# THE REPUBLIC

**v**

# DR. CASSIEL ATO FORSON

**[1st ACCUSED/APPLICANT]**

# SYLVESTER ANEMANA

**[DISCHARGED]**

# RICHARD JAKPA

**[3rd ACCUSED]**

SUIT NO. CR/0198/2O22 6th JUNE, 2024

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**COUNSEL**

**MR. GODWIN K. TAMEKLO present with GIDEON ABOTSI holding the brief of DR. ABDUL BAASIT AZIZ BAMBA for A1**

**THADDEUS SORY for A3 present with BAFFOUR GYAWU BONSU ASHIA and EBENEZER APPIAH**

**HON. GODFRED YEBOAH DAME (AG) for the REPUBLIC present with ALFRED TUAH YEBOAH (DAG), MRS. YVONNE ATAKORA OBUOBISA (DPP), MR. JOSHUA SACKEY (SSA) AND DANIEL ARTHUR OHENE-BEKOE (ASA)**

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# RULING

This is a Ruling on two matters filed by the **1st Accused/Applicant** (who may, where the context so admits, also be referred to as the 1st Accused/Appellant/Applicant or A1) on the following matters;

1. An application for Stay of proceedings pending appeal filed on the 21st of May, 2024;

2. (a) Motion on notice for an order of enquiry into the conduct of the Attorney-General,

(b) an order of mistrial in the instant criminal proceedings,

(c) an order of injunction to restrain the Prosecution from any further prosecution of the instant criminal proceedings pending the determination of the Applicant's motion for mistrial, and/or

(d) an order of stay of proceedings in the instant proceedings pending the Applicant's motion for mistrial, pursuant to Articles 12(1),

19(1)(2)(c) and (e), 33(1), 88(1),(3) and (4) of the 1992 Constitution and/or the inherent jurisdiction of the Court.

In the recording of the pending applications on the last day of hearing this matter, i.e. 4th June, 2024, it was recorded as follows;

**By Court:** *We have three applications pending and I have seen that Mr. Sory filed a notice objecting to the affidavit filed by the Republic/Respondent but there are three substantive applications pending. The first one is the stay of proceedings pending appeal that Dr. Bamba filed, an application for an order of enquiry into the conduct of the Attorney General for injunction for stay of proceeding filed on 28th May, 2024 by Dr. Bamba and also a third application filed by Dr. Bamba which is an application for an order striking out the charges and staying proceedings against the third accused and there is a fourth motion for for an order of enquiry of the conduct of the Attorney General and there is an affidavit in opposition to the stay of proceedings filed by the A1/Applicant……."*

After studying the processes, it has become expedient that two Rulings be written, the subject-matter of each will be each Accused person. In other words, each accused person's (two) Applications/Objections will be dealt with together in one Ruling.

The antecedents and facts of this case have been well set out in the Ruling on the Submission of no case delivered on **30th of March, 2023**, in which all three accused persons were directed to open their defence. There is no need to rehash them, except to state the relevant fact that the accused persons were arraigned before this Court on the basis of a charge sheet filed on the 23rd of December, 2021. It was placed before the instant Judge by Order of the Chief Justice dated the 17th of January, 2022. The Accused persons were first to appear on that day, but due to the state of health and need for treatment of the 2nd Accused person, the matter was adjourned to the next day, the 18th of January, 2022. Steady progress has been made since then.

In the Ruling on the submission of no case dated **30th of March, 2023**, this Court concluded that a prima facie case had sufficiently been made to merit all three accused persons then before it, to each open their defence. The main issues to be determined, upon a study of the submission of no case are that;

a) The matter was settled that the ambulances i**n the state that they were delivered** could not serve any useful purpose, but the assertion was made, per the cross-examination and other evidence put forward particularly by the 3rd Accused person (also referred to as A3), that there were moves to fix the defects thereby proffering the case that there was no loss occasioned to the State.

This meant, in the circumstances that the persons against whom the charges have been laid would have a prima facie case to answer in the light of the evidence put before the Court.

b) Further, there was the issue of what authority the 1st Accused exercised when he asked for the LCs to be issued. It is the case of the Prosecution that the LCs were issued without due cause and authorization. The prosecution in stating that A1 had no authority has stated, among others, that the agreement that culminated in the delivery of the defective ambulances which cannot be used in the condition that it is.

On the part of A1, he insisted that he had the authority of the Minister of Finance, whose deputy he was, to issue the request. He was then called upon to put forward evidence of his authority which he has done and closed his case. As indicated, A3 is in the process of testifying and is being cross-examined and has indicated that he has other witnesses to call.

What duty is left was for the Court to complete the hearing, assess the evidence when the hearing is concluded, and deliver a Judgment keeping in mind the charges (and nothing extraneous) before it.

This Court, upon the conclusion of the evidence-in-chief of A3, gave a direction, pursuant to sections 69 and 71 of NRCD 323, that A3 be cross-examined by lawyers for A1 before the prosecution takes its turn. That direction became the subject-matter of an appeal filed on the 21st of May, 2024. The first application for stay of proceedings, which is also a subject-matter of this Ruling, was premised on that appeal.

That application was yet to be served and determined when another issue cropped up.

On the **23rd of May, 2024**, while under cross-examination by Mr. Tamekloe for A1, A3 made the allegation that the Attorney-General has attempted to interfere with him in private conversations held, not in this courtroom and not on the record, with the view to getting him (A3) to implicate A1. A3 also says in his affidavit that the Attorney-General in those conversations had told him that he was not guilty and that he was only added to the case to prevent a situation where A1 would be seen to be a victim of persecution, more or less.

A1 has brought before this Court evidence in the form of the record of proceedings as well as the secretly recorded (telephone) conversation between A3 and the Attorney-General which has been attached to the 1st

Accused/Applicant's supplementary affidavit filed on 31st May, 2024 as **Exhibit "CAF2".**

The applications have both been vehemently opposed to by the Republic, in substance and procedurally. By way of procedure, the Republic objects to the recording and also says that there is no proven misconduct on the part of the Attorney-General to merit the applications being granted.

This Ruling, being an interlocutory one will be as brief as possible in the circumstances but will give succinct reasons for the conclusions drawn on each of the orders being sought.

## LEGAL FRAMEWORK/BASIC PRINCIPLES

1. **Jurisdiction in Criminal Matters cannot be implied;**

**See: YEBOAH AND ANOTHER v. THE REPUBLIC [1999-2000] 1 GLR 149 (CA) Per Gbadegbe JA (as he then was);**

*"Since jurisdiction in criminal matters is conferred only by statute, in the absence of any express statutory limitation in the exercise of jurisdiction, the same cannot be implied."*

This means, basically that whatever power that this Court is being called upon to exercise in this case, being a criminal trial, must clearly be backed by statute. There is no room for an "implied jurisdiction".

Further, section 8 of the Criminal Offences Act, 1960 (Act 29) states;

***"A person is not liable for punishment by the common law for an act."***

The foundational question to be asked is whether the matters being dealt with fall within the ambit of criminal proceedings. Not only must the Applicant demonstrate that there is in existence a certain law, but, there must also be a demonstration that the existing law confers jurisdiction on this Court to deal with the specific matters raised in criminal proceedings.

a) **On the Application sought to order an enquiry into the conduct of the Attorney-General**: This Court has been invited to order an enquiry into the alleged witness tampering by the Attorney-General. Unfortunately, there is no rule of law or practice which allows such an enquiry to be made in the course of criminal proceedings as this Court is being invited to do, particularly when the alleged misconduct did not take place in the view or to the hearing of the Court. It must be borne in mind that A3 is still under cross-examination and has made an allegation against the person of the Attorney-General in a bid, as

cross-examination is meant to do, to undermine the case of the Prosecution. The Prosecution is yet to commence cross-examination. Even A1 himself is yet to conclude the cross-examination of A3.

Thus, describing what has been put forward as uncontested or unassailable is not a proper statement of the law of evidence. Is it the case that there should be enough to cause the Court to make an order for an enquiry? Under what statute or rule of procedure? There is no such provision. What jurisdiction is to be exercised must necessarily be within a certain legal framework (and this is without prejudice to whatever administrative steps may be taken by the appropriate body in respect of the allegations raised).

To conclude under this head, I hold that there is no legal basis for a Court in the course of criminal proceedings to order an enquiry into the conduct of a prosecutor. There may be another forum for such an exercise but these criminal proceedings cannot accommodate it.

**b. On the application for an order of Mistrial in the instant criminal proceedings:**

**The Legal Framework on declaring Mistrials (and having to retry) a matter;**

The word "Mistrial" does not actually occur in any of our legislations. The circumstances under which a "mistrial" may occur thereby requiring a matter to be retried (and not an acquittal) is with reference to sections 285 (4) and 286 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30). The relevant legislation states;

***285(4); Where the jury are not unanimous in their opinion, the Justice shall, after the lapse of a time that the Justice considers reasonable, discharge the jury, but a verdict of not less than five to two shall, in respect of an offence which is not punishable by death, be held, taken to be and received by the Court as the verdict of the whole jury.***

***286. Where the jury is discharged, the accused shall be detained in custody or released on bail, and shall be tried by another jury.***

Mistrials have, in our law and practice, always and only been relative to hung juries in trials on indictment. There has been no situation where a summary trial being presided over by a single judge has resulted the declaration of a mistrial and an order for retrial to my knowledge. The Applicant has not provided such a precedent in our domestic legal framework either by way of legislation or judicial pronouncement, except to state the broad principles of the Constitution and "inherent jurisdiction".

The Respondent has rightly cited the case of **TUAH v. AMOAH [1980] GLR 815** @919 (HC) in which Korsah J set out in general the possible scenarios that might amount to a mistrial and a retrial being ordered viz;

*"In my view, a new trial may be ordered on appeal in cases in which there has been some irregularity at the trial which amounts to a mistrial. As for example in cases of:*

*(a) defect of jurisdiction in respect of time, place and person; or*

*(b) judgments so imperfectly worded or so ambiguous or inconsistent that they are too imperfect, to amount to a verdict at all; or*

*(c) misconduct of the jury discovered after trial; or*

*(d) misdirection or improper admission of evidence or failure to observe the rules of natural justice, which occasions some substantial wrong or miscarriage of justice; or*

*(e) where, for any other reason, the trial is a nullity."*

In our body of laws, as far as the legislation or case law is concerned, there is no provision for the court to declare a mistrial on the basis of the alleged misconduct of a lawyer, either for the prosecution or the defence. Having laid the foundation that basically whatever power this Court is being called upon to exercise in this case, being a criminal trial, must clearly be backed by statute, as stated by **Azu Crabbe CJ in the Yeboah case (cited supra),** in

the absence of a specific statute to that effect, no mistrial can be declared or ordered.

Some reference may be made to some foreign case law. However, the case law of those foreign jurisdictions are based on their legislation and as such, we may have to locate analogous legislation to have those cases applicable within our jurisdiction.

The instances stated in the **Tuah case** are not applicable in this instance.

This case has been pending since the charge sheet, signed by Mrs. Yvonne Attakora-Obuobisa, the Director of Public Prosecutions for the Attorney-General, was filed on 23rd December, 2021. We have made steady progress with the prosecution closing its case on 14th February, 2023 and the 1st Accused also closing his case on the 16th of November, 2023 after having called three witnesses.

From the allegations made against the Attorney-General, the interference he is supposed to have ran took place when A3 was supposed to have commenced his testimony or right before that. In a trial that has ran for more than two and a half years, how can the alleged happenings of the last few weeks render the jurisdiction of this Court and the charges against the accused persons void?

In all this, what this Court has to focus on is whether the matters being canvassed are relevant to a determination of the case before it.

The charges before this Court in respect of the two accused persons are;

**COUNT 1**

**Statement of Offence**

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

**Particulars of Offence**

**Cassiel Ato Forson** between August 2014 and April 2016 in Accra in the Greater Accra Region of the Republic of Ghana willfully caused financial loss of €2,370,000 to the Republic by authorizing irrevocable letters of credit valued at €3,950,000 to be established out of which payments amounting to €2,370,000 were made to Big Sea General Trading Ltd of Dubai for the supply of vehicles purporting to be ambulances without due cause and authorization.

**COUNT 3**

**Statement of Offence**

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

**Particulars of Offence**

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

**COUNT 5**

**Statement of Offence**

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

**Particulars of Offence**

**Cassiel Ato Forson** between 2014 and 2016 in Accra in the Greater Accra Region of the Republic of Ghana intentionally misapplied the sum of €2,370,000 being public property by causing irrevocable Letters of Credit to be established against the budget of the Ministry of Health in favour of Big Sea General Trading Ltd of Dubai for the supply of vehicles purporting to be ambulances without due cause and authorization.

With the filing of a *Nolle Prosequi* in respect of A2, Dr. Sylvester Anemana, counts 2 and 4, of which he was the subject, have become moot.

The question is whether, in the circumstances of this case, this Court should or has the power to go on to determine the tangential issue of the *bona fides* or otherwise of the Attorney-General in bringing these charges before the Court or go ahead to take the whole evidence and make findings of fact on all issues including whether or not the charges were properly laid or brought *mala fide*.

At present, there is no rule of procedure or legislation to merit such a process as I am being called upon to engage in. There is also no power conferred on the Court in the instance where allegations of misconduct on the part of the Prosecutor or any other lawyer before it, ought to be gone into in the course of the criminal trial and a finding made on it. There are appropriate institutions for dealing with such allegations by the rules of practice. The trial court is not one of them.

In this case, the Applicant has not demonstrated how he has been prejudiced, especially as this Court has already found prima facie evidence that he has a case to answer independent of whatever implication the Attorney-General had allegedly sought to deal him. He has adduced evidence and closed his case. The Court will have to assess the evidence to draw a conclusion one way or the other.

However, bad faith, false or tramped up charges may be defences in addition to any others, which may be considered in the assessment of the all the evidence before the Court when the Judgment is being delivered.

There being no legislation in our criminal law and procedure for such a declaration of mistrial as this Court is being called upon to deliver in the circumstances of this case, and there being no other legal basis, I shall decline the invitation to declare a mistrial in this case.

That Application would accordingly be dismissed on that score

**c. On the Application for Injunction to restrain the Prosecution from any further prosecution of the instant proceedings pending the determination of the Applicant's motion for mistrial:**

The law is tritely known that injuncting statutory bodies in the performance of their lawful duties should, if at all, be sparingly done.

It has been held that the Court ought to be cautious in dealing with applications for injunctions when a body is entrusted with statutory discretion and not dog its exercise with injunctions.

Please see:

- **NII KOTEI DZANIE v. THE RECEIVER AND EOCO (Suit No. H1/222/2020 dated 27th April, 2022) CA** and its precursor determined by this Court in **Suit No. FT/0001/2020 dated 6th February, 2020.**

- **ATTORNEY-GENERAL v. CHRAJ [1999-2000] 1 GLR 358)**

- **ENNIN v. AMPIAH [1982-83] GLR 952.**

In the circumstances of this case, I find no exceptional circumstance in the application to injunct the Attorney-General and his office from performing their statutory duty at this late stage of the trial, especially when the Court has ordered A1 to open his defence which he has done.

The Application for injunction is accordingly refused on that score

d. **<u>On the Application for Stay of proceedings in the instant proceedings pending the determination of the Applicant's Motion for mistrial; and</u>**

**<u>The application for stay of proceedings pending appeal:</u>**

The first application for stay of proceedings pending appeal filed on the 21st of May, 2024, is mainly premised on A1's conviction that this court made an

error of law in its decision that A1 first cross-examine A3 before the Prosecution cross-examines A3 and that the order is in breach of the constitutional right to fair trial.

The second application filed on 28th May, 2024, seeks to stay proceedings pending the determination of the Applicant's motion for mistrial.

In this Ruling, the motion for mistrial has been determined and as such the second application for stay of proceedings pending the determination of that process has become moot.

In general, the law on stay of proceedings in criminal matters is set out below.

## THE LAW ON STAY OF PROCEEDINGS IN CRIMINAL CASES

It is without question that the matter of whether or not a court would stay its own proceedings is discretionary.

This Court has the power, per the decision in the relatively recent Supreme Court case of **REPUBLIC v. HIGH COURT, (GENERAL JURISDICTION), ACCRA; EX PARTE: MAGNA INTERNATIONAL TRANSPORT LTD. (GHANA TELECOMMUNICATIONS CO. LTD INTERESTED PARTY)**

**(J5/66A/2017) [2018] GHASC 53 (07 November 2018)** the law was settled that the High Court has jurisdiction to stay its own proceedings pending appeal.

There has been in recent months quite a discussion in the domain of legal scholarship the view that the case of the new Rule 27A of the Court of Appeal Rules might have taken away the jurisdiction of the trial High Court to stay its own proceedings but the decision of the Supreme Court in **REPUBLIC v. HIGH COURT (CRIMINAL DIVISION 9)[SIC]; ACCRA EX PARTE ECOBANK GHANA LIMITED ; ORIGIN 8 & ANOR (RESPONDENTS &INTERESTED PARTIES (CIVIL MOTION NO: J5/10/2022 dated 18th January 2022** (Reported on www.ghalii.org as [2022] GHASC 6) which is binding on all courts below has put that matter to rest.

However, there is no question that in taking that decision, special circumstances must be found to exist before the grant of such an application.

In the case of **THE REPUBLIC v. HAJIA HAWA NINCHEMA & 6 OTHERS, SUIT NO. FT/012/2019 DATED 31ST JULY, 2019**, this Court discussed at length what would amount to special circumstances to merit a stay of the proceedings of the Court.

For instance, in that case, due to the pending the determination of the Constitutional question of the appointment of Mr. Martin Alamisi Amidu as

Special Prosecutor, which matter went to the propriety of the charge sheet before the court, it was determined, on the authority of decision of the Court of Appeal in ***THE REPUBLIC v. STEPHEN KWABENA OPUNI (SUIT NO. H3/32/2019 dated the 8th of April, 2019*** *the Court, per Amadu Tanko JA (as he then was)* that the matter be stayed.

Parts of the decision of this Court are produced *in extenso* hereunder;

*In the decision of the Court of Appeal in the case of* ***THE REPUBLIC v. STEPHEN KWABENA OPUNI (SUIT NO. H3/32/2019 dated the 8th of April, 2019*** *the Court, per Amadu Tanko JA in his concurring judgment enumerated what would amount to exceptional circumstances inter alia that;*

(1) *An application for stay of proceedings is one which invokes the discretionary jurisdiction of the court based on the peculiar facts placed before the court. Therefore, that jurisdiction cannot be exercised from a vacuum. Since it is discretionary, it must be judicious and ought to take into consideration of judicial balancing of any alleged imminent injury or prejudice to the respective rights and interest of the parties pending the determination of the interlocutory appeal.*

(2) *In criminal proceedings as in the instant case, that exercise would involve the balancing of the public interest which the Respondent represents in the expeditious prosecution of alleged criminal conduct, as against the interest*

*of an accused who is presumed innocent until otherwise pronounced by a court of competent jurisdiction. In so doing, the court ought to be mindful of the rights of the accused whose trial ought not to appear unduly rushed while there is a pending intervening judicial process in order to avoid a potential risk of compromising the outcome of the process and the right of the persons standing trial.*

(3) *That is why the consensus of judicial authority require an applicant seeking a stay of proceedings pending the determination of an interlocutory appeal to establish a case of a special kind often referred to as "**exceptional**" in order to succeed. The meaning and scope of the word "**exceptional**" imprecise. Suffice it to say that it admits of a circumstance or situation which is unique and beyond the ordinary course of events. It will involve the consideration of some collateral circumstance and to some extent inherent matters which may, unless a stay is granted paralyze one way or the other the Applicant's constitutional or statutory rights in the pending appeal.*

(4) *Therefore, where the situation is embellished in such terms to appear as though there is a restriction on legal avenues albeit within acceptable judicial practice, that situation cannot be said to be **'exceptional'**. In my view, for a situation be exceptional, it must be specifically tied up to an*

*imminent development in the judicial proceedings which if not stayed, would irreparably prejudice the case of the Applicant. It must be one for which the rights of the Applicant to a fair trial will suffer a limitation or restriction which is unwarranted by law. In other words, the Applicant has a duty to demonstrate that if a stay is not granted, it would overwhelming suffocate the tenets of justice while the interlocutory appeal is pending.*

(5) *It is conceivable that in the course of any trial several objections of a different nature may be raised which require the Trial Judge to deliver a ruling. These include but are not limited to objections on the competence of witnesses, discovery of documents, answer to interrogatories admissibility of evidence whether oral or documentary or the proper custody of documents. Whereas it is open to a party in the proceedings to appeal against any such ruling it considers erroneous, the resort to an application to stay further proceedings for each and every unfavourable ruling pending the determination of the interlocutory appeal though an available right in procedure, will certainly be abusive of the judicial process and will unduly disrupt the substantive trial and must not be allowed.*

(6) *Admittedly, there are exemplary situations where a ground of appeal formulated in the notice of the interlocutory appeal,* ***prima facie*** *provokes*

*an issue of a jurisdictional nature or one that alleges a violation of a constitutional or statutory provision which may be a condition precedent with respect to the action or any step or order in the proceedings. In criminal proceedings, these may include a challenge to the Trial Court's jurisdiction or the propriety of a charge which if upheld on appeal, will potentially vitiate the entire proceedings or bring the continuation of the proceedings in the Trial Court to an end. In any such situation, an exceptional circumstance may be said to have arisen and therefore, it may be judicially prudent that the trial proceedings be stayed pending the outcome of the interlocutory appeal. It is however significant to note that the mere expectation that the interlocutory appeal will succeed is not a sufficient ground to grant an order for stay of proceedings. See the cases of* ***BRUTUW VS. AFERIBA AND ANOR. [1979] GLR at 566 at 570 HC and REPUBLIC VS. COMMITTEE OF ENQUIRY (RT BRISCOE (GHANA LIMITED) EX-PARTE RT BRISCOE 1976 I GLR 166 – 169 CA……..***

*In this case, there is quite clearly a challenge to the jurisdiction of the court and the propriety of the charge before the Court.*

*There is also on the record the fact that the arguments before the Supreme Court have been virtually concluded. It is likely that the matter will be disposed of quite expeditiously.*

*I am of the opinion that the situation at hand would amount to exceptional circumstances such that the instant proceedings ought to be stayed pending the determination of the Appeal and/or the status of the first Special Prosecutor, whichever comes first……..*

*I am of the view that where there is a constitutional matter pending determination, such as where a referral is made, even where there is no appeal pending, it would be in the interest of justice for the proceedings to be stayed."*

In this case, without going into any more detail, it is obvious that none of the instances set out in the decision of His Lordship Tanko JA (as he then was) would be applicable in the circumstances of this case.

I have noted the generic Notice of Appeal which is the foundation for the application to stay proceedings pending appeal. I have noted that even the alleged error of law was not particularized. It seems that there is no real intention or impetus to prosecute any appeal in the foreseeable future.

I hold that there are no exceptional circumstances to merit the grant of stay of proceedings pending appeal at this late stage of the trial.

After having concluded as I have above, I will examine the alternative of applying the constitutional provisions that have founded the application as brought.

**AN ALTERNATIVE CONSIDERATION OF THE APPLICATION OF THE CONSTITUTIONAL PROVISIONS: (ARTICLES 19, 33, 88 (AND 296) OF THE 1992 CONSTITUTION)**

**ON THE ADMISSIBILITY OF EXHIBIT "CAF 2"**

In researching this decision, recourse has been had to our constitutional provisions regarding fair trial, and the exercise of discretion and same will be discussed in brief in relation to the peculiar facts of this case.

It has been put forward by the Respondent that Exhibit CAF 2 is inadmissible as it is secretly recorded evidence. In the case of **THE REPUBLIC v. DR. FREDERICK MAC-PALM AND 9 ORS.(CR 0401/2021),** the Court was called upon to determine the admissibility of secretly- recorded evidence of meetings held to plan the overthrow of the Constitution. In a Ruling dated 2nd November, 2021, the Court extensively discussed all the issues at play here, including alleged breaches of privacy rights and settled on following the decision in **RAPHAEL CUBAGEE v. MICHAEL YEBOAH ASARE [2017- 2020] SCGLR 305** and concluded that in criminal proceedings, the right to privacy is subject to the exceptions provided for by **Article 18 (2) of the 1992 Constitution of Ghana** and considerations of what is in the public interest as provided for by **Article 12 (2) of the 1992 Constitution.**

**Article 18 (2) and 12 (2) of the 1992 Constitution** provide as follows:

*"18 (2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.*

*12 (2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest".*

*(Emphases mine)*

In the **Cubbagee case**, the Supreme Court held that the discretionary evidence rule is to be applied in determining admissibility of evidence obtained in breach of the rights guaranteed by **Article 18 (2) of the 1992 Constitution.** In following the decision of the Supreme Court, this Court sought to balance the nature of the alleged offences committed and the public interest, against the rights of the accused persons. Having embarked on this exercise and having come to the conclusion that, regarding the seriousness of the charges for which the accused persons had been arraigned

in the Court, it was in the public interest to admit the audio and video recordings obtained in breach of such rights. Accordingly, all objections relating to a breach of the rights of privacy of the accused persons, including recordings without Warrant, were held to have no merit and overruled.

This being a criminal proceeding and in the interest of reciprocity, (because should the situation be reversed and law enforcement seeking to have such evidence admitted, the application would likely be granted) the pen drive containing the recorded conversation is admitted. In any case, it has not been denied in principle that that conversation actually took place.

The Exhibit CAF 2 having been admitted however, there is the need to ascribe weight to it. Section **7 (1) of the Electronic Transactions Act of 2008, Act 772** provides that electronic recordings are admissible in evidence in legal proceedings, except as provided in the Act. Section 7 (2) of Act 772, supra and provides a guide to assessment of the weight to be attached to the said evidence.

In the case of **CHANTEL v. KOI [2011] 29 GMJ 20 CA,** it was held that at page 51 of the Report that one important principle that should guide the

tribunal of fact in determining the credibility of witnesses is the need to test the story of the witness as to its consistency with the probabilities that surround the currently existing conditions. In short, the test is whether the story of the witness is in harmony with the preponderance of probabilities which a practical and informed person would recognize as reasonable in those conditions. In other words, once adduced, evidence ought to be tested to determine if it makes sense in the circumstances, and as has been stated supra, the accused person in a criminal matter has a lower burden to only raise reasonable doubt.

See also **NTIRI & ANOR v. ESSIEN & ANOR [2001-2002] SCGLR 451**, it was held that it is the trial court which determines the credibility of a witness. These include the demeanour of the witness, the substance of his testimony, the existence or non-existence of any fact testified to by the witness etc.

Finally, it was held in the case of **TAMAKLOE & PARTNERS UNLTD. V. GIHOC DISTILLERIES CO. LTD,(SC)[2018-2019] 1 GLR 887, (reported on the online portal, www.dennislaw as [2019] DLSC 6580),** that where the court finds evidence not credible, it could also attach little or no weight to the evidence even though it as been admitted without objection.

After having listened to the conversation between A3 and A1, the issue of whether the Attorney-General actually told A3 to implicate A1 is not borne out by the evidence on Exhibit CAF 2. Those words were uttered by A3 at about minute 09:00 to 10:00. In the same vein, the declaration that A3 was innocent and "going through ordeal" but was being asked to help make the case of the AG better was not made by the Attorney-General, but was made by A3, to which the Attorney-General responded at minute 10:20,

*"I am not asking you to help me…."* at minute 10:30. The statement made that *"You and I, you've been meeting me at my cousin's place…"*(at minute 10:45) etc. when studied closely, together with A3's alleged attack of conscience did not proceed from the mouth of the Attorney-General.

What might cause some discomfiture is the fact of having the discussion in the first place, on live matters before the Court and the fact of the Attorney-General having asked A3 to seek a medical excuse (at the 14th to 15th minutes) so as to be absent from Court.

Be that as it may, the matters alluded to in the conversation and the fact of it, with the Attorney-General being a lawyer are matters which do not fall within the remit of criminal proceedings and the duty of this Court, but may fall under the ambit of the Legal Profession (Professional Conduct and

Etiquette) Rules, 2020 (L.I. 2423) which makes the General Legal Council the body responsible for dealing with such alleged infractions.

That said however, and applying well-known principles worldwide, the most important consideration would be whether there is evidence that the accused persons will not have a fair trial in this instance that we are not having a jury trial but a summary one presided over by a single judge, or that the trial shall be avoided *ab initio* because of the content of the conversation. Even in jurisdictions where they have precedent of mistrials being declared because of what is referred to as witness tampering, the threshold is seen to be very high.

The Supreme Court of Canada, applying its Constitutional provision which is somewhat similar to our Article 13 of the 1992 Constitution has had to decide whether or not to stay the proceedings in particular criminal matters which would be of interest in the application of the constitutional principles.

The following are a few examples of such cases;

**In R v. O'CONNOR, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411** - L'Heureux-Dubé J, speaking for the unanimous Supreme Court of Canada established the framework for dealing with situations where the fairness of a trial is

compromised, including by witness tampering. The court did not grant a stay of proceedings but instead focused on balancing the rights of the accused against the need to maintain the integrity of the judicial system opined that;

*["I]t seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused".*

That notwithstanding, the Court took the view that staying the proceedings was not the only option to ensure that there was trial fairness.

**In R. v. REGAN**, (also available on www.Canlii as 2002 SCC 12 (CanLII), [2002] 1 SCR 297, during the police investigation into allegations that the accused, a former Premier of Nova Scotia, had committed numerous sexual offences against a variety of young women who had worked for or with him, a police officer confirmed to a reporter that the accused was under investigation, in violation of police policy to remain silent about individual suspects until charges are laid. At the conclusion of the investigation, a report was submitted to the Director of Public Prosecutions ("DPP") requesting his opinion about the laying of charges. The DPP recommended that charges should be laid involving four of the eight Nova Scotia-based

complainants who were willing to testify. He chose the incidents which involved the most serious physical violations. He also recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. The police did not agree with the DPP's charging recommendation, being of the view that a more complete picture of the allegations against the accused should be put before the court. After the Crown joined police in re-interviewing most of the original complainants, 19 counts for sex-related offences were laid against the accused. One year after the preliminary inquiry, the Crown decided to prefer a direct indictment setting out 18 counts of sex-related offences, including one new charge (Count 16).

After the DPP's written recommendation, one of the Crown Attorneys met with police. At that recorded meeting, she suggested that it would not be "advisable" for charges to be brought before a particular judge, because she thought he might be a political appointee of the same party as the accused. Instead, she said she would "keep monitoring the court docket to see who is sitting when and what would be in our best interest". Police and Crown also agreed to re-interview a number of the complainants.

The case primarily dealt with prosecutorial misconduct. The Court discussed the relevant law on procedural fairness. The Supreme Court

reiterated that a stay of proceedings is a last resort and should only be granted in the clearest of cases where there is no other remedy to cure the prejudice suffered by the accused. **The Court refused the stay of proceedings in that instance too.**

**Further, in R v. BABOS, 2014 SCC 16, [2014] 1 S.C.R. 309 t**he accused were charged with numerous firearms offences, as well as offences related to the importation, production and trafficking of methamphetamine. During the course of the trial, the accused brought an application to stay the proceedings for abuse of process. They took issue with three forms of state misconduct: attempts by the Crown to intimidate them into foregoing their right to a trial by threatening them with additional charges should they choose to plead not guilty, collusion on the part of two police officers to mislead the court about the seizure of a firearm, and improper means used by the Crown in obtaining the medical records of one of the accused persons without his consent. The trial judge stayed the proceedings. The Quebec Court of Appeal set aside the stay and ordered a new trial. The accused persons appealed the decision of the Court of Appeal.

The Supreme Court of Canada **(Abella J. dissenting)** dismissed the appeals. The Court concluded that the Crown's conduct in securing Mr. Piccirilli's medical records occasioned no prejudice to the integrity of the justice system.

The harm caused by the finding of police collusion was curable through an alternative remedy: excluding the firearm from evidence against both appellants. And the Crown's threatening conduct, while reprehensible, did not approximate the type of shocking conduct needed to justify a stay. ……

Finally, the court must decide whether staying the proceedings or having a trial despite the impugned conduct better protects the integrity of the justice system. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits.

Justice Abella in dissenting made the profound statement that "**Justice is not only about results, it is about how those results are obtained**." When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.

**The bottom line though is that even with the well-established Canadian system, the application to stay proceedings was dismissed despite the misconduct of the prosecution, thereby demonstrating their** cautious approach in granting stays of proceedings, even in cases where there is evidence of witness tampering and there is allegation of abuse of process of the Court. The Court's approach highlights the principle that **such a remedy is extraordinary and reserved for only the most egregious circumstances where no other remedy can ensure a fair trial**.

In the British case of **REGINA v. HORSEFERRY ROAD MAGISTRATES COURT;EX PARTE BENNET** dated 24th June, 1993 (Available on www.bailii.org ), the Appellant, a citizen of New Zealand, was wanted for what prosecution said was criminal offences involving the purchase of a helicopter by a series of false pretences and defaulting to pay the money involved. He was eventually traced to South Africa. Extradition was discussed between the Police and the Crown Prosecution Service, but the idea was abandoned because there was no formal extradition provision in force between the UK and the Republic of South Africa and resort would have to be had to a special arrangement.

In spite of this, the Appellant was arrested in South Africa ostensibly to be deported to his home country of New Zealand, but after a roundabout trip

via Taipei, and back to South Africa with two men who identified themselves as South African police, he was handed over to Scotland Yard, without formal extradition process having taken place in South Africa from where he was arrested. It was planned that the Appellant, on transit through London, being deported to New Zealand, would be arrested in London. In essence, he was kidnapped from South Africa and handed over to the British Police. In Court, the British Police denied any involvement in the arrangement. The House of Lords allowed the appeal, asserting the court's authority to investigate and potentially refuse to proceed to trial if the accused was brought within the jurisdiction illegally.

Lord Griffiths stated inter alia viz;

*"There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can rightly be surrendered from one country to another. …"*

It was stated however that staying proceedings or quashing decisions on abuse of process in criminal matters should only be in the clearest of cases.

The Judgment emphasised the role of the judiciary in upholding the rule of law and ensuring fair trials and concluded that the question of whether or not the trial court was competent to investigate the illegality alleged by the Appellant.

There are many more cases of such breaches which may be of academic interest but cannot be digested here for the sake of time and space.
What is observed, however, that in almost the cases from other jurisdictions, the breaches are very fundamental and have to do with how the case was instituted and how the investigations were done to be able to get to the evidence (to be) placed before the Court.

After having listened to the recording, the question to be asked is – is the there actual evidence that the Attorney-General as the Prosecutor has been shown to have behaved in such an egregious manner that the 1st Accused/Applicant's right to a fair trial is in jeopardy?

The conversation before the Court in Exhibit CAF 2 took place in the last few weeks or months, long after the Court had made a determination, on the prima facie evidence, that all the accused persons had a case to answer and the 1st Accused/Applicant had even mounted a spirited defence and closed his case.

A3 is yet to conclude his evidence because there were issues with filing of his witness statements and case management as is borne out by the record.

In the circumstances of this case, and having in mind the issues at stake in the trial, being ambulances that all parties acknowledge are of no use in the condition that they were delivered, the circumstances and justification of which is the subject of the instant trial, and how far this case had travelled before the conversation that sparked these applications came to be, I should think not.

Based on the **Exhibit CAF 2,** the Attorney-General is heard speaking to the 3rd accused person he is prosecuting outside the court and discussing the evidence and even making suggestions as to what the accused should do to obtain **an adjournment**. That, to my mind may negate the principles of right thought. That said, however, the 3rd Accused cannot by any stretch of imagination be seen to be the one to be procuring new evidence, or cowed by the conversation, but the whole situation could be a source of discomfort and discomfiture.

I have found, supra, on well-established principles, that it is well-nigh impossible to injunct a statutory body or public officer, from carrying out

official duties. I have also found that the circumstances of this case to not merit a termination of the proceedings to its logical conclusion. However, to prevent further erosion of the judicial process and uphold the principles of justice, (judicial notice having been taken of what public controversy this may have generated), **I am of the considered view that it would be prudent that the Attorney-General be strongly advised not to be directly or personally involved in the further prosecution of this case**. *This is not in any way, shape or form making a value judgment on whether the Attorney-General was right or wrong in holding a conversation bordering on what was a live case in court with an accused person he was prosecuting,* but I am of the respectful view that this is one way of ensuring that the judicial process is protected and to gain public confidence such that it may not be the perception that cases can be dealt with in any other place than in the courtroom.

**The applications brought on behalf of the 1st Accused/Applicant are dismissed as having no merit.**

**PRELIMINARY POINT OF LAW**

**AFIA SERWAH ASARE-BOTWE (MRS)**
**(JUSTICE OF THE COURT OF APPEAL)**