IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

CORAM: WOOD CJ (MRS) PRESIDING
ADINYIRA (MRS) JSC
DOTSE JSC
YEBOAH JSC
GBADEGBE JSC
BENIN JSC
AKAMBA JSC

WRIT
NO.J1/13/2015

5TH MAY 2016

MARTIN KPEBU **PLAINTIFF**

VRS

THE ATTORNEY-GENERAL **DEFENDANT**

JUDGMENT

BENIN, JSC

The plaintiff herein seeks a single relief from this court, namely: *A declaration that section 96(7) of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) as amended by the Criminal Procedure Code (Amendment) Act 2002, (Act 633) contravenes Articles 15(2) and 19(2)(c) of the 1992 Constitution and is therefore null, void and of no effect.*

In order to appreciate the ensuing discussion, it is necessary at this early stage to set out the relevant provisions of Act 30 as amended, as well as the Constitution, 1992 upon which this action is founded. Section 96(7) of Act 30 as amended by Section 7 of Act 633 and also as amended by section 41(1)(a) of the Anti-Terrorism Act, 2008 (Act 762) reads:

A court shall refuse to grant bail-

(a) in a case of treason, subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody , or acts of terrorism;
(b) where a person is being held for extradition to a foreign country.

The relevant provisions of the Constitution read:

Article 15(2): No person shall, whether or not he is arrested, restricted or detained, be subjected to

(a) torture or other cruel, inhuman or degrading treatment or punishment;
(b) any other condition that detracts or is likely to detract from his dignity and worth as a human being.

Article 19(2)(c): A person charged with a criminal offence shall,…….be presumed to be innocent until he is proved or has pleaded guilty.

When they filed their statement of case the defendant argued that by virtue of Article 14(1) of the Constitution the liberty of the individual could be curtailed in certain situations, therefore section 96(7) of Act 30 had this constitutional backing. The defendant therefore set down Article 14(1) in the memorandum of issues whether section 96(7) of Act 30 was inconsistent with it. The court consequently adopted the issue as formulated by the defendant, whether section 96(7) of Act 30 as amended by Act 633 is inconsistent with Articles 14(1), 15(2) and 19(2)(c) of the Constitution. The said Article 14(1) provides that:

Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law-

- ***(a) in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or***
- ***(b) in execution of an order of a court punishing him for contempt of court; or***
- ***(c) for the purpose of bringing him before a court in execution of an order of a court; or***
- ***(d) in the case of a person suffering from an infectious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community; or***
- ***(e) for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or***
- ***(f) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or***
- ***(g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.***

Arguments by the plaintiff

Counsel for the plaintiff began his arguments by reference to Article 19(2)(c) of the Constitution which presumes that a person is innocent until he is proven guilty or has pleaded guilty. This affirms the innocence of a person charged with an offence until the court has found him to be guilty. He submitted that bail was directly linked to individual liberty which is guaranteed by Article 14 of the Constitution. Counsel submitted that "*the law on bail is of immense importance in the criminal administration of justice and the courts and the police may use such powers to restrict the liberty of a person who is accused of some offence. This restriction on the liberty of the individual as an accused person is susceptible to abuse particularly on the part of the law enforcement agencies and it is on the basis of checking the abuses and excesses that the Constitution 1992 has itself set the parameters upon which the liberty of persons may be curtailed pending their conviction or otherwise. This is in compliance with the cardinal principle of*

criminal jurisprudence in common law jurisdictions and which is constitutionalized in Article 19(2)(c) which treats an accused as innocent until the contrary is proved."

Counsel then proceeded to argue that bail has two main purposes or objectives. The first is to ensure the accused makes himself available at the subsequent proceedings whilst he is not in custody. The second one is "*to ensure the safety of the community pending trial of the accused person…."* He argued that the second objective is *"tantamount to punishing the accused person even before trial and it is on the basis of this that s. 96(7) of the Criminal Procedure Act (as variously amended) was enacted."*

Counsel then made this important assertion, in relation to his case, that "*the no-bail provision as captured in section 96(7) of…..Act 30 as amended by…….Act 633, has raised constitutional challenges particularly when viewed against the automatic presumption of innocence until proven guilty or confession of commission of the crime……"* In respect of this submission counsel made reference to this court's decision in the case of **Gorman v. Republic (2003-2004) SCGLR 784.** Counsel has serious issues with parts of this decision. In short he urged the court to depart from that decision. Indeed counsel dwelt at length on this decision which in his view should not be allowed to stand. I will return to it in a moment.

Arguments by the defendant

After a brief summary of the case set up by the plaintiff, counsel for the defendant submitted "*that the Constitution itself makes it clear that the refusal to grant bail to a suspect/accused if exercised judiciously shall not be held to be inconsistent with or in contravention of the Constitution."* He relied on these constitutional provisions: Articles 14(1)(g) and 21(4)(a) and (b). Article 14(1) has been quoted above but for purpose of emphasis I reproduce 14(1)(g):

> ***(1) Every person shall be entitled to his personal liberty and a person shall not be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law:***
>
> ***(g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.***

Article 21 also provides in relevant terms that:

(4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision-

(a) for the imposition of restrictions by order of a court that are required in the interest of defence, public safety or public order, on the movement or residence within Ghana of any person; or

(b) for the imposition of restrictions, by order of a court, on the movement of residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana…. (Emphasis supplied***)***

On the strength of the above-cited provisions, counsel for the defendant submitted that "*the declaration sought by the plaintiff cannot be entertained, the claim or relief sought by him is in itself unconstitutional"*

Counsel made reference to section 96(7) of Act 30 and said it is a mandatory requirement that the court shall refuse to grant bail in the offences and situations described therein. That being so it overrides any alleged violation of the principle of natural justice as held in cases like **Twum v. Attorney-General (2008) 7 M.L.R.G.** and **Akuffo-Addo & others v. Quashie-Idun (1969) GLR 667.**

Counsel's view was that as long as both Act 30, section 96(7) thereof and the Constitution per Articles 14(1) and 21(4)(a) and (b) allow the detention of persons during trial, the argument of the plaintiff which border on morality is untenable.

Let me begin with a reference to the case of Gorman v. Republic, supra, hereafter called the Gorman case. Counsel quoted a portion of that decision at page 795 of the report and based a lot of his argument on it. For a better understanding I will reproduce the said extract from the decision, per Modibo Ocran, JSC, who read the opinion of the court: "*Undergirding our principles for decision on applications for bail is the effective enforcement of our criminal law guided by due process considerations, which constitute the procedural aspects of the commitment to protect liberty of the individual. A true system of criminal justice must, indeed, reflect both aspects of criminal jurisprudence. If not, one of two consequences will follow, either the law enforcement agencies of the State ride roughshod over the rights of the accused, or criminals would have a field day in the system as they*

roam the streets in full liberty and with contempt for the efficacy of our criminal enactment"

This was a general statement of principles that the court outlined. Counsel for the plaintiff took serious exception to the use of the word 'criminals' in the statement. His view was that until proven guilty no person was a criminal, which I think is a true statement of the law. A careful reading of the statement in question would show that the learned justices were referring to accused persons, which expression they had used in the immediately preceding line. It could never be attributed to the court that it did not know that persons under investigation or in court for trial and who have not been convicted are not criminals. The expression 'criminals' as appearing in the decision should be understood in the context in which it was employed. The court was talking about bails for persons facing trial, so the expression must be construed to mean accused persons. To emphasize this point, the court was dealing with 'accused' persons and had used both 'accused' and 'criminals' in the same sentence; therefore the court was not talking about convicted persons, that is criminals, but accused persons who had not been convicted and thus not criminals.

Counsel also had issues with another pronouncement by the court in the Gorman case. At page 797 the court delivered itself in these words: "*Basing ourselves on articles 14(1) and (3) and to some extent on article 19(2)(c) of the 1992 Constitution, we hold that there is a derivative constitutional presumption of grant of bail in the areas falling outside the courts' direct duty to grant bail under article 14(4). However, this by itself is not dispositive of the legal problem of bails, for it seems clear that this presumption is rebuttable. Any other reading of the Constitution would lead to the untenable conclusion that every accused person has an automatic right to bail under our Constitution. This presumption is, for example, rebutted in cases where a statute specifically disallows bail based on the nature of the offence, such as the situations outlined in section 96(7) of…….Act 30……."*

In counsel's view this decision raises some challenges to the right to liberty of the individual which is guaranteed by the Constitution. Counsel's view was that the presumption of innocence is not rebuttable unless a person has been pronounced guilty of an offence after a hearing or upon a plea of guilt. Secondly, counsel's view is that the constitutional presumption of innocence cannot be taken away by a statute, as the decision implies.

Indeed when one reads the Gorman decision further, one gets the impression that the court's statement under discussion was not indicative of what counsel attributes to it; it was part of the general principles that have been applied in questions of bail that the court was talking about. Unless that is the understanding, one would find it hard to reconcile the viewpoint that section 96(7) of Act 30 is one of those instances where the presumption of innocence is rebutted with what the court said subsequently. I am here referring to what the court said at pages 801-802, namely: "*Thus, even in the case of offences mentioned in section 96(7) of the Criminal Procedure Code, bail must be granted if there is no trial within a reasonable time. Justice Brobbey, in his Practice & Procedure in the Trial Courts & Tribunals (Vol 1, 2000 p. 466), writes:* ***'Since the Constitution is the fundamental law of the land, to the extent that article 14(3) and (4) mandate bail for all offences while Act 30, s 96(7) excepts the grant of bail in murder cases, etc the latter is deemed to have been repealed by the former by reason of the inconsistency. This was the view taken in Dogbey v. The Republic (1976) 2 GLR 82 and Brefor v. The Republic (1980) GLR 679. There is no doubt that the latter view backed by the two cases is more accurate.'*** *This court is in entire agreement with Justice Brobbey's opinion"*

It should be pointed out that this last statement is an endorsement of the view that in so far as s. 96(7) appears to be a fetter or clog on the undisputed constitutional right of the courts to grant bail in every offence, it is inconsistent with the Constitution and thus stands repealed, albeit by implication. The court, having endorsed this view, could not at the same time say that s. 96(7) of Act 30 has rebutted the presumption of innocence. At worst they would be contradictory in terms, in which case the more beneficial one to the right of accused persons or in favour of personal liberty should prevail. But my reading of the decision in the Gorman case does not convince me the court was contradicting itself when it is considered in the light of all the principles that have been applied and are applicable to bail cases where there has been unreasonable delay in the proceedings. For soon after affirming the opinion by the learned author quoted above, the court proceeded to discuss the matter before it which was in respect of an application for bail in a matter where there was no delay. The ratio of that case should thus be confined to the court's decision in matters where there had been no delay in the proceedings which does not attract the duty imposed on the court to consider bail under Article 14(4) of the Constitution.

I would therefore proceed to consider this action without having any shadow of the Gorman decision ahead of me. This principle of presumption of innocence is a very important one in the criminal justice system and it underpins the basic concept of individual liberty under the Constitution. When the opportunity arose the US Supreme Court seized the occasion to firmly place this principle in its jurisprudence. That was in the case of **Coffin v. United States, 156 U.S. 432 (1895)** decided on March 4, 1895. The court said that "***the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law…..***"

The principle has gained worldwide acceptance. The UN Declaration of Human Rights, Article 11(1) states that:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

The same principle is re-stated by Article 7(1)(b) of the African Charter on Human and Peoples' Rights. Article 19(2)(c) of the Constitution reaffirms this principle which Ghana has subscribed to at both the UN and AU.

In the Gorman case the court was not called upon to determine whether s. 96(7) of Act 30 was inconsistent with Article 19(2)(c) of the Constitution. Article 19(2)(c) of the constitution gives a suspect under investigation or an accused on trial the benefit that he is innocent until the court has found him guilty after a hearing or following a plea of guilt. The grant of bail is one of the tools available to the court to ensure that a suspect or an accused, as the case may be, is guaranteed his innocence until the court has found him guilty. The presumption of innocence embodies freedom from arbitrary detention and also serves as a safeguard against punishment before conviction. It also acts as a preventive measure against the State from successfully employing its vast resources to cause greater damage to a person who has not been convicted than he can inflict on the community. Therefore in my humble view any legislation, outside the Constitution, that takes away or purports to take away, either expressly or by necessary implication, the right of an accused to be considered for bail would have pre-judged or presumed him guilty even before the court has said so. That would be clearly contrary to this constitutional provision which guarantees his innocence until otherwise declared by a court of competent jurisdiction. In my opinion, besides article 14(3) and (4) which the court in the Gorman case endorsed as having impliedly repealed s. 96(7) of Act 30, the

said statutory provision is also contrary to the letter and spirit of Article 19(2)(c) in so far as prohibition of the right to apply for the court's consideration for bail presumes the guilt and not the innocence of a suspect or accused, as the case may be. Article 14(3) and (4) provide:

(3) A person who is arrested or detained

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, shall be brought before a court within forty-eight hours after the arrest, restriction or detention.

(4) Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released whether unconditionally, or upon reasonable conditions, including in particular conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

In view of these clear provisions the interpretation placed on them in the Gorman case that they impliedly repealed section 96(7) of Act 30 as amended is sound. For the court is in no way prohibited from considering bail in any criminal offence as section 96(7) purports to do. Thus these three provisions, namely Articles 14(3) and (4) and 19(2)(c) and as I shall shortly demonstrate Article 14(1), should be read together in order to appreciate that a prohibition on the right to bail is in conflict with the constitutional provisions on individual liberty. I will return later to this.

The danger posed by this law, that is s. 96(7) of Act 30, is that it sets no time frame in which the investigations should end; it sets no time frame within which the provision should cease to apply whether or not investigations have been concluded; it sets no specific conditions in which they are to apply. It means therefore that if the prosecution prefers any of these charges against another person whether the facts support the charge or not, the court's only duty is to put you away because the law says so. It is a sure recipe for abuse of executive power to stultify all the provisions on personal liberty enshrined in the Constitution. It is necessary to state that the issue whether to deprive a person of his personal liberty under Article 14 of the Constitution is not a magisterial or executive act, but a judicial one. I recall

the words of Justice Frank Murphy in his dissenting opinion in the case of **Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946)** at 219 that**: "*Liberty is too priceless to be forfeited through the zeal of an administrative agent.*"**

The existence of Article 14(4) whereby the court can grant bail as a result of unreasonable delay does not remove the danger because judges and magistrates can rely on this law to deny bail, and indeed the practice still goes on. The courts yield to the imperative nature of that law and thereby deny personal liberty to the individual without the restraining hand of the judiciary. Since the provision is clearly inconsistent with the provisions on personal liberties guaranteed under the Constitution it should not be left to stand. Indeed any law that violates any of the Chapter 5 rights under the Constitution is itself unconstitutional.

At this stage let us refer to the experiences of other established democracies on this question which were considered for their persuasive influence.

In India the law stresses the importance of the presumption of innocence. In an article with the tltle: **Bail, A Matter Of Right: Not To Be Denied On Ground Of Nationality,** by Bijoylashmi Das, the learned author made reference to Article 21 of the Indian Constitution, a similar provision like Article 14 of our Constitution, 1992, and said, rightly so, that personal liberty is of utmost importance and that *"deprivation of personal liberty must be founded on the most serious considerations relevant to welfare objectives of the society as specified in the Constitution.*" Quoting from some decisions of the Indian Supreme Court, the learned author continued thus: *"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust, exercisable, not casually but judicially, with lively concern for the cost to the individual and community*." This statement is true and apt and I reiterate what I earlier said that the question of bail consideration is not a magisterial or executive act, which section 96(7) purports to do, but a judicial one, to be performed under the Constitution.

In the United States in the very year 1789 that the Bill of Rights was introduced, the Judiciary Act was enacted. It allowed bail to be granted by every court of competent jurisdiction in every offence except in capital offences where bail was restricted to the Supreme Court and other superior courts named therein. Thus the right to bail was recognized pursuant to the right of the individual to his liberty until a judicial pronouncement to the contrary has been made.

Let us move into specific subjects. I will consider extradition laws in the United States and then go on to consider anti-terrorism laws in the United Kingdom. In the United States, the Bail Reform Act makes no provision for bail in international extradition cases. However, the courts have not shied away from granting bail in appropriate cases, bearing in mind, however, the need to respect the principle of comity and co-operation with other nations. The Supreme Court had the opportunity to pronounce on the question of bail in extradition proceedings in the case of ***Wright v. Henkell, 190 U.S. 40 (1903)*** decided on 1 June 1903. The court recognized that international and diplomatic considerations weighed against the grant of bail in extradition proceedings. However, at page 63, the court speaking through Fuller, CJ had this to say: "*We are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that while bail should not ordinarily be granted in cases of foreign extraditions those courts may not in any case, whatever the special circumstances, extend that relief."* The courts themselves do recognize the need to be slow in granting bail in such cases; hence they have applied what they call the presumption against bail in extradition cases, thereby placing a burden on defendant to rebut the presumption in order to get bail. And even in those cases where bail has been granted it has been on very strict conditions and limited in its terms. See these cases: ***United States v. Kin-Hong, 83 F. 3d, 523 (1st Cir 1996); Martin v. Warden, 993 F. 2d. 824 (11th Cir 1993); Salerno v. United States, 878 F. 2d 317 (9th Cir. 1989).*** These references have been made to show that even in cases of foreign extradition which have a bearing on the nation's international standing among the comity of nations the court has the undoubted power to consider bail in appropriate cases even without express statutory backing as part of its duty to ensure the liberty of all persons as duly guaranteed. And in a constitutional dispensation the court has a duty imposed by the Constitution to ensure the protection of human rights. The restrictions that the courts in the United States have imposed upon themselves in extradition proceedings is to acknowledge that the interest of the State and for that matter the society should also be considered in matters of bail in criminal offences. That is the beauty of democracy that all competing interests are catered for.

In 2001 the UK adopted the Anti-terrorism, Crime and Security Act, apparently in response to the events of September 11, 2001 in the USA. On 16 December 2004 the House of Lords issued a ruling that the detention without trial of some foreigners detained at HM Prison Belmarsh under Part 4 of the Act was unlawful, being incompatible with European, and thus domestic human rights laws. See **A**

and others v. Secretary of State for the Home Department (2004) UKHL 56; popularly called the 'Belmarsh 9' case. In response to this ruling the Prevention of Terrorism Act 2005 (c.2) was passed. In April 2006 a High Court judge issued a declaration that section 3 of the 2005 Act was incompatible with the right to a fair trial under article 6 of the European Convention on Human Rights. The system of control orders in the Act was described by Justice Sullivan as an affront to justice. That was in the case of **MB, Re (2006) EWHC 1000 (Admin**). The learned judge had this to say:

"To say that the Act does not give the respondent in this case, against whom a non-derogating control order has been made by the Secretary of State, a fair hearing in the determination of his rights under Article 6 of the Convention would be an understatement. The court would be failing in its duty…….if it did not say, loud and clear, that the procedure under the Act whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage are conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of judicial supervision." Emphasis supplied. The Court of Appeal, whilst disagreeing that the respondent's Article 6 rights had been breached nevertheless agreed that his Article 5 rights were breached. But the reasoning of the High Court judge is sound.

The relevance of the 2004 decision by the House of Lords in the 'Belmarsh 9' case and the High Court decision in **Re MB**, supra, is that the courts took special recognition of the human rights laws and would not compromise them in favour of other instruments which were an infraction on the human rights of individuals. Especially those situations where the power to determine the rights of an individual were placed in the hands of the executive without the court's right of superintending same cannot be sustained.

Even in countries which have legislations that place limitations or what may appear to be prohibition on bail for certain offences, access to the courts is not completely shut out. See schedule 1 of the Bail Act of 1976 applicable in England and Wales and the Code of Criminal Procedure, 1973 of India. The latter classifies some offences as non-bailable. But the attitude of the courts is reflected in the Supreme Court decision that the basic rule under the law is bail and not jail, see the

case of ***State of Rajasthan, Jaipur v. Balchand @ Ballay (1977) AIR 2447; (1978) SCR(1) 535***. The courts have been able to consider bail in all offences including those classified as non-bailable, but that right is denied the Police who are non-judicial officers. Indeed the Act itself permits the courts to grant bail under certain conditions even for offences described as non-bailable. They are so described because in certain conditions the accused or suspect may be refused bail, for instance where there appears to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. See section 437 of the said Act.

However, it is noted that under Scot law the crimes of treason and murder were made non-bailable. That was introduced by section 24(1) of the Criminal Procedure (Scotland) Act, 1995. But it did not survive the ensuing public disapproval so it was repealed five years later by section 3(1) of Bail, Judicial Appointments etc (Scotland) Act, 2000 thereby allowing the courts to consider bail in all crimes. However, the laws set out some stringent conditions for bail in some specific crimes like drugs and sexual offences.

Under Schedule 1, Part 1 of the Bail Act of 1976 applicable in England and Wales, the law sets out situations in which the court may deny bail to an accused. Indeed they are set out as exceptions to the right to bail. But they are no more than the grounds our courts do normally consider whether to grant bail or not, like those situations mentioned in section 96(1) to (6) of Act 30. What is important to note is that the right to be considered for bail is not foreclosed by the law; the prosecution has to satisfy the court that an accused has forfeited his right to bail in any of the grounds listed in the schedule.

Under the Criminal Procedural Code of the Czech Republic, bail cannot be considered in certain listed offences including murder, rape, robbery; but, the court is not debarred from considering an application for bail altogether as it is under section 96(7) of Act 30. Under the Czech Code the court is required to refuse bail where the person is being held due to concern of continuation of criminal activity. In other words it sets out ground rules for refusal to allow bail, just like the English Act cited above. Several of such legislations exist globally. Yet the power to superintend over the criminal justice system in democracies has not been denied the judicial arm of government which has the mandate to protect the fundamental rights of citizens, of course mindful of the public interest as well.

On the African continent, let us turn attention to South Africa which also practices constitutional democracy like Ghana. Section 61A of the Criminal Procedure Code

of the State of Bophuthatswana required that the court should refuse bail in certain situations only upon information provided by the Attorney-General. In the case of **Smith v. Attorney-General, Bophuthatswana (1984) 1 S.A. 196(B)** the Bophusthatswana Supreme Court struck down this provision as invalid the same being in conflict with the Bill of Rights, the equivalent of the Human Rights Chapter 5 of our Constitution, 1992. This is what Hiemstra CJ said: "***The universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons. Every man is entitled to due process of the law. This principle is so ancient that it can be traced back to the Magna Carta…… In section 61A the judicial process is eliminated. The order refusing bail to a suspect is still made in open court by a judicial officer, but it is a pantomime of a court. The magistrate is not only compelled to accept the Attorney-General's ex parte statements of fact, not supported by any evidence, but the statute also tells him what order to give, namely a refusal to grant bail. A statute which eliminates the judicial process in matters of personal liberty is plainly unconstitutional."*** Emphasis supplied.

In arriving at my decision, I considered the arguments of Counsel for the defendant which I entirely rejected. Under Article 14(1)(g), it is true the liberty of a person who has committed or is reasonably suspected to have committed an offence may be curtailed. That provision must not be read in isolation, but in conjunction with Articles 14(3) and (4) as well as 19(2)(c). Indeed Article 14(1) should be read as a whole. The said provision, that is 14(1), does not say, expressly or by necessary implication, that a person detained in the circumstances described, is not entitled to be granted bail. No such words should be imported into that provision. It does not justify the existence of section 96(7) of Act 30 which prohibits the consideration of bail, contrary to article 14(1)(g) which permits the detention of a person in certain situations, without prohibiting such a person from being considered for release on bail. This provision in article 14(1)(g) whether standing on its own or when read in conjunction with Article 14(4) is clear that it was not intended that a person held under the former could not be granted bail at all in certain specified offences, which section 96(7) purports to do. Counsel for the defendant appeared to have reached an illogical conclusion from his own arguments. Let me repeat the material part of his argument. He said that "*the Constitution itself makes it clear that the requirement to grant bail to a suspect/accused if exercised judiciously shall not be held to be inconsistent with or in contravention of the Constitution"* Who has the power to determine that the issue of bail has been judiciously exercised? It is certainly not the executive; it is the function of the judiciary by virtue of Article

125 of the Constitution. Article 14(1) has set out under what terms and situations the detention of an individual may be justified; in none of those situations is the court's involvement excluded. And as counsel for defendant duly acknowledged, the exercise of this duty is to be done judiciously. From Counsel's own arguments the only logical inference or conclusion should be that if any other law exists which does not allow the court to judiciously determine whether or not to curtail a person's personal liberty that law would be inconsistent with Article 14(1). For if the court is denied the right to examine the question of bail how does it exercise its function judiciously? What jurisdiction the Constitution has granted cannot be detracted from by any other law, it can only be added to.

Counsel's argument amounts to the court being called upon to shirk the duty imposed on it by Article 14(1) to ensure that any person who is deprived of his personal liberty has been subjected to due process which calls for examination of every case regardless of the offence the person is alleged to have committed. For Article 14(1) does not give room for the lawful detention of a person based upon the nature of the offence alleged to have been committed by him. It is pertinent to observe that Article 14(1) says 'no person shall be deprived of his personal liberty except in the following cases….' Thus the Constitution itself has circumscribed the situations in which a person may be deprived of his liberty. Therefore s. 96(7) of Act 30 that seeks to add to this list is inconsistent with the constitutional provision. Thus the existence of section 96(7) of Act 30, as amended undermines the express provisions of Article 14(1) of the Constitution.

What of Article 21(4)(a) and (b)? These provisions do not call for any interpretation at all. The simple language employed is clear that by an order of a court a person's right may be curtailed. These provisions rather give credence to the position of the plaintiff that in all cases the continued detention of a suspect or accused after forty-eight hours of arrest, restriction or detention can only be justified by an order of court and that the right of a court to consider bail cannot be curtailed permanently by statute.

The plaintiff's application has also been brought under Article 15(2) of the Constitution, 1992 which largely deals with the right to dignity. Clause 1 of Article 15 states the inviolability of the right to human dignity. This right has been stressed and given prominence in matters of governance at least from the time of Roman civilization. Before then, religious theologians had insisted on it basing their arguments on the biblical revelation that God created man in his own image. There is no need to trace its history in this short piece. Suffice it to say that, like the

presumption of innocence, it has gained worldwide acceptance. The inviolability of the human dignity is a core human right which must be respected and protected. The UN Charter recognizes it and so does the UN Declaration on Human Rights in its preamble which states that the '*recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'*

The International Covenant on Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights both state that all human rights derive from the inherent dignity of the human person. In the same vein, the European Court of Human Rights regards human dignity as underpinning all of the human rights protected by law. See the case of **Pretty v. United Kingdom; case no. 2346/02 (2002) ECHR 423 dated 29 April 2002.** Hence the same court applied the principle of human dignity to a case founded on the right to a fair hearing, see the case of **Bock v. Germany 12 EHRR 1990 247 delivered on 29 March 1989.** This principle has been applied in several cases including forms of punishment, equality of sexes, gay and lesbian rights and several others, depending on the jurisdiction and in the context of their constitution and statutes. I do not intend to go into these cases on account of relevancy. However, I note that the free person and his dignity are the highest values of the constitutional order therefore the State in all its forms is obliged to respect and defend it.

I have perused the argument of the plaintiff and I do not really fathom the connection between article 15(2) of the Constitution and section 96(7) of Act 30 in the instant case. This being a case of constitutional interpretation we have to examine the provision from the perspective of its two legal components, namely the form of punishment prescribed by a statute and also the form of detention that defiles human dignity. The fact that a suspect or accused is placed in custody does not per se violate the dignity of the individual person. For it is a requirement of the Constitution that a person suffers the consequences of his crime. For that reason the Constitutional provision in Article 14(1)(g) enables the investigating agencies and/or the court to place a person behind bars in appropriate cases during investigations, arraignment or trial. What the Constitution frowns upon is arbitrariness or the inhumane or cruel nature of the detention or punishment, as the case may be. Counsel appeared not to have addressed this question adequately; he rather spent so much time on American jurisprudence whereby the courts there had departed from their previous decisions, in his quest to satisfy us to depart from the

decision in the Gorman case. In the process he got lost in transit and failed to address the questions posed by Article 15(2).

This provision gives protection to the person who is under some form of detention following an arrest. The provision ensures that his human dignity is not abused by the sort of punishment that is inflicted upon him or the way and manner his detention is effectuated by the State. That is where all state actors have a role to play at every turn in the criminal justice system to ensure that a complainant's dignity as a person is not abused.

Counsel's only submission of some substance is in respect of the kind of conditions that prevail in our prisons. Consequently he thinks when a person who has not been convicted is denied bail and is sent to such jails it would be violating his human right to personal dignity. I think this argument is a little far-fetched and quite dangerous. The reason being that if conditions prevailing in the prisons are employed as a ground for striking down a law, then all criminal suspects and convicted criminals as well would apply to be set free on that account. The ends of justice should not lead to chaotic results and absurd situations. That surely is contrary to the constitutional provisions and even international human rights instruments which allow the prosecution and possible imprisonment of persons who fall foul of the criminal laws.

Counsel did not invoke this provision appropriately. In my view, the provision is invoked where the plaintiff complains that the legislation in question has prescribed some form of punishment that is cruel, degrading or inhuman which is consequently inconsistent with this constitutional provision. Secondly, the provision applies if there is a complaint that a particular legislation has prescribed some form of detention which is a violation of his human dignity. In either case it will be within the plaintiff's right to have such legislation declared unconstitutional. Here again the plaintiff has not demonstrated that section 96(7) of Act 30 prescribes a form of punishment or detention that violates the human dignity. Indeed it contains no such provision. The conditions in the prisons are not the subject of this legislation under consideration.

Let us wind down by returning to the earlier arguments on the Gorman case. Counsel for the plaintiff was concerned that when the court used the expression 'criminals' in the Gorman case to describe persons who had not been convicted, it "*makes it virtually impossible for such an applicant to seek a bail from the court"* I think the court went on to explain that a court could grant bail in all cases first as a constitutionally imposed duty under Article 14(4) where there has been

unreasonable delay and in other cases where there has been no such delay. The court was concerned that bail should not be used as an instrument of oppression by state actors against accused persons whilst at the same time it should not be manipulated by persons who have been accused of committing crimes particularly serious crimes to be left at large in situations which call for their incarceration pending trial. It was a timely caution to the courts, especially trial courts to exercise due care in questions of bail, more particularly in serious crimes.

Let me return to the discussion on Articles 14(1), (3) and (4) and 19(2)(c). It is observed that an application for bail may be made in any offence wherein Article 14(4) applies, that is in cases of unreasonable delay in the pre-trial proceedings or during the trial where the accused has been placed in custody. This provision has additional support in Article 19(1) which provides that ***A person charged with a criminal offence shall be given a fair hearing within a reasonable time.*** This provision taken together with Article 14(4) confirms the importance attached to time in dealing with criminal offences lest the rights of the individual should be abused, even for those who are on bail. However, a critical appraisal of Articles 14(4), 19(1) and 19(2)(c) would appear to confer the power or jurisdiction to consider and grant bail to the trial court, which in the context means the court with the jurisdiction to hear the particular offence. For instance in cases of piracy or murder and others where the High Court is the only court with original jurisdiction, application for bail cannot be made to any other court in the first instance. Thus even if the complaint of unreasonable delay is from the pre-trial proceedings as envisaged under Article 14(4), nevertheless a committal court or a holding court, if it may be so called, has no jurisdiction to entertain any application in respect of offences which it has no jurisdiction to hear.

In respect of applications for bail brought under Article 14(4), which are mostly in serious crimes, the appropriate court is required first of all to make a determination that on the facts and circumstances there has been unreasonable delay. If it arrives at a contrary decision the court of course will not proceed at all to the next phase. If it clears the constitutional hurdle and thus determines that there has been unreasonable delay, it becomes the duty of the court to proceed to assess the various grounds for the application under enabling statutes and applicable jurisprudence. It must always bear in mind that it has a constitutional duty under Article 12(2) to balance the interest of the individual against that of others and the public as well. These safeguards are in place under the Constitution to ensure the enjoyment of the rights guaranteed under the Constitution by the entire members of

society and ensure a smooth and effective operation of the criminal justice system. Thus whilst it is possible to let loose a person on trial for armed robbery for instance, yet it is still possible to put such a person behind bars if that will serve the general good of other persons or the community. It becomes obvious that the court should not be in haste in taking decisions on bail under Article 14(4), it must receive all the evidence it needs from both the accused and the State and should thus afford them every opportunity to present the evidence to enable it make an informed decision. This constitutional provision imposes on the court more than a passive acquaintance with the laws on bail; it requires more than a cursory examination of a bail application; it requires more than 'having perused the papers filed, and having heard counsel on both sides, I hereby grant, or refuse to grant the application', as the case may be. It calls for a well-reasoned decision. Thus applications for bail in serious offences should be taken as a serious business in the interest of society which has adopted a constitution impliedly removing the restrictions imposed by section 96(7) of Act 30 and placing the trust in the court that all competing interests would be taken care of.

To conclude I uphold the claim that section 96(7) of Act 30, as variously amended is inconsistent with Article 19(2)(c) of the Constitution and for that reason is null, void and of no effect. In my view article 14(1)(g) does not justify the continued existence of section 96(7) of Act 30, as amended. Indeed in so far as article 14(1)(g), either standing on its own or when read together with Article 14(4), leaves room for the court to consider a release of a person detained under that provision, section 96(7) of Act 30 as amended is clearly inconsistent with it, and to that extent is null, void and of no effect. And in so far as the prohibition imposed by section 96(7) of Act 30 does not fall within the exceptions in Article 14(1) it is inconsistent with it and is thus null, void and of no effect. Section 96(7) of Act 30 is accordingly struck down. I do hereby reject the claim founded on Article 15(2) of the Constitution for reasons explained above.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

WOOD (MRS) CJ

I have had opportunity to read both the lead opinion and dissentient of my respected Brother and Sister, Benin JSC and Adinyira (Mrs) JSC respectively. Unfortunately, I disagree with the latter's ratiocination on the principal issue before this court, namely, the constitutional validity of section 96 (7) of the Criminal and other Offences (Procedure) Act, 1960 (Act 30) viz a viz articles 14 (1), 15 (2) and 19 (2) of the 1992 Constitution. Contrariwise, I agree with the Benin JSC findings of an existing inconsistency between these two provisions.

I would however take the liberty to contribute to this important discourse, with its many possible far-reaching ramifications, particularly, in relation to the status quo, given that for some decades, before this epoch-making decision, courts have regulated affairs on the assumption that section 96 (7) of Act 30, was perfectly constitutional and not in conflict with the relevant articles 14 (1), 15 (2) and 19 (2) (c) of the Constitution. Thus, hitherto, in the lower courts in particular, where the bulk of criminal proceedings in respect of those serious offences listed under section 96 (7) of Act 30, are conducted (initiated or tried), applications for bail, have typically been met with the common refrain- "not- entitled- to- bail", on account of the section 96 (7) of Act 30 prohibition.

Our decision demands a further exercise of our constitutional jurisdiction under article 2 (2) of the Constitution. Making the appropriate consequential orders and issuing broad directions will meet the demands of justice, given its possible effect on the many accused persons being held in pre-trial detention, on grounds that their offences were non-bailable.

One of the cardinal features of constitutional democracies governed by the rule of law is the power of judicial review. It is a strong bulwark against illegality and impunity and insulates citizens against their human rights violations. Dr. Date-Bah

JSC, in the case of Adofo v Attorney –General [2005-2006] SCGLR 42, spoke the mind of this court on the rationale behind judicial review litigation, the legal process through which, as in this instant action, the apex court determines the constitutionality of executive or legislative action. He said of the latter:

"The power of judicial review of the constitutionality of legislation, which is explicitly conferred on this court by articles 2(1) and 130 (1) of the Constitution is one that should vigilantly be enforced by this court in the discharge of its obligation to uphold the Constitution of this country… The Constitution expects judges to protect individuals and minorities from the power of the majority. The provisions on the fundamental human rights and freedoms enshrined in Chapter 5 of the 1992 Constitution are intended to facilitate the fulfillment by judges of this expectation."

Buoyed by articles 2(1) and 130 (1) of the Constitution, the Plaintiff, desirous of advancing the frontiers of our constitutional jurisprudence, and safeguarding the individual rights and liberties of the citizenry, has invoked the original jurisdiction of this court for declaratory relief and further nullification of the relevant statutory provision. The action is premised on the ground that:

"...Section 96 (7) of the Criminal and Other Offence (sic) (Procedure Act), 1960 (Act 30) as amended by the Criminal Procedure Code (Amendment) Act, 2002 (Act 633) contravenes Articles 15 (2) and 19 (2) (c) of the 1992 Constitution…"

As per paragraph (4) of the Plaintiff's statement of case, section 96 (7) is said to provide that:

"…a court shall refuse to grant bail in a case of treason, subversion, murder, robbery, hijacking, piracy,rape and defilement or escape from lawful custody"

This statement contains an error which even if inadvertent, is nonetheless significant enough to merit correction. Pertinently, some offences have been excluded from the list of serious offences provided under section 96 (7) of Act 30, and which offences, in the lexicon of criminal law in our jurisdiction, are referred to as "non-bailable" offences.

Thus, the correct legal position, following the revision and consolidation of all amendments under the principal enactments, per Laws of Ghana (Revised Edition) Act 1988, Act 562, section 96 (7) of the Criminal and Other Offences (Procedure) Act,1960, (Act 30) is that:

"A Court shall refuse to grant bail;

(a) In a case of acts of terrorism, treason, subversion, murder, robbery, offences listed in Parts 1 and 11 of the Narcotic Drugs Control, Enforcement and Sanctions) Law, 1990 (P.N.D.C.L. 236), hijacking,piracy, rape,defilement or escape from Lawful Custody, or 13 (a)(15)

(b) Where a person is being held for extradition to a foreign Country."

The determinative point in this action thus turns on the constitutional validity of section 96 (7) of Act 30, viz a viz articles 14 (1) and 19(2) (c) of the 1992 Constitution.

I agree with my Sister Mrs. Adinyira JSC, that the Plaintiff expended considerable time and energy, in putting up a case unsupportable in law. This he did by urging a departure from what he erroneously thought was a previous decision of this court, and thus exposed himself to clear danger of a "non-suit". That pathway, which resulted in copious references to decisions of the United States Supreme Court, to

demonstrate how the court changes its opinions overtime, was therefore clearly of no assistance or precedent value to this court. And so the argument inter alia that:

"The Plaintiff recognises the decision in Gorman v The Republic. However, the Plaintiff's case is that, the decision should not stand the test of time. Gorman was in 2003. Today we are in 2015; a lot of water has passed under the bridge as such calls for a review of Gorman."

is, for the purposes of the central question in this instant action, non sequitur. The reason is simple. Clearly, undergirding the doctrine of stare decisis and its related principles as pertains to this court's governing jurisdiction, is the fact that the decision from which the departure is urged, is a definitive or conclusive decision in a previous action. However, in the case of Gorman and Others v The Republic [2003-2004] SCGLR 784 (Gorman case), this court made no distinctive pronouncement on the constitutionality or otherwise of the section 96 (7) of Act 30.

Nonetheless, the saving grace as regards Counsel's approach is this. In court room litigation, it is not Counsel's mere spirited views nor propositions that informs a court's decision one way or the other. Otherwise, court work would be in perpetual jeopardy. Judges would be rendered judicially impotent and ineffectual, without the ability to pronounce on any dispute, given parties' competing interests and the divergent opinions that are invariably advanced in support of their respective positions. Classically, Counsel's or a party's significantly different views on any given matter, only assists the court to comprehend their respective claims, and identify the law and facts in issue. But certainly, their assertions, opinions, theories or arguments are not the determinants for either identifying the real issues or judging the matter.

Thus, beyond Counsel's spirited arguments, it was incumbent on us to determine, the subsidiary issue of whether or not the court authoritatively decided the constitutional validity of section 96 (7) of Act 30 viz a viz articles 14 (1) and 19 (2) (c) of the Constitution- the key issue for adjudication in this instant action.

I agree entirely with the finding that the Gorman case is not an authoritative pronouncement of this Court on the constitutional validity of the section 96 (7) of Act 30, and which would neccessarily require our sound and compelling reasons, if we are minded to depart therefrom.

Four issues were raised in the Gorman appeal hearing before this court. These, together with the arguments in support thereof, are neatly set out in the head notes. The constitutionality or otherwise of articles 14(1) and 19 (2)(c) viz a viz section 96 (7) of Act 30 do not from part of the issues raised before this court. The appeal questioned the correctness of the Court of Appeal decision, which had reversed the trial High Court court's grant of bail, and denied the accused bail, on account, specifically, of the heineousness or gravity of the offence. In other words, the Court of Appeal's decision to rescind the bail earlier granted by the High Court, was not premised on the ground that per section 96 (7) of Act 30, by the operation of law, the appellants were not entitled to bail; their offences being "non-bailable". Hence, no arguments were advanced by the parties; either with the leave of the court - which leave they sought either on their own volition, or was granted by the court suo moto- as is the just legal requirement, following the court's first time incursions into the matters related to section 96 (7) of Act 30, and which finally culminated, inter alia, in the following broad statements only:

"Drawing on our general analysis of the law above, we summarize our holdings as follows:

"(5) Outside the strictures of s.96 (7) of the Code and article 14(9) of the Constitution, the presumption of the grant of bail is still extant, and is exercised under judicial discretion which is itself fettered by other provisions of s. 96.

(6) There is no prima facie inconsistency between the relevant provisions of the code and the 1992 Constitution."

Consequently, the court's pronouncements on the section 96 (7) of Act 30, constitutes obiter dicta. The same is without binding authority, and thus of persuasive precedent only, if at all. It is not the ratio decidendi of the Gorman case; a mandatory binding authority, from which this court can depart.

Admittedly, the 1979 High Court case of Owusu v The Republic [1980] GLR 460, raised a similar legal question, given that article 14 (3) (b) and (4) of the 1992 Constitution, on which that case was premised, is couched in similar words as article 21 (3)(b) and (4) of the 1979 Constitution. In that case, the applicant who had been charged with the offence of abetment of murder, in applying for bail, was met with a similar argument, namely, that section 96 (7) (a) of Act 30 prohibited the grant of bail. But, the decision on that critical legal question, if at all is of persuasive authority only.

However, this action is the first frontal challenge to the constitutionality or otherwise of section 96 (7) of Act 30, in the context of the 1992 Constitution. And on this substantive issue, I agree with my brother Benin JSC that this statutory provision contravenes articles 14 (1) and 19 (2) (c) of the 1992 Constitution, and clearly to that full extent null and void and of no effect.

Denial of personal liberty constitutes a most serious human rights violation under both domestic and international law. The Plaintiff thus rightly questions the constitutional validity of section 96 (7) of Act 30 within our entrenched human

rights constitutional framework, in the light of the high value attached to personal liberty, within the context of the preamble to the 1992 Constitution, article 14 and additionally the article 19 (2) presumption of innocence guaranteed an accused person until otherwise found guilty by a court of competent jurisdiction, following due process, namely, the fair trial procedures detailed under the Constitution and other laws of Ghana.

Thus, the determination of this validity question requires a proper construction of these relevant constitutional and statutory provisions in a manner consistent with the well-established interpretative principles of this court.

Articles 14 (1) (f) (g) (2) (3) &(4) and 19(2) (c) of the 1992 Constitution provide:

(a)…

(f) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or

(g) Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.

(2) A person who is arrested, restricted or detained shall be informed immediately; in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.

(3) A person who is arrested, restricted or detained –

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released,

shall be brought before a court within forty-eight hours after the arrest, restriction or detention.

(4) Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Article 19 (2) (c) of the Constitution provides:

(2) A person charged with a criminal offence shall…

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

A contextual, holistic, liberal and suis generis interpretation of these fundamental human rights provisions, in conformity with the established constitutional principles of this court, as expounded in a long line of cases, including the more recent case of Bortier Quaye v E C & Attorney–General [2012] SCGLR 433, which advocates a purposive "reading of entire provisions with a view to assuring that every provision is given effect…" validates the conclusions reached by Benin JSC in this matter.

Constitutional human rights and freedoms provisions are entitled to the most benevolent and liberal construction on account of their very essence - entrenched constitutional laws pertaining to fundamental rights and freedoms. Thus, a narrow and restrictive interpretation, in a manner that fail to advance individual rights and liberties is not permissible.

Article 14 (1) explicitly delineates the constitutional and therefore only valid limitations to the right to personal liberty. Article 14(1)-(4) which enumerates the conditions for curtaliment, is thus subject to a strict and narrow construction. Also, any substantive or procedural legislation which is inconsistent with the enumerated grounds, risks nullification on grounds of unconstitutionality.

Unlike what obtains in some other jurisdictions, both article 14 and section 96 (7) of Act 30 do not specifically provide for, and draw a distinction between "bailable" and "non-bailable" offences. I am inclined to think that, we borrowed the "bailable" or "non-bailable" terms, for ease of reference, from a jurisdiction with a different legal framework, possibly India, but these are not terms of art and not statutorily provided for. On the other hand, the Indian Penal Code specifically classifies offences into bailable and non-bailable. The terms are defined under section 2(a) of the Criminal Procedure Code, 1973 (Cr.Pc), and with detailed provisions on their respective scope and applicability, and the grounds for the grant of bail in non-bailable offences. Instructively then, foreign precedents are not of much assistance on the issue of their scope and applicability.

Giving our article 14 a sui generis construction, it is to be noted that bail, not being an inalienable right, article 14 (4) does not confer on "a person arrested, restricted, or detained under paragraph (a) or (b) of clause (3) of article 14", an automatic absolute right to bail in all cases and under all circumstances. But neither does it provide for the complete opposite, namely an automatic denial of bail. Automatic, does not, in my view, imply that the court's decision on whether bail must be denied or granted, is mechanically triggered upon the mere production of a charge sheet, as the case may be, with a stated bailable or non-bailable offence , even if the same were a trumped- up charge, or plainly if the facts do not support the charge. In other words, it has never been the legal nor judicial thinking

that in criminal proceedings, bail considerations kick in at the mere wave of a charge sheet. Fidelity to the rule of law and due process dictates that the full panoply of the judges' powers be deployed fully to serve justice to both the prosecution and the defence along the entire judicial chain process. Thus, ordinarily, if the facts as presented in court -which must necessarily disclose the nature of the evidence to be proferred -do not support the charge, the person arrested, detained or charged is entitled to a discharge. Also, section 96 (7) of Act 30, does not mean persons charged with any of the enumerated offences are completely debarred or prohibited, from applying for bail. It is their constitutional right to apply for bail at any stage of the judicial process. But as I shall demonstrate, bail is inevitably denied on account of the mandatory prohibition under section 96 (7) of Act 30.

By way of comparative analysis, article 14 of the Constitution does not expressly or impliedly prohibit the grant of bail to persons charged with the offences listed under 96 (7) of Act 30, as was the expressly provided under the old 1969 Kenyan Republican Constituition. Section 72 (5) of the 1969 Constitution of Kenya, was a definite amendment specifically effected "to prohibit the grant of bail to offences punishable by death."(Criminal Case No. 115 of 2008 Republic v Milton Kabulit & 6 Others [2011] eKLR Refers)

What article 14(3) and (4) of the Constitution of Ghana does is to vest discretionary power in the courts, to grant or deny bail to persons charged with a criminal offence; under the clear obligation that the power shall be exercised rationally- not arbitrarily or capriciously- but judicially, in accordance with substantive and procedural due process. It does follow that, in all criminal cases, the only grounds on which bail may be granted or denied, are those set out under section 96 (1)-(6) of Act 30, which criteria- for grant or refusal of bail- includes the

nature of the accusation and the nature of the evidence in support of it. These are the factors that the court is obligated to scrutinize on an application for bail. Importantly, article 14 (3) and (4), does not provide for indefinite pre-trial detention. Thus, even where for compelling reasons bail is denied, the court has a constitutional duty to provide a fair trial within a reasonable time, failing which the person is entitled to be released on bail. The courts have a duty to strictly uphold the constitutional right to a fair trial within a reasonable time for persons under pre-trial detention. That is the principal antidote against lengthy pre-trial incarceration periods, which unavoidably, is a restriction on liberty and which also militates against the presumption of innocence. For purposes of clarity, I reproduce the relevant provisions:

(3) A person who is arrested, restricted or detained –

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released,

shall be brought before a court within forty-eight hours after the arrest, restriction or detention.

(4) Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

A further safeguard of human liberty and dignity is the constitutional right of presumption of innocence guaranteed under article 19 (c) of the Constitution. This important right is embodied in the following International and Regional instruments to which Ghana is a signatory.The Universal Declaration of Human Rights (UDHR) (Article 11(1), International Covenant on Civil and Political Rights (ICCPR) (Article 14 (2) and the African Charter on Human and People's Rights (7b). I concede that likewise, this presumption does not raise an automatic or absolute right to bail. However, it being one of the universally acknowledged most powerful protections afforded the individual, it is the juridical synergy between articles 14 (3) and (4) in particular and 19 (2) (c), on which Plaintiff anchors his case and prays for the nullification of section 96 (7) of Act 30.

The article 14 having provided the substantive legal framework within which the right to liberty operates, to test the limits of legality of section 96 (7) of Act 30 by reference to its express provisions viz a viz the express provisions of articles 14 and 19(2) (c), begs the following question. How do we interprete section 96 (7) of Act 30? Differently stated, what is the legislation designed to accomplish?

Statutory provisions are equally subject to purposive interpretation. This has been the long- standing legal position as firmly held by such cases as; Nana Hyeaman 11 v Osei and Others [1982-83] GLR 495, Eshun and Another v Poku and Others [1989-90] 2 GLR 572 and Appiah v Biani [1991] 1 GLR 155, and the more authoritative pronouncement of this court in the case of Asare v. Attorney – General [2003-2004] 2SCGLR 823; Adofo and Others v Attorney-General and Another [2003-2005] SGLR 239 and Republic v High Court, Accra; Ex Parte Yalley (Gyanae and Another Interested Parties [2007-2008] 1 SCGLR 512.

An equally significant statutory interpretation principle requires that laws that curtail rights and freedoms, must not be construed expansively or liberally, but narrowly or restrictively.

On the proper construction of section 96 (7) of Act 30, I am not persuaded by the opinion expressed by my Sister Mrs. Adinyira JSC. In summary, she argues that the contrary Benin opinion arises from "a mechanistic out of context construction of the entire provision within the context of the word "shall" and as buttressed by the use of the phraseology "in a case of", rather than the use of "where a person is charged". She urges that our section 96 (5) and (6) would require some pre-trial evidential hearing akin to what obtains in some other jurisdictions such as the US, UK and India. Pertinently, she reasoned:

"Certainly, determining whether for example a case of murder has been established by the prosecution requires a judicial enquiry into the nature of the evidence and not by merely looking at the charge sheet. This determination by the court is a mandatory judicial process required under section 96(6) and it implies a hearing with the accused present, and accorded due process. This is the procedure envisaged under article 14(1) when a person is arrested and detained under 14 (i) (g). In some jurisdiction like US, UK, and India, this process is usually called a pre trial session for bail in non-bailable offences; and presided over by a superior court judge that has jurisdiction to hear such cases.

If section 96(7) of Act 30 is placed in its proper context it means that only persons who fit in these categories of offences are subject to detention without bail after the

judicial process elaborated in section 96(5) and (6) has been followed. I therefore hold that section 96(7) of Act 30 does not eliminate the judicial process in matters of personal liberty and it is also erroneous to say access to the courts for bail in those cases is also ousted. That is not the intent of the section and this is not how other jurisdictions with similar provisions have understood it."

But, I found it difficult to subscribe to her views. Sound judicial policy, judicial case management and other prudential reasons necessitate that some form of a judicial enquiry be conducted, particularly at the pre-trial stage, when persons are brought before the courts pursuant to article 14 (3) and (4). This would enable the court to decide or give directions on such pertinent due process issues as the accused person's accessibility to legal counsel, the thorny issue of bail, whether the accused requires psychiatric or some other medical examination or treatment, trial dates and other related matters. Beyond this, I think that had the legislature intended the peculiar type of statutory "pre-trial hearing" advocated by my learned Sister, and which specifically obtains in other jurisdictions, section 96 (7) of Act 30 or some other legislation, would have expressly or impliedly provided for same. Secondly, the terminologies referred to are not terms of art. Indeed, article 14 (3) and (4) does not even deploy the use of the specific term "a person charged with an offence", although this is the individual clearly envisaged under article 14 (4), for example. Such a person is simply described or referred to as "a person arrested, restricted or detained…and is not tried within a reasonale time". And so I would not think that the law contemplates a special bail hearing as mandatorily required in other jurisdictions.

Indeed, the case of Republic v Owusu (Supra) which she relied on to buttress her views rationalised that:

"It was only when on the summary of evidence a case of murder, treason… etc could be said to have been committed, that the court is mandatorily stopped from granting bail."

But summary of evidence is peculiar to trial on indictments only. And yet a number of the offences listed under section 96 (7) of Act 30, are subject to summary trial before the High or Circuit Courts. How does summary of evidence fit into the summary trial mode?

In my view, the whole tenor of section 96 (1)-(6) of Act 30, juxtaposed with section 96 (7) of Act 30, wherein the word "shall" is employed, invariably leads to the conclusion that section 96 (7) of Act 30 is purposefully designed to curtail the discretionary power vested in the courts by the Constitution, to the end that persons charged with the offences listed under 96 (7) of Act 30 are not entitled to be admitted to bail. Indeed, it is the very provision that leads inescapably to this conclusion. Otherwise, why the general section 96 (1)-(6) of Act 30, on bail and recognisances, regarding the conditions under which bail may be granted, including the criteria, the amount and other conditions of bail etc. in the one breadth, and followed in another breadth by the mandatory cut -and- dried subsection (7), which states that:

"A Court shall refuse to grant bail:

(a) In a case of acts of terrorism…",

(b) The use of the word "shall" denotes an obligation as defined by section 42 of the Interpretation Act, 2009, Act (792) ,which provides:

(c) "In an enactment the expression "may" shall be construed as permissive and empowering and the expression "shall" as imperative and empowering."

In other words, what is the relevance or utitlity of section 96 (7) of Act 30, if section 96 (1)-(6) are statutory provisions of general application intended to cover all criminal offences, without exception. In my view, the language employed, in the context of the word "shall" as properly construed, is intended to prohibit the grant of bail in those cases specified under section 96 (7) of Act 30. Section 96 (7) of Act 30 is therefore an unlawful addition to the constitutional limitations carefully circumscribed under article 14 (1). It is unstitutional, an infraction designed to fetter the discretionary authority vested in the courts by article 14 (3) and (4) of the 1992 Constitution. To that extent, section 96 (7) of Act 30 conflicts with the guaranteed constitutional right to personal liberty per article 14 (1) and presumed right of innocence under article 19 (2) (c)- a fundamental element of the right to fair trial- and the same must be struck down.

Does it mean that striking down the impugned legislation, exposes this nation to grave risk, since the well- intentioned, albeit unconstitutional, imnvalidated legislation, was designed to promote national and international security and stability, by offering protection against violent crimes? Does it amount to an abandonment of our national and international obligations ? I do not think so. I would not underestimate the potentialities of article 14 of the Constitution and section 96 (1) –(6) of Act 30 in our jurisprudence. These laws are sufficiently elaborate, weighty and far-reaching enough to assure simultaneously a healthy balance between the two important competing rights and interests which the constitution has a burden to uphold, namely, the personal liberty rights of accused persons and national and international security and stability. Indeed, the court's constitutional authority under article 14, coupled with section 96 (1)-(6) of Act 30, contain sufficient substantive and procedural safeguards for the protection and preservation of society. What remains to be done is for the State to strengthen the law enforcement institutions holistically, through the needed reforms, eliminating

the systemic weaknesses that result in underperformance and further, provide adequate resources, to enable persons whose liberty must unavoidably be restrained, obtain the benefit of a trial within reasonable time.

Finally, following the resultant declaratory orders, I urge, that we examine closely the constitutional doctrine of prospective overulling and opt for orders that would minimize an ugly direct or indirect effects of our decision in this case.

As a general rule, a declaration of unconstitutionality, applies both retrospectively and prospectively. Under the doctrine of prospective overruling, which has its origin in American jurisprudence, and which has been adopted, developed and applied in deserving cases in other jurisdictions, including India, Malaysia, Signapore, United Kingdom, Uganda and other Commonwealth countries, this court has power to decide whether, to limit the retroactive effect of the declaration of invalidity. The rationale for the the rule is to provide a pragmatic solution to total chaos or anarchy, inconvenience, hardship and injustice in the administration of justice, following a declaration of unconstitutionality, in those clearly bona fide cases where isses had been determined in the honest belief that the impugned legislation was valid law. A key factor that should influence the invocation of the rule is the extent of the entrenchment of the existing rule. Invoking the doctrine would thus prevent an indiscriminate wholesale nullification of long standing settled issues and decisions based on the invalidated law, a potential source for large scale re-litigation of settled rights and obligations and a multiplicity of suits.

We have constitutional authority to determine whether our decision shall operate prospectively or retrospectively. It derives from article 1 clause (2), sub-clause (2) of the 1992 Constitution, which provides:

“The Supreme Court, shall for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider

appropriate for giving effect, or enabling effect to be given, to the declaration so made."

In this instant case, where the impugned legislation has been applied in a large number of cases over a long period of time, I urge that we avoid a strict retroactive application of our decision, so as to avert a wholesale re-opening of settled issues and prolonged litigation in relation to all persons being held in pre-trial detention under the impugned section 96 (7) of Act 30. Official records show that as of 4th May, 2016, as many as two hundred and fifty –six (256) accused persons were being held in pretrial detention on "non bailable offences" charges at the Nsawam Medium Security prisons alone. In order to avert a crisis in the administration of justice, the full effects of this decision must be managed in a way that would not over burden our already distressed criminal justice system. I have confidence that the full scope and applicability of the doctrine will be explored, developed and clarified through case law, as had been done in other jurisdictions.

This case marks a watershed in the history of our criminal jurisprudence. I commend the Plaintiff, a private legal practitioner for his industry in initiating this judicial review litigation in the public interest, giving us the opportunity to examine bail law in the light of our constitutional framework.

(SGD) G. T.WOOD (MRS)

CHIEF JUSTICE

DOTSE JSC:

I have had the opportunity of reading the opinions of my learned Sister and Brother, Adinyira (Mrs) and Benin JJSC. The facts and issues arising out of this case have been admirably set out in the opinion of Benin JSC and I need not repeat them in this opinion.

INTRODUCTION

This is a concurring opinion to the conclusions arrived at by my brother, Benin JSC and I may only relate the facts of the case whenever the need arises for purposes of emphasis.

On the contrary, I should be deemed as being unable to agree with the conclusion of my respected sister Adinyira JSC that section 96 (7) of Act 30 as amended is not inconsistent with the provisions on personal liberties guaranteed under article 19 (2) (c) of the Constitution 1992.

What then are my reasons in agreeing with Benin JSC that section 96 (7) of the Criminal and other Offences (Procedure) Act, 1960, (Act 30) as variously amended is inconsistent with and contravenes article 19 (2) (c) of the Constitution 1992 and for that reason is null, void and of no effect, and should be struck down?

DUTY OF COURTS

The power of the common law courts including the courts in Ghana to admit persons accused of crime to bail has over the years been recognized as an integral part of our criminal jurisprudence. Professor Henrietta Mensa-Bonsu, writing on the topic "*The right to Bail, whose Right? Statute, Judge made law and the 1992 Constitution",* (and published in the January-June 2014 Vol. 3, No 1, Banking and Financial Law Journal of Ghana, pages 199-223), gave an overview of how the

issues on bail in Ghana have been perceived in the following terms, with which I agree.

> *"In Ghana, issues surrounding bail have often generated controversy either by the denial of bail or by terms under which it is granted. In addition, the power as inherited at common law has been greatly curtailed by legislation. Since 1992, the Supreme Court of Ghana has made some effort to straighten out the exercise of the power as it affects the constitutional rights of the citizen, but this effort notwithstanding, the issues pertaining to bail have been persistent and recurrent in nature. Rightly, or wrongly, the public now perceives of this power as an instrument for punishing politically unpopular defendants through the courts, or a means by which powerful accused persons escape their just deserts. These incorrect notions of the role and purpose of that instrument thus underscores the need to subject the instrument to some examination, in order to shed some light on its historical antecedents and thereby elucidate the principles that have guided and continue to guide the exercise of this power by situating it in its historical context."*

It is in the above context that I consider the plaintiff's action as a real challenge and opportunity to address some of the issues that are relevant in the said article.

FACTS

The crux of the Plaintiff's case is that, section 96 (7) of Act 30, as amended, contravenes articles 15 (2) and 19 (2) (c) of the Constitution 1992.

Section 96 (7) of Act 30, as amended by Act 633, 2002 and section 41 (1) (a) of the Anti-Terrorism Act, 2008, Act 762 provides as follows:-

"a court shall refuse to grant bail in a case of treason, subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody; or acts of terrorism and (b) where a person is being held for extradition to a foreign country"

The plaintiff states rightly in my view that the no bail provisions as captured supra in section 96 (7) of Act 30 as amended has raised serious constitutional challenges and issues especially when viewed against the automatic presumption of innocence until proven guilty or confession of the crime which are constitutional guarantees under the Constitution 1992.

What should be noted is that, the provisions in section 96 (7) of Act 30 already referred to supra have completely ousted the unquestionable and time honoured traditions of the discretionary nature of the court's powers to grant bail to an accused person where the charge or offence is even one of those in respect of which the court's discretion has now been ousted.

It must also be observed that, section 96 (4) of Act 30 provides as follows:-

"A court shall not withhold or withdraw bail merely as a punishment."

Section 96 (5) of the same Act 30 also provides as follows:-

"A court shall refuse to grant bail if it is satisfied that the defendant

(a) ***may not appear to stand trial, or***

(b) ***may interfere with a witness or evidence, or in any way hamper police investigations, or may commit a further offence when on bail; or***

(d) is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while the defendant is on bail".

All the above procedural rules in Act 30 in my opinion have to be practicalised with the constitutional provisions guaranteeing fundamental human rights and personal liberties in Chapter 5 of the Constitution 1992. In any case, sections 96 (4) and (5) of Act 30 do not take away the discretion of the courts in the issue of grant of bail.

What then is the effect of providing that a court should not withdraw, withhold or refuse to grant bail as a punishment when it is provided in the same law that the court's are forbidden to grant bail in the vast number of cases as listed in section 96 (7) of Act 30 as amended?

What then comes to my mind is who determines for example that an offence is defilement, rape, murder, robbery etc. such that bail is not to be granted by the courts? This issue faced Roger Korsah J, (as he then was) when presiding in the High Court, Kumasi in the case of ***Seidu v Republic [1978] 1 GLR 65*** in which he stated when considering an application for bail under the no bail regime as existing under the then prevailing NRCD 309 as follows:-

> *"The issue as to whether a case was one of murder or some other crime had to be determined objectively. Although the prosecution had to describe what charge it would proffer against a party,* ***it was however the duty of the courts to decide whether the case was one of murder or some other crime considering the evidence in support of the accusation. A case would not be***

considered as a murder case until it had been decided by the court having jurisdiction to try it to be so."

At this stage, I think it is somewhat important to set out in detail, the facts in the ***Seidu v Republic*** case already referred to supra.

FACTS IN THE SEIDU CASE

The Applicants for bail therein were facing a provisional charge of murder. They were arrested upon the confessions of an accomplice who named them as being his accomplices in the murder of the deceased. The Applicants denied the charge and were granted bail by the District Court. The Republic then applied to the High Court to quash the grant of bail by the District court granting bail. The Applicants attended court voluntarily to the Certiorari hearing.

The High Court, in quashing the order of bail held that, **since a district court was incapable, by virtue of section 39 (1) (b) of the Courts Act, 1971, (Act 372) of trying an offence punishable by death or imprisonment for life, it had no jurisdiction to grant bail.** (This proviso is now contained in section 48 (1) (b) of the Courts Act, 1993 (Act 459).

The Applicants then applied to the High Court for bail. After nine months of police investigation, the only evidence found against the applicants was a blood stain found in the van belonging to the wife of the first applicant. Even though the blood was found upon analysis to be human blood, the Pathologist was unable to declare that the sample of blood belonged to the same blood group as the deceased. The issue that faced the court in the Seidu case **was whether despite the mandatory provisions of section 96 (7) of Act 30, as amended by the Criminal Procedure Code (Amendment) Decree, 1975 (NRCD 309), the court could, in the absence of evidence supporting a charge of murder, grant bail and furthermore, who**

had the right to decide whether a case was one of murder or some allied crime.

Section 96 (7) of Act 30, as amended by NRCD 309 provided as follows:-

> ***"A court shall refuse to grant bail (a) in a case of treason, subversion, murder, robbery, hijacking, piracy or escape from lawful custody…"***

It is apparent that, the current section 96 (7) of Act 30 is almost similar to the provisions under the legal regime when Seidu v Republic was decided in 1978, except that some more offences have been added to the no bail regime.

Based upon the above facts and the legal regime then existing in 1978, Roger Korsah J, held as follows, (see page 68 of the report):-

> *"Now before Act 30, s.96 was amended by N.R.C.D 309,* ***the granting of bail in murder cases was not unknown although it was uncommon, and no one doubted the power of the High Court to grant bail in such cases****. My brother Taylor J, has in characteristic style dealt with this topic in* ***Okoe v Republic [1976] 1 GLR 80*** *at p.87 and I have no desire to belabour the point, but suffice it to say that the* ***sole test as to whether a party ought to be bailed is whether it is probable that, that party would appear to stand his trial.*** *Of course, in applying this test, regard must be had to the nature of the accusation, the nature of the evidence in support of the accusation and the severity of the punishment which conviction will entail.* ***But for the provisions of Act 30, s. 96 as amended by N.R.C.D 309, there is no doubt in my mind that, on a consideration of the evidence in support of the accusation, every court having power so to do would grant bail to the applicants herein."*** *emphasis supplied*

From the above analysis and rationale of the decision of the learned Judge in the ***Seidu v Republic*** case, already referred to supra, the following principles must guide courts having jurisdiction to consider bail applications in serious cases such as indictable offences and or offences tried summarily.

1. Whether the accused would appear to stand for his trial
2. The nature of the evidence in support of the charge or offence against the accused.
3. Closely linked to the above is the nature of the accusation, and
4. The severity of the punishment which conviction will entail.

It is therefore quite clear that, the power of the courts to grant bail in the offences for which bail had been debarred was not uncommon. I believe it was this realization by the learned Judge in the *Seidu v Republic* case which led him to again state as follows:-

> "*A careful reading of Act 30, s. 96 (7) as amended by N.R.C.D 309, especially having regard to the phrase "shall refuse" would suggest that the legislature recognized the power bestowed on the High Court to grant bail in murder cases and did not seek to abolish it, but was saying that the court should not exercise the power in murder cases."*

By parity of reasoning, it meant that the legislature was saying that, the courts should not exercise that power in all the offences listed in the amendment to section 96 (7) as currently existing in Act 30. There is therefore the need to examine the factors to be considered very critically when applications for bail in respect of these offences are being considered. See also the decision of Aboagye J, (as he then was) in the case ***of Prah and Others v The Republic [1976] 2 GLR 278*** where he held *"that under section 96 (7) (a)* ***a person properly charged with the offence of murder could not be granted bail.***

However, in this case, the applicants denied committing the crime which was not opposed by the prosecution. They could therefore be granted bail since the evidence did not support the fact that they had committed any offence."

The decision in the **Prah v Republic** case is consistent with the reasoning in the Seidu case, that where the facts in a charge, do not support the offence charged, the accused is entitled to bail even in non bailable offences.

What must be noted in the instant case is that, the provisions guaranteeing the enjoyment of personal freedoms have been provided in Article 19 (2) (c) of the Constitution 1992, among others. This being a constitutional provision, it is on a higher pedestal in the laws of Ghana, reference article 11 (1) of the Constitution 1992. It means therefore that Article 19 (2) (c) of the Constitution takes precedence in the laws of Ghana and any law found to be inconsistent to this constitutional provision, must on the basis of articles 2 (1) (a) and 130 (1) (b) of the Constitution 1992 give way and be declared inconsistent and in contravention of the Constitution 1992. In my opinion, section 96 (7) of Act 30 as amended, is one such legislation that is inconsistent with the Constitution 1992.

Indeed, in looking at the entire section 96 of Act 30, there is no doubt, the intention of the legislature is to ensure that all persons accused of crime are not unduly denied of their personal liberties during the period of their arrest, arraignment and trial and before their conviction and sentence.

1. I believe that explains the rationale for the liberal provisions in section 96 (1) which allows the courts to admit persons to bail pending trial or on appeal on conditions set by the courts.
2. Section 96 (2) re-enforces the provisions of Section 96 (1) by granting power to the High Court to vary or modify the bail conditions granted by the lower courts.

3. S. 96 (3) states that the amount of bail fixed shall not be harsh or excessive and shall have regard to the circumstances of each case.
4. S. 96 (4) re-emphasises the principle that courts should not use bail as a punishment to accused persons appearing before them.
5. S. 96 (5) sets out the conditions upon which a court if satisfied shall refuse to grant bail under certain conditions which indeed are common law principles to which reference has been made in this judgment.
6. S. 96 (6) sets out the conditions which the courts are to consider and take into account when evaluating whether an accused if granted bail will appear and stand trial. These are also common law principles which the courts have applied over the years satisfactorily, and
7. S. 96 (7) which contains the impugned provisions where bail has been automatically ousted in respect of the offences listed therein.

The general tenor of section 96 of Act 30, which deals with grant of Bail in general therefore gives very clear indications that on the whole, the courts have a discretion to grant bail to persons appearing before them in criminal cases upon conditions stated therein.

The ousting of grant of bail in s.96 (7) is therefore odd and an unnecessary interference with the discretion of the Courts.

In construing s. 96 (7) of Act 30 as amended, a court of law must act in such a way as not to defeat the intention of the Legislature, as gleaned from the general tenor of the entire section 96 of Act 30 as a whole.

In this case, even considering the Criminal and Other Offences (Procedure) Act 1960 as a whole with specific reference to section 96, thereof, it is clear that the legislative intent contained therein is not to use the issue of bail as a punishment. Further, the grant of bail should also not be on harsh and excessive conditions.

With the above as the philosophical guide to the unlocking of the principles behind the provisions contained therein, courts of law must apply the rule of construction based upon the four corners of the Act – ex visceribus actus. Thus, it was stated by Coke in the ***Lincoln College case, (1595) 3 Co. Rep. 586*** as follows:-

> ***"The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only by itself, - for no one can rightly understand any part without perusing the whole again and again."***

Justice V.C.R.A.C Crabbe, in his invaluable book, ***"Understanding Statutes"*** page 60, listed the following as the factors a court of law must look for when construing an Act of Parliament.

a. "A Court of law will not be astute to find out ways in which to defeat the object of the Act, see Smith's case *(In re London Marine Insurance Association (1869) LR 4 Ch. App. 611 at 614.)*

b. A court of law will not only look at the language of the preamble or of any particular section but at the language of the whole Act. See ***Bywater v Branding (1828) 7 B & C 643 at p. 660.***

c. A court will look at the context, the collocation and the objects of the words relating to the matter in hand in order to interprete the meaning of the words according to what would appear to be the meaning intended to be conveyed by the use of the words. See ***Rein v Lane (1867) LR 2 QB 144*** at p. 151.

d. A court of law will not admit the principle that abstract justice would require or justify a departure from the established rule of construction. See ***Exp. Sepulchre's (1864) 33 LJCH 372 at 375.***

e. A court of law will not, in the treatment of two consecutive subsections in an Act, isolate one from the other and give effect to each without regard to the other unless it is absolutely necessary."

See Romer L.J, in ***Minister of Health v Stafford Corporation, 1952 ch.730***

Having considered all the above factors even without the constitutional provisions in article 19 (2) (c) of the Constitution 1992, I am of the view that, section 96 (7) of Act 30 as amended must be construed such as to achieve the legislative intent of ensuring that persons who stand trial are not subjected to arbitrary and capricious use of the power of bail by denying them the enjoyment of their personal liberties and freedoms.

It must therefore be observed by all courts that, applications for bail must be considered when all the facts of the case are presented before them. This is the only way by which a court can make an informed decision i.e. by determining whether a prima facie case of rape, defilement, murder, robbery, narcotics etc. has been committed to enable the court decide whether if bail is granted the accused will appear to stand trial.

The facts of the case of ***Dodzie Sabbah v The Republic [2009] SCGLR 728*** is a real testimony and proof of the fact that, the preferment of charges against persons accused of crime must be done in good faith. In otherwords, the prosecutorial bodies, especially the Police, the Attorney-General's Department, Narcotics Control Board, Economic and Organized Crime Unit etc. must not use their powers to charge persons capriciously and arbitrarily without any regard to the facts of the case and the laws applicable. Unfortunately, that was what happened in the Dodzie Sabbah case referred to supra

See also the unreported decision of this court in the case *o*f ***Dodzie Sabbah v The Republic***, Suit No. J3/3/2012 dated 11th June, 2015 which was in respect of Article 14 (7) of the Constitution 1992. Indeed if regard is not paid to the good faith principle in the preferment of criminal offences against accused persons, the Government would be saddled and burdened with the payment of huge compensations to persons acquitted on appeal who satisfy the requirements set out in the unreported decision in the Dodzie Sabbah case on Article 14 (7) of the Constitution 1992.

By parity of reasoning, it can fairly and firmly be stated that, a case can only be said to be rape, defilement, murder, robbery etc. by the court having jurisdiction to try that particular offence. **The practice where courts which do not have jurisdiction to try an offence grant accused persons bail should not only be frowned upon but should actually not be the practice**. In this respect, committal proceedings held in the District Courts pursuant to section 181 – 188 of Act 30 should not be construed as having conferred jurisdiction on those courts to enable them adjudicate in indictable offences.

Thus, it is only the court, having jurisdiction to try an offence that can on the facts as presented decide that this offence is one of murder, rape, robbery etc or some other offence, and then consider whether on the facts as presented after bail hearings, decide to grant or refuse bail.

Furthermore, in view of the constitutional position I have taken that section 96 (7) of Act 30 is inconsistent with article 19 (2) (c) of the Constitution 1992, a court must consider whether to grant bail or not in the light of the provisions of sections 96 (4) (5) and (6) of Act 30.

This is because, taking a cue from the meaning of bail which can be summed up as ***the procedure by which a person arrested, detained and or imprisoned for an offence is set at liberty***, care must be taken to protect the personal rights of the accused before he is convicted.

That is a conditional liberty. It is conditional for further proceedings of the person to whom bail has been granted. The sole aim of this is to secure the release of the person arrested pending his trial upon sufficient security for his appearance.

This process is a further illustration of the principle of presumption of innocence until proven guilty which is a constitutional guarantee under Article 19 (2) (c) of the Constitution 1992. If this presumption is pursued to its logical conclusions, it has the tendency of reducing the huge numbers of remand prisoners under the criminal justice system who are on remand basically because of this no bail legal regime. Indeed, it will remove the blot in our criminal justice system of just remanding accused persons who have no chance of being prosecuted because of lack of evidence.

However, if a court is satisfied from the facts presented in any case, that the accused when released on bail will not appear in court, then the court would be perfectly justified in refusing to grant bail by giving reasons.

This point was made with clarity by Charles Crabbe JSC, sitting as a single Judge of the Supreme Court in the case of ***Republic v Registrar of High Court; Ex-parte Attorney-General [1982-83] GLR 407***, when he stated thus,

> ***"The grant of bail was an exercise of a discretionary power and the main consideration was the likelihood of the person concerned failing to appear for further proceedings."***

I think it is worthwhile to relate some of the facts in the Ex-parte Attorney-General case just referred to supra. This is to ensure that the logical reasoning and historical narration of the antecedents of bail in the said decision of Charles Crabbe JSC would be understood in proper context.

FACTS IN EX-PARTE ATTORNEY-GENERAL

This was the case in which the Special Prosecutor for the Armed Forces Revolutionary Council Special Tribunal had been tried and convicted on two counts of extortion and sentenced to seven years imprisonment by the Circuit Court, Accra. He applied to the High Court for bail pending appeal and this was granted by the High Court. The learned High Court Judge in granting the application for bail stated that ***"in my view proof of a vital ingredient of the offence of extortion is missing. On this ground alone the conviction is prima facie bad in law and the appeal is likely to succeed. I do not think I need to wait for the record of proceedings to make up my mind".***

The Attorney-General, the Applicant therein, sought certiorari proceedings to quash the grant of bail on the grounds of error of law on the face of the record. Even though the substantive application for certiorari on grounds of error of law was refused by the Supreme Court, the Court took pains to discuss in depth the historical and jurisdictional basis of the discretionary nature of the grant of bail pending trial and appeal. In view of the learning which is derived from this judgment, I will refer to it in extenso from pages 418-420 of the report.

> ***"The grant of bail to persons facing trial is a matter within the sole discretion of the trial court.*** *In a famous American case Stack v. Boyle 342 U.S. 1 at pp. 4 and 5 (1951) the Supreme Court stated that:*

"The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty . . . Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."

The Statute of Westminster, Prisons and Bail Act, 1275 (3 Edw. 1 c. 15), *appears to be the first statutory regulation on the question of granting bail. This had come about as a result of the misuse of the discretionary power and, of course, then things were not as they are now. That statute laid down certain cases in respect of which magistrates could not grant bail.* ***Firstly, serious offences, such as murder and treason. Secondly, offences where there is very little doubt as to the guilt of the accused, such as pickpockets caught in the act. Thirdly, offences relating to the escape of prisoners and the like****.*

A noteworthy feature of the statute is that it did not attempt to lay down a single principle on which the grant of bail should be based. A list is provided. A list for the grant. And a list for refusal. There was no fundamental change in the law between 1826 and 1875. True, there were changes in the procedure in order to curb and obviate abuse. ***The Criminal Law Act, 1826 (7 Geo. 4, c. 64) laid down the principle that bail should be granted in cases where the presumption of guilt is small.*** *It also stated that: ". . . where any Person shall be taken on a Charge of Felony or Suspicion of Felony . . . and the Charge shall be supported by positive and credible Evidence of the fact, or by such Evidence as . . . shall . . . raise strong*

Presumption of the Guilt of the Person charged, such Person shall be committed to Prison . . .”

The principle then again is that bail shall not be granted where there is the strong likelihood of conviction. The Prevention of Vexatious Removal of Indictments into Court of Kings Bench Act, 1835 (5 & 6 Will. 4, c. 33), s. 3—swept away all the factors which previously governed the grant of bail. *In their place a single criterion was substituted—**that of the accused being available to stand trial.** The Indictable Offences Act, 1848 (11 & 12 Vict., c. 42), placed the question of bail solely within the discretion of the committing justice. And as Stephen commented in **A History of the Criminal Law of England** (1883) Vol. 1, p. 239:*

“The short result is that the justice may in his discretion either grant bail or refuse to bail any person accused either of felony or of any common misdemeanour except libel, conspiracies other than those named, unlawful assembly, night poaching and seditious offences.”

In respect of the latter offences bail could not be refused. The Indictable Offences Act, 1848 provided that in cases of treason no bail could be taken except by the High Court. The only condition upon which bail would then be granted as provided by section 23 of the Act was:

*“procuring and producing such surety or sureties as, in the opinion of such justice, **will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence.”***

The Bail Act, 1898 (61 & 62 Vict.,c. 7) *modified this obsolete requirement of sureties.* ***An accused could be admitted to bail on his own recognisance.*** *From this little skirmish into history it does appear that the guiding principle, even in legislation,* ***for granting bail is that the accused person should appear for the further proceedings.*** *That is the intendment of the provisions of our own Code relating to the grant of bail.* ***The modern position regarding bail is summed up by Archbold, Criminal Pleading, Evidence and Practice in Criminal Cases (36th ed.), pp. 71-72, s. 203 thus****:*

"The proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial . . . The test should be applied by reference to the following consideration:

(1) The nature of the accusation;
(2) The nature of the evidence in support of the accusation;
(3) The severity of the punishment which conviction will entail;
(4) Whether the sureties are independent or indemnified by the accused person."

I deemed it worthwhile to have quoted the long narrative from the above judgment for the following reasons:-

1. The historical analysis of the development of bail by the English courts is relevant for our purposes because apart from England being our colonial masters, most of our received law has had a lot of English influence.

2. Secondly, our system of law is based on the common law which draws a lot from English law and jurisprudence.

3. Thirdly, unlike the English practice, our presumption of innocence until proven guilty is a constitutional guarantee. This means that, this presumption takes precedence over all statutory legislation. Under English law, this presumption of innocence is a common law principle embedded in their criminal jurisprudence.

4. Fourthly, the issue of bail in the English courts being largely a discretionary matter within the province of the Judge is very much similar to our own criminal procedure legislations and practice.

5. Fifthly, the analysis in the judgment under reference is also in tune with modern trends in criminal procedure which has been embedded into our constitutional provisions in article 19 of the Constitution 1992 guaranteeing fair trial and also other basic provisions guaranteeing personal freedoms and liberties in articles 14, 15, 16 and 17 just to mention a few under the Constitution 1992.

6. Finally, the quotation from Archbold, Criminal Pleading, Evidence and Practice is almost similar to our own provisions in section 96 (6) of Act 30.

What this means is that section 96 (7) of Act 30, if read in conjunction with sections 96 (4) and (5), alongside the numerous cases on the subject of bail pending trial are sufficient to preserve the integrity and sanctity of our criminal

procedure in line with the constitutional guarantees enshrined in Article 19 (2) (c) of the Constitution 1992.

The discretionary nature of the issue of grant of bail was not lost on the learned Judge in the ex-parte Attorney-General case.

Taking a cue from the decision and analysis of the facts and the historical context of bail applications and legislations in this country and under English law, I am of the very firm conviction that, the striking down of section 96 (7) of Act 30 as amended, as being inconsistent and in contravention with Article 19 (2) (c) of the Constitution 1992 will not create any vacuum in our criminal jurisprudence. This is because sections 96 (4) (5) and (6) of Act 30 contain adequate provisions which if properly applied, harmonised and administered by the courts may achieve the same results without any trace of unconstitutionality as the present legal regime connotes.

It would thus appear that, despite the striking down of section 96 (7) of Act 30, which forbids the grant of bail in the specific offences mentioned, a court having jurisdiction to try an offence, may for good reason refuse to grant bail to an accused even in a so called bailable offence if the facts of the case show clearly that the accused, because of his antecedents, is not likely to appear and stand trial if granted bail.

The decision of my brother Benin JSC, in which I concur is not a carte blanche for the courts to admit every Tom, Dick and Harry to bail pending trial because of the removal of the statutory shackles in the impugned section 96 (7) of Act 30. I

believe the courts having jurisdiction in the offences stated therein, have an unfettered discretion to grant bail using the time honoured principles and traditions that have guided the courts and also as provided in section 96 (4) and (5) of Act 30, already referred to supra.

In my research into this case, I have found the case of ***Republic v Court of Appeal, Ex parte, Attorney-General (Frank Benneh) case [1998-99], SCGLR 559, at 568,*** where Edward Wiredu JSC,(as he then was) presiding, Adjabeng, Atuguba, concurring for different reasons and Sophia Akuffo, JJSC, Kpegah JSC dissenting, stated the following in the case where the Attorney-General applied to the Supreme Court for certiorari to quash the decision of the Court of Appeal in granting bail to the accused, Frank Benneh therein in a narcotics related offence. Whilst refusing the application for certiorari the majority per Edward Wiredu JSC (as he then was) stated the following which I find very instructive and a useful guide:-

> *"It is the right of every person in Ghana to enjoy his liberty, freedom of movement, etc. as enshrined in the 1992 Constitution.* ***It is also the duty of the courts to protect, defend and enforce these rights whenever they are being suppressed or stifled by any authority or persons in authority. In the instant case, the accused is presumed to be innocent until it is otherwise established.*** *It would therefore be unjust to deprive him of his right to enjoy his freedom in the absence of any law prohibiting the grant of bail to him under the circumstances as established by the facts of this case. Respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure it's observance. The trial tribunal was therefore not justified under those circumstances to refuse the accused's request for bail. The Court of Appeal was therefore right in granting him bail."*

It must be noted and observed that the above decision was given by the Supreme Court on 2nd December 1998 before the impugned section 96 (7) of Act 30 in it's present form was enacted in 2002 and 2008 in respect of the Anti-Terrorism Act, Act 762. Notice is however made of the amendments earlier introduced by NRCD 309.

Secondly, the Supreme Court broadly considered the constitutional provisions guaranteeing personal freedoms and the principle of being presumed innocent until the contrary was proved or established in court.

Thirdly, the Supreme Court did not measure those personal liberties against any law which violated the enjoyment or threatened enjoyment of those rights.

That explains why it went on to state that the enjoyment of those rights could be curtailed by the prohibition of the grant of bail under circumstances established by law. However, statutory interventions, no matter how very well intended cannot take away constitutional rights guaranteed under the Constitution.

Whilst conceding the fact that the formulation of the principle of law on the protection of personal liberties in the Frank Benneh case was very liberal and wide, the case nonetheless states very useful lessons and guide on the curtailment of personal liberties.

The Supreme Court must be understood to have frowned on curtailment of personal liberties as guaranteed under the Constitution 1992.

However, as has been analysed and decided by my brother Benin JSC, the provisions of article 19 (2) (c) of the Constitution 1992 are such that, section 96 (7) of Act 30, even though is a law legitimately passed as an Act of Parliament, is inconsistent with the provisions of article 19 (2) (c) of the Constitution 1992.

I believe that, the majority opinion in the Frank Benneh case, upheld the principle that an accused is presumed innocent until the contrary is proved. The decision in the instant case will also improve upon and expand the said principle.

How did the case law on the operation of grant of bail in the very serious offences fair until the decision in the Frank Benneh case supra.

The case of ***Okoe v Republic***, already referred to supra comes up for mention. In this case, the High Court per Taylor J, (as he then was) held as follows:-

> **"Section 96 of Act 30 as amended by NRCD 309, s. 2 substantially consolidated the common law principles governing the grant of bail when a person was brought to court and there was no question of delay in his prosecution**. Once there was unreasonable delay in prosecuting the case, Section 96 was inapplicable and article 15 (3) (b) and (4) of the Constitution 1969 (now Article 14 (3) (b) and (4) of the Constitution 1992) became applicable and in such a situation, bail in all cases must be given subject only to the conditions prescribed in the article."

Based on that criteria, the Applicant therein was admitted to Bail. What must be noted here is that, but for the issue of unreasonable delay in the prosecuting of the applicant under the relevant constitutional provisions, the applicant would have been denied his constitutional right of being declared innocent until proven guilty.

Another case worthy of mention is the case of ***Abiam v The Republic [1976] 1 GLR 270*** where Mensa Boison J, also considered the effect of section 96 of Act 30 as amended by NRCD 309 which stipulated a mandatory prohibition against the grant of bail in murder offences in contra distinction to an offence of attempted murder which was the offence therein charged in the Abiam case, wherefore the

applicants therein were accordingly granted bail because there was no statutory injunction against the grant of bail.

In the case of ***Boateng v Republic, [1976] 2 GLR 444***, Mensa Boison J, again, when considering a bail application in respect of the Applicant therein who had been charged for stealing cocoa held whilst dismissing the application for bail as follows:-

"since the charge of stealing cocoa was included in the definition of the offence of subversion under the subversion Decree, 1972 NRCD 90, S.1(1), **the Court was precluded under section 96 (7) (a) of Act 30 as amended by NRCD 309 from granting the application for bail pending trial**."

Similarly, in the case of ***Dogbe v The Republic [1976] 2 GLR, 82*** Taylor J, (as he then was) reiterated his earlier stance in other cases that "the provisions of Act 30, S. 96 (7) **as amended by NRCD 309 were mandatory and imperative. They ousted the hitherto unquestionable ancient and time honoured discretion of the courts to grant bail to a person accused of crime when the case was inter alia, even murder."**

It will thus be seen that, before the decision of the court in the Frank Benneh case supra, the courts were generally refusing to grant bail to persons accused of offences in respect of which the no bail regime had been legislated. The only exceptions were instances where, in the opinion of the court, there was unreasonable delay in the prosecution of the accused persons. See **Gyakye v Republic [1971] 2 GLR 280**, and ***Republic v Arthur, [1982-83] GLR 249***, where the application for bail in a case which involved murder, pending trial, was refused on the grounds that there was no unreasonable delay contrary to the decision in ***Gyakye v Republic.***

All these decisions indicated quite clearly that, the imperative and mandatory provisions of section 96 (7) of Act 30 as amended by NRCD 309 which was the then prevailing legal regime, constituted major set back to the courts in their quest to grant bail to persons accused of crimes in respect of which Bail was to be refused. The only exception was that of unreasonable delay as provided in Article 14 (4) of the Constitution 1992 which states:-

"Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released, either unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Even what constituted this unreasonable delay was not based on any objective criteria, but was subjective. As a matter of fact, it can safely be concluded that, the mandatory provisions in section 96 (7) of Act 30, as amended, constituted a major set back and a clog on the powers of the courts to admit persons standing trial for offences in respect of which courts were precluded from granting bail.

Whilst conceding the fact that, courts could still have granted bail using their ancient and time honoured discretion in granting bail, the position under the mandatory provisions of s. 96 (7) of Act 30 as amended are a major inhibiting factor and quite intimidating.

Such was the position of the case law before the decision in the Frank Benneh case, referred to supra which unfortunately did not receive massive following until the decision in the Gorman case already referred to was handed down by the Supreme Court. The rest they say is history.

FACTS IN THE GORMAN CASE

On 28th January 2004, the five appellants in the Supreme Court, and one other, were arraigned before the Greater Accra Regional Tribunal on narcotics related charges, to wit, sections 1 (1) (2) and 56 (c) of the Narcotics Drugs (Control, Enforcement and Sanctions Law) 1990 PNDCL 236.

They were all granted bail by the trial Regional Tribunal. The Attorney-General, the respondent therein, appealed to the Court of Appeal, against the grant of bail to the accused persons. The Court of Appeal, on 3rd March 2004 upheld the appeal and rescinded the bail granted by the trial Tribunal.

The Court of Appeal in its judgment held that in granting bail, the trial tribunal should have considered adequately the fact that the offences levelled against the accused were ***"serious and grave***".

All the accused persons, except the second, brought appeals against the decision of the Court of Appeal to the Supreme Court.

It must therefore be noted and observed that the ***Gorman v Republic*** case, as held by Benin JSC was an appeal case and not one which invoked the original jurisdiction of this court in its interpretative or enforcement jurisdiction as provided in article 2 (1) and 130 (1) of the Constitution 1992. The decision of the court in the case should therefore be understood in that context.

It is however conceded that, the court in it's decision in the Gorman case appeared to have considered the case as if the original jurisdiction of the court had been invoked.

That is improper, and any such pronouncements should be considered as an obiter dicta. This is because, the court was not called upon to grant those reliefs, as if it was deciding a case invoking it's original jurisdiction.

Even though, the Supreme Court, in the Gorman case, speaking through my very respected brother ***Modibo Ocran JSC*** of blessed memory made some notable pronouncements, I will confine myself to the following which the court itself stated as summary of their holdings in the case on pages 808-809 of the report as follows:-

(1) "The constitutional presumption of innocence embedded in article 19 (2) (c) of the 1992 Constitution does not import an automatic right to bail.

(2) The constitutional duty of the court under article 14 (4) of the Constitution, to grant bail to the accused if he or she is not tried within a reasonable time, is applicable irrespective of the nature of the accusation or the severity of the punishment upon conviction.

(3) In the cases falling outside the direct duty to grant bail under 14 (4), there is a constitutional presumption of grant of bail drawn from the spirit of the language of articles 14 (1) and (3), and 19 (2) (c), in further protection of persons charged with offences which do not mandate the grant of bail.

(4) The said constitutional presumption of grant of bail is rebuttable; **and it is in fact rebutted by a statutory provision that expressly disallows bail, such as the circumstances outlined in s 96 (7) of the Criminal Procedure Code, 1960 (Act 30).**

(5) Outside the strictures of s 96 (7) of the Code and article 14 (4) of the Constitution, the presumption of the grant of bail is still extant, and is

exercised under judicial discretion which is itself fettered by other provisions of section 96.

(6) There is no prima facie inconsistency between the relevant provisions of the Code and the 1992 Constitution.

(7) Considerations of the nature of an accusation and the severity of punishment upon conviction, as part of the decision not to grant bail under s. 96 (5) & (6), are constitutional; and that the gravity of an offence may be viewed as an aid in understanding and categorizing the nature of an accusation.

(8) The Court of Appeal, in arriving at its judgment of 3 March 2004 to rescind bail in this matter, at variance with the judgment in the Benneh case to grant bail, did not violate the constitutional provision on stare decisis; and

(9) The Supreme Court is not bound by the specific result of the Benneh case since the factual contexts are distinguishable."

There appear to be quite some level of inconsistencies in the summaries of the holdings of the Supreme Court as was stated by the Court itself supra.

There is certainty about the effect of the provisions of article 11 (1) of the Constitution 1992 which puts the Constitution 1992 at the apex of the laws of Ghana. In that scenario, article 19 (2) (c) being a constitutional provision is superior to an Act of Parliament which section 96 (7) of Act 30 is.

In that respect, the summary in No. 4 supra, to the effect that a constitutional provision on the grant of bail is rebuttable and infact has been rebutted by a statutory provision in section 96 (7) of Act 30 is not only inconsistent with the provisions of article 11 (1) (a) of the Constitution 1992, but also violently violates the tenets of the supremacy of the Constitution 1992.

Whilst conceding that the grant of bail is guided by judicial discretion, the provisions of the Constitution on the protection and enjoyment of personal liberties is such that no statutory provision can oust those principles of constitutional provision the way the reasoning was stated in the Gorman case.

For example, if bail is understood in the context of the duty of common law courts to release accused persons facing trial on bail by ensuring that they appear to stand trial at a later date, then any law to the contrary, which forbids the courts from exercising this discretion which has received constitutional blessing is nothing more than inconsistency of a statutory provision with that of a constitutional provision. In that respect, the statutory provision must give way and be struck down.

In that, respect therefore, it is an absurdity and gross inconsistency to state in No. 6 supra that there is no prima facie inconsistency between the relevant constitutional provision and Section 96 (7) of Act 30 as amended.

In my humble opinion, the Gorman case is clearly distinguishable from the circumstances of the instant case.

My brother Benin JSC has clearly demonstrated it to be so, and I have also explained the differences in some few words supra.

Without claiming to be departing from the Gorman case, any inconsistency inherent in that decision with clear constitutional provisions as has been amply demonstrated herein, must be taken into contention in the final outcome of this case.

The decision by the Supreme Court in the Gorman case, cannot be said to be an authoritative decision on the applicability of article 19 (2) (c) of the Constitution 1992. This is because, that was not the primary focus of the appeal. Rather, the said

constitutional provision had been used by the appellant's counsel therein to strengthen his arguments in the Supreme Court for grant of bail to the appellants.

CONCLUSION

I deem it appropriate to conclude this concurring opinion with the following concluding remarks by Prof. Mensa-Bonsu, (in her article already referred to supra), where she stated thus:-

> *"It must be restated that although bail is more of a right than a specific right of an accused, it is derivable from other well recognized rights to liberty and the right to a fair trial. Police officers and Judges must, therefore, approach the issue from the standpoint of being disposed to granting bail unless persuaded otherwise, rather than the converse. Executive interference must be resisted* ***whilst constitutional protections must be liberally construed in order to make them work for the citizens.*** *The history and spirit of the power to grant bail requires no less of any Judge who is mindful of the hopes and aspirations that are reposed in that high office by the generality of the citizens."*

It can therefore be safely concluded that accused persons who are arraigned before the law courts are entitled to rights which include rights to admit them to bail pending trial. These rights are to be construed in the light of the constitutional and statutory interventions made in a very liberal and expansive regime to give meaning to the constitutional guarantees of fair trial.

Any such law as prevails in section 96 (7) of Act 30 as amended, is not only inconsistent with the Constitution 1992 especially article 19 (2) (c), but also offends and violates the letter and spirit of the Constitution 1992.

The existence of this section 96 (7) of (Act 30) as amended in our statute books has been a blemish since the coming into force of the Constitution 1992.

In associating myself with the decision of Benin JSC, I urge that practice direction be given by this court, pursuant to our decision in this case which should serve as a guide to all courts on how their discretion in the exercise of the right to grant or refuse bail applications must be conducted. Directions also need to be given to ensure that the effect of this decision does not result into the opening of the flood gates for all remand prisoners.

Fact of the matter is that, there is no automatic right to the enjoyment of bail by an accused before the courts. Every case must be dealt with on a case by case basis. As already stated by me, the primary duty of a court is to ensure that an accused when granted bail will appear and stand for his trial. Bail should not be used as a punishment to deny the grant of bail. Whenever there are grounds which indicate that an accused may not appear to stand trial due to his antecedents or facts of the case, the Court should decline bail to such an accused person.

Since my decision is that, there is now no law prohibiting courts from the grant of bail, in the non-bailable offences, reference should be made to sections 96 (4) (5) and (6) of Act 30 and present day realities, (such as the dangers associated with terrorism, narcotics and it's related crimes) whenever bail applications are considered by the courts having jurisdiction in those offences. Since all these issues have been adequately addressed by my brother Benin JSC, and I concur with his opinion, there is nothing more useful to add.

To the extent of the inconsistency, between Article 19 (2) (c) of the Constitution, and section 96 (7) of Act 30 as amended I endorse the decision of my respected brother Benin JSC that the said section 96 (7) of Act 30 be struck down.

I therefore rest my concurring opinion with the following quotation:-

Michael G. Trachtman, writing in page 9 of his celebrated book, *"The Supremes' Greatest Hits, The 34 Supreme Court cases That Most Directly Affect Your Life*" stated as follows:-

> ***"Like the highest courts of other democracies, the Supreme Court has the authority to decide, once and for all, what important laws really mean when applied to the real life situations that arise after the laws are enacted."***

In this regard, it is the duty of this Supreme Court to decide whether section 96 (7) of Act 30 as amended, when applied to the real life situations of grant of bail to persons accused of crime are consistent with the basic laws of the land. Not being so consistent, the said section 96 (7) is accordingly struck down.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

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YEBOAH JSC

I agree

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

AKAMBA, JSC

I have had the privilege of reading both the well-reasoned lead opinion of my able and respected brother Benin JSC as concurred in by Her Ladyship the Hon. Chief Justice (Presiding) and my brother Dotse, JSC as well as the dissenting opinions of my sister Adinyira (Mrs) and brother Gbadegbe, JJSC. I would have just been satisfied in associating myself with the opinions expressed by Benin JSC but for my desire to contribute to this epoch making constitutional interpretation of articles 14(1), 15 (2) and 19 (2) of the Constitution 1992, as they affect S. 96 (7) of the Criminal and other Offences (Procedure) Act 1960 (Act 30) which latter restrains the Courts from granting bail to any persons accused of crimes listed thereunder including treason, subversion, murder, robbery etc.

Much as I am in agreement with their reasoning and conclusion I wish to express myself on certain aspects of the effect that S. 96 (7) of Act 30 has on the Constitutional provisions on the liberty of the individual and the extent, if any, that the court in the Gorman case dealt with this Constitutional question. I begin on the premise that the section 96 (7) as it stands now runs contrary to the express and guaranteed constitutional right to liberty of the individual which can only be taken away by law as captured in Article 14 (1) of the Constitution 1992.

It is trite to observe that the Constitution 1992 as the supreme law of the land has guaranteed the individual's liberty as captured under chapter five (5). This right cannot be taken away by an enactment except where the Constitution specifically so permits. It is instructive to read article 14 (1) of the Constitution 1992 to the effect that:-

"14 (1) Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law-

(*a) in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or*

(b) in execution of an order of a court punishing him for contempt of court; or

(c) for the purpose of bringing him before a court in execution of an order of a court; or

(d) in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community; or

(e) for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or

(f) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or

(g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.

(2) A person who is arrested, restricted or detained shall be informed immediately; in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to a lawyer of his choice.

(3) A person who is arrested, restricted or detained -

(a) for the purpose of bringing him before a court in execution of an order of a court; or

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released,

shall be brought before a court within forty-eight hours after the arrest, restriction or detention.

(4) Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released wither unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

The courts are the guarantors of the liberty of the individual as provided under the constitution. It is clear from article 14 (4) supra, that the mandate to determine whether or not to grant bail to a person arrested, restricted or detained is vested in the courts and not in the Executive or Legislative arms of government. In simple logic, what business does Parliament, the law maker, have in arrogating to itself, the right to tell the courts, that notwithstanding the clear provisions of the Constitution guaranteeing the liberty of the individual, the courts should refrain from granting bail in those stated crimes? That is the exact import of Section 96 (7) of Act 30 should it continue to operate on our statute books. As I intimated supra whenever the Constitution desires to empower any body or authority to do an act contrary to or in furtherance of a stated right or obligation it specifically provides for same. For instance article 159 of the Constitution empowers the Chief Justice to make regulations for the efficient function of the Judicial Service. It enacts:

"159 The Chief Justice may, acting in accordance with the advice of the Judicial Council and with the approval of the President, by constitutional instrument, make regulations for the efficient performance of the functions of the Judicial Service and the Judicial Council under this Chapter."

No such power has been extended to the Legislature to make any regulations in furtherance of article 14 (4) of the Constitution and thus enabling the curtailment of the liberty of the individual as section 96 (7) of Act 30 (1960) purportedly does.

I have read the lead dissenting opinion and I find it, with the greatest respect, to be rather academic and without answering the core issue before us. It is trite to state that Article 14 (1) (3) and (6) emphasize that a person who is arrested, restricted or detained must be brought before a court within forty-eight (48) hours and when not tried within a reasonable time for the court to determine whether or not to release him on bail. These provisions do not curtail the grant of bail as canvassed in the dissenting opinion. On the contrary they emphasize the fact that within 48 hours, a person arrested for any offence must be put before the Court for the Court to determine whether or not to continue with the detention or grant him/her bail.

The Constitution grants the discretion to the court to determine the desirability of bail and not for statute to deny bail as of right as S. 96 (7) proclaims. If this situation is allowed to stand as advocated in the dissenting opinion, it would be a slap in the face of the constitutional provisions in article 14 (1) (3) and (4). As regards article 21 (4) quoted in the dissenting opinion, it is instructive that the said article 21 (4) (a) and (b) are restrictions imposed by order of a court pursuant to the exercise of the Court's discretion. This is contrary to the wording of S.96 (7) of Act 30 which restrains the courts from granting bail in respect of the listed offences.

In any case one cannot use the example of article 21 (4) (a) and (b) of the Constitution which is the Constitution itself listing out some exceptions as a justification in contra distinction from the Legislature seeking by S. 96 (7) of Act 30 to water down powers the Constitution has given the courts to exercise under their wide discretion to safeguard the liberty of the individual.

Lastly, I wish to comment on the reference to article 14 (6) of the Constitution as an apparent endorsement of the view that a person may be held contrary to article 14 (3) of the Constitution. The article under reference speaks of lawful custody which to me cannot mean anything else than the period permitted under the law for detaining persons arrested for infringing the law. The article 14 (3) of the Constitution stipulates that a person arrested, restricted or detained, shall be brought before a court within forty-eight hours after the arrest, restriction or detention. Short of certain practical obstacles the provision is devoid of any ambiguity. It is within the mandate of the court to consider bail if the person's trial cannot commence as provided in article 14 (4) of the Constitution.

COMMENT ON GORMAN CASE

It emerged in the course of these discussions that whatever pronouncement that was made in the Gorman case regarding article 19 (2) (c) vis a vis section 96 (7) was made per incuriam as the court was not called upon to determine that issue. While it is true to state that the court in the Gorman case, {i.e. Gorman and Others v The Republic (2003-2004) SCGLR 784} was not called upon to determine article 19 (2) (c) of the Constitution, it cannot be right to refer to whatever consideration and pronouncement that was rendered of those provisions as having been made per incuriam. With the greatest respect, the core issue before the court in the Gorman case was whether or not to grant the applicants' bail in the face of the Court of Appeal's refusal to grant them same. In considering the issue of bail the court did make some pronouncements pertaining to Article 19 (2) (c) of the Constitution and section 96 (7) of Act 30. These pronouncements as far as they go, can only be described as obiter in the light of the obvious fact that the application before the court was not one for an interpretation of the Constitution but an application for the exercise of the court's power to grant bail simpliciter, a power conferred under

Article 14 (4) of the Constitution. These obiter pronouncements cannot be a reason for ousting our jurisdiction in the present action. A judgment per incuriam is one which has been rendered inadvertently as for example where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies or a judgment rendered in ignorance of legislation. On the other hand an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way'- that is incidentally or collaterally and not directly upon the question before the court, or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy or suggestion. (See Black's Law Dictionary, Eight Edition, by Bryan A Garner). The court in Gorman's case was called upon to consider whether or not to grant the applicants' bail having been denied same by the Court of Appeal. The court's pronouncements on article 19 (2) of the constitution was obiter in the circumstance.

CONCLUSION

In the result, aside from the above observations, I agree with the views advanced by my brothers Benin and Dotse JJSC and my sister the Hon. Chief Justice Wood that section 96 (7) of Act 30 cannot and should not stand as it is contrary to the letter and spirit of articles 14 (1) (2) (3) (4) and 15 of the Constitution and to that extent is hereby struck down. This is an appropriate case to order that the present outcome should have prospective effect and I hereby so order.

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

DISSENTING OPINIONS

ADINYIRA (MRS.) JSC:

The Plaintiff issued a writ seeking:

1. A declaration that section 96(7) of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) contravenes Articles 15(2) and 19(2) (c) of the 1992 Constitution and is therefore null, void and of no effect.
2. Such further or other orders as the Honourable Supreme Court will deem fit to make.
3. Cost for court expenses and counsel fees.

Comment on Plaintiff's statement of Case

Before I go on I am drawn to respond to a matter relating to the Plaintiff's statement of case at least for the benefit of the profession. Though the Plaintiff's writ was dressed as a writ to invoke our original jurisdiction for interpretation and enforcement, yet he spent a substantial portion of his submissions making it appear that the same was an application for a review of this Court's previous decision in *Gorman [and Others] v The Republic [2003-2004] SCGLR [784] which he believed was an authoritative decision of this Court on same provisions and binding on us. If his position were to be correct, the Plaintiff would have non-suited himself by his own submissions as he would not have a cause of action to relitigate the same issue. Review application is not the right forum. See Okudzeto Ablakwa (No3) & another* [2013-2014] 1 SCGLR 16.

It was therefore proper for us to look at *Gorman* case to determine whether the Supreme Court considered the issue as to whether there was any inconsistencies between section 96(7) of Act 30 and article 19 (2) (c). It *is the view of the Court that* whatever pronouncement made in reference to the said provisions by the Court in *Gorman* case was made *per incuriam* as the Court *was not called* upon to determine that issue. The reasons for that conclusion are sufficiently discussed in the opinions of my brothers Benin and Dotse JJSC and I have nothing useful to add.

Plaintiff's Arguments

The Plaintiff submits that:

> "… the effect of section 96(7) of Act 30 whittles down the constitutional provision on the presumption of innocence when viewed against the automatic presumption of innocence until proven guilty and in the absence of express provision in the constitution itself to the effect that such a provision is subject to any necessary modification by any enactment, a statute cannot have the force of whittling down a constitutional provision as a result of article 1 (2) of the Constitution 1992 stating the supremacy of the Constitution."

The Plaintiff submits further that "the only grounds on which an accused shall be refused bail be the ones specified in section 96(5) and section 96(7)" sic!

Defendant's Response

The Defendant relying on articles 14 (1) (g) and 21 (4) (a) and (b) argued that by the combined effect of these articles, the refusal to grant bail under section 96(7) of Act 30 cannot be said to be unconstitutional.

Agreed Issue

The agreed issue set down for our determination was:

> "Whether section 96(7) of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) contravenes Articles 14 (1), 15(2) and 19(2) (c) of the 1992 Constitution and is therefore null, void and of no effect.

The issue in respect of whether section 96(7) of Act 30 is inconsistent with article 15(2) has effectively been dealt with by my esteemed brother Benin JSC whose judgment I had the benefit to read beforehand. I agree with his reasoning and conclusion in dismissing the claim on that and I have nothing useful to add except that: "*Ours is to interpret the Constitution in the context of disputes, broadly interpreted*" per Adade JSC in *Bilson v. The Attorney- General* [1993-94] SCGLR 104 at 108. [e.s.]

What remains is the central issue whether section 96(7) of Act 30 contravenes articles 14 (1) and 19(2) (c) of the 1992 Constitution and is therefore null, void and of no effect; on which I wish to express my individual opinion which is in dissent to the reasoning by my brethren that section 96(7) of Act places a fetter on the discretion of the Court to grant bail in non-bailable offences and therefore is in conflict with Article 19(2) (c). In doing so I think it would be pertinent to examine

the said section within the context of the entire article 14 with other relevant constitutional provisions such as article 12 (2) that limits the fundamental human rights to "respect for the rights and freedoms of others"; and article 21 (4) (b) which expressly states that:

(4) Nothing in or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision

> (b) …[**or] for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana. [e.s.]**

Section 96(7) of Act 30 is one such 'provision''

It is incorrect to suggest that: "section 96(7) as amended has been a blot on our statute book since the coming into force of our 1992 Constitution" as it was contained in the 1969 Constitution and 1979 Constitution respectively and these earlier constitutions had analogous provisions as article 14 of our present 1992 Constitution.

Section 96(7) of Act 30 in its current form was enacted in 1975 by the Criminal Procedure Code (Amendment Decree); with the offences of narcotics and terrorism added in 2002 and 2008 respectively and were all consolidated and revised. The judicial thinking that section 96(7) of Act 30 placed a fetter on the discretion of the courts in granting bail in murder, treason etc came about by the courts routinely following the narrow and strict interpretation placed on the wording of a previous provision in section 96 (1) of Act 30 which came into effect on 1 February 1961; that excluded capital offences from the provisions of section 96 on the grant of bail. That section said:

"When any person, other than a person accused of an offence punishable with death appears or is brought before any court…he may in the discretion of the court be released upon his entering… a bond."

With the coming into effect of the 1992 Constitution with article 14 (4),similar in wording as in similar provisions of the previous Constitutions of 1969 and 1979 respectively, some courts refused bail as they still held on to the view that that section 96(7) totally ousted their power to grant bail in those offences in spite of the clear language of article 14 (4).Justice S.A. Brobbey commented on this thorny

issue in his book, *Practice & Procedure in the Trial Courts & Tribunals* [Second Edition]. He writes at page 542:

> "The thorny question posed by Act 30, s 96 (7)as amended… and the 1992 Constitution, Article 14(3) and (4) is whether or not a person charged with any of the offences specified in subsection 7, especially murder may be granted bail. There are two conflicting views on this. One is that subsection 7 is so categorical that it ousts the jurisdiction of the courts to grant bail to anyone charged with any of those offences. See *Donkor v the Republic* [1977]2GLR 383 and *Boateng v the Republic* [1976]2 GLR 444.
>
> The other view is that where a person charged with any offence is not tried "within a reasonable time**"** he should be granted bail in terms of the constitutional provisions of article 14(3) and (4). Since the Constitution is the fundamental law of the land, to the extent that article 14(3) and (4) mandate bail for "all" offences while Act 30, s 96(7) excepts the grant of bail in murder cases, etc the latter is deemed to have been repealed by the former by reason of the inconsistency. This was the view taken in Dogbey v. *The Republic* (1976) 2 GLR 82 and *Brefor v The Republic* (1980) GLR 679. There is no doubt that the latter view backed by the two cases is more accurate."

I have examined in detail *Dogbey* and *Brefor* cases and I do not find any words or expression by Taylor J (as he then was), to the effect that Article 15 (3) (b) and (4) of the Constitution 1969 and article 21 (3) (b) and (4) (a) repealed section 96 (7) of Act 30 by reason of inconsistency as the learned Justice Brobbey suggests.

Justice Taylor rather held a strong contrary view and in *Brefor,* after a long discourse on the rules of interpretation, he held at page 703:

> "…the most casual consideration of the problem will reveal <u>that it is impossible by any process of interpretation to contend that the constitutional provisions repeal the said section 96 (7) of Act 30.</u>The two ought to be read together and the principles of statutory interpretation I have canvassed in this ruling demonstrate that the law immediately coming before the Constitution, 1979 and after it, is that a court is to refuse bail in murder cases, etc, except in the cases of unreasonable delay in trials as it is provided in article 21(4) (a) of the constitution, 1979."

But even then Justice Taylor denied bail in the two cases as he did not consider the three years delay in holding a trial unreasonable. Whereas Andoh J. in *Owusu v.*

The Republic [1980] GLR 460 granted bail as he considered three years was undue delay, and he commented on the wrong interpretation placed on section 96(7) of Act 30.

In contrast, courts in other jurisdiction appear to deal differently with non bail offences. I will rely on the same cases cited by my eminent brother Benin JSC, namely, *Wright v. Henkell* 190 U.S. 40 (1903)decided on 1 June 1903; *United States v. Kin-Hong*, 83 F. 3d, 523 (1st Cir 1996); *Martin v. Warden*, 993 F. 2d. 824 (11th Cir 1993); *A and others v. Secretary of State for the Home Department* (2004) UKHL 56; and *MB, Re* (2006) EWHC 1000 (Admin). These cases illustrate how courts in other jurisdictions with similar 'no bail' provisions did not consider themselves 'fettered' or totally banned from considering bail in their bid to adhere to their duty to uphold personal liberty as enshrined in their constitutions. Some of the cases cited related to extradition, and acts of terrorism in which executive orders or executive instruments for the detention of suspects were made denying the courts the power to investigate the reasons for the detention. Even in the face of these restrictions; the courts asserted their power to consider bail even though they did not eventually grant the request. In their desire to protect the personal liberties of accused persons, the judges were also aware that the interest of society should also be considered in matters of bail in criminal offences and therefore exercised self-restraint.

The Plaintiff's submissions are extreme over simplification of constitutional doctrines raised in this case; and also reflects what I consider a narrow and strict interpretation of the section 96 (7) of Act 30.The problem is not with the subsection but the jurisdictional orientation of some of the courts in dealing with issues of bail in cases they do not even have jurisdiction to hear, the most obvious example being murder; and even then most of the offences listed in the said section are first degree felonies, which should be tried on indictment and not summarily by lower courts His submissions brings to light the need for a thorough revision of criminal procedure and administration of criminal justice in Ghana to reflect constitutional and international human rights instruments and conventions on the primary issues before us: the liberty and freedom of movement of persons who violate the criminal law.

A determination of the set down issue therefore calls for a thorough but short discussion on the real import and place application of this age old and universally declared human right of the presumption of innocence of an accused person as enshrined in article (19(2) (c*)* of our Constitution, in relation to the question of

bail; and a true and purposive interpretation of section96 (7) of Act 30vis a vis articles 14, 12, (2)1 (4) (b) respectively.

Article 19(2) (c) - Presumption of Innocence

The presumption of innocence sometimes referred to by the Latin expression *Ei incumbit probatio qui dicit, non qui negat* (the burden of proof is on the one who declares, not on the one who denies), is the principle that one is considered innocent unless proven guilty. It is thus a due process requirement that the prosecution proves the charge against the accused beyond reasonable doubt. The doctrine is therefore more appropriately relevant in determining the evidential burden on accused persons in criminal trial. Article 19 (2) (c) which provides that a person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty is one of the protection accorded to an accused person's right to fair trial as enshrined in article19 (1) which provides that: "A person charged with a criminal offence shall be given a fair hearing within a reasonable time by court." Article 14(4) makes it mandatory that when an accused person is not put to trial within a reasonable time that person shall be granted bail by a court.

An accused person's right to be presumed to be innocent until proved guilty at his trial is strengthened by his right to be considered for bail prior to trial; this serves to prevent the infliction of punishment prior to conviction; as the purpose for granting bail is to ensure the accused person turns up for his trial and not based on his guilt or innocence.

For lack of any better precedent in our jurisprudence on the subject, I refer to the dictum of Coleridge J in *R v Scaife* (1841)5 JP 406; which can still be classified as locus classicus. He said at page 406:

> I conceive that the principle, on which parties are committed to prison by magistrates previous to trial, is for the purpose of ensuring the certainty of their appearing for trial. It seems to me that the same principle is to be acted on in an application for bailing a person 'is not a question of the guilt or innocence of a person. Bail is a question of the consideration of a very important element whether the party if admitted to bail would appear to take his trial. Thus the requirements as to bail are merely to secure the attendance of the prisoner at the trial"

Though this presumption of innocence does not raise a right to automatic bail, it raises a right not to be denied reasonable bail without just cause, as in contrast with

breach of article 19 (1) where the grant of bail is automatic irrespective of the nature of the offence. For instance where a person is charged with an offence for which a punishment by imprisonment could not lawfully be passed, it will be without just cause to deny reasonable bail in such circumstances. That is one of the underlying reasons that a distinction is made between bailable offences which cover minor offences and non bailable offences, which cover violent and serious offences against the person, the state and international relations.

It is worth stressing again that since the purpose of granting bail is to secure the presence of a person to attend his trial, and not based on his guilt or innocence, then where it can be demonstrated that the person is a flight risk or a danger to the community , or for his own protection (from vigilantes and mob attack), or may interfere with evidence or witnesses and bail is refused; it would be erroneous to say that the person's rights under article 19(2) (b) i.e. presumption of innocence has been infringed. I will return to Article 19(2) (c) later.

Section 96(7) of Act 30

Section 96(7) provides that: "*A court shall refuse to grant bail in a case of treason, subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody, or… where a person is being held for extradition to a foreign countr*y".

The Plaintiff's argues that the wording of section 96(7) of Act 30 that the Court shall not grant bail in the cases listed leaves no room for the courts to exercise their discretion to consider bail in those cases and that it whittles down the presumption of innocence. I find this notion erroneous as the Plaintiff has taken and read section 96(7) of Act 30 literally, narrowly and out of context. The text alone cannot offer acceptable meaning without the context in which it is made. This narrow approach is against the rules of construction or interpretation of a statute. It is axiomatic that the purposive approach is the best approach as consideration is given to the subject matter, the scope, the purpose and to some extent, the background.

Guided by the purposive approach, I will make a contextual analysis of section 96(7) of Act 30 within the entire section 96 and in relation to article 19(2) (c)to dispel this thinking that the subsection puts a fetter on judicial discretion and offends the principle of presumption of innocence.

Courts are accorded in section 96 (1) the general right to grant bail which by necessary implication grants the right to refuse bail as well.

Section 96(5) states a duty to refuse bail in certain situations including the likelihood that the defendant may not appear to stand trial. It states the conditions on which bail shall be refused: "*A Court shall refuse to grant bail if it is satisfied that the defendant may not appear to stand trial, or may interfere with a witness or the evidence or in any way hamper police investigation, or may commit a further offence when on bail, or is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while the defendant was on bail".*

In my view the first condition is the most decisive as a person in custody is entitled to be considered for bail, and if there are reasons to satisfy the court that the defendant is a flight risk then it is a just cause to refuse bail.

Section 96(6) states the factors the court has to take into consideration in deciding whether a person in custody may not appear to stand trial if released on bail. Factors to be taken into account in considering the likelihood of the accused not turning up for trial is not only in respect of the nature of the offence or the punishment, but, most importantly, **whether the evidence in support of the accusation is strong.**

The offences listed in section 96(7) are of a type where the risk of flight by the accused is high due to the severity of the offence and attendant punishments of capital punishment, life imprisonment or a long sentence are given respectively upon conviction.

The well known test of whether a person ought to be granted bail is whether it is probable that person will appear to take his trial. Obviously if this test is applied successfully in a case where a person is charged with any of the offences listed in the ensuing subsection (7) which by their nature are very serious offences and carry heavy sentences, and there is strong evidence in support of the charge, then there is a just cause to deny bail as from all indications it is likely that the accused may not turn up for trial. In that respect bail shall not be granted in line with subsection (5). That is the intent of subsection 96(7) to list such offences which in the administration of criminal justice are termed non-bailable offences, and acceptable by international norm and are applied reasonably and not arbitrarily.

Having placed section 96(7) in its right context, I deem it proper to consider this subsection in detail. Section 96(7) states:

> 7. A court shall refuse to grant bail-

a) in a case of treason, subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody , or
b) where a person is being held for extradition to a foreign country

The exclusive focus put on the mandatory meaning of the word 'shall' in section 96(7) of Act 30is mechanistic and fails to take account of the context in which it is used. I do not think the words "shall refuse to grant bail" means that the court is prohibited from hearing an application for bail in those kinds of offences. No proper interpretation could be made without reference to the context. It should be noted that the section 96(7) of Act 30 which follows subsections (5) and (6) does not say the court shall refuse bail where a person is charged with any of the specified offences. It rather says a court shall refuse to grant bail in a case of treason, subversion, murder etc. The use of the phrase 'in a case of' in the context of the preceding subsections (5) and (6) means if on the evidence, a case of murder…etc could be said to have been committed then the court shall refuse bail.

See also *Owusu and Another v The Republic [1980] GLR 460* at 462, though a High Court decision is sound and reflects my thinking where Andoh J correctly constructed section 96(7) of Act 30 by holding:

> "At first glance of the above provision [Section 96(7) (a) of Act 30] one may be tempted to say that the court is ousted of jurisdiction in granting bail in the offences listed above but then it is significant to note that the section does not say that the court should refuse bail when a person is charged with any of the offences. It rather says that the court shall refuse bail in cases of treason, etc. The mentioning of a "case" means or implies that it was only when **on the summary of evidence a case of murder, treason,…etc could be said to have been committed, that the court is mandatorily stopped from granting bail.** I think it was not without reasoning that section 96(7) of Act 30 as amended mentions a 'case' instead of a 'charge'."

In the *Owusu* case, the two accused were charged with abetment of murder, Andoh J in considering the evidence found the evidence of abetment against the first accused slim, and that against the second accused baseless. However since he found evidence of delay of 3 years in their trial, he decided to grant them bail under article 21 (4) of the 1979 Constitution.

Certainly, determining whether for example a case of murder has been established by the prosecution requires a judicial enquiry into the nature of the evidence and not by merely looking at the charge sheet. This determination by the court is a

mandatory judicial process required under section 96(6) and **it implies a hearing** with the accused present, and accorded due process. This is the procedure envisaged under article 14(1) when a person is arrested and detained under 14 (1) (g). In some jurisdiction like US, UK, and India, this process is usually called a pre trial session for bail in non-bailable offences; and presided over by a superior court judge that has jurisdiction to hear such cases.

If section 96(7) of Act 30 is placed in its proper context it means that only persons who fit in these categories of offences are subject to detention without bail after the judicial process elaborated in section 96(5) and (6) has been followed. I therefore hold that section 96(7) of Act 30 does not eliminate the judicial process in matters of personal liberty and it is also erroneous to say access to the courts for bail in those cases is also ousted. That is not the intent of the section and this is not how other jurisdictions with similar provisions have understood it.

Why section 96(7) of Act *30?*

The view has been expressed that: what is the relevance of section 96 (7) of Act 30 in view of the elaborate steps set down in subsections (1) to (6) to guide the courts in considering bail in all criminal. I submit with all due respect that this view diminishes the debate as subsection (7) is the non-bailable clause in our Criminal Procedure Code as pertains in other jurisdictions. The public will want to know what offences are non-bailable. The above view cannot form the basis to declare the said section unconstitutional. The criticism rather calls for a criminal law revision and not to strike down a rather useful bit of legislation which is legitimate and constitutional by the clear wording of section 21(4) ((b). I consider section 96 (7) of Act 30 a law reasonably required for the stability of communities, and countries.

Respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure its observance. However its enforcement is balanced against the legitimate interests of others as well as public interest as stated under article 12 (2). Consequently the Constitution, for example, expressly and by implication provides by articles 14 (1) and 21 (4) (a) and (b) places a limitation on freedom of liberty and movement where a person commits a criminal offence. Accordingly, any limitation that criminal legislation may have on fundamental rights and freedoms is legitimate if it is reasonable and in the public interest. See *United States v. Salerno,* 481 U.S. 739 (1987) and contrast with *Benneh Case* [1998-99] SCGLR 559 at 568;where the Supreme Court affirmed the

Court of Appeals decision to grant bail in a narcotic case as there was no law at that time prohibiting the grant of bail.

The types of offences determined as non-bailable in criminal jurisprudence are types of violent crimes the courts are aware that public interest, as well as international and diplomatic considerations weighs against the grant of bail. The justification for restricting the grant of bail in such cases is considered as a law reasonably required for the stability of communities, and countries.

The attainment and enjoyment of fundamental human rights have become prime instruments in international relations. Therefore the restrictions of some of these fundamental human rights by domestic statutes have been considered necessary to combat certain crimes which have the tendencies to destabilize peace and stability of not only the local community but the international community as well. Such restrictive laws are usually made as a matter of state policy, in response to treaty obligations and international law and conventions; for example the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988. In 2012 Ghana acceded to the Palermo Convention on Trans-national Organizes Crime. This led to the amendment of section 96 (7)) of Act 30 in 2002 and of the Anti-Terrorism Act, 2008, Act 762.

It will be useful here to make some comparism with other jurisdiction. Other countries like US, UK, India, have legislations that prohibit bail for capital offences, crimes of violence, drug offences, sexual offences and other specific offences. The criteria specified in Section 96 (5) (6)) and (7) of Act 30 are similar to what pertains in the penal laws of other countries.

For example, under US Federal laws 18 U.S.C. § 3142(f) provides that only persons who fit into certain categories are subject to detention without bail: persons charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, certain drug offenses for which the maximum sentence is greater than 10 years, repeat felony offenders, or if the defendant poses a serious risk of flight, obstruction of justice, or witness tampering. There is a special hearing held to determine whether the defendant fits within any of these categories; anyone not within them must be admitted to bail.

The US Supreme Court upheld this provision as being constitutional, in *United States v. Salerno,* 481 U.S. 739 (1987), holding that the only limitation imposed by the Constitution is that "the Government's proposed conditions of release or detention be not excessive in light of the perceived evil".

Some states, for example Arizona, also follow the federal law to permit pre-trial detention of persons charged with serious violent offenses, if it can be demonstrated that the defendant may flee, or pose a danger to the community. UK, Czech Republic and India also have such restrictive laws. The Czech Republic has as many as 31 offences in which bail is excluded; except that in these jurisdictions it is a superior court that considers bail applications in such matters.

Even Canada where its Constitution guarantees the right not to be denied reasonable bail without just cause, has special provisions relating to certain offences found in section 469 of the *Criminal Code of Canada* (murder, treason, etc.) that provide for bail hearing before a superior court judge, and the accused bears the burden of proof. A review is heard by the Court of Appeal.

In my view, if section 96(7) of Act 30 on which the matter herein turns were expressed as in the US Federal Law *supra* the Plaintiff could reach a different interpretation of it than what he is now putting on it.

From the foregoing, I hold as unsupportable the Plaintiff's submission that section 96(7) of Act 30 takes away the court's discretion to consider bail in those offences listed. The real intent of the said section is to provide that the Court shall refuse bail where the evidence before it shows the defendant falls within that class of cases. These cases are mostly first degree offences which ordinarily should be tried at the High Court on indictmentf Whether the offence is tried on indictment or summarily, anyone not falling within that class of cases is entitled to bail.;9 the evidence to support the charge can be found not only in the bill of indictment but also from the depositions of prosecution witnesses on the police docket [See Section 268 of Act 30 which appears under Part V of the Act that deals with trial on indictment and may well apply to summary trials in order serve the ends of justice.]

Apart from legal considerations, there are also public policy considerations in respect of treaty obligations and international conventions that can support the law that persons who fall within cases listed under section 96(7) of Act 30 shall be refused bail. The underlying principle is that due to the seriousness of the offences, and the severity of the sentence, e.g. capital punishment, the likelihood of the accused person to flee is a just cause to withhold bail in the overall common pursuit to combat crime.

In concluding on the issue whether section 96 (7) of Act 30 is inconsistent with article (19(2) (c*)*, I hold further that, since the principle on which accused persons

are committed to prison pending trial, is for the purpose of ensuring the certainty of their appearing to stand trial and not based on their guilt or innocence, the application of section 96 (7) is not inconsistent with article (19(2) (c*)* which does not raise a right to automatic bail. The Constitution by the wording of article 21(4) (b) expressly permits a person to be detained for the purpose of ensuring that he appears before a court at a later date for trial of a criminal offence or for proceedings for extradition or removal from Ghana.

Is section 96 (7) of Act 30 in contravention of articles 14 (1) (3) (4)

Article 14 (1) which protects personal liberty sets out expressly exceptions whereby a person shall be deprived of his personal liberty in accordance with procedure prescribed by law. These include holding a person for extradition purposes or upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana as stated in14 (1) (f) and (g) respectively. Obviously it is impossible to mention all the offences under the Criminal Offences Act, 1960 (Act 29) and other enactments in the said article 14 (1) (g). Accordingly all other offences in addition to extradition are included in the limitation of the enjoyment of personal liberty under article 14 (1).The offences listed in section 96 (7) of Act 30 are recognized worldwide as serious offences and generally termed non-bailable offences. The public is entitled to know which offences are not-bailable.

The Criminal and Other Offences (Procedure) Act, 1960, Act 30, is the enactment envisaged by article 14 (1) which contains the prescribed procedure for the arrest, restriction, detention, trial and sentencing of persons falling under 14 (1) (g)

The requirement under article 14 (3) to bring a person arrested, restricted or detained under article 14(1)(g) before a court within 48 hours which is also provided for in section 15 (1) of Act 30, does not imply that the person has an automatic right to be granted bail. No such words can be imported into article 14 (3). In my view the very purpose of article 14 (3) is to prevent a person whose liberty has been deprived under 14 (1) (g) to be held in custody by the police beyond 48 hours after his arrest. It is intended to subject the police power of detention not to go beyond 48 hours and to subject the power of detention to judicial control. It is to subject the person to due process before the court whose duty is to examine whether the continued detention of the person before his trial is necessary. The Court has discretion to grant bail by following the procedure set out in section 96 of Act 30.

Express Constitutional Provisions Curtailing Grant of Bail

Furthermore in considering other relevant constitutional provisions on the deprivation of personal liberty and freedom of movement, I find that the combined effect of articles 14 (1) (3) (6) and 21(4) contemplates the situation where a person's liberty and freedom can be restricted in the public interest by refusing bail for the purpose of ensuring that he appears to face trial. In that respect, there is no inconsistency of section 96(7) of Act 30 with article 14(1) or (3). In addition, Article 21 (4) states:

> (4) Nothing in or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision-
>
> …
>
> (b) for the imposition of restrictions, by order of a court, on the movement of residence within Ghana of any person either as a result of his having been found guilty of a criminal offence under the laws of Ghana **or for the purposes of ensuring that he appears before a court at a later date for trial for a criminal offence or for proceedings relating to his extradition or lawful removal from Ghana. [e.s.]**

In this respect section 96 (7) of Act 30 which oust the right to bail in the offences listed therein is constitutional.

That being the case the Constitution offer reparation under Article 14 (6) that provides that such period spent in lawful custody is counted in imposing sentence. The rational being that the person was placed on remand not because he is guilty but just to ensure his appearance for trial and it is therefore just and equitable to consider time spent on remand as part of sentence imposed when found guilty.

The Supreme Court has applied article 14 (6) in reducing sentences in cases like *Bosso v The Republic* [2009] SCGLR 420; *Frimpong alias Iboman v The Republic*, [2012] 1 SCGLR 297; *Frimpong Badu v Republic* unreported, Supreme Court Criminal Appeal No J3/11/2015, 11 November 2015. The appellate and trial courts failed to comply with this constitutional provision which we considered was a violation of the constitutional rights of the appellants.

Article 14 (6) states:

> "Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment."

From the foregoing I hold that the wording of section 96(7) of Act 30 when taken in the context of the whole of section 96 of Act 30 is not in conflict with article 14 (3) which said article does not lay down any criteria for the grant of bail. Consideration of bail at the time of arrest may only be implied from article 19(2) (c) which is not the same as a right to bail.

Article 14(4) - *right to bail when no trial within a reasonable time*

The right to protection of personal liberty is derived from article 14(1) whereas the right to bail is derived from article 14 (4).It is only article 14(4) that provides a right to bail in breach of the right of an accused to trial within a reasonable time. Article 14(4) provides: "*Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released, either unconditionally or upon reasonable condition, including in particular conditions reasonably necessary to ensure that he appears at a later for trial or for proceedings preliminary to trial."*

I do not share the view that article 14(4) repeals section 96(7) of Act 30 as each deals with a different scenario exclusive of the other after the arrest and detention of a person. No question of delay arises when bail is being considered at the time an accused person is brought to court within forty-eight hours of his arrest in compliance with article 14(3). In that context the court follows the procedure under section 96 of Act 30 and bail is withheld if a case of any of those specified in 96 (7) of Act 30 is made out against the person. It is where there is a question of delay in bringing the person to trial in breach of article 19 (1) that section 96(7) ceases to apply, as by the language of article 14 (4) bail is to be granted in all offences. Notwithstanding section 96(7) of Act 30 bail is mandatory in all offences when an accused person held in custody is not brought to trial within a reasonable time.

These two provisions co-exist in issues relating to bail in the one system of administration of justice**. Section 96(7) is applied to hold a person to ensure his trial and this is permitted by article 21 (4). On the other hand article 14 (4) mandates the court to release an accused whose trial has been unreasonably delayed; and 'trial' under this article includes preliminary trial in committal**

proceedings. Therefore where there is a delay in completing investigations in order to hold committal proceedings the accused is entitled to bail upon application to a court of competent jurisdiction on grounds of delay. Wherein is the conflict to be resolved in favour of the Constitution, the Supreme law of the land?

Following the above, I hold that upon a proper and purposeful construction, section 96(7) of Act 30 and article 14(4) can co-exist. They are not inconsistent with each other. They are laws *in pari materia* as Taylor J as he then was said decades ago in *Brefor* at page 703 that:"…the most casual consideration of the problem will reveal that it is impossible by any process of interpretation to contend that the constitutional provisions repeal the said section 96 (7) of Act 30.'

I will now address some concerns raised by the Plaintiff and some of my eminent brothers, Dotse and Benin JJSC on the issue before us.

Benin JSC and concurred by Dotse JSC, exercised "the fear that the existence of Article 14(4) whereby the court can grant bail as a result of unreasonable delay does not remove the danger posed by section 96(7) of Act 30 because judges and magistrates "can rely on section 96(7) of Act 30 to deny bail, and indeed the practice still goes on."

I empathize with this view; but following what I said at the beginning of this discourse, the danger rather lies in the jurisdictional difficulty some courts finds themselves and this cannot be a legitimate reason for striking down section 96(7) of Act 30.It is rather a call to duty of judges to adopt a generous and purposive construction of article 14(4) especially when considering bail in cases of non-bailable offences. There is no legal basis for the courts to deny bail under article 14(4) on the strength of section 96 (7) as the latter is inapplicable when there is the issue of delay in the trial of the accused. By the clear wording of article 14 (4) a court has no discretion but to grant bail; this is the occasion that the argument of the supremacy of the Constitution is pertinent. The duty of the court to protect, defend and enforce fundamental human rights cannot be compromised by the perfunctory way bail applications are treated. The duty to enforce human rights is to be performed judiciously, "with lively concern for the cost to the individual and community.''

The overall concerns raised by the Plaintiff and expounded by the majority view do not justify the call for striking down section 96(7) of Act 30 as unconstitutional. The concerns raised may be pertinent so far as there seems to be no clear rules or

guidelines on when investigation should close or how long a person can be held on remand without being charged or committed to trial in cases of trial by jury as pertains in some jurisdictions. This calls for urgent review of procedures in preliminaries before trial by the Law Reform Commission. This may include the revision of section 96 of Act 30 in clearer terms on the grant of bail.

I am of the view that the provision of non-bailable offences is a necessary law despite the perceived 'evil'; designed to promote national, regional and international security in terms of narcotic trade, acts of terrorism, and serious crimes. A person may even be denied bail in a bailable offence because the public confidence in the administration of justice may be disturbed by letting the individual, still legally innocent, go free pending the investigation and completion of the trial or passing of sentence due to the circumstances of the case.

What is trial within a reasonable time by a court?

Benin JSC had an issue with the phrase '"tried within a reasonable time by a court" in article 14 (4) due to the difficulty to determine that. The Constitution does not define what trial within a reasonable time is. The thorny issue then is how to determine trial within a reasonable time having regard to the past and current problems affecting the administration of criminal justice in the country.

The reality is that no person would be arrested unless somebody, the crime victim, the police officer or the prosecutor believes that the suspect was guilty of a crime. Accordingly, I am of the view that the time for calculating the period of unreasonable delay should commence from the date of arrest and not the date the accused was charged or arraigned before court. It is the day of the arrest whether with or without a warrant that the whole machinery of the state is mounted against such a person. It is therefore sound, fair, just and precise for the clock to start counting for his trial or discharge, immediately after his arrest. After all the forty-eight hours within which a person is to be brought to court begins from the moment of his arrest, restriction or detention.

I base this opinion on a decision of the Gambian Supreme Court (High Court), *Clarke & Garrison v Attorney- General* [1960-93] GR 448; which gave a generous and purposive construction to section 20 (1) of the Constitution of Gambia the same more or less as article 14 (3) (b) and (4) of the Ghana Constitution,1992. I find the decision in the case persuasive. This case was discussed by Dr. S.Y. Bimpong-Buta in his book *The Role of the Supreme Court in the Development of*

Constitutional Law in Ghana, at pages 371 to 376 from which I quote extensively. In *Clarke & Garrison v Attorney- General*

On the facts of the case, the court held that the applicant's right to a fair hearing within a reasonable time has been infringed.

Ayoola CJ held:

> "In my judgment, any reading of section 20 (1) which will confine the protection afforded by that subsection only to persons charged before a court and from the date of his being arraigned must be rejected. The right to a speedy trial is a right which accrues to an accused person from the time the decision to prosecute him has been manifested by his arrest…Delay to offer an accused for trial within a reasonable time is itself an infringement of his right to have the case against him heard within a reasonable time. In my judgment a generous and purposive construction to support that conclusion ought to be put on section 20 (1)."

According to the learned author:

> "The Supreme Court of the Gambia, per Ayoola CJ applied the decisions from four jurisdictions: …the Supreme Court of Kiribati in *Republic v Taabere* [1985] LRC (Crim) 8 touching on section 10(1) of the Constitution of Kiribati ; …Privy Council in *Bell v Director of Public Prosecution* [1985] 2 All ER 585, in relation to section 20 (1) of the Jamaican (Constitution)Order in Council, 1961 Sch 2; …Privy Council in *Mungroo v R* [1991] 1WLR 1351 touching on section 10(1) of the Constitution of Mauritius;…United States Supreme Court in *Barker v Wingo* [1972] 406 US 514, US."

Ayoola CJ in his judgment identified some guidelines in determining whether an accused (such as the applicants) has been deprived of his right to a fair trial, namely:

> ... "the length of the delay, reasons given by the prosecution, for the delay, the responsibility of the accused for asserting his rights, prejudice to the accused… in considering whether reasonable time has elapsed, regard must be had to the past and current problems affecting the administration of justice in the particular country; [and]… what is reasonable time cannot be

prescribed but must be determined from case to case having regard to the circumstances of each case."

It is desirable that we apply the same or similar criteria to our Constitution, which protects an accused from oppression by delay for a fair trial within a reasonable time. Any reason for delay given by the prosecution or on the part of all those involved in the administration of justice must not be used to the prejudice of the accused person. Where there was no justification for the delay, the absence of *mala fides* on the part of the prosecution would not make such delay reasonable. In any case it is not necessary for an accused person to prove *mala fides* on the part of the prosecution.

CONCLUSION

"Personal liberty, deprived when bail is refused is too precious a value of our constitutional system recognized under article [14] that the crucial power to negate it is a great trust, exercisable, not casually but judicially, with very lively concern for the cost of the individual and community."Per Bijoylashmi Das, author of: Bail, A matter of Right Not to be Denied on Grounds of Nationality and cited by my brother Benin JSC; which I totally endorse as it supports my stand on this issue.

While the argument that the no-bail provision in section 96(7) of Act 30 places a fetter on the discretion of the court to grant bail cannot be dismissed with a wave of the hand, it is my view that stronger and legal arguments could be made to counter it. Firstly, under the 1992 Constitution, the right to personal liberty as a fundamental human right and freedom is derived from article 14 which at the same time expressly provides limitation to the enjoyment of the right not to be deprived of one's personal freedom under 14 (1). These include holding a person for extradition purposes or for purposes of arrest, restriction and detention upon reasonable suspicion of a person having committed or being about to commit a criminal offence under the laws of Ghana as stated in article 14 (1) (f) and (g) respectively. Article 21 (4) (b), expressly permits a court to hold a person to ensure his appearance to stand trial.

The crucial power to deprive a person of his personal liberty is a judicial act which decision is taken after due process in accordance with rules of procedure set out in Section 96 of Act 30. Section 96(7) of Act 30 which restricts the grant of bail in some specific offences like murder, terrorism, narcotics and rape is consistent with article 14 and article 21 of the Constitution. The problem is not the wording of the

Section 96(7) of Act 30 but with the attitude of some of the courts refusing to grant bail in the offences listed therein despite the clear wording of article 14(4). This is not a sound reason to strike down section 96(7).

Finally the calls for striking down of section 96(7) of Act 30 were not made on any solid legal arguments except the sweeping invocation of the supremacy of the Constitution and of fundamental human rights as a catch-all defence of the rights of persons who have infracted the criminal law and the rights and liberties of others in the community and society.

From the foregoing, I hold section 96(7) of Act 30 does not contravene article 14 (1), 15 (2) and 19(2) (c).

I so declare.

I however commend Mr. Martin Kpebu for his spirited arguments which has given this Court the opportunity to consider the provisions of the Constitution on personal liberty and section 96 (7) of Act 30 which in my opinion co-exist with article 14 (4) with each playing its role in the administration of criminal justice in the country. His concerns and that of my eminent brethren constitute legitimate calls for a review of the entire section 96 of Act 30 and providing guidelines regarding timelines for actions by all players in the administration of criminal justice between the period of the arrest of a person to the time of his trial.

From the foregoing, all the reliefs sought by the Plaintiff are denied.

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

GBADEGBE JSC

The action herein, which is taken by the plaintiff, a lawyer seeks a declaration of nullity in the exercise of our interpretative function of section 96(7) of the Criminal and Other Offences (Procedure) Act, 1960, (Act 30) as amended by the Criminal

Procedure Code (Amendment) Act, 2002 (Act 633) for allegedly contravening articles 15(2) and 19(2) (c) of the 1992 Constitution. I have after giving careful consideration to the issues for our decision in this matter come to the view that the impugned provision is not inconsistent with the articles of the constitution on which reliance is placed by the plaintiff to sustain the action herein. As the action herein has invoked our original jurisdiction under articles 2.1 and 130 of the 1992 Constitution with a view to annulling the impugned legislation, I desire by way of approach in determining the constitutionality or otherwise of the impugned section to consider section 96 conjunctively and not disjunctively as in my view that advances the true legislative intent regarding the question whether it is indeed, inconsistent with the 1992 Constitution.

Section 96(7) of Act 30 as amended provides thus:

"**A court shall refuse to grant bail in a case of subversion, murder, robbery, hijacking, piracy, rape and defilement or escape from lawful custody, or where a person is being held for extradition to a foreign country."**

By way of observation, I wish to say that the list of specified crimes to which section 96(7) applies was expanded by section 41 of the Anti-Terrorism Act, 2008, (Act 762) to include the offence of terrorism. The plaintiff's contention is that by the said provision, the jurisdiction of our courts to grant bail has been taken away notwithstanding the clear and unequivocal provisions contained in articles 14(1), 15 and 19(2) of the constitution. The plaintiff further makes the assertion that the only legitimate grounds that a court may take into account in denying bail to an accused person are those contained in sections 96(5) and 96(6) of Act 30, which sub-sections regulate the grant of bail and appear to place a fetter on the right to bail in a manner that undermines the arguments pressed on us by him regarding the

interpretation to be placed on the impugned section in the light of article 14 of the constitution. I am in a great difficulty comprehending the rationale which accords legitimacy to the limitations contained in sub-sections(5) and (6) but seeks for no discernible reason to withhold validity from sub-section(7). Can it be said that the law-maker in one vein has the authority derived from article 14 of the constitution to enact sub-sections 5 and 6 of section 96 but acted in excess of authority in respect of sub-section 7? It seems to me that the plaintiff does not appreciate the fact that in construing legislations, the better approach is to read the various parts of an enactment together as one document in order to give effect to the intention of the lawmaker. It must be borne in mind at the onset that the impugned section has undergone various amendments since it was first passed for the purpose of creating some restrictions on the power of the court to grant bail to accused persons and as said earlier in this paragraph, the existing legislation in the nature of a consequential amendment is contained in section 41 of the Anti- Terrorism Act, 2008, (Act 762). In its present form, the exceptions include crimes which at the time the impugned section came into being were not reasonably foreseen such as terrorism which was only recently added to the list of crimes specified in section 96(7) of Act 30).It seems to me from the various amendments that the impugned section is ambulatory to take account of changing circumstances including giving effect to international obligations. For example, it is no wonder that in view of the threat to which acts of terrorism pose to safety and order it was added to the list of specified crimes. Recent happenings the world over must counsel us that the right to personal liberty like all other fundamental human rights though tangible cannot be enjoyed absolutely.

A careful reading of sub-section 7 together with the other sub-sections of section 96, presents one with a clearer understanding of the carefully drafted provisions

which were enacted to ensure the appearance of persons who are charged with criminal offences before our courts. Examining the whole of section 96, there is no doubt that its objective is to secure the release of persons who are arrested, restricted and or detained pending trial for crimes allegedly committed in the Republic. The object of bail as was said in an old English case entitled **R** v **Broome** [1851], 18 L.T. O. S.19 is to secure by a pecuniary penalty, the appearance of an accused person at his trial. So stated, the effect of bail is to place the accused in constructive custody of the court to ensure that he submits himself to the jurisdiction of the court. It seems therefore that the impugned section seeks to deny bail to a person in respect of offences which are considered very serious and in relation to which having regard to the penalty provided for conviction, it is not reasonable to expect that when released on bail pending trialwould for example turn up in the case of murder to face the stiff penalty of a sentence of death.

It is trite law that in considering bail pending trial, a court may take into account factors such as the nature of the offence and the reasonable likelihood of the accused turning up subsequent to bail to face his trial. See: (1) **R** v **Scaife** (1841), 9 Dowl. 553; (2) **Ex parte Tomanzie** (1885), 2 T.L.R. 205. It appears to me that section 96(7) is a statutory acknowledgement of the common law attitude of courts in refusing to grant bail to persons charged with capital and other serious offences as was pronounced by Afreh JA (as he then was) in the case of (1) **Isa v The Republic** [2001-2002]1 G L R 128, 137. Although the said decision was on the right of a convicted person to bail pending appeal, the pronouncements made in relation to the limitations on the right to personal liberty under article 14(1) of the 1992 Constitution are of persuasive effect to us in these proceedings. At page 137, the learned judge delivered himself thus:

"Admittedly, the applicant would, unfortunately, have spent some time in prison. But this will not be an unlawful infringement of the applicant's constitutional right to liberty. In the administration of criminal justice it is often necessary to keep suspects or accused persons in prison prior to and during trials; or imprison convicted persons pending the hearing and determination of their appeals. Article 14 of the Constitution, 1992 recognises such incarceration as an exception to the right to personal liberty."

While the thinking which might have informed the development of such attitude on the parts of common law courts might today be questioned in the light of advents in constitutionalism, I am unable to agree that merely acknowledging the said thinking or presumption in the impugned section has the effect of its unconstitutionality. In my opinion, the question which arises for our determination in these proceedings turning on the said section is whether it is indeed, a violation of provisions of the constitution as contended by the plaintiff.

Over the years, our courts have been applying the provisions on the grant of bail under the 1969 and 1979 Constitutions which utilized words which are substantially the same as those contained in articles 15(2) and 19(2) of the 1992 Constitution by which the fundamental freedoms of personal liberty and the presumption of innocence among others were conferred on us as part of our fundamental human rights against the background of section 96(7) of Act 30 of 1960. I wish at this point to observe that when courts seek to apply provisions of enactments there is inherent in the process of enforcement an application of what is thought to be their true meaning. A useful starting point in this delivery is to have regard to some of these decisions. In the several cases that were previously determined, our judges did not shy away from the onerous responsibility of

protecting these fundamental human rights, but on the contrary exhibited boldness in giving effect to what they perceived as reasonable interpretation of the said provisions in relation to offences which are dire in their consequences such as murder, and robbery. Some of the said decisions speak to the extent to which judges in this country have striven to breathe life into the otherwise abstract right of personal liberty by the "*jealous scrutiny* "which they exhibited in considering cases in which violations of the said right were alleged. See :(1) Macmillan LJ in **Liversidge** v **Anderson** [1941] 3 All ER 338.For example, in the case of **Okoe** v the **Republic** [1976] 1 GLR 80. Taylor J (as he then was),considered the applicable principles granting bail under article 15 of the 1969 Constitution and section 96 of Act30 and at page 95 after an exhaustive discussion of the concept of bail and its practice expounded the legal position as follows:

"In my opinion with the exception of the few principles I have criticized and drawn attention to, section 96 of Act 30 as amended by NRCD 309 consolidates substantially, the common law principles governing the grant of bail when a person is brought to court and when there is no question of delay in his prosecution. Once there is an unreasonable delay in the prosecuting the case then section 96 of Act 30 is in my view inapplicable and article 15(3) (b) and (4) of the Constitution, 1969, becomes applicable and in such a situation, *bail in all cases must be given subject* only to the conditions prescribed in the articles."

Earlier on in the course of his discussion of the principles governing bail, the learned trial judge at page 93 made reference to the constitutional provisions contained in article 15 (3) (b) and (4) of the 1969 Constitution by which it was provided thus:

“15. (3) Any person who is arrested, restricted or detained

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the laws of Ghana, and who is not released, shall be brought before a court within twenty-four hours.

4. Where a person arrested, restricted or detained in any circumstance as is mentioned in paragraph (b) or the immediately preceding clause is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

The above constitutional provisions which are similar to article 14(3) (b) and (4) of the Constitution, 1992 by which it is provided in the words that follow:

“3(b) A person who is arrested, restricted or detained-

(b)upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana, and who is not released, shall be brought before a court within forty-eight hours after the arrest, restriction or detention.

4. Where a person arrested, restricted or detained under paragraph (a) or (b) of clause 3 of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular, conditions reasonable necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

My lords, it does appear to me that the formulations of the right of personal liberty under the 1969 and 1992 Constitutions are the same and accordingly as a rule of

construction, they must attract the same interpretation. In this regard, I observe that the plaintiff has not provided any legitimate reasoning for inviting us not to follow the collection of cases on the point. In the circumstances, what Taylor J (as he then was) in the **Okoe** case (supra) though rendered by a court lower than the Supreme Court is of persuasive value and is deserving of our attention in our effort to determine the claim with which we are confronted in these proceedings. At page 93 of the said judgment, the learned trial judge observed as follows:

"It is noteworthy that under these provisions….. once an accused person is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he is mandatorily entitled to be released either unconditionally or upon reasonable conditions including such conditions as are reasonable to secure his attendance at the trial**."**See also: Boateng v The Republic [1976] 2 GLR 444.

Pausing here, I venture to say that a careful reading of article 14 clauses 2 and 4 on which this case partly turns is expressed in a language free from any dispute as to its meaning, an attribute that it shares with article 15(3)(b) and (4) of the 1969 Constitution. The question which agitates my mind then is why did the framers of the constitution provide in article 14(4) of the 1992 Constitution the following words in relation to the unconditional or otherwise release of an accused person? The operative words to which my mind is directed here are as follows:

"Where a person arrested, restricted or detained……. Is not tried within a reasonable time, then…… to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

It seems to me that the constitution makers were aware of the existing provisions contained in section 96(7) of Act 30 and its subsequent amendments by which

certain designated crimes such as murder, robbery, possession of narcotic drugs, treason had a provision precluding the grant of bail. One must also credit the law-maker with knowledge of the decisions of courts on the scope and extent of the previous provisions contained in the 1969 and 1979 Constitutions, which as said earlier in the course of this delivery were expressed substantially in the same language. I do not for a moment think that it is unreasonable to impute to the constitution makers knowledge of the existing law as interpreted and applied by the courts when they re-enacted the same provisions which were contained in the previous Constitutions of 1969 and 1979; indeed it is a guide that we fall upon when construing enactments. The words contained in article 14(4) of the constitution, which are known to our jurisprudence are sufficient in themselves to persuade me as to the purpose of the provision and leaves me in no doubt as to the correct construction to be placed on the article. This approach renders the words to which reference has just been made in article 14(4) relevant and it seems to me that any other interpretation would render the said words not only irrelevant but unnecessary as well. This means that the Constitution itself recognized that while there might be certain crimes in respect of which in furtherance of the right to personal liberty may be granted as of right in some cases including murder, robbery, terrorism the right to bail may only be available when the court is of the view that there has been unreasonable delay in prosecuting the accused. I think that this construction credits the makers of the constitution with reasonableness and avoids the situation being urged on us by the plaintiff that once a person who is arrested, restricted or detained in respect of a crime is not tried within forty-eight hours, then he is entitled to be admitted to bail and accordingly section 96(7) of Act 30 is not in conformity of the Constitution and must to that extent be declared null and void. Such an invitation seeks essentially to deny to our courts which are guardians of the rights of the good people of this country the exercise of any

discretion in applications for bail including but not limited to considerations such as the likelihood of the accused turning up at his trial and the severity which conviction might entail. The plaintiff's contention seems to me to be derived from an unattractive construction of the impugned section and I am unable for the reasons set out in this delivery to make accession to his submissions.

The position discussed in the preceding paragraph appears to be similar to that which pertains to Nigeria where by article (section) 35 of their constitution provisions similar to that contained in article 14(1) of the 1992 Constitution provide in regard to personal liberty as follows:

"Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law……."

The constitutional provision then proceeds to enumerate instances such as are contained in clause (1a) to (1g) of article 14.There is also by section 35(4) of the constitution, a requirement that persons arrested shall be brought before court within a reasonable time or be released either unconditionally or upon such conditions as are reasonably necessary to ensure their appearance before court at a later date to face trial. But then there is a further provision in section 35 (7) of the constitution by which bail is withheld in cases involving persons arrested for capital offences. The comparative reference made to Nigeria is to demonstrate that the right to personal liberty like all other rights which are fundamental in nature are not absolute but qualified in their enjoyment. See: **Dokubi –Asari** v **Fed. Rep. of Nigeria** (2007)12 NWLR (Pt.1048), 331 in which Ibrahim Tanko Mohammad JSC observed as follows:

"The above provisions of section 35 of the constitution leave no one in doubt that the section is not absolute. Personal liberty of an individual within the contemplation of section 35 (1) of the Constitution is a qualified right in the context of this particular case as by virtue of sub-section (1c) thereof which permits restrictions on individual liberty in the course of a judicial inquiry or where, rightly as in this case, the appellant was arrested and put under detention upon suspicion of having committed a felony…."

I do not disregard the fact that in Nigeria, the preclusion regarding capital offences is contained in the Constitution unlike here where it is provided for by an Act of Parliament, which by learning is subsidiary in nature. But then there are the opening words of article 14 (1) of the 1992 Constitution as follows:
"Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following circumstances and in accordance with procedure permitted by law."
Similar restrictions are recognised in jurisdictions such as Australia where in the case of **Gethardy** v **Brown** (1985) 57 ALR 472, 495-496, the High Court in a case that concerned an aspect of personal liberty-freedom of movement emphasized that the exercise of the said right is not absolute and that restrictions are permissible if necessary for the promotion of public order, safety or morals. I observe that while rights are not created by states but recognised by them, their enjoyment can only be secured by a legal system which creates the environment for all citizens to exercise these rights in a manner that balances individual rights with the needs for security of the state. Although there may be philosophical objections to restrictions being placed on fundamental human rights, I think that it provides the only acceptable mode by which the enjoyment of those rights by the citizenry can be guaranteed. Perhaps, it may be said that most of the offences specified in the impugned section

are clear instances in which those accused have deprived others of their fundamental human rights such as the right to life in the case of murder and it is surprising that in our efforts to give meaning and content to the right of personal liberty, we tend to lose sight of those whose rights have been trampled upon by limiting our consideration to the violators. Such an attitude undermines the reasonable expectation of law abiding citizens that persons who do not respect the rights of others will not be treated as privileged citizens in a manner that appears to discriminate against the victims of those crimes.

Article 14 (1) of the constitution while enumerating the circumstances to which the right of personal liberty may be subject also refers to permissible legal procedure which cannot be said to exclude the practice prevailing in our courts by which applications for bail are made on behalf of persons who are under arrest in respect of crimes and are either acceded to or refused by taking into account established principles to which reference have earlier on been made as well as section 96 (7) of Act 30-the impugned section. Indeed, Act 30 is the substantive legislation that regulates the existing practice and procedure in criminal matters in our jurisdiction. The use of the words "and in accordance with procedure permitted by law" in article 14(1) appear to be of some value to us in the determination with which we are confronted in these proceedings and seem to give legitimacy to the existing practice and procedure in our courts regarding applications for bail.

Before I end this delivery, I wish to turn my attention to the case of **Gorman** v **The Republic** [2003-2004] 2 SCGLR, 784. By the said decision, this court considered the applicability of article 14(4) in cases for bail pending trial for offences specified in the impugned section. In its judgment, the court unanimously reached the conclusion that the provision contained in articles 14(1) and (3) created

a "derivative constitutional presumption of grant of bail" by virtue of article 14(4) but that presumption might be rebutted by the statutory preclusion contained in section 96(7) of the Criminal and other Offences (Procedure Act), Act 30 of 1960 as amended by section 2 of NRCD 309. Before us it has been forcefully urged by the plaintiff that the said decision was wrong and accordingly, we are invited to pursue a different path on the lines contended by the plaintiff.

In my view, had the said decision directly dealt with the status of section 96(7) of Act 30, its value as a binding precedent would not have been in question as it is a previous decision of this court. The pronouncements in the **Gorman** case (supra) in so far as the impugned section is concerned were incidental to the determination of the question of bail and did not directly deal with the issue of the status of the section by declaring or defining it. That case seems to have determined only the interest of the parties in the bail application and although the impugned provision was discussed in the judgment, its unconstitutionality or status was not distinctly raised and inevitably decided such as to create estoppel by judgment See: (1) **R** v **Humphrey** [1975] 2 All ER 1023, 1026.

As the judgment in the **Gorman** case (supra) did not determine the status of section 96(7) of Act 30, it fails to measure up to the designation of a judgment *inrem.* See: (1)*Halsbury's Laws of England*(4th edition, reissue, 1992), volume 16, para 971 on "*Estoppel*"; (2) **Lazarus-Barlow Estates Co Ltd** v **Regent Estates Ltd** [1949] 2 All E. R. 118, 122.Reference is also made to the following passage from B L Stayer's book "*The Canadian Constitution and the Courts",*(3rd edition, 1988) at page 194, wherein he observes:

" …….. that on principle a decision as to statutory invalidity, made in an ordinary litigation, other than a declaratory action should not lead to a judgment *in rem.* Such proceedings involve a collateral attack on the legislation, not a direct

attack. That is, the issue before the court may involve for example a claim for damages, a criminal prosecution, or an application to quash the order of the inferior tribunal. The relief requested is not a declaration of invalidity of a statute *per se*, though it may be necessary for the court to make some finding in this regard where statutory invalidity is alleged, as a ground for the granting of the relief requested."

While conceding that the court in the **Gorman** case (supra) was not directly called upon to determine the constitutionality of the said provision but the interest of the appellants in the statutory provision for the purpose of deciding their entitlement to bail which having been granted earlier in their favor by a High Court was rescinded by the Court of Appeal, I think that the pronouncements made in the judgment of the court which was delivered by Prof Ocran JSC (as he then was)are entitled to be accorded great weight especially so as it has by virtue of the rules of judicial precedent contained in article 129 of the constitution been applied by lower courts in resolving similar questions on the grant of bail. I think the decision in the **Gorman** case (supra) which was attacked in these proceedings by the plaintiff may be likened to the judgment of a court of co—ordinate jurisdiction which though not binding onus is one to which me may give effect to on grounds of judicial comity unless we are convinced that it was delivered in error. See: **Asare** v **Dzeny** [1976] 1 G.L.R, 473, 480. The principle inherent in the case of **Asare** v **Dzen**y enables us to direct our minds to reasonable restraint when we are confronted with previous decisions rendered by this court and which have for a considerable period been the basis of the exercise of jurisdiction by other courts by virtue of the doctrine of judicial precedent contained in article 129(3) of the constitution in order not to undermine a core characteristic of the common law namely certainty of the law.

After giving careful thought and consideration to the said decision in the light of the action herein, I have come to the decision that it mirrors the true meaning of the impugned section in line with previously decided cases and I accept the pronouncements made therein as a correct exposition of the law. Therefore, I am of the opinion that in cases specified in section 96(7) of Act 30 as amended by Act 762 where a person is charged with any of the offences specified in the section is being proceeded with by way of trial reasonably then the court may refuse bail to the person pending trial. Where, however there has been unreasonable delay or the case is not being prosecuted within a reasonable time then by virtue of article 14(4) of the 1992 Constitution , such a person may be admitted to bail pending trial. That position is derived from a fair reading of the provisions of the constitution and actually reflects the thinking in several jurisdictions where bail being, a creature of statute mayon legitimate grounds reached after delicately balancing the security needs of society against the right to personal liberty of the individual may be restricted in cases where a person is being proceeded against for a capital and or some other serious offence as contained in section 96 (7) of Act 30. I think similar considerations preclude courts from granting bail in respect of other offences which do not come within the scope of the impugned section and emphasizes the discretion that courts have in such matters. After all in any civilized democracy, citizens may have to give away some of their rights for the good of the society subject in appropriate instances to the payment of compensation as provided for in article 14(7) of the constitution. The restriction on the right to personal liberty which arises from section 96(7) of Act 30 is in its nature only a qualification but not a deprivation such as to constitute a contravention of the Constitution of 1992.

It seems to me that the real thrust of the plaintiff's case appears to be the violation of the right of his personal liberty contained in article 14 of the 1992

Constitution and in particular clauses 3 (b) and (4) The other rights such as the presumption of innocence, in my respectful view impacts upon the right guaranteed by article 14 but is more appropriately considered in determining the evidential burden on accused persons in criminal matters .That aspect of the matter has been sufficiently dealt with by my esteemed colleagues in various judgments which are about to be read today; for which reason I desire not to expend any further time on it. Having come to this view of the matter, I find myself on the side of my worthy sister Adinyira JSC (Mrs.) with whose dissenting opinion, I am in convergence.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

COUNSEL

BRIGHT OBENG MANU ESQ FOR THE PLAINTIFF

WILLIAM KPOBI ESQ. CHIEF STATE ATTORNEY FOR THE DEFENDANT