IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
CRIMINAL DIVISION
ACCRA – GHANA

CORAM: KANYOKE J.A (PRESIDING)
YAW APPAU J.A.
ACQUAYE J.A.

CRIMINAL APPEAL
NO.H2/6/07
20TH JUNE 2008

DANIEL KWASI ABODAKPI … APPELLANT

VRS

THE REPUBLIC … RESPONDENT

JUDGMENT

KANYOKE J.A;

The appellant herein, a former minister of Trade and Industry ,together with Victor Selormey(deceased),also a former Deputy minister of Finance, were arraigned before the Fast Track High Court, Accra presided over by His Lordship S.T Farkye, an Appeal Court Judge (now retired)sitting as an additional High court Judge, on seven counts with the following offences;(1)two counts of conspiracy to commit crime, namely willfully causing financial loss to the state contrary to sections 23(1)and 179A(3) (a)of the Criminal offences Act, 1960(Act 29),(2) two counts of Willfully causing financial loss to the state contrary to section 179A(3) (a) of the criminal offences Act,1960(Act29),(3)One count of conspiracy to commit crime, namely Defrauding by false pretences contrary to section 23(1)and 131 of the criminal offencsAct,1960(Act29)and (4)two counts of defrauding by false pretences contrary to section 131 of the criminal offences Act,1960(Act29)Each of them pleaded not guilty to all the counts.

In pursuance of discharging their burden of proving the guilt of each of the accused persons on all the courts beyond all reasonable doubt the prosecution called ten witnesses who testified and tendered some documents(Exhibits).Each of these ten witnesses was rigorously and extensively cross examined by the defence. On the close of the case for the prosecution learned counsel for both accused persons made a submission of no case to answer on each of the seven counts for and on behalf of each of the accused persons.

In a reasoned ruling dated the 18th October 2004 the leaned trial judge rejected the submission of no case to answer and called upon each of the accused persons to open his defense to the charges. On the 22nd October 2004 counsel for each of the accused persons filed a notice of Appeal against the dismissal of the submission of no case to answer by the trial court.

However, Victor Selormey (deceased) who had been sick all along died before he could prosecute his appeal. The Appellant's appeal against the ruling of the trial judge was rooted on nine grounds of appeal in the main contending that the prosecution had failed to establish the essential ingredients of the offences against the appellant. It was also contended on behalf of the appellant that the audi alteram pattern rule was breached in respect of the Audit Report-Exhibit D. conducted by PW2-Philip Baffour Awuah and therefore that Exhibit D being the basis of the prosecution, was a nullity. It was a further contention being the basis of the prosecution that prosecution was a nullity of the appellant that there were contradictions in the prosecutions case and that these contradictions rendered the prosecutions case insufficient to warrant the trial Judge calling on the appellant to open his defense. He again contended that PW9-Mr. Bibilazo had conceded in his evidence that the Study Proposal-Exhibit (G) which the appellant contracted with Dr Frederick Owusu Boadu to prepare could cost a maximum of USD 150,000 and therefore that the appellant legitimately paid for work legitimately done; therefore the appellant did not commit any offence. Furthermore counsel for the appellant maintained instantly that the appellant said he knew next to nothing about the words "Feasibility Study" contained in Exhibits A and B respectively being the letters Victor Selormey wrote to Ecobank authorizing the lodgments of USD 100,000.00 and USD 300,000.00 respectively into the private and personal account of Dr Owusu Boadu at Ecobank. Finally it was the contention of the appellant that there was nothing improper about his dealing with Dr Fred Owusu Boadu in connection with the Gateway Project leading to the contract-Exhibit (G) executed between him and Dr Boadu.

In a reasoned and a well considered ruling this court (Coram; R C Owusu (Ms), Piesare and Anin Yeboah JJ.A.)dismissed the appellants' appeal on the 29th March 2006 holding in effect that the prosecution had established all the essential ingredients of each of the charges against the appellant and that the contradictions or discrepancies pointed out by the learned counsel for the appellant in his submissions did not sufficiently discredit the case of the prosecution or make it so unreliable that no reasonable tribunal might convict the appellant on the charges. The submission about the alleged breach of the audi alteram partern rule was also rejected. The court therefore directed the appellant to return to the court below to open his defence on all the charges if he so wished. The appellant did return to the trial court and opened his defence and called witnesses.

On the 5th-day of February 2007 the trial judge in a considered judgment found the appellant guilty on all the counts and convicted him on each of the counts. The appellant was sentenced to 10years I.H.L. On each counts to run concurrently. It is against his conviction and sentence that the appellant has again appealed to this court.

On the 28th January 2008 in pursuance to leave granted by this court on 11th October 2007 learned counsel for the appellant filed a pleathora of amended grounds of appeal as follows;

a) "The verdict is unreasonable and cannot be supported by the evidence.

b) The judge erred in law when he failed to consider the evidence of some of the prosecution witnesses particularly the evidence of PW9 whose evidence was crucial to the determination of the issues.

c) The judge erred when he completely failed to consider the case for the defense including the evidence of witnesses called by the defence.

d) The judge erred in law when he adjudged that the 1st accused had received copies of Exhibit A and B when there was no evidence led by the prosecution to establish this.

e) The sentence imposed on the accused is unreasonable, excessive, baseless and totally unsupported by the facts and the evidence adduced at trial.

f) In respect of the charge of fraud by false pretence contrary to section 131 of the criminal code,1960(Act29)the trial judge erred in failing to realize that there was absolutely no evidence of any representation made by the appellant to Ecobank on the basis of which it acted.

g) The trial judge erred in placing undue reliance upon the designation of "feasibility study" in correspondence about payment to Dr Fred Boadu when the evidence of the prosecution clearly showed that the designation was irrelevant to the making of the payments.

h) The trial judge erred in disregarding the evidence of the defense without any reason.

i) The trial judge erred in not providing reasons for relying on certain evidence of the prosecution when such evidence was contradicted by other evidence of the prosecution.

j) The trial judge erred in refusing to give reasons for imposing the maximum custodial sentence on the appellant.

k) In stating that he disbelieved the defence of the appellant without more and proceeding to convict the appellant on the evidence of the prosecution the learned trial judge in effect settled the burden of proof from the prosecution onto the appellant thereby occasioning a miscarriage of justice.

L)The learned trial judge failed to make any findings of the specific intent necessary to prove the charges levelled against the appellant."

The prosecution also filed this cross-appeal;

"(a)The trial court erred in not making a restitution order in favour of the Republic,"

The charges were framed from the following facts as outlined by the prosecution.

As part of their official duties as ministers of state the appellant and Victor Selormey(deceased)were also co-chairmen of an Oversight Committee on a Trade and Investment Programme(TIP) which began in 1992 and ended in or around 1997.Under the TIP United States Agency on International Development(USAID) provided the Government of Ghana with USD 80,000,000.00 as a grant to be used in development and promoting export of non-traditional exports When an Audit Team audited the account of the TIP found with Ecobank it was detected that the appellant and late Victor Selormey took advantage of their position as co-chairmen of the Oversight Committee and fraudulently caused to be transferred an amount of USD400,000.00(being the old cedi equivalent of(¢2,732,389,880.00 cedis)between August and December 2000 from the TIP fund with Ecobank into the private and personal account of one Dr Frederick Owusu Boadu of Leebda Corporation, Texas, U.S.A. The money was purported to be payment for feasibility study allegedly conducted or carried out by the said Dr Frederick Owusu Boadu as represented by the appellant and late Victor Selormey when in fact and in truth no such feasibility study was conducted or carried out by Dr Boadu. The payment of the USD 400,000.00 according to the prosecution was not only fraudulent but also false and resulted in a financial loss to the state.

The defence of the appellant was in the main a complete denial of all the offences preferred against him. He said he was innocent of all these charges and maintained insistently all along that he knew next to nothing about the words “Feasibility Study” that were introduced into exhibits A and B being the letters written by the late Victor Selormey to Ecobank authorizing the payment of the USD400,000.00 to Dr Fred Owusu Boadu and explained that it was only Victor Selormey who could explain the circumstances leading to the introduction of those words into exhibits A and B. According to the appellant what Dr Boadu did was to prepare a Study Proposal and not a Feasibility Study. Finally the appellant said what he requested the late Victor Selormey to authorize payment for was a study proposal as evidenced by his letter Exhibit P. to late Victor Selormey. In all the appellant called three witnesses including one Mrs. Agnes Batsa (DW2) who was late Victor Selormey’s secretary and who drafted Exhibits A and B for Victor Selormey to sign.

In a nutshell these are the rival stories of the prosecution and the appellant.

I propose to deal firstly with ground (i) of the amended grounds of appeal which complains about contradictions in the case of the prosecution. It is significant to note here that during his appeal to this court against the dismissal of the submission of no case to answer learned counsel for the appellant raised the same complaint of contradictions in the case of the prosecution. Learned

counsel for the appellant has again accused the trial judge in this appeal for ignoring these so described contradictions in his assessment of the evidence of the prosecution. One such so described contradiction learned counsel for the appellant pointed out is to be found in the evidence PW9-Mr.Bibilazo PW3-Mr.J.A.Ollennu and PW4-Mr. Kwesi Arhin regarding the issue as to whether a study proposal is paid for. According to learned counsel for the appellant whilst PW3 and PW4 said proposals are not paid for PW9 said proposals are paid for and gave a minimum price of USD150,000.00.

It is absolutely incorrect to say that PW9 said Exhibit H or G. i.e. the study proposal prepared by Dr. Owusu Boadu could fetch a minimum price of USD 150,000.00.Referring to his terms of reference when Exhibit H was sent to MDPI for assessment and the conclusion that was arrived at this is what Mr. Bibilazo (PW9) said at page 317 lines 25 continued at page 318 line 1-10 of vol.1 of the record of proceedings.

> "the other one in the terms of reference and that is how much in the opinions of MDPI would such a report cost a client"

We have looked at a number of factors that are taken into consideration in determining fees …….
We have concluded that judging from the document we have looked at and given that it is going to be given out to a consultant to be undertaken, there were two possible situations that could take place. It could either be given to a Ghanaian resident consultant and here I define resident consultant to include a firm or it could be given to the off-shore consultant. The difference is great in terms of cost in the sense that the Ghanaian consultant in terms of cost, depending on where he is located might not have very serious over heads. But for an off-shore consultant the cost would include air ticket to the consultancy site and his home base including hotel bills and so on. So in conclusion we have arrived at a figure which says that if it is a locally resident consultant who was going to carry out this assignment possibly they would have cost $75,000.00.whereas if it was an off-shore consultant it would be in the middlehood of $150,000.00" (my emphasis)
In the executive summary of Exhibit U-PW9's report it is there stated at page 1113 of vol.3 as follows;

> **"The consultancy fees for the scope of work as indicated in the document(Exhibit H) could range from US$75,000.00.to US$150,000.00 at the minimum depending on whether the assignment was done using consultants who were resident in Ghana or outside Ghana"**

In cross examination of PW9 the following transpired at page 320 of vol.1 of the record of proceedings.

"Q. In your consultancy fee schedule you have quite clearly stated that US.$75,000.00. to US. $150,000.00 is the minimum. Not so?

A. we have".

The answer 'we have simply means yes we have stated so in our consultancy fee schedule PW9 therefore never said categorically that the minimum cost of Exhibit U or H would be or was US.$150,000.00. But even if he said so, I do not see how this affects the substance of the prosecution's case. As far as I am concerned, I hold the view that even if there is such a contradiction to the evidence of PW3, PW4 and PW9 on that issue does not go to the root of the prosecution's case. It has never been the case of the prosecution that the payments were made to Dr. Owusu Boadu for a Study Proposal. In fact in his report-(Exhibit U) PW9 stated emphatically that the Study Proposal submitted by Dr. Owusu Boadu was not a feasibility study. Another contradiction learned counsel for the appellant pointed out is the source of the US.$400.000.00.According to counsel for appellant whilst PW2-Baffour Awuah said the US.$400,000.00 came from the TIP fund,PW3 said it came from the interest account especially created to hold interest payments on credit given out to exporters. I agree with learned counsel for the Republic that even if this is a conflict or contradiction that contradiction is of little significance and effect as it does not go to or affect the substance of the prosecution's case. Whether the US.$400,000.00.came from the TIP fund or the interest account, the overriding fact is that, the US.$400,000.00. was public money belonging to the Government of Ghana and not the appellant's or Victor Selormey's personal fund, hence the charge of willfully causing financial loss to the state. Finally under ground (i) of the appeal learned counsel for the appellant pointed out that in his evidence PW2 said the Accountant-General did not know about the transaction relating to the transfer of the US.$400,000.00. To me this is another irrelevant point as far as the source of the money is concerned. The overwhelming evidence on the record is that the US. $ 400,000.00.which was public money was transferred into the private and personal account of Dr. Fred Owusu Boadu, on the basis of Exhibits A and B. As far as I am concerned these discrepancies in the evidence of PW2,PW3,PW4 and PW9 as pointed out by learned counsel for the appellant are of little or no significance at all and effect on the prosecution's case incriminating the appellant on all the seven counts. I must even express surprise that learned counsel for the appellant has found it necessary to raise these same so called contradictions again when he raised the same issue in his appeal against the dismissal of the submission of no case to answer. This court, differently constituted found his submission on these alleged discrepancies unimpressive and dismissed them for the reason that those alleged discrepancies or contradictions did not go to the root of the prosecution's case against the appellant. I endorse that conclusion, I accordingly dismiss the appeal on ground(i)of the appeal.

I next propose to deal with grounds (b),(c),(h)and (k)of the amended grounds of appeal together as they all touch and concern the learned trial judge's alleged failure to consider the defence of the appellant. Under these heads of appeal learned counsel for the appellant submitted that (1)the learned trial judge failed completely to consider the case for defense including the evidence of witnesses called by the defence and referred to various judicial authorities such as Lutterodt v commissioner of Police[1962]2 GLR429,Darko v. The Republic [1968] GLR.203, Ralph Casey Hayford v. The Republic, 1st June 2006, C.A. unreported, and Togbe Fifi iv .v. The Republic [1965] GLR33at P.36 in support of his submissions,(2)that the learned trial judge failed to give reasons for not considering the defence of the appellant so the trial judge's judgment is flawed and must be set aside on that ground and referred to the case of Adams v. The Republic [1992]2 GLR 150 at p. 172 in support of that submission.(3)that in stating that he did not believe the appellant's defence without more and proceeding to convict the appellant on the evidence of the prosecution only the learned trial judge in effect shifted the burden of proof from the prosecution onto the appellant thereby occasioning a miscarriage of justice and referred to article 19(2),(c) of the constitution 1992 which talks about presumption of innocence on the part of an accused in a criminal trial,(4) that the trial judge erred in not considering the evidence of the defence witnesses in particular the evidence of DW1-Mr. Evans Addo who tendered exhibits 17 and 17A being minutes and a report on a meeting held by the appellant with the US Trade Representative during which the Science and Technology Valley /Park project was discussed and support from the donors,DW3-Dr.Sipa Yankey who confirmed the appellant 's evidence about the discussions he had with the appellant and that he reviewed the contract-Exhibit G. and DW2-Mrs Agnes Batsa who said the first letter from the appellant to late Victor Selormey requesting authorization for the payment of the USD 100,000.00 was with the police but which the prosecution failed or refused to produce and tender in evidence and (5).finally that by failing to give reasons for disregarding the defence and its witnesses' testimonies and rather relying on the prosecution's witnesses' testimonies which contained contradictions, the conviction of the appellant is bad in law and must therefore be set aside. These in a nutshell are the submissions of learned counsel for the appellant on grounds (b) (c), (h) and (k) of the appeal. The response of the learned Chief State Attorney on these grounds of appeal are that (1) the trial judge did consider the defence of the appellant in his judgment and quoted a portion of the trial judge's judgment at pages 920 lines 24-28, page 921 lines 1-2 and page 924 lines 31-32,all of vol. 2 of the record of proceedings to support this (2) that the defence of the appellant throughout the trial was a mere denial that he did instruct late Victor Selormey to authorize the transfer of the USD100,000.00 and USD 300,000.00 respectively in respect of a feasibility study and explained unsatisfactorily that it was only Victor Selormey who could tell how the words "Feasibility Study" came to be introduced into Exhibits A and B which formed the basis of the transfer of the USD400,000.00 into the private and personal account of Dr. Fred Owusu Boadu.

He submitted that the mere denial by the appellant has not dented the root of the prosecution's case,(3) that the gamut of the appellant's story about the envisaged Gateway phase II project and its trappings and his vision for Ghana under the Gateway project are not germaine to the prosecution's case since they did not answer why the words Feasibility Study were applied for the transfer of the USD400,000.00 when no such Feasibility Study was prepared by Dr.Boadu,(4) that where the defence of an accused in a criminal trial such as in the instant case is a mere denial the trial judge is not obliged to give reasons for rejecting such defence and referred to the case of Adams v. the Republic (supra) (5) that the witnesses called by the appellant to testify on his behalf were not of any assistance to him. For example DW3-Dr.Sipa Yankey's evidence that he reviewed the contract document-Exhibit G. and found it to be a simple contract rather shows that-Exhibit G being a study proposal did not measure up to a feasibility study. And to make matters worse DW2-Mrs. Agnes Batsa's evidence rather seriously and totally collapsed the defence of the appellant and finally (6) that by opening his defence the burden of persuasion shifted to the appellant and cited section11 (3) of the Evidence Act, 1975 (NRCD323) and a passage from the book "Criminal Law in Ghana" by Mr. P.K. Twumasi at page 147 to support his submission. In the view of the learned Chief State Attorney Article 19 (2) (c) of the constitution 1992 has not repealed section 11(3) of NRCD323. The *-learned chief state attorney therefore submitted that since the appellant's own witness-DW2 has corroborated the case of the prosecution that the appellant did not only know of the introduction of the words "Feasibility Study" into Exhibits A and B but that infact and in truth that he was the prime mover of these words his mere denial of the offences entitled the trial judge to rightly arrive at the verdict of guilty based upon the totality of the evidence before him and to have rejected the mere denial of the appellant. It is the further submission of the learned Chief State Attorney that in these circumstances the trial judge was not obliged to give reasons for not believing the defence of the appellant and that the verdict of the trial judge was predicated on proven facts and inferential evidence. He prays therefore that the appeal on the amended grounds (b),(c), (h) and (k) should fail.

For my part, I have thoroughly perused and meticulously examined all the evidence on the record that is evidence of the appellant and his three witnesses alongside the evidence of the ten prosecution witnesses together with all exhibits tendered in the trial as well as the judicial authorities referred to by both counsel and I have come to the inevitable conclusion that the appeal has no merit on grounds (b), (c), (h) and (k) of the amended grounds of appeal. In the first place it is incorrect to say that the trial judge completely ignored the defence of the appellant in his judgment. Perhaps the trial judge did not consider that defence in a manner counsel for the appellant would have wished and along the lines propounded in the case of Togbe Fiti iv vs. The Republic (Supra). A careful reading of this case reveals however that it is not in all circumstances that a trial judge is bound to consider the defence of

an accused in a criminal trial along the guidelines stated in that case. There are exceptions to these guidelines and one of these exceptions is that where the defense of the accused is a mere denial of the offences charged then the trial Judge is entitled to convict him of the charge provided there is sufficient and satisfactory evidence to support that conviction. In his book of above reference Mr.P.K. Twumasi emphasized this point at page 147 in these words;

> **"On the authorities if a court rules that there is a prima facie case to warrant an answer from the accused all that the court's ruling amounts to is that it is prepared to convict the accused on the evidence adduced so far by the prosecution unless some explanation is made by the accused person. If therefore the accused merely puts forward a flat denial such as "I deny the charge! I am innocent without more than that the only alternative open to the court is to convict the accused person because a prima facie case means evidence which is sufficiently strong to support conviction if uncontroverted".(**my emphasis).

It appears to me that some of the judicial authorities referred to by counsel for the appellant are not applicable in the circumstances of this case or they do not answer to the question whether a trial judge is entitled to reject a mere denial of an offence by an accused in a criminal trial. . Thus in Luttorodt v. Cop (supra) the issue turned on the role of a trial judge where the evidence is oath against oath. In such a situation it is the obligation of a trial judge to weigh the evidence of the one oath against the other oath very carefully before deciding to prefer one oath to the other and give reasons for such preference. In that case the trial judge did not examine the case of the prosecution and that of the defence along these lines. Ollennu J.S.C. who delivered the Judgment of the court stated at page 436 as follows;

> **"where as in this case, the decision turns upon the oath of one prosecution witness against that of a witness for the defence, it is incumbent upon the trial court to examine the evidence of each of these two witnesses carefully, along with other evidence in the case, oral, documentary and circumstantial as well, before preferring one of the conflicting evidence to the other and where the preference is for the prosecution he must make it appear from the Judgment that his preference is reasonable…**…"

In that case the Supreme Court found that in "in no part of his three page judgment did he in anyway examine the case for the prosecution or that for the defence"

Therein lies the difference between Lutterodt v. COP (supra) and the instant case.

In the case of Togbe Fiti IV v. The Republic (supra) the defence was not a mere denial of the offence. In addition to that denial the appellant went further to show the reasons why the complaint had been made against him but the trial Judge did not consider these reasons in his judgment. In the instant case the pivot of the prosecution's case revolved around the words "Feasibility Study", in Exhibits A and B and the appellant's answer to the case is a mere denial of knowledge of how these words came to be in Exhibits A and B. In any case as I said it is not wholly true that the trial Judge in the instant case did not consider the defence of the appellant. At pages 920 lines 24-28, 921 lines 1-2 continued at 924 lines 31-32 of vol.2 of the record of the proceedings the trial judge stated as follows:

> **"In his evidence in chief the 1st accused person denied having committed the offences in all the charges preferred against him".**

He categorically stated that he did not receive exhibits A and B written by the late Victor Selormey to the Ecobank authorizing the payment of USD300,000.00 to Dr.Owusu Boadu. I have studied his defence of denial of the offences and I do not belief (fix) his defence."(my emphasis)
The word "study" in my view is not a term of art and it must therefore be construed in its ordinary plain meaning. Collins Shorter Dictionary & Thesaurus (current edition) defines the word "study" at page 723 to mean amongst others to "scrutinize". The same Dictionary defines the word "scrutinize" at page 664 to mean "examine closely"

I am aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense and are therefore meant for instruction to these books. See R v. Peters (1886) 16 Q.B.D. 636 at page 641 by Lord Coleridge. The instruction which Collins Shorter Dictionary cited above gives is that the verb "study" means to "scrutinize or closely examine".

This being the case when the trial judge stated that he had studied the defence of the appellant that should be understood to mean that he had closely examined and or scrutinized the appellant's defence and found it to be not worthy of belief. Be that as it may what was the defence of the appellant? A careful examination of the totality of the evidence on the record of proceedings reveals undoubtedly that the gravamen or the pivot of the prosecution's case revolves essentially around the words "Feasibility study" captured in Exhibits A and B. It is the prosecution's case that the contents of Exhibits A and B to the effect that Dr. Fred Owusu Boadu had rendered a service for the Gateway Secretariat in the form of preparing a feasibility study for the establishment of the Science and Technology Park/Valley were false and that the falsity of these facts were known to the appellant, Dr Fred Owusu Boadu and late Victor Selormey but that despite this the three musketeers engineered a

grand design for the common criminal objective namely causing to be transferred public money of USD 400,000.00 at Ecobank into the private and personal account of Dr Owusu Boadu.

But the appellant did not only put up a mere denial of the offences preferred against him, he also attempted to pass the buck about the introduction of the words '' feasibility study into exhibits A and B.

When he was asked by his counsel in his examination in chief to explain how these words came to be captured in Exhibits A and B even though his letter to Victor Selormey. –Exhibit P made no mention of those words he explained at page 651 lines 10-16 of vol.2 of the record of proceedings as follows.

"Q It is the case of the prosecution that you authorized payment for a feasibility study when you knew that no such feasibility study had been done. What is your reaction to that?

A. My lord what I asked to be paid for is contained in the letter of 19th December 2000 that I authored to the Ministry of Finance with the title ''Request for payment for consulting services for a study proposal to create a science and technology community Park/valley''

Then at page 652 lines 3-11 of vol.2 of the record of proceedings the appellant continued as follows:

"Q. What does Exhibit P talk about?

A. It talks about payment for a study proposal

Q. Can you explain why Exhibit B is asking for payment for a feasibility study since you have indicated to the court that you did not authorize payment for feasibility study?

A. My lord that can be best explained by the author of that letter.

Q. Who is the author of the letter?

A. The late selormey"

It is clear from this evidence of the appellant that his explanation was an attempt to charge the deceased Victor Selormey with the introduction of the words feasibility study into Exhibits A and B in the knowledge that his said explanation could not be contradicted As Brett M. R. stated in In re Garnette Gandy V. Maccaulay (I885) ch. D. 1 at P 9

> **"The law is that when an attempt is made to charge a dead person with a matter in which if he were alive, he might have answered the charge the evidence ought to be thoroughly shifted and the mood of any judge who hears it ought to be first of all in a state of suspicion''**

because of the tendency for the interested party to invent stories in the knowledge that they cannot be contradicted by the dead person. Thus this suspicion of the evidence of the appellant concerning the introduction of the words feasibility study into Exhibits A and B must have been at the back of the trial judge's mind and thereby influencing him to disbelieve the defence of the appellant.

Apart from this suspicion surrounding the bare denial of the appellant is the direct evidence of his own witness incriminating him with the offences.

According to DW2 the appellant was the author of the words feasibility study in Exhibits A and B. In her evidence in chief DW2 was emphatic that the appellant wrote two letters including exhibit P to late Victor Selormey. Thus at page 786 lines 19-24 of vol. 2 of the record of proceedings Mrs. Batsa (DW2) emphatically stated as follows;

> **"My lord the first letter that came from Mr. \Dan Abodakpi stated categorically that. 'Appointment of consultant to conduct feasibility study into the establishment of Science and Technology park/valley' so the Ministry of Finance did not create this heading. It was the first letter that came from Mr. Dan Abodakpi. If you have it I would be grateful**"

The significance and importance of this evidence of DW2 is that it is coming from the appellant's own witness because DW2 came to court to testify on a subpoena applied for by leaned counsel for the appellant. See p 774 of vol. 2 of record of proceedings

Secondly this evidence corroborates the case of the prosecution that the appellant had knowledge of the introduction of the words feasibility study into Exhibits A and B. Section 7(1) of the Evidence Act 1975 (N.R.C.D 323) defines corroboration as follows.

"Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence''

DW2 Mrs. Agnes Batsa's evidence does not only corroborate the case of the prosecution but it also connects the relevant person, to wit the appellant herein with the crimes charged. It has been held time and again in numerous judicial authorities that "where the evidence of a party on an issue had been corroborated that party's case ought to be preferred to that which had not been corroborated even by his own witness unless there were good reasons to be clearly stated in the judgment".
See Manukure v. Agyemang [1992-93] GBR 888.C.A and Asare v. Donkor & Serwah II [1962]2GLR 178.The trial judge therefore had good reason to prefer the corroborated case of the prosecution to the bare denial of the appellant.

Thirdly the evidence of DW2 Mrs. Agnes Batsa on the appellant's knowledge of the introduction of the words feasibility study into Exhibits A and B conflicts materially with the evidence of the appellant himself that he knew next to nothing about the introduction of those words into Exhibits A and B. In the case of Dowouna II V. Olewolon (2006) MLRG page 154, SC the supreme court held at p 158, interlia that "whenever the testimony of a party on a crucial issue was in conflict with his own witness on that issue it was not open to a trial court to gloss over such a conflict to make specific findings on that issue in favour of the party whose case contained the conflicting evidence on the issue……inconsistencies though individually colourless may cumulatively discredit the claim of the proponent of the evidence."
The trial judge could not therefore have proceeded to make specific findings on the bare denial of the appellant on that issue in his favour.

Fourthly the appellant has himself admitted that he wrote two letters to the late Victor Selormey. In other words in his evidence in chief the appellant admitted that he had written an earlier letter prior to exhibit p. Thus at page 674 lines 31-32 of vol. 2 of the record of proceedings the following transpired;

"Q. The letter which you wrote to the Ministry of Finance is marked as exhibit P. Is that the letter?

A. My lord this letter dated 19th December 2000 was the second of the two letters that I wrote in connection with this payment.

Q. Do you know where the previous one is

A. No, my lord

Q. To whom was the previous letter addressed

A. To Hon. Victor Selormey, Deputy Finance Minister"

Now having admitted that he wrote such an earlier letter it became incumbent on the appellant to establish by evidence that his said earlier letter did not capture the words feasibility study as he was relying on that issue as a defence. He had to prove the affirmative and it was not the responsibility of the prosecution to prove the negative

It is trite learning that "where knowledge of a fact was peculiarly within the knowledge of an accused person a negative averment was not to be proved by the prosecution but on the contrary the affirmative must be proved by the accused as a matter of defence." See R v. Oliver (1994) 29 Cr. App. R. 137, C.C. A,R v. Scott [1921]86 J.P.69, R. V. Turner (1816) S & M..291 and the local case of Salifu & Another v. The Republic [1974]2GLR 291.In Turner's case Bayley .J. had this to say at page 216;

> **"I have always understood it to be a general rule that if a negative averment be made by a 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**"

Also in the case Williams v. Russell, 149 L.T.190at P, 191,C.C.A. Talbot J. also relying on the principle in Turner's case said ;

> "**Where it is an offence to do an act without lawful authority the person who sets up lawful authority must prove it and the prosecution need not prove absence of lawful authority**"

In the instant case it is not for the prosecution to prove the absence of the words Feasibility Study in the appellant's earlier letter. It is for the appellant to prove the affirmative that the words feasibility study were not in his earlier letter to Victor Selormey since he was relying on that for his defence. He could have done that by calling his former secretary who drafted that earlier letter for him to sign to testify on his behalf. f the appellant thought it fit and necessary to call Victor Selormey's former secretary (DW2)he could also have called his former secretary to testify on his behalf when he realized that the prosecution were relying heavily on the words feasibility study in exhibits A and B as the pivot of their case.

In my view in all the circumstances of this case I find no merit in the charge learned counsel for the appellant has put on the prosecution for not tendering the earlier letter of the appellant in evidence as it was not the obligation of the prosecution to establish that that earlier letter of the appellant did not contain the words feasibility study.

According to the appellant's own witness –DW2;

> "But my lord in the Civil Service when there is a subject matter that has been introduced and you start working on it you don't change it midway unless there is a substantial reason why its should be changed.
>
> And there was no reason why Mr. Dan Abodakpi should have given us a different title" in exhibit B.

According to Mrs. Agnes Batsa she had worked at the Ministry of Finance from 1976 to 2001, that is, a period of 25years.Therefore she must be presumed to be well conversant with Civil Service procedures especially with regard to the drafting of official correspondences. In any case this evidence of Mrs. Batsa was not in anyway controverted. Again her evidence that it was the appellant who introduced the words feasibility study into his earlier letter to Victor Selormey has also not been controverted. On the contrary in cross-examination Mrs. Batsa(DW2)said what she wrote in her statement to the police (exhibit 13)and what she said in her testimony in court were the truth nothing but the truth.

With this damaging and incriminating evidence coming from the appellant's own witness I do not see anything wrong with the trial Judge not proceeding further to consider the mere denial of the appellant of the offences against him. In my view the case of Togbe Fiti IV v. The Republic (supra)is not applicable in the circumstances of this case.

I am not unmindful that in his Reply to the written statement of counsel for the Republic learned counsel for the appellant made a belated attempt to discredit Mrs. Agnes Batsa (DW2) by describing her as a "frightened witness on interdiction". In my opinion that is mere speculation without supportive evidence in the record of proceedings. Fright is a state of mind which is normally discerned outwardly by certain movements or utterances of the person frightened such as fidgeting, restlessness, contusing on the face, screaming etc. There is no evidence on the record that DW2 exhibited these traits in court .Learned counsel for the appellant was not his counsel in the court below, so there is a reasonable presumption that counsel for the appellant was not in court on the days DW2 gave her testimony in the witness box so he did not see and hear DW2 testify. Learned counsel for the appellant is not therefore in a position to know whether or not DW2 was frightened. We are also sitting on this case as an

appellate court; we are therefore in a disadvantaged position of also not having seen and heard DW2 testify in the witness box. This court cannot therefore know whether or not DW2 was a frightened witness. I accordingly reject the description of DW2 as a frightened witness.

It has also been alleged that DW2 was a confused witness simply because she said at page 787 of vol.2 of the record of proceedings as follows;

> "When you look at it critically (i.e. exhibits P, and B) they are talking about the something. So materially they are the same" DW2 said this when she was talking about the procedure in the Civil Service with regard to the headings of correspondences in the Civil Service. She then continued on the same page as follows;
>
> "Q. But the letters are different
>
> A. The wordings are different but the subject matter is the same."

This evidence as far as I am concerned is true because exhibit P was in respect of a payment of money to Dr. Fred Owusu Boadu for work allegedly done by him in exhibit G-the contract. Exhibit P was requesting Victor Selormey to authorize payment in accordance with the terms in exhibit G exhibit B written by Victor Selormey authorizing the payment was on the basis of exhibit G. So the subject matter of exhibit P was the same as the subject matter of exhibit B. Where therefore is the confusion in the above quoted evidence of DW2? I do not also see the relevance of article 19 (2) , (c) of the constitution 1992which talks about the presumption of innocence of an accused person in a criminal trial in Ghana. This principle of criminal law has always been with us for decades except that it has now gained a constitutional status. In any case article 19(2),(c) of the constitution has not repealed section 11 (3) of the Evidence Decree (Act), 1975(NRCD 323).Looking at all the evidence as contained in the record of proceedings particularly the evidence of DW2 I am satisfied that the appellant mere denial of the offences and his unsatisfactory explanation as to how the words feasibility study came to be introduced into exhibits A and B, the rejection by the trial judge of that mere denial or defence of the appellant is not bad in law and has not occasioned a miscarriage of justice. The appeal is also dismissed on grounds (b), (c),(h) and (k)of the amended grounds of appeal

I next proceed to consider the appeal on grounds (a), (d) and (f) together because I understand the gist of these grounds of appeal to be complaining in sum total that the prosecution had failed to discharge their burden of proof to establish the essential ingredients of the offences against the appellant and therefore that the verdict of guilty found against the appellant on each of the seven counts by the trial judge is unreasonable baseless and cannot be supported by the evidence on the record. Learned counsel for the appellant referred to and relied on a number of judicial authorities such as Abdulai

Mohammed V. The State [1971] 1 GLR.191 and The State V. Brobbey [1962] 2 GLR.101 at p.103 in support of his submissions.

I am surprised that despite the dismissal of the appeal against the failure of the submission of no to answer and the reasons this court differently constituted, gave for dismissing that appeal, I would have thought that learned counsel for the appellant would have now limited his submissions on grounds (a) (d) and (f) of the appeal to showing whether on the totality of the evidence on the record the appellant had succeeded in controverting the evidence of the prosecution which the Court of Appeal found and accepted as sufficiently establishing the essential ingredients of all the charges preferred against the appellant. In my opinion the appellant having chosen to open and opening his defence assumed the burden of persuasion imposed on him under section 11(3) of the Evidence Act, 1975 (NRCD 323) which says.

> **"…in a criminal action the burden of producing evidence when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt**."

And as P.K. Twumasi has stated in his book of above reference at page 147 "……if a court rules that there is a prima facie case to warrant an answer from the accused all that the court's ruling amounts to is that it is prepared to convict the accused on the evidence adduced so far by the prosecution unless some explanation is made by the accused person….:" (Emphasis mine).

But as the author has also stated on the same page...

"However, if the accused is convicted and he appeals against the conviction the appellate court will be entitled to interfere with the findings of the trial court if on the evidence the prosecution's case is in fact insufficient to support the conviction on any of the following grounds:

(1) That a material witness was not called by the prosecution

(2) That the prosecution's case was full of material conflicts or irreconcilable discrepancies and as such is manifestly unbelievable

(3) That not all the ingredients of the offence were proved

(4) That the identity of the accused was not sufficiently proved

(5) That for any other reason the prosecution's case could not be said to have been proved beyond reasonable doubt and that if the trial court had carefully considered these matters it would have occurred to it that there was no evidence to constitute a prima facie case."

See also the case of Donkor V The State [1964] GLR 598. But it seems to me that the facts of the Donkor case are completely different from the facts in the instant case.

In the Donkor case (supra) the facts are as follows: The appellant was convicted on four counts of extortion contrary to section 239 of the Criminal Code, 1960 (now Criminal Offences Act) (Act 29). In the first count the appellant was described as a "road section Officer". It then explained that he extorted £G1 from one M. The second, third and fourth counts did not state the appellant's occupation; rather they stated the amount and the individuals from whom the appellant allegedly extorted money. At the trial, at the close of the case for the prosecution it was submitted that the charges were defective in that they disclosed no triable offences and that no evidence had been led to prove that the money was taken under the colour of any office. The Circuit Judge overruled the submission and the High Court upheld the judge's submission. On appeal the Supreme Court held, interalia that:

> **"(3) Since the prosecution elected not to give any evidence in proof of the matters charged, then there was no triable offence before the court. The submission of no case made on behalf of the appellant should have been upheld and the fact that some of the evidence given by the appellant after he had been wrongly called upon for his defence, seemed to supply some of the omissions of the prosecution did not change the legal position that no offence had been alleged or proved by the prosecution."**

My understanding of this holding in the Donkor case is that where on the face of the charge and its particulars no offence or triable offence is properly laid before the court, then an unsuccessful submission of no case to answer makes no difference to the legal position that no offence had been alleged or proved by the prosecution and it makes no difference that the wrong dismissal of the submission of no case to answer has resulted in the accused opening his defence and supplied some of the omissions to the charge or charges. In the Donkor case, (supra) the Supreme Court found that section 239 of Act 29 created the offence of extortion by a public officer so that count in the information of the charge which mainly stated the offence of extortion in the case without any further words to show the specific offence of extortion was inherently bad as it sinned against section 112 (1) of Act 30 and that for that reason the four counts were bad for duplicity, secondly that the particulars of the charges that the appellant held a public office and that he demanded and received money under the colour of his office were omitted and these were matters that went to the root and formed the essence or a gravamen of the offence. It was for these reasons that the Supreme Court held that since the charges were fundamentally defective and the particulars too did not disclose any triable offence it

made no difference that the appellant's evidence provided or supplied the omissions in the particulars of the charges. This is not the situation in the instant case. It has not been shown that in the instant case the charges are defective or that their particulars lack the essential requirements of the offences charged. Furthermore this court differently constituted affirmed the trial judge's rejection of the submission of no case to answer and went ahead to hold that on the close of the prosecution's case all the essential ingredients of all the offences had been established by the prosecution. Therefore it has not been shown that the rejection of the submission of no case was wrongly overruled by the trial judge. I therefore do not see the relevance of the Donkor case (supra) to the instant case. It is my view that the Donkor case (supra) is not applicable to this case. That case was decided on its own peculiar facts.

However, I think despite the dismissal by this court of the appellant's appeal against the rejection of the submission of no case by the trial court, that does not preclude this court presently constituted from determining the issue whether on a totality of the evidence the prosecution had succeeded in proving their case on each of the counts beyond all reasonable doubt and whether the conviction of the appellant is supported by the evidence. The role of this court in dealing with the appeal against the dismissal of the submission of no case was to consider whether on the close of the prosecution's case a prima facie case had been made out warranting calling on the appellant to open his defence on the charges, whilst the role of this same court sitting presently on the appeal now against the conviction and sentence of the appellant is to consider whether the conviction of the appellant is supported on the totality of the evidence on the record. Therefore the role of this court in the two situations is different. In proceeding to carry out my task, in this appeal therefore I will consider all the evidence including that of DW2 on the record to determine the fate of this appeal. To me even though on the close of the prosecution's case DW2's evidence was not then before the trial court, that in my opinion does not preclude the prosecution at the end of the trial from producing and relying on Dw2's evidence as part of its case against the appellant. This is supported by section 11(3) of the Evidence Act, 1975 (NRCD 323) which provides that "in a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt". (Emphasis mine). See also "section" (2) and (4) of NRCD 323 on the tests of sufficiency.

At page 15 of the Commentary on the Evidence Decree 1975 there is this explanation of the phrase "on all the evidence".

"The party with the burden of producing evidence is entitled to rely <u>on all the evidence in the case and need not rest entirely on evidence introduced by him. The party with the burden of producing evidence on the issue may point to evidence introduced by another party which meets or helps meet the test of sufficiency. It is for this reason that the phrase 'on all the evidence' is included in each of the tests of sufficiency</u>" (my emphasis).

In simple and unambiguous language this simply means, on the close of the trial in a criminal case the court has to consider the guilt or otherwise of the accused "on all the evidence". The court need not consider only the evidence introduced by the prosecution but can also rely on evidence supplied by the accused or his witness if that evidence meets or helps to meet the test of sufficiency of evidence, the prosecution is required to introduce for conviction. In short the prosecution can also rely on evidence from the accused or his witness if that evidence is favourable to the case of the prosecution.

Counts 1, 3 and 5 have charged the appellant and Victor Selormey with the offences of conspiracy (1) to willfully cause financial loss to the state contrary to section 23 (1) and section 179 A (3) (a) of the Criminal Code Act 29 (2) . Conspiracy to defraud by false pretences contrary to section 23 (1) and 131 of the same Code, Section 23 (1) and section 179 A (3) (a) of the code, Act 29 provides that if two or more persons agree or act together for the common purpose of doing something such as proposing a cause of action which on the facts known to them if done will necessarily cause or is likely to cause financial loss to the state they are guilty of conspiracy to cause financial loss to the state. The particulars of count (1) read as follows:

"<u>Particulars of Offence</u>

<u>Daniel Kwasi Abodakpi and Victor Selormey between May and December 2000 at Accra</u> in the Greater Accra Region and within the jurisdiction of this court <u>acted together</u> with a Dr. Frederick Boadu and persons unknown with a common purpose to willfully cause financial loss of one hundred thousand US dollars equivalent in Cedis to the state."

The particulars of counts 3 are in the same wording as the particulars of count 1 except that the figure or amount stated therein is US dollars ($300,000.00). The particulars of count 5 read as follows:

"<u>Particulars of Offence</u>

Daniel Kwasi Abodakpi and Victor Selormey between May and December 2000 in Accra in the Greater Accra Region and within the jurisdiction of this court acted together with a Dr. Frederick Boadu and persons unknown with a common purpose to defraud the sate."

In the circumstances of this case the likelihood of financial loss to the state at the time the appellant and late Victor Selormey presented exhibits A and B respectively to Ecobank to authorize the payment of the USD 100,000.00 and the USD 300,000.00 to Dr. Frederick Owusu Boadu the two of them knew that Dr. Frederick Owusu Boadu had not done any work or rendered any service in the form of a feasibility study to merit payment of that money which was public money to him. The evidence on the record is that on the strength of Exhibits A and B respectively the USD 400,000.00 was transferred from the account of the Government of Ghana at Ecobank into the private and personal account of Dr. Frederick Owusu Boadu at Ecobank. I said the appellant and late Victor Selormey presented Exhibits A and B to Ecobank because the totality of the evidence on the record inclusive of that of DW2 leaves no doubt in my mind that the appellant was a full participant in the introduction of the words 'feasibility study' into Exhibits A and B Aside the evidence of DW2 the prosecution also adduced sufficient circumstantial evidence to connect the appellant to the introduction of the words feasibility study into Exhibits A and B which formed the basis of the payments of the USD 400,000.00 to Dr. Frederick Owusu Boadu.

> "It is not all conspiracies which are necessarily sinister plots. A conspiracy may not necessarily be evil. The agreement to do the unlawful act or acting together to do the unlawful act might have been motivated by good intentions or by a desire to achieve a result which the conspirators think might be beneficial to the state or for the good of the general public" .See Ibrahim Adam v. The Republic, SUIT No.FT/MISC.2/2000 28th APRIL 2003(unreported). In the instant case the appellant gave evidence about his good intentions or desire to establish the Science and Technology Park/Valley which he thought might be beneficial to the State or the people of Ghana. However, in criminal law, motive is generally irrelevant in determining the question whether the act of the accused (the appellant in the instant case) amounted to a crime so in this case the self serving evidence of the appellant about his good intentions to establish the Science and Technology Community Park/Valley as a precursor to the Gateway Phase 11, project does not or will not absolve him from criminal liability if his act or acts were criminal as found by the trial judge. So in this case all that the prosecution had to prove was that two or more of the accused persons acted together with a common purpose for or in committing or abetting a crime, that is for doing something such as presenting or recommending a course of action which on the facts known to them to be false constituted the offence of causing financial loss to the state or presented a false representation on the basis of which they obtained the consent of another person to part with something and which false facts known to them constituted the offence of defrauding by false pretences. I think the prosecution has been able to establish a conspiracy to cause financial loss to the stare and to defraud the Government of Ghana in the sum of USD 400,000.00 respectively against the appellant in this case.

In the instant case it is the appellant and late Victor Selormey who were charged together on counts 1, 3 and 5 with the offence of conspiracy. And the particulars of these counts alleged that the two of them between May and December 2000 at Accra in the Greater Accra Region and within the jurisdiction of the trial court acted together with Dr. Frederick Owusu Boadu and persons unknown with a common criminal purpose to willfully cause financial loss to the state in the sums of USD 100, 00000 and USD 400,000.00 respectively and that also they acted together for the common criminal purpose to defraud the State respectively. The essential elements or ingredients of the offence of conspiracy can be found in section23 (1) of the Criminal Code (now Criminal Offences Act) 1960 (Act 29). This section states that;

> **"23(1) If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether with or without any previous consent or deliberation each of them is guilty of conspiracy to commit or abet that crime as the case maybe**."

In the case of Ibrahim Adam and Others V. The Republic Cr. Appeal No. 22/2003 dated 25 February 2005, C.A (unreported) it was held per Lartey J.S.C (as he then was) at page 7 of the judgment that;

"from this definition (of section 23(1) of Act 29), the ingredients to establish in a charge of conspiracy are:

"(a) that there must be at least two persons to be involved in it

(b) that the persons must agree or act together

(c) that the object of the agreement or acting together must be directed at a common purpose and

(d) that the common purpose is to commit or abet a crime."

In Commissioner of Police V. Afari and Addo [1962] 1 GLR 486, S.C. the erstwhile Supreme Court held, interalia that conspiracy as defined in section 23 (1) of Act 29 "consists not only in the criminal agreement between two minds but also in the acting together in furtherance of a common criminal objective".

In the same case the court observed that in the law of conspiracy it is rare for direct evidence to be adduced for agreement and that this is usually proved by evidence of subsequent acts done in concert to indicate an agreement. And in the case of State V. Otchere & Ors. [1963] GLR 463 the court noted that in order to prove a conspiracy the evidence may either be direct or circumstantial, but where it is sought to prove a conspiracy by circumstantial evidence it must be such that not only may an inference of conspiracy be drawn from it but also that no other inference can be drawn from it."

The court laid down the following proposition at page 530:

> **"when it is sought to prove by circumstantial evidence that a person has committed a crime, the evidence of collateral circumstances and facts from which the prosecution seek to infer guilt of the accused person must be such as leads uniquely to the conclusion that the accused person has committed the crime, in other words, the collateral circumstances and facts proved must be capable of explanation on no other hypothesis than the accused person committed the crime. If there are more that one inference to be drawn from such circumstances and facts or if the only inference is merely one of suspicion, the prosecution must fail**."

In the instant case the prosecution did not charge the appellant and Victor Selormey on the conspiracy charges on the basis of an agreement between them but on the basis that they acted together for a common criminal purpose. It is appropriate in my view therefore to review the evidence on record to see whether on the conclusion of the trial the prosecution had succeeded in or had been able to establish that the appellant and late Victor Selormey had acted together with the common purpose of willfully causing financial loss to the State and also defrauded the state by false pretences and whether that common purpose was for a criminal objective. The prosecution adduced evidence to prove the following facts which on the main are not disputed.

(1) That the appellant and Victor Selormey were the only Co-chairmen of the Oversight Committee of the TIP fund programme.

(2) The appellant solely contracted with Dr. Frederick Owusu Boadu to prepare a study proposal for the establishment of a Science and Technology Park/Valley – This contract is evidenced by Exhibit G:

(3) Exhibit G. was submitted by Dr. Boadu's College, Texas, USA to the Gateway Secretariat through the Ministry of Trade and Industry, Accra

(4) The beneficiary of Exhibit G was to be the Gateway Secretariat but under the auspices of the Ministry of Trade and Industry. The fee under the contract was pegged at not exceeding USD 400,000.00

(5) Exhibit G. had its own prescribed schedule of payment as follows:

(a) USD 100,000.00 on receipt of a copy of the contract by the Gateway Secretariat i.e. The client or beneficiary

(b) USD 150,000.00 upon the beneficiary's receipt of the draft Report acceptable to it and

(c) Finally the last installment of USD 150,000.00 upon the beneficiary's receipt of the final Report acceptable to it. The consultant was also to submit invoices in duplicate to the coordinator at the Gateway Secretariat.

(6) The appellant wrote to late Victor Selormey to effect payment for the work allegedly done by Dr. Frederick Owusu Boadu. On the face of Exhibit G. Victor Selormey was not a signatory and yet when he received Exhibit P from the appellant he (Victor Selormey) authorized final payment in accordance with the terms of the consultancy Service Agreement when the appellant did not according to him discuss Exhibit G. with his Co-chairman- Victor Selormey and when Exhibit G (the contract) or a copy of it was never attached to Exhibit P and did not disclose how much balance of the "final payment" to be made and yet Victor Selormey knew that the balance was USD 300,000.00 and accordingly authorized payment of that exact amount. According to the appellant, even though on their face Exhibits A and B were copied to him and Dr. Boadu, the appellant's defence or case is that he did not receive Exhibits A and B. If the appellant did not receive Exhibit A how did he know that an earlier payment had been made to Dr. Owusu Boadu for him to request in Exhibit P that Victor Selormey should authorize a 'final payment' to Dr. Owusu Boadu,

(7) There is again undisputed evidence from PW 9 Bibilazo that Exhibit G prepared by Dr. Frederick Owusu Boadu was not a feasibility study and the appellant's own witness Mrs. Agnes Batsa (DW2) dropped the bombshell when in her testimony she said emphatically that it was the appellant who introduced the words 'feasibility study' in his earlier letter to Victor Selormey to authorize the payment of the initial USD 100,000.00 to Dr. Owusu Boadu.

(8) The appellant in his own evidence admitted writing such an earlier letter even though he denied that he used the words 'feasibility study' in that letter.

(9) If even the appellant did not indeed receive Exhibits A and B he knew something about the introduction of those words in Exhibits A and B according to his own witness – Mrs. Agnes Batsa (Dw2).

(10) Despite the plain and unambiguous heading or title of Exhibit P. Victor Selormey ignored it and introduced his own heading or title in Exhibit B as follows, "Appointment of consultant to conduct feasibility study into the establishment of the Science and Technology Park/Valley." Why did Victor Selormey do this?

(11) In his letter- Exhibit P to Victor Selormey the appellant wrote interalia as follows:

> "**I have received and reviewed the final copy of the Study Proposal which we initiated as part of the Gateway Phase11 Programme**".

Is it not reasonable to infer from the use of the pronoun 'we' in exhibit P that the appellant was referring to himself and Victor Selormey and yet would want the court to believe his story that he did not discuss exhibit G-the contract with Victor Selormey.

(12) The appellant in collaboration with Victor Selormey hurriedly caused to be paid to Dr. Owusu Boadu USD 400,000.00 being the whole contract sum and contrary to the written payment terms or payment schedule of Exhibit G. when the Gateway phase II programme had not even commenced, why this indecent haste.

All these facts and others were established by the prosecution through both direct and circumstantial evidence. The circumstantial evidence adduced by the prosecution went beyond mere suspicion. Section 18 (2) of the Evidence Act, 1975 (NRCD 323) Provides that;

"An inference is a deduction of facts that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action". Mr. P.K Twumasi in his book of above reference at page 111 paragraph 3 and page 112 paragraphs 1 states this on the law of conspiracy:

"In conclusion the legal position is that conspiracy may be proved in one of two ways. The first mode of proof is by direct evidence which admittedly is very rare to obtain. Such evidence may be offered by a person who may have concurred in the conspiracy for the sole aim of detecting and punishing the actual conspirators or by the confession statements of some of the conspirators themselves, or by any eye witness account. The second and the most regular mode of proof is by establishing evidence of overt acts. The overt acts are done to carry out the criminal objective."

The offence of conspiracy has therefore two essential elements, namely

(1) The actus reus – the agreement or the act or acts and (2) the mens rea or the mental element. For our purposes here I will not discuss in detail the element of agreement because the charge of conspiracy against the appellant and Victor Selormey are that they acted together for a common criminal purpose or objective therefore the prosecution were required to prove only the overt acts of the appellant and his accomplices. It is not essential that a prior agreement should have been made between the appellant and Victor Selormey and other unknown persons prior to their acting together. The essence of the acting together lies in the situation where A for instance is doing something for the purpose of committing a crime and another person or persons goes to his assistance and the two or more of the conspirators act together or in concert for a common criminal purpose then they might thereby be held to have conspired to commit a crime. But if B is however unaware of it or rejects, A's or the other conspirators overtures or assistance there is no conspiracy although B may be guilty of abetment of the offence committed or attempted by A. See R. V. Leigh [1775] I C and K 25, 28 17 E R. 897 [1959] C.L.R. 211 and The Republic V. Ibrahim Adam & Ors (supra) p.24. See also State V. Otchere & Ors (supra). Thus in a charge of conspiracy the overt acts of each of the alleged conspirators must be looked at or examined to see whether they were done for a common criminal purpose. It is not enough to show that the appellant and Victor Selormey and Dr. Boadu and unknown persons acted independently to pursue the same end for a conspiracy is not merely a concurrence of acts or wills but a concurrence resulting in agreements for a criminal objective. It must be shown that they agreed or acted together with a common purpose to commit a crime. It is the agreement or collaboration with a common criminal purpose that constitutes the conspiracy and not just a collaboration that produces a result that is criminal.

The crucial question in this case is therefore this: is there any evidence that the appellant and Victor Selormey acted together or collaborated for a common criminal purpose? There is no doubt that each of them acted on some aspect of the Gateway Phase 11 Programme. What is the meaning of acting together? 'Together means co-operation and interchange between constituent elements, members etc in or into contact or union with each other, in or into one place or assembly, at the same time'. See Collins English Dictionary. (2nd ed) [1986] p. 1600.

In my opinion there is evidence that the appellant, Victor Selormey and Dr. Frederick Owusu Boadu acted together or collaborated in respect of the Gateway Programme. Did that acting together or collaboration amount to a conspiracy?. For an answer let us look at the roles of each of them.

Dr. Frederick Owusu Boadu and the appellant prepared and signed the contract –Exhibits G. Dr. Frederick Owusu Boadu prepared the exhibit G referred to as a Study Proposal. This was done at the

request of the appellant. The appellant and Victor Selormey were the co-chairmen of the Oversight Committee supervising the Gateway Project. It was the appellant, who wrote to Victor Selormey requesting him to authorize payment to Dr. Boadu in respect of Exhibit G. Victor Selormey instructed Ecobank to pay Dr. Boadu the initial USD 100,000.00 according to Exhibit A for a feasibility study allegedly conducted by Dr. Boadu when no such feasibility study was conducted by Dr. Boadu. Again by Exhibit P the appellant requested Victor Selormey to make the 'final payment' to Dr. Boadu in respect of the same Exhibit G –the contract. Even though Exhibit P did not state or mention what amount of money the 'final payment' was, Victor Selormey knew that it was USD 300,000.00 and wrote Exhibit B authorizing Ecobank to pay Dr. Boadu this exact amount of USD 300,000.00. This again in respect of Exhibit G.

There is evidence uncontradicted from the appellant's own witness that the appellant was the author of the words ' feasibility study' in Exhibit A when he knew very well that Dr. Boadu never conducted any such feasibility study and that what he did was a study proposal. Again even though Exhibit P talked about Study Proposal Victor Selormey chose to use the words 'feasibility study' in his Exhibits A and B. Was this a co-incidence or it was a grand design by the appellant and Victor Selormey to get the USD400,000.00 paid to Dr. Owusu Boadu when they knew very well that Dr. Owusu Boadu had not done any work in the form of a feasibility study and was not therefore entitled to payment for such a service. It is clear from section 23 (i) of Act 29 that the mental element of conspiracy is purpose that is the common purpose of the agreement or collaboration between the parties must be to commit the crime charged.

"This is so even were the crime contemplated is one that can only be committed recklessly or negligently or even is a crime of strict liability. See section II (1) (2), (3),(4) and (5) of Act 29.

"Purpose means the reason for which anything is done, created or exists, a fixed design, outcome or idea that is the object of an action or other effort, fixed intention in doing something; determination. There must be an intention to carry out the unlawful purpose" 'See Republic V Ibrahim Adam and 4 others (supra) page 29 of the judgment. In the case of Yip-Chip-Cheung V. R. [1994] 99. C. App R. 406, Lord Griffiths emphasized this point at p. 410 as follows:

"The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea of the offence." See also R. V. Anderson [1986] A.C. HL27 per Lord Bridge at p.39 E.

It is clear from the facts enumerated above that the appellant and Victor Selormey clearly acted together with Dr. Owusu Boadu for a common purpose for a criminal objective namely to willfully cause financial loss to the state and to defraud by false pretences the State/Government of Ghana. In the circumstances of this case the likelihood of financial loss to the state at the time the appellant and Victor Selormey acted together with Dr. Boadu to present false state of facts in Exhibits A and B to Ecobank authorizing Ecobank to transfer the amount of USD 400,000.00 into the account of Dr. Frederick Owusu Boadu for no work done by Dr. Boadu was ought to have been obvious to them. At the time the appellant and Victor Selormey through their joint collaboration authorized Ecobank to pay Dr. Boadu by virtue of Exhibits A and B, they knew or ought to have known that Dr. Boadu had not rendered any service in the form of preparing a feasibility study for the Gateway Programme, yet they represented these false representations to the Government through Ecobank by means of which they obtained the consent of the Government to part with the whopping sum of USD 400,000.00 to Dr. Owusu Boadu. Clearly it cannot be seriously contended that the appellant and Victor Selormey did not intend to commit the offences of willfully causing financial loss to the State and or defrauding by false pretences, the Government of Ghana for a common criminal purpose.

On a totality the evidence or 'on all the evidence' on the record of proceedings in this case, it is clear that the appellant, Victor Selormey and Dr. Frederick Owusu Boadu by their various acts fraudulently represented to the Government of Ghana through Ecobank or the Managing Director of Ecobank that the amount of USD 400,000.00 was meant for the payment of a feasibility study purportedly conducted by Dr. Frederick Owusu Boadu for the Establishment of Science and Technology Community Park/Valley when in fact no such 'feasibility study' was conducted by Dr. Owusu Boadu. It is also my view that the appellant and Victor Selormey knew that the state of facts stated in exhibits A and B were false. By their collaborative acts, the State did lose its ownership of the amount of USD. 400,000.00 to Dr. Frederick Owusu Boadu

The totality of the evidence leaves no doubt in my mind that the appellant actively and intentionally collaborated with Victor Selormey in the preparation of Exhibits A and B and their presentation to the Government through Ecobank and their intention was clearly to commit the crimes charged.

In the instant even before the introduction of the testimony of Mrs. Batsa (DW2)The prosecution has adduced sufficient witness overt acts of the appellant, Victor Selormey and Dr. Owusu Boadu itemized above from which a reasonable inference could be drawn incriminating the appellant and Victor Selormey to the offence of conspiracy. In other words even on the conclusion of the prosecution's case at the court below, the prosecution had produced sufficient facts from which the disputed facts (circumstantial evidence) from which conspiracy could be presumed or inferred. This was confirmed

by this appellate court differently constituted in Criminal Appeal No 112/22/05 dated 29/3/2006 (unreported)in dismissing the appeal against the rejection of the submission of no case to answer by the trial court. On all the evidence before this court the prosecution's case has been greatly further enhanced by the evidence of the appellant's own witness-Mrs. Agnes Batsa(DW2)This evidence of the prosecution coupled with the uncontradicted and uncontroverted evidence of DW2 had clearly excluded any element of truth or reasonable probability or any doubt in the case of the prosecution that could enure to the benefit of the appellant on the conspiracy charges. There was therefore no need for the trial Judge in my view to go beyond the mere denial of the offences by the appellant to consider that defence in the stages or along the guidelines enumerated in the cases of Amartey v. The Republic[1964]GLR256 and Togbe Fiti iv v. The Republic (supra).I am satisfied that on the totality of the evidence in the record of proceedings the prosecution had sufficiently and satisfactorily prove the guilt of the appellant on counts 1,3and 5 beyond all reasonable doubt and that the trial Judge was right in convicting him on these counts. The appeal is accordingly dismissed on counts 1,3 and 5.

Let me now deal with the substantive offences of willfully causing financial loss to the state and defrauding by false pretences with which the appellant and Victor Selormey had been charged. I will like to deal firstly with the charge of defrauding by false pretences. This charge is the subject matter of counts 6 and 7.

"Count 6; Statement of offence

Defrauding by false pretences contrary to section 131of the Criminal Code, 1960(Act29)

Particulars of offence

Daniel Kwesi Abodakpi and Victor Selormey between May and December, 2000 at Accra in the Greater Accra Region and within the jurisdiction of this court did represent to the Managing Director of Ecobank (GH.)limited that a Dr. Frederick Owusu Boadu had conducted a feasibility study on the establishment of a science and technology community Park/valley and by means of such representation obtained the consent of the Government of Ghana to part with an amount of one hundred thousand US dollars($1000,000.00) equivalent in cedis which representation he Knew to be false and which he (sic) made with intent to defraud."(Emphasis mine)

Section 131 of the Criminal Code, 1960(Act 29) as amended by the National Liberation Council Decree (NLCD) 398 paragraph 5 thereof reads:

"Whoever defrauds any person by any false pretence will be guilty of a second degree felony."

'False pretence has been defined in section 133(1) of the same Code as"… a representation of the existence of a state of facts made by a person either with the knowledge that such representation is false or without the belief that it is true and made with intent to defraud."

And section 132 of the same Code defines the offence of defrauding by false pretences as follows:

"A person is guilty of defrauding by false pretences if by means of any false pretence or by personation; he obtains the consent of another person to part with or transfer the ownership of anything."

Therefore under section 133 of the Criminal Code, 1960 (Act 29) for the prosecution to succeed in proving the offence of defrauding by false pretences they are required by law to prove the following:

(1) That the accused made a representation of the existence of a state of facts.

(2) That the representation was made either by written or spoken words or by impersonation.

(3) That the representation was made with the knowledge that it was false or made without the belief that it was true.

(4) That the representation was made with intent to defraud.

(5) That the representation was made by the accused (or by a person) and that by that representation he obtained the consent of another person to part with something. In a criminal trial of an accused for the offence of defrauding by false pretences if the prosecution fails to adduce sufficient and satisfactory evidence to prove all the above stated ingredients of the offence their case must fail. Even a failure by the prosecution to prove sufficiently any one of these essential ingredients of the offence will be fatal to the prosecution's case. It may also be noted that the mens rea sufficient to prove the substantive offence (or whatever offence the accused is charged with) is not necessarily sufficient to support the charge of conspiracy to commit that offence. This is because mens rea of conspiracy is always common purpose, a specific intent. But the mens rea of the substantive offence may be intention, recklessness or negligence: or it may require no mens rea at all. See section 11(2), (3), (4) and (5)of the Criminal Code,1960(Act 29).

I now turn to the evidence on counts 6 and 7. In his judgment the trial Judge after referring to the evidence of PW1-Mr.kwame Akaba who gave evidence as a representative of Ecobank stated as follows at page 926 lines 29-continued at page 927 lines 1 and 25: of vol.2 of the record of proceedings;

"In fact no such feasibility study was ever conducted by the said Dr. Boadu. As a result of the false representation an amount of $400,000.00 was transferred into the personal account of Dr. Fred Boadu causing financial loss to Ghana Government..."

The trail judge then quoted Exhibit P requesting Victor Selormey to authorize "final payment" of $300, 000.00 US dollars to Dr. Fred Owusu Boadu and continued as follows at page 927 lines 25-28 of vol.2 of the record of proceedings:

"2nd accused on receipt of Exhibit P wrote Exhibit B to the Ecobank for the bank to pay US $300, 000.00 into the personal account of Dr. Fred Owusu Boadu.

Copies of Exhibits A and B were sent to the 1st accused and Dr. Fred Owusu Boadu."

He then concluded as follows at page 926 lines 1-4 of vol.2 of the record of proceedings:

"From what I have stated above the counts of defrauding by false pretences have been established by the prosecution witnesses. The 1st accused is therefore found guilty on counts 6 and 7. He is convicted on counts 6 and 7 accordingly".

Learned counsel for the appellant has taken a swipe at this conclusion reached by the learned trial judge hence ground (f) of the appeal which reads:

> **"In respect of the charge of fraud by false pretences contrary to section 131 of the criminal code 1960(Act 29)the trial judge erred in failing to realize that there was absolutely no evidence of any representation made by the appellant to Ecobank on the basis of which it acted**."

Under this ground of appeal learned counsel for the appellant contended that PW1-Mr. Akaba never said anywhere in his evidence that Victor Selormey (2nd accused in the case) made any false representation to Ecobank which made the bank to pay the amount of US$400, 000.00 to Dr. Fred Owusu Boadu. Learned counsel for the appellant contended that PW1's testimony was rather that the Ecobank was not influenced in anyway by the contents of Exhibits A and B in transferring the $400,000.00 U.S. dollars from the TIP fund account in that bank into the private account of Dr. Fred Owusu Boadu. In other words that the Ecobank was not influenced by any false representation in Exhibits A and B to transfer that money into Dr. Boadu's account. According to PW1 Victor Selormey being the custodian of that TIP account his signature on Exhibits A and B was sufficient and operative to permit the transfer of that money into the account of Dr. Boadu. Learned counsel for the appellant therefore submitted that the prosecution had failed to prove the most essential element of the offence of defrauding by false pretences against the appellant because (1) there is no evidence that the appellant made a representation which he knew to be false and which representation another person relied on to part with something and (2) that there is no evidence that Ecobank or the Managing Director of Ecobank transferred the $400,000.00(US dollars) into the account of Dr. Fred Owusu Boadu because of any false representation made to it or to him by the appellant. The trial judge therefore erred in law in convicting the appellant on counts 5,6 and 7.

In his written submissions, the Chief State Attorney discounted that submission by the learned counsel for the appellant. He also quoted the testimony of PW1 and the finding made by the trial judge in respect of the charges in counts 5, 6 and 7 and then submitted that;

> **"it is my submission that on the counts of defrauding by false pretences the prosecution led evidence to show that the representations made to the Managing Director of Ecobank(Gh) Limited by Exhibits A and B were false and that the appellant and Victor Selormey were aware of the falsity of the representations yet same were made with intent to defraud**."

It seems to me that there is a misapprehension and a misreading of the particulars of counts 6 and 7and this permeated throughout the submissions of both counsel for the appellant and the Republic. The submissions of both counsels are at variance with the particulars of counts 6 and 7. A very careful and critical reading and examination of the particulars of counts 6 and 7 reveals inevitably in my view that the victim of the alleged fraud or false representation, if any is not Ecobank or the Managing Director of Ecobank but the Government of Ghana. The key words or phrase in the particulars of counts 6 and 7 are "… and by means of such representation, obtained the consent of the Government of Ghana to part with an amount of …"

Therefore if Exhibits A and B were proved to be false and the appellant and Victor Selormey had knowledge that they were false, then it is these false state of facts that enabled the appellant and Victor Selormey or it was by means of these false state of facts that the appellant and Victor Selormey obtained the consent of the Government of Ghana to part with her ownership of $ 400,000.00 (US dollars) to Dr. Fred Owusu Boadu. Exhibits A and B, if false, were only therefore made to pass to the Government of Ghana through Ecobank or the Managing Director of Ecobank. Nowhere in the particulars of counts is 6 and 7 it stated that by reason of the false representation the appellant and Victor Selormey obtained the consent of Ecobank or the Managing Director of Ecobank to part with the $400,000.00 (US dollars). PW1- Mr. Akaba did not also say so in his testimony, so I do not know where learned counsel for the appellant and the Chief State Attorney got that impression. Perhaps the clumsy way in which the particulars of counts 6 and 7 are drafted created this impression.

Now section 132 of Act 29/60 provides that;

> **"A person is guilty of defrauding by false pretences if, by means of any false pretence or by personation he obtains the consent of another person to part with or transfer the ownership of anything."**

The particulars of counts 6and 7 have averred in their respective particulars that by virtue of the false representations contained in Exhibit A and B a false representation known to the appellant and Victor Selormey, the appellant and Victor Selormey by means of that false representation obtained the consent of the Government of Ghana to part with ownership of USD100,000.00and USD 300,000.00respectively to Dr. Fredrick Owusu Boadu. So the question is this; can the Government be

said to be a person within the meaning of section 132 of Act 29 I will answer this question in the affirmative. Section 1of the Criminal Code,1960 (Act29)has defined the word 'person' as follows.

> **"Person for the purposes of any provision of this Code relating to defrauding a person or to committing any offence against the property of any person includes the Republic of Ghana"**
>
> **Section 32 of the Interpretation Act 1960 (C.A.4) defines "Government" to "include an authority by which the executive power of the Republic is duly exercised in a particular case**"

The Republic of Ghana therefore exercises it's powers through the Government of the day. The Republic of Ghana being an inanimate organ thinks and acts through the Government .This court must therefore adopt the purposive approach in the construction of section 132 of the criminal code,1960(Act29)in order to avoid an absurdity because a literal and strict construction of section 132 of Act 29 will result in absurd situations or consequences. "It is the duty of the court to aim at doing substantial justice between the parties and not to let that aim be turned aside by technicalities."

See Okofo Estates Ltd v. Modern Signs Ltd [1996-97]SCGLR 224 at page 230. On the issue of the need for construing legislation so as to avoid injustice the words of Taylor JSC.(as he then was)in Kwakye v. Attorney-General [1981]1GLR 944 at p.1070 are apt. He said ;

> **"The function of the Supreme Court in interpreting the constitution or any other statutory statement is not to construe written law merely for the sake of justice. If therefore a provision in a written law can be interpreted in one breadth to promote justice and in another to promote injustice I think the Supreme Court is bound to select the interpretation that advances the course of justice**"

This view accords with Lord Denning's in the case of Northman v. Barnett LBC[1978]1W.LR220 where Lord Denning advocated the adoption of what is known as the 'apparent Legislative purpose' in the construction or interpretation of statutes or documents .As Lord Denning said in that case at p.228;

> **"Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words, if necessary- so as to do what Parliament would have done had they had the situation in mind**"

See also the cases of Eshun v. Poku [1989-90]GLRD128 and also Appiah v. Biani 1991 GLR. To me therefore to adopt the literal and strict method of construing or interperating the word "person" to exclude the Government in section 132 of Act 29 will be absurd, create injustice and do violence to the

legislative purpose of section 132 of the Criminal Code 1960(Act29) Besides section 4 (a)of the criminal code- Act29 prohibits a strict construction or interpretation of the provisions of the Code. Section 4 (a) of Act 29 provides;

> **"4(a) This code shall not be construed strictly either as against the State or as against a person accused of any offence but shall be construed amply and beneficially for giving effect to the purposes thereof."**

In my view to construe section 132 of Act 29 literally to mean that a 'person' only means a human being or a company will mean that the Government or the State can never be the victim of the offence of defrauding by false pretences. To me that will be absurd and smack of injustice I hold therefore that the word 'person' includes a human being or a company or the Government or the Republic of Ghana.

I agree with the leaned trial judge that Dr Fred Owusu was paid for no work done. Yes on the evidence on the record Dr Boadu did some work but the work he did was a study proposal and not a feasibility study. But he was not paid for a study proposal, he was paid for a feasibility study which he never conducted. It has also been contented that Victor Selormey was the custodian of the T I P Fund at Ecobank so he could disburse or cause to be disbursed that fund for any purpose. That may be so, but Victor Selormey was only a custodian of the TIP fund and not the owner of it. So in his custodial position he could only disburse or cause to be disbursed that fund lawfully and for a lawful purpose and in the interest of the Government and not for a criminal purpose or in a manner which is criminal or according to his won whims and caprices. The evidence on the record is that the disbursement of the $400,000.00 was illegal and fraudulent and that the appellant fully participated in, assisted and collaborated or acted together with Victor Selormey to fraudulently disburse that $400,000.00 (US dollars). The appellant cannot therefore in my view escape blame. On the evidence the appellant was the prime mover and part and parcel of the false representation in Exhibits A and B.

I take note of ground (d) of the appeal which complains that the trial judge erred in law when he adjudged the 1st accused had received copies of Exhibits A and B when there was no evidence led by the prosecution to establish this. Admittedly it is true that there is no direct evidence that the appellant did in fact receive Exhibits A and B even though they were copied to him. The law is that when an appellant appeals against a judgment on the ground that the judgment cannot be supported by the evidence the appellate count is entitled to look at the totality of the evidence on the record and come to its own decision one way or the other . Coupled with this principle of law is the equally important rule of the count that an appeal is by way of a re-learning.

Exercising my powers on the basis of these two salutary principles of law, I have reviewed all the evidence on the record and I have come to the conclusion that even though I concede that there is no direct evidence that the appellant did receive Exhibits A and B, the circumstantial evidence leads irresistibly and inferentially that the appellant did receive at least Exhibit A. If he did not receive Exhibit A, how did he know that an initial payment had already been made to Dr Fred Owusu Boadu so as to write in his letter Exhibit P requesting Victor Selormey to authorize the "final payment" to Dr Fred Boadu. How did Victor Selormey know that the "final payment" was for an amount of $300,000.00 when the appellant did not state any figure or amount in his letter –Exhibit P. In any case whether or not the appellant as a matter of fact received Exhibits A and B there is sufficient credible and satisfactory evidence that he knew of and was part of the introduction of the words "Feasibility Study" into Exhibits A and B. The incontrovertible evidence is that he was in fact the author of these words, see the evidence of Dw2 his own witness.

Learned counsel for the appellant also contended that the trial judge failed to make any findings of the specific intent necessary to prove the charge of defrauding by false pretence against the appellant.

Section 16 of the Criminal Code, 1960 (Act 29) states as follows:

> **" ….. an intent to defraud means an intent to cause, by means of such forgery, falsification or other unlawful act, any gain capable of being measured in money or the possibility of any such gain, to any person at the expense or to the loss of any other person**."

In the case of Bruce v. Commissioner of Police [1963] 1 GLR 36 the supreme court said this at page 40

> **"Intent to defraud, like all other intents: is incapable of direct proof, and if the prosecution proved that the natural consequence of the appellant's acts (in this case the alteration made in the licences) was to the Accra City Council, then, so long as the intent to defraud was averred in the particulars of the charge, the prosecution would be entitled to a verdict of guilty, unless the accused person offered an explanation which established that the Accra City Council was defrauded in that it lost financially by Bruce's forgeries and Bruce did offer an explanation which the trial judge rejected as unacceptable** .."

And in the case of the Republic v. Ibrahim Adam and 4 others suit No. FT/Misc. 2/2000, 28th April 2003 unreported, His Lordship Afreh J.S. C. sitting as an additional High Court judge dilated on this issue of intent to commit a crime as follows:

"Section 11(3) of Act 29 is generally interpreted as stating the well known presumption of intent that a person is presumed to intend the ordinary consequences of his voluntary act-see section 38 of the Evidence Degree, 1975 (NRCD 323). Applying the subsection's interpretation by the Supreme Court …. in Akorful v. State [1963] 2GLR371 it may be stated by reason of subsection 11(3) a court (or jury) is entitled to presume that the accused person intended to cause the prohibited consequence if in the absence of any explanation it is satisfied on the facts adduced by the prosecution it would have appeared to the accused if he had used reasonable caution and observation that there would be great risk of his act causing or contributing to cause the prohibited consequence. The presumption of intention is rebut table and not absolute and if the court believes the accused person's evidence relating to his intention or thinks it is probable and if the evidence raised a reasonable doubt in the mind of the court the accused person is entitled to be acquitted."

See also R. v. Amponsah [1938] 4 W. A.C. A. 120, and Adekora v. The Republic (1984-86) 2 G.L.R.345.

In the instant case the defence of the appellant is a mere denial of the offences charged. The explanation he offered was that it was Victor Selormey who could tell how the words 'feasibility Study' were introduced into Exhibits A and B, an explanation which must be looked at with great suspicion. The trial judge rejected the mere denial of the appellant. In the particulars of counts 6 and 7 is averred the words "with intent to defraud" and the prosecution adduced both direct and circumstantial evidence to show the acts of the appellant and Victor Selormey to establish that they caused financial loss to the State and to show that the appellant and Victor Selormey did and in fact defraud the Government of Ghana in the sum of $400,000.00 (US dollars). Based on this evidence or the totality of the evidence the trial judge rejected the mere denial of the appellant. I think the trial judge was in his rights to reject that denial because the appellant did not offer any reasonable and acceptable explanation for his role or acts in the false representations contained in Exhibits A and B. The prosecution did prove that the Government of Ghana was defrauded in that she lost the financially by the appellant's and Victor Selormey's acts of false representation and since the appellant's denial and explanation did not show that there was no intent on his part to defraud, the appellant must be presumed to have intended the consequences of his acts. In conclusion I am satisfied that the conviction of the appellant on counts 5, 6 and 7 is proper. I accordingly dismiss the appeal on count 5, 6 and 7.

Wilfully Causing Financial Loss to the State,

Contrary to section 179 A(3) (a) of the Criminal Code, 1960 (Act 29). The appellant and Victor Selormey also faced the substantive offence of willfully causing financial loss to the state contrary to section 179 A (3) (a) of the Criminal Code 1960 (Act 29) in counts 2 and 4 relating to the USD 100,000.00 and USD 300,000.00 respectively.

The particulars of these 2 charges are stated in the same words except that the amount of money stated in them differs. The particulars of count 2 states:

" Particulars of offence.

Daniel Kwasi Abodakpi and Victor Selormey between May and December 2000 in Accra in the Greater Accra Region and within the jurisdiction of this court did act together to cause an amount of one hundred thousand US dollars ($100,000.00) equivalent in cedis to be paid to Dr Frederick Owusu Boadu as fees for feasibility Study forwards the establishment of a Science and Technology Park/Valley even though they knew the said Dr Frederick Owusu Boadu had not done any such study thereby willfully causing financial loss to the state"

As I said count 4 is in the same wording except that the amount stated in that count is US dollars $300,000.00. The conviction of the appellant on counts 2 and 4 forms part of the complaint under ground (a) of the appeal which is that "The verdict is unreasonable and cannot be supported by the evidence."

Learned counsel for the appellant referred to the evidence of Mr. Akaba (Pw1) who said under cross-examination that the Government had frozen the accounts of Dr Boadu and that Dr Boadu had invested some of the money in treasury bills and further that there had been further disbursements from the proceeds of the USD $400,000.00 transferred into the account of Dr. Boadu. In the view of counsel for the appellant this means the Government had custody of the amounts that had been allegedly lost to the state. Learned counsel for the appellant also contended that judging from pw1's evidence to the effect that a substantial portion of the amount had been invested in treasury bills the money was generating income.

Therefore there has been no financial loss to the state. In the view of learned counsel for the appellant, by the Government freezing the account it brought the moneys in the account under its control and cannot claim that it had lost that money. The prosecution, he contends did not prove that the Government had lost the funds transferred into the account of Dr Frederick Owusu Boadu. Learned counsel for the appellant submitted that on the basis of these facts the trial judge should have acquitted and discharged the appellant on counts 2 and 4 especially since the appellant was not shown to have

made any representation to Ecobank in connection with the transfer of the USD 4000,000.00 into the personal and private account of Dr Frederick Owusu Boadu.

The Chief state Attorney for the respondent, in his written submissions rebuffed the submissions of learned counsel for the appellant by submitting that the prosecution's evidence adduced through the ten witnesses and the appellant's own evidence and coupled with DW2's evidence the offences of willfully causing financial loss of the amounts of USD 100,000.00 and USD 300,000.00 respectively to the State had been proved beyond all reasonable doubt.

Now what are the essential elements of this offence:

Willfully causing financial loss to the state. In the case of The Republic v. Ibrahim Adam and 4 others (supra).

His Lordship D.K. Afreh J.S.C (as he then was), sitting as an additional High court judge took pains to dig deep into the origin of the word "willful "and the history of the offence of wilfully causing financial loss to the State culminating in the passage of PNDCL 78 on this "special offence of causing financial loss to the state. He cited and analyzed a plethora of judicial authorities foreign and local and finally summed up the essential elements of the offence of wilfully causing financial loss to the state at page 21 of the judgment under section 179 A (3) (a) of Act 29 as follows:

"(i) a financial loss

(ii) To the state

(iii) Caused through the action or omission of the accused and

(iv) That the accused

(a) Intended or desired to cause the loss or

(b) Foresaw the loss as virtually certain and took an unjustifiable risk of it, or

(c) Foresaw the loss as the probable consequence of his act and took an unreasonable risk of it, or

(d) 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."

These essential ingredients of the offence of wilfully causing financial loss to the State were confirmed and accepted by the court of appeal when that case went on appeal to the court of appeal.

The major ground which has been canvassed on behalf of the appellant in the instant case is that because the Government has frozen the account of Dr. Fred Owusu Boadu, the US$4000, 000.00 in that account is still available to the government so the State has not lost that money. Another limb of the contention that there has been no financial loss has the basis in the fact that part of that money has been used to buy treasury bills is earning income I find it extremely difficult to appreciate the force of that argument that there was no financial loss in this case to the Government. Indeed the trial judge concluded that there was a loss; the appellant contends that the trial judge's conclusion is not

supportable because there is evidence that the government has frozen that account and that the money or part of it earning income from treasury bills purchased with it. With all due respect I am unable to accept the argument of learned counsel for the appellant because as the Chief Stats Attorney has contented rightly in my view the fact that the Government has frozen that account of Dr. Boadu does not give ownership of that money or any ownership right over that money and its proceeds (income) if any to the Government. Even though the account has been frozen Dr. Boadu still remains the owner of that money and its proceeds if any. Since the Government has not confiscated that account or the money in that account, the Government still has no ownership right over that money. Freezing somebody's account is like putting a public officer on interdiction. The account is frozen or the person is on interdiction pending the occurrence of an event such as pending the completion of investigations into the opening and operation of that account or pending the completion of investigations into the conduct or acts of the person interdicted. That is why when a person is interdicted he continues to receive half salary until the interdiction is lifted. So interdiction does not mean dismissal or termination of employment of the person interdicted. Similarly when the Government freezes the account of somebody that person can make withdrawals from that account, of cause with the permission of the Government; this is the situation which normally happens following military take over of the Government. The reason is simply that mere freezing of the account does not automatically or legally confer ownership right over that account to the Government. I do not therefore agree with learned counsel for the appellant that the Government did not suffer any financial loss in respect of the US$400,000.00 and it's proceeds (income) because of the freezing of that account by the Government. I again agree with the learned Chief State Attorney that once the US$1, 00,000.00 was moved from the TIP/NTE financing facility and the US$300,000.00 was also moved from the provision made for logistic support for the Ministries of Finance and Trade and Industries (as evidenced by Exhibits A and B) opened by Ecobank being public funds into the private and personal account of Dr. Boadu those amounts are a loss to the State. The Government cannot have access to these moneys without putting in place a legal process for that purpose. There is even evidence on record indicating that Dr. Boadu had opened a cedi account at Ecobank in April 2000 and that between August and December 2000 the cedi equivalent of the US$400,000.00 being ¢2, 732,387,880.00 was transferred into Dr. Boadu's account at Ecobank and that almost immediately after the lodgments were made Dr. Boadu instructed Ecobank to make substantial disbursements from the transferred amounts. Exhibit C again indicates that Dr. Boadu's cash account was depleted almost immediately after the lodgments. Also, according to PW1 Dr. Boadu instructed Ecobank to purchase treasury bills with the balance in the account? All these pieces of evidence go to show that Dr. Boadu started exercising ownership rights over these amounts almost immediately after the lodgments of that money into his account at Ecobank. It has also been insistently contented on behalf of the appellant that the appellant did not make any false representation to anybody because he did not write Exhibits A and B.I think this submission flies in the

face of Mrs. Agnes Batsa's (DW2's) evidence that the appellant is the author of the words," feasibility study" in Exhibits A and B and that in the Civil Service Procedure when you introduce a particular title or head in a letter, you do not change it in subsequent correspondences in connection with the same subject matter. DW 2's said evidence stands on the record uncontradicted and uncontroverted. So the question is when the appellant used these words in his first letter to Victor Selormey when he knew that Exhibit G-the contract was not a feasibility study was that not a false representation? Did the appellant not foresee or could he not have foreseen the consequences of that false representation. If the appellant had used reasonable caution and observation would it not have appeared to him that his act in using the words" feasibility study" knowing full well that the work or service Dr. Fred Owusu Boadu conducted was not a feasibility study and therefore that his said act would cause or probably contribute to cause a financial loss of those amounts to the state. Did the appellant not foreseen or could he not have foresee that loss as the probable consequences of his act and yet he nevertheless took that unreasonable risk. Can it not be reasonably inferred that he intended or desired to cause financial loss to the state. It is in these circumstances that I do not find any merit in the submission that the appellant did not make any false representation to anybody leading to the loss of the US$400,000.00 to the state. I am satisfied that the prosecution had adduced sufficient evidence coupled with DW2's evidence to establish that the appellant and Victor Selormey willfully intentionally or deliberately caused financial loss or were reckless in handling the contract-Exhibit G. resulting in a financial loss of US$4000,000.00 to the state. The appellant was therefore properly convicted of the offences in counts 2 and 4. I accordingly dismiss the appeal on these counts.

Finally I deal with the appeal on grounds (e) and (j) of the appeal. Under these two grounds the complaint of the appellant is that the sentence imposed on him is unreasonable, excessive and totally unsupported by the facts and the evidence and that the trial judge erred in refusing to give reasons for imposing the maximum custodial sentence on him. It is trite law that the question of sentence is within the discretion of the trial court or Judge, except were the offence provides expressly its own penalty. In the case of Kwashie ie v. the Republic [1971] IGLR.488 at p.499 the court of appeal held in dismissing an appeal against sentence as follows:

"(1) when a trial judge is imposing a sentence on a convicted person there is no obligation on him to give reasons for the sentence that he imposes.

(2)…When a court decides to impose a deterrent sentence the value of the subject matter of the charge and the good record of the accused become irrelevant.

(3) In determining a sentence it is proper for a court to consider on the one hand the social or official position of the offender and on the other that the offence may be aggravated by reason of such position."

And in Imprain v The Republic [1991] IGLR. holding (ii)Kpegah J.(as he then was) said:

"In deciding whether a sentence was too severe and ought to be interfered with or not, the relevant consideration was not the limit of the trial court's sentencing powers as prescribed in the Courts Act,1971 (Act 372) but rather the gravity of the offence taking into consideration all the circumstances of the offence…"

In the instant case the offence of defrauding by false pretences is a second degree felony and under section 296(5) of the Criminal Procedure Code, 1960(Act 30 the maximum sentence for defrauding by false pretences is 25years under section 179(D) of Act 29 "a person convicted of a criminal offence specified in this chapter is liable to a fine of not less than two hundred and fifty penalty units or to a term of imprisonment not exceeding ten years or to both the fine and the imprisonment."

The appellant was sentenced to ten (10) years imprisonment on each counts 1,2,3 and 4 also 10yearsHL on each counts 5,6 and 7 without a fine. The sentence was therefore within the sentencing limits of the trial judge. Looking at the maximum sentence of ten years for willfully causing financial loss to the state and the maximum sentence of 25 years for the offence defrauding by false pretence I think that the sentence of 10 IHL imposed on the appellant which was to run concurrently, was not too excessive, and unreasonable in the circumstances. In any case the court takes judicial notice of the fact that the appellant has since received a Presidential reprieve for the remaining part of his sentence having already served about sixteen (16) months of his sentence. Besides it has not been shown that the trial judge exercised his discretion wrongly or improperly in his imposition of that sentence on the appellant. The appeal is accordingly dismissed on the grounds (e) and (j) of the appeal.

In respect of the cross -appeal I am satisfied that the trial judge, having convicted the appellant on the charges, erred in law in not making a restitution order in respect of the US$400,000.00infavour of the victim which is the Government of Ghana. Since the appellant was also convicted of an offence involving dishonesty such as stipulated under section 147 c of the Criminal Procedure Code, 1960(act 30),to wit defrauding by false pretences. I accordingly allow the cross appeal and make an order of restitution of the US$400,000.00 in favour of the State/Government against the appellant.

In conclusion the appeal against the conviction and sentence if the appellant on each of the seven courts is dismissed.

(SGD) S. E. KANYOKE
(JUSTICE OF APPEAL)

ACQUAYE, JA:-

The appellant was charged together with the late VICTOR SELORMEY with conspiracy to cause financial loss to the State contrary to Sections 23(1) and 179A(3) of the Criminal Code Act 29/1960 and causing financial loss to the State contrary to Section 179A(3) of the same code. The two were also charged with conspiracy to defraud by false pretences contrary to Sections 23(1) and 131 and defrauding by false pretences contrary on Section 131 of the Criminal Code 29/60. The 2nd Accused died in the course of the trial but the trial proceeded and the appellant was convicted on all the charges and sentenced to Ten Years I.H.L. It is against the conviction and sentence that the appellant has appealed to this Court.

I have had the benefit of reading the judgment of my two senior brothers. I am of the view that there was evidence beyond reasonable doubt before the trial court to warrant the conviction and sentencing of the appellant. I share and associate myself with the views expressed by my brother Justice Kanyoke that the appeal has no merit and must be dismissed.

It is necessary to set out the facts on which appellant was tried and convicted. The appellant, a former Minister of Trade and Industries jointly chaired with the 2nd Accused a Trade and Investment Programmed (TIP) set up by the Government of Ghana and USAID under a United States aid of $80,000. Three accounts were opened at Ecobank for this programmed. The first account was one in which the main funds to assist non traditional exporters was lodged. The second account was to receive repayments from the exporters and the third was an account in which interests were paid. Apart from the TIP fund there was also a Gateway Project managed tightly under the control of the World Bank. The appellant as supervising Minister of the Gateway Project sole sourced one Dr Frederick Boadu to prepare a proposal for a Science and Technology Community Park for a fee of $400,000. The evidence is that proposals are not paid for but the Accused Persons conspired and misdescribed the proposal as a feasibility study and succeeded in getting Ecobank to pay for it from the interest account.

It was argued for the appellant that by freezing the accounts of Dr Frederick Boadu, the Government brought the monies under its control so the Government cannot claim that it had lost any money. It must be noted that the government lost the use of the money immediately it left its authorized accounts and entered that of Dr Frederick Boadu. The freezing of Dr Frederick Boadu's accounts does not return the money into Government chest. That money can only go back into Government chest by an Order of Restitution by the court as the Republic's cross-appeal seeks to do.

It was also argued for the appellant that the trial judge failed to consider the evidence of PW9, in that PW9's evidence showed that the appellant requested payment for a proposal Dr. Frederick Boadu was contracted to do. It is true Pw9 concluded at page 318 that the report Dr Frederick Boadu submitted was not a feasibility report. He had at the previous page (317) testified that:

> **"We have concluded that judging from the document we have looked at [proposal] and given that it is going to be given out to a consultant to be undertaken, there were two possible solutions that could take place".**

He then went on to described the two solutions as by either a local consultant or a foreign consultant and gave the figures of $75,000 and $150,000. The figures he gave relate to the undertaken, which was the preparation of the feasibility report. The figures did not relate tot e proposals which Pw4 had earlier testified that they were not to be paid for.

The third ground of appeal was that the trial judge failed to consider the defence of the appellant. It is true that after stating that he did not believe the evidence of the appellant the trial judge should have gone on to consider whether his defence was reasonably probable and his quilt proved beyond reasonable doubt. The appellants defence was a mere denial of the offences with a proviso that he recommended to the 2nd Accused to pay for a proposal. The appellant's testimony was belied by that of his own witness Dw2 Mrs. Batsa who said the "feasibility study" was introduced by the appellant in his first letter which heading could not be changed by Civil Service procedure. As the appellants defence had been shattered by his own witness there was no alternative defence for the trial judge to consider.

Pw10 also testified that the "feasibility study" was to paid from the interest account, but as there was insufficient money in that account the 2nd Accused wrote to Ecobank to transfer money from TIP 1 accounts into the interest account which was used to pay the $300 to Dr Frederick Boadu.

There is evidence that the TIP 1 account were to be used solely for lending to non traditional exporters and that it was the interest account TIP 3 which was to be used for ancillary purposes. Transferring money from TIP 1 account into TIP3 accounts to pay for this proposal was therefore fraudulent. The appellant had all along conspired with the 2nd Accused and he is equally guilty.

It is for these and the other reasons given by my learned brother that I find that there were sufficient evidence before the trial judge to justify the conviction and sentence of the appellant.

I agree that the sum of $400,000 or ¢2,732,387,880.00 paid to Dr Frederick Boadu's account should be paid back into government chest together with all interest it has earned from the treasury bills some of the money were used to purchase.

(SGD) K. A. ACQUAYE
(JUSTICE OF APPEAL)

YAW APPAU, JA

I had the opportunity a day or two ago, to read the elaborate decision just delivered by my elder brother Kanyoke, JA, which has been concurred by my brother Acquaye, JA. While I appreciate the industry he exhibited in that judgment, I do not share his conclusions that the judgment of the Court below was impeccable and should therefore not be disturbed. I sincerely believe that the judgment of the Court below was flawed and should not be made to stand. I proceed to give my reasons for saying so.

The appellant herein, Mr. Daniel Kwasi Abodakpi, is the Honourable Member of Parliament (MP) for Keta Constituency. He was once the Deputy Minister and later the Minister of Trade and Industry. On the 14th day of October 2002, he was charged together with the late Mr. Victor Selormey who was also a Deputy Minister of Finance under the same government, before the Fast Track High Court on seven (7) counts of conspiracy to commit crime, to wit; willfully causing financial loss to the State and defrauding by false pretences and the substantive offences of willfully causing financial loss to the State and defrauding by false pretences respectively; contrary to sections 23 (1), 179A (3) (a) and 131 of the Criminal Offenses Act, [Act 29] of 1960. The appellant was the 1st accused while the late Victor Selormey was the 2nd accused in the Court below.

They all pleaded not guilty to the charges but as fate would have it, Mr. Selormey who was the 2nd accused (A2) in the case, did not survive the trial. He died at a time he was supposed to call evidence in support of his defence. This was after the Court below had dismissed a submission of no case made on their behalf by their lawyers and had called on them to open their defence. His side of the whole story was therefore not told.

The appellant appealed to this Court against the refusal of the submission of No case to answer in the court below but this Court threw him out and ordered him to go back to the court below to open his defence. The trial High Court, after a full trial which spanned a period of about four and a half years, found the appellant who was then the only accused person in the case guilty on all the seven (7) counts of conspiracy, willfully causing financial loss to the State and defrauding by false pretences and convicted him accordingly on the 5th day of February 2007. He was sentenced to a prison term of ten (10) years IHL on each of the seven counts to run concurrently.

The appellant has appealed to this Court against his conviction and sentence. He filed his notice of appeal on 6th February 2007; i.e. a day after his conviction and sentence. He later amended his grounds of appeal with the leave of this Court on 28th January 2008 by adding further grounds of appeal. The grounds of appeal that form the basis of this appeal were numbered by the appellant in his statement of case or submissions as follows: -

"a. The verdict is unreasonable and cannot be supported by the evidence.

b. The judge erred in law when he failed to consider the evidence of some of the prosecution witnesses, particularly the evidence of PW 9 whose evidence was crucial to the determination of the issues.

c. The judge erred in law when he completely failed to consider the case for the defence including the evidence of witnesses called by the defence.

d. The judge erred in law when he adjudged that the 1st accused had received copies of exhibits 'A' &'B' when there was no evidence led by the prosecution to establish this.

e. The sentence imposed on the accused is unreasonable, excessive, baseless and totally unsupported by the facts and the evidence adduced at the trial.

f. In respect of the charge of fraud by false pretences, contrary to section 131 of the Criminal Code, 1960 (Act 29), the trial judge erred in failing to realize that there was absolutely no evidence of any representation made by the appellant to Ecobank on the basis of which it acted.

g. The trial judge erred in placing undue reliance upon the designation of "feasibility study" in correspondence about payment to Dr. Fred Owusu Boadu when the evidence of the prosecution clearly showed that the designation was irrelevant to making the payments.

h. The trial judge erred in disregarding the evidence of the defence without any reason.

i. The trial judge erred in not providing reasons for relying on certain evidence of the prosecution when such evidence was contradicted by other evidence of the prosecution.

j. The trial judge erred in refusing to give reasons for imposing the maximum custodial sentence on the appellant.

k. In stating that he disbelieved the defence of the appellant without more and proceeding to convict the appellant on the evidence of the prosecution, the learned trial judge, in effect, shifted the burden of proof from the prosecution onto the appellant, thereby occasioning a miscarriage of justice.

l. The learned trial judge failed to make any findings of the specific intent necessary to prove the charges leveled against the appellant".

The prosecution, which is the respondent in this appeal, also cross-appealed against the failure of the trial court to make a restitution order in respect of the US$400,000 in favour of the State.

Though counsel for the appellant, in his detailed written submissions, tackled the grounds of appeal separately, with the exception of grounds (e) and (j), which he rightly lumped up together, it appears to me that all the other grounds of appeal raise issues of fact and in some few cases, mixed law and fact. Therefore, with the exception of grounds (e) and (j), which centre on the sentence imposed by the trial Court, the remaining grounds could be dealt with together under the omnibus ground that; 'the verdict is unreasonable and cannot be supported by the evidence'. I, however, choose to tackle the ground(s) that deal with the offences under counts 5, 6 and 7; i.e. conspiracy to defraud and defrauding by false pretences first and that is precisely ground (f). I find it expedient to deal with this ground (f) first, before coming to the other grounds, which touch mainly on the 'controversial' offence of 'wilfully causing financial loss to the State'.

Ground (f) reads: -

"In respect of the charge of fraud by false pretences, contrary to section 131 of the Criminal Code, 1960 (Act 29), the trial judge erred in failing to realize that there was absolutely no evidence of any representation made by the appellant to Ecobank on the basis of which it acted".

Before I make any attempt to refer to and analyze or scrutinize the submissions of both the appellant and that of the respondent on this ground, I think it would make sense, particularly for clarity of thought, to reproduce the charges leveled against the appellant and the deceased A2 on this issue of conspiracy and fraud by false pretences, which fall under counts 5, 6 and 7 on the Charge Sheet presented to the Court below and then the provisions of the law as contained under sections 23 (1) and 131 of the Criminal Offences Act under which the appellant was charged.

Counts Five (5), Six (6) and Seven (7) of the Charge Sheet read:

COUNT FIVE

STATEMENT OF OFFENCE

Conspiracy to commit crime namely; defrauding by false pretences contrary to section 23 (1) and section 131 of the Criminal Code 1960, Act 29.

PARTICULARS OF OFFENCE

1. **Daniel Kwasi Abodakpi and Victor Selormey, between May and December, 2000 at Accra in the Greater Accra Region and within the jurisdiction of this court, acted together with a Dr. Frederick Boadu and persons unknown with a common purpose to defraud the State.**

COUNT SIX

STATEMENT OF OFFENCE

Defrauding by false pretences contrary to section 131 of the Criminal Code 1960, Act 29.

PARTICULARS OF OFFENCE

Daniel Kwasi Abodakpi and Victor Selormey, between May and December 2000 at Accra in the Greater Accra Region and within the jurisdiction of this court did represent to the Managing Director of Ecobank (Gh) Limited that a Dr. Frederick Owusu Boadu had conducted a feasibility study on the establishment of a Science and Technology Community Park/Valley and by means of such representation, obtained the consent of the Government of Ghana to part with an amount of One hundred thousand US dollars ($100,000.00) equivalent in cedis which representation you knew to be false and which you made with intent to defraud.

COUNT SEVEN

STATEMENT OF OFFENCE

Defrauding by false pretences contrary to section 131 of the Criminal Code 1960, (Act 29).

PARTICULARS OF OFFENCE

Daniel Kwasi Abodakpi and Victor Selormey, between May and December, 2000 at Accra in the Greater Accra Region and within the jurisdiction of this court did represent to the Managing Director of Ecobank (Gh) Limited that Dr. Frederick Owusu Boadu had conducted a feasibility study on the establishment of a Science and Technology Community Park/Valley and by means of such representation obtained the consent of the Government of Ghana to part with an amount of Three hundred thousand US dollars ($300,000.00) equivalent in cedis which representation you knew to be false and which you made with intent to defraud.

Sections 23 (1) and 131 of the Criminal Offences Act, 1960, (Act 29) on Conspiracy and Defrauding by false pretences also provide:

Conspiracy

"23 (1) If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime, as the case may be".

Defrauding by false pretences (Amended by NLCD 398, paragraph 5)

"131. Whoever defrauds any person by any false pretence shall be guilty of a second degree felony".

'Defrauding by false pretences' has been defined under section 132 of the Code as follows: -

"A person is guilty of defrauding by false pretences if, by means of any false pretence, or by personation he obtains the consent of another person to part with or transfer the ownership of anything". {Emphasis added}.

'False pretence' has also been defined under section 133 (1) of the same Code as**: -"… a representation of the existence of a state of facts made by a person, either with the knowledge that such representation is false or without the belief that it is true, and made with an intent to defraud."**

By the provisions and definition of the offence of defrauding by false pretences as stated under **Sections 131 and 132 of Act 29/60**, as quoted above, there is no doubt to the fact that it is only against a person that such an offence could be committed. The offence of defrauding by false pretences could only be committed by a person against another person either through false representation made to that person or personation; with intent to defraud. I shall revisit this issue.

The facts of the instant case, which is now on appeal before us, that were presented to the court below as forming the basis of all the charges leveled against the appellant and the late Victor Selormey under the seven counts were that; the United States Agency for International Development (USAID) provided the government of Ghana an amount of $80,000,000.00 under a programme called Trade and Investment Programme (TIP). The amount was to be used to develop and promote export of non-traditional goods. The appellant and the late Victor Selormey who was the second accused in the court below (A2), were the joint-chairmen of a committee that was formed to see to the implementation of the programme. This committee was known as the 'oversight committee'. An audit inspection revealed that some irregular disbursements were being made from this TIP fund with Ecobank Limited. A Special Audit Task Force on the Pay Service was therefore mandated to conduct investigations into the disbursement of the funds. The investigations revealed that the appellant and "A2" had taken undue advantage of their positions as Chairmen of the oversight committee of the TIP Programme and fraudulently caused to be transferred a total of US$400,000.00 between August and December 2000 to the personal account of Dr. Frederick Owusu Boadu of Leebda Corporation, Texas, U.S. It was alleged that the appellant falsely represented to the Managing Director of Ecobank that the amount was meant for the payment of a '**feasibility report'** conducted by the said Dr. Boadu into the establishment of the Science and Technology Community Park/Valley when he knew no such report had been prepared.

After giving the above facts, the prosecution tasked itself to prove the under listed points to establish that the appellant and the late Victor Selormey conspired to defraud the State in the amount of $400,000.00 which constituted a loss to the State, thus the charges against him: -

1. That no feasibility report was ever conducted by Dr. Owusu Boadu as represented by the appellant and the late Victor Selormey.

2. That the relevant institutions that should have had knowledge of the contract or agreement between the Ministry of Trade and Dr. Boadu did not have any such knowledge.

3. That the personnel of the Gateway Project had denied any knowledge of the existence of the alleged contract.

4. That Phase 2 of the project, for which the alleged feasibility study or report was requested had not commenced as at the time the alleged or purported contract was executed.

Since the appellant and the late Victor Selormey both pleaded not guilty to all the charges, the prosecution (i.e. the respondent), was tasked to prove the charges against them according to law. This burden which is cast upon the prosecution in all criminal trials at all times is not discharged any how. The law has set down a standard upon which the burden is discharged. This standard of proof, which the law prescribes in all criminal charges, is notoriously known as, "**proof beyond reasonable doubt**".

According to P. K. Twumasi in his book, "Criminal Law in Ghana", published by the Ghana Publishing Corporation, at page 123, the first duty that every criminal court has to direct its attention to is this fundamental principle that the prosecution is under a duty to prove the guilt of the accused beyond reasonable doubt. The accused has no burden of proving his innocence. This is trite learning under the law on crime so I would not waste time on what constitutes reasonable doubt. However, I wish to stress and with much importance that this duty to prove charges leveled against another beyond reasonable doubt is a standard one. The principles that underlie this duty and how it has to be accomplished are the same. They do not change according to the status or the disposition of either the accused person or the complainant involved nor do they change according to the charges preferred nor the public perception, concern or reaction in respect of the offence and/or the accused person in question.

In this appeal, the appellant has urged this Court to conclude that the prosecution did not lead sufficient evidence to establish the ingredients of the offence of defrauding by false pretences and then conspiracy to defraud by false pretences against him so it was wrong for the court below to have convicted him on counts 5, 6 and 7.

According to the appellant, the charges under counts 5, 6 and 7 indicate that the appellant and the late Victor Selormey acted together with a Dr. Frederick Owusu Boadu and persons unknown with a common purpose to defraud the State through false pretences. However, the prosecution did not lead any evidence to prove the most essential ingredient of the offence of defrauding by false pretences, which is that the appellant had made a representation which he knew to be false and which representation another person relied on to part with an item to the appellant or a third person, which he would otherwise not have done. According to the appellant, he should not even have been called upon to make a defence under these counts.

The appellant referred to the testimony of P.W.1 Mr. Akaba from Ecobank, and submitted that there was nothing in Mr. Akaba's testimony that suggested that Ecobank released the amount involved in the contract with Dr. Frederick Owusu Boadu because of any false representation made to his Managing Director by the appellant as was contained on the charge sheet.

The prosecution, in its written submissions in reply, rebuffed this argument and also quoted the testimony of P.W.1 and the finding of the court below on this charge of defrauding by false pretences and contended

that the offences under counts 5, 6 and 7 were established by the prosecution so the court below was right in its findings. The respondent then submitted as follows: -

> **"It is my submission that on the counts of defrauding by false pretences,, the prosecution led evidence to show that the representations made to the Managing Director of Ecobank (GH) Limited by Exhibits 'A' and 'B' were false and the appellant and Victor Selormey were aware of the falsity of the representations yet same were made with intent to defraud."**

From the above quoted submission made by the respondent, there is no doubt to the fact that the respondent admits that the alleged false representation made to the M. D. of Ecobank was contained in two letters authored by the late Mr. Victor Selormey who was the 2nd accused (A2) in the Court below.

The respondent in its written submission, reminded this Court of the decision of the Supreme Court in the case of **ATIEMO v. COP [1963] 1 GLR 117**. What that decision says simply is that if there is evidence before the trial judge which the trial judge accepts to ground a conviction, an appeal court would not interfere with that conviction. I agree totally with the respondent on this principle, which is also applicable in civil trials where an appellate court is not supposed to interfere with findings of facts made by a trial court if those findings are supported by evidence before the trial court.

This principle is based on the basic legal norm that no person could be convicted on a crime without any evidence supporting the charge. So, if from the totality of the evidence before the trial court, there is no evidence on which the conviction of the accused on the charge(s) preferred could be based but the trial court nevertheless proceeded to convict, then an appeal court would be shirking its responsibility if it fails to interfere. As the respondent rightly quoted in its written submission against this appeal, Van Lare, J.A. in **Atto Kojo Okine v. C.O.P**, an unreported judgment of the Court of Appeal dated July-December 1959, which the Supreme Court relied on in the Atiemo case (cited above) stated clearly that it is not for the Court of Appeal to; **"re-try a criminal case in which a conviction has been based upon evidence which the trial court was <u>entitled to accept"</u>.** {Emphasis added}.

The important phrase there is; "**entitled to accept**" but not "**decided to accept**". Van Lare, J.A. chose his words very carefully because it is only evidence that could ground conviction on the preferred charge(s) that the trial court is entitled to accept or must accept as a matter of course.

If the trial judge decides to accept evidence that has no weight to ground conviction under the law; i.e. evidence that he is not <u>entitled to accept</u> to ground conviction, then the appellate court has an obligation to interfere when it is called upon to do so.

The charges under counts 6 and 7 indicate that the appellant and the late Victor Selormey did represent to the Managing Director of Ecobank that a Dr. Frederick Owusu Boadu had conducted a feasibility study on

the establishment of a Science and Technology Community Park/Valley and by means of such representation, obtained the consent of the government of Ghana to part with the sums of US$100,000 and US$300,000 respectively, which representation they knew to be false but which they made with intent to defraud.

The essential ingredients that the prosecution was required to establish before succeeding on these two charges of defrauding by false pretences were:

(i) That the person charged made a false representation or impersonated another person.

(ii) That the false representation or impersonation was made with intent to defraud.

(iii) That by means of the false pretence or personation, he obtained the consent of another person to part with or transfer the ownership of a thing, subject-matter of the charge.

The prosecution has to prove all three ingredients if it has to succeed as the failure to prove any one of the above ingredients is fatal to its case.

In the instant case the respondent was required under the law to produce credible evidence before the Court below to prove that the appellant and the late Victor Selormey made a false representation to somebody and by means of that false representation, which they made with intend to defraud, they obtained the consent of that person to part with or transfer the ownership of property, the subject-matter of the charge.
In my view, the respondent failed miserably to discharge its responsibility in this regard and the court below should have dismissed the charges against the appellant under counts 5, 6 and 7.
On these charges, this was what the court below said: -

> **"P. W. 1 gave evidence to the effect that the 2nd accused falsely represented to Ecobank (GH) Limited, the agent of the Government holding TIP funds that a feasibility study was conducted by Dr. Fred Owusu Boadu for which amounts of $100,000 (one hundred thousand dollars) and $300,000 (three hundred thousand dollars) were paid into the account of Dr. Fred Owusu Boadu. See Exhibits 'A' and 'B'.**
>
> **In fact no such feasibility study was ever conducted by the said Dr. Boadu. As a result of the false representation, the amount of $400,000 US Dollars was transferred into the personal account of Dr. Fred Boadu causing financial loss to Ghana Government."**

The Court below then quoted appellant's letter to the late Selormey, (i.e. Exhibit 'P'), which made Selormey wrote Exhibit 'B' and continued as follows**:**

> **"The 2nd accused on receipt of Exhibit 'P' wrote Exhibit 'B' to the Ecobank for the bank to pay US$300,000 into the personal account of Dr. Fred Owusu**

Boadu. Copies of Exhibits 'A' and 'B' were sent to the 1st accused and Dr. Fred Owusu Boadu.

From what I have stated above, the counts of defrauding by false pretences have been established by the prosecution witnesses. The 1st accused is therefore found guilty on counts 6 and 7. He is convicted on counts 6 and 7 accordingly".

In the first place, P. W. 1 never stated anywhere in his testimony that Mr. Victor Selormey who was the 2nd accused in the case, made a 'false' representation to Ecobank which made the bank to pay the amounts in issue as was concluded by the trial court in its judgment as quoted above. P. W. 1 never made any such statement and no other prosecution witness offered any such evidence before the Court below. Again, the evidence on record did not suggest in any way that Ecobank (Gh) Limited was holding the (TIP) accounts as the agent of the Government of Ghana as the Court below concluded. I am therefore at a loss as to the basis for the trial court's conclusion.

Even granted that Mr. Selormey did make such representation, as the trial court contended in its judgment, which was not the case anyway, there was no evidence from the prosecution that established that it was Mr. Selormey and the appellant who made that representation to the Managing Director of Ecobank. In fact, there was no such evidence before the lower court.

In the trial judge's own finding made, as quoted above, it was the 2nd accused the late Victor Selormey who made a representation to the Managing Director of Ecobank through Exhibits **'A'** and **'B'**. I could not therefore phatom the basis for which the court below connected the appellant to the contents of Exhibits '**A'** and **'B'**. However, if I understood the Court below very well, the argument was that since Mr. Selormey was made to write Exhibit **'B'** because of Exhibit **'P'**, which the appellant had previously written to Mr. Selormey, then the representation the late Mr. Selormey made in Exhibits **'A'** and **'B'** was prompted by the letter the appellant wrote to him; i.e. Exhibit **'P'**. I want to make it clear at this point that the Court below, in its judgment, did not make mention of any earlier letter written by the appellant to the late Mr. Victor Selormey apart from Exhibit **'P'**.

Be that as it may, does that mean that the representation made in Exhibits **'A'** and **'B'** to the M.D. of Ecobank were made by both the appellant and the late Selormey? I do not think so.

The court below referred to Exhibit **'P'** and quoted it in full. Incidentally, no where in Exhibit **'P'** did the appellant use the words '**feasibility study'**; the ground on which the court below based its findings of guilt against the appellant. The letter (Exhibit **'P'**) was to the effect that he the appellant had received the final report on the '**Study Proposals'** that his Ministry had contracted Dr. Boadu to prepare so he was authorizing the final payment in accordance with the terms of the consultancy agreement. The first thing any discerning mind would quest for, after reading Exhibit **'P'** would be the alleged consultancy agreement

or contract referred to in that letter. What does the contract talk about? Does it talk about a '**feasibility study'** or a '**study proposal'**?

The evidence before the court below as is contained in the record of appeal is overwhelming that the 2nd accused in the Court below, the late Mr. Victor Selormey, was a Deputy Minister of Finance and the government representative responsible for the operation of the account at Ecobank from which the US$400,000 was released or transferred to the account of Dr. Boadu. The appellant had nothing to do with the (TIP) account at Ecobank as P.W.2 misrepresented in his audit report Exhibit 'D', which formed the basis for the prosecution of the appellant and the late Mr. Selormey. P. W. 1 Mr. Akabah who was the prosecution's own witness, was emphatic about that.
What the appellant did by writing Exhibit **'P'** to the 2nd accused was to request the Ministry of Finance to pay for a consultancy service contract the Gateway Secretariat under the auspices of his Ministry, i.e. the Ministry of Trade, had signed with one Dr. Fred Owusu Boadu. Exhibit **'P'** did not mention any particular account from which the payment should be made.

After receiving Exhibit **'P'** from the appellant, Mr. Selormey wrote to Ecobank as the person in charge of that account for and on behalf of the government, directing Ecobank to release funds from that account for the payment of the contract. The decision to release monies from that account to pay for the contract was therefore that of the 2nd accused the late Mr. Victor Selormey who was then in charge of that account. The appellant had nothing to do with that decision. At least, the evidence on record did not establish that the appellant was part of the decision that decided to pay for the consultancy services from that particular account. The claim therefore that the appellant and the late Mr. Victor Selormey used their positions as joint-chairmen of the Oversight Committee to fraudulently disburse funds from this (TIP) account, which was an allegation contained in P.W.2's Audit Report (Exhibit 'D') and formed the basis of the prosecution of the appellant and the late Victor Selormey was not correct.

In fact from the record before this Court, Exhibit 'D'; i.e. the Audit Report, which was prepared by the auditing firm headed by P.W. 2, contains a lot of pitfalls and inconclusive findings, which its author P.W. 2 seemed to appreciate, albeit reluctantly, during cross-examination. I quote below a few of his answers during cross-examination by counsel for the appellant, which appear at pages 125-130 of the record of proceedings:
"Q. On page 1 of your Audit report particularly the second paragraph, there is a whole narration as to what the TIP Fund is supposed to be for. Can you tell this court the source of your information? That is where you got all this information.
A. I got this information from the Ministry of Finance.
Q. Who at the Ministry of Finance gave you all this information?

A. I don't recall exactly but it is public information and I got it from the Ministry of Finance.

Q. But you said somebody gave it to you there?

A. Yes, but I don't recall the person's name because if you go to USAID, you get the same information and it is public information.

Q. I am putting it to you that the information contained in paragraph 2 is wrong.

A. My Lord, I don't know that, that information is wrong.

Q. In the first place, you stated in paragraph 2 that the amount of money given to the Government of Ghana was $63.88 million. Is that not it?

A. It is my Lord.

Q. Are you aware that the total amount committed by USAID was $80 million?

A. I am not aware…

Q. Turn to page 3 of your report, which is Exhibit 'D', paragraph 4.0 (WORK DONE). You said that you conducted your audit in accordance with International Accounting and Auditing Standard. Does it also include having to invite the person who is being audited for his comments?

A. My Lord, I was not auditing any particular person. I was auditing the TIP Funds but not human beings.

Q. Mr. Baffour Awuah, you have produced a report touching and concerning two people who are standing trial here. You said that you conducted your audit in accordance with International Accounting and Auditing Standards and this is your document. My question is, would this International Accounting and Auditing Standard, also include having to invite the persons who are the subject of the audit for their comments?

A. Yes. If the people involved were in office, I would have invited or visited them.

Q. So, if they are no longer in office, there is no need inviting them.

A. If I make an effort to find them and I cannot get them, there is nothing I can do.

Q. Did you indicate in your report that you made efforts to contact them but you were unsuccessful? Is it anywhere in your report?

A. No my Lord."

In the first place, from the record of proceedings before the Court, the narration that P.W. 2 gave in his report as to what the TIP Funds were meant for was not correct or accurate. He himself conceded and said he did not know that it was wrong. Again, the figure he gave in his report as the amount USAID advanced to the Government of Ghana was not correct. While the actual amount advanced to the Government was US$80 million, which the prosecution admitted was the case from the facts they gave in the Court below as quoted supra, P.W. 2's report Exhibit 'D', which formed the foundation for the prosecution of the appellant and the late Victor Selormey, indicated that the amount was US$63.88 million. This means that P.W. 2 started his audit on a wrong premise; meanwhile he did not find it necessary to get in touch with the people

in charge of the TIP project for explanation as he himself conceded. How can the product of such a shoddy start be accurate?

Throughout the evidence led by the prosecution or the respondent, it was not established that Mr. Victor Selormey did not have any authority to order for the payment of the contract from that account. His only crime, as epitomized from the prosecution's case is that, he said he was paying for a '**feasibility study**' when he knew he was paying for a '**study proposal'**. At page 4 of its written submissions filed on 25/03/2008, the respondent summed up its case as follows**:**

> **"Appellant was so allergic to the words "Feasibility Study" because he realized that those words formed the gravamen of the prosecution's case. The prosecution's case hinged on the fact that USD 400,000 was paid to Dr. Frederick Owusu Boadu purportedly for a feasibility study he had purportedly prepared while in fact and in deed he never prepared any feasibility study. So he was paid for a non-existent Feasibility Study".**

This means that if Mr. Selormey's two letters; i.e. Exhibits **'A'** and **'B'** had used the phrase '**study proposals**' instead of '**feasibility studies'**, the prosecution/respondent would have smelt no crime.
From the evidence on record, the appellant never on any occasion made any representation to the M. D. of Ecobank with regard to the transfer of the US$400,000. If the appellant made any representation at all, then it was to the 2nd accused Mr. Selormey but not to the M. D. of Ecobank. So seriously speaking, the prosecution woefully failed to establish that the appellant ever made any representation to the Managing Director of Ecobank that Dr. Fred Owusu Boadu had conducted a feasibility study for which he should be paid any monies, which said representation made Ecobank to transfer the said amount and which said representation the appellant knew to be false but nevertheless made it with the intent to defraud. There is no such evidence before the trial court for the trial judge to have come to that conclusion.

Even quite apart from that, the important question that the trial court should have asked itself is; who is the victim of this alleged fraud? Is it the Managing Director of Ecobank to whom the alleged false representation was made or is it the State that owned the money in Ecobank?
In the case of **RABBLES v. THE STATE [1964] GLR, 580,** the Supreme Court held that an essential element of the offence of defrauding by false pretences is that; **'the victim of the offence had been induced by the representation to act to his detriment'.**

In this case now before us, who is the victim of the alleged fraud who was induced by the representation made in Exhibits **'A'** and **'B'** to act to his detriment? It cannot be the Managing Director of Ecobank

because the property that was parted with did not belong to him. He did not therefore part with the ownership of anything to his detriment.

From the record of appeal, the M. D. of Ecobank did not tell the Court below that the appellant and the late Selormey made certain false representations to him that made him part with his money or someone's money under his care. He did not testify at all. The only evidence called by the prosecution to support these charges of defrauding by false pretences was the testimony of P. W. 1 Mr. Akabah who is a staff of Ecobank and then Exhibits **'A'** and **'B'**; i.e. the letters that Victor Selormey wrote to Ecobank for the transfers of the monies, which the prosecution tendered in evidence through P.W. 1 Mr. Akabah.

As counsel for the appellant rightly argued in his written submissions, Mr. Akabah never stated anywhere in his evidence that the appellant ever made any representation to his Managing Director, not even to mention the falsity of any such representation, that made Ecobank to release the funds concerned. What P. W. 1 Mr. Akabah said was that the only letters that were addressed to the Managing Director of his Bank (Ecobank), i.e. Exhibits **'A'** and **'B'**, which the prosecution heavily relied on, were signed by Mr. Victor Selormey (A2). According to him, his bank never dealt with the appellant. From the contents of Exhibits **'A'** and **'B'**, they were only copied to the appellant. However, the fact that they were copied to him did not mean that he had a hand in their authorship.

Mr. Akabah (P.W.1) even went further to state categorically that it was the second accused (A2), i.e. the late Mr. Victor Selormey who was vested with authority to operate the {TIP) account from which the amounts were drawn so it was not what was represented in the two letters signed by Mr. Selormey that made the bank, of which he is the Operational Manager, to release the funds but because of the fact that the signature under the letter was operative. He added that the bank was bound to pay as it had no right to challenge the authority of the 2nd accused (the late Victor Selormey) with regard to the operation of the account in question. Ecobank was therefore not the agent of the Government of Ghana holding the (TIP) funds as the Court below concluded. It was the late Mr. Victor Selormey who was rather the representative of the Government as the Deputy Minister of Finance in charge of the (TIP) accounts.

Incidentally, the prosecution did not establish in any way, from the entire record of appeal that I have seen and read, that Mr. Victor Selormey had no authority to operate or order payments from that account. Though allegations were made initially that he did not consult other institutions that should have been drawn into the picture, the evidence before the court below and in the record of appeal suggests that Mr. Victor Selormey (A2) was in fact the Government representative responsible for the operation of this account and he needed not to consult anybody before doing so.

So if the victim of the alleged fraud by false pretences is not the Managing Director of Ecobank, then who is this victim? Is it the Government of Ghana as the charge sheet appears to tell? From the respondent's submissions, the victim is the Government of Ghana or the State. The charge is that the appellant made representations to the M. D. of Ecobank and as a result, obtained the consent of the Government of Ghana to part with $400,000 in two batches.

I have stated earlier on in this judgment that it is only a person against whom the offence of defrauding by false pretences could be committed and I added that I would re-visit this issue. I now proceed to do so.
Section 132 of the Criminal Code, 1960 (Act 29) defines 'defrauding by false pretences as; **"A person is guilty of defrauding by false pretences if, by means of any false pretence, or by personation, he obtains the consent of another person to part with or transfer the ownership of anything".** [Emphasis added].
From this definition, the offender and the victim must all be persons. They could either be physical persons (homo sapiens) or legal persons, i.e. (companies or other incorporated legal entities that have legal personalities). The Criminal Offences Act (Act 29) of 1960 under Chapter 1 on Interpretation defines 'person' as used in the Act as including the Republic of Ghana. This means that the Republic of Ghana or the State could also be a victim of the offence of defrauding by false pretences. However, the particulars of the charges do not indicate that the alleged false representation was made to the Republic of Ghana. According to the particulars, the false representation was made to the M. D. of Ecobank and by that false representation; the consent of the Government of Ghana was obtained in transferring the amounts involved. The question is; how was this consent of the Government of Ghana obtained?

I have already indicated supra that the M. D. of Ecobank never testified in the Court below. It was his Operations Manager who testified as P.W. 1. The testimony of P.W. 1 was emphatic that the bank did not transfer the monies into the accounts of Dr. Fred Owusu Boadu because of any false representation made to his M. D. by either the appellant or the late Victor Selormey or both. As P. W. 1 indicated in his evidence, Ecobank had no authority to challenge the directives of Mr. Selormey since he was responsible for the operation of the accounts. Therefore, from the prosecution or the respondent's own case presented to the Court below through P.W. 1, Ecobank was not induced by any false representations made to its M. D. by the appellant and the late Victor Selormey to part with the amounts as the prosecution loudly trumpeted and for which the appellant was convicted by the Court below. Mr. Selormey who authorized the payments had authority to do so as the representative of the Government in charge of the account involved and he did that alone without the involvement of the appellant. That was the unambiguous testimony of P.W.1. Mr. Akabah.

Again, I want to emphasize that the Managing Director of Ecobank could not be described as the agent of the Government or the State with regard to the custody of the money in the account in question as the Court below wrongly did. What the trial court failed to appreciate is the fact that it was the representative of the Government of Ghana responsible for the operation of the Ecobank account, in the person of the late Mr. Victor Selormey, who wrote Exhibits **'A'** and **'B'** to the M.D. of Ecobank for the release of the $400,000, the subject-matter of this case.

Mr. Selormey (A2), who was the Deputy Minister of Finance at the time, was responsible for the operation of the account on behalf of the government. The evidence on record is very clear on that. So Mr. Selormey was in fact, the agent or the representative of the Government then in charge of the account at Ecobank. Is the prosecution saying that he Mr. Selormey, as the government representative or agent in charge of the account, was induced to part or transfer money from that account through his own false representations in Exhibits **'A'** and **'B'**?

In fact, the offence of defrauding by false pretences does not arise at all in the circumstances of this case. If it is the case of the prosecution that the late Mr. Victor Selormey misapplied the (TIP) accounts when he ordered for the payment of the contract the appellant entered into with Dr. Boadu from that account, as the prosecution seemed to suggest as part of its case, then Mr. Selormey's charge should not have been either defrauding by false pretences or causing financial loss to the State. In such a case, he could be held for misapplying the funds. The offence of defrauding by false pretences could not therefore hold against him.

As for the appellant, he never made any representation at all to the M. D. of Ecobank. The only representation he made as the Minister of Trade was to Mr. Victor Selormey in his capacity as the Deputy Minister of Finance with responsibility over the Gateway Projects. If the prosecution thought the representation the appellant made to Mr. Victor Selormey in his letter Exhibit **'P'** that was quoted by the trial court in full was false and that it was because of such false representation that made Mr. Selormey to authorize the payment of the amount in issue from the Ecobank account, then the appellant alone should have been charged for defrauding Mr. Selormey by false pretences because it was to him that the appellant made a representation. He never made any representation to the M. D. of Ecobank because he had no authority to do so. The appellant had no authority under any law or statute to order Ecobank to release any monies from the (TIP) account and he never did any such thing for whatever purpose, as the evidence on record clearly discloses.

So in my candid view, the trial court erred when it came to the conclusion that the charges of defrauding by false pretences under counts 6 and 7 have been proved by the prosecution against the appellant. This was a fundamental error, which should not be made to stand.

On the charge of Conspiracy under count 5, the appellant was said to have acted together with the late Victor Selormey, Dr. Fred Owusu Boadu and other unknown persons to defraud the State. The defrauding

is the alleged representation made to the M. D. of Ecobank, which the prosecution said the appellant and the others knew to be false.

Under our law, conspiracy is committed when two or more persons agree or act together with a common purpose for or in committing or abetting a crime. The offence is in two legs.
Firstly, an accused could be charged with the offence of conspiracy if it is found out that he agreed with another person or others with a common purpose for or in committing or abetting a crime though he did not eventually partake in the commission of the crime. In such a situation, the particulars of the charge of such an accused person would read that he '**agreed together' with the others** with a common purpose for or in committing or abetting the crime. The particulars could not read, '**he acted together'** since he did not take part in the act.

On the other hand, if it is difficult to prove previous agreement in concert for or in committing or abetting the crime, but there is evidence that the accused took part in the act with others, then he could still be charged with conspiracy but the particulars would read that; he '**acted together'** with the others with a common purpose for or in committing or abetting the crime but not he **'agreed together'**.
In the instant appeal before us, the appellant was said to have acted together with the late Mr. Victor Selormey, Dr. Boadu and other unknown persons in committing the offence of defrauding by false pretences contrary to sections 23 (1) and 131 of Act 29/60. The particulars did not say that they agreed or had any previous agreement. By these particulars of the charge, it is being alleged that the appellant partook in the act of defrauding by false pretences; i.e. he and the others made certain representations to the M.D. of Ecobank to secure the transfers of monies when they knew the said statements that induced the payments were false but nevertheless made with the intention to defraud the State.

Having concluded that the substantive charge of defrauding by false pretences under counts 6 and 7 could not hold against the appellant, the charge of conspiracy under count 5 also fails as a matter of course as no evidence was led to establish that. Surprisingly, the trial court said nothing about the charge of Conspiracy to Defraud under count 5 in its entire judgment. Throughout the whole judgment, the trial court was silent on the charge under count 5. It did not diagnose that charge in any way so there was no conclusion that the appellant was guilty under count 5 throughout the judgment of the court below. There was no mention of it at all in the judgment, the reason being that no evidence was led to establish same. It was therefore wrong for the trial court to have convicted the appellant on that charge also.

The respondent seemed to be suggesting in its submissions that since this Court dismissed the appellant's appeal against the refusal of the submission of no case made on his behalf by his counsel and ordered him to go back to the Court below to open his defence, which suggested that this Court was ad idem with the

trial court that the prosecution was able to establish a prima facie case against the appellant, the Court should not disturb the findings of the trial court on the conviction of the appellant because the submissions made by his counsel in this appeal were almost the same as the submissions he made in support of the submission of no case and lost. I do not find this argument appealing.

Though I do not know the reasons for which this Court, differently constituted, dismissed the appeal in respect of the submission of no case made by the appellant, I have, in most cases been against accused persons who rush to the appellate court to appeal any time a trial court exercises its discretion under section 173 of Act 30/60 by calling on the accused to open his/her defence after the close of the prosecution's case. Section 173 is explicit that it is the trial court that has to decide whether in its view, there was a case for the accused person to answer or not. It states: -

> **"If at the close of the evidence in support of the charge, <u>it appears to the Court</u> 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".**

From the above provision, the trial court would only acquit at this stage if it appears to it that there is no 'sufficient' evidence to connect the accused person to the offence for which he/she was charged. If, on the other hand, it appears to the trial court that there is sufficient evidence for which it must hear from the accused, then it becomes obligatory on the part of the trial court to invite the accused person to open his/her defence. It could be that what appeared to the trial court as the case, at the close of the prosecution's case, might not be the case, but as the trial of facts and the court that has heard and observed the witnesses, it is not appropriate for an appellate court to quickly interfere at this stage unless there is a fundamental error that makes the continuation of the case inappropriate.

In the instant case, since the prosecution contended in the facts presented to the Court below that the contract for which Dr. Boadu was paid the amount in question was unknown to people who should have known about it and that even the Coordinator in charge of the Gateway Project in the person of Dr. George Sipah Yankey had told the police that he did not know anything about it, there was the need to invite the appellant to also tell his side of the story. I would have done the same thing with regard to the offence of '**causing financial loss to the state'**, if I were in the shoes of the trial court, but not on the charges of defrauding by false pretences and conspiracy under counts 5, 6 and 7.

I have to emphasize, however, that the yardstick that is used in determining whether the prosecution has established a **prima facie** case or not is not the same as the one used in determining whether the prosecution has established its case against an accused person **beyond reasonable doubt**. They are two different things.

In deciding either to call on an accused person to open a defence or not, the trial court is not supposed to make findings of fact. Findings of fact are made when the trial court is considering the guilt or otherwise of an accused person at the close of the case for the prosecution and the defence. The same court that comes to the conclusion that the prosecution has established a prima facie case can also come to the conclusion that the prosecution could not establish its case beyond reasonable doubt when it comes to the consideration of the totality of the evidence before the court.

CAUSING FINANCIAL LOSS TO THE STATE

I now move on to the charges under counts 1, 2, 3 and 4 on 'conspiracy' and 'causing financial loss to the State'; contrary to sections 23 (1) and 179A (3) (a) of Act 29/60. I do not want to repeat the charges here but counts 1 and 3 are on conspiracy to commit the crime of causing financial loss to the State contrary to sections 23 (1) and 179A (3) (a) while counts 2 and 4 are on the substantive charges of causing financial loss to the State to the tunes of US$100,000 and US$300,000 respectively; contrary to section 179A (3) (a).

I have already given the offence created under section 179A (3) (a) of Act 29/60 a 'controversial' tag. This is not because the offence itself is controversial but because of the hell that was raised about it when it was applied against certain important personalities in the society, including the appellant in this case. All of a sudden, the offence appeared to some people as a 'monster' ready to devour any public servant whose discretion fails, no matter how good-intentioned.

This offence of causing financial loss to the State; i.e. **Section 179A (3) (a)** of Act 29/60, which I personally think is a very good, well-thought of and opportune piece of legislation, has therefore generated a lot of debate and controversy to the extent that some of the antagonists of the legislation are unfortunately calling for its repeal. This section was, however, inserted into our Criminal Code, now Criminal Offences Act (Act 29/60) by section 3 of the Criminal Code (Amendment) Act, 1993 (Act 458), as one of the **"SPECIAL OFFENCES"** created by the first Parliament of our Fourth Republic and codified as part of our Criminal Offences Act, 1960 (Act 29). The main purpose of this legislation is to check unwarranted and/or reckless public expenditure that occasions loss to the State.

From the line of arguments of some of its antagonists, the false impression being created in the mind of the public is that, under section 179A (3) (a), a public servant or official is summarily guilty of a crime whenever he takes part in a decision that involves the disbursement of funds from the public purse that turns out to be uneconomical to the State. It is not correct, to say the least that, that is the intention of the law.

Though the law is popularly phrased; '**causing financial loss to the State'**, the statute is not concerned merely with the fact that there has been a financial loss to the State. The law is more concerned with the way or manner in which the loss was occurred; i.e. '**the HOW**?

The statute or law says that the loss to the State must have been caused **willfully** or **maliciously** or **fraudulently** before there can be criminal liability. The section reads: -

> **"Any person through whose willful, malicious or fraudulent action or omission – the State incurs a financial loss; commits an offence."**

The law only seeks to do away with the culture of impunity and to restore into society the ethics of discipline, honesty, responsibility and professionalism in the discharge or management of public business. Section 179A (3) (a) is not therefore vague as some people perceive it to be. In my view, it is very progressive and one of the best legislative acts of the first Parliament of the Fourth Republic. It is for the courts to clothe it proactively with its rightful garment as the legislature intended it to be, but not to masquerade it to appear monstrous as some people already perceive it to be in order to hang it to the benefit of a few and to the detriment of the larger community of Ghana.

The late Justice Dickson Kwame Afreh in his well-researched and well-reasoned judgment in the case of **THE REP. v. IBRAHIM ADAM & 4 Others** (unreported judgment of the High Court presided over by Afreh, J.SC. dated 28th April 2003), gave meaning to the offence of causing financial loss to the State as provided under section 179A (3) (a) of the Code.

Justice Afreh went at length to explain the meaning of the words '**willful**', **malicious** and **fraudulent** as used in the statute. He placed much emphasis on the word '**willful**' and concluded that the word as used is synonymous to **intention** and **recklessness**. He could not have concluded otherwise. He then summed up the essential elements or ingredients of the offence of causing financial loss under section 179A (3) (a) as follows: -

"i. That there is a financial loss.

ii. That the financial loss is to the state.

iii. That the financial loss was caused through the action or the omission of the accused; and

iv. That the accused: –

(a) intended or desired to cause the loss; or

(b) foresaw the loss as virtually certain and took an unjustifiable risk of it; or

(c) foresaw the loss as the probable consequence of his act and took an unreasonable risk of it; or

(d) 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."

I agree hundred percent (100%) with Justice Afreh on the above. Before the appellant could therefore be convicted of the offence of causing financial loss contrary to section 179A (3) (a), all the four ingredients listed above must be proved. It must be proved that the State has occasioned a financial loss; that the loss was caused through the action or inaction of the appellant and that the appellant intended or desired to cause the loss; or he foresaw the loss as virtually certain but took unjustifiable risk of it; or he foresaw the loss as the 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 or inaction, would probably cause or contribute to cause the loss.

Though the court below concluded that all the above ingredients were proved by the prosecution against the appellant and gave reasons why it thought so at pages 14 and 15 of the judgment, which I shall come to later, the Court below did not indicate clearly how these ingredients were allegedly established or proved against the appellant.

As I have posited earlier on, all the grounds of appeal, with the exception of (e) and (j), are subsumed under ground (a); i.e. **"The verdict is unreasonable and cannot be supported by the evidence."** Therefore, instead of tackling them separately as the appellant and the respondent did in their written submissions, I will lump them together under ground (a).

In fact, from the respondent's point of view, the appellant and the late Victor Selormey fraudulently caused financial loss to the State because they represented that one Dr. Fred Owusu Boadu had conducted feasibility studies into a project for which an amount of $400,000 was paid to Dr. Boadu when in fact Dr. Boadu had done no such work to merit the payment. That is the generality of the respondent's case. The respondent's sword in this legal battle seems to be the phrase '**feasibility studies'** as that is what the respondent/prosecution raised any time the defence wanted to strike. It is simply; "**YOU SAID YOU WERE GOING TO PRODUCE A FEASIBILITY STUDY BUT THAT WAS NOT WHAT YOU DID."**

Before concluding that the appellant and the late Victor Selormey did commit the offence of causing financial loss to the state, this was what the Court below said in its judgment at page 14 and 15: -

"In respect of this case before me, the prosecution has to establish that there was:

1. **Financial loss.**
2. **The state suffered the loss.**
3. **That the loss was caused through the action of the 1st accused.**
4. **The 1st accused person intended or desired to cause the loss.**

According to the evidence adduced by the prosecution, the 1st accused (who is the appellant herein) wrote Exhibit 'P' which is the request for consulting services for a study proposal to create a Science and Technology Community to the 2nd accused authorizing the final payment in accordance with the terms of the consulting service agreement.

On receipt of Exhibit 'P', the 2nd accused wrote Exhibit 'B' to the Managing Director of Ecobank Gh. Ltd. authorizing the bank to pay US$300,000 (Three Hundred Thousand US Dollars) into the account of Dr. Fred Owusu Boadu with copies to the 1st accused and Dr. Fred Owusu Boadu.

It is accepted by this Court that the 1st accused received a copy of Exhibit 'B'. The 2nd accused on the 10th of August 2000 also wrote Exhibit 'A' to the Managing Director of Ecobank Ghana Ltd. also authorizing the bank to pay US$100,000 (One Hundred Thousand US Dollars) into the personal account of Dr. Fred Owusu Boadu. 2nd accused copied Exhibit 'A' to the 1st accused and Dr. Fred Owusu Boadu. Here too, it is accepted by this court that the 1st accused received a copy of Exhibit 'A' even though the 1st accused denied receiving copies of Exhibits 'A' and 'B'.

The total amount paid into Dr. Fred Owusu Boadu's account was US$400,000 (Four Hundred Thousand US Dollars).

The prosecution led evidence to show that Dr. Fred Owusu Boadu did not conduct any feasibility study into the establishment of Science and Technology Park/Valley.

According to the prosecution, the amount of USS400,000 (Four Hundred Thousand US Dollars) belonged to the Ghana Government and the transfer of the amount of US$400,000 (Four Hundred Thousand US Dollars) into the account of Dr. Fred Owusu Boadu was a financial loss to the State since no work was done by Dr. Fred Owusu Boadu. [Emphasis added].

According to the evidence of P.W.1 and other prosecution witnesses as well as Exhibits 'A', 'B' and 'P', the financial loss was caused by the 1st accused and the 2nd accused who is dead and that the loss was willfully caused by the accused persons.

According to Archibold, willfully is defined as intentionally. The two accused persons intentionally paid US$400,000 to Dr. Fred Owusu Boadu when no work was done by him (Dr. Fred Owusu Boadu). [Emphasis added].

The 1st accused is accordingly found guilty on counts 2 & 4. The 1st accused is accordingly convicted on counts 2 and 4 …"

From the above quotation taken from the judgment of the court below, the appellant was found guilty on the offence of causing financial loss to the State by the Court below because;

(1) He wrote Exhibit **'P'** to the late Victor Selormey (then 2nd accused) that Dr. Boadu had submitted the final report on a '**Study Proposal'** to him in respect of an agreement his Ministry (i.e. Ministry of Trade)

had entered into with him so the late Victor Selormey as the Deputy Minister in charge of the Gateway Project, should pay him the balance of the contract sum which was US$300,000;

(2) That, based on this letter, the late Victor Selormey also wrote Exhibits **'A'** and **'B'** to the M. D. of Ecobank directing that payment for the work done by Dr. Boadu be made from the TIP interest account, which directive the bank complied with;

(3)That at the time the appellant and the late Victor Selormey wrote Exhibits **'P'** and then **'A'** and **'B'** respectively, they knew Dr. Boadu had done no work to merit that payment. They had therefore willfully or maliciously or fraudulently caused financial loss to the State.

In the first place, the conclusion of the court below that Dr. Boadu had done **no work** (emphasis mine); to merit the payment of the amount of money to him was not supported by the evidence on record. The trial court was therefore wrong in coming to that conclusion. The evidence on record as was presented by the respondent was to the effect that Dr. Boadu did some work but what he did was not what the appellant said he was going to do under the contract. According to the prosecution, the appellant said Dr. Boadu was being paid for a feasibility report he had submitted but it turned out that he did not prepare a feasibility report but a study proposal. That is the reason why the prosecution charged the appellant with the offence of causing financial loss to the State. Undoubtedly, the only letter the prosecution tendered in evidence as the letter the appellant wrote to the late Victor Selormey, which led to the release of the sum of US$300,000 by Selormey to Dr. Boadu was Exhibit **'P'.**

The question is; what were the contents of Exhibit **'P'**? Exhibit **'P'** is headed; -

"Re: Request for Payment for Consulting Services for "A Study Proposal to create a Science and Technology Community"

The letter itself reads: -

"I have received and reviewed the final copy of the above study proposal, which we initiated as part of the Gateway Phase II programme.

The report meets our expectation and would constitute the basis for the Science and Technology Park Component envisaged under Phase II of the Gateway Project. I therefore authorize the final payment in accordance with the terms of the Consultancy Service Agreement.

Signed

Daniel Abodakpi

Minister Responsible for Gateway Project."

Ironically, there is nothing in Exhibit **'P'** that shows that the representation the appellant made to the late Victor Selormey in Exhibit **'P'** was to the effect that Dr. Boadu had presented a **'Feasibility Study Report'** to him for which he was authorizing payment. All along, the appellant's case had been that his Ministry only entered into an agreement with Dr. Boadu to present a **'Study Proposal'** on the Science and Technology Community Park/Valley based on the consultancy contract entered into with him. This

contract was tendered in evidence by the prosecution as Exhibit 'G'. The contract that the appellant entered into with Dr. Boadu therefore becomes very paramount in determining what in fact the Ministry of Trade per the appellant contracted Dr. Boadu to do; whether a '**feasibility study'** or a **'study proposal**'. Exhibits **'A'** and **'B'** are not the determining factors because it was not the appellant who wrote them.

Again, the words '**we**' and **'our'** as were used by the appellant in his letter Exhibit **'P'** could not be said to be referable to he the appellant and the late Victor Selormey as is being suggested in the judgment earlier read since Mr. Selormey and/or the Ministry of Finance were not one of the contracting parties. The contracting parties were the Gateway Secretariat under the auspices of the Ministry of Trade and Industry, which was represented by the appellant and then Dr. Fred Owusu Boadu. The 'we' and 'our' were therefore referable to the Ministry of Trade & Industry and the Gateway Secretariat, which assigned the consultancy contract to Dr. Fred Owusu Boadu.

The evidence on record disclosed that discussions on this Science and Technology Community Park/Valley had gone on between the appellant and others for a long time both at home and in the United States of America and this was attested to by the officials from the Gateway Secretariat who testified for the prosecution. P.W.2's contention, as was contained in his report Exhibit 'D' and in his evidence in the Court below that officials at the Gateway Secretariat did not know anything about the Project was therefore not correct. Though Mr Ollenu from the Gateway Secretariat who testified as P.W.3 said he knew nothing about the contract that was entered into between the Gateway Secretariat under the auspices of the Ministry of Trade and Industry on one part and Dr. Fred Owusu Boadu on the other part, he stated in his testimony that he knew about the Science and Technology Park project. He was however emphatic that he was not the final authority at the Gateway Project Secretariat. The fact that he did not know anything about the contract as he claimed was therefore not strange. There is no doubt to the fact that Dr. George Sipah Yankey was the Coordinator at the Gateway Project Secretariat while the appellant was the Minister in charge of the Project. The two were therefore the final authority on the project.

The appellant's case was that the letters that the late Victor Selormey caused to be written to Ecobank for payment, in which the phrase '**Feasibility Study'** was used instead of '**Study Proposal**' were not authored by him as he never used the term 'Feasibility Study' in his correspondence with the late Victor Selormey. He said the contract his Ministry entered into with Dr. Boadu did not talk of '**feasibility study'** but a baseline study that was why Dr. Boadu had to submit a study proposal. He again said he did not personally receive the copies of Exhibits **'A'** and **'B'** that were addressed to him.

The 'Final Report' that Dr. Boadu submitted to the appellant, which necessitated the writing of Exhibit **'P'** to the late Victor Selormey is headed: -

"**PROPOSAL TO CREATE A SCIENCE AND TECHNOLOGY COMMUNITY (TECHNOLOGY VALLEY) TO PROMOTE PUBLIC-PRIVATE SECTOR PARTNERSHIPS FOR ECONOMIC GROWTH IN GHANA".**

It was on the basis of the report titled as above, which the appellant said he had received from Dr. Fred Owusu Boadu, that he wrote Exhibit **'P'** to the late Victor Selormey for final payment as agreed in the consultancy contract. From the nature of the contract and the final report that was submitted to the appellant by Dr. Fred Owusu Boadu, the appellant never misrepresented anything in Exhibit **'P'**. What Exhibit **'P'** talked about was in fact what the appellant's Ministry had contracted Dr. Boadu to do.

From the evidence before this Court, there is no doubt about the fact that a Consultancy Contract was entered into between the Ministry of Trade represented by the appellant and Dr. Fred Owusu Boadu. This contract was tendered in evidence by the respondent in the Court below as Exhibit 'G'. It was on the basis of this contract that Dr. Boadu prepared Exhibit 'H'; i.e. his final report, which was preceded by a draft report. There is nothing like '**Feasibility Studies'** in either the contract or the final report. The words or phrase '**feasibility studies',** which the prosecution has made fetish of, was only used in the two letters that the late Victor Selormey caused to be written to the M. D. of Ecobank for the payment of the contract sum.

What the prosecution seemed to be saying and which the Court below unfortunately swallowed hook, line and sinker was that if Selormey's letters had not used the words '**feasibility studies'** but '**study proposals**', Ecobank would not have transferred the sums as directed and that it was because the phrase '**feasibility studies'** was used that was why Ecobank was induced or deceived into transferring the amounts into Dr. Boadu's account. The prosecution then submitted that the appellant and the late Victor Selormey willfully or intentionally used the phrase '**feasibility studies'** instead of '**study proposals'** to defraud or induce Ecobank to transfer the amounts to Dr. Boadu, thus causing a loss to the State that owned the funds from which the payment was effected. That conclusion was in fact a fallacy when juxtaposed with the testimony of P.W. 1 Mr. Akabah.

This fallacy formed the foundation of, or was the gravamen of the respondent's case in the Court below. Meanwhile, in the testimony of P.W. 1 Mr. Akabah, who is the Operational Manager of Ecobank, he said the bank did not transfer the monies because of the use of the words or phrase '**feasibility studies**' in Exhibits 'A' and 'B'. According to him, the bank could not challenge any directive from the late Victor Selormey for payments from that account since he was the government official operating the account and that a mere direction from the late Victor Selormey to the bank to pay with his signature attached was enough. This evidence from P.W. 1 diffused the prosecution's claim that Ecobank was induced into transferring the monies due to false representations made by the appellant and the late Victor Selormey. This minor and harmless blow from the prosecution managed to catch the trial judge off guard thus confusing him to come to the wrong conclusion he came to.

When the prosecution at the close of its case had failed to lead any evidence to connect the appellant to the use of the words '**feasibility studies'**, the appellant, out of abundance of caution, called the then Secretary to the late Victor Selormey in the person of Mrs. Batsa to testify on why she used the words '**feasibilty studies'** in her letters that she wrote on the instructions of the late Victor Selormey, instead of '**study proposals'** as used by the appellant in his letter Exhibit **'P'** that was addressed to the Ministry of Finance. The sum total of the testimony of Mrs Batsa who testified as D.W.2 was that there was no difference between the terms '**feasibility studies'** and '**study proposals'** because to her, they mean the same thing.
Instead of considering the testimony of Mrs. Batsa as a whole, the respondent in its submissions, chose to be selective. The respondent selected those portions of her testimony that suited its course and turned a blind eye on other aspects of the same testimony, which when considered together with the other portions, gave a different picture from what was presented by the respondent.

Here was a witness who had earlier on said that she used the phrase '**feasibility studies'** in Exhibits 'A' and 'B' instead of '**study proposals'** as used in Exhibit 'P' because there was an earlier letter in which the appellant had used the phrase '**feasibility studies'**. This witness who said the earlier correspondence she was referring to was with the police, could not produce the so-called earlier correspondence in which the appellant allegedly used the phrase '**feasibility studies'**, neither could the prosecution produce any such letter at the time it was presenting its case. The respondent, in its written submission, tried to make capital out of Mrs. Batsa's testimony to suggest that the appellant used the phrase '**feasibility studies'** in his first letter to the late Victor Selormey so his denial that he ever used that phrase in his correspondence was false and part of the grand design to defraud the State. According to the respondent, this was because the testimony was coming from the appellant's own witness Mrs. Batsa.

I do not accept this argument as convincing. I find it necessary or expedient to emphasize here that the duty of the prosecution to establish the guilt of an accused is absolute. It does not shift. In the instant case, at the close of the respondent/prosecution's case, it had not laid anything before the Court below to suggest that the appellant ever used the words or phrase '**feasibility studies'** in any correspondence with the late Victor Selormey. So strictly speaking the burden on the appellant to produce satisfactory evidence to rebut that claim did not arise. The appellant was not required under any law to prove his innocence. To me, the appellant's decision to call Mrs. Batsa for further explanation was therefore unnecessary. However, I do not see the extent to which Mrs. Batsa's testimony did strengthen the prosecution's case as the respondent seemed to be contending in its submissions.

In the case of **DONKOR v. THE STATE [1964] GLR 598**, the Supreme Court held that where a submission of no case is wrongly overruled, the fact that the accused gives incriminating evidence filling

the omissions or defects in the case for the prosecution will not change the legal position especially where no offence has been alleged or proved by the prosecution.

What I could discern from Mrs Batsa's testimony was that she was a confused woman who was not sure of what she was saying. The woman was on interdiction when she was subpoenaed to appear before the Court below to testify on events that had happened some four, five or more years back. Though she indicated in her testimony that in the first letter the appellant wrote to her boss; i.e. (the late Victor Selormey), the phrase '**feasibility studies'** was used, the totality of her testimony before the Court below shows clearly that she was not sure of herself. Quite apart from the fact that she could not produce this letter which she said was with the police, she admitted that if the letter had been produced in court it would have clarified the issue as to whether she was right or the appellant was right.

To buttress the fact that Mrs. Batsa was not sure of herself was her later assertion that the two phrases; i.e. '**feasibility studies'** and '**study proposals'** meant the same thing. To her, the use of the two phrases alternatively was semantical. This later assertion by Mrs. Batsa that the two terms meant the same thing to her raised doubts in Mrs. Batsa's testimony as to whether or not the appellant ever used the term '**feasibility studies'** in his so-called first letter to the late Victor Selormey on the subject, since the prosecution did not lead any evidence to support that at the close of its case. That should have served as a 'caveat' to the Court below that the use of the phrase '**feasibility studies'** in Exhibits **'A'** and **'B'** could probably not be attributed to any previous correspondence between the appellant and the late Victor Selormey, as Mrs Batsa was alleging.

In any way, a careful reading of the judgment of the Court below suggests clearly that the Court below did not give any consideration at all to the testimonies of the defence witnesses including that of Mrs. Batsa. Again, the Court below did not avert its mind to the contents of the contract (i.e. Exhibit 'G'), that led to the production of Dr. Boadu's report (Exhibit 'H'). That would have assisted the Court below to know exactly what the appellant's Ministry had contracted Dr. Boadu to do; either a '**feasibility study'** or a '**study proposal'** because appellant's letter (Exhibit **'P'**) never mentioned '**feasibility study'**.
In his judgment, the trial judge said he did not believe the explanation of the appellant in defence. This was what the Court below stated at page 6 of its judgment: -

> "**In his evidence in-chief, the 1st accused person denied having committed the offences in all the charges preferred against him. He categorically stated that he did not receive copies of Exhibits 'A' and 'B' written by the late Victor Selormey to the Ecobank authorizing the payment of US$100,000 and US$300,000 to Dr. Fred Owusu Boadu. I have studied his defence of denial of the offences and I do not believe his defence".**

Short of believing the explanation of the appellant, the trial court did not go on further to find out whether the explanation of the appellant as it stood, was reasonably probable. In fact, the trial court failed to subject the appellant's explanation to the '**reasonably probable'** test propounded by the Supreme Court in the Lutterodt case cited infra.

Could it be that the appellant in deed did not receive copies of Exhibits **'A**' and **'B'** as he claimed in his defence? And even if he did receive them, did he co-author them?
The law is clear that where a court does not believe the story or explanation of an accused person, the court should nevertheless go ahead to consider whether that explanation is reasonably probable, when it is considered together with the evidence on record as a whole. This is a notorious principle of criminal law when it comes to the establishment of guilt of an accused person. See the cases of **R. v. ABISA GRUNSHIE [1955] 1 WALR 36; R. v. ANSERE [1958] GLR 385 – C.A.; DARKO v. THE REPUBLIC [1968] GLR 203; KWESI v. THE REPUBLIC [1977] 1 GLR 448; LUTTERODT v. C.O.P. [1963] 2 GLR 429 – SC.**

The Supreme Court in the Lutterodt case laid down three stages that every court has to go through in determining the guilt of an accused. This was what the highest court of the land said:
"Where the determination of a case depends upon facts and the court forms an opinion that a prima facie case has been made the court should proceed to examine the case for the defence in three stages;
(1) Firstly, it should consider whether the explanation of the defendant is acceptable. If it is, that provides complete answer, and the court should then acquit the defendant;
(2) If the court should find itself unable to accept or if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable; if it should find it to be, the court should acquit the defendant; and
(3) Finally, quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e. the prosecution and defence together, and be satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if not, it should acquit."

Unfortunately, the record before this Court does not suggest that the court below subjected the explanation of the appellant in defence to this 'three-stage' test propounded by the Supreme Court in the Lutterodt case, which the courts are bound to follow with diligence.

In the first place, the appellant told the Court below that he did not receive the copies of Exhibits **'A'** and **'B'**, which were copied to him. The prosecution did not lead any evidence to establish that he did receive them contrary to his denial of having received them. The prosecution's own testimony showed that the log books at the Ministry of Trade and the Gateway Secretariat did not indicate that the said letters were ever received. This was what the trial judge said at page 10 of his judgment:

> **"Interestingly, copies of Exhibits 'A' and 'B' were sent to the 1st accused (i.e. the appellant) and Dr. Fred Owusu Boadu. The 1st accused in his evidence in-chief stated that he did not receive copies of Exhibits 'A' and 'B'. The investigator (P.W.10) in his evidence in-chief stated that he went through the Ministry of Trade and Industry and the Gateway Secretariat where one would ordinarily find correspondence on the matter but found nothing. Under normal circumstances, in the course of business, when a letter is received by a ministry, it is normally entered in a log book. In this case, the prosecution tendered all the log books from the Ministry of Trade and Industry and it was only Exhibit 'P' which was entered in the log book**".

Notwithstanding the above findings, the Court below concluded that it did not believe the appellant's explanation that he did not receive them and without more, went ahead to say that it had accepted that the appellant did receive them when there was no such evidence before the court.

The important question is; is it not reasonably probable that the appellant did not receive copies of Exhibit **'A'** and **'B'** as he claimed in the face of the prosecution's failure to lead any evidence to suggest that he did receive them?

Again, the appellant denied ever writing to the late Victor Selormey in respect of the contract with Dr. Boadu in which letter he used the phrase, '**feasibility study'**. The prosecution, at the close of its case could not produce any evidence to suggest in the least that the appellant ever corresponded with the late Victor Selormey using the words or phrase '**feasibility study'**. The only evidence led by the prosecution connecting the appellant to the contents of Exhibits **'A'** and **'B'** in which the phrase '**feasibility study'** was used was Exhibit **'P'**, which the appellant addressed to the late Victor Selormey. No where in Exhibit **'P'** was the phrase '**feasibility study'** used. The court below, however concluded, albeit wrongly, that so long as the appellant was copied with Exhibits **'A'** and **'B'**, he knew about the use of the words '**feasibility study'** in the said letters. The court then concluded that it did not believe the appellant without determining whether his explanation that he never used those words was reasonably probable.

In my view, the totality of the evidence on record suggests clearly that the appellant's denial that he ever used the words or phrase '**feasibility study'** in any correspondence with the late Victor Selormey was not only reasonably probably but was true as the totality of the evidence on record discloses. In fact, the respondent could not produce any evidence to contradict that explanation. Mrs Batsa's testimony, which

the respondent is now relying on as proof that the appellant once used the phrase in his first correspondence with Victor Selormey was not conclusive that he did use those words as claimed. There is serious doubt as to whether the appellant ever used those words judging from Mrs Batsa's conclusion that she did not see any difference between the two phrases, which doubt should have been resolved in appellant's favour.

The fact that in Selormey's letters, (i.e. Exhibits **'A'** and **'B'**), which were drafted by Mrs. Batsa, the words '**feasibility studies'** were used instead of '**study proposals'** as was contained in the appellant's letter Exhibit ''P', did not mean that there was any grand design by the appellant and the late Victor Selormey to defraud the State leading to a loss as the prosecution had contended.

Again, from the totality of the evidence before the court below, the prosecution could not establish that the appellant as the Minister of Trade in charge of the Gateway Project had no mandate to enter into any contract with Dr. Boadu for the preparation of a 'Study Proposal' as the appellant contended in his defence. The prosecution contended that the contract was sole sourced. However, it led no evidence to establish that the sole sourcing was illegal or the appellant had no authority to sole source the contract. So clearly, there was no reason for the appellant to hide anything in the first place.

Again, the prosecution did not lead any evidence to establish that the contract the appellant entered into with Dr. Fred Owusu Boadu for and on behalf of the Ministry was illegal. According to the prosecution, there were no witnesses to the contract. However, it was not established by the prosecution that all such contracts are to be witnessed as a matter of practice so the failure to procure a witness in this case meant there was something sinister about the motives of the appellant in entering into that contract. Neither did the prosecution lead any evidence to establish that the 'Study Proposals' that Dr. Boadu submitted for which the amount of $400,000 was paid, as was indicated as the contract sum in the contract document, was a worthless piece of document that could not serve the purposes of the intended Science and Technology Community Park/Valley. There was no such evidence.

The prosecution's own witness (P.W.9) Mr. Thompson Abubakar Bibilazu who was called by the prosecution to testify on the final report submitted by Dr. Boadu as an 'expert', was emphatic that the work that Dr. Boadu had done was a 'Study Proposal' that merited a minimum charge of US$150,000 if prepared by an external or off-shore consultant. This was emphatically stated in the report that was submitted to the Commissioner, C.I.D. by P.W. 9's outfit (MDPI) as requested by the Commissioner and tendered in evidence by the respondent in the Court below through P.W. 9 as Exhibit 'U1'.The report, however, did not state the maximum charge that the document or work could have attracted.

In his evidence during cross-examination, P.W. 9 admitted this fact. I think it is important I quote this part of P.W. 9's cross-examination for emphasis:-

"Q. In your report on page one on "Consultancy Fees", you stated that, "the consultancy fee for the scope of work as indicated in the document…" And by the document, you are referring to Exhibit T. Not so?

A. Yes.

Q. You have stated there that, the fees would range from seventy-five dollars (U.S. $75,000) to one hundred and fifty dollars (U.S. $150,000) at the minimum, i.e. the minimum consideration. Not so?

A. Yes…

Q. In your consultancy fee schedule, you have quite clearly stated that U.S.$75,000 to U.S. $150,000 is the minimum. Not so?

A. We have.

Q. No maximum is stated here?

A. No".

Exhibit 'T' which was tendered in evidence by P.W. 9 is the same as Exhibit 'H'. It was the final report that was submitted to the appellant by Dr. Fred Owusu Boadu. This report was submitted to P.W. 9's outfit (MDPI) by the Commissioner C.I.D. to study and submit a report as to whether or not it was a 'feasibility study'.

There is no doubt to the fact that Dr. Boadu was contracted as an external or off-shore consultant. This means that, from the prosecution's own point of view, Dr. Boadu had done some work that should have been paid for in the minimum of US$150,000, contrary to the conclusion of the court below that Dr. Boadu had done no work at all to merit the payment of any money to him under the contract.

Again, there was no evidence from the respondent, as the record of appeal clearly shows that suggests in the least that the final report that Dr. Boadu submitted to the appellant, which P.W. 9 says qualifies for a minimum consultancy charge of US$150,000 for an off-shore consultant, did not in fact satisfy the terms of the contract signed with the Gateway Secretariat under the auspices of the appellant's Ministry; i.e. the Ministry of Trade and Industry. According to P.W. 9, his outfit did not evaluate the final report of Dr. Boadu because the terms of reference did not require them to do so. So from the evidence of P.W. 9, no loss has been occasioned the State because the report that Dr. Boadu submitted to the appellant for which appellant wrote Exhibit **'P'** to the late Victor Selormey, was a report that qualified to be paid for, contrary to the testimony of P.W.2 and P.W.4.

I find it particularly amazing or difficult to understand why the Court below preferred the testimonies of either P.W.2 (the M.D. of the auditing firm that carried on with the special audit that implicated the appellant), or P.W. 4 who was a mere staff at the Gateway Secretariat who were all ordinary laymen on the subject, to that of P.W. 9 (the acclaimed expert on the subject), when they said 'Study Proposals' are not

paid for contrary to the testimony of P.W.9 who is the prosecution's own 'expert' witness on the subject that Dr. Boadu's report merited payment; at least a minimum of US$150,000.

P.W.9 did not mention the maximum fee that an off-shore consultant like Dr. Fred Owusu Boadu could have charged for the report submitted by Dr. Boadu. He again did not say that the US$400,000 fee that was agreed on between Dr. Boadu and the Ministry of Trade was on the higher side. Meanwhile the Court below did not give any reasons for preferring the testimony of P.W.2 and 4 to that of P.W. 9 the acclaimed 'expert'. In my view, the failure to give reasons was a legal error.

So the question is; where was the loss that the State incurred?
Again, the prosecution's case that no one at the Gateway Secretariat knew anything about the contract the appellant entered into with Dr. Boadu turned out to be false. Dr. George Sipa Yankey who was the Coordinator of the Gateway Project Secretariat testified that he knew about the contract. The prosecution failed to call him as a witness with the excuse that when they contacted him he said he knew nothing about the contract between the appellant and Dr. Boadu. He however testified for the appellant as D.W.3 and denied that he was ever contacted by the police on the matter. Even P.W.2 said emphatically that he did not make any attempt to contact Dr. George Sipah Yankey who was a key person to have been contacted, when he was conducting the audit in the same way as he failed to get in touch with the appellant and the late Mr. Selormey. This debunked the prosecution's claim that no one at the Gateway Secretariat knew about the contract between the appellant and Dr. Boadu.

Again, the respondent's initial claims that the late Victor Selormey should not have made payments from the Ecobank account since it was not meant for such a purpose, which statement was made by (P.W.2) the M.D. of the firm of auditors that laid the foundation for the prosecution of the appellant and the other accused person, collapsed when P.W. 3 confirmed, during cross-examination that there was nothing wrong with effecting payment from that account as similar ventures were financed from that account.

As I have already indicated in this judgment, the prosecution could not lead any evidence to establish that the late Victor Selormey had no authority to authorize for the payment of the work done by Dr. Boadu from the (TIP) accounts with Ecobank. The impression created by the audit report, which the respondent relied on in prosecuting the appellant and Victor Selormey was that the contract should not have been paid for from the {TIP} account with Ecobank but because the appellant and the late Victor Selormey were joint-chairmen of the Oversight Committee responsible for the Gateway Project, they used their positions to fraudulently transfer the monies from the account to the personal account of Dr. Fred Owusu Boadu. Even the prosecution suggested that the two misapplied the funds. That was why in the opening summary

of the prosecution's case it was suggested that some unusual disbursement were being made from the {TIP} accounts thus the establishment of the Special Audit Task Force.

However, the evidence that came from the prosecution's own witnesses, particularly P.W.3 did not suggest what the prosecution initially thought. In answer to a question by counsel for the appellant during cross-examination, P.W.3 admitted that the second accused in the Court below Mr. Victor Selormey was not even a member of the Oversight Committee of the Gateway Project. According to P.W. 3, the then Vice-President of the Republic was the Chairman of the Oversight Committee and the Minister of Trade (i.e. the appellant) was only assisting the oversight committee as the Supervising Minister or the Minister in charge of the Project. I quote below the question and answer:

"Q. I am putting it to you that the 2nd accused person was never a member of the Gateway Oversight Committee.

A. He was never a member my Lord".

The conclusions of the Special Audit Task Force, upon which the charges were leveled against the appellant and the late Victor Selormey, were found to be baseless after all. This was because the appellant and the late Victor Selormey were not contacted for any explanations with regard to the said payments before the report was submitted to the National Security Coordinator, who actually commissioned Barfour Awuah and Co. to conduct the Special Audit contrary to Article 187 of the 1992 Constitution, which charges the Auditor General with that responsibility. The fact is that the appellant had nothing to do with the disbursement of monies from that account. The evidence on record did not establish or even suggest that.

The reasons given by the auditors as was contained in the testimony of P.W. 2 Mr. Baffour Awuah for not contacting the appellant and the late Victor Selormey for explanations on the payment to Dr. Boadu were lame and inexcusable. While P.W.2 said his initial investigations revealed that the Gateway Secretariat was not aware of the contract on the Science and Technology Community Park/Valley, his own testimony was that he obtained a copy of the report on the project from the Library of the Gateway Secretariat. When pressed, during cross-examination by counsel for the appellant to tell the one at the Secretariat who made the copy available to him, he could not tell. Meanwhile, P.W. 3 who was an official from the Gateway Secretariat told the Court below that there was no Library at the Gateway Secretariat as P.W. 2 claimed in his testimony. So the question is; if the Gateway Secretariat was not aware of the contract, then how did the final report end up on its Library shelves, granted the Secretariat had a Library as P.W. 2 contended? And if the Secretariat had no Library as P.W. 3 contended, then who at the Secretariat made the report of Dr. Boadu available to P.W. 2 for the auditing? These were lingering questions the prosecution/respondent could not answer.

Though I do not want to enter into the debate as to the propriety or otherwise of the special audit by P.W. 2's Audit Firm, which led to the prosecution of the appellant and the late Victor Selormey, the Auditor-General's claim that he commissioned Barfour Awuah & Co to conduct the audit for which the appellant and Selormey were charged was unfortunate in the wake of the overwhelming evidence before the Court below that he (i.e. the Auditor-General who testified as P.W. 5), did not assign the job to P.W.2's company, i.e. Baffour Awuah and Associates. It was the National Security Coordinator with the advice of the Ministry of Finance that assigned the auditing job to P.W. 2's Company. The Auditor-General was drawn into the picture afterwards to regularize the Constitutional anomaly.

The undeniable fact, as gathered from the evidence on record is that P.W. 2's Company (Baffour Awuah & Associates) was sole-sourced for the audit assignment as Dr. Boadu was also sole-sourced for the consultancy contract. If sole sourcing is a crime that could lead to one being charged with causing financial loss to the State, as the respondent seemed to be contending in the case of the contract signed between Dr. Boadu and the Gateway Secretariat per the appellant, albeit wrongly, then could P.W.2 Mr. Baffour Awuah, P.W.5 Mr. Duah Agyemang who is the Auditor-General and possibly the National Security Coordinator, also face prosecution in future for sole-sourcing P.W. 2's Company; i.e. (Baffour Awuah and Associates) to conduct the Special Audit in question, as the appellant contended in his submissions?
On the totality of the evidence on record, I agree totally with the appellant that the prosecution or respondent woefully failed to prove the ingredients of the offence of causing financial loss to the state contrary to section 179A (3) (a) of Act 29/60 against the appellant so it was wrong on the part of the court below to have convicted the appellant on counts 2 and 4.

There was no loss as was suggested by the prosecution because Dr. Boadu was paid for work done under a contract he entered into with the Ministry of Trade and Industry. This contract was tendered in evidence as Exhibit 'G'. According to the contract, Dr. Boadu, who was the consultant, was to undertake a baseline study in the establishment of a Science and Technology Community Park/Valley. No mention was made of 'feasibility studies' in the contract and he did just that.

It was therefore not correct for the Court below to have concluded that the State occasioned a loss because Dr. Boadu was paid the amount of US$400,000 for doing no work , when in actual fact, the evidence before the Court below suggested that he did some work that had to be paid for. The prosecution's own 'expert' witness (P.W.9) agreed that the work Dr. Boadu did was qualified to be paid for. He suggested US$150,000 as the minimum charge for the work done by Dr. Boadu. He did not state the maximum. The prosecution's case was not that there was a loss because Dr. Boadu was over-paid. Their case was that the State lost the US$400,000 because no work was done to merit that payment contrary to their own case as presented in the Court below.

Again, the prosecution or respondent failed to establish that granted there was a loss, the appellant desired the loss or failed to take due diligence to avert the said loss. In fact, the prosecution led no evidence to prove that the appellant put up a conduct that showed that he intended the State to suffer any loss, unlike what happened in the quality grain case in which it was established that some of the accused persons were very reckless when they defied all warnings and reason; including warnings from the Attorney General's office, the then Ghana's Ambassador to the United States, the then Vice-President Professor John Evans Atta-Mills, etc. and went ahead to guarantee a loan for Ms. Cotton's company (i.e. the Project Company) when they knew the company could not make good the loan or its indebtedness.

Though the respondent tried to link the schooling of the appellant's children abroad to his dealings with Dr. Fred Owusu Boadu and possible financial gains, no link was established to support the charges leveled against the appellant in this case. What happened in this case rather was that the appellant entered into a contract with Dr. Boadu for and on behalf of the Gateway Project Secretariat as the Minister with oversight responsibility over the Project. The illegitimacy of that contract has not been established. The contract was tendered in evidence as Exhibit 'G'. It was a perfect contract and the fact that the Coordinator of the Gateway Project Secretariat Dr. Yankey described it as a 'simple contract' did not mean it was an illegal contract.

The contract fee was indicated in the contract as not to exceed US$400,000. That was exactly the amount that was paid to Dr. Boadu after submitting the final Report titled, '**Study Proposals**'. The appellant's letter to the Ministry of Finance; i.e. Exhibit **'P'**, stated clearly that he the appellant had received the final report on the '**study proposals'** so final payment should be effected. He did not indicate how and from where the payment should be made. The appellant did not misrepresent any facts to Mr. Selormey when he said he had received this report from Dr. Boadu, which was tendered in evidence as Exhibit 'H'. Again, Dr. Boadu was not paid over and above what was stated in the agreement, so there was no loss stricto sensu.

Meanwhile, the respondent did not lead any cogent evidence before the Court below to suggest in the least that the final report Dr. Fred Owusu Boadu submitted to the appellant did not merit the amount of US$400,000 transferred into his accounts. In his evidence, P.W. 9 said his outfit did not evaluate the final report of Dr. Boadu because the terms of reference given to them, did not permit them to do so. The offence of causing financial loss to the State does not therefore arise at all judging from the circumstances of this case. This being the case, the charges under counts 1 and 3 on conspiracy to commit the crime of causing financial loss to the State also fail miserable.

As Judge Curtis Raleigh once said, the law should not be seen to sit by limply, while those who defy it, go scot free and those who seek its protection lose hope. The courts exist to do justice to all irrespective of colour, race, sex, nationality, political affiliation, position, etc. and judges must recognize this Constitutional fact and act accordingly. I think the law is on the side of the appellant. It should therefore be applied in his favour.

With regard to grounds (e) and (j) of the grounds of appeal, I do not want to touch on the appropriateness or otherwise of the maximum sentence imposed by the Court below since the trial court had the discretion to decide on the punishment. The important thing is that the punishment imposed must be within the jurisdiction of the court. In the instant case, though it could be said that it is inappropriate for a trial court to impose a maximum sentence on a first offender without giving reasons for doing so, I would not fault the trial judge in deciding to impose the maximum sentence in this case since he had the authority to do so. That was his prerogative. The unfortunate thing however is that the appellant did not commit the offences for which he was charged to deserve his conviction and sentence.

On the respondent's cross-appeal, I do not think it has any merits. Dr. Fred Owusu Boadu was paid for work he legitimately did for the Ministry of Trade and Industry under a contract he signed with the Ministry; i.e. Exhibit 'G'. The money did not go to the appellant. This Court could not therefore order the appellant to refund that amount to the State. If the State thinks the amount paid to Dr. Boadu was not commensurate with the work he did, then the course opened to the Government was to have taken Dr. Boadu to task on that for that issue to be determined on its merits but not to level criminal charges against the appellant and the late Victor Selormey for offences which they never committed. I will therefore allow the appeal and dismiss the cross-appeal as unmeritorious.

Appeal against conviction and sentence on all the seven counts allowed. Cross-appeal dismissed. Conviction of appellant on all seven counts is hereby quashed.

(SGD) YAW APPAU
(JUSTICE OF APPEAL)

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