, the High Court decisions are equally divided. Justice Ademosu led the school of judges who religiously upheld and continue to uphold the principle abhorring the preferment of a conspiracy count when there is effective and sufficient evidence to charge and prove the substantive offence.[87] The combination of the inchoate and substantive offences often withers the view of the judge on the prosecution's confidence in the quality of the evidence. In the *State v. Foday Bangura Mohammad*, Justice Ademosu said, "It is undesirable to add a count of conspiracy to an indictment charging specific substantive offence in a case where it is clear that the evidence to be submitted for consideration is nothing more than evidence of actual commission of the offence."[88] Justice Browne-Marke appears to agree with this view when he noted that a conglomeration of the substantive offences into one conspiracy charge will not pass muster if the substantive offences fail.[89] He, however, noted that he has consistently upheld

81 *State v. Hebbert Akiremi George-Williams & Others, supra* note 15, 599.
82 *Ibid*., 560.
83 *The State v. Hamza Sesay and Sarah Finda Bendu* [2010] SLHC 12 (High Court).
84 *The State v. Alpha Y Bah and Others* [2012] SLHC (High Court).
85 *State v. Hebbert Akiremi George-Williams & Others, supra* note 15, 599-560.
86 *The State v. Mustapha Amara, Joseph Tewuleh and Bob S. Peterson, supra* note 53, 6-7.
87 *The State v. Allieu Sesay, Samuel Cole, Franklyn Pratt, Gloria Gabisi and Fatmata Ojubara Sesay* (2011) II SLHC 389 (High Court) 452-453.
88 *State v. Hebbert Akiremi George-Williams & Others, supra* note 15, 600.
89 *The State v. Philip Lukuley* II SLHC 537 (High Court) 542-543, 561-562.

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the propriety of charging both conspiracy with the substantive offences in the same indictment.[90]

3.3 Individual versus Corporate Liability in Public Procurement

In advancing the discourse on judicial interpretations bordering on judicial uncertainty in the application of the ACA 2008, the individual versus corporate liability issue under the protection of public property or revenue offence under section 48(2)(b) comes to mind. The referenced section states:

> A person whose functions concern the administration, custody, management, receipt or use of any part of public revenue or public property commits an offence if he willfully or negligently fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale, or disposal of property, tendering of contracts, management of funds or incurring of expenditures…[91]

Public procurement is generally recognized as a key conduit for grand corruption, and the audit reports from Audit Service Sierra Leone have repeatedly noted the systematic lack of compliance by government institutions.[92] The Public Procurement Act 2004 and the Public Procurement Regulations 2006 were enacted with the objective of embedding efficiency (value for money) and transparency in public procurement.[93] Failure to comply with the two instruments is considered corrupt practice and punishable under section 48(2) (b) of the ACA 2008. The former Mayor of Freetown Municipality and the City's top management officials were convicted, inter alia, of the offence of "[W]illfully failing to comply with the law relating to the procurement" of services jointly and severally contrary to section 48(2)(b) aforesaid in the *State vs. Herbert George Williams & Others*.[94] The convictions were on the basis of individual criminal liability.

Criminal liability for contravening section 48(2)(b) was attributed to corporate liability by the Court of Appeal in *Dr. Sarah Bendu v. the State*.[95] The court, in considering the question of whether the appellant was acting in her personal capacity by herself or was acting in a group, in her capacity as head of the SLRTA management, held that where an accused was acting in a capacity as member of management, individual criminal liability would not arise. The conviction was according quashed, as Justice Hamilton opined:

90 *The State v. Hamza Sesay and Sarah Finda Bendu, supra* note 83.

91 The Anti-Corruption Act, 2008, *supra* note 4, s48(2)(b).

92 *See*, for example, Audit Service Sierra Leone, 'Report on the Audit of the Management of the Ebola Funds: May to October 2014', 15-24, <www.auditservice.gov.sl/report/assl-report-on-ebola-funds-management-may-oct-2014.pdf>.

93 The Public Procurement Act, 2004 now repealed by The Public Procurement Act, 2016; and The Public Procurement regulations, 2006.

94 *State v. Hebbert Akiremi George-Williams & Others, supra* note 15.

95 *Bendu v. the State* [2011] Court of Appeal 12, SLCA.

> It is clear that the Anti-Corruption Act makes provision for the indictment of corporate bodies or management. Section 129(a) of the Anti-Corruption Act provides: Where an offence under this Act is committed by a body corporate. If the body of persons is a body corporate, every director or officer of that body shall be deemed to have committed the offence". [...] The Criminal Procedure Act (No. 32 of 1965) section 207 provides in clear terms: A corporation may be charged either alone or jointly with another person with an offence triable on indictment [...] In my humble opinion, since the decision to award the contract was done by the management and procurement procedures have not been followed the SLRTA management should have been charged in accordance with section 129(a) of the Anti-Corruption Act, 2008. The learned trial judge with due respect was mistaken in holding that the Appellant wilfully failed to comply with procurement procedures since it was management that decided on awarding the contract, and not the Appellant unilaterally.[96]

Does management or corporate liability obviate individual liability? Should the prosecutorial discretion of the Commission be interfered with on the basis of whom to charge, that is, if only one member of management is indicted? The court's insistence that all the members of the Management be charged or none at all unfairly interferes with the Commissioner's prosecutorial discretion under section 89 of the ACA 2008. With a clear express statutory provision for prosecutorial autonomy, the court's focus ought to be on whether there is sufficient proof to convict the accused before it, and not whether there exist equally culpable persons who are not charged and for that reason acquit the accused. In *Sheiku Tejan Koroma v. the State*,[97] the conviction of the accused (the Minister of Health at the time of indictment) was confirmed and appeal disallowed by the Court of Appeal for contravening the aforementioned section 48(2)(b) on an individual basis. These two cases are pitted against each other, and it is anyone's guess which case law a trial judge will rely on when confronted with conflicting precedents. This state of affairs will continue until the Supreme Court intervenes.

3.4 One-Sided Disclosure Obligation – the Rights of the Accused v Public Interest

As part of the fair trial discussion in 2.3 above, this paper has argued that prosecutorial disclosure is one of the tools necessary to enhance and encourage fairness in the dispensation of justice within the corruption context. Justice is binary in corruption discourse, often pitting the rights of the accused against the interest of the general public. The Supreme Court in the *State vs. Francis A. Gabbidon*[98] has ruled on this difficult legal question. Justice Semanaga-Janneh (JSC) in the unanimous decision said:

96 *Ibid*., 11-12.
97 *Sheiku Tejan Koroma v. the State* [2012] SLCA (Court of Appeal).
98 *State v. Francis A. Gabbidon* [2008] Supreme Court 2, SLSC.

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> The Anti-Corruption Commission was established in the fight against corruption which was, and is, generally perceived, rightly or wrongly, by both local and international communities as pervasive, cancerous and corrosive; a disease that has been destroying and continues to destroy the morals, mores and economic health of the body politic [...] in all circumstances, the public interest outweighs that of the Applicant.

The highest court held that the interest of the general public outweighs that of the accused in corruption cases. This is so based on the court's acceptance of the effects of corruption in Sierra Leone.

The public interest, however, appears to have been sidestepped in the drafting of the disclosure requirements in the ACA 2008. Neither in the ACA 2008 nor in the CPA 1965 is there any provision or obligation on an accused who elects to defend a corruption charge to prior disclose evidence, including summary of witnesses' statements in an ongoing trial. The prosecution is left with the option of only encountering defence evidence during the trial. In most cases the prosecution may only rely on the tricky safe harbour of leading rebuttal evidence on two difficult strands.[99] First, rebutting good character evidence of the accused if led by the defence. In the *State v. Adrian Fisher*,[100] the trial court exercised its discretion and allowed the prosecution to call evidence to rebut good character evidence occasioned by the accused. Second, the prosecution could be granted leave to rebut evidence adduced *ex improviso* by the defence. In the *State vs. Rev. Hassan Mansaray and Abdul Aziz Bangura*,[101] the court granted leave to rebut evidence of proof of disbursement of donor funds by the 1st accused introduced only at trial even after a long protracted investigation. The Commission had previously requested all relevant documents, which were not submitted by the accused. Outside these two ambits, the Commission is left to rely on the quick wits of its prosecutors to address defence evidence as they emerge.

3.5 Judicial Analysis of Forensic Evidence

What could be the margin of appreciation or interpreting forensic evidence in a criminal trial? Are trial judges permitted to intervene in appreciating evidence in pursuit of justice? Notwithstanding the provision of section 1 of the ACA 2008, dealing with the definition of document, and section 73 of the same allowing the admissibility of anything within the possession and control of the Commission, judges to some extent face serious challenges when it comes to the need for forensic evidential analysis. Having the technique and penchant for the use of forensic analysis is very important in fighting corruption, which belongs to the general genre of financial/economic crimes. The bulk of the evidence is documentary and

99 The Criminal Procedure Act, 1965. (n 20) Sec 196(1), which states: "At the close of the evidence for the defence, or, where it is sought to rebut evidence of good character, after evidence of good character has been given, the Court may, in its discretion, grant the prosecutor leave to call rebutting evidence where something has arisen *ex improviso*, in the course of the defence."

100 *The State v. Adrian J Fisher* (2010) I SLHC 248 (High Court) 23-24.

101 *The State v. Hassan Mansaray and Abdul Aziz Bangura, supra* note 56, 20.

mostly appertains to fabrication of exculpatory evidence to create doubts in the prosecution's story.

Fabrication of evidence in the absence of forensic examination remains a huge challenge in the fight against corruption. In at least two cases, the High Court has held that the defence fabricated receipts in attempting to justify expenses, in answer to misappropriation charges. In the *State vs. Edward Yamba Koroma and Others*[102] Justice Browne-Marke said:

> It was not his business to disprove the case of the prosecution, but if his evidence has led the court that it may have been fabricated, I would have to ask myself why this was so. The only reasonable conclusion a tribunal of fact and law would arrive at, is that it intended to exculpate the 1st accused. The conclusion I have reached as regards goods supposedly purchased and which should have been taken into store, is that they were not purchased [...] I believe, based on the observations I have made above, that it was brought into existence solely for the purpose of misleading this court.[103]

In the *State vs. Hassan Mansaray and Abdul Aziz Bangura*, Justice Katusi J., in addressing his mind to counts 5, 6 and 7 of the indictment, interestingly observed that "[t]here is no doubt that these documents [Exhibits SSSS1-6] were collected after the 1st Accused had had interview with the Anti-Corruption Commission Interrogators, again making him, a cool, calm, composed, deliberate schemer".[104] In examining Exhibits TTTT1-9 tendered by the accused in answering to the charge of misappropriation of donor funds in count 5, trial judge said, "[T]he money the subject of this count was withdrawn on 03-03-09. All documents are five and more months after the money was withdrawn. Does this make sense? Indeed 1st Accused is [...] a calculated liar and schemer."[105] He concluded his reasoning on count 7 thus: "I would respectfully agree with prosecuting Counsel that Exhibit 'UUUU' 1-8 is yet another creation of 1st Accused to hoodwink the court."[106]

Returning to the *State vs. Edward Yamba Koroma and Others*, the trial judge, in assessing fuel receipts tendered by the defence, relied on his examination of the handwriting using a magnifying glass. Justice Brown-Marke had this to say: "The best way of confirming that fuel has been purchased, is by looking at the receipts issued by the supplier. These are not by themselves fool-proof – there may well be instances where, due to the connivance of fuel pump attendants and driver, FALSE RECEIPTS are issued for fuel not pumped into vehicles."[107] Two critical points must be noted in the methodology adopted by the trial judge. First, it takes activism and an anti-corruption approach for a judge to go this far in examining handwriting or fabricated evidence without the prosecution leading the necessary

102 *State v. Edward Yamba Koroma, Mason I Kargbo and Dominic K. Jusu* [2012] SLHC (High Court).
103 *Ibid*., 36.
104 *The State v. Hassan Mansaray and Abdul Aziz Bangura, supra* note 56, 111.
105 *Ibid*.
106 *Ibid*., 112.
107 *State v. Edward Yamba Koroma, Mason I. Kargbo and Dominic K. Jusu, supra* note 102, 36.

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evidence. Second, was it right or proper for a judge to adopt such methodology in the absence of an expert opinion? Would the test for accepting a suggestion of fabrication be the conspicuous nature of the fabrication to make redundant any expert opinion? What if an accused utilizes sophisticated fabrication techniques?

The answer to the foregoing questions may be found in the ongoing corruption case against Peter Conteh relating to the United States (USAID)-sponsored environmental project. The bulk of the Commission's evidence is documentary and includes bank withdrawal authorization letters alleged to have been forged by the accused person. Forensic examination was conducted in the United States and then submitted to the Commission. What the court makes of the process will help clarify this important aspect of addressing fabrication of documentary evidence in financial and economic crimes within the prism of the fight against corruption.

3.6 In Need of Sentencing Guidelines

Apart from reliance on limited common law principles for sentencing, namely the nature and gravity of the offence, the conduct of the accused, including the time of a guilty plea, the accused character and antecedents, judges enjoy a wide range of discretion in sentencing.[108] Often the offence creating section of a statute or the common law rule would merely impose a minimum or maximum sentencing regime. Judges are expected to draw on their experience and appreciation of the evidence vis-à-vis the mitigating circumstances peculiar to the accused. While this may work well for the general criminal justice dispensation, it is not the case for corruption cases which must maintain the deterrence posture. The imposition of a minimum sentencing regime for Part IV offences in the ACA 2008 is a clear indication of the parliamentary deterrence intent.

The CPA 1965 provides for the procedural authority for the execution of sentences, but falls short of providing a guide for judges to follow in passing a sentence.[109] The lack of a sentencing guideline constrains judges in corruption cases who attempt to balance the principles noted above against the deterrence posture of the corruption statute. In a number of cases, for example,[110] the sentence pronounced for various counts is not cumulative, or the highest fine taken as the cumulative sentence or discharge in cases of sentencing for additional counts based on an act giving rise to multiple charges under the ACA 2008. This appears to be keeping up with courts' abhorrence of spreading the charges for a prohibited conduct over two or more counts (multiplicity of charges) – an inherently unfair practice.[111]

108 *See* M.E. Frankel, 'Lawlessness in Sentencing', *University of Cincinnati Law Review*, Vol. 41, 1972, pp. 1, 4.

109 *See* s230-244 of the Criminal Procedure Act, 1965, *supra* note 20, for execution of sentences other than capital punishment.

110 *See State v. Solomon Hindolo Katta & Others, supra* note 19; *The State v. Hassan Mansaray and Abdul Aziz Bangura, supra* note 56; *The State v. Mark George, supra* note 53; *The State v. Mustapha Amara, Joseph Tewuleh and Bob S. Peterson, supra* note 53; *The State v. Philip Conteh & Others, supra* note 53.

111 *See R v. Harris* (1969) 53 Cr App R 376 (Court of Appeal [England]).

The problem, however, lies in the lack of uniformity in the continuing pattern of the exercise of judicial discretion in the face of the mandatory regime in the ACA 2008. Clearly, the case law suggests the judges appear to be balancing the interests at play, that is, the public interest signified by the strict parliamentary intent versus the interest of the accused-cum-convict. The Supreme Court in the *State v. Francis A. Gabbidon* has unequivocally held that "in all circumstances, the public interest outweighs that of the Applicant";[112] hence, this continuing lack of uniformity and resolve to follow the mandatory regime is diluting the deterrence posture of the ACA 2008. Sometimes it appears as if the judges are looking out for opportunities not to convict or impose a harsh sentence. Therefore, a sentencing guideline that takes a true conscientious and balance approach based on fairness and deterrence will resolve the present stalemate.

4 Conclusion

Anti-corruption practitioners, policymakers and other stakeholders have been afforded time and great opening to consider the opportunities and challenges in the corruption case law. This can be, inter alia, the appropriate yardstick to measure the robustness of the ACA 2008 and the general resolve to eradicate the menace. A judicial determination is often the culmination of all necessary endeavours in the accountability and transparency delivery chain. With regard to the opportunities created, one can only advocate for a continuing progressive interpretation of the enabling legislations in maintaining this heightened resolve to fight graft, balanced with constitutional protection of accused persons and other interested parties. When compared with previous legislations and other criminal offences, the anti-corruption legislations have enabled the determined drive to make Sierra Leone corruption free.

In considering the challenges identified in the jurisprudence so far, it is clear that judicial contradiction is the biggest problem. This can be attributed to the fact that anti-corruption could be deemed *sui generis*, and as such the general approach to criminal law will not work without glitches. Most of the troubling concerns may hinge on this lack of a unified judicial approach to corruption cases. It is common for courts to adopt certain approaches to issues, for example the receptiveness of courts to the alternative dispute resolution mechanism and decisions of arbitral panels in that regard. In the case of corruption in Sierra Leone, the intention of Parliament could be gleaned from the general deterrence aura of the ACA 2008. While a legislative amendment may be in place for the completeness of the inchoate offences creating section in the ACA 2008,[113] what needs to change mainly is the judicial approach to corruption cases.

112 *State v. Francis A. Gabbidon, supra* note 98.
113 The Anti-Corruption Act, 2008, *supra* note 4, s128.