IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA. A. D. 2024

CORAM:

POKU-ACHEAMPONG, J.A. (PRESIDING)
MENSAH, J.A.
ACKAAH-BOAFO, J.A

SUIT NO: H2/22/2023

30TH JULY, 2024

REPUBLIC --- RESPONDENT

VERSUS

1. **CASSIEL ATO FORSON ------- 1ST ACCUSED/APPELLANT**
2. **SYLVESTER ANEMANA** --------- *DISCHARGED*
3. **RICHARD JAKPA --------- 3RD ACCUSED/APPELLANT**

J U D G M E N T

Ackaah-Boafo, JA

i. Overview:

[1] My Lords, based on the facts presented in this appeal and the question for our determination, I wish to start my opinion with the statement by M. Hor in the article "*The Privilege against Self-Incrimination and Fairness to the Accused*"[1] to the effect that:

> "**Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution.**"

The statement above was adopted and succinctly enunciated by the Supreme Court of Canada per Lamer, C.J., for the majority in the case of *R v P. (M.B.)*, [1994] 1 SCR 555

[1] [1993] *Singapore J. Legal Stud.* 35, at p. 35.

(M.B.P.) at paras 36 and 37. Domestically, Adinyira JSC also quoted the above statement in her opinion in the case of **Michael Asamoah & Another v. The Republic, Suit No. J3/4/2017** dated July 26, 2017. I shall later speak to the quote above in considering the merits or otherwise of this appeal.

[2] The 1st Accused/Appellant, Cassiel Ato Forson, was charged with Willfully Causing Financial Loss to the State, contrary to the Criminal Offences Act, and Intentionally Misapplying Public Property, contrary to the Public Protection Act (Counts #1 and 5). The 3rd Accused/Appellant, Richard Jakpa, was also charged with one count of Causing Financial Loss to the State, contrary to the Criminal Offences Act (Count #3). Both Appellants pleaded Not Guilty to their respective charges.

[3] The prosecution called five witnesses who testified and tendered many documents as exhibits to help prove its case. At the close of the prosecution's case, Counsel for the Accused persons submitted that their clients should not be called upon to open their defence because the prosecution had failed to discharge its onus in respect of the charges preferred against them. The learned trial judge, by a ruling dated March 30, 2023, dismissed the submissions made and called upon both the 1st and 3rd Accused persons to open their defence.

[4] It is in respect of the decision made by the trial judge that we are called upon to review the record of appeal and determine whether the trial judge's refusal to uphold the submission of no case (called a 'Directed Verdict' in some jurisdictions) is sustainable in law based on the evidence heard.

ii. The Background Facts:

[5] I note that the detailed background facts as presented by the prosecution can be found in the ruling of the trial Judge. Nevertheless, for our purpose I deem it appropriate to also set out the facts provided to the court. The facts presented by the prosecution are that the 1st Accused/Appellant was the Deputy Minister for Finance from 2013 to 6th

January 2017. The 2nd Accused who has since been discharged by the court was, at all material times, the Chief Director of the Ministry of Health, while the 3rd Accused/Appellant was the local representative of Big Sea General Trading Limited, a company based in Dubai, United Arab Emirates (Big Sea).

[6] The Prosecution contends that in 2009, the President of the Republic indicated in his State of the Nation address to Parliament the need to procure new ambulances to expand the existing fleet for the benefit of districts covered by the National Ambulance Service (NAS). Consequently, the Ministry of Health initiated action to acquire more ambulances. The 3rd Accused/Appellant, using his company Jakpa at Business, presented a proposal and terms of a loan from Stanbic Bank to finance the supply of two hundred (200) ambulances to the Government.

[7] The prosecution further contended that on 22nd December 2011, the Cabinet endorsed an Executive approval for a joint memorandum submitted by the Ministries of Health and Finance and Economic Planning for the purchase of 200 ambulances for the NAS, out of a loan facility of fifteen million, eight hundred thousand Euros (€15,800,000.00) to be paid out of a credit arrangement between Stanbic Bank and the Government of Ghana.

[8] Subsequent to that, by a joint memorandum dated 30th April 2012, the Ministers for Finance and Health applied for parliamentary approval for the supply of 200 ambulances at a price of €15,800,000.00 to be paid out of a credit facility proposed to be sought from Stanbic Bank Ghana Limited. On 1st November 2012, Parliament granted approval for the financing agreement between the Government of Ghana and Stanbic Bank Ghana Limited for the procurement of the 200 ambulances. Neither the memorandum to Parliament nor the approval by Parliament dated 1st November 2012 referenced any role to be played by either Big Sea General Trading Limited Dubai, UAE or its agent, Jakpa at Business Limited, in the transaction. Furthermore, neither the

memorandum to Parliament nor the parliamentary approval referred to the terms under which Big Sea or Jakpa at Business would be involved in the transaction.

[9] The further case of the prosecution is that by a letter dated 19th November 2012, the 2nd Accused, then the Chief Director at the Ministry of Health, requested approval from the Public Procurement Authority (PPA) to engage Big Sea through a single-sourcing process for the supply of 200 ambulances. The letter falsely represented that the reason for the single-sourcing was that Big Sea had arranged financing for the project. The PPA approved the engagement of Big Sea by a single-source procurement method for the supply of the 200 ambulances after a further false representation by the 2nd Accused.

[10] The facts further state that by an agreement dated 19th December 2012, the Government of Ghana, represented by the Ministry of Health, formally contracted with Big Sea for the supply of 200 Mercedes Benz ambulances at a price of fifteen million, eight hundred thousand Euros (€15,800,000.00), with a unit price of seventy-nine thousand Euros (€79,000).

[11] Under the Agreement, 25 ambulances were required to be delivered within 120 days of the execution of the agreement. The remaining 175 vehicles were to be delivered in batches of 25 every 30 days thereafter. Advance payment was prohibited under the agreement. Additionally, payment of the purchase price was stipulated to be made by "raising an irrevocable and transferable Letter of Credit" from the Government of Ghana's bankers for the benefit of the supplier. Upon delivery of every 50 ambulances, 25% of the purchase price was to be paid through confirmed letters of credit (LC) on "sight of goods" opened in favour of the supplier and upon submission of several documents specified in the agreement.

[12] The prosecution says, on 7th August 2014, contrary to the terms of the agreement, the 1st Accused/Appellant wrote to the Bank of Ghana, "*urgently requesting ... to establish the Letters of Credit for the supply of 50 ambulances amounting to EUR*

3,950,000 representing 25 percent of the contract sum, while arrangements are being made to perfect and sign the loan agreement ... in favour of Big Sea." On 12th August 2014, the 1st Accused/Appellant again wrote to the Controller and Accountant-General, authorizing the release of the sum of Eight Hundred and Six Thousand, Six Hundred and Eighty-Eight Ghana Cedis, Seventy-Five Ghana Pesewas (GH₵806,688.75) to the Minister for Health to enable him to pay the bank charges covering the establishment of the LC for the supply of 50 Mercedes Benz ambulances and related services.

[13] The Controller and Accountant-General, referring to the two letters dated 7th and 12th August 2014 written by the first accused person, wrote to the Bank of Ghana on 14th August 2014, authorizing it to establish an irrevocable transferable Letter of Credit in the sum of €3,950,000 in favour of Big Sea.

[14] According to the prosecution, contrary to the terms of the agreement, the Ministry of Health failed to conduct a pre-shipment inspection of 20 ambulances, which were ready for shipment, before payment was made. A consignment of 10 ambulances shipped from Dubai on 22nd October 2014 arrived on 16th December 2014. A post-delivery inspection of the first batch of 10 ambulances revealed various fundamental defects, rendering them unworthy of being described as ambulances. These defects were brought to the attention of Big Sea in a letter dated 11th February 2015 written by the second appellant.

[15] Big Sea acknowledged the defects with the vehicles in a letter dated 19th February 2015 but indicated that the defects could have been avoided if officials of the Ministry of Health had conducted a pre-shipment inspection of the vehicles in Dubai. They further indicated that the company proceeded to ship the vehicles upon receiving the LCs on 18th August 2014. The company also indicated that the second consignment of 10 vehicles with the same defects had been shipped 51 days before the date of the letter from the ministry. The company promised to send their technicians to fix all issues relating to the defects and train Ghanaian staff before handing over the ambulances.

[16] The third batch of 10 vehicles was shipped on 12th February 2015. All 30 ambulances had the same fundamental defects as stated above. A further inspection by Silver Star Auto Limited, acting through Carl Friedrechs Limited at the request of the Ministry of Health, disclosed that the vehicles were not originally meant to be ambulances and were, therefore, not fit to be converted for that purpose. A total amount of €2,370,000 was paid for the 30 vehicles.

[17] By a letter dated 20th January 2016, the Minister for Health, Mr. Alex Segbefia, informed Big Sea that the vehicles did not meet the specifications for an ambulance and were not fit for the purpose. The Minister requested an inspection of a well-equipped ambulance vehicle that meets specifications by 20th February 2016. A team from the National Ambulance Service proceeded to Dubai and conducted an inspection on 11th February 2016. The visit to Dubai decided, pursuant to the inspection, that a technical team from Big Sea would come to Ghana to rectify the defects. This has since not been done according to the prosecution.

iii. The Charge Sheet:

[18] On the strength of the above facts, the charges stated below with particulars were preferred against the 1st and 3rd Accused/Appellants. The charges are as follows:

Count One

Statement of Offence

Willfully causing financial loss to the Republic contrary to section 179A (3)(a) of Criminal Offences Act, 1960(Act 29)

Particulars of Offence

Cassiel Ato Forson between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana willfully caused financial loss of €2,370,000.00 to the Republic by authorizing irrevocable letters of credit valued at €3,950,000.00 to be established out of which payments amounting to €2,370,000.00 were made to Big Sea General Trading Ltd for the supply of vehicles

purporting to be ambulances without due cause and authorization.

Count Three

Statement of Offence

Willfully causing financial loss to the Republic contrary to section 179A (2) of Criminal Offences Act, 1960(Act 29)

Particulars of Offence

Richard Jakpa between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana willfully caused financial loss of €2,370,000.00 to the Republic by intentionally causing vehicles purporting to be ambulances to be supplied to the Republic of Ghana by Big Sea General Trading Ltd of Dubai without due cause.

Count Five

Statement of Offence

Intentionally misapplying public property contrary to section 1(2) of the Public Protection Act, 1977 (SMCD 140)

Particulars of Offence

Cassiel Ato Forson between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana intentionally misapplied the sum of €2,370,000.00 being public property by causing irrevocable letters of credit to be established against the budget of the Ministry of Health in favour of Big Sea General Trading Ltd for the supply of vehicles purporting to be ambulances without due cause and authorization.

[19] As earlier stated, the 1st and 3rd Accused/Appellants pleaded not guilty to the charges preferred against them. The prosecution in proving the charges against them called five witnesses who testified and tendered documents. Counsel made submission

of no case for the consideration of the court, but same was dismissed by the Court. Dissatisfied with the ruling of the Court, both Accused persons have filed appeals before us for our consideration. The 1st Accused/Appellant filed his appeal on April 14, 2023. The Notice of Appeal is at pages 602-604 of the Record of Appeal (ROA), volume 2. The 3rd Accused/Appellant also filed his appeal on April 17, 2023 and the Notice of Appeal is at pages 608 – 610 of the ROA, volume 2. For purposes of clarity and in considering each appeal, I wish to deal with each Appellant's case separately. I therefore wish to start with the 1st Accused/Appellant, who shall be referred to as the 1st Appellant going forward.

iv. The Grounds of Appeal:

[20] The grounds of appeal set out in the Notice of Appeal of the 1st Appellant are as follows:

a. The Court erred in not upholding A1's submission of no case to answer as the prosecution failed or neglected to adduce sufficient evidence on the particulars of offences contained in the charges against A1.
b. The Court erred in holding that the prosecution adduced sufficient evidence to show that A1 caused payments to be made for the 30 ambulances under the letters of credit.
c. The Court erred by disregarding evidence that it was the Ministry of Health that authorized payments under the letters of credit, including the variation of the original conditions for payment.
d. The Court erred when it held that there is sufficient evidence that A1 wilfully caused financial loss to the Republic and/or intentionally misapplied public property.
e. The Court violated the right to fair trial of A1 when it disregarded evidence in favour of A1.
f. The Court erred in shifting the burden of proof on A1 to prove that he had the authorization of the Minister of Finance to request the Bank of Ghana to set up the letters of credit for the payment of the ambulances.

g. The Court erred when it held that the ambulances were defective contrary to provisions of the contract between the Government of Ghana and Big Sea General LLC for the purchase of the ambulances.
h. The ruling of the Court is unreasonable having regard to the evidence.
i. Additional grounds will filed upon receipt of the record of proceedings.

[21] Even though the 1st Appellant indicated that additional grounds would be filed, none have been filed. I will address the grounds of appeal filed later in this opinion, but from the nature of these grounds, it is clear that the 1st Appellant is challenging the trial court's decision regarding the submission of no case made and dismissed. According to the 1st Appellant, the trial judge erred in her analysis of the facts and application of the law. The Appellant contends that the trial judge ignored the evidence presented in his favour, rendering the ruling unreasonable, and seeks this court's intervention to set aside the ruling made against him.

v. The Charges & Proof:

[22] My Lords, the relevant provisions of the Statute under which the 1st Appellant is charged are, as stated elsewhere in this judgment, willfully causing financial loss to the state under Section 179A (3) (a) of Act 29 in count 1, and intentionally misapplying public property contrary to Section 1(2) of the Public Protection Act, 1977 (SMCD 140) in count 5. Having reviewed the ruling of the lower court, it is my opinion that the trial judge commendably dealt well with both statutory law and decisional law concerning the charge of willfully causing financial loss to the state. She addressed the historical background of the charge and discussed case law by our apex court. On that note, I can do no better.

[23] The trial judge discussed cases such as **Republic v. Ibrahim Adam & Others** (2003–2005) 2 GLR 661, in which Afreh J.S.C. (as he then was) set out the essential elements of the offence of causing financial loss to the state under Section 179A, which include:

a) Financial loss;

b) To the State;

c) Caused through the action or omission of the accused;

d) Intended or desired to cause loss; or

e) Foresaw the loss as virtually certain and took an unreasonable risk of it; or

f) Foresaw the loss as a probable consequence of his act and took an unreasonable risk of it; or

g) If he had used reasonable caution and observation, it would have appeared to him that his act would probably cause or contribute to the loss.

[24] On count five, I note that the trial judge referred to the relevant section of the law, briefly applied it to the facts, and concluded that a prima facie case has been made for the 1st Appellant to open his defence. I shall later comment on this in my analysis and evaluation. It is important to note that, on both counts, as the particulars of the offense allege, it is the contention of the prosecution that the 1st Appellant authorized irrevocable letters of credit and misapplied public property "without due cause and authorization,". Therefore, the prosecution must adduce sufficient evidence to support its contention that the 1st Appellant acted without authorization.

[25] When it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt. In *Phipson on Evidence,* 11th ed. (1970), p. 920, para. 2025, it is stated:

> At the present day, in the absence of evidence, innocence of crime is usually said to be presumed by law; at all events the burden of proof is always cast upon the party asserting criminality. Its commission, when the question arises in a criminal case, must, however, be proved not by a mere preponderance of evidence, but beyond a reasonable doubt.

[26] My Lords, in our jurisdiction the Evidence Act, NRCD 323 is the applicable law. The relevant provisions in my view are Sections 10, 11 and 17. Sections 11 (2) and (4) for instance state as follows:

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as a fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

[27] Section 17 refers to allocation of "burden of producing evidence" and Section 10 (1) and 2(b) of the Act defines the burden of persuasion as follows:

10. Burden of persuasion defined

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.

(2) The burden of persuasion may require a party

(b) To establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

The above will be applied to the evidence to determine whether or not the prosecution produced sufficient evidence in this case to warrant the order for the Appellant to open his defence.

vi. The Law on Submission of No Case:

[28] My Lords, there is no paucity of authority on when a court should hold that at the close of the prosecution case, the burden of producing evidence on the prosecution, as per Section 11(2) of the Evidence Act, Act 323, has been met sufficiently to warrant the accused being called upon to open his defence. To my mind, the trial judge again properly stated the law and discussed the landmark cases applicable to the subject, such as **The**

State v. Ali Kassena [1962] 1 GLR 144 and **Apaloo v. The Republic** [1975] 1 GLR 156, and the test on making a submission of no case as set out in those cases.

[29] It is noted that the latest in the line of cases that deals with the subject matter of submission of no case, together with the statutory provisions, is the case of **Michael Asamoah & Another v. The Republic** supra. Adinyira JSC, speaking for the unanimous court, referred to Sections 173 and 174(1) of Act 30 as the applicable provisions in a summary trial, such as the instant appeal. To leave no one in doubt, I hereby set out the said provisions, which are as follows:

> Sections 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 him to make a defence, the Court shall, as to that particular charge, acquit him."
>
> Section 174 - **The defence**
>
> (1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require the accused to make a defence, the Court shall call on the accused to make the defence and shall remind the accused of the charge and inform the accused of the right to give evidence personally on oath or to make a statement.

[30] The learned justice, after referencing the test set out in the earlier cases, stated that the underlying principle behind the concept of submission of no case is that an accused person should not be called to defend himself by way of evidence "when there is no evidence upon which he may be convicted." [Emphasis Mine]. The learned justice further restated the grounds under which a court may uphold a submission of no case as set out in the earlier cases, whether under a summary trial or trial by indictment, as follows:

a) There had been no evidence to prove an essential element in the crime;
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.

[31] The above is the jurisprudence a court is to apply when a submission of no case is made and are therefore the factors we are to consider in dealing with the instant appeals.

vii. Competence of the Grounds of Appeal:

[32] My Lords, before proceeding further, it is my opinion that a closer look at the grounds of appeal reveals that, apart from two of the eight grounds, all the grounds of appeal are incompetent as they do not comply with the mandatory rules governing the formulation of grounds of appeal. The grounds (**a**), (**b**), (**c**), (**d**), (**f**), and (**g**) formulated by the 1st Appellant are, in my view, incompetent because the 1st Appellant failed to comply with the mandatory statutory rules governing the formulation of grounds of appeal, endorsed on a Notice of Appeal, for the purpose of invoking the jurisdiction of this Court.

[33] My Lords, the 1st Appellant alleges errors of the court below without setting out the particulars of the errors as required by the rules of this Court. For instance, the 1st Appellant alleges in grounds (a), (b), and (c) that "*The Court erred in not upholding ...,*" "*The Court erred in holding that the prosecution adduced sufficient evidence...,*" and "*The Court erred by disregarding evidence that...,*" without indicating what amounted to the error of either law or fact complained about.

[34] Rule 8(4) of the Court of Appeal Rules, C.I. 19 states as follows:

"(4) *Where the grounds of an appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated.*" [Emphasis mine].

It cannot be denied that the rules are couched in mandatory terms and ought to be complied with. It is my opinion that insofar as the particulars of the alleged "error" of the court, whether of law or fact, are not provided, the identified grounds set out above do not comply with Rule 8(4) of C.I. 19. My Lords, it cannot be denied that the policy rationale behind Rule 8(4) is to narrow the issues on appeal and shorten the hearing by specifying the alleged error(s) made by the lower court.

[35] In the case of **Zabrama v. Segbedzi**[2], the learned Judge Kpegah JA (as he then was) stated that "The Courts have emphasized the need for particularization of errors of law and/or misdirection in a ground of appeal." The court identified the rationale for particularizing the misdirection and/or error in law alleged against the decision of the court below to be that:

> "... a person who is brought to an appellate forum to maintain or defend a verdict or decision which he has got in his favor shall understand on what ground it is impugned."

[36] On this issue, in my view decisional law has settled it, as there are a number of judicial pronouncements by the Supreme Court interpreting similar provisions in the Court's own rules. The apex court has also stated the consequences of non-compliance with such a rule. Dealing with Rules 6(4) and (5) of C.I. 16 (The Supreme Court Rules), which are in *pari materia* with Rules 8(4) and (5) of C.I. 19, the court in the case of **F.K.A Company Ltd. v. Nii Teiko Okine (Substituted by Nii Tackie Amoah VI)** Civil Appeal No. J4/1/2016 dated 13th April 2016, opined as follows through Akamba JSC:

> "It is important to state that the adjudication process thrives upon law which defines its scope of operation. It is trite to state, for instance, **that nobody has an inherent right of appeal. The appeal process is the creature of law. Any initiative within the context of the adjudication process must be**

[2] [1992] 2 GLR 221.

guided by the appropriate, relevant provision, be it substantive law or procedural law. As courts, if we fail to enforce compliance with the rules of court, we would by that lapse be enforcing the failure of the adjudication process which we have sworn by our judicial oaths."

[37] As stated above, in this case, the 1st Appellant does not indicate whether the error is that of law or fact and does not stipulate the nature of the error and why the Court below is alleged to have erred as prescribed by the rules. In my view, the impugned grounds of appeal fail to indicate why, how, and what the error committed by the Court is. Clearly, the grounds do not comply with the rules of procedure. See the Supreme Court unreported case of **Adams Addy & Adu Akwaanor v. Solomon Mintah Ackaah**[3].

[38] As the jurisprudence establishes, there is no inherent right for any litigant to appeal, as an appeal is a creature of statute. Therefore, a party who is piqued by a ruling/judgment and desires to appeal against the same must comply with the conditions spelled out by the law regarding an appeal. To that extent, the 1st Appellant is mandated by law to provide particulars of the alleged errors in the grounds of appeal set out in the Notice of Appeal because, without the particulars, the Court is left to speculate as to what the alleged errors are. The allegation of error(s) must be set out in concise, clear, and plain terms as required by the rules. It is not for the Court to speculate and infer. As this Court is bound by its own rules and the decisions of the Supreme Court, the impugned grounds of appeal set out in the 1st Appellant's Notice of Appeal as grounds (a), (b), (c), (d), (f), and (g) contravene the mandatory provisions in Rule 8(4) of C.I. 19. Consequently, all those grounds of appeal are inadmissible and unarguable as they are not compliant with the rules of court. They are hereby struck out.

[39] My Lords, as indicated earlier, the 1st Appellant also raised ground (**e**) that "*The Court violated the right to fair trial of A1 when it disregarded evidence in favour of A1*"

3 Civil Appeal No. J4/19/2021 Judgment is the 14th day of April 2021.

and ground (**h**) that "*The ruling of the Court is unreasonable having regard to the evidence.*" My Lords, ground (h) is the criminal jurisprudence version of the civil appeal's omnibus ground of appeal that, "The judgment/ruling is against the weight of evidence on record." It is trite that where an Appellant in a criminal case alleges in his notice of appeal that the judgment is unreasonable or cannot be supported having regard to the evidence, it is incumbent on an appellate court to analyze the entire record of appeal to satisfy itself that, taking into account the testimonies and the documentary evidence, the prosecution proved its case beyond a reasonable doubt, or as in this case, that the prosecution provided sufficient evidence and the conclusions of the judge are reasonable and supported by the evidence. In effect, a criminal appeal, like a civil appeal, is by way of rehearing. See **Dexter Johnson v. The Republic** [2011] SCGLR 601. It is also noted that having set out the ground of appeal under discussion, the onus is on the Appellant to satisfy us, as the appellate court that the judgment is indeed unreasonable having regard to the evidence.

[40] Bearing in mind this court's rehearing jurisdiction and the law regarding what the prosecution must prove before the accused person may be called upon to open his defence, I am of the view that this court, in its duty to rehear the matter, will review the evidence presented during the trial by the prosecution at the close of its case, as far as the 1st Appellant is concerned, in respect of the charges for which he has been called upon to open his defence. In doing so, I shall first deal with the ground of appeal (h), by which the 1st Appellant contends that the ruling of the court is unreasonable having regard to the evidence.

viii. Counsel's Submission:

[41] I gather from the submission of Counsel for the 1st Appellant that he subsumed all the grounds of appeal, including the ones struck out as being unarguable, in arguing that the ruling is unreasonable on the grounds that no sufficient evidence was proffered by the prosecution to warrant the call on the 1st Appellant to open his defense. Learned counsel submitted that "the prosecution failed to pass the test of submission of no case

to answer by not adducing sufficient evidence on essential ingredients of the criminal offenses against A1." At point 28 of the submission, Counsel identified four specific issues as follows: **a**) A1 did not commit or engage in any personal acts to warrant the charges against him; **b**) A1 did not cause payments to be made for the ambulances; **c**) A1 did not cause any financial loss to the Republic or misapply public property; and **d**) The evidence that the ambulances were defective as per the agreed specifications of the contract, Exhibit V, is so unreliable that no court can reasonably rely on it.

[42] Counsel for the 1st Appellant next submits that the prosecution failed to discharge the burden regarding the allegations that A1 acted without "due cause and authorization," and therefore this Court should acquit and discharge him pursuant to section 173 of Act 30.

[43] Supporting the contention that the prosecution failed to discharge its burden, counsel further submitted that the apex court and this court have elaborated on the nature of the prosecution's burden in a trial. Citing the case of **Republic v. Ernest Thompson & Others**[4], counsel stated that this court, citing the Supreme Court decision in **John David Logan & Frank David Laverick v. The Republic**, observed that:

> "The Supreme Court, in the case of John David Logan & Frank David Laverick v. The Republic, Criminal Appeal No. J3/1/2006 of 7th February 2007, stated the importance of particulars of the offence that whatever evidence is led in support of a charge should directly concern and be in line with the particulars of the offense as given by the prosecution. The Supreme Court, after reciting in detail the facts of the case, said: '**These are the facts as given by the prosecution, and in support of which evidence was led to prove the prosecution's case against the accused person. And whatever evidence that was led in support should directly concern and be in line with the particulars of the offence as given by the prosecution**....'

[4] [2021] GHASC 169

[44] Dr. Bassit Bamba further referred to the *Ernest Thompson case* supra, stating that this court highlighted the importance of particulars of the offence in a charge sheet and the fact that its importance is not only for the prosecution but also for the accused. According to Counsel, the court stated that 'the charge and particulars should be so informative that an accused should know what he is being accused of upon reading both the statement of offence and the particulars of offence and for him to plead appropriately.' Counsel further submitted that this court, referencing the *David Logan v. The Republic* case by the Supreme Court, stated that:

> "It is also necessary to note that what may be mentioned in the facts of the case by the prosecution may not necessarily be part of the particulars of the offense which the prosecutor is obliged to prove..." and the fact that "an accused is not also charged under the facts but under the charge sheet which includes the particulars of the offense[5]."

[45] The further submission of Dr. Bassit Bamba is that the rulings in the *Logan* and *Ernest Thompson* cases unequivocally make it clear that the prosecution must adequately prove the particulars of the offences charged by the close of its case. In this case, Counsel submitted that the trial court failed to ensure that, and thus violated the 1st Appellant's right to a fair trial and causing a miscarriage of justice. According to counsel, at the close of the prosecution's case, there was no prima facie evidence against A1, making it erroneous to require him to defend himself.

[46] Further, counsel submitted that the grounds of appeal filed demonstrate that the 1st Appellant did not commit any personal acts, as he did not authorize payments, and did not cause financial loss to the state or misappropriate any property. Again, counsel submitted that the evidence that the ambulances were defective, as per the contract specifications (Exhibit V), is so unreliable that no court can reasonably rely on it.

[5] Ibid.

[47] Counsel further submitted that A1, acting in his official capacity, had the authority from the Minister of Finance and therefore the contention that he had no authority to act and must provide evidence to show he had the authority of the then Minister of Finance to sign Exhibits A, B1, and B was unfounded. To that extent, Counsel submitted that the alleged defects had nothing to do with the 1st Appellant. Based on the above and other arguments captured in the 32 page written submission, Counsel prayed the Court to overturn the ruling and acquit the 1st Appellant.

ix. Respondent's Counsel's Submission:

[48] The mainstay of the argument of the prosecution representing the Republic is that the learned judge did not err because a prima facie case was established based on the evidence heard. The prosecution submitted that "*The evidence presented by the prosecution, standing on its own, can safely convict in the absence of a credible explanation by the defence. Further, the evidence of the prosecution was not discredited in any material way by the defence during the cross-examination by the counsel for the defence so as to make the evidence unreliable*".

[49] Proceeding further, the learned Principal State Attorney, Richard Gyambiby who signed the submission for the Hon. Attorney General set out the law on causing financial loss to the state and cited the cases such as **Republic v. Ibrahim Adam & Others [2003-2005] 2 GLR 661,** by which Afreh JSC, set out the ingredients of the offence and stated that in this case, the evidence establishes that there was a loss and the loss was to the state.

[50] In making a link between the loss and the 1st Appellant, the learned State Attorney referred to the evidence of the second prosecution witness, Edward Markwei, a staff of the Bank of Ghana and the current Head of the Trade Finance Unit of the Banking Department of the Bank of Ghana. The pith and substance according to the submission of counsel of testimony of Mr. Markwei was that 1st Appellant was directly involved in the payment of €2,370,000 for vehicles that were falsely claimed to be ambulances from

the Ministry of Health's accounts. According to counsel, evidence showed that on 7th August 2014, the 1st Appellant urgently instructed the Bank of Ghana to establish an irrevocable transferable Letter of Credit for €3,950,000 in favour of Big Sea General Trading LLC for 50 ambulances. This instruction was received by the bank on 8th August 2014. A copy of that letter was tendered as **Exhibit A** (found at page 611 of the Record of Appeal).

[51] Counsel further submitted that another letter dated 12th August 2014 authored by the 1st Appellant authorized the Controller and Accountant-General to establish letters of credit for the same company, requesting for the LCs to be established. The letter was received by the Bank of Ghana on 15th August 2014, and it directed that the cedi equivalent of the LC and other related charges should be debited to the Ministry of Health. Counsel submitted that the evidence pf the witness, Mr. Markwei, confirmed that the authorization by the 1st Appellant resulted in paying €2,370,000 to Big Sea General LLC for non-compliant vehicles. According to Counsel, the 1st Appellant's actions, from the terms of the contract governing the transaction, the duty he owed as a public officer with responsibility over the use of the public purse on account of his status and duties as Deputy Minister of Finance, were deemed criminally negligent and unwarranted.

[52] The further submission of the learned State Attorney is that the 1st Appellant's contention that the LCs did not constitute payment both unnecessary and utterly absurd. This is because according to counsel, the contract for supplying ambulances to the MOH, tendered in evidence by PW3, Mr. Kwaku Agyemang-Manu as Exhibit V (located at page 704 of the Record of Appeal), explicitly stated in clause 4 that payment would be made through the establishment of irrevocable and transferable Letters of Credit. Thus, it is bewildering how one could argue that A1's authorization for the Bank of Ghana to establish LCs did not constitute authorization for payment for the ambulances. Counsel stated that it is particularly striking and relevant that the defence counsel failed to present any alternative method by which payment was made for the transaction, other than through the establishment of the LCs authorized by the 1st Appellant.

[53] Having stated that the LCs authorized the payment for the ambulances, Mr. Gyambiby explained how the payments were made and specifically spoke about Exhibits "D', "E", "F", "G" and "H' and submitted that the amount of €2,370,000 which was directly withdrawn from the Ministry of Health's (MOH) accounts at the Bank of Ghana, as authorized by the 1st Appellant. These accounts belong to the Government of Ghana. Consequently, it is indisputable that a withdrawal from an MOH account directly results in a depletion of the nation's funds, as established in **Tsatsu-Tsikata v. Republic** [2003 – 2004] SCGLR 1068. Counsel submits that this case does not involve a payment from the account of a government-owned company or another state agency that might not be considered part of the Government of Ghana. To counsel, the prosecution has clearly established the first two elements of the offence of willfully causing loss to the state under section 179A (1)(a)(i) and thus established a prima facie case against the 1st Appellant.

[54] Counsel also submitted on the specifications of the ambulances as set out under Exhibit V, together with all the findings on the vans under Exhibits Z, AU, and AV. According to counsel, all the reports in the identified exhibits contain such critical defects that they dispel any notion that the ambulances were properly supplied. Counsel submitted that the defects identified put beyond doubt that the vans supplied were not fit for purpose after the government had paid the sum of €2,370,000, which constitutes a loss to the Republic because the vans are worthless.

[55] Next, Counsel discussed the elements of the offence of causing financial loss to the state, as stated by Afreh JSC in the case of *Republic v. Ibrahim Adam & Others* supra. Based on the elements of the offence set out in the *Ibrahim Adam* case, Counsel argued that the 1st Appellant's *mens rea* for the offence of willfully causing loss to the state is demonstrated by his action in requesting the establishment of LCs as payment for vehicles that did not meet the specifications of ambulances, showing a blatant disregard for the terms of the governing contract. According to Counsel, this behaviour aligns with all the characteristics of criminal negligence established by various decisions of Ghanaian courts

on this matter. Counsel submitted that the 1st Appellant's failure to adhere to the agreement's terms violated all four indicators of *mens rea* inherent in the offence's fourth element of willfully causing financial loss. The prosecution contends that it is evident that the 1st Appellant either intended to cause financial loss, foresaw the loss as virtually certain but unjustifiably risked it, saw the loss as a probable consequence but chose to take an unreasonable risk, or failed to exercise due care and attention, thereby causing the loss.

[56] On the issue of whether or not the 1st Appellant had authorisation, Counsel submitted that it is not disputed that the 1st Appellant voluntarily authorized both the Bank of Ghana and the Controller and Accountant-General to "urgently establish" Letters of Credit (LCs) for the payment of the vehicles. Counsel submitted that the 1st Appellant issued the LCs without any authorization from other parties. According to Counsel a thorough review of the record reveals no evidence of authorization from the former Minister for Finance or any superior officer. On the contrary, the exhibits presented by the prosecution indicate that the 1st Appellant acted independently and not under any purported authorization from his former superior.

[57] Mr. Gyambiby submits that the actions taken by the Controller and Accountant-General as well as the Bank of Ghana were based on the 1st Appellant's directives, not on any action by Mr. Seth Terkper, the former Minister of Finance. Furthermore, according to Counsel the prosecution submitted an internal memorandum from the Ministry of Finance concerning the issues at hand, which demonstrated that the Ministry of Finance staff involved in the transaction relied solely on the 1st Appellant's authorization and not on the Minister, Mr. Seth Terkper. Counsel referred to Exhibit AL, being a MEMO to the Director of Budget and copied to the Minister and the 1st Appellant, dated 11st August 2014 (found at page 770 of the Record of Appeal).

[58] Counsel referred to snippets of the cross-examination of some of the prosecution witnesses, including Mr. Emmanuel Edumadze Mensah and Mr. Kwaku Agyeman-Manu,

who testified as the Minister of Health. They were both questioned about the fact that the 1st Appellant signed the letters the prosecution contends led to the issuing of the LCs "for" the minister and also copied the minister. Referencing the answers provided by the witnesses, the state attorney submitted that in the civil service, simply signing a letter as "for Minister" does not imply that the Minister has authorized its content. Counsel further submitted that the witness explained that copying the Minister on the letter also does not indicate the Minister's approval of the letter or its contents. This practice of "copying the Minister" serves only for informational purposes and does not signify the Minister's approval or authorization.

[59] Again, Counsel referred to Exhibit 5 for A1 (at page 878 of the Record of Appeal) and submitted that the said document does not show that Mr. Seth Terkper authorized the 1st Appellant to write the letters in question. Counsel submitted that the said exhibit does not contain any statement from Mr. Seth Terkper claiming ownership of the letters written by the 1st Appellant. Additionally, at no point does the exhibit indicate that Mr. Terkper made the decision to bypass the parliamentary-approved financing method or authorized the establishment of the LCs contrary to the terms of the Ambulance contract.

[60] Counsel also referred to Exhibit AK, a letter by the former Minister for Finance dated 18th July 2014 (found at page 766 of the Record of Appeal). According to Counsel, the said letter was authored by the Minister around the same period that the 1st Appellant authorized the establishment of the LCs and their payment from the MOH accounts with the Bank of Ghana on 7th August 2014. In the view of Counsel, the content of both letters shows that the Minister and his deputy, the 1st Appellant, were engaged in different activities concurrently. Based on this and other arguments made in the submission, Counsel submitted that the 1st Appellant had no authorization from the Minister of Finance and that his actions in authorizing the establishment of the LCs were reckless and criminal, according to the prosecution.

x. Applying the Law and Analysis:

[61] The charges preferred against the 1st Appellant were earlier stated, and therefore, there is no need to rehash them again. I wish to state that, while recognizing that the submission of counsel is helpful, this court, like the trial court, has the duty to weigh the evidence presented in the ROA in a limited way to satisfy itself whether, as held by the trial judge, sufficient evidence was presented by the prosecution at the end of its case against the 1st Appellant. The evaluation of the evidence ought to be done based on the jurisprudence set out in the *Michael Asamoah* case mentioned at paragraph 30 of this opinion.

[62] My Lords, it cannot be denied that the 1st Appellant was charged based on exhibits "A" and "B2" dated August 7, 2014, and August 12, 2014 (at pages 611 and 614 of the ROA), which he signed. He does not deny signing those letters but contends that he did so as part of his duties as Deputy Finance Minister and on the authorization of the substantive Minister of Finance.

[63] My Lords, from my review of the record, the 1st Appellant became involved in this matter after a letter (Exhibit 10) from the law firm Legal Ink representing Big Sea General Trading LLC dated March 28, 2014, was addressed to the Attorney General. The letter was an intention to institute civil action against the Republic of Ghana for breach of contract. (See pages 723–726, Volume 2 of ROA). The record of appeal further shows that the Attorney General (AG) wrote an opinion dated May 2, 2014, captioned "Re: Agreement between Big Sea General Trading LLC and the Government of Ghana," addressed to the Ministry of Health, stating that the ministry was bound by the opinion of the AG on questions of law. (See page 727 of ROA, Volume, for a copy of the letter).

[64] My Lords, from the narrative based on the ROA, it is clear the 1st Appellant became involved after the AG's advice letter to the Ministry of Health. As indicated above, the 1st Appellant does not deny that he authored the letters requesting the issuance of the LCs. He maintains that he did so in his official capacity as Deputy Minister and on behalf of

the Minister of Finance. He denies that he was reckless and asserts that his actions were not criminal. However, the prosecution disagrees and therefore it is important that the evidence heard be reviewed. Now, what evidence was heard? From the ROA, Mr. Markwei (PW2), Mr. Agyemang Manu (PW3), and Mr. Edumadze Mensah (PW4) spoke about the LCs.

[65] I note that Mr. Markwei, in particular, said in his evidence, for whatever reason, that the 1st Appellant "instructed" the Bank of Ghana (BoG) to establish an LC in favour of Big Sea in the letter of August 7, 2014. At trial, he was challenged on the use of the word "instructed" (See pages 155-156, ROA Volume 1), and, in my opinion, he chose to equivocate on it instead of accepting it. In my view, this was unnecessary posturing because the 1st Appellant did not use the word "instruct" but rather "requested" in the letter he wrote.

[66] Mr. Markwei told the court that the letter of August 7, 2014 was on the letterhead of the Ministry of Finance and was signed on behalf of the Minister (See pages 158-159, ROA, Volume 1). Mr. Markwei also stated that the LC is not a payment but a guarantee. This transpired on June 7, 2022, when he was cross-examined by Dr. Bamba, Counsel for the 1st Appellant.

> "Q: So you will agree with me from this explanation of the Letters of Credit that a Letter of Credit in itself is not payment, will you not?
>
> A: Yes, my lady, but the Letters of Credit guarantee payment.
>
> Q: A Letter of Credit guarantees payment subject to certain conditions being met, is that correct?
>
> A: Yes, my lady.
>
> Q: It therefore follows that if the conditions under the Letters of Credit had not been met, then payment would not be made, correct?
>
> A: No, my lady. It is only when the conditions are met that the payment would be made. (See pages 161-162, ROA, Volume 1). [Emphasis Mine].

[67] My Lords, the evidence also establishes that the witness told the court that the 1st Appellant was not the Applicant for the LCs, but the Ministry of Health was. Again, this is what transpired when Mr. Markwei was further cross-examined after Counsel tendered a document, Exhibit 1 for A1, through the witness:

Q: Take a look at Exhibit 1 for A1. It has a column for Applicants, does it not?

A: Yes, my lady.

Q: And the Applicant herein refers to the entity applying for the Letters of Credit, does it not?

A: Yes, my lady.

Q: And on Exhibit 1 for A1, the Applicant is stated as the Ministry of Health, is it not?

A: Yes, my lady. (See pages 170-171, ROA, Volume 1) [Emphasis Mine]...

The witness also told the court that the documents for payment include the issued LC and documents such as a pre-shipment inspection certificate or label, and an insurance policy or certificate covering all risks, etc. See pages (172-173, ROA, Volume 1)

[68] When the cross-examination continued, the following evidence was further elicited:

"Q: Who signed Exhibit 1 for A1?

A: It was signed by the Controller and Accountant General and the Deputy Controller and Accountant General.

Q: So you agree with me that A1 was not the Applicant in Exhibit 1 for A1?

A: I did not get the question very clearly.

Q: The question is that A1, (Hon. Dr. Cassiel Ato Forson), is not the Applicant indicated on Exhibit 1 for A1, is that not so?

A: No, my lady, Hon. Dr. Cassiel Ato Forson is not the Applicant on Exhibit 1 for A1. (See page 174 ROA, Volume 1). [Emphasis Mine].

[69] My Lords, Mr. Kwaku Agyemang-Manu also testified for the prosecution. At the time of the testimony, he was the Minister for Health. In his evidence, he told the court what happened during the transition period and what he did as the appointed person in charge of health and also what he did after he was nominated by the president as the Minister for Health. Mr. Agyemang-Manu testified about the letter from the AG advising the Ministry of Health about Big Sea's intention to sue and the Ministry's response. He also testified about the post-delivery inspection of the ambulances and the report written, which indicated that medical equipment which ought to have been in the ambulances were not in them. He also conceded that the equipment later were shipped to Ghana and at Tema port but said they were not cleared, because according to him the Ministry did not have the funds to do so. Many documents were tendered through him by the prosecution.

[70] Mr. Agyemang-Manu also testified about the letters of August 7, 2014 and August 12, 2014 by the 1st Appellant to request for the LC. I note that he initially said, the LC was requested without the notice of the Ministry of Health, but when he was confronted later about it under cross-examination, he accepted that his initial position was wrong. Mr. Agyemang-Manu also said LC is not a payment by a guarantee. Again, the following is a snippet of the discourse:

Q: And you have also served as the Chairman of the Public Accounts Committee in Parliament, is that correct?

A: That is correct.

Q: So you have quite a working understanding of how LCs operate, is that correct?

A: Yes, I do.

Q: And are you aware, are you not, that LCs are not payments in themselves but are guarantees of promises of payment subject to certain conditions being met, is that not so?

A: That is so.

Q: So if the Ministry of Finance requests the BOG to establish an LC, that does not mean that the BOG should make payment under the LC?

A: It means that Finance is authorizing BOG to make payments on certain conditions.

Q: And of course, if those conditions are not met, then payment should not be made under the LC, is that not the case?

A: That is the case. (See pages 276 – 277, ROA, Volume 1).

Mr. Agyemang-Manu also told the court that if an LC has not been established, payment cannot be authorized. (See page 298, ROA, Volume 1). He also said that even though the letter requesting for the LC is the primary document, the Bank of Ghana will not be able to establish an LC with the letter only. (See page 201-202, ROA, Volume 1).

[**71**] Interestingly, despite the very clear and unequivocal answers above that an LC was not a payment but a guarantee, Mr. Agyemang-Manu later gave a different answer on August 30, 2022 when he said that per the terms of the contract, payment should be done by LC, therefore a request for LC to be established, meant requesting for payment to be made. My Lords, due to the inconsistencies in the record of the evidence of Mr. Agyemang-Manu, I consider his later evidence as unreliable and place no weight on it.

[72] Be that as it may, in my thinking, does the above evidence support the prosecution's position that by authoring the letters of August 7, 2014, and August 12, 2014, the 1st Appellant caused the payment for the ambulances to be made and, as a result, caused the loss of €2,370,000 to the state?

[73] What did the trial judge say in her ruling? The trial judge stated (at page 580, ROA, Volume 1) that, "***In this case, from the particulars of the offence, A1 is alleged to have caused the issuance of LCs for the payment of ambulances which, when delivered, were not fit for purpose.***" The judge then reviewed the evidence of Dr. Ansong-Bridjan, who testified that there were defects with the vehicles

when a team from the Ministry of Health inspected them after they were delivered in Ghana and not pre-shipment of the ambulances as required in the contract. The learned trial judge referred to the evidence of the witness, set out the defects mentioned by the witness, and stated that the accused persons did not countermand the testimony of the witness about the defects during cross-examination. This, the judge said, "would be a tacit admission of the fact, except that an explanation may be canvassed to raise reasonable doubt." (See page 584 of the ROA, Volume 1).

[74] At page 585, ROA, Volume 1, the trial judge then concluded as follows:

"*The fact of the defects, making the vehicles unfit for purpose, and from the case of the prosecution, impossible to use, when the sum of two million, three hundred and seventy thousand Euros (€ 2,370,000) had been expended to procure vehicles meant to be used as ambulances which could not be so used, in the view of this Court, would be prima facie evidence of a loss to the state.*

This means, in the circumstances that the persons against whom the charges have been laid would have a prima facie case to answer".

[75] My Lords, at page 578 (ROA, Volume 1), the trial judge referred to the case of **Republic v. Ibrahim Adam & Others Supra** and stated the essential elements of the offence of causing financial loss to the state as stated at paragraph 23 in this opinion. After referring to the essential elements of the offence however, the trial judge did not provide reasons for concluding that a prima facie case had been made against the 1st Appellant based on the elements of the offense she set out. To that extent, it is my view that, there is no evidence from the record that reveals the critical connection between the facts, the law, and the conclusion reached. The conclusion of the learned trial judge that "persons against whom the charges have been laid would have a prima facie case to answer" is with respect, inherently ambiguous.

[76] I am of the opinion that the evidence does not show that by authoring the letters of August 7, 2014, and August 12, 2014, the 1st Appellant caused loss to the state or

misapplied the property of the state. There is no evidence that the loss was caused as a result of an omission by the 1st Appellant in authoring the letters. Or that, he intended to cause loss to the state. Or, he foresaw the loss as virtually certain and took an unreasonable risk of it. There is also no evidence that the 1st Appellant foresaw the loss as a probable consequence of his act and took an unreasonable risk of it. Also, from the record, there is no evidence to show that if he had used reasonable caution and observation, it would have appeared to him that his action would probably cause or contribute to the loss to the state by the payment. Based on the record of appeal, I am of the respectful opinion that there is a lack of logical connection between the evidence and the finding of the court that a prima facie case has been established.

[77] From the evidence, PW4 stated at page 354 of the ROA, Volume 1 that the Ministry of Finance on its own cannot raise an LC on behalf of another Ministry because "the MDA involved has to be notified". Based on the record, apart from the letters requesting the issuance of the LC, the 1st Appellant took no other step for the payment of the LCs. Also, the evidence establishes that an LC on its own is not a payment unless certain conditions are met. The evidence shows that the 1st Appellant was not the Applicant but rather the Ministry of Health, on whose behalf the request for the LC was made. To that extent, it is difficult to accept the prosecution's submission that by requesting the issuance of the LC, the 1st Appellant was reckless because he did not comply with the terms of the contract, which with respect his ministry was not a party. To my mind, the evidence does not support the position of the prosecution.

[78] Further, the evidence establishes that the 1st Appellant's approval was not sought by the BOG before payments were made, but rather the Ministry of Health (See page 187, ROA, Volume 1). As the Applicant, the Ministry of Health, was the contracting party and had the responsibility to ensure that all the conditions for the LC were met before payment. The Ministry of Health was to ensure that pre-shipment inspection had taken place and all the conditions of the LC were met before payment. Not doing so, to my mind, was inexcusable and reckless because it is the Ministry of Health, which approved

all the payments apart from those ordered by the court after A3, sued Big Sea General Trading LLC. In my view therefore, if anyone was culpable, it ought to be those in charge of the Ministry of Health and not the Deputy Minister for Finance who from the evidence officially performed his duty.

[79] It is trite, and in this case, Mr. Edumadze Mensah in his testimony affirmed that in all situations, the Ministry of Finance authorizes and approves public financing of Ministries and, in effect, government departments. To that extent, it is my view that requesting the issuance of an LC on behalf of the Ministry of Health, was not out of place by the 1st Appellant, as a Deputy Finance Minister. This was done after the AG had received the notice of intention to sue for breach of contract by Big Sea and advised the Ministry of Health of the consequences of non-compliance. Again, it is trite that in the context of performing official public acts, there is a presumption of regularity until the contrary is proved.

[80] This is on account of Section 37 (1) of the Evidence Act, 1975 (NRCD323), which provides that:

"*It is presumed that official duty has been regularly performed.*"

My Lords, this is rendered with some classical flourish of Latinism as '***Omnia praesumuntur rite et solemnite esse acta'*** – all things are presumed to be done in proper and regular form. In my view, the principle applies to the performance of public functions, by no less a person than the Deputy Finance Minister. He occupied a public position and performed public functions, which are presumed to be correct. It is noted that Ghanaian law stipulates that such presumptions are rebuttable. This leads me to the next leg of the analysis, which is whether the 1st Appellant had authorization for the letters he wrote. If he had no authorization, then the presumption would be deemed rebutted.

[81] The particulars of the charges laid by the prosecution state that the 1st Appellant authorized irrevocable letters of credit in the amount stated in the particulars and

indicated in this opinion, which was paid to Big Sea General Trading Ltd for the supply of vehicles purported to be ambulances without due cause and authorization. Counsel for the Republic, in his submission, part of which is stated above, asserted that the 1st Appellant issued the LCs without authorization from other parties and also stated that a review of the record reveals that the 1st Appellant acted independently and had no authorization from the substantive Finance Minister at the time, Mr. Seth Terkper.

[82] Counsel for the prosecution referred to Exhibit AL, an internal memo dated August 11, 2014, from the Ministry of Finance. According to Counsel, the Ministry of Finance staff involved in the transaction relied solely on the 1st Appellant's authorization and not on the substantive Minister. Referencing the testimony of Mr. Edumadze Mensah, Counsel submitted that the staff who worked on the establishment of the LCs clearly attributed their actions and decisions to the direction of the 1st Appellant, and not the Minister. Counsel said the staff were under no illusion that the authorization for the LCs to be established was coming from the 1st Appellant, not his boss.

[83] The 1st Appellant, through his counsel, submits that the prosecution failed to prove the particulars of the offences charged by the close of its case because it failed to prove that the 1st Appellant had no authorization for authoring the letters of August 7 and 12, 2014. Counsel submitted that the allegation that the 1st Appellant acted "without due cause and authorization" forms an essential part of the prosecution's case, thus the burden of proof rests on the prosecution. Consequently, the prosecution needed to produce the then Minister of Finance to testify that the 1st Appellant lacked his authorization to issue Exhibits A, B1, and B2. The prosecution failed to do so although Mr. Seth Terkper, the then Minister of Finance, was a material witness for the prosecution.

[84] My Lords, I wish to extract excerpts from the evidence of the prosecution witnesses to provide the flavour of the positions of the prosecution and the defence as stated above. When PW2, Mr. Markwei, was cross-examined by the 1st Appellant's Counsel on June 7, 2022, he was asked questions about whether or not the 1st Appellant's letter was written

with the authority of the Minister of Finance. The following crucial and important evidence was elicited after he was asked to read Exhibit "A":

"Q: So you will agree with me, will you not that whatever is contained in Exhibit A was done under the instruction or on behalf of the Minister of Finance?

A: Yes per what the letter I have here indicates. So, I believe that, that was done on behalf of the Minister on the basis of the letter that I have.

Q: So based on the response that you just gave, you will agree with me, will you not that when you were instructed to act on Exhibit A, you knew that Exhibit A was under the authority of the Minister of Finance?

A: When we were instructed to issue this letters of Credit what was there was this letter and the basis of this letter, I do believe that on the basis of the letter that was sent to us with the designation of "For Minister" it means it is written on behalf of the Minister.

Q: And you cannot tell whether this letter was written by A1?

A: Yes my lady. The letter I have in my hand was signed by A1". [Emphasis Mine].

See pages 160 – 161 of ROA, Volume 1

[85] On July 21, 2022, when Mr. Kwaku Agyemang-Manu was cross-examined, the following evidence was also elicited regarding whether Exhibit A was signed on behalf of the substantive Minister of Finance:

"Q: When you served as a Deputy Minister, did you have occasion to sign a letter for or on behalf of your substantive Minister?

A: That has been years back and I will find it very difficult to remember.

Q: But you agree with me that it is not unusual for a Deputy Minister to sign a letter for or on behalf of the substantive minister.

A; That is usual.....

Q: So on the face of Exhibit AG, it is clear that it was not signed on the blind side of the Minister for Health and that is why you are relying on the

document.

A: That is not the case.

Q: What do you mean when you say "that is not the case"?

A: My thinking is that, copying the Minister does not mean the Minister's approval or instruction because copies on letters as these are supposed to be information document and some of these in practice at times get to the Minister's notice later after this has been dispatched, may be days or weeks. And when the Minster sees it and he is not in approval, he may act in several different ways some of which may include warning directors not to sign on his behalf without his approval in a memo to all directors. Some of these may be verbal warnings so it depends on the Minister.

Q: And the clearest evidence, you agree with me of a letter that has been signed for and on behalf of a Minister has the approval of the Minister is when the Minister has confirmed that indeed he authorised the signing of the letter?

A: That is correct.

Q: Have a look at Exhibit A, so Exhibit A was signed for the Minister of Finance, is that not the case?

A: That is the case.

Q: And the Ministry of Finance was copied on Exhibit A, is that not correct?

A: That is the case.

See pages 179, 181 and 182 of ROA, Volume 1.

[86] Mr. Edumadze Mensah, PW4, was also questioned about the letters written by the 1st Appellant and whether he could have requested the LC without the knowledge of the substantive Minister. The following is a discourse between the witness and Counsel for the 1st Appellant:

"Q: In your experience at the MOF and Economic Planning, can an LC be lawfully established for an MDA without the approval of the Minister of Finance?

A: No, it cannot be done.

Q: At paragraph 33 of your witness statement, you indicate that on 12th August, 2014, A1 authorized the C&AGD to charge the LC against the capital expenditure vote of MOH?

A: That is correct.

Q: How was this alleged authorization done, was it verbal or written?

A: The paragraph 33 is making reference to a letter that was signed so it was a written letter.

Q: Have a look at this letter and confirm whether it is a copy of the letter you refer to in paragraph 33 of your witness statement?

A: This is a copy of the letter that I am making reference to in paragraph 33 of my witness statement.....

Q: So the first sentence of paragraph 2 of Exhibit B2 states that authority was being conveyed to the C&AGD, is that correct?

A: That is correct.

Q: And this letter indicates on its face that it was written for the Minister of Finance?

A: Yes. The Minister's designation is under the Deputy Minister's designation".

[87] My Lords, the above captures the heart of the evidence that the 1st Appellant could not, on his own, request the establishment of the LC without the knowledge and authorization of the substantive minister, Mr. Terkper. My Lords, this court has previously held that when a person signs a document on another person's behalf, the person who signs does not take responsibility for the content of it, but rather the author does. That is, the person on whose behalf another person signs. See the case of **Samuel Aboagye & Another v Frank Otchere Baidoo**[6].

[88] I note that the investigator, PW5, Mr. Rockson Gyamfi, testified and Exhibit 5 for A1 (at page 878, ROA Volume 2) was tendered through him. In that exhibit, Mr. Terkper

[6] The judgment of the Court of Appeal dated 16th March, 2017 in Civil Appeal No. H1/53/2016.

wrote:

> *"Upon receipt of the Attorney-General's opinion, MOF proceeded to establish the Letters of Credit. The letter noted that this was a valid contract and the terms of the Agreement must be respected."*

Commenting on this exhibit in the submission filed, the prosecution invited the court to note that "nowhere in Exhibit 5 for A1 did Mr. Seth Terkper claim ownership of the letters written by the 1st Appellant. Mr. Seth Terkper did not state at any part of the exhibit that the 1st Appellant's decision to side-step the parliamentary-approved means of financing and the decision to authorize the LCs to be established contrary to the terms of the Ambulance contract were made by him."

[89] The nub of the trial judge's reasons on the issue of the authority of the 1st Appellant to write the letters to request the issuance of the LC can be found at pages 585–586, stated as follows:

> *"Further, there is the issue of what authority the 1st Accused exercised when he asked for the LCs to be issued. It is the case of the Prosecution that the LCs were issued without due cause and authorization. The prosecution in stating that A1 had no authority has stated, among others, that the agreement that culminated in the delivery of the defective ambulances which cannot be used in the condition that it is.*
>
> *On the part of A1, he insists that he had the authority of the Minister of Finance, whose deputy he was, to issue the request. That said, however, the law is quite clear, that where a negative averment is made, in this case, that A1 acted without authority, and then there is a positive one, the onus is on the one making the positive assertion to prove the positive. ...*
>
> *The law is quite clear that the party who makes a positive assertion must offer positive proof of same because* ***"he who denies a fact cannot produce proof."***

The trial judge referred to some judicial decisions, including cases from this court and stated that;

"*In such circumstances, it is for A1 to adduce evidence to show that he had authority. The burden on the accused person, however, is not as high as that on the prosecution. The accused only needs to raise a reasonable doubt*".

[90] With regards to Exhibit 5 for A1, the learned judge again stated as follows:

"I have very well noted Exhibit 5 for A1, the statement volunteered to the investigators by the Honourable Seth Terkper on the 10th of December, 2018. The import of the document can be seen from reading it as a whole and it is reproduced hereunder;

"Upon assuming office, requests were made for various payments-Cabinet had placed a moratorium on loans and payment for the 200 ambulances was also held in abeyance due to a Technical report from the MOH regarding defects that were described as critical upon receipt of the Attorney-General's opinion, MOF proceeded to ask BOG to establish the Letter of Credit. The letter noted that there was a valid contract and the terms of the Agreement must be respected. At this point the loan facility (to MOH) had lapsed and so the LC was established against MOH Budgetary allocation. This is my brief recollection of events subject to obtaining the documents to enable me elaborate further if required."

That said however, it should not be lost on us that the statement has not been subjected to cross-examination. The statement volunteered by the Minister even shows that at the time it was volunteered, he did not have enough information.

Dr. Bamba asserts that the Honourable Seth Terkper was a material witness who ought to have been called by the prosecution to prove that A1 acted without authority.

That is a misapprehension of the law.

Since A1 avers that he acted with the authority, and under the lawful instruction of the Honourable Minister, he (the Minister) would be material to the Accused person (in this case, A1 who alleges that he had authority) and not to the Republic which is averring the negative". [Emphasis Mine].

See pages 588 – 589, ROA, Volume 2

[91] From the quotation above, the consideration leading to the trial judge's call for the 1st Appellant to open his defence was anchored in the assertion that, because he claimed to have performed his duties in his official capacity, he must demonstrate the same. My Lords, I hold a different view. Our system of criminal justice is anchored on the principle of the prosecution having the burden of proof, and thus proving the facts in issue against an accused person beyond reasonable doubt. The prosecution stated in the particulars of the charge that the 1st Appellant had "acted without due cause and authorization." The question to be asked is: what did that mean? Is it the case that there was no valid reason or justification for writing the letters of August 7 and 12, 2014, or that the 1st Appellant did not have the required permission or authority from the Minister to write the letters at the centre of this suit, and therefore the letters were unjustified and unauthorized? With that in mind, the question is, on whom did the burden of proof lie? The jurisprudence as established in the *Republic v. Ernest Thompson & Others* supra indicates that the prosecution is to prove the allegations as stated in the particulars of the offence.

[92] My Lords, I respectfully state that, based on the facts, the statement that "*The law is quite clear that the party who makes a positive assertion must offer positive proof of the same because* ***'he who denies a fact cannot produce proof'***" is not applicable in this case. The charges are not strict liability offences. Also, the prosecution's own witnesses confirmed that an LC cannot be issued without the approval and knowledge of the Minister of Finance. To my mind, that affirms the presumption of regularity stated above. To that extent, it is my opinion that the trial judge's call for the 1st Appellant to show that he had authority is inappropriate. This is because the case of *The State v. Ali Kassena* supra reiterates the well-settled principle that, in every criminal trial, after the close of the prosecution's case, the judge has the duty to determine whether guilt may be inferred from the facts as presented by the prosecution. It was stated that there can be no inference of guilt unless there are objective facts from which the inference can be made. If the positive facts are lacking, as in this case, what is left is mere conjecture or speculation. In this case, by calling on the 1st Appellant to open his defence suggests

that he was only entitled to be acquitted if he proved his defence; that is show that he had authority to the satisfaction of the court. With respect, in my view, that was wrong.

[93] Further, I note that the prosecution referred to Exhibit AL and submitted that, according to Mr. Edumadze Mensah, based on that Memo, all the staff assumed or knew that the authorization came from the 1st Appellant and not his boss. Counsel therefore in effect invites this court to draw an inference from the evidence that the 1st Appellant had no authority to write the letters at the centre of this case. In my respectful opinion, the process of drawing inferences from evidence is not the same as speculating, even where the circumstances permit an educated guess. In my view, it is also important to point out that supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference in this case. The assumed facts for the inference must be taken from the primary facts for a proper and reasonably drawn inference. A reasonably drawn inference requires an evidentiary foundation, which in this case is lacking because no evidence was led to show that the 1st Appellant had no authority to act. The facts relied on by learned Counsel, with due deference to him, are based on conjecture and speculation. The issue of whether the 1st Appellant had authorization to act or not is a matter of fact and cannot be speculated upon.

[94] The above leads me to Exhibit 5 for A1 and the positions of the prosecution and the court. The prosecution submits that the Finance Minister did not accept ownership of the letters of August 7 and 12, 2014, and "did not state at any point in the exhibit that the 1st Appellant's decision to sidestep the parliamentary-approved means of financing and the decision to authorize the LCs to be established contrary to the terms of the Ambulance contract were made by him." The trial judge also, while acknowledging that the statement came from the Minister voluntarily, stated that "the statement has not been subjected to cross-examination".

[95] First and foremost, I have no hesitation in dismissing the prosecution's contention that the request for the LCs was reckless and criminal because it did not receive

parliamentary approval. The idea of parliamentary approval was never part of the prosecution's case, as it never formed part of the particulars set out for the offence for which the 1st Appellant was charged. With respect, it was an afterthought, and I will not place any weight on it. Regarding the court's position on the said exhibit, with the greatest respect and deference to the trial judge, that is not the position of the law. The document either has some probative value, for which some weight can be placed on it, or it does not. It is not the law that a statement ought to be subjected to cross-examination before value can be ascribed to it.

[96] From the above analysis, both the prosecution and the court's positions make Dr. Bamba's submission not a "misapprehension of the law" as stated by the court. Mr. Terkper was a material witness. Authorization to request the LC was the critical issue at the trial. The only person who could have put the matter beyond doubt as to whether the 1st Appellant had the authority to authorize the two letters, at the center of this case, was Mr. Terkper himself. However, the prosecution woefully failed to call him, and that, to my mind, was fatal to their case. It is my view that the failure to call the Finance Minister, on whose behalf the impugned letters indicate the 1st Appellant signed for, amounts to a failure to establish that the 1st Appellant requested the issuance of the LC without due care and authorization and a failure to call a material witness.

[97] The Supreme Court, in the case of **Tetteh v. The Republic**[7], held that a witness is material if his/her testimony will, one way or another, help to resolve an important issue the court is to determine. Specifically, the court held that:

> *"...Whether or not a witness is a material witness depends on the quality and content of the evidence he is expected to offer in relation to the case on trial. He will be deemed to be material if the evidence expected from him is deemed to be so vital as to be capable of clearly resolving one way or the other an important*

[7] [2001-2002] SCGLR 854 at 857

and decisive issue of fact that is in controversy.

In my opinion, had Mr. Terkper been called as a witness, his testimony would have, one way or another, helped resolve the contention that he did not claim ownership of the letters dated August 7 and 12, 2014. This would also have removed the doubts the court had about Exhibit 5 for A1 not being tested under cross-examination, I do hold. See also the case of **Sarpong v The Republic [1981] 790**, which held that failure of the prosecution to call the General Manager who allegedly promised to give the accused/appellant the roofing iron sheets was fatal to the prosecution case because he was the only one who could confirm or deny the assertion.

[98] My Lords, I now turn to ground (e) of the appeal, which is that "*The Court violated the right to a fair trial of A1 when it disregarded evidence in favour of A1.*" The 1st Appellant's Counsel submits that the trial judge, by calling on him to open his defence and explain that he had authority to author the letters of August 7 and 12, 2014, violated his right to a fair trial. This is because, pursuant to Article 19(1)(2)(c) and (10) of the Constitution, together with Section 173 of Act 30 and Sections 10, 11, 14, 15, and 17 of NRCD 323, it is the prosecution which must adduce evidence to support the particulars of the offences charged, including the allegation that he acted "without due cause and authorization." Learned counsel further submitted that the circumstances under which the onus is reversed for an accused person to prove his innocence, as per Article 19(16)(a) of the Constitution, do not include the charges preferred against him. Counsel therefore submitted that in the present case, neither Section 179(A) (3)(a) of Act 29 nor Section 1(2) of SMCD 140 imposes such a burden on the 1st Appellant. Consequently, Counsel submits that the trial judge's holding that he must open his defence to explain that he had authority to act, as stated on page 588 of the ROA, was wrong.

[99] My Lords, in the first paragraph of my opinion, I referred to the quote that an accused person has the right not to be forced into assisting in his or her own prosecution. In my opinion, that protection afforded to accused persons is anchored in the overarching principle against self-incrimination, which is firmly rooted in our constitutional law as a

fundamental principle of justice under Article 19(2) (c) and the common law. The root of the principle is based on the presumption of innocence and the fact that the state as the Hobbesian "Leviathan," which prosecutes an accused, has more resources than the accused. In other words, until the prosecution establishes that there is a case to meet, an accused should not be compelled to testify.

[100] As counsel for the 1st Appellant correctly observes in his submission, in the case at bar, the law under which the 1st Appellant is charged does not impose a burden on him to explain whether he had authority to act. He was not charged with a strict liability offence but with willfully causing financial loss and misapplication of state property. It is therefore difficult to reason with the trial judge on her decision that the 1st Appellant must testify to explain whether he had authority to act.

[101] Further, by saying that Exhibit 5 for A1 has not been subjected to cross-examination and that the 1st Appellant should rather establish that he had authority to act, the learned trial judge is by implication saying that she has heard the prosecution witnesses but must also hear from the 1st Appellant in order to decide. I am of the view that this is tantamount to shifting the burden on the 1st Appellant to prove his innocence. It also implies that the 1st Appellant would be found guilty if he fails to explain that he had authority to act.

[102] In my view, the position of the court is contrary to the principle in **Atsu v. The Republic [1968]** GLR 717, where this court at page 719 stated as follows:

> *"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 the onus to prove the guilt of the person they accused of an offence, and not an accused should establish his innocence, the accused should therefore not to show his hands until the need arises".*

[103] My Lords, it is true that at the close of the prosecution's case, the guilt of the accused is not supposed to be proved beyond reasonable doubt for purposes of submission of no case. But, the law requires that the prosecution provide sufficient evidence as per Section 11(2) of the Evidence Act, such that the evidence should be capable of convicting the accused if he/she does not offer any explanation. If there is no evidence to support the charge laid against the accused, the court must hold that no prima facie case has been made out and that the accused is entitled to be acquitted and discharged forthwith.

[104] My Lords, the position above is the same in other common law countries. In the Canadian case of **R. v. Charemski**, [1998] 1 S.C.R. 679, McLachlin J. (as she then was) made it clear that the sufficiency of evidence cannot be assessed without reference to the ultimate burden on the prosecution to prove the case beyond a reasonable doubt when considering a directed verdict. McLachlin J. said at p. 701:

> "*...sufficient evidence' must mean sufficient evidence to sustain a verdict of guilt beyond a reasonable doubt; merely to refer to 'sufficient evidence' is incomplete since 'sufficient' always relates to the goal or threshold of proof beyond a reasonable doubt. This must constantly be borne in mind when evaluating whether the evidence is capable of supporting the inferences necessary to establish the essential elements of the case.*" [Emphasis mine]

[105] My Lords, from the above and established in the case of *Michael Asamoah & Another v. The Republic*, supra, in considering an application for submission of no case, not only should all the elements of the offence be proved, but also the evidence adduced should be reliable and should not have been so discredited through cross-examination that no reasonable tribunal can safely convict on it. Additionally, the evidence at this stage should not be equally balanced as to be open to two likely explanations or consistent with both guilt and innocence.

[106] My Lords, as stated earlier, there is no link between the evidence heard and the elements of the charge for the court to hold that a prima facie case has been made.

Consequently, based on the evaluation of the evidence led before the trial court and the submissions made on behalf of the 1st Appellant, I am of the view that the prosecution failed to provide sufficient evidence that meets the threshold of connecting the 1st Appellant with the offences he is charged with and relates to the ultimate of proof beyond a reasonable doubt. These reasons explain why I take the position that the trial judge erred in her application of the law in calling upon the 1st Appellant to open his defence in respect of the charges in counts 1 and 5.

xi – The 3rd Appellant Appeal:

[107] My Lords, I now turn my attention to the appeal of A3, Mr. Richard Jakpa. The facts are the same as set out above, and therefore I do not wish to restate them but rely on what was earlier stated in this opinion. On the charge sheet, Mr. Jakpa was charged with Count 3. The charge sheet states as follows: "Willfully causing financial loss to the Republic contrary to Section **179A (2)** of the Criminal Offences Act, 1960 (Act 29)." [Emphasis mine].

To rehash the particulars as provided on the charge sheet, it is as follows:

> "***Richard Jakpa*** *between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana willfully caused financial loss of €2,370,000.00 to the Republic by intentionally causing vehicles purporting to be ambulances to be supplied to the Republic of Ghana by Big Sea General Trading Ltd of Dubai without due cause*".

[108] At the close of the prosecution's case, the trial judge, in her ruling delivered on March 30, 2023, referred to Section 179A(3)(a) of the Criminal Offences Act as the charging section in count three (ROA, Volume 2, page 549). At page 576 (ROA, Volume 2), the learned trial judge stated as follows:

> *"A1 and A3 are charged under counts one and three, being Willfully Causing Financial Loss to the state Republic contrary to Section 179A of the Criminal Offences Act, 1960 Act 29) (as amended)*".

[109] The trial judge further referred to aspects of the evidence heard, cited case law and stated at page 590 as follows:

> *"I shall conclude the discussion on the law and the evidence on the matter of whether or not there is a case to answer against A1 and A3 on the charge of Willfully Causing Financial Loss to the Republic by a brief discussion on the issue of the liability of directors or shareholders of corporate entities.*
>
> *Without going into any great detail at this preliminary stage, it must be stated that it is not unknown for directors of a company to be held criminally liable for actions taken in the performance of their corporate responsibilities.*
>
> *Thus the question of whether the 3rd accused as a natural person could be criminally liable for acts of a company being an artificial person, will be settled by quoting from the Ghanaian case of words of Charles Crabbe J (as he then was) in the case of* ***THE REPUBLIC v. BAYFORD [1973] 2 GLR 421 @page 427..."***

Continuing, the learned judge referenced what the court stated at page 427 of the report and then stated at page 591 of ROA, Volume 1 as follows:

> *"In these circumstances then, it would be proper to prosecute the director or an officer of a company for alleged criminal actions arising out of the performance of their corporate duties.*
>
> *I have also taken a close look at the exhibits as well as the oral evidence on record with regard to the various sums of money which were paid to Jakpa at Business, whose sole shareholder and a director is A3, as well as the entire circumstances of this case, I hold that at this preliminary stage, the Prosecution has been able to adduce sufficient prima facie evidence to merit A3 being called upon to open his defence".*

[110] As stated earlier in paragraph 19 of this opinion, the 3rd Accused/Appellant, dissatisfied with the Court's ruling, filed the instant appeal on April 17, 2023. The grounds of appeal on page 609 are as follows:"

i. The court erred in coming to the conclusion that A3 being the shareholder/Director took steps to obtain payment for the vehicles which according to the prosecution turned to be unfit for purpose.

ii. The court erred when it held that there is sufficient evidence that A3 willfully caused financial loss to the Republic.

iii. The Court violated the right to fair trial when it disregarded evidence in favour of A3.

iv. The court erred when it held that the ambulances were defective contrary to provisions of the contract between the Government of Ghana and Big Sea General LLC for the purchase of the ambulances.

v. The ruling of the Court in (sic) unreasonable having regard to the evidence.

vi. Additional grounds will be filed upon receipt of the record of proceedings.

[111] My Lords, even though the 3rd Appellant indicated that additional grounds would be filed, no further grounds of appeal have been submitted. I note that, like the 1st Appellant, the 3rd Appellant also contends that the trial judge erred, as stated in the grounds of appeal filed. However, he has also failed to provide particulars of the errors as required by *Rule 8(4) of C.I. 19*. To that extent, I adopt my analysis at paragraphs 32 to 38 of this opinion and strike out grounds (i), (ii), and (iv) of the grounds of appeal as inadmissible and unarguable since they do not comply with the rules of court. I shall address grounds (iii) and (v) of the grounds of appeal.

[112] I note that the import of some of the grounds of appeal, which have been struck out can be covered under the omnibus ground of appeal, by which the 3rd Appellant is inviting us to review the record of the appeal on the grounds that the ruling of the court is unreasonable having regard to the evidence.

xii. Summary of Counsel's Submission:

[113] Counsel for the 3rd Appellant argues that neither Jakpa@Business nor the 3rd Appellant engaged in any transaction with the Ghanaian government, thus no loss could

have resulted to the Republic. Counsel further submits that the trial court misapplied the legal principles and statutes and thus erred in finding that the 3rd Appellant, a shareholder and director of Jakpa@Business, has a case to answer.

[114] Counsel contends that no case was made under Section 179(2) against the 3rd Appellant. In regard to Section 179(3)(a) of Act 29, Counsel submits that in so far as the charge sheet is concerned, the 3rd Appellant was not charged under that section at the close of the prosecution's case. Counsel again submits that the 3rd Appellant, as director of Jakpa@Business the agent of Big Sea, its principal, he cannot be liable for the actions of Big Sea. Counsel further argues that the prosecution did not provide evidence or suggest that Jakpa@Business or the 3rd Appellant should be liable for acts related to the purchase of the ambulances. To learned counsel, if there is any liability at all, Big Sea should be liable, as Jakpa@Business had no role in the contract with the government of Ghana.

[115] Citing legal precedents and statutory provisions, Counsel submits that there is no evidence to justify holding the 3rd Appellant, a director liable instead of Jakpa@Business, if there is any culpability. Counsel criticizes the trial court's reliance on the *Bayford case*, arguing it misapplied the ratio and ignored relevant statutory provisions.

[116] Responding to the submission of the 3rd Appellant, Counsel for the Respondent the learned state attorney argued that the state proved a loss of €2,370,000 and focused on whether the 3rd Appellant intentionally caused this financial loss. Counsel submits that the evidence and statements of the 3rd Appellant confirmed that Jakpa@Business represented Big Sea and acted as its sole agent in Ghana. According to counsel, despite claiming otherwise, the 3rd Appellant's company Jakpa@Business was unregistered during key dealings. He also asserts that the 3rd Appellant was deeply involved in an agency agreement with Big Sea and received a significant commission. Counsel further argued that Mr. Jakpa knew the imported vehicles did not meet contract specifications and lacked required medical equipment, leading to financial loss for the Republic.

[117] Counsel emphasized that the 3rd Appellant's actions, such as obtaining an injunction to halt payments and altering vehicle specifications without consultation, directly caused financial damage. To learned counsel, the trial court rightly found a prima facie case of criminal responsibility against him.

[118] With regard to whether as a director of Jakpa@Business, the 3rd Appellant could be held responsible for the actions of the company, Respondent's counsel argued that company law does not shield individuals from criminal liability and that the 3rd Appellant misinterpreted relevant laws and cases. Counsel therefore urged the court to dismiss the Appellant's arguments, asserting that the charges and proceedings were valid and that the 3rd Appellant's actions warranted criminal liability under the law.

xiii. Evaluation & Analysis:

[119] My Lords, the above represents the arguments of the parties and their positions on the ruling of the trial court. I wish to deal with the two remaining grounds of appeal stated above together. Before doing so, I note that counsel for the 3rd Appellant submits that the charge sheet and the proceedings are defective because even though the 3rd Appellant was charged under Section 179A(2), the trial judge in her ruling referred to Section 179(3)(a) as the charging provision. Counsel therefore argues that by referring to a section of the Criminal and Other Offences Act, which the 3rd Appellant did not plead to is a breach of his constitutional right under Article 19 (2)(d) of the constitution.

[120] Responding to the above argument, learned counsel submitted that the 3rd Appellant did not raise a specific ground of appeal concerning this issue but only raised the issue in the written submission and therefore the court should not entertain same. Counsel submitted that the 3rd Appellant was charged under section 179A(2) of Act 29, which covers willfully causing financial loss to the Republic, as stated in the charge sheet. Therefore, the 3rd Appellant's claim that section 179A (2) only contemplates economic loss, and not financial loss, is a misreading of the law. Counsel argued that Section 179A

(2) states causing damage or loss, whether economic or otherwise, to a public body or agency is a criminal offence. Therefore, financial loss is included under section 179A (2), as it is covered by the "otherwise" and therefore the Appellant's argument should be dismissed.

[121] Counsel for the 3rd Appellant in his submission argued in response to the fact that the issue of the charge sheet was not raised as a ground of appeal and stated as follows:"

> "The current position of the law is that where the ground of appeal challenges the evidence on which the court has based its decision, the parties would be permitted to argue points of law where the weight of evidence is substantially influenced by points of law such as rules of evidence and practice or the discharge of the burden of persuasion or producing evidence.[8] In such a case, points of law may be advanced to help facilitate a determination of the factual matters relevant to the points of law".[9]

[122] My Lords, having read the *Owusu Domena* case, I am of the view that the 3rd Appellant Counsel's submission is sustainable. Benin, JSC, referencing the decision of the Supreme Court in **Tuakwa v. Bosom** (2001-2002) SCGLR 61, stated that the ratio in that case "*has erroneously been cited as laying down the law that when an appeal is based on the ground that the judgment is against the weight of evidence, then only matters of fact may be addressed upon. Sometimes a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law. Thus, when the appeal is based on the omnibus ground that the judgment is against the weight of evidence, both factual and legal arguments could be made where the legal arguments*

---

[8] *Owusu-Domena v Amoah* [2015-2016] SCGLR 790.

[9] *Owusu-Domena v Amoah* [2015-2016] SCGLR 790. See also *Attorney-General v Faroe Atlantic Co. Ltd* [2005-2006] SCGLR 271, Atuguba & Associates v Scipion Capital (UK) Ltd & Anor [2019-2020] SCLRG [Adaare] 55 at page 67 and Kofi Kyei Yamoah Ponkoh v Asomdwe House Co. Ltd Civil Appeal No J4/35/2020 dated the 26th day of May, 2021.

would help advance or facilitate a determination of the factual matters." [Emphasis Mine].

[123] I understand His Lordship to say that legal arguments could be advanced based on the omnibus ground if the arguments could help to determine the factual matters. I am therefore of the view that, based on the law, even though no specific ground of appeal was set out by the Appellant, this court can properly consider the arguments made by Counsel for the 3rd Appellant.

[124] The 3rd Appellant argues that the charge sheet shows he was charged under Section 179A (2) of Act 29, which concerns damage or loss (economic or otherwise) resulting from transactions or business conducted by an accused person with a public body or agency. But, the judge in her ruling referred to Section 179(3)(a), which deals with financial loss without regard to the circumstances of how the loss was caused. Also, counsel submits that even though the 3rd Appellant pled not guilty to Section 179A(2), the trial judge, on her own motion, referred to Section 179(3)(a) in her ruling when there had not been any amendment of the charge by the prosecution and when the 3rd Appellant did not plead to Section 179A(3)(a).

[125] My Lords, I agree with the 3rd Appellant that without an amendment, the trial judge on her own motion could not change the provision under which he was charged by stating same as that of the 1st Appellant. Especially so, when the 3rd Appellant did not plead to the charge under section 179(3) (a). To that extent, the judge was in error by referring to section 179(3) (a) instead of the charging provision on the charge sheet, being Section 179A (2).

[126] I, however, disagree with the 3rd Appellant that the charge and the proceedings are defective as a result. I am of the respectful view that it is not every finding based on an error of law that is fatal to a ruling or verdict. In my respectful opinion, where the error is harmless, or even if serious, it is counterbalanced by evidence so overwhelming to override the error and no substantial wrong or miscarriage of justice resulted, it should

not affect the decision. In this case, even though Section 179A (2) was stated to be the charging section, the wording used does not align with what is provided under section 179A (2), but rather the wording under section 179A (3)(a).

[127] The evidence led clearly speaks to financial loss, as both the direct evidence and the cross-examination of counsel all refer to financial loss as stipulated under section 179(3)(a) rather than section 179A(2). I therefore conclude that the 3rd Appellant knew and understood the charge and the particulars of the same at trial.

[128] I am also of the opinion that in every case, if the reviewing court, such as this court, takes the position that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice. But, where the error is of a minor nature having no impact on the verdict, it should not overturn the verdict or ruling. In my view, there is nothing in the record of this case to suggest that there was a reasonable possibility that, but for the error in stating Section 179(3)(a) instead of what is on the charge sheet, the ruling would have been different. I will therefore conclude that the change of the charging section by the trial judge was minor and does not infringe on the constitutional right of the 3rd Appellant.

[129] I cannot leave the discussion of this issue without wondering why steps were not taken by the prosecution to amend the charge sheet for Count 3 to conform to the evidence before the close of the prosecution's case. Had that been done, this issue would have been prevented.

[130] My Lords, I now turn to the ultimate issue, which is whether the ruling of the court is unreasonable based on the evidence heard. As indicated above, the other ground of appeal, which is "*the Court violated the right to fair trial when it disregarded evidence in favour of A3*" can be subsumed under the omnibus ground. In discussing the 1st Appellant's appeal, I referred to the case of **Dexter Johnson v. The Republic** Supra,

which speaks to the fact that the Appellant herein is to point out from the record that the prosecution failed to provide sufficient evidence to support the charges against him and therefore the conclusion of the judge was not reasonable and not supported by the evidence.

[131] Counsel for the 3rd Appellant in demonstrating that the ruling was unreasonable submitted that "at the close of the prosecution's case, the prosecution did not suggest nor insinuate, either from the facts alleged or the evidence adduced, that it is Jakpa@business official [the third accused] who should be held liable for the acts and omissions executed for and on behalf of Jakpa@business by the third accused as its agent, in relation to the transaction for the purchase of the ambulances, rather than Jakpa@business itself, which by law is criminally liable for such acts and/or omissions".

[132] Counsel again submitted that from the record of appeal, at the close of the prosecution's case, the prosecution did not allege any fact and made no effort to adduce any evidence to prove why, as Big Sea's agent, Jakpa@business, which had no role to play in the execution of the contract between the government and Big Sea, has its official, the 3rd Appellant, charged "for causing economic or other loss to the Republic instead of Big Sea itself", when Jakpa@business did not engage in any transaction, business, or other relationship with the government that could cause any loss, whether economic or otherwise.

[133] Learned counsel further submitted that, the court below ignored the applicable statutory provisions and rather justified its decision by reference to the case of **Republic v Bayford**[10]. In the view of counsel, the court below wrongly applied the ratio in the *Bayford* case to the present 3rd Appellant because the court in the *Bayford* case interpreted a specific legislation which the Court held would cover individuals also, even if they were servants of the company. According to Counsel, the *Bayford* court "compared

[10] [1973] 2 GLR 421.

and construed the relevant provisions of the statute which criminalized the acts in question relative to the facts and reached its conclusion." It is the view of Counsel therefore that "the court below applied the *Bayford* case without any consideration whatsoever of its implications relative to the statutory provisions under which the 3rd Appellant was charged."

[134] Learned counsel further submitted that at the close of the prosecution's case there was no indication either from the facts or evidence adduced by the prosecution, which the 3rd Appellant or the court was informed of the nature of the acts engaged in by the 3rd Appellant on which the 3rd Appellant's prosecution is based. Based on the above and other arguments contained in the submissions filed, Counsel prayed the court to allow the appeal.

[135] Justifying the decision of the trial court, calling on the 3rd Appellant to open his defence, the learned state attorney for the Republic among other arguments made first submitted that the Court has "established that there has been a loss of €2,370,000 to the Republic".

[136] According to the state attorney, the 3rd Appellant represented Big Sea throughout the contract period and was the first to approach the Ministry of Health (MOH), as confirmed by PW3's testimony. Counsel stated that the 3rd Appellant acted as Big Sea's agent, having signed an agency agreement that made him the sole agent of Big Sea in Ghana and West Africa. Counsel stated Exhibit BC, the cautioned statement of the 3rd Appellant corroborates this fact. Learned counsel also submitted that the agency agreement between Big Sea and Jakpa@Business Limited is confirmed by Exhibit AN.

[137] Counsel submits that in Exhibit BC, the 3rd Appellant acknowledges being the chairman of Jakpa@Business. However, Jakpa@Business was not a registered entity at the time it signed the agency agreement and also approached the MOH to supply ambulances to it in 2010, and thus was the sole directing mind and personality of the

unincorporated Jakpa@Business. It is the case of the prosecution that Jakpa@Business was only registered in July 2014, as shown in Exhibit AM.

[137] It is the case of the Appellant that as the sole directing mind and personality of the unincorporated Jakpa@Business, the 3rd Appellant had comprehensive knowledge of both the contract (Exhibit V) and the agency agreement (Exhibit AN), as well as the specific requirements and specifications of the ambulances outlined in the contract, which turned out to be ordinary vans not contracted for, resulting in a loss to the Republic.

[138] In further demonstrating that the trial judge was justified to call on the 3rd Appellant to open his defence, Counsel submitted that the 3rd Appellant, representing Big Sea, received a commission of 28.7% of the contract price, which was testified by PW5 and confirmed by the 3rd Appellant himself when he issued a writ against Big Sea to ensure payment of his commission of 28.7% of €2,370,000. In Exhibit AT1 (page 814 of the Record of Appeal), the 3rd Appellant, as the Plaintiff, sought an order directing the 1st Defendant (Big Sea) to fulfill its payment obligations to him, specifically 28.7% of all outstanding payments excluding €100,000 already received. Counsel further stated that in Exhibit AT2 (page 818) shows that the 3rd Appellant personally obtained an interim injunction to stop the government from paying Big Sea, despite knowing that the supplied vans were defective.

[139] According to Counsel, Big Sea expressed concerns in Exhibit AC, found on page 741 of the Record of Appeal, that the demand for 28.7% by Jakpa@Business could jeopardize the project, highlighting the severity of the situation. Furthermore, according to counsel, the delivered vans lacked the required medical equipment, a fact admitted by the 3rd Appellant in Exhibit BC and Big Sea in Exhibit AC. Big Sea also stated that the 3rd Appellant neglected his duties by accepting these vans without the medical equipment and knowing they were ordinary vans. Counsel says, the trial court found the 3rd Appellant criminally responsible based on these actions and required him to open his defence, as a prima facie case was established against him under count three.

[140] My Lords, as a starting point, it is well-settled that based on the charge the prosecution preferred against the 3rd Appellant, the prosecution had to prove its case that 'there had been a financial loss, and it is to the state, and it was caused through the action or omission of the accused, intended or desired to cause the loss; foresaw the loss as virtually certain and took unreasonable risk of it; or foresaw the loss as a probable consequence of his act and took an unreasonable risk of it; or if he had used reasonable caution and observation, it would have appeared to him that his act would probably cause or contribute to the loss'[11]. These essential elements of the charge were set out by the trial judge in the ruling.

[141] My Lords, at the close of the prosecution's case, the trial judge, in her decision, stated that sufficient evidence had been proffered based on her review of the "*exhibits as well as the oral evidence on record with regard to the various sums of money which were paid to Jakpa@business, whose sole shareholder and a director is A3*," and therefore he had to open his defence. The judge does not indicate, which of the 3rd Appellant's actions or inactions as the sole shareholder and a director led to the financial loss to the state.

[142] A review of the record unimpeachably confirm that Jakpa@business is not a contracting party to the ambulance agreement between the Ministry of Health and Big Sea, but only the agent of Big Sea. At page 407 of the ROA, Volume 1, PW5, the investigator was asked to point to any clause of the agreement, Exhibit V that "points to the obligations of A3 to supply". He answered that "The contract before me is between the MOH and Big Sea". When pressed to confirm, the obligations of A3 to supply, he conceded that A3, Mr. Jakpa had no obligations under the contract. Mr. Agyemang-Manu also told the court that the MOH had no agreement with A3 and also confirmed that A3 had no obligations under the contract, Exhibit "V". See pages 334 -335, ROA, Volume 1.

[11] The essential elements of the charge of causing financial loss to the state set out by Afreh, JSC in *Republic v. Ibrahim Adam & Others* Supra.

[143] Now, if the 3rd Appellant had no obligations under the contract to supply the ambulances, then what action or omission of his led to causing the loss to the state? As noted above, the Respondent's counsel speaks to the lawsuit instituted by Jakpa@Business against Big Sea and the injunction granted by the court in his favour to make its case. With respect to the prosecution, I do not see the nexus between the lawsuit between Jakpa@Business and Big Sea and the loss, the state contends it has incurred. The evidence establishes that Jakpa@Business had an agency agreement with Big Sea, its principal. There was a dispute between them, to leverage its right, Jakpa@Business went to court and obtained an order, which led to some payments due it against the principal, Big Sea and not the government of Ghana. The contention that Big Sea expressed concerns that Jakpa@Business's demand for 28.7% "could jeopardize the project, highlighting the severity of the situation" to my mind is meaningless as it has no link to the loss the state incurred. In any case, did Big Sea allege that the payment of 28.7% to its agent, Jakpa@Business made it impossible for it to meet its contract obligations to the state? The question therefore, is how did that lead to the state incurring financial loss? No explanation is given and therefore I would not accede to this argument.

[144] At page 220 of the ROA, Volume 1, Mr. Markwei, when cross-examined by counsel for the 3rd Appellant, said the second payment which was to be made brought about a dispute between Big Sea and Jakpa@business, and the court ordered that an amount of over 250,000 Euros be paid to Jakpa@business. The money paid, according to the prosecution forms part of the loss caused to the state. Again, the prosecution in the evidence led, failed to show how the payment led to the loss to the state because there is no evidence that the payment made to Jakpa@Business pursuant to a court order, was not legitimate. Indeed, if it was not legitimate, the state can take steps to recover same. In my respectful opinion, prosecuting the shareholder/director of Jakpa@Business based on the instant facts only, in the absence of fraud or any criminal act on his part, I do not think is the panacea.

[145] My Lords, the prosecution again refers to the fact that when Jakpa@Business

signed its agency agreement with Big Sea in 2011, it was not an incorporated entity because it was incorporated in 2014, and therefore Mr. Jakpa was the sole controlling mind of the unincorporated body. Again, from the record, the prosecution did not provide any evidence to show how that act helps to establish any of the elements of the charge of causing financial loss to the state.

[146] Another argument advanced by the prosecution is that Jakpa@Business despite having comprehensive knowledge of the contract (Exhibit V) and the specific requirements and specifications of the ambulances, what was supplied turned out to be ordinary vans not contracted for. With the greatest respect, in my view, there is an insufficient factual basis for this argument. It is already established that Jakpa@Business is not a party to the contract and had no obligation to supply the ambulances, therefore to my mind, if what was supplied did not meet what was contracted for, the entity to be blamed, is Big Sea and not Jakpa@Business.

[147] My Lords, in any case, the evidence establishes that the contract by Clause 7c provided for pre-shipment inspection of the ambulances by the MOH before they were shipped but that was not done (See page 316, ROA, Volume 1). The evidence also establishes that after the delivery of the ambulances and after the post-delivery inspection, when the "defects" listed in the ruling of the court below was noted, by exhibit AF (*Addendum To The Original Agreement*), the parties, that is MOH and Big Sea LLC at a meeting in Dubai on February 11, 2016 "agreed on a road map to resolve those technical issues from the post-delivery inspection of the ambulances". As part of Exhibit AF, Big Sea shipped medical equipment to Ghana to be cleared. Mr. Agyemang-Manu conceded that the government of Ghana did not perform its obligations under Exhibit AF. See page 319, ROA, Volume 1. Exhibit AF is dated February 22, 2016.

[148] At page 320, ROA, Volume 1 when Mr. Agyemang-Manu was cross-examined by Dr. Bamba, the following evidence was elicited:

"Q: And, the containers with their accessories and medical equipment are still

at the Tema Port?

A: I am aware.

Q: And the government of Ghana has still not cleared these containers from the team (sic) Port, are you aware?

A: I will not say government of Ghana should have cleared the containers at the Tema Port because it has been indicated here that the government of Ghana should have facilitated. In one of my meetings with Jakpa@business, I told him emphatically that government did not have the budget or the resources to go to pay and clear the items so he should go and pay and clear the items to rectify the anomalies on the ambulances."

The answer above clearly contradict the government's obligations under the original contract, Exhibit V.

[149] The evidence further establishes that the ambulances were initially parked at the forecourt of the state house, but they were moved to the Air Force base at Burma Camp by the National Ambulance Service at the direction of the Ministry of Health sometime in November 2015. Mr. Forster Ansong Bridjan, PW1, who testified on 31st May 2022, said "**Looking at the time we parked them there and the current state, the vehicles have actually deteriorated.**"

[150] My Lords, if the above is accurate, in my respectful opinion, it defies logic that Jakpa@Business, agent of the supplier Big Sea, would be charged with causing financial loss to the state based on the facts in the record of appeal when the plan put in place to rectify the defects of the ambulances to enable their use has not been implemented because the government failed to meet its obligations under the "roadmap" agreed to in 2016. In any event, that roadmap leading to the shipment of the parts to Tema Port was agreed upon between the MOH and Big Sea, not with Jakpa@Business, so it is not clear why Jakpa@Business would be asked to "go and pay and clear the items to rectify the anomalies on the ambulances." As a corollary to the foregoing, it bears mentioning that if there are vehicles (even if deficient in certain requisite parts) parked in Ghana, an action plan in place

between the MOH and the supplier Big Sea to rectify the deficiencies, and additional parts or accessories in storage at Tema Port for the said rectification, then there is a need to reassess the quantum of the alleged loss, a factor that impacts the case against all the accused in this case and calling into question the maturation of the charges proffered against the accused persons.

[151] As noted above, in *Ali Kassena* and in *Michael Asamoah* supra, the Supreme Court has established that in considering an application for submission of no case, not only should all the elements of the offence be proved, but also the evidence adduced should be reliable and should not have been so discredited through cross-examination that no reasonable tribunal can safely convict on it. Additionally, the evidence should not be equally balanced as to be open to two likely explanations or consistent with both guilt and innocence.

[152] My Lords, I am of the respectful opinion that there are no positively proved facts from which an inference can be made that Jakpa@Business, as the agent of Big Sea LLC, which entered into an agreement with the Ministry of Health, through its actions or omissions or recklessness, caused financial loss to the government of Ghana. In my view, in the absence of any positive evidence, what is left is impermissible speculation and conjecture for some findings to be made against the 3rd Appellant.

[153] My Lords, from the ROA, at page 591, Volume 1, the trial judge stated that a close look has been taken of the exhibits and she has also considered the oral evidence on record regarding the sums of money paid to Jakpa@Business, whose sole shareholder/director is A3, and based on the circumstances of the case, in her view, the prosecution had been able "to adduce sufficient *prima facie* evidence to merit A3 being called upon to open his defence". In my respectful opinion, and with deference to the trial judge, there is no link between the evidence heard and the elements of the charge to hold that a prima facie case has been made. With respect, receiving sums of money ordered by a court of law to be paid for work done as an agent pursuant to a contract

without more cannot satisfy the element of causing financial loss to the state.

[154] Based on the evidence heard, in my view, no reasonable tribunal can safely convict on it. Also, in my respectful opinion, the evidence proffered by the prosecution against the 3rd Appellant cannot even be said to be open to two likely explanations but to only one, which is that of innocence of the charge.

xv. Disposition:

[155] Based on the above analysis and in fidelity to the law, I am of the opinion that the appeals filed by both the 1st and 3rd Appellants should succeed. In the result, I would allow the appeals, and the ruling of the trial court dated March 30, 2023, calling on the 1st Appellant to open his defence in respect of the charges in counts 1 and 5, is hereby set aside. Also, the call on the 3rd Appellant to open his defence in respect of the charge in count 3 is set aside. In their place, an order upholding the submission of no case entered for the both the 1st and 3rd Appellants in respect of those three counts in the charge sheet are issued. Consequently, both Appellants are hereby acquitted and discharged.

SGD

.....

KWEKU T. ACKAAH-BOAFO

(JUSTICE OF THE COURT OF APPEAL)

CONCURRING OPINION

BRIGHT MENSAH JA:

Introduction:

I have had the privilege of reading the judgment of my esteemed brother, Ackaah-Boafo JA. I think he has done justice to the appeal and do agree with his legal analysis of the case and the conclusions he reached. However, I feel obliged to contribute to the discourse. My contribution is principally a point of law **as to what a prima facie case/evidence is;** the duty cast on a trial court in making a determination at the close

of the case of the prosecution and the consequences that follow. Upon outlining the parameters of the law, I shall then proceed to apply same to the instant appeal and to satisfy myself whether at the end of the close of the instant case, the prosecution factually and legally made a sufficient case to warrant the call on the accused/appellants to enter into their defence.

I do not intend to detain the court with the facts of the case as my learned brothers, Poku-Acheampong JA (Presiding) and Ackaah-Boafo JA have succinctly and copiously chronicled them in their respective judgments. It is useful as this stage to resort to the statutory provisions that govern the application of the test. It is provided in **S. 174(1) of the Criminal and Other Offences Act, 1960 (Act 30):**

> *(1) At the close of the evidence in support of the charge, if it appears that a case is made out against the accused sufficiently to require the accused to make a defence, the court shall call on the accused to make the defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement."*

Per contra, the law states in **S.173 of Act 30:**

> *"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."*

These statutory provisions have received varied interpretations by the courts in a legion of cases, both reported and unreported. The law now appears settled that at the close of the case of the Prosecution the court may call upon the Accused to make a defence only when **a prima facie case** has been established against him. The law as I understand it, is that if at the close of the prosecution's case, no sufficient evidence had been led to prove the ingredients of the charge levelled against the accused the trial judge is enjoined by law as stipulated in **S. 174(1) of Act 30** to hold that no prima facie case has been made. In consequence, the accused person shall be entitled to be

acquitted and discharged on that charge. See: ***Sarpong v R [1981] 790***.

In ***Sarpong v R [supra],*** the appellant has been found guilty, convicted and sentenced to serve 4 years IHL for the offence of fraud by false pretences contrary to **S. 131 of Act 29/60.** The prosecution alleged that some time in March 1979, the appellant went to see the General Manager of A.C. Ltd at the factory and that when he came out of the general manager's office, he told the complainant in the case that the general manager was his friend and had agreed to supply him with roofing iron sheets and if he gave money he would supply a quantity of the iron sheets. According to the prosecution, based on that representation the complainant parted some to the appellant did not however supply any such iron sheets although he had given a receipt to the complainant in his handwriting acknowledging that he did take money from the complainant. The matter was reported to the Police and the appellant was then charged and arraigned before the Sekondi Circuit Court. The prosecution never called the General Manager to testify in the case but relied on the evidence of an accountant of the company who was called into the general manager's office when in the presence of the appellant, the general manager had merely instructed the accountant to provide buckets to the Sekondi-Takoradi City Council where the accused was working at the time. The general manager had also informed the accountant that payment of the buckets would be done by the appellant.

At the close of the prosecution's case and before the appellant was heard, the trial judge held that the appellant knew that the representation he was alleged to have made was false to his knowledge and that it was made with intent to defraud. Following that, the trial judge held that a prima facie case had been established and thereupon invited the appellant to open his defence. As stated supra, the appellant was subsequently convicted and sentenced.

On appeal against conviction, it was submitted on behalf of the appellant that the holding by the trial judge at the close of the prosecution's case that the appellant knew that the representation he was alleged to have made was false to his knowledge, was wrong in law. One of the grounds of appeal learned Counsel for the appellant strongly canvassed on appeal was that the learned Circuit Judge erred in finding the accused guilty before

he opened his defence.

In allowing the appeal, the court held that the trial court was in error when it made those fundamental and crucial findings of fact before it heard the appellant on his defence. At ***p. 796 of the Law Report*** the appellate court observed that those findings meant a total acceptance of the case the prosecution presented even before the appellant was heard and that the learned Circuit Court judge had opened his mouth too wide at that stage of the trial.

There is unbroken chain of judicial authorities that has settled the rule that at the close of the case of the prosecution the litmus test is whether a prima facie case has been established and not a proof beyond reasonable doubt. In ***Tsatsu Tsikata v R [2003-2004] 2 SCGLR 1068*** the Supreme Court postulated thus:

> *"The standard of proof borne by the prosecution at this stage cannot be proof beyond a reasonable doubt..... Indeed, if the submission of 'no case' is made just at the close of the prosecution's case and 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 the Counsel's address? ....."*

Prima facie explained:

And so, what is a prima facie case?

The term, "prima facie" is a Latin expression that literally means a case at first hand. In law, it implies that a court of law has the duty to evaluate a case at the initial stage of a trial to satisfy itself if there is any evidence to support the allegation, the subject of the trial or the case.

The **Osborn's Concise Law Dictionary, 8th ed** explains a prima facie case to mean "of first appearance". That is to say, a case in which there is evidence at a preliminary stage that will suffice to support the allegation made in it, and which will stand unless there is

evidence to rebut the allegation. Under common law, prima facie denotes evidence that unless rebutted, would be sufficient to prove a particular proposition or fact. Put differently, it is that evidence which is sufficient to raise a presumption of fact or to establish the fact in question unless rebutted.

The Legal Information Institute, a law research and editorial group housed at the **Cornell University Law School in Ithaca, N.Y. (USA)** has aptly described it as follows:

> *"A prima facie case is the establishment of a legally required rebuttable presumption. It is generally understood as a flexible evidentiary standard that measures the effect of evidence as meeting, or tending to meet, the proponent's burden of proof on a given issue. In that sense,* ***a prima facie case is a cause of action or defense that is sufficiently established by a party's evidence to justify a verdict in his or her favor provided such evidence is not rebutted by the other party.***" [emphasis mine]

It needs reiterating that as a matter of law, the trial court is not required at the close of the Prosecution's case to make any findings of fact or make any pronouncement touching on the merits of the case. The trial court's mandate is only to look at the evidence on record as offered by the Prosecution and decide as to whether or not a prima facie case has been made. If the court should make any findings of fact or say something which seemingly decide on the merits it will be presumed to have prejudiced the case of the defence and to have made the trial most irregular. This is because the trial court would be presumed to have made up its mind at that stage of the trial.

It was in the light of that principle that that criminal law jurist Taylor, J. (as he then was) postulated in ***R v Accra Special Circuit Court, Exparte Akosah (1977) 2 GLR 283 @ 292*** worth reproducing here:

> *"At the close of the case for the prosecution, a trial court ought not to attempt to make any findings of fact all.* ***Findings of fact can only be made after the close of the defence and the reason for this is because at the close of the case for the prosecution, all the facts in issue are legally rebuttable facts and therefore displaceable by evidence from the Accused.***
>
> ***A finding of fact at that stage can put the accused at such a disadvantage***

as to prejudice his case and make the trial most irregular." [emphasis mine]

It is extremely important to explain that by reason that the court was not required to make findings of fact at the close of the case for the Prosecution did not also mean that the court cannot acquit and discharge at that stage of the trial. All that the principle simply means is that if the court after scrutinizing and considering all the evidence led on record by the Prosecution, it was satisfied that a prima facie case has been established then, as a matter of law, the court shall call upon the Accused person to open his defence. Per contra, where the court was of the opinion that no prima facie case has been made out, it has the power in terms of **S. 173 of Act 30/60** to acquit and discharge at that stage of the trial without even calling on the accused to enter into his defence.

It bears stressing that where the court rules that a prima facie case has been made out and orders the Accused person to open his defence, it does not mean that the Accused was guilty at that stage. What it simply means is that the evidence on record as led by the Prosecution has gone beyond mere allegations or speculations which calls for clarification or explanation from the Accused, bearing in mind the constitutional fiat as housed in **Article 19(2) (c) of the 1992 Constitution** that a person is presumed innocent unless found guilty or has pleaded guilty himself. It is after the accused person has given his side of the story by way of offering evidence in rebuttal of the evidence on record led by the Prosecution will the court then be seized with jurisdiction to pronounce him guilty or not. In other words, it is only at the end of the trial where the accused has offered in rebuttable can the court make findings of facts.

In real practice, lawyers usually make or file submissions of 'No Case to Answer' at the close of the case for the prosecution, thus inviting the trial court to make a determination at that stage of the trial as to whether, given the evidence led on record, the accused was entitled to be acquitted and discharged or to open his defence.

Making a "Submission of No Case To Answer:

Undoubtedly, the starting point where meaning placed on **Sections 173 and 174(1) of Act 30** was well articulated, is the case of ***The State v Ali Kassena (1962) 1GLR 144***

@ 148 in which case, the then Supreme Court stated the principle as follows:

"A submission that there is no case to answer may properly be made and 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

(c) is so manifestly unreliable that no reasonable tribunal could safely convict on it."

The principle was re-echoed in that infamous currency case, ***Apaloo v. R (1975) 1 GLR 156 C/A***, in which case the court relying on Ali Kassena [supra] repeated verbatim, the ingredients of making a successful 'submission of no case to answer'.

It is perhaps worth noticing that this court, [Coram: Azu Crabbe CJ, Sowah & Kingsley-Nyinah JJA] in ***Moshie v R [1976] 1 GLR 287*** added a fourth layer to the established principle and held:

"The judge should not leave a case to the jury if he was of the opinion that:

1) there had been no evidence to prove an essential element in the crime;

2) the evidence adduced by the prosecution had been so discredited as a result of cross-examination, or

3) the evidence was so manifestly unreliable that no reasonable tribunal could safely convict on it;

4) the evidence was evenly balanced, that is, the evidence was susceptible to two likely explanations,

one consistent with guilt, one with innocence."

[emphasis added]

The Supreme Court in its recent decision in ***Asamoah & Anr v R [2017-2018] 1 SCLRG 486 @ 493***, speaking through Adinyira JSC endorsed and adopted all the four elements in making a successful submission of 'No Case to Answer' as follows:

> *"The underlying factor behind the principle of submission of no case to answer is that an accused should be relieved of the responsibility of defending himself when there is no evidence upon which he may be convicted. The grounds under which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trial or trial by indictment may be restated as follows:*
>
> *a) there had been no evidence to prove an essential element in the crime;*
>
> *b) the evidence adduced by the prosecution had been so discredited as a result 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."*

In summary, therefore, the solemn and or the prime function of the court at the close of the prosecution's case is to consider whether a prima facie case has been established to warrant the call on the accused to enter his defence in accordance with **S.174 of Act 30**. On the other hand, if the threshold of not establishing a prima facie case was not met, the court in exercise of its power under **S.173 of Act 30** and acquit and discharge the accused. The duty is not otherwise cast on the court to determine whether the

Accused was guilty or that his guilt could be inferred.

Legal analysis & my opinion:

I now proceed to discuss the appeal in the light of the settled principles herein referred to supra.

It is imperative to observe that **Cassiel Ata Forson,** the 1st Accused/ appellant herein, was arraigned before the Accra High Court [Financial Division] charged with two (2) counts contained in the charge sheet the prosecution presented, as follows:

COUNT 1

Statement of Offence

Willfully causing financial loss to the Republic contrary to section 179A(3)(a) of Criminal Offences Act, 1960(Act 29).

Particulars of Offence

Cassiel Ato Forson between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana willfully caused financial loss of €2,370,000.00 to the Republic by authorizing irrevocable letters of credit valued at €3,950,000.00 to be established out of which payments amounting to € 2,370,000.00 were made to Big Sea General Trading Ltd (sic) for the supply of vehicles purporting to be ambulances without due cause and authorization

COUNT 5

Statement of Offence

Intentionally misapplying public property contrary to section 1(2) of the Public Protection Act, 1977 (SMCD 140)

Particulars of Offence

Cassiel Ato Forson between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana intentionally misapplied the sum of € 2,370,000.00 being public property by causing irrevocable letters of credit be established against the budget of the Ministry of Health in favour of Big Sea General Trading Ltd (sic) for the supply of vehicles purporting to be ambulances without due cause and authorization.

On record, **Richard Jakpa,** the 3rd Accused/appellant was charged with one (1) count of wilfully causing financial loss to the Republic contrary to section 179A(2) of the Criminal Offences Act, 1960 (Act 29).

Particulars of offence

Richard Jakpa between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana wilfully caused financial loss of €2,370,000 to the Republic by intentionally causing vehicles purporting to be ambulances to the supplied to the Republic of Ghana by Big Sea General Trading Ltd of Dubai without due cause.

Both accused/appellants pleaded not guilty to the charges. The prosecution called five (5) witnesses in support of their case. At the close of the case of the prosecution, the lawyers for both accused/appellants made a 'Submission of No Case to Answer'. However, in a Ruling of the High Court that appears on ***pp 554-601 of Vol. 2 of the record of appeal [roa]*** the lower court dismissed the submissions, holding that the prosecution has established a sufficient case against the appellants and called on them to open their defence. So far as it is relevant, I reproduce here below, the holding of the lower court in justifying why the accused/appellants ought to open defence:

> *"In fact, a look at the addresses filed on behalf of all the accused persons, the evidence on record (including the cross-examination) settles on the fact that there were defects in the ambulances when they were delivered and not fit for purpose. In fact, from both Mr Owiredu Dankwa and Mr Ampah Korsah's submissions, there were moves to fix the defects. In such circumstances, nothing more need be said by way of evidence since the fact of the defects in the vehicles was not controverted in cross-examination and would be a tacit admission of the fact, except that an explanation may be canvassed to raise reasonable doubt."* See: ***p. 584 Vol. 2 [roa]***

The lower court went further to hold at ***p. 585 Vol. 2 [roa]*** as follows:

> *"The fact of the defects, making the vehicles unfit for purpose and*

from the case of the prosecution, impossible to use, when the sum of Two Million, Three Hundred and Seventy Thousand Euros (€2,370,000) had been expended to procure vehicles meant to be used as ambulances which could not be so used, in the view of this, would be prima facie evidence of a loss to the state."

It is against this Ruling that both 1st accused/appellant and the 3rd accused/ appellant have launched the instant interlocutory appeals.

Notice of Appeal by 1st accused/appellant:

The grounds of appeal canvassed in the 1st accused/appellant's notice of appeal filed with the lower court on 14/04/2023, are reproduced here below:

a. *The Court Judge erred in no upholding A1's submission of no case to answer as the prosecution failed or neglected to adduce sufficient evidence on the particulars of offences contained in the charges against A1.*

b. *The Court erred in holding that the prosecution adduced sufficient evidence to show that A1 caused payments to be made for the 30 ambulances under the letters of credit.*

c. *The Court erred by disregarding evidence that it was the Ministry of Health that authorized payments under the letters of credit, including the variation of the original conditions for payment.*

d. *The Court erred when it held that there is sufficient evidence that A1 wilfully caused financial loss to the Republic and/or intentionally misapplied public property.*

e. *The Court violated the right to fair trial of A1 when it disregarded evidence in favour of A1.*

f. *The Court erred in shifting the burden of proof on A1 to prove that he had authorization of the Minister of Finance to request the Bank of Ghana to set up the letters of credit for the payment of the ambulances.*

g. *The Court erred when it held that the ambulances were defective contrary to provisions of the contract between the Government of Ghana and Big Sea General LLC for the purchase of the ambulances.*

h. *The ruling of the Court is unreasonable having regard to evidence.*

i. *Additional grounds will be filed upon receipt of the record of proceedings.* See: ***pp 602-604 Vol. 2 [roa]***

Notice of appeal filed by 3rd accused/appellant:

In like manner, the 3rd accused/appellant filed an appeal against the decision of the High Court [Financial Division] complaining that:

a. *The Court erred in coming to the conclusion that A3 being the shareholder/director took steps to obtain payment for the vehicles which according to the prosecution turned to be unfit for purpose.*
b. *The Court erred when it held that there is sufficient evidence that A3 wilfully caused financial loss to the Republic.*
c. *The Court violated the right to fair trial when it disregarded evidence in favour of A3.*
d. *The Court erred when it held that the ambulances were defective contrary to provisions of the contract between the Government of Ghana and Big Sea General LLC for the purchase of the ambulances.*
e. *The ruling of the Court is unreasonable having regard to the evidence.*

f. *Additional grounds will be file upon receipt of the record of proceedings.* See: ***pp 605-607 Vol. 2 [roa]***

Now, to the merits or otherwise, of the instant appeal.

I proceed on the settled principle of law, a trite learning that an appeal is by way of hearing the case. See: ***Apaloo v R [supra].*** The Supreme Court has put the matter beyond per adventure that a criminal appeal is by way of re-hearing the case. See: ***Exter Johnson v R [2011] SCGLR 601***.

An appeal by a way of hearing means that by law, the appellate court is enjoined to scrutinize the evidence led on record and make its own assessment of the case as though it was the trial court. Where the court below comes to the right conclusion based on the evidence and the law, the appellate court does not disturb its judgment. On the other hand, the judgment of the lower court attracts being upset on appeal where the judgment is unsupportable by the facts and or the evidence.

The grounds upon which a criminal appeal may succeed are spelt out in ***S. 31(1)&(2) of the Courts Act, 1993 (Act 459).***

Subsection 1 of S. 31 provides:

> *"(1) Subject to subsection (2) of this section an appellate court on hearing any appeal before it in a criminal case shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a mis-carriage of justice and in any other case shall dismiss the appeal.*

However, the court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or that the point raised in the appeal consists of a

technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted upon that charge or indictment. See: **S. 31(2) of Act 459.**

Furthermore, an appeal shall be dismissed on ground only that there was an omission of the particulars of the offence in the charge sheet or indictment but evidence is led in support of the charge.

Guided by the law stated supra, if after critically analyzing the evidence led on record I find that the conclusions the High Court, Accra [Financial Division] reached are supportable, I shall dismiss the appeal and direct both appellants A1 and A3 to go back to the trial court to enter into their defence. Per contra, if I took the position that having regard to the evidence led on record, no prima facie case has been established or that the Prosecution were unable to establish the ingredients of the charges levelled against the appellants or that the case has been so grossly discredited by reason of cross-examination of the witnesses for the Prosecution by defence Counsel then by powers conferred on me by **rule 32 of the Court of Appeal [CI 19]** and **S. 173 of Act, 1960 (Act 30),** uphold the appeal and acquit and discharge the appellants at this stage without calling upon them to open their defence.

Now, having stated the general position of the law and the ground rules, I proceed to evaluate the evidence the prosecution led in our present case. Before proceeding further, it is right proposition of law to state that although an accused carries no burden to prove his innocence, he bears that duty to make it appear that no sufficient evidence has been made against him. That principle finds expression in the case of ***COP v Akoto (1964) GLR 231*** which held:

> *"A person charged before a court has a duty to make it appear that no charge has sufficiently been made against him to require an answer from him. This is a time-honoured practice and a fundamental principle in criminal law which has not been taken away by S.173 of Act 30....."*

Azu Crabbe in the lead judgment in ***Moshie v R [supra] @ 280*** adopted and applied the statement of law espoused in ***R v Burdett (1820) 4 B & Ad. 95 @ 161-162*** that runs as follows:

> *"No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradictions."* **[emphasis underscored]**

The learned author and jurist, A.N.E. Amissah Esq., in his invaluable book, **Criminal Procedure In Ghana (1981)** has posited at **p. 128** thus:-

> *"When the Prosecution has completed calling the evidence it intends to in order to establish its case, it closes the case. At this stage, the judge may consider whether there is any case for submission to the jury. This he may do so upon a sub-mission by or on behalf of the accused that no case has been made by the prosecution against the accused to answer....."*

The chief question in these appeals is whether the prosecution led a sufficient or prima facie case warranting the invitation to the accused /appellants to enter into their defence.

The case of **Cassel Ato Forson – Count 1**

In the first count, **Cassel Ato Forson** has been fixed with the charge of Willfully causing financial loss to the Republic contrary to section 179A(3)(a) of Criminal Offences Act, 1960(Act 29) because it was alleged that what he sought to do leading to the initiation of the criminal proceedings against him was without due cause and authorization.

I have critically and soberly examined all the evidence led on record, both oral and documentary; the evidence-in-chief each witness of the prosecution offered and the cross-examination of the witnesses by defence Counsel. Upon a very passionate reflection of the evidence and arguments of both Counsel for the appellant and for the Republic, it is my respectful opinion that the evidence in its totality is so unreliable that no reasonable tribunal minded to do justice could safely convict upon it, for varied reasons.

First, it has been stoutly argued by Counsel for the Republic and which submission was endorsed by the learned trial judge that, without due and authorization was a negative assertion and to prove the positive, the duty was cast on Ato Forson to prove that he has that authority to do so. In so holding, the learned trial judge relied on a principle in a civil case, ***Ackah v Pergah Transport Ltd*** and other cases to press home her point. See: ***p. 856 of Vol. 2 [roa].***

To me, in every criminal charge, unless the provision of the law under which a person has been charged makes it a strict criminal liability, the prosecution has the duty to produce evidence in terms of **Sections 17, 11** and **10 of the Evidence Act, 1975 [NRCD 323]** to show that the element[s] of the offence have been established before the burden is shifted unto the accused to explain his side of the story and or to prove the positive as the prosecution strongly contends in the instant case. This proposition of law is reinforced by **S. 17(2) of NRCD 323** that stipulates:

> *"(2) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact."*

As a matter of emphasis, it is the requirement of the law as housed in **S. 11(2) of NRCD 323** that the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue. In **sub-rule 2 of S. 11** in particular, the law enacts that:

> *"In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could mind could find the existence of the fact beyond a reasonable doubt."*

The burden of persuasion has been statutorily defined in **S. 10(1) of NRCD 323** to mean the obligation of a party to establish a requisite belief concerning a fact in the mind of the tribunal of fact or the court. **Sub-rule 2 of S. 10** also stipulates:

> *"(2) The burden of persuasion may require a party to raise*

a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."

Combining all the relevant provisions on producing evidence particularly in criminal trials as set out supra, it is plainly obvious that unless the particular enactment under which a person is charged makes the offence a strict liability offence, the prosecution always carries the burden to place sufficient evidence before the trial court before an accused may be invited to prove the positive. A strict liability in criminal law is liability for which *mens rea* does not have to be proved in relation to the element comprising the *actus reus.* The liability is said to be strict because the defendant [accused] will be convicted even though he was genuinely ignorant or reckless of his acts or omissions, unless he produced evidence to rebut it or proved the contrary. A typical example of a strict criminal liability offence is **S. 37(1) of Narcotic Control Commission Act, 2020 [Act 1019]** that provides that a person who, without lawful authority, proof of which lies on that person, has possession or control of a narcotic drug for use or for trafficking commits an offence. In that instance if the evidence is that the accused is found in his possession, a narcotic drug the accused carries the burden to prove that he has the right or has been granted the licence to carry the drug.

In our present case, in response to some questions under cross-examination of PW2 – **Edward Markwei** had admitted that the letter, **Exhibit A** 1st accused/appellant wrote was done on behalf of the Minister of Finance. For purpose of clarity, I reproduce here below that aspect of the evidence:

"Q. Kindly take a look at Exhibit A, so this letter is on the letter Head of Ministry of Finance, is that not so

A. Yes my lady

x x x x

Q. Who signed Exhibit A

A. My lady, A1 signed it

Q. Can you read the words that appears after the signature of A1.

A. Witness reads to the hearing of the court.

Q. So you will agree with me, will you not [sic] that whatever is contained in Exhibit A was done under the instruction or on behalf of the Minister of Finance.

A. Yes per what the letter I have here indicates. So I believe that, that was done on behalf of the Minister on the basis of the letter that I have." See: ***pp 158-160 Vol. 1 [roa]***

However, under further cross-examination on Exhibit B, a letter which 1st accused/appellant wrote, **PW2** made a U-turn to say those letters, **Exhibit A, B and B1** the appellant authored were written in A1's personal capacity and not sanctioned by the then substantive Minister. In response to some questions which I find them relevant to cite here, **PW2** relayed as follows:

"Q. Is it your case that these letters that you just referred to were signed in his personal capacity as Hon. Cassiel Ato Forson.

A. Yes my lady. I am saying Yes because on the face of the letter, it is written for Minister but as to whether it was really for Minister, I would not be in the position to say.

Q. So your case is that it was written in his personal capacity.

A. I have answered the question and I said on the basis of the letter that I have before me, it was signed for the Minister but as to whether it was really for the Minister, I would not be in the position to say.

Q. Counsel just said that sometimes letters are written on authority for Minister but Counsel is just suggesting to me that sometimes it is on the authority of the boss or higher authority but sometimes it is not on the authority of the higher authority."

See: ***pp 198-199 Vol. 1 [roa]***

On the turn of PW3 – Hon. Kwaku Agyemang-Manu [the immediate past Minister for Health] he also cast doubt on the authority of A1 to have had express instructions of the then substantive Minister for Finance to have written and signed those letters **Exhibits A, B1 and B2**. As to whether the then Minister of Finance had confirmed that he requested A1 to sign Exhibit A on behalf of the Ministry of Finance, PW3 stated that he was not aware of that. See: ***pp 281-283 Vol.1 [roa].***So invariably, the prosecution claims that those letters A1 wrote on behalf of the Ministry of Finance requesting for establishing the LCs were done on the blind side of the substantive Minister, Hon. Seth Tekper. However, there is no evidence on record suggesting that the former Minister of Finance has ever repudiated Exhibits A, B1, and B2 if the appellant did have the authority to do what he did or that he rejected them.

To succeed on the charge that the 1st Accused/appellant acted without cause and authorization, the best evidence to establish it was for the prosecution to have invited the substantive Minister, Hon. Seth Tekper, having regard to the evidence it was done on his blind side. I am of the considered opinion that Seth Tekper was a material witness whose evidence would have decided the case one way or the other. Failure to invite him was fatal to the case of the prosecution. For, the law is well settled that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other that witness is a material witness that ought to be called to offer evidence. See: *Rex v Kuree 7 WACA 175.* See also: *Sarpong v R [supra],*

The conviction in the *Rex v Kuree case* was set aside on appeal primarily on the ground that the prosecution failed to call a material witness. The court explained *at p. 178 of the Law Report* that the evidence of that witness would certainly have settled one way or the other the truth or otherwise of the matter.

There is that evidence on record in our present case that in the course of investigations into the matter, Hon. Seth Tekper is said to have volunteered a statement to Investigator, PW5 in this case that seems to suggest that the request for the estatement of the LCs was done on behalf of the Ministry of Finance. For purpose of clarity, I reproduce excerpts of the statement, Exhibit 5:

> *".....upon receipt of the Attorney-General's opinion, MoF [Ministry of Finance] proceeded to establish the LC. The letter noted that this was a valid contract and the terms of the agreement must be respected....."*

By this voluntary statement to the Investigator, Mr Seth Tekper was very much aware of the steps the appellant took in requesting for the establishment of the LC to avert the threat of imminent action against the Government of Ghana for breach of contract. There is no iota of evidence on record to show that if indeed, the letters the appellant wrote were done on his blind side, Mr Tekper repudiated same or he queried the appellant for what he did. It cannot be lost on this court that it is the Ministry of Finance that has the sole power and or duty to request for or authorize LCs to be established on behalf of government Ministries and Departments. The prosecution witness, PW4 in his evidence to the trial court as appearing on *p. 354 Vol. 1 [roa]* admitted that that was right procedure to follow. Therefore, the presumption is that the appellant had the authority to do what he did and followed the proper procedure.

In the result, I roundly disagree with the learned trial judge to have rubbished and or rejected Exhibit 5 saying that the author of that statement has not been subjected to cross-examination. I think that the lower court fell into serious error occasioning a gross miscarriage of justice to the appellant because his duty is only to raise doubt in the case of the prosecution. On the authorities, if there was a doubt in the case of the prosecution it shall inure to the favour of the accused.

It is instructive to observe that Hon. Agyeman-Manu in his evidence to the trial court on 21/07/2022, admitted that the appellant copied Hon. Seth Tekper of each letter he wrote in connection with the request for establishment of the LC. From these pieces of evidence, it can safely be inferred that the Minister was aware and approved the steps the appellant took. In the circumstances, I disagree with the findings of the lower court that the appellant has the duty to prove the affirmative that he exercised due cause and authorization.

Having regard to the above analysis, I do uphold the submissions of learned Counsel for 1st accused/appellant canvassed in respect of Count 1.

Consequently, I allow the appeal on Count 1.

I now move to count 5.

It is worth repeating that in Count 5, Cassiel Ato Forson was charged with the offence of intentionally misapplying public property contrary to section 1(2) of the Public Protection Act, 1977 (SMCD 140). It is alleged that between August 2014 and April 2016 the appellant wilfully caused financial loss of €2,370,000 to the Republic by intentionally causing vehicles purporting to be ambulances to the supplied to the Republic of Ghana by Big Sea General Trading Ltd of Dubai without due cause.

Under this count, the lower court after evaluating the evidence of the prosecution, held at ***p. 585 Vol. 2 [roa]*** that the vehicles that were imported into Ghana on the basis of the LCs that the appellant requested to be issued, were unfit for purpose. Thus, the appellant has a case to answer.

From the available evidence led on record, it was established that the appellant wrote to request for the establishment of LCs captured in **Exhibit A** based on an opinion proffered on the matter by the Attorney General per **Exhibit X** in the teeth of the threat by the contracting partner, Big Sea Trading Ltd to sue the Government of Ghana for breach of contract contained in a letter tendered in evidence as **Exhibit W.** So, clearly **Exhibit W** and other pieces of correspondence that had gone on between the parties brought into existence **Exhibit A** and other the letters appellant wrote**.** After the appellant making the request and the letters he wrote, there is nothing on record to prove that the appellant did anything again insofar as the importation into the country of the ambulances was concerned.

Additionally, it is beyond any serious dispute that the applicant in the LCs application was the Ministry of Health. As the applicant and beneficiary of the LCs, it was the duty of the Ministry of Health to do the necessary pre-shipment inspection to be satisfied that the ambulances being imported met the required specification and standards. **It was not the duty of the appellant, Ato Faorson to do so.** Indeed, the exporters of the ambulances, Big Sea Trading Ltd alluded to the fact that if pre-shipment inspection was done by the Ministry of Health, the controversy as to whether the ambulances were defective would have been avoided. See: **Exhibit AC *p. 741 Vol. 2 [roa].***

Significantly, the Big Sea Ltd had stated in unambiguous terms that they did at several times invited the Ministry of Health to do the pre-shipment but the Ministry did not even

bother to respond. As a result, they had to ship the ambulances in that state. So far as it is relevant, I reproduce here below, that aspect of **Exhibit AC** [dated 24/06/2015 addressed to the Minister of Health]:

> *"We invited the Ministry on two occasions but they could not honour the invitation. We had no choice than to ship the ambulances."*

The letter continued:

> *"Our Area Manager for West Africa had a meeting with the Chief Director and we were asked to take steps to rectify the situation. We immediately took steps to address all the issues raised with the delivery. We officially wrote to your Ministry in March, inviting three key technical personnel from the user section to come and meet our engineers and receive their input so move the project forward. This was aimed at removing any ambiguity in terms of internal designs, specifications and materials to be used. We never received any official response to our invitation and the process stalled. We are still waiting to receive the names of the Ministry's personnel visiting our facility."* See: ***p. 742 Vol. 2 [roa]***

It is instructive that under the original agreement/contract between the Government of Ghana [represented by the Ministry of Health] and the Big Sea General Trading LLC for the supply of 200 ambulances, ***Clause 7*** thereof stipulated that the purchaser, which I construe it as Ministry of Health, **shall undertake pre-shipment inspection in accordance with the technical specifications** mentioned in the "car specification list" etc. See: ***p. 707 of Vol. 2 [roa].*** The Ministry of Health for reasons that have not been explained with any degree of certainty, never honoured that part of the contract.

In the face of this monumental failure on the part of the Ministry of Health to do their job conscientiously, **I do not think it shall be fair and just to lay the blame at the doorstep of the appellant.**

Significantly, there is that established evidence on record that subsequently in **February, 2016** there was a post-delivery meeting between the Government of Ghana [through

the Ministry of Health] and Big Sea Ltd that sought to address any or all defects in the ambulances shipped into the country, which defects Big Sea seriously contended, would have been avoided if the Ministry of Health did the pre-shipment inspection. That post-delivery meeting brought into existence, to what the parties termed, **Addendum to the original agreement** for the purchase/sale of the ambulances tendered in evidence as **Exhibit AF**. Under that addendum **Exhibit AF,** it was agreed that Big Sea shall ship into the country some medical equipment to fix them so as to correct any defects in the ambulance and the Government of Ghana was to facilitate the delivery of the equipment. Sadly enough, although Big Sea fulfilled its side of the bargain by shipping those medical equipment it appears that till date those equipment are still lying idle in the Tema port. To leave no one in doubt as to the current state of affairs, I reproduce here below, some answers he offered in response to questions put to the immediate past Minister of Health, Hon. Kwaku Agyemang-Manu [PW3] under cross-examination by Counsel for the appellant:

"Q. You agree with me that they are many documents on the ambulance transaction apart from the ones that have been tendered through you that you may not be aware of.

A. That is correct. At least you have given me two documents that I have not seen before.

Q. There were attempts by the parties ie the Government of Ghana through the Ministry of Health and Big Sea to resolve the technical issues arising from the post-delivery inspection of the ambulances, is that so.

A. That is correct.

Q. *Have a look at **Exhibit AF,** have you seen it.*

A. Yes my lady.

Q. Which is a report of a meeting between Big Sea and a representative of the Government of Ghana.

A. That is correct

Q. And in Exhibit AF the parties agreed on a road map to resolve those technical issues from the post-delivery inspection of the ambulances, is that correct.

A. That is correct.

Q. To the best of your knowledge, did the Government of Ghana perform any obligations under Exhibit AF dated 11th February 2016.

A. I will say No.

Q. Are you aware that after Exhibit AFR was written, Big Sea shipped some medical equipment to the Ministry of Health.

A. I am aware.

Q. And the containers with their accessories and medical equipment are still at the Tema Port.

A. I am aware.

Q. And the Government of Ghana has still not cleared these containers from the team [sic] Port; are you aware.

A. I will not say Government of Ghana should have cleared the containers at the Tema Port because it has been indicated here that the Government of Ghana should have facilitated. In one of my meetings with Jakpa@business, I told him emphatically that Government did not have the budget or the resources to go to pay and clear the items so he should go and pay and clear the items to rectify the anomalies on the ambulances....."

Now, per **Clause 6.3 of the contract, Exhibit V**, as appearing on ***p. 707 of Vol. 2 [roa],*** it was the duty of the Government to clear the containers of equipment or accessories from the Tema Port to enable Big Sea to install the medical equipment/accessories in the 30 ambulances because it was a C.I.F contract. I do observe that the lower court held at ***p. 585 Vol. 2 [roa]*** that the appellant caused

financial loss to the Republic because the ambulances were "defective" and not fit for purpose when the Republic had expended money to procure the ambulances. However, having regard to the overwhelming evidence that the Ministry of Health for no apparent reason refused or neglected to do pre-shipment inspection envisaged under **Exhibit V;** Big Sea Ltd having fulfilled its part of the post-delivery agreement by supplying the medical equipment to address any technical defects in the ambulances as per **Exhibit AG** whilst the Government of Ghana has not taken delivery of them from the Tema Port, the lower court fell into serious error when it called upon the appellant to open his defence. It was a clear travesty of justice for the appellant to be called upon to answer that charge.

In the final analysis, it is my respectful opinion that there has been no evidence to prove an essential element in the crime or that evidence was so manifestly unreliable that no reasonable tribunal minded to do justice in the matter could safely convict upon it. I do, therefore, allow the appeal on **count 5** in favour of the appellant.

I return to the case of **Richard Jakpa** – 3rd accused/appellant.

As stated supra, **Richard Jakpa** was charged with one (1) count of wilfully causing financial loss to the Republic contrary to **section 179A(2) of the Criminal Offences Act, 1960 (Act 29).** It is alleged that between August 2014 and April 2016 wilfully caused financial loss of €2,370,000 to the Republic by intentionally causing vehicles purporting to be ambulances to the supplied to the Republic of Ghana by Big Sea General Trading Ltd of Dubai without due cause.

Before proceeding to consider the merit of arguments of Counsel and the appeal generally, I feel compelled to deal with an important point of procedure which goes to the jurisdiction of the lower court in dealing with the case of the 3rd accused/appellant in its Ruling. It is important to stress that per the charge sheet that appears on ***pp 1-2 of Vol.1 [roa]*** the 3rd accused/appellant was charged with the offence contained in Count 3 of the charge sheet. That is the offence to which the appellant pleaded to. However, in its Ruling the lower court proceeded on the assumption that the appellant was rather

charged with **willfully causing financial loss to the Republic contrary to Section 197A(3)(a) of Act 29/60.** There is no evidence on record that the charge sheet was amended and that the offence under **Section 197A(3)(a) of Act 29/60** was substituted for **Section 179A(2) of 1960 (Act 29).**

That has attracted severe criticism from learned Counsel for the appellant, arguing that the substitution for, or amendment in charge when no opportunity was given to the appellant is in violation of his constitutional right enshrined in **Article 19(2)(d) of the 1992 Constitution.** Learned Counsel for the respondent has called the bluff of the Counsel's contention on the basis that the point was not raised as a ground of appeal.

Admittedly, the point was not specifically raised as a ground of appeal. Nevertheless, it is a question of law as whether the lower court can *suo motu* substitute a fresh charge for a charge that an accused person has pleaded to and being tried in respect of the offence. Being a question of law, it is appropriate if it is subsumed under the omnibus ground that the holding of the lower court was against the weight of evidence having regard to the evidence led on record.

With the greatest respect, I am of the respectful opinion that the lower court erred in law to have *suo motu* changed the offence when there is no evidence on record to show that first, the charge was ever amended and next, the appellant was given the opportunity to plead to the new charge. Failure on the part of the lower court amounted to denying the appellant a fair trial and in violation of Article 19(2)(d) of the Constitution, thus occasioning a gross miscarriage of justice. That point alone, without more, is a good ground to setting the order of the trial court inviting the appellant to open his defence. See: ***Moshie v R [supra].***

In the ***Moshie v R [supra],*** Counsel for the appellant had at the close of the prosecution's case indicated to the trial High Court that he did not intend to make a submission of no case. The learned trial judge then ruled that in the absence of any submission of no case, he was calling on the accused to enter into his defence. On appeal, the Court of Appeal speaking through Azu Crabbe CJ deprecated the method the trial court adopted which, according to the court, amounted to abdication of its duty under **S. 271 of Act 30/60.**

From the available evidence, it can be deduced that the appellant was charged with the offence on the account that some monies were paid to him when defective ambulances have been brought into the country by his principal, Big Sea. It is noted that the money was paid out to the appellant upon an order of the Accra High Court after the appellant had sued Big Sea Ltd. That order was not appealed against or set aside upon an application made to the court. So, however erroneous the order may be, it is legally effective and binding on the parties to the litigation in the suit.

In any event, as recounted supra, if there was any financial or economic loss to the Republic, the blame is attributable to the recklessness, neglect or apathy on the part of the officials at the Ministry of Health. The Ministry was the applicant in the ambulance acquisition. If they had exercised much diligence and restraint and worked conscientiously in the interest of the State, the whole saga of defective ambulances not fit for purpose would have been prevented.

There is that other issue as to whether it was Jakpa@business or Richard Jakpa that ought to be charged with the criminal liability. This point is moot having regard to the analysis and reasons stated in this judgment.

Overall, I think both appellants have demonstrated a good cause for this court to interfere with the Ruling of the lower court. The appeal is allowed in its entirety and the Ruling of the lower court is hereby set aside. Consequently, both appellants are hereby acquitted and discharged.

SGD

.....

P. BRIGHT MENSAH

(JUSTICE OF THE COURT OF APPEAL)

DISSENTING JUDGMENT

POKU-ACHEAMPONG, J.A.:

I have had the opportunity of reading the lead judgment of my learned brother Ackaah-Boafo and the concurring opinion of my learned brother Mensah, JJA.

I am unfortunately unable to agree with my learned colleagues and I present my

dissenting opinion as required.

This is an appeal against the ruling of the High Court, Financial and Economic Crime Division, Accra dated 30th March 2023. In the ruling the trial Judge dismissed the applications by the 1st & 3rd Accused/Appellants for submission of no case and invited them to open their defence.

Aggrieved and dissatisfied with the ruling the Appellants filed their notices of appeal.

On 14/04/2023 the 1st Accused/Appellant filed his notice of appeal with the following as the grounds of appeal.

a. *The Court erred in not upholding A1's submission of no case to answer as the prosecution failed or neglected to adduce sufficient evidence on the particulars of offences contained in the charges against A1.*
b. *The Court erred in holding that the prosecution adduced sufficient evidence to show that A1 caused payments to be made for the 30 ambulances under the letters of credit.*
c. *The Court erred by disregarding evidence that it was the Ministry of Health that authorised payments under the Letters of Credit, including the variation of the original conditions for payment.*
d. *The court erred when it held that there is sufficient evidence that A1 wilfully caused financial loss to the Republic and/or intentionally misapplied public property.*
e. *The Court violated the right to fair trial of A1 when it disregarded evidence in favour of A1.*
f. *The Court erred in shifting the burden of proof on A1 to prove that he had authorization of the Minister for Finance to request the Bank of Ghana to set up the Letters of Credit for the payment of the ambulances.*
g. *The Court erred when it held that the ambulances were defective contrary to provisions of the contract between the Government of Ghana and Big Sea General LLC for the purchase of the ambulances.*
h. *The ruling of the Court is unreasonable having regard to evidence.*
i. *Additional grounds will be filed upon receipt of the record of proceedings.*

On 17/4/23 the 3rd Accused/Appellant filed his Notice of Appeal with the following as the grounds of appeal:

1) *The Court erred in coming to the conclusion that A3 being the shareholder/Director took steps to obtain payment for the vehicles which according to the prosecution turned to be unfit for purpose.*
2) *The Court erred when it held that there is sufficient evidence that A3 wilfully caused financial loss to the Republic.*
3) *The Court violated the right to fair trial when it disregarded evidence in favour of A3.*
4) *The Court erred when it held that the ambulances were defective contrary to provisions of the contract between the Government of Ghana and Big Sea General LLC for the purchase of the ambulances.*
5) *The ruling of the Court is unreasonable having regard to the evidence.*
6) *Additional grounds will be filed upon receipt of the record of proceedings.*

Both Appellants indicated in Grounds (i) and (f) of their respective notices of appeal that additional grounds will be filed; but no additional grounds were filed.

Summary of Facts:

In his maiden State of the Nation Address to Parliament in 2009 the late President J. E. A. Mills (of blessed memory) outlined as one of his priorities the acquisition of ambulances to augment the existing fleet of ambulances of the National Ambulance Service (NAS) Based on this the Ministry of Health commenced the process to procure ambulances.

The 3rd Appellant through his company Jakpa at Business presented a proposal and the terms of a loan agreement, from Stanbic Bank to finance the supply of 200 ambulances to the Government.

Cabinet on 22/12/11, on receipt of a joint memorandum from the then Ministers of Health and Finance for the purchase of 200 ambulances, endorsed same. The transaction was

to be financed by a loan facility of fifteen million, eight hundred thousand Euros (€15,800,000.00) to be granted by Stanbic Bank to the Government. Parliament's approval for the supply of 200 ambulances at a cost of €15,800,000.00 was obtained following the submission of a joint memorandum dated 30/4/2012 by the Ministers of Finance and Health.

On 1st November, 2012 Parliament granted approval for the loan facility between the Government and Stanbic Bank Ghana Limited for the procurement of the 200 ambulances.

By a letter dated 19/11/2012 the 2nd Accused, who has been discharged on humanitarian grounds by the Trial Court, then the Chief Director at the Ministry of Health, sought approval from the Public Procurement Authority (PPA) to engage Big Sea General Trading Ltd Dubai, UAE by sole sourcing process for the supply of 200 ambulances.

The Public Procurement Authority (PPA) granted approval for the engagement of Big Sea by sole sourcing for the purpose.

The Government of Ghana represented by the Ministry of Health entered into a formal contract, dated 19/12/2012 with Big Sea General Trading LLC for the supply of 200 Mercedes Benz ambulances at a total cost of €15,800,000.00 and at a unit price of €79,000.00 (Seventy Nine Thousand Euros).

Per this agreement 25 ambulances were to be delivered within 120 days of execution of the agreement. The remaining 175 vehicles were to be delivered in batches of 25 every 30 days thereafter.

Payment of the purchase price was to be by "raising an irrevocable and transferable letter of credit" from the bankers of the Government of Ghana in favour of the supplier.

Upon delivery of every 50 ambulances, 25% of the purchase price was to be paid through confirmed letters of credit (LC) on "sight of goods" opened in favour of the supplier and upon submission of documents specified in the agreement.

On 7th August 2014 contrary to the terms of the agreement the 1st Appellant wrote to Bank of Ghana. "*Urgently requesting ... to establish the letters of Credit for the supply of 50 ambulances amounting to €3,950,000 representing 25% of the contract sum, while arrangements are being made to perfect and sign the Loan Agreement ... in favour of Big Sea.*"

1st Appellant on 12/8/2014 further wrote to the Controller and Accountant-General authorizing the release of GH¢806,688.75 to the Minister for Health to enable him pay the bank charges for the establishment of the Letter of Credit for "the supply of the 50 Mercedes Benz ambulances and Related Services."

The Controller and Accountant-General on the basis of the two letters dated 7th and 12th August written by the 1st Appellant also wrote to Bank of Ghana on 14/8/2014 authorising it to establish an irrevocable and transferable Letter of Credit for €3,950,000.00 in favour of Big Sea. The Ministry of Health failed to conduct pre shipment inspection of the 20 ambulances which were ready for shipment before payment was made, as required under the contract. The first consignment of 10 ambulances shipped from Dubai on 22/10/14 arrived on 16th December, 2014. A post-delivery inspection of the first batch of 10 ambulances revealed fundamental defects making them unfit to be described as ambulances. By a letter dated 11/2/2015 signed by 2nd Appellant Big Sea was accordingly informed of these fundamental defects on the 10 ambulances.

Big Sea acknowledged the defects on the vehicles in its reply dated 19/2/2015. They stated also that they proceeded to ship the vehicles upon receipt of the Letter of Credit on 18/8/2014. They added that the second consignment of 10 vehicles, with the same defects, had already been shipped 51 days before the date of the letter from Ministry of Health.

Big Sea promised to send their technicians to fix all the defects and train Ghanaian staff before a handover of the ambulances.

On 12/2/2025 the third batch of 10 vehicles was shipped. All the 30 ambulances had the same fundamental defects. The Ministry of Health engaged Silver Star Auto Ltd (distributors of Mercedes Benz vehicles in Ghana) acting by Carl Friederichs GmbH to conduct further inspection.

This inspection showed that the vehicles were not originally meant to be ambulances and were therefore not fit to be converted into ambulances.

A total amount of €2,370,000 was paid for the 30 vehicles.

Per a letter dated 20/1/2016 Alex Segbefia the Minister of Health, at the time, informed Big Sea that the vehicles did not meet the specifications for an ambulance and were not

fit for the purpose. The Minister asked for an inspection of a well-equipped ambulance vehicle that meets the specifications by 20/2/2016.

A National Ambulance Service (NAS) team proceeded to Dubai and conducted an inspection on 11/2/2016. It was decided, pursuant to the inspection, that a technical team from Big Sea would come to Ghana to rectify the defects.

This has not been done yet.

The 1st and 3rd Accused/Appellants were arraigned before an Accra High Court on 18/1/2022.

The 1st Appellant is charged with one count of wilfully causing financial loss to the Republic contrary to section 179A(3)(a) of the Criminal Offences Act, 1960 (Act 29) and one count of intentionally misapplying pubic property contrary to section 1(2) of the Public Property Protection Act, 1977 (SMCD 140).

The 3rd Appellant is charged with wilfully causing financial loss to the Republic contrary to section 179 A(2) of the Criminal Offences Act, 1960, (Act 29).

The charges against the Appellants as contained in the charge sheet, are as indicated below:

Count 1

Statement of Offence

Willfully causing financial loss to the Republic contrary to section 179A (3)(a) of Criminal Offences Act, 1960(Act 29)

Particulars of Offence

Cassiel Ato Forson between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana willfully caused financial loss of €2,370,000.00 to the Republic by authorising irrevocable letters of credit valued at €3,950,000.00 to be established out of which payments amounting to €2,370,000.00 were made to Big Sea General Trading Ltd (sic) for the supply of vehicles purporting to be ambulances without due cause and authorization.

Count 5

Statement of Offence

Intentionally misapplying public property contrary to section 1(2) of the Public Protection Act, 1977 (SMCD 140).

Particulars of Offence

Cassiel Ato Forson between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana intentionally misapplied the sum of €2,370,000.00 being public property by causing irrevocable letters of credit to be established against the budget of the Ministry of Health in favour of Big Sea General Trading Ltd (sic) for the supply of vehicles purporting to be ambulances without due cause and authorization.

Count Three

Statement of Offence

Wilfully causing financial loss to the Republic contrary to section 179 A (2) of the Criminal Offences Act, 1960 (Act 29)

Particulars of Offence

Richard Jakpa between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana wilfully caused financial loss of €2,370,000.00 to the Republic by intentionally causing vehicles purporting to be ambulances to be supplied to the Republic of Ghana by Big Sea General Trading Ltd of Dubai without due cause.

The Law

Sections 173 and 174 of the Criminal and other Offences (Procedure) Act, 1960 Act 30 provide as follows:

> *"173: 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.*
>
> *174: At the close of the evidence in support of the charge if it appears to the court that a case is made out against the accused sufficiently to require the accused to make a defence, the court shall call on the accused to make the defence and shall*

remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement."

The case of *State vrs Ali Kassena* has pride of place in any discussion of the subject of submission of no case. The Supreme Court in that case enunciated the principle as follows:

A submission that there is no case to answer may properly be made and 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,

(c) So manifestly unreliable that no reasonable tribunal could safely convict upon it.

See also the case of *Apaloo & Ors Vrs the Republic 1975 1 GLR 156.*

A recent Supreme Court decision on the subject of submission of no case is the case of *Michael Asamoah & Anor Vrs The Republic, Criminal Appeal No: J3/4/2017, (date 26th July, 2017.)* The apex court delivered itself through Adinyira JSC as follows:

"The underlying factor behind the principle of submission of no case to answer is that the accused should be relieved of the responsibility of defending himself when there is no evidence upon which he may be convicted. The grounds under which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trial or a trial by indictment may be restated as follows:

1) There had been no evidence to prove an essential element in the crime;

2) The evidence adduced by the prosecution has been so discredited as a result of cross examination or

3) The evidence was so manifestly unreliable that no reasonable tribunal could safely convict upon it.

4) *The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt and one with innocence."*

Standard of Proof in a Submission of No Case

An important issue that must be considered is what should be the standard of proof when a submission of no case is made. Should the evidence put forward by the prosecution at that stage of the trial be evidence beyond reasonable doubt? Should it be sufficient evidence? Should it be evidence that will entitle one to say that a prima facie case has been made so the defence should be called upon to open their defence?

The case of *Tsatsu Tsikata V the Republic, [2003-2004] 2 SCGLR 1068* sheds some light on this.

In the said case the apex court clearly stated that:

> *"The standard of proof borne by the prosecution at this stage cannot be proof beyond a reasonable doubt.*
>
> *Indeed, if the submission of no case is made just at the close of the prosecution's case and 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 the counsel's address. It seems ... we have to look for a lower proof at this preliminary stage in the criminal proceedings."*

In the Michael Asamoah case, cited supra, the apex court affirmed the above position at page 6 of its judgment where it states that *"furthermore the standard of proof borne by the prosecution at this stage cannot be proof beyond a reasonable doubt, as held in the case of Tsatsu Tsikata V the Republic."*

Also in the *Evans Asiedu Aikins & Ors V the Republic Criminal Appeal No H2/3/2015 dated 4/6/2015* this Honourable Court described the standard of proof required as one of a

sufficient quality which appears to be in line with the decision of the apex court in the Tsatsu Tsikata case.

The position of the law shows clearly that the standard of proof required at the stage of a submission of no case is not that of proof beyond reasonable doubt.

Practice Direction

The Practice Direction Disclosures and Case Management in Criminal Proceedings) dated 30th October 2018 section 5(2)(a) provides as follows:

> *"At the close of the case of 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 the Accused person as to require the Accused person to open his defence."*

Decision of Trial Court

In line with the law and the Practice Direction, the Learned Trial Judge gave a reasoned opinion in a ruling dated 30/3/23 (see page 544-601 of Vol. 2 of the ROA).

The reasons put forward by the Trial Judge are as follows:

1. *A1 arranged or directed for the Letters of Credit to be issued in payment for the ambulances which were delivered but found not fit for the purpose.*
2. *The evidence of PW1 Dr. Foster Ansong Bridjan the Acting Director of Operations National Ambulance Service, showed that there were defects in the ambulances upon delivery.*
3. *A1 according to the prosecution lacked authority to issue the letters of credit but A1 insisted that he had the authority. The Trial Court held that since the prosecution claimed that A1 acted without authorization but A1 claimed he had authority A1 bore the responsibility to show he had authority.*
4. *The ambulances with the fundamental defects could not be used leading to a prima facie case of financial loss to the nation.*

Relying on the authority of *Republic Vrs Ibrahim Adam & Ors (2003-2005) 2GLR 661 and*

the Tsatsu Tsikata Vrs the Republic 2003 – 2004 SCGLR 1068 case the Trial Judge set out the essential ingredients of the offence of causing financial loss to the state under section 179 A3 and concluded that the ingredients had been established by the prosecution in respect of Counts 1 and 3 for the A1 and A3.

In respect of Count Five which was the charge against A1 of Intentionally Misapplying Public Property contrary to section 1(2) of the Public Property Protection Act, 1977 (SMCD 140) the court held that:

> *"The ingredients that the prosecution was required to establish in this charge was first the mens rea of intention, secondly misapplication or loss or damage that is caused to an item which is a property and thirdly that the property belongs to the state. These ingredients the Judge held had been established by the prosecution."*

She concluded that once it had been established prima facie that the ambulances were not fit for the purpose and not value for money the 1st Accused had a case to answer in count 5.

She therefore called on the 1st and 3rd Accused/Appellants to open their defence.

Arguments of Counsel for 1st Appellant

Counsel for 1st Accused/Appellant dealt with ground F of his grounds of appeal first.

He then went on to argue Grounds A, B, C, D, E and G together.

Ground F:

Counsel argues that the court erred in shifting the burden of proof on 1st Accused/Appellant to prove that he had the authorization of the Minister of Finance to request the Bank of Ghana to set up the letters of credit for the payment of the ambulances. Counsel takes issue with the statement that the law is clear that where a negative averment is made, that 1st Accused acted without authority and he makes a positive assertion that he acted with authority, the onus was on the one making the positive assertion to prove the positive.

Counsel argues that this reasoning is flawed by virtue of the meaning and legal effect of Article 19 (2) read together with Article 19, (16) (a) of the 1992 Constitution, Section 173 of the Criminal Procedure Act 1960 Act 30 and Sections 10, 11, 14, 15 & 17 of the

Evidence Act 1973 (NRCD) 323.

Counsel argues further that since in the particulars of offence in counts 1 and 5 the prosecution alleged that 1st Accused in signing Exhibits A and B2, acted "without due cause and authorization" it is wrong to task 1st Accused /Appellant with proving that he acted with the Minister of Finance's authority.

He continued further that no statutory provisions including Section 179 (A) (3) (C) of Act 29 place this burden on 1st Accused /Appellant as a statutory exception to the fundamental principle in Criminal jurisprudence that the prosecution must adduce evidence to prove the offences against an accused person.

In support of the above contention, Counsel relies on the case of *Donkor v. The Republic [1974] 2 GLR 254.*

In that case Wiredu J (as he then was) observed as follows:

> *"For where a statute creates an offence, it is the duty of the prosecution to prove each and every element of the offence which is a sine qua non to securing conviction. Unless the same statute places a particular burden on the accused, the fundamental and cardinal principle as to the criminal burden of proof on the prosecution should not be shifted even slightly."*

In the instant case, counsel for 1st Appellant contends further, that neither Section 179 (A) (3) (a) of Act 29 nor Section 1 (2) of SMCD 140 imposes such a burden on 1st Accused/Appellant.

The trial Judge therefore erred in placing the burden on 1st Accused/Appellant to prove that he had the Minister of Finance's authority to issue Exhibits A and B2. According to counsel, prosecution has failed to prove this essential part of the charge thus rendering the trial Judge's ruling fundamentally flawed.

Counsel for Respondent's Response to Arguments on Ground F

The Respondent Counsel's response to Ground F is that the prosecution had established a prima facie case against the 1st Appellant before the court invited him to prove his claim that he was authorized to establish the LC's. The burden of producing evidence had already been satisfied by the prosecution.

Thus, Counsel argues that the trial Judge did not err in stating that it lies with the 1st Appellant to prove his claim that he was authorized by the Minister of Finance to issue Exhibits A and B1 as the matter is within the peculiar knowledge of the 1st Appellant.

He relies on *Section 14 (1) of the Evidence Act, 1975 NRCD 323* which states that the evidential burden may shift, in support of his contention. He further cites the case of *George Akpass v. Ghana Commercial Bank Ltd., Civil Appeal No. J4/08/2021 dated 16th June, 2021* in support of his contention.

In that case, the court held that placing the evidential burden on a party to prove the negative is an error in law. The court observed that the burden of proof is on the party within whose knowledge a matter lies and who asserts the affirmative to prove it and not he who avers the negative.

The George Akpass case is a case of wrongful dismissal/unfair termination brought by the Plaintiff against his former employer the Ghana Commercial Bank Ltd.

A Disciplinary Committee of the Bank had recommended after its investigations that the Appellant for his misconduct be sanctioned by way of demotion. Management on receipt of the report changed the recommended sanction of demotion to dismissal. The Plaintiff's argument was that in changing the demotion to dismissal Management had not informed the Union of the change in the recommendation of the Disciplinary Committee as required by Article 14 (h) (iii) of the Collective Bargaining Agreement governing the parties' relationship.

Counsel for Appellant contended that since Appellant made a negative assertion of matters within the peculiar knowledge of the Respondent Bank i.e. that the Respondent did not inform the Union while the Respondent asserted the positive that it notified the Union, the evidential burden then shifted unto the Respondent to prove that it informed the union. Counsel for Appellant argued that the trial court wrongly allocated the burden of producing evidence to the Appellant and this was wrongly concurred in by the Court of Appeal.

In dealing with the issue the Supreme Court in a majority decision per Amegatcher, JSC, stated as follows:

"*The position of the law admits of no controversy, Section 14 (1) of the Evidence*

Act 1975 NRCD 323 contemplates situations where the evidential burden may shift. One such situation is where, as a rule, the Plaintiff who is the party on whom the burden rests asserts the negative and the Defendant who is required to disprove asserts the positive." In the case of Boakye v. Asamoah & Anor [1974] 1 GLR 38 the Plaintiff asserted that the amount paid was ¢120.00 while the Defendant was saying that it was not ¢120.00. The trial Magistrate shifted the onus on the Defendant to prove that he paid more than ¢120.00. Osei Hwere, J. (as he then was) held that the order of the Magistrate was to call on the Defendant to prove the negative. In the words of the learned Judge, at page 45:

> *"If a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative." ...*

"The appellant asserts that the Union was not informed of Management's decision while the position of the Respondent bank was that the Union was informed. In so far as the appellant asserted that the Union was not notified, he asserted the negative.

The Respondent who insisted that the Union was notified asserted the positive and therefore assumed the evidential burden to lead evidence to establish that position...

That finding by the two courts placing the evidential burden on the appellant to prove the negative is an error in Law. We hereby set it aside."

In the case of *Lawrence Agyei & Anor Vrs Bernard Opoku-Sakyi (2021) JELR 109781 (SC) (or case No: J4/15/2021, 1st December, 2021),* the Supreme Court per Kulendi JSC affirmed the position in the Akpass case as follows:

> *"It is not practically feasible for any Plaintiff to be expected to prove the negative. The absurdity of proof of the negative is an exception to the burden of proof. Under our law, no Plaintiff can be required to prove a negative assertion when the Defendant asserts a positive claim on the same issue."*

Also in the case of *Commissioner of Police Vrs Isaac Antwi [1961] GLR 408 (Supreme*

Court case) the Appellant was convicted of stealing by means of his employment. He appealed to the Supreme Court and argued ten grounds of appeal which raised 2 main issues, namely that the trial judge had misdirected himself on the nature of the burden of proof of guilt and on the facts proved in evidence.

The court held per Korsah CJ as follows at page 412:

> *"Burden of proof in this context is used in two senses. It may mean the burden of establishing a case or it may mean the burden of introducing evidence.*
>
> *In the first sense it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt; but the burden of proof of introducing evidence rests on the prosecution in the first instance but may subsequently shift to the defence, especially where the subject matter is peculiarly within the accused's knowledge and the circumstances are such as to call for some explanation."*

See also *Bank of West Africa Ltd Vrs Ackun [1963] 1GLR 176* where Sarkodee-Addo (JSC) referred to Powell's Principles of the Law of Evidence (10th ed.) at page 135-136 on the issue of burden of proof as follows:

> *"As a rule the onus of proof lies upon the party who has in his pleading maintained the affirmative of the issue; for a negative is usually incapable of proof. The affirmative is generally, but not necessarily maintained by the party who first raises the issue ... But the burden frequently shifts, as the case proceeds, from the person on whom it rested at first to his opponent. This occurs whenever a prima facie case has been established on any issue of fact or whenever a rebuttable presumption of law has arisen."*

Section 14 of the Evidence Act (NRCD 323) provides as follows:

> *"Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."*

A reference to the Commentary on the Evidence Decree, 1975 (NRCD 323) will be helpful at this stage. At page 17 thereof it states as follows:

> *Section 14 – Allocation of burden of persuasion.*

"This Section has two purposes. First, it gives some guidance as to who has the burden of persuasion. Secondly it makes clear that the burden of persuasion can shift..."

In determining the allocation of the burden of persuasion, courts consider the knowledge of the parties, the availability of evidence, the most desirable result in terms of public policy in the absence of proof and the probable existence or non-existence of a fact."

In analyzing the text of Section 14 of the Act and the Commentary thereon, on the issue of the knowledge of the parties in this case especially the matter of whether the LCs were issued, with or without authorization the facts are better known by the 1st Accused/Appellant and it is peculiarly within his knowledge. The desirable result in terms of public policy will be to have him lead evidence on it.

I therefore agree with the counsel for Respondent that the trial Judge did not err on the basis of the authority in the George Akpass case cited supra. It is in order to ask A1 *to* prove his assertion that he was authorized by the Minister of Finance to issue Exhibits A & B2. Those issues are peculiarly within his knowledge.

I do not think that the position taken by the trial Judge is a misstatement of the law and is per incuriam **Article 19(1) (2) (c) (10) and (16).**

As rightly contended by Respondent's Counsel the Appellants have not clearly indicated how these constitutional provisions have been flouted by the trial Judge in following the authorities on positive and negative averments.

I do not think that the Trial Judge's decision has occasioned a miscarriage of justice to the Appellant.

I am emboldened in this view by the fact that this decision was made after the court had established the essential ingredients of the offence of causing financial loss.

Other Grounds of Appeal

I will now consider the other grounds of appeal of the 1st Appellant which were argued together.

Counsel argued all the grounds together on the basis that all the remaining grounds of

appeal could be subsumed under ground A. He contended that the prosecution failed the test of submission of no case to answer by not adducing sufficient evidence on the essential ingredients of the criminal offences against A1.

Counsel for 1st Appellant outlined four specific issues arising out of the grounds of appeal as follows:

a. A1 did not commit or engage in any personal acts to warrant the charges against him.
b. A1 did not cause payments to be made for the ambulances.
c. A1 did not cause any financial loss to the Republic or misapply public property.

The evidence that the ambulances were defective as per the agreed specifications of the contract. Exhibit V, is so unreliable that no court can reasonably rely on it.

I find the first issue a bit puzzling because to be guilty of the charge of causing financial loss one's acts need not only be personal. Indeed the charge invariably covers official acts which lead to a loss to the state financially.

Counsel argues that the prosecution has failed to discharge the legal burden in respect of the allegation that A1 acted without due cause and authorization and prayed the court to acquit and discharge A1 pursuant to section 173 of Act 30.

Counsel cited the cases of *Republic Vrs Ernest Thompson & Ors Criminal Appeal No J3/05/2020 dated 17th March, 2021 and Logan & Laverick Vrs the Republic Criminal Appeal No: J3/1/2009, 7/2/2007* as cases in which the Supreme Court and the Court of Appeal have explained the nature of the prosecution's burden in a trial.

In the Logan case the apex court stated that whatever evidence that was led in support of a charge should directly concern and be in line with the particulars of the offence as given by the prosecution.

The legal test for submission of no case to answer is common ground for A1, the Prosecution and the Trial Judge.

At the beginning of this opinion, I touched on the test as enunciated in *State Vrs Ali Kassena, Republic Vrs Apaloo and Michael Asamoah Vrs Republic* and will not repeat same.

Essential Ingredients of Offence of Wilfully Causing Financial Loss to the State.

There is also common ground between the Prosecution, A1 and the Trial Judge on this subject.

The locus classicus case on this is the case of *Republic Vrs Ibrahim Adam & Ors [2003-2005] 2GLR 661.* In that case Afreh JSC, of blessed memory, outlined the ingredients of the offence of causing financial loss to the state as follows:

1. That there has been a financial loss.
2. That the loss was to the state.
3. That the loss was caused through the action or omission of the accused.
4. That the accused intended or desired to cause the loss or foresaw the loss as virtually certain and took an unjustifiable risk of it or foresaw the loss as the probable consequence of the act and took an unreasonable risk of it or.
5. If he had used reasonable caution and observation it would have appeared to him that his act would probably cause or contribute to cause the loss.

The above has been generally accepted and adopted as the correct position of the law on the ingredients of the offence of wilfully causing financial loss in our criminal jurisprudence.

In the *Tsikata Vrs the Republic case [2007-2008] SCGLR 702*, the Supreme Court per the late Prof. Modibo Ocran (JSC) defined wilfully as appears in section 179 (3)(a); as follows:

> *"Based on the foregoing analysis we conclude that even when used, in a criminal statute, the word 'wilful' could, as a matter of law, cover cases in which a public officer voluntarily engages in a course of conduct which in fact injures the state financially whether with an evil or malicious intent to injure the State, or simply actuated by a reckless and persistent disregard for laid down corporate and statutory rules, or as a result of sheer obstinacy, or as a part of a bureaucratic culture of financial unaccountability. But it is also true that "wilful" may be used to describe an act which is done not only deliberately or intentionally, but in circumstances where the doer must also have intended or at least foreseen the*

probable consequences of their non-action. We are of the view that the first interpretation of "wilful" puts more teeth into the effort to reduce corporate lawlessness and lessen the potential incidents of financial loss to the state.

We therefore hold that the word "wilful" as used in section 179A(3)(a) of the Criminal Code 1960 covers both intentional reckless acts that in fact end up in financial loss to the state, as well as acts with such consequences done with a bad or evil motive."

The above elucidation of the word "wilful" by the apex court and the ingredients of the offence outlined in the Ibrahim Adam judgment give us the parameters for making a determination of whether the submission of no case has properly been rejected or not.

That the charge of wilfully causing financial loss is a controversial charge/offence in our statute books, is not in contention.

See the case of the *Republic Vrs Nana Osei Kwadjo II, (Kpegah JSC's judgment) Criminal Appeal No: 2/2000, 11th July, 2008.*

The dicta of Modibo Ocran JSC above quoted in extenso, however offers some rationale as to why such a law remains in our statute books.

It is to check among other things the bureaucratic culture of lack of financial accountability in the public sector and to reduce corporate lawlessness especially in state organisations and state owned Corporate Institutions.

With this as a background we would consider the evidence put up by the prosecution and the arguments of the Appellant's Counsel to determine whether the decision of the Trial Judge is a sound one or not.

In respect of Count 1 Counsel for 1st Appellant's arguments that a prima facie case has not been established against A1 as in Count 1 may be summarized as follows:

1. A1 did not commit any personal acts. At all material times A1 acted in his official capacity with the authority of the then Minister of Finance.
2. There was no evidence to prove A1 caused payments for the ambulance.
3. The holding that the ambulances were defective is not supported by the record and the evidence in support of that holding is so manifestly unreliable that no reasonable tribunal could safely convict on it.

In respect of Count 5, the offence of intentional misapplication of property, Counsel outlined the elements of that offence by referring to the case of *The Republic Vrs Eugene Baffoe-Bonnie & 4 Ors – (Case No: CR/904/2017 dated 12th May 2020)*

Kyei Baffuor JA sitting as an additional High Court Judge stated as follows:

> *"The ingredients that prosecution is required to establish in this offence are first the mens rea of intention, two misapplication or loss or damage that is caused to an item which should be a property and three that it is a property of the Republic."*

Counsel for 1st Appellant argues that in alleging that A1 in making Exhibits A and B2 did so without due cause and authorization did not provide any evidence of any reckless and persistent disregard for laid down corporate and statutory rules by A1.

Again the prosecution failed to state the person A1 should have obtained authorization from in requesting the establishment of the Letter of Credit which he failed to do.

Also none of the prosecution witnesses provided any direct evidence to prove that A1 did not obtain the authorization from his boss, the former Minister of Finance, Seth Terkper to sign off Exhibits A, B, & B2 or that the said exhibits are forgeries.

Counsel on this point concludes that in the absence of rebuttal evidence from the Minister of Finance that he did not authorize A1 to issue Exhibits A & B2 the correct legal position is that the evidence on the face of the exhibits that A1 acted on the authority of the Minister of Finance is presumed to be true by the operation of Section 37 of NRCD 323. The prosecution did not adduce any evidence to rebut this presumption.

Counsel cited the case of *Ghana Ports & Harbours Authority & Captain Zeim Vrs Nova Complex Ltd [2007-2008] SCGLR* 806 in support of his contention.

In the said case the apex court per Wood JSC as she then was, stated that section 37(1), *"falls in the class of presumptions which by virtue of the fact that they permit contrary evidence to be led, are described as rebuttable, conditional, inconclusive or disputable presumptions. It is trite learning that presumptions of this kind have a prima facie effect only and the presumed facts may therefore be displaced by evidence."*

In a riposte to these arguments the Counsel for the Respondent puts forward the following arguments which we think are solid evidence to displace the presumption in Section 37 of the Evidence Act.

The evidence led by the prosecution at the trial shows that the prosecution has established all the ingredients of the offence in count 1 preferred against A1. Counsel asserts that there was a loss and the loss was to the state.

PW2 Edward Markwei of the Bank of Ghana, the deputy to the Head of Trade Finance Unit of the Banking Department, Bank of Ghana gave evidence on the direct acts of 1st Appellant in the payment of the sum of €2,370,000 for the vans supposed to be ambulances, out of the accounts of Ministry of Health.

PW2 in his evidence in chief stated that by a letter dated 7th August, "Exhibit A", signed by 1st Appellant the Bank of Ghana was urgently instructed to establish an irrevocable transferable Letter of Credit (LC) in the sum of Euro 3,950,000.00 in favour of Big Sea General Trading LLC as payment for the supply of 50 ambulances to the Ministry of Health.

1st Appellant also wrote another letter dated 12/8/2014 Exhibit B2 to the Controller and Accountant General authorizing them to furnish the Bank of Ghana with the bank details of the Ministry of Health to charge the Letter of Credit upon maturity.

The Controller and Accountant-General per a letter dated 14/8/2014 Exhibit B authorized Bank of Ghana to establish the Letter of Credit. The letter further directed that the cedi equivalent of the letter of credit when matured and other related charges should be debited to Ministry of Health sub C.F. Account No: 1018431527014.

PW2 tendered in evidence the Controller and Accountant General's letter attached to which were the two letters authorized by A1 as Exhibit B1, and B2.

Counsel for Respondent contends that it is the authorization for the Letters of Credit to be established given by A1 which resulted in the payment of the amount of €2,370,000 in favour of Big Sea General LLC for the supply of the vehicles which did not meet the description of an ambulance.

Counsel contends that 1st Appellant's actions from the terms of the contract governing the transaction, the duty he owed as a public officer with responsibility over the use of the public purse on account of his status as a Deputy Minister of Finance in 2014, and the position of the law in Ghana were criminally negligent.

PW2 explained, according to Counsel, that an irrevocable Letter of Credit once established

guarantees payment up to the value of the Letter of Credit established provided the beneficiary presents the necessary documents that mandate payment.

Payment for the goods or service in question is thus automatically made on the establishment of an irrevocable Letter of Credit and the receipt of the requisite documents.

Following the establishment of the LCs there were three drawdowns on it as follows:

a. The first drawdown from the LC of Euro 790,000 was paid on 26/11/2014 for the first 10 vehicles, PW2 tendered the evidence as Exhibit D.
b. The second drawdown on the LC was fraught with some challenges involving a court action initiated by Jakpa at Business. The sum of Euro 790,000 was disbursed for another batch of 10 vehicles.
c. The third and final drawdown of Euro 790,000 was paid directly by Ghana International bank (GHIB) acting on behalf of Bank of Ghana on 19/3/2015 for another 10 vehicles.

The foregoing, Counsel contends, shows that there was a loss to the state. The sum of €2,370,000 was paid directly out of the accounts of the Ministry of Health with Bank of Ghana as authorized by 1st Appellant. Ministry of Health's accounts belong to the Government of Ghana. Thus payment out of the Ministry's account directly constitutes a depletion of the Nation's coffers.

Counsel for Respondent concludes that the above shows that the prosecution has proven clearly the first two ingredients of the offence of wilfully causing financial loss to the state under Section 179 A(1)(a).

3Rd Ingredient

The Loss was caused through the Action or Omission of the accused (1st Appellant)

A1 contrary to the ambulance contract (Exhibit V) instructed Bank of Ghana to establish Letters Credit with the value €3,950,000.00 to pay for 50 ambulances to the Ministry of Health. (Exhibit A).

A1 further instructed the Controller to write to the Bank of Ghana for the Letters of Credit to be paid and specified the exact account from which the payment should be made- Exhibit B2.

For the establishment of the letters of credit the Stanbic facility should have been signed first. This was the provision in the contract Exhibit V.

During the course of the investigations Minister Seth Terkper did not admit that he authorized A1 to establish the letter of credit.

Exhibit AK – Written by Seth Terkper 3 weeks before A1 wrote Exhibits A & B2 by which he authorized Bank of Ghana and the Controller and Accountant General to establish letters of Credit, show that the 2 were operating with different intentions.

Exhibit AL – The internal memo to the Director of Budget Ministry of Finance shows that it was A1's authorization for the LCs to be established that the Ministry of Finance officials were working with and not Terkper's authorization.

An examination of the contract "Exhibit V" by A1 would have shown that at the time he instructed Bank of Ghana and the Controller and Accountant General to effect payment, payment was not due at all under the relevant provisions of Exhibit V the contract.

(See Clauses 8, 4, 6.3 and 7 of the Contract on Effective Date, Payment Terms, Delivery Terms and Pre Shipment Inspection) A1's decision – to instruct payment, was contrary to all these provisions.

The evidence adduced per Exhibits C, D, E, F, G, H & J – show that all the payments were made before the shipment of each consignment of 10 vehicles contrary to the terms of the contract, and when no pre shipment inspection had been carried out.

See Exhibits AD & AE letters by Alex Segbefia Minister of Health which describe the Vehicles as "Ordinary Vans" and not ambulances.

See also Exhibit Z and Exhibit AU (pages 821-831 of ROA vol (2)) on the reports of the National Ambulance Service (NAS) and Carl Friederichs GmbH, dealers in Mercedes Benz, engaged by Silver Star Auto Ltd to conduct inspection of the vans.

Madam Sherry Ayittey in her letter "Exhibit Y" in response to the letter "Exhibit X" from Deputy Attorney-General Dr. Ayine stated that the Stanbic facility required for the performance of the contract had not been secured and that the Ministry of Health did not

have budgetary provision for the contract.

Disregarding all this A1 on 7/8/2014 wrote Exhibit A to Bank of Ghana urgently requesting them to establish the LCs for supply of the ambulances while arrangements are being made to perfect and sign the loan agreement.

These pieces of evidence, in my opinion, effectively displace /negate the rebuttable presumption that the official duty of requesting for the issuance of the LCs by writing Exhibits A and B2 were regularly performed by the A1/1st Appellant.

Fourth Element – The Mens Rea Ingredient

The fourth ingredient has been described as the *mens rea* element of the offence. As explained by Afreh (JSC) in the Ibrahim Adam case (cited supra) the *mens rea* element comprises the following:

i. Accused intended or desired to cause the loss through his actions or
ii. Accused foresaw the loss as virtually certain and took an unjustifiable risk of it; or
iii. Accused could foresee the loss as a probable consequence to his actions but took unreasonable risk of it or
iv. If accused had used reasonable caution and observation it would have appeared to him that his act would probably cause or contribute to cause the loss.

The Respondent contends that the last example of *mens rea* means that failure to exercise due care and attention or being negligent and reckless in handling state funds, properties could make one liable criminally. In other words if one's carelessness, recklessness lack of due care and attention occasions a loss to the state one could be charged under the law for loss to the state.

The 1st Appellant's disregard of the terms of the contract including the provisions that there should be no payment until contract has been signed, there should be no advance payment and there should be pre shipment inspection before payment are all acts of lack of due care and attention, and carelessness. The evidence has been provided by the prosecution witnesses together with exhibits on these omissions and acts.

Was there authorization by the Minister to A1 for writing Exhibits A & B2?

Counsel for Prosecution contends that the cross examination of PW2, Pw3, and PW4 by Counsel for A1 points out clearly that A1 did not have the authorization of the Minister when he wrote exhibits A & B2. He refers to the following to support this point:

a. The cross examination of PW2 on 14/6/2022 at pages 197-199 vol 1 of the Record of Appeal.
b. Cross examination of PW3 Kwaku Agyeman-Manu the Minister of Health on 21st July 2022 found in pages 281 – 283 of the ROA vol 1

Counsel highlights the responses of PW3, Minister of Health and former Deputy Minister of Finance that in the Civil Service, merely signing off a letter as "for Minister" does not necessarily mean that the Minister has authorized the writing of such a letter.

Again copying the Minister in a letter does not necessarily imply that the Minister has approved of the letter or its contents. The process of "copying the Minister" is for information purposes only and does not mean approval or authorization of the Minister.

On the issue of whether or not there was authorization excerpts of the cross examination of PW5 by Counsel for 1st Appellant recorded at page 14 of the record of proceedings for 9th February 2023 is quite relevant and should be considered in determining whether the Trial Judge erred or not.

The relevant excerpts are as follows:

> *"Q: - And in those two letters the 1st Accused copied the Minister is that correct?*
> *A: - Yes my Lady, but in the course of our investigations, the team spoke to the Minister of Finance Hon. Seth Terkper and he stated in his statement given to the office that upon the assumption of office there was a moratorium on the loans including the loan contracted for the ambulance. The team also got a letter from Minister of Finance addressed to Big Sea where the Minister was informing them that the loan agreement had expired and efforts were being made to operationalize the loans which had been approved by Parliament as the source of funding for the procurement of the 200 ambulances. Investigations further obtained a letter from MoF which indicated that the then deputy Minister of Finance had instructed that*

the LC be charged against the MoH budget."

See Exhibit AK – letter dated 18th July 2014 signed by the Minister Seth Terkper himself.

At page 381 of the ROA (Vol 1) the following transpired between Counsel for A1 and PW5

Q: - The statement Seth Terkper gave you in December 2018, Hon Seth Terkper, the Former Minister never denied knowledge of the establishment of the LC from Exhibit 5 for A1, is that correct?.

A – Yes but he never accepted authorizing the Deputy Minister of Finance to establish the LC.

I have taken time to set out the grounds together with the evidence of the Appellant and Respondent to enable us make a determination as to whether the Trial Judge was right in her rejection of the submission of no case by the 1st Appellant on this first count.

In the Tsatsu Tsikata case, cited supra, the court gave an idea as to what the trial Judge's function is or should be in a submission of no case.

It is primarily to come to a decision whether there is a genuine case for trial. The enquiry is therefore to focus on the fundamental question whether the evidence adduced at that stage by the prosecution presents a sufficient disagreement to call for a full trial, or whether it is heavily tilted in favour of one party, that the party in whose direction it is tilted must succeed or prevail as a matter of law.

In other words, as the court explained, the inquiry is whether there are any real factual issues that can be fully resolved only by a trier of facts because they could possibly be resolved in favour of any one of the parties.

The court concluded as follows:

"We therefore hold that where reasonable minds could differ as to the import of the evidence presented in a motion for submission of no case, that motion should not be upheld. If on the other hand, there can be but one and only one conclusion favouring the moving party, even assuming the truth of all that the prosecution has to say, the Judge must grant the motion."

See also the case of Republic Vrs High Court (Criminal Division) Accra, Ex Parte: Stephen Kwabena Opuni, Attorney General (Interested Party) (2021) JELR 109037 (SC)

I am of the view that the prosecution has established the ingredients

1. Of financial loss and
2. That the loss was to the State.

I am persuaded from the evidence adduced that there were fundamental defects to the vans supplied and they cannot be used as ambulances in Ghana. The letter of a former Minister of Health Alex Segbefia, that the vans were not fit for purpose and that they were ordinary vans being passed off to the Ministry as ambulances cannot be taken lightly. See Exhibit AE.

Exhibit 2 – Details the defects on the vehicles.

In a cross-examination on 2/6/22 of Dr. Ansong Bridjan PW1 by Counsel Owiredu Dankwa for A2 the following transpired:

> *Q:- So at National Ambulance Service what do you determine medical equipment in an ambulance is not functioning?*
>
> *A – There were no medical equipment in the Ambulance. So there was nothing like inspection to know its functionality, but to see whether they were even in the Ambulances or not.*

As remarked rightly by the Trial Judge at page 584 of ROA Vol. 2 from the evidence on record and the addresses by Owiredu Dankwa (for A2) and Ampah Korsah (for A3) there were moves to fix the defects. This shows there were defects in the Ambulances when they were delivered and were not fit for purpose.

As observed rightly by the Trial Judge, the issue of the defects in the vehicles was not controverted in cross-examination and is a tacit admission of the fact.

See on this Fori Vrs Ayirebi (1966) GLR 627 SC, Takoradi Flour Mills Vrs Samir Faris 2005-2006 SCGLR 882.

The defects, making the vehicles unfit for purpose, and from the argument of the Prosecution impossible to use when €2,370, 000 has been paid for them as ambulances – in the view of the trial court constitutes prima facie evidence of a loss to the state.

The report on defects cover the following areas:

a. The body
b. Cockpit (Drivers Compartment).

c. Patient Compartment.
d. Engine Compartment.

I find this evidence overwhelming as against the contention of Appellant's Counsel that by the terms of the contract, Exhibit V, what was supplied was the specifications indicated in the contract.

Also that the accessories were shipped separately and could be installed in the vans.

I am of the view that the Trial Judge was right in her determination that there was prima facie evidence of a financial loss, to the State and that the vans have fundamental defects and are not fit for purpose.

Without Due Cause and Authorisation:

At the onset of the trial A1's Counsel brought an application seeking to strike out the charge sheet for being defective or an order directed at the prosecution to provide further details in the particulars of offence on the specific acts of A1 that relate to "without due cause and authorization" and or "intentionally misapplied" in Counts 1 & 5.

The Trial Judge in dismissing the application stated that those words have their ordinary meanings and are not in the least technical.

I agree with this view of the Trial Judge. The dictionary meanings of the two words are as follows:

The Oxford Advanced Learner's Dictionary International Students Edition define:

"Without Cause" as - without a good reason.

"Authorisation" as – Official permission or power to do something, the act of giving permission.

I am of the opinion that the sole act that led to this charge of financial loss is the issuing of the irrevocable, transferable letters of credit by the A1 in the manner that it was done.

The prosecution has shown that these letters of credit were issued without a good reason as I have already explained in the discussion of the 3rd ingredient of offence.

It is my position that the "without cause" in the particulars of offence has been established as concluded by the Trial Judge.

Appellant claims he acted in his official capacity and pleads section 37 of the Evidence

Act, (NRCD 323). He claims he acted on behalf of the Minister of Finance Seth Terkper. He tendered Exhibit 5 for A1 in support of this.

The prosecution failed to call the Minister Seth Terkper to testify that A1 did not have his authorization.

On its part the Prosecution through PWs 3, 4, 5 contend that the Minister did not grant the authorization and that A1 acted on his own.

That when the Minister was trying to find another means of funding for the ambulances project after the Stanbic one had expired A1 went ahead to establish the Letters of Credit.

In following the decision of Ocran JSC in the Tsikata case I state that the issue of without authorization is a genuine factual issue which needs to be properly resolved by the trier of facts.

I hold that the evidence on that matter presents a patently clear disagreement requiring a submission to full trial.

I however pose the question whether once the "without cause", i.e. without good reason has been established and there is prima facie evidence of a financial loss to the State the issue of whether A1 had permission/authorization to cause the issuance of the letters of credit is still very relevant? If A1 had authorization will it change the fact that the issuing of the LC's was done without good cause and a loss has been caused to the state? I think not.

I therefore hold that the Trial Judge was right in dismissing the submission of no case in Count 1 for A1.

Count 5

Intentionally Misapplying Public Property Contrary to Section 1(2) of the Public Property Protection Act, 1977 (SMCD 140)

The arguments advanced by the Respondent in support of Count 5 are as follows:

A1 intentionally misapplied the sum of €2,370,000.00 (public property or public funds) by causing irrevocable letters of credit to be established against the budget of the Ministry of Health (MoH) in favour of Big Sea for the supply of vehicles purporting to be ambulances without due cause and authorization. Counsel for Respondent argued that it is the element of wrongful payment of the money involved which constitutes

misapplication of public property.

Count 5 requires the Republic to prove that the act of 1st Appellant in causing irrevocable letters of credit to be established in favour of Big Sea was unjustified and that same resulted in the wrongful payment of the sum of €2,370,000.00. It is the element of wrongful payment of the amount of money which constitutes misapplication of public property.

Section 8 of SMCD 140 defines "public property" in these terms:

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

The prosecution has established clearly, under submissions on the Count one that A1's authorization for LCs to be issued as payment for the vehicles purporting to be ambulances was without good cause and, indeed, reckless, having regard to the circumstances under which the authorization for payment was made.

The circumstances are:

i. The Cabinet and Parliament's approved means of financing for the supply of the ambulances was a Stanbic Facility, but A1 ignored this and, without justification, directed for the MoH budget to be applied for payment for the vehicles;
ii. By the terms of the contract for the supply of the ambulances, payment was not due at the time 1st Appellant directed for MoH's account to be debited and caused payment to be made;
iii. The contract prohibited advance payment and required delivery before payment, but 1st Appellant proceeded to authorize payment before shipment of the vehicles was done;
iv. The contract required pre-shipment inspection, but 1st Appellant ignored this and caused payment for the vehicles to be effected when there had not been pre-shipment inspection;
v. The failure to conduct pre-shipment inspection resulted in the delivery of vehicles unworthy of use as ambulances.

Please see exhibits Z, AU and AV – the report of the National Ambulance Service, report of Carl Friederichs GmbH and the report of EOCO respectively.

In his response to the above Counsel for A1 put forward the following arguments:

The prosecution's evidence that A1 instructed the Bank of Ghana to establish an irrevocable transferable Letters of Credit was discredited in cross examination. Also the mere fact of establishment of Letters of Credit does not amount to payment. They are only guarantees for payment subject to certain conditions being complied with.

Counsel for A1 argued further that there is no evidence on record to suggest that after A1 wrote Exhibits A, and B2, for the Minister of Finance, he authorized any payments to be made under the Letter of Credit. Prosecution was unable to adduce any evidence to show prima facie that by reason of Exhibits A and B2 which were written by A1 under the authority of the Minister of Finance, A1 caused, or foresaw the consequence of a financial loss to the Republic and desired the financial loss or took an unreasonable risk in writing Exhibits A, B1, and B2 for the Minister of Finance which led to the financial loss. There is no prima facie case against A1 that through a deliberate, unauthorized, criminally reckless, or an otherwise illegal act, he caused a financial loss to the Republic. In the circumstances, Counsel submitted that no prima facie case was made against A1 in respect of the offence of causing financial loss to the Republic, and the trial judge's finding to the contrary is not supported by the evidence on record.

Counsel further submitted that there was no prima facie evidence that A1 intentionally misapplied public property. The same reasons assigned for the view that A1 did not cause financial loss to the Republic apply mutatis mutandis to the allegation that A1 intentionally misapplied public property. Apart from Exhibits A, B1 and B2, which were signed by A1 under the authority of the Minister of Finance, Counsel contends that A1

(a) Was not the Applicant for the establishment of the Letters of Credit.

(b) A1 did not authorize payments to be made under the Letters of Credit. The payments were made based on the orders of a court of competent jurisdiction and /or the authorization of the Ministry of Health, who was the Applicant for the establishment of the Letters of Credit.

I find the argument of Letters of Credit not being a form of payment unconvincing. The contract Exhibit V Clause 4.2 on Payment Terms States clearly that payment shall be by establishment of Letters of Credit.

Again it is trite knowledge that a letter of credit also known as a documentary credit or banker's commercial credit or letter of undertaking is a payment mechanism used in international trade to provide an economic guarantee from a creditworthy bank to an exporter of goods. Without the establishment of the letters of credit this whole transaction would not have been carried out as Big Sea would not have shipped the vans. So the Letters of Credit were clearly a form of payment and constituted the payment in this transaction.

I am of the view that the ingredients of the offence in respect of Count 5 have been established against A1.

The trial Judge was right in refusing the submission of no case.

COUNT 3

Willfully causing financial loss to the Republic contrary to Section 179 A (2) of the Criminal Offences Act, 1962, (Act 29)

Particulars of Offence

Richard Jakpa between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana wilfully caused financial loss of €2,370,000 to the Republic by intentionally causing vehicles purporting to be ambulances to be supplied to the Republic of Ghana by the Big Sea General Trading Ltd. of Dubai without due cause.

Counsel for the 3rd Appellant contends that from the facts and particulars of the offence the 3rd Accused/Appellant is alleged to have engaged in, leading to his prosecution there is no information disclosed as to the distinct acts and omissions engaged in by him which caused the financial loss.

He contends that the facts do not disclose whether the 3rd Accused *"arranged with his principal"* to supply the 200 ambulances to the Government of Ghana by any of the following means:

i. Assisting Big Sea to ensure the manufacture of the ambulances

ii. *Facilitating the preparation and documentation required to ship the ambulances to Ghana.*

iii. *Physically and personally shipping the ambulances to Ghana.*

iv. *Ensuring that the ambulances were cleared from the port and delivered to Ghana making sure that the Government took delivery of the ambulances even though the Government did not want the ambulances.*

He contends further that at the close of its case the prosecution made no attempt whatsoever to show.

i. *How and in what ways*

ii. *By what acts*

iii. *As the Local Representative of Big Sea*

iv. *The 3rd Accused/Appellant arranged with his principal (Big Sea) to supply the ambulances*

Counsel argues further that it is not clear from the facts whether the 3rd Accused/Appellant's role as the Local Representative of Big Sea was personal or as JBL's Director and Shareholder.

Issue of Defective Charge and Proceedings:

Counsel for 3rd Appellant contends that the trial court set out the charge against 3rd Accused as under Section 179 A (3). The Trial court thus treated 3rd Appellant as if he was facing the same charge as 1st Accused i.e. under 179 A (3) when A3 had been charged under section 179A(2). This, Counsel contends, is wrong.

He argues that the charge violates the provisions of Article 19 (2) (d) of the 1992 Constitution's requirement for fair trial. Under this provision the person charged has the right to be informed:

i. *In a language he understands*

ii. *In detail*

iii. *Of the nature of the offence charged*

Counsel referred to the case of *Osei Kwadjo II v. Republic [2007-2008] 2 SCGLR 1148 in support of his contention.*

The 3rd Accused/Appellant was never charged with the offence of causing financial loss and never pleaded to any such offence. It was not a charge the prosecution preferred against 3rd Accused.

In response to this argument of a defective charge Respondent countered as follows:

The argument was an attempt to argue a ground the 3rd Appellant has not raised and invited the court to decline the attempt to touch on matters not raised in the grounds of appeal.

On the substantive issue Respondent argued that at the time of signing the contract Exhibit V and the Agency Agreement Exhibit AN, 3rd Accused was personally the sole directing mind and personality of Jakpa @ business (unincorporated).

This gave him complete knowledge of the contract and of all the requirements under the contract.

He knew the exact specifications of the ambulances under the contract.

PW5 testified that when Jakpa at Business was finally incorporated in 2014, 3rd Appellant was the sole shareholder. He was responsible for the distribution and sale of the vehicles in Ghana and West Africa. He was therefore very much aware of vehicles that he imported into Ghana which were ordinary vans uncontracted for which led to a loss to the Republic.

For his work as Agent representing Big Sea, 3rd Appellant was paid a commission of 28.7% of the contract price as stated by PW5 in his evidence and confirmed by 3rd Appellant himself. Again to ensure that he was paid his commission of 28.7%. 3rd Appellant instituted a civil action against Big Sea. 3rd Appellant's civil action in the court reveals that even after incorporation he was the acting mind and alter ego of the company.

It is the case of the Respondent that 3rd Appellant connived with his principal to unilaterally change the vehicle specifications. This is admitted by Big Sea in Exhibit AC with the excuse that the contracted type of vehicle "309" was not available but type "311" which had a bigger engine was the one available.

Thus, without consulting MOH, 3rd Appellant and his principal changed the type of vehicle specified under the contract. 3rd Accused was aware that the vehicles which were sold to MOH were not the ones contracted for.

Again, the vans arrived without medical equipment, which fact is acknowledged by 3rd Appellant in his investigation cautioned statement "Exhibit BC". (See page 857 of ROA Vol. 2) and by Big Sea in Exhibit AC. The Respondent contends that it were these acts of the 3rd Appellant that led the trial court to conclude that a case had been established against him.

The argument of 3rd Appellant was that he cannot be held liable for his acts as Chairman and shareholder of Jakpa at Business Ltd and that he had no contractual relationship with the Government. The case of the Republic Vrs Bayford was wrongly applied.

The Respondent's Counsel in response stated that company Law Principles must be separated from criminal liability. A person who commits an offence is guilty of the offence committed. Under the law a person cannot hide under company law principles to push criminal liability to his company.

Section 179 (A) (2) of the law under which the 3rd Appellant was charged states that "A person who by lawful act or omission causes loss..."

In the *Republic v. Bayford* case, Counsel for Respondent argues the court was clear that a party in criminal actions cannot claim vicarious liability. The argument of 3rd Appellant, is therefore misleading and a misrepresentation of the law on criminal liability.

Analysis

Charge – I will first like to deal with the issue of whether there is a defective charge or not in Count 3 in respect of A3.

As already indicated the statement of offence in respect of Count 3 for 3rd Appellant is as follows:

Statement of Offence

Wilfully causing financial loss to the Republic contrary to Section 179 A (2) of the Criminal Offences Act, 1960 Act 29.

Particulars of Offence

> *"Richard Jakpa between August, 2014 and April, 2016 in Accra in the Greater Accra Region of the Republic of Ghana wilfully caused financial loss of €2,370,000.00 to the Republic by intentionally causing vehicles purporting to be ambulances to be supplied to the Republic of Ghana by the Big Sea General Trading Limited without*

due cause."

Although Section 179 A (2) is obviously quoted in the statement of offence the wording of the statement of offence and particulars of offence clearly show that the 3rd Accused had been charged under 179 A (3).

The 179 A (2) may therefore have been inadvertently stated there.

The Attorney-General however contends that the loss contemplated under the section is not limited to only economic loss but includes any other matter that can qualify as a loss. Respondent therefore contended that financial loss also falls under section 179A(2).

In the case of Republic of Vrs Ernest Thompson & Ors – The Court of Appeal observed as follows;

> *"This case highlights the importance of particulars of offence in a charge sheet. And the importance is not only for the Prosecution but also the Accused. The charge and particulars should be so informative that he should know what he is being accused of on reading both the statement of offence and the particulars of offence and for him to plead appropriately. Our careful reading of the test outlined above and a reading of the statement of offence and particulars show that the requirement has been fulfilled by the prosecution in this charge."*

Although Section 179 A (2) is quoted instead of 179 A (3), it is clear that the 3rd Accused in Count 3 had been charged with causing financial loss and he understood same clearly and pleaded appropriately to it.

It is my position that the prosecution has fulfilled its obligation to sufficiently and reasonably set out the particulars of offence in the charge sheet.

The Supreme Court in the same Ernest Thompson & Ors. case (Criminal Appeal No. J3/05/2020 dated 17th March, 2021), per Amadu, JSC observed as follows:

> *"Whether or not reasonable information has been given an accused person in the particulars of offence is on a case by case basis. Each case will have to be examined on its own peculiar facts and circumstances. The particulars of offence shall provide the basic facts which will have to be proved at the court."*

I have examined the peculiar facts and circumstances and conclude that the particulars of offence provide the basic facts required and it is therefore not a defective charge.

Can 3rd Appellant be Held Liable for His Acts as Chairman and Shareholder of Jakpa at Business Limited?

The 3rd Appellant's first two grounds of appeal touch on the above subject. Counsel for 3rd Appellant's contention is that JBL as a legal person in law is criminally liable for its own acts and omissions. As a legal person criminally liable for its own acts and/or omissions JBL's shareholder and director, 3rd Appellant is not liable for acts or omissions imputed to JBL as JBL's acts or omissions.

The records show that even before JBL was incorporated in 2014, the 3rd Appellant had carried out activities in his personal capacity in respect of this contract for which he can be called upon to explain or justify as to their propriety. Thus specific personal liability has been established against A3.

In the case of *Evans Asiedu Aikins & 2 Others Vrs the Republic*, cited supra, this court per Torkornoo JA, as she then was, stated as follows:

> *"The law is also clear that, if these direct controlling minds act with dishonest intention, the courts will lift the veil of incorporation to bring the human perpetrators to book."*

See the case of *Morkor Vrs Kuma (East Cost Fisheries) [1998-99] SCGLR 620 holding 3.*

I am of the opinion that the *Republic v. Bayford [1973] 2 GLR 421* case was correctly applied by the trial Judge in her ruling. The court's position that in criminal matters a company's director cannot claim vicarious liability is in our opinion correct.

Having concluded that 3rd Accused/Appellant can be held personally liable for his actions and omissions, we will now consider whether these acts and omissions led to/or contributed to a financial loss to the State which was done wilfully. Put simply, did the court err when it held that there was evidence that the 3rd Appellant caused financial loss to the Republic?

I have discussed already the ingredients of the offence of causing financial loss and will therefore not repeat same.

I have arrived at the following conclusions already:

a. That there was a loss.
b. And that the loss was to the State.

c. That the vehicles supplied were defective and have fundamental defects and cannot be converted into ambulances.

I do not agree with the Appellant's contention that it is premature to state that the vehicles have fundamental defects and are not fit for purpose due to compelling evidence available which we have referred to.

Is there evidence to support the claim that 3rd Accused was involved in causing this financial loss to the State?

The relevant evidence put forward is that:

1. 3rd Accused in his role as agent of the principal Big Sea was responsible for the distribution and sale of the vehicles in Ghana and other West African Nations except Nigeria
2. In this position he must be deemed to have been aware or ought to have been aware of the type, nature, quality of vehicles supplied to Ghana.
3. There is also evidence that the original specifications of the Mercedes Benz 309 was changed to 311 by the Principal Big Sea and his Agent A3 without the knowledge, consent and approval of the Ministry of Health Ghana.
4. With this unilateral change and the later discovery, when the vehicles were delivered, that they were not fit for purpose A3 can be deemed to have contributed to the events that led to the loss.

I conclude therefore that the trial Judge did not err in ruling that 3rd Accused has a case to answer.

In my opinion, the submission of no case in respect of 3rd Accused was rightly rejected by the trial Judge. 3rd Accused/Appellant has a case to answer together with the 1st Accused/Appellant.

I have in arriving at this decision discussed all the five grounds of appeal of the 3rd Appellant and I conclude that they are not meritorious.

CONCLUSION

In conclusion the learned trial Judge did not err in her ruling that 1st Appellant and 3rd

Appellant have a case to answer.

The submissions of no case made by the two were therefore rightly rejected in the ruling of the Learned Trial Judge dated 30/3/23.

SGD

.....

ALEX POKU-ACHEAMPONG
(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

ABDUL BAASIT AZIZ BAMBA WITH GODWIN EDUDZI TAMAKLOE FOR 1ST APPELLANT

BAFFOUR GYAWU BONSU ASHIA WITH EBENEZER APPIAH AND NINA BEL NONO FOR 3RD APPELLANT

RICHARD GYAMBIBI (PSA) WITH JOSHUA SACKEY (SSA) FOR REPUBLIC/RESPONDENT