IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

CORAM: DOTSE, JSC, (PRESIDING)
YEBOAH, JSC
GBADEGBE, JSC
AKAMBA, JSC
PWAMANG, JSC

CRIMINAL APPEAL

NO: J3/5/2014

13TH JULY 2016

G/L/CPL EKOW RUSSEL - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

JUDGMENT

AKAMBA, JSC:

There is a growing menace of drugs infiltrating the very fabric of our society. The situation calls, not only for concern but vigilance as well amongst all in order to stem the tide. This will not be achieved by mere wishful thinking but by willing, active and prudent initiatives to expose the miscreants and to bring them to justice. The fact of the matter is that those who indulge in these activities know the *"rules"* of engagement and will do all it takes to beat them. Against this background the

law enforcement agencies must be current in modern methods of stemming criminal activities and in particular and for our purpose, in meeting all necessary requirements for successful prosecution.

The strength of our criminal justice system over the years has not thrived on mere wishes and speculation but by the production of evidence that meets the standard of proof of crime in a court of justice. Without the necessary evidence, presented in accordance with the rules of law, all the prior efforts made in arresting a suspect would be brought to nought.

FACT BACKGROUND

This appeal lies from a decision of the Court of Appeal dated 13th February 2013 which affirmed the appellant's conviction and sentence. The appellant at the time material to this case was a Police officer attached to the Accra Regional Headquarters. On 27th March 2007 one Maxwell Antwi, a car dealer at Nyamekye, a suburb of Accra was arrested by a Police Detective from CID Headquarters, Accra on suspicion of being in possession of a narcotic drug. Indeed a search on his person revealed some whitish substance suspected to be cocaine – a narcotic drug.

Upon interrogation, he mentioned that the substance was part of some nine hundred (900) grams of similar substance that the appellant Ekow Russel gave to him to sell on his behalf. According to the said Maxwell Antwi, he had succeeded in selling some of the drugs and given the money to the appellant. He was in the process of selling the rest of the substance when he was arrested. It is apparent from the appeal record that Maxwell Antwi and Ekow Russel were charged jointly as 1st and 2nd accused respectively. On 7th February 2008 the 1st accused Maxwell Antwi changed his plea to one of guilty and was convicted and sentenced to 10

years IHL. Maxwell Antwi died on 10th January 2009 while serving his sentence at Koforidua Prisons. (See page 420 of ROA)

Based on these facts, the appellant, Ekow Russell, was tried and convicted by the High Court, Accra and sentenced to 12 years IHL on counts 1 and 2 but acquitted on count 3. On appeal against his conviction and sentence, the Court of Appeal found no merit in the arguments proffered and dismissed same, thus affirming the decision of trial court.

BASIC PRINCIPLES OF CRIMINAL JUSTICE

Let me state certain basic principles underlying our criminal justice system as a prelude to considering the grounds of appeal raised before this court. The first is that an accused person is presumed innocent until the prosecution proves or establishes the contrary. This is a constitutional guarantee provided under article 19 (2) (c) of the Constitution 1992 which states:

"19 (2) A person charged with a criminal offence shall-

(c) be presumed to be innocent until he is proved or has pleaded guilty."

The next is that throughout the trial of an accused person, the prosecution has the burden to prove each ingredient of the charge (s) against the accused, beyond reasonable doubt. Failure to meet this high burden in relation to one of the ingredients of a charge must resonate in an acquittal on that particular charge. The Prosecution must produce the evidence to meet the requirements of S. 11 (2) of the Evidence Act, 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, required 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."

Lastly, our criminal justice system is premised upon the principle that it is better for ninety-nine criminals to go away scot free, than for one innocent person to be wrongly incarcerated or jailed.

ORIGINAL CHARGE SHEET

The trial High Court Judge convicted the appellant herein on counts one and two and this was upheld by the Court of Appeal. The following are the charges that went before the trial court:-

"Count One

Statement of Offence

Possession of Narcotic Drugs without Lawful Authority, Contrary to Section 2 of the Narcotic Drugs (Control, Enforcement and Sanctions) Law, PNDCL 236.

Particulars of Offence

Ekow Russell, that you between 22nd and 27th March 2007 in and around Nyamekye, in Accra and within the jurisdiction of this Court, did have in your possession and under your control, without lawful authority, a quantity of cocaine a narcotic drug.

Count Two

Supply of Narcotic Drugs, Contrary to Section 6 (1) of the Narcotic Drug (Control, Enforcement and Sanctions) Law PNDCL 236.

Particulars of Offence

1. Ekow Russel, that you on or about the 22nd March 2007 at Nyamekye in Accra and within the jurisdiction of this court did supply Maxwell Antwi with a quantity of cocaine without any lawful authority."

GROUNDS OF APPEAL

Four grounds of appeal have been filed for our determination, namely:

1. The Court of Appeal erred when it affirmed the Appellant conviction and sentence.
2. The Court of Appeal erred when it affirmed the admission of Exhibit F and G into evidence.
3. The Court of Appeal erred when it also relied on Exhibit F to affirm the conviction of the Appellant.
4. The Court of Appeal erred when it failed to comply with a decision of the Supreme Court.

ANALYSIS

I will consider the first three grounds of appeal (supra) together in relation to each of the counts on which the appellant was convicted. I will embark on this with a break-down of each of the above quoted counts filed against the appellant Ekow Russel to ascertain whether indeed the prosecution led any evidence in proof of each of the counts to warrant the eventual convictions. I will also determine the fourth ground of appeal in the closing considerations of the three grounds of appeal.

COUNT ONE

The appellant was charged for being in possession of narcotic drugs without lawful authority. What evidence was led by the prosecution in proof of this charge? Possession is the fact of having or holding property in one's power; the exercise of dominion over property. (See Black's Law Dictionary, Eight Edition by Bryan A Garner). Possession in law can be actual or constructive. Possession is said to be actual when one has physical occupancy or control over the property. It is constructive when there is control or dominion over the property without actual possession or custody of it. What evidence did the prosecution lead in proof of the charge of possession by the appellant herein, Ekow Russell?

The prosecution's evidence in proof of this charge is centered on the testimony of PW2, Lance Corporal Thomas Anyekase, who arrested Maxwell Antwi in front of Cata Hotel, Nyamekye (a suburb of Accra) at which time he was behaving suspiciously by putting something in his underpants after he had given a similar thing to somebody. A search on his person revealed some whitish substance suspected to be cocaine. He was arrested to the CID headquarters in Accra and handed over to the station officer of the Organised Crime Unit for investigation. Upon interrogation by the station officer, suspect Maxwell Antwi indicated that the substance found on him was part of some 900 grams of similar substance the Appellant gave to him to sell. That he had already sold some of it and paid the proceeds to the Appellant and was in the process of selling the rest when he was arrested. It was from this piece of evidence that the court was to conclude that the appellant was in possession of the whitish substance which was subsequently confirmed to be cocaine.

In our determination of this ground of appeal it is important to put the PW2's evidence in proper context. In the closing stages of PW2's testimony in court this is what he said at page 54 of the record of appeal (ROA):

"He did interrogate Maxwell Antwi and he admitted that the substance he was holding or was arrested with was cocaine and that substance that he was arrested with was given to him by the 2nd accused Lance Corporal Ekow Russell. After handing him over I did not do anything in respect to this case because I was not the Investigator whatever transpired was between the investigator and the accused persons."

Then under cross-examination by the 2nd accused (appellant herein) this is what the PW2 said:

"Q. You said you arrested Maxwell at Nyamekye with the substance and from Nyamekye to the Police Headquarters, did Maxwell ever mention my name to you that I gave him that substance?

A. No my lord.

Q. And at the point of, as you said Maxwell mentioned my name to the Investigator, were you there when he mentioned the name or it was after that you heard it?

A. It was after that I heard that he mentioned your name.

Q. So it means that Maxwell never told you that I, Ekow Russell have a hand in whatever he was possessing that time?

A. Yes my lord.

….

Q. So you agree with me that you cannot say that Maxwell mentioned my name as the provider of whatever he was in possession at that time?

A. That is during his arrest he didn't but I said from the station officer or from the investigator of the case during interrogation that he mentioned that his source of supply was from you.

Q. You have just told this court that you never interrogated him and that the interrogation was done by the investigator and you later on heard and I am saying that you cannot come here and say that Maxwell mentioned my name as the provider of whatever he was holding.

A. Yes my lord."

The arresting officer PW2 admitted as underlined above that he was not privy to the so-called mention of the appellant as the source or provider of the drug for which he arrested Maxwell. The connection to the appellant was based upon what he (PW2) learnt later from the Investigating officer, PW6 Happy Michael Addae. This transmission is obviously hearsay evidence. How then can hearsay evidence provide a foundation for corroboration by PW6, because you cannot put something on nothing? Put differently, how do you corroborate hearsay evidence which is no evidence, so as to achieve what results?

Whatever PW2 said about what he subsequently heard as emerging from PW6's encounter with Maxwell Antwi would be hearsay so long as he (PW2) was not present when it was uttered. Admitting PW2's testimony about what he heard would be against the hearsay rules provided under s. 117 of the Evidence Act, NRCD 323. In simple terms the rule against hearsay requires that a witness should not talk about something of which he has no personal knowledge. He should rely upon his own observation and recall of the matter in dispute. PW2's testimony about what happened between PW6 and Maxwell Antwi, which amounts to admissions, do not also fall within the exceptions provided under s. 119 of the

Evidence Act NRCD 323 because PW2 is not a party to the charge in his own capacity nor has the appellant manifested his adoption of or belief in the truth of the statement. Equally important, the appellant had not authorized PW2 nor appointed him as his agent to make the statement concerning the mention of his name as the source. Also, PW2 did not make the statement as a co-conspirator in furtherance of the crime. It is therefore surprising that both the trial judge and the honouable appellate judges glossed over this very important evidential foundation which had not been satisfied to pronounce that PW6 had corroborated PW2 that the appellant was the source of the cocaine retrieved from Maxwell Antwi. Section 118 of NRCD 323, would also not avail the prosecution because at the time the PW6 testified in this matter Maxwell Antwi was available and yet not called as a witness. This section avails the prosecution where the declarant is unavailable as a witness. I will return to this issue anon when dealing with the hearsay rules. The trial court and the Court of Appeal simply refused to be guided by Part VIII of the Evidence Act, NRCD 323 hence they fell into avoidable errors to the detriment of the appellant, and thereby causing a miscarriage of justice to the appellant.

Hear what the trial judge stated at page 390 of the ROA:

"PW6 ASP Happy Michael Addae formerly Chief Inspector who is the Station Officer. And the Investigator in this case corroborated the evidence of PW2 that upon interrogating the accused he mentioned that Maxwell Antwi (sic) was his source of supply of the cocaine. PW6 also stated that in his presence and of Maxwell Antwi, the accused admitted that he gave cocaine to the Maxwell Antwi which he sold and gave the proceeds being money to him. PW6 also testified that his presence and the accused, Maxwell Antwi informed him that he sold part of the 900 grams of the cocaine and he gave that money to the accused. The accused also confirmed this to him that he received the US$9,700 as the proceeds. PW6 also

tendered Exhibit B as the cocaine taken from Maxwell Antwi when he was arrested."

There is obviously a mix-up in the trial judge's recount of the narrative by PW2 because PW2 never interrogated Maxwell Antwi beyond arresting him and handing him over together with the suspected cocaine. The PW6 cannot therefore corroborate what the PW2 was not privy to. The trial judge was therefore wrong in his evaluation of the evidence and the attributes he gave to PW2 on the alleged admission by the appellant.

CORROBORATION

Corroboration is defined in section 7 (1) of the NRCD 323 as consisting '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.' The essence of corroboration is to confirm or support a proof of a specific fact on which other evidence has already been given or would be given in due course. This will give the inference that the evidence already given or yet to be given, when given is more likely than not to destroy or establish the fact in issue. Since the testimony of PW6 is based on hearsay evidence the same cannot be allowed to stand against the appellant. I find the trial judge's admission of PW6's hearsay evidence against the appellant and its subsequent endorsement by the Court of Appeal wrongful and pursuant to section 8 of the Evidence Act 323, I hereby exclude same from the record. The first appellate court did no better by also glossing over the many wrongful inferences that the trial court made and thereby affirming the conviction on count one.

In the result the conviction of the appellant on count one which same was affirmed by the Court of Appeal is hereby set aside. The appeal on count one could have

terminated at this point but since other issues were raised before us I would address them, such as the question of possession since that was a matter of concern.

Possession offences in general represent a particular category of strict liability offences. In spite of this, the courts have recognized that the possession must be voluntary in order to constitute the actus reus of the relevant offence. Even where no knowledge is required in respect of the nature of what the accused possesses, there must be knowledge that he possesses something, which seems to imply that the possession must at least be voluntary. All these elements do not come into play in the present set of narrative which must satisfy the very first hurdle in a charge of possession that is to say that the accused (appellant) was in possession either actual or constructive. The appellant was not arrested with the whitish substance which was later confirmed to be cocaine. He was nevertheless charged for possession simply because his co-accused (late Maxwell Antwi) mentioned him as the source of the substance. In any case PW2 in his testimony before the court did not say that the appellant was mentioned as the source of the substance.

It is significant to point out that the evidence of PW6 was composed of his viva voce testimony of what he was told and gathered during his investigations into the case and the written records particularly the investigation caution statements obtained from Maxwell Antwi incriminating the appellant as being the source of the narcotic drug found on him. These statements were tendered in evidence at the trial. They include exhibits L, K, and J. (See pages 422 to 426 of ROA)

To admit these exhibits (supra) simpliciter, as providing the nexus that the prosecution was required to lead evidence to establish, would be to underestimate the nature of the burden the prosecution is required to meet in a charge of such magnitude.

In the case of **Francis Yirenkyi vs The Republic, CRA J3/7/2015 delivered on 17th February 2016 (unreported), SC,** I had occasion to elaborate on the evidential value of confessions made against other accused persons. This is what I stated:

"It is trite criminal law that a confession made by an accused person which is admitted in evidence is evidence against him. It is however not evidence against any other person implicated in it (See Rhodes (1954) 44 CR. App. R. 23) unless it is made in the presence of that person and he acknowledges the incriminating parts so as to make them, in effect, his own.

This position is in contrast with the evidence on oath of a co-accused in a joint trial, which is evidence for all purposes, including the purpose of being evidence against the accused. (See Rudd 1948 32 Cr. App. R. 138)

At common law the plea of guilty of a co-accused was not evidence against the accused (Moore (1959) 40 Cr. App. R. 50).

In the instant case the incriminating evidence relied upon was made prior to the arraignment. It was not evidence given while they were jointly charged when the co-accused in his defence made the incriminating statement. In such instance, the co-accused against whom the incriminating statement is made has the opportunity to discount the incriminating statement in cross-examination."

Thus in the instant appeal, whereas the confessions made in exhibits L, K and J would be incriminating their maker, Maxwell Antwi himself, they cannot be used or weighted as incriminating the appellant herein unless the statements were made in the presence of the appellant and he acknowledges the incriminating parts and thereby making them his own. In the light of the foregoing determination, I find

exhibits L, K and J of no evidential value such as to incriminate the appellant herein.

THE HEARSAY RULE

The point has also been urged that PW6's testimony concerning what Maxwell Antwi said concerning the source of the cocaine found on him ought to be admitted as not constituting hearsay thus justifying the positions taken by both the trial High Court and the Court of Appeal. It is unfortunate that, simple as they are, the hearsay rules which are now graciously codified and adopted in statutory form in the Evidence Act, NRCD 323 still baffles practitioners in prosecution, defence and even the bench.

The fact of the matter is that the question whether a matter is hearsay or not cannot be answered without establishing what is it the court is invited to infer from the evidence. In this instance, PW6's evidence is being proffered to prove that the person so mentioned is the one who gave out the whitish substance and thus committed the offences charged and in those circumstances the evidence would clearly be hearsay. PW6 has no personal knowledge of this fact and relies upon information derived from elsewhere or someone else.

The trial court and the first appellate court belabored over the issue of constructive possession being in the appellant. In the case of **Republic v Munkaila (1996-97) SCGLR 445**, this court highlighted the issue of Constructive Possession.

In that case the appellant arranged for the 1st accused to smuggle narcotic drugs into Ghana. The 1ST accused was arrested with the drugs. It was held that since the appellant it was who employed the 1st accused to smuggle the drugs to Ghana, he was deemed to be in possession and liable accordingly. Even though the appellant was not found in physical possession of the drug, the court held that "a person

would be in in constructive possession or joint possession of an object if he had control over the other person in physical control of the article as to its disposal, control or otherwise. The actual manual possession or touch of the goods by the accused was unnecessary for the completion of the offence…"

The above statement of the law on possession is sound. It is premised upon a number of considerations, key among which is the fact that the court found that it was the appellant who employed the 1st accused to smuggle the narcotic drugs into Ghana hence he was deemed to be in possession and liable. In the present state of affairs, the prosecution failed to assemble credible evidence that would pass the evidential test required of them. Such evidence must not be hearsay evidence but evidence that would be admissible under the rules of engagement.

Here I pause to ask why the prosecution failed to call Maxwell Antwi as a witness. All the issues about hearsay would have been out of the question. I have read what purports to be the prosecution's answer to this question but that is unconvincing. Fact of the matter is that following his conviction and sentence on 7th February 2008, Maxwell Antwi was available if the prosecution was minded to invite him to be their witness. Were it the case that a witness could not travel to the court for stated reasons, the prosecution in appropriate cases, could have applied to the trial court invoking section 124 of Act 30, the Criminal and other Offences (Procedure) Act for a commission to issue dispensing with his attendance at the High Court and for a District Court to examine the witness and the outcome transmitted to the trial court. PW 6 testified in these proceedings on 29th October 2008 (See page 90 of ROA). Maxwell Antwi died on 10th January 2009. So that, between his conviction date of 7th February 2008 and his death on 10th January 2009 what was the prosecution waiting for? Well, it was their case to make.

Having failed to meet the initial test, no further consideration can be given to the rest of the evidence put forward by the prosecution since you cannot put something on nothing – it will collapse. As a reminder section 11 (2) and 13 (1) of the Evidence Act, NRCD 323 provides:

"11 (2) 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 evidence of the fact beyond all reasonable doubt.

….

13 (1) In any civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."

ADMISSIBILITY OF CONFESSION STATEMENTS

The strongest effort made by the prosecution to sustain a conviction of the appellant came from their attempt to rely upon a confession statement purportedly made on 28th March 2007 and accepted in evidence and marked as Exhibit F. A confession is an acknowledgment in express words, by the accused in a criminal charge, of the truth of the main fact charged or of some essential part of it. By its nature, such statement if voluntarily given by an accused person himself, offers the most reliable piece of evidence upon which to convict the accused. It is for this reason that safeguards have been put in place to ensure that what is given as a confession is voluntary and of the accused person's own free will without any fear, intimidation, coercion, promises or favours. Exhibit F was accepted in evidence after a heated controversy over its voluntariness. Another confession statement obtained from the appellant, exhibit G, was withdrawn because the alleged

independent witness could not be identified. Since an appeal is by way of rehearing, the issue of the admissibility of exhibit F, being the subject of vehement challenge in this appeal, would be revisited. I would begin consideration of the admissibility of exhibit F by observing that quite a number of 'caution statements' were obtained from the appellant in the course of these investigations and tendered in evidence. Exhibit C was obtained on 11th April 2007; Exhibit D was obtained on 29th March 2007; Exhibit E was obtained on 27th June 2007; Exhibit F was obtained on 28th March 2007. Exhibit G a 'further statement' was obtained on 14th April 2007 but was withdrawn. (See pages 409 to 418 of ROA). It is obvious from the exhibits above listed that quite apart from exhibit F in which the maker admits the offence, the rest (except for exhibit G which was withdrawn by the prosecution) are denials or retractions. It is simply because the exhibit F purports to be a confession statement hence the challenge to its admissibility.

INDEPENDENT WITNESS

The appellant objected to the tendering of exhibit F. His reasons are that he did not give such statement but that the Chief Inspector Henry Addae wrote a statement in his own words of which he had no idea and he was made to sign it while he was in Mr Adu Amankwah's office on 28th March 2007. In brief, the statement attributed to him was not his making. There was also no independent witness to the signing. It is in order to resolve such stalemates that the Evidence Act, NRCD 323 stipulates for the presence of an independent witness who will help to determine the circumstances in which the statement was obtained. Who then is an independent witness under the Evidence Act, NRCD 323? J. Ofori Boateng in his book entitled 'The Ghana Law of Evidence, 1993, provides a very useful and beneficial definition of an independent witness against the background of the many difficulties encountered in the earlier attempts at disqualifying members of the

police and armed forces as independent witnesses and the requirement that the independent witness be approved by the accused. The present state of the law is that policemen and members of the armed forces qua policemen and members of the armed forces are not disqualified per se but that they must meet the standard test. Thus at page 115 of his book, the distinguished jurist and author provides the following inclusive definition:

"Independent witness may include every person who qualifies to be a competent witness and has no direct personal interest in the case in issue. And so, even policemen and soldiers who come from the investigating stations may qualify under the Decree to be independent witnesses whether the detained accused person approves of them or not. An incarcerated accused person wishing to confess voluntarily therefore has no choice but to accept any competent disinterested person imposed on him by the investigating police or military officer, even when this disinterested person is another policeman or a military man." [Underline Mine]

It is against this working definition and this court's earlier decision in the case of **Kwaku Frimpong @ Iboman vs The Republic, [2012] 1 SCGLR 297** that I would consider the objection taken to the admission of exhibit F.

In the Iboman case (supra), this court gave a vivid summary of the rationale for the necessity for the presence of an independent witness when obtaining confession statements from accused persons. My respected brother Dotse JSC stated the rationale in the following words:

"The rationale for the above elaborate provisions is clear: They are to ensure that the rights of the declarant, i.e. the accused, who is under restriction, are not trampled upon by the Police or the investigative agencies. These constitute the rights of all accused persons as has been protected by 1992 Constitution."

The present case affords us an opportunity to have another look at our decision in the Iboman case (supra) especially on the question as to who is an independent witness in the light of section 120 of the Evidence Act, NRCD 323. There is no denying that section 120 (2) and (3) of NRCD 323 is provided to ensure fairness to an accused person who volunteers to make a confession while under State restrictions. Thus the safeguards enumerated in the NRCD 323 (1975) are formulated to protect the rights of the accused that are guaranteed by the Constitution 1992. In the same vein the provisions of section 120 of NRCD 323 are not intended to stifle investigations into crimes by state agencies. It is common knowledge the difficult and harsh conditions under which some of these agencies operate in order to bring culprits to justice. On the other hand, we need to be mindful of the level of impunity that agencies can go to without proper guidelines to streamline their operations.

The requirement for an independent witness is dictated by the need to grant both investigators and accused persons a transparent, fair and even field for the proper gathering of evidence. Two illustrations will assist us in arriving at a working definition of the independent witness envisaged under section 120 of NRCD 323. In the course of these investigations, exhibit G was obtained from the appellant herein. It was purported to be a confession statement. It was supposed to have been obtained in the presence of an 'independent witness' - a supposed aunt of the appellant identified as Rosemary Asiedu on 14th April 2007.[See page 417 of ROA]. The prosecution was compelled to abandon their reliance on that statement because, not only did the appellant deny making it, they (prosecution) could not trace Rosemary Asiedu from her Aburi Secondary School address that was given to them. The prosecution claimed that the witness had come to visit the suspect (appellant) during the investigations and was invited by the investigator as a potential independent witness. The investigator thought he could rely on her to witness the statement of the suspect. This choice was made without regard to the purpose to be served and the need for circumspection in order to achieve those objectives. The result was to succumb to a witness who is otherwise non-existent or who could not be traced when needed. The prosecution had no option than to withdraw the statement or suffer a humiliating rejection by the court. The problem with this 'independent witness' (if indeed there was such witness) was that she had an interest which was better served by swerving the investigators in order to

absolve her relative. In the same vein a policeman or soldier or prison officer who is closely involved with the investigation team is likely to play bias in favour of his duty calling by simply not being truthful on the matter in issue. It is therefore not so much the institution one belongs to that should determine whether a person is qualified to be an independent witness as much as the level of interest and closeness one has to or in the particular case under investigation. For the above reasons I find this an opportune occasion to clarify that the segment of our decision in the Iboman case which gives the impression that police personnel per se are excluded from being independent witnesses when it states to the effect that 'an independent witness must not be someone who is so closely connected to the police as to make him more or less dependent on the police' as not properly couched and as such not in consonance with the intendment of our s 120 of the NRCD 323 and to that extent made per in-curiam. In order to attain the objectives of providing adequate safeguards for a suspect under investigation an independent witness as used in s.120 of NRCD 323 may include any person who qualifies to be a competent witness and has no direct personal interest in the case in issue. Such an independent person must be a person who is disinterested in the matter under investigation. At the official level, the independent person should not be directly under the control and influence of the person investigating the crime nor himself be part of the investigation team. In summary, any person - be it a policeman, a soldier, a prison officer, other security investigating apparatus or civilian - who qualifies in terms of being disinterested in the matter under investigation, and is not under the direct control and influence of the person investigating the crime, or is not himself part of the investigation team and qualifies to be a competent witness may serve as an independent witness. The independent witness must also meet the requirements of section 120 (3) of NRCD 323. By this provision the person must:

(a) Understand the language which the accused speaks
(b) Can read and understand the language in which the statement is made
(c) Must understand read and speak English.

Against the above understanding, I proceed to measure exhibit F as to whether or not it was obtained voluntarily and in the presence of an independent witness. The prosecution named one Christopher Afful as the independent person who witnessed the recording of exhibit F. The appellant disputes the presence of any such witness as well as the voluntariness of the statement. The presence of the

independent witness is crucial for determining the voluntariness of the statement. Equally important is the need for the witness to be truly independent in the sense of being a disinterested person in the matter being investigated in order to give his testimony a measure of credibility. Recounting the events leading to the choice of Police Constable Christopher Afful at the material time, this is what Happy Michael Addae said at page 139 of the appeal record:

"Yes my lord I could remember on the 28th of March when I called accused on phone and he came in police uniform. I marched him before my Unit Commander. So after my Unit Commander interrogated him and he confessed my Unit Commander asked me and other policemen, including Christopher Afful to take the accused to his residence and search him. So after the search we came back and I used Christopher Afful as independent witness to witness the statement I was taking from accused."

It is obvious from the account given by Happy Michael Addae that Constable Christopher Afful was part of his investigation team that went to search the premises of the appellant for anything incriminating failing which, on their return, he used him as the independent witness.

Here are excerpts from the cross-examination of Constable Christopher Afful during the voire dire (See page 128 of ROA):

"Q. All right I am sure my lord understands my question so I won't pursue it. Now, on that Wednesday afternoon I suggest to you that you had no business with Chief Addae until he called you. Is that not so? You had no business with Chief Inspector Addae until he sent for you?

A. No my lord

Q. You had business with him?

A. Yes my lord.

Q. What type of business?

A. We conducted search at A2's house, he was our commander at that time.

Q. So Chief Addae led you and others to go and search the 2nd accused?

A. Yes my lord."

It quite evident from the record that Constable Christopher Afful played an important role in the investigations into the allegations against the appellant culminating in the search of the appellant's premises which he admits. Such a person without doubt cannot be described as a 'disinterested witness'. This is not because he is a policeman but because of his role in investigating the appellant at the time. Any other policeman who was not involved directly in the investigations could have passed the test for an independent witness. Corporal Christopher Afful was not a disinterested person and could not have dissociated himself from doing the bidding of the team leader or the team as a whole, whether rightly or wrongly. Thus he did not satisfy the requirement of an independent witness for the purpose for which he purportedly witnessed exhibit F. His testimony concerning the circumstances under which the statement was obtained cannot be trusted more so when he was part of the investigation team. The appellant denies the presence of Corporal Christopher Afful at the time the exhibit was given to him to sign. He signed the document because they threatened to handcuff him and parade him to his residence for the search. Given the interest and role of Constable Afful in this matter, he did not qualify to serve as an independent witness as envisaged under s 120 of NRCD 323. His testimony and accounts of events were warped to achieve the objectives of the investigations of which he was an essential part.

Both the trial judge and the appellate judges were unmindful of the policy considerations which underlie the requirement for an independent witness and thereby fell into the grave error of accepting exhibit F as a confession statement.

Underlying these policy considerations are the need for reliability of confessions weighted against the indignity and injustice of the use of physical and psychological coercion to extract incriminating statements. The question of reliability is important because a confession is a damning statement made by the accused himself and it is apt to be given considerable weight by the tribunal of fact. If the tribunal should choose to believe that a confession was made when in fact there was no confession or that a particular confession were true when in fact it was false, it is very likely that the wrong verdict would be reached or at least that the accused would be seriously prejudiced. Since a true confession is so highly persuasive, care must be taken to ensure that the tribunal of fact does not credit evidence of a confession unless there is good reason to believe that the confession was actually made in the terms presented in court and was a true and reliable statement when made. (See the commentary on the Evidence Decree, 1975, NRCD 323, page 100)

By a strange and curious coincidence exhibit D which was obtained on 29th March 2007, the very next day after exhibit F was purportedly made, bears a complete denial of the charges levelled against the appellant. In exhibit D the appellant stated that Maxwell Antwi trumped up the charges against him because of their rivalry over a girl-friend. See also page 267 of ROA.

This case has all the hallmarks of very poor investigation and lack of professionalism. A lot was taken for granted by the investigators who were unmindful of the fact that their desire to bring culprits to justice for infringing the criminal laws must be matched by the safeguards for the liberty of the individual guaranteed by law.

In the circumstances narrated supra I find merit in this ground of appeal and declare exhibit F as not obtained in accordance with section 120 of NRCD 323 as amended by SMCD 237. The so called independent witness was unqualified to be an independent witness. Consequently, the exhibit F was made in the absence of a qualified independent witness and same was wrongly admitted in evidence by the trial court after the voire dire. The subsequent affirmation by the Court of Appeal was equally wrong. This certainly is one of the situations in which this court may appropriately expunge the exhibit F as inadmissible pursuant to section 8 of the Evidence Decree. (See also Edward Nasser vs McVroom 1996/1997 SCGLR 468). It is accordingly expunged as an exhibit pursuant to s. 8 of NRCD 323. Consequently the appeal on this ground is allowed.

Our attention has also been drawn to the case of **Antoh v The State 1965 GLR 676**. We have no doubt that the statement of principle therein made is correct. It is correct to state that the admissibility of a statement by a court does not necessarily mean that the statement is of evidential value so as to automatically result in conviction. A statement that is admitted into evidence must be weighted to determine whether it is valuable enough to sustain the conviction sought. The present case is different. Here, we are discounting the admission of exhibit F as same did not meet the prior requirement of the presence of a qualified independent witness before obtaining the 'confession statement' from the accused. In essence the exhibit was obtained in the absence of a qualified independent witness which is a necessary prerequisite of s. 120 (2) of NRCD 323.

COUNT TWO

The evidence relied upon to sustain count one was the same for this count except that in the latter instance it was proffered to establish a charge of supplying

narcotic drug contrary to s 6 (1) of PNDCL 236. With the collapse of the possession charge in count one the second count of supplying cannot stand. The simple reason for this is that one cannot supply what one does not actually or constructively possess. For the same reasons advanced in allowing the appeal against the appellant's conviction on count one, count two equally fails. The appeal on count two is consequently allowed.

In conclusion and for all the reasons rendered above, the appeal is allowed. The decision of the trial judge which same was affirmed by the Court of Appeal is hereby set aside. Considering the totality of evidence on record and the role played by the appellant herein in the events that led to the charges against him, it is clear that the accused is being acquitted based upon a pure technicality.

On the whole therefore, I do not find this to be a suitable case to invoke article 14 (7) of the Constitution for the award of any compensation. For the avoidance of doubt, we do not find the appellant in the circumstance of this case, suitable for the award of any compensation.

The article 14 (7) of the Constitution, 1992 states that:

"Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted."

The appellant is acquitted and discharged on both counts. Appellant is not entitled to any award of compensation.

(SGD) J.B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) V.J.M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) N.S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

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