IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
DORDZIE (MRS.), JSC
LOVELACE-JOHNSON (MS.), JSC
AMADU, JSC

CIVIL MOTION
NO. J5/58/2021

28TH JULY, 2021

REPUBLIC

VRS

HIGH COURT (CRIMINAL DIVISION 1), ACCRA ..... RESPONDENT

EXPARTE: STEPHEN KWABENA OPUNI ..... APPLICANT

ATTORNEY-GENERAL ..... INTERESTED PARTY

RULING

MAJORITY OPINION

PWAMANG JSC:-

My Lords, the applicant before us prays the court to exercise our supervisory jurisdiction and quash by an order of Certiorari, "part of the ruling of the said High Court (Criminal Division 1), Accra dated 7th day of May, 2021 which rejected exhibits 58, 59, 60…74 and 75 from the evidence and for an order of Prohibition to prohibit His Lordship Justice

Clemence Jackson Honyenuga (JSC) sitting as an additional High Court Judge from continuing with Case No. CR/158/2018- Republic v Stephen Kwabena Opuni, Seidu Agong, Agricult Ghana Limited." As grounds for the application, the applicant pleads grievous error of law, breach of the right to be heard and real likelihood of bias.

The brief background to the application is this. At the criminal trial pending in the High Court, Accra, the applicant who used to be the Chief Executive Officer of Cocobod has been charged together with two others on various counts including abetment of defrauding by false pretences and willfully causing financial loss to the state of Ghana in relation to the procurement and supply of Lithovit Foliar Fertilizer from Germany. The fertilizer was for application by farmers on cocoa so as to increase the country's cocoa output. At the close of the case of the prosecution, the applicant made a submission of no case to answer and in his ruling dismissing that application the trial judge made the impugned orders and findings. Part of the case made by the prosecution against the Accused persons, as captured by the trial judge at pages 17 to 21 of his 89-page ruling, which is Exhibit "EXH OP3" in these present proceeding, was as follows;

"Investigations have revealed that on assumption of office, Stephen Kwabena Opuni 1st Accused person as Chief Executive Officer (CEO) of COCOBOD, directed, contrary to established policy and practice that the period for testing should be shortened. Additionally, upon the direction of the 1st Accused person no field or laboratory tests were conducted for renewal of certificates for the use of Lithovit Foliar Fertilizer on cocoa during his tenure in office……On the 19th February 2014, the 1st Accused person applied to the Public Procurement Authority (PPA) for approval for the 3rd Accused company to be singled sourced to procure 700,000 litres of "Lithovit Fertilizer 'although conditions for single source procurement had not been satisfied.'…..In the course of investigations, tests conducted revealed variously that the "Lithovit" supplied by the 2nd and 3rd accused to COCOBOD had been adulterated and did not meet the specified standard and that the product could not be used as foliar nutrient on cocoa. Furthermore, the tests indicated that the "Lithovit" which was tested

could be harmful to humans and animals as well as hazardous to water and that the amount of Lithovit found in the sample was insignificant and could compromise the outcome of its application on cocoa. Even though COCOBOD had spent (sic) a sum of $65,200,000 (GHC217, 345,289.20) on Purchase of "Lithovit Liquid Fertilizer", COCBOD's records show that there was not significant increase in cocoa yield within the period."

The prosecution tendered various document as proof of these serious allegations made against the Accused persons including letters written by the 1st Accused person, minutes of meetings of the Entity Tender Committee of Cocobod, reports by the Cocoa Research Institute of Ghana (CRIG) on the quality of the fertilizer and police witness statements made by some cocoa farmers to the effect that they did not experience increase in their cocoa yield after applying the fertilizer. In cross-examining the police investigator of the case who testified as PW7, the lawyer of the accused person challenged the correctness of the allegations contained in the passages I have quoted above and tendered through him, without objection by the Attorney General, other police witness statements obtained during investigations into the case that the prosecution decided not to tender. These witness statements are the exhibits which are the subject of the order of exclusion that the certiorari application seeks to quash and they are to the effect that; First, the then head of the CRIG gave a statement denying being coerced in his work by anyone during the period in question. Second, the procurement officer gave a statement that according to the applicant exonerates him of any breaches of the procurement law. Third, witnesses made statements that there had been alternative laboratory tests of samples of the fertilizer in question by the Ghana Standards Authority whose results differed from the tests being relied upon by the prosecution. Fifth, some statements were taken by police investigators from some of the farmers who used the fertilizer on their cocoa farms and their verdict was that the fertilizer was effective in increasing their yield. These witness statements which according to the applicant prove his defences to the charges were in the custody of the prosecution and it took his lawyer to apply at the disclosures stage of the case to obtain and tender them. At paragraph 12 of the affidavit in support the

applicant deposes that all of the witness statements tendered by the Accused persons through the police investigator that are favourable to their defences have been ordered to be expunged by the trial judge but those police witness statements tendered by the same investigator that appear to favour the case of the prosecution, Exhibits "PP", "LL" and "MM" series, have been maintained on the record of the court.

As justification for excluding the statements tendered by the Accused persons through the investigator the trial judge said as follows;

"However, counsel tendered exhibits 71,72, and 73 being statements of Genevieve Baah Mante (Mrs), Fiona Gyamfi and Paula Adjei Gyang which confirm that there was another test conducted on the Lithovit supplied to GSA for further testing. It is trite that a witness should not talk about something of which he had no personal knowledge but rely upon his own observations and recall of the matters in dispute and this is the rule against hearsay provided under section 117 of NRCD 323. See Ekow Russel [2017-2020] SCGLR 469 Holding (4). It is also trite that a court could admit documents into evidence and reject same during Judgment. In view of the decision in Ekow Russel v The Republic, a Supreme Court decision, this court was wrong in admitting Exhibits 71,72 and 75 since they offend against the hearsay rule in section 117 of NRCD 323.

In the circumstances, this court rejects exhibits 71, 72 and 75 as hearsay since the authors were not under section 117 of NRCD 323 available to answer questions and in the denial of PW7 about another scientific test, these exhibits are hereby rejected as marked as 'rejected'.

Further at page 88 of his ruling he said this;

"Moreover, by the decision of the Supreme Court in Ekow Russel v the Republic (supra) I would reject exhibits 58,59.60,61,62,63,64,65,66,67,68,69,70,71,72,73,74 and 75 as they offend the hearsay rule in Section 117 of NRCD 323 as a court has power to reject

evidence during judgment stage. The exhibits were all tendered through witnesses who were not authors and could not answer questions based on them. Meanwhile the witnesses are available".

The complaint of the applicant is that the above orders of the trial judge are grievously erroneous in that they were made in breach of statute and secondly, the trial judge did not hear him before *suo moto* expunging from the record evidence that had been tendered without objection by the prosecution. The second leg of the application is the prayer for an order of Prohibition for the reasons that in his ruling dismissing the submission of no case, the trial judge made prejudicial statements which indicate that he has already made up his mind that he is guilty as charged without hearing his defence. I intend to tackle first the Certiorari part before coming to the Prohibition.

My Lords, the supervisory jurisdiction of the court over a superior court such as the High Court is not to be exercised in favour of an applicant unless she satisfies the Supreme Court that substantial grounds exist to justify its exercise. In **Republic v High Court (Commercial Division) Accra; Ex Parte The Trust Bank Ltd. (Amponsah Photo Lab & 3 Ors Interested Parties) [2009] SCGLR 164** at pages 170 to 171 of the Report, the venerable Date-Bah, JSC stated the grounds for exercise of the supervisory Jurisdiction of the Supreme Court over a Superior Courts, such as we have in this case, as follows;

"In the the Ex Parte Tsatsu Tsikata case, Wood JSC, as she then was, said (at p. 619 of the Report):

"The clear thinking of this court is that, our supervisory jurisdiction under article 132 of the 1992 Constitution, should be exercised only in those manifestly plain and obvious cases, where there are patent errors of law on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned decision a complete nullity. It stands to reason then, that the error(s) of law alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. The error of law must be one on which the decision depends. A minor, trifling, inconsequential or unimportant

error, or for that matter an error which does not go to the core or root of the decision complained of; or stated differently, on which the decision does not turn, would not attract the court's supervisory jurisdiction."

The combined effect of these two authorities, it seems to me, is that even where a High Court makes a non-jurisdictional error which is patent on the face of the record, it will not be a ground for the exercise of the supervisory jurisdiction of this court unless the error is fundamental. ***Only fundamental non-jurisdictional error can found the exercise of this court's supervisory jurisdiction. The issue which arises, on the facts of this case then, is whether the trial High Court either committed a jurisdictional error or made a non-jurisdictional error which is so fundamental as to attract the supervisory jurisdiction of this court." (Emphasis supplied).***

One type of error of law that this court has consistently held to be fundamental and would warrant the exercise its supervisory jurisdiction over a superior court is where the error committed by the court amounts to violation of provision of a statute or the Constitution. See **Republic v High Court; Ex parte Commission on Human Rights and Administrative Justice (Addo Interested Party) [2003-2004] SCGLR 312.** In **Republic v High Court (Fast Track Division) Accra; Ex Parte National Lottery Authority (Ghana Lotto Operators Association & Ors Interested Parties) [2009] SCGLR 390** the applicant prayed the Supreme Court to quash a decision of the High Court on ground of error of law in that the trial judge granted an order of interlocutory injunction which had the effect of allowing the appellants to carry on lotto business in violation of provisions of the National Lottery Act, 2006 (Act 722). The Supreme Court unanimously quashed the order of the High Court. In two powerful opinions Atuguba and Date-Bah, JJSC declared the law in very definite terms. At page 397 of the Report, Atuguba, JSC said as follows;

"It is communis opinio among lawyers that the courts are servants of the legislature. Consequently any act of a court that is contrary to a statute such as Act 7; 22, & 58(1) – (3) is, unless expressly or impliedly provided, nullity."

Then at page 405 of the Report, Dr. Date-Bah JSC added that:

"I agree that the order made on 1st April, 2009 by his Lordship Asante J granting the interested parties an interlocutory injunction pending an appeal should be brought to this court and be quashed. The learned judge acted in obvious excess of his jurisdiction. No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament. But that is the effect of the order by the learned judge. The Judicial Oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows; 'I will at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana.' This oath is surely inconsistent with any judicial order that permits the infringement of an Act of Parliament."

In this application the allegation is that the order of the trial judge for the exhibits to be expunged breaches provisions of the **Evidence Act, 1975 (NRCD 323)** so if that is indeed the case, the error would be fundamental. In order for us to determine whether the trial judge erred in this matter and if the error is fundamental, it is helpful to quote what the Supreme Court itself said in the **Ekow Russell v The Republic (supra)** that the judge used as authority for expunging the exhibits. Akamba, JSC in that judgment said as follows at page 484 of the Report;

"Since the testimony of PW6 is based on hearsay evidence the same cannot be allowed to stand against the appellant. We find the trial judge's admission ***of hearsay evidence of the sixth prosecution witness against the appellant*** *and its subsequent endorsement by the Court of Appeal wrongful and pursuant to section 8 of the Evidence Act 323, we hereby exclude same from the record". (Emphasis supplied).*

The authority of a court to *suo moto* exclude inadmissible evidence pursuant to section 8 of NRCD 323 is not in doubt. In the case of **Juxon-Smith v KLM Dutch Airlines [2005-2006] SCGLR 438** Georgina Wood, JSC (as she then was) at page 448 of the Report noted as follows;

"Quite apart from the fact that it was the defendant who first brought up this issue on appeal, was the court wrong in invoking section 8 of NRCD 323 on its motion to exclude the documents on these legal grounds? Not in the least! The object of section 8 which stipulates that: "Evidence that would be inadmissible if objected to by a party may be excluded by a court on its own motion", has been spelt out in a host of cases including Amoah v Arthur [1987-88] 2 GLR 87, CA; Ussher v Kpanyinli [1989-90] 2 GLR 13 CA and Edward Nasser & Co Ltd v McVroom [1996-97] SCGLR 368. In the words of Acquah JSC (as he then was) in the McVroom case (at page 476) that power is to enable the court: "to exclude evidence which ***is inadmissible per se****," Abban JSC (as he then was and of blessed memory) in Amoah v Arthur (supra) (at page 102) justifies an appellate court's invocation of the rule in the following circumstances: (emphasis supplied).*

"It was the duty of the trial judge to reject inadmissible evidence which had been received, with or without objection, during the trial when it comes to consider his judgment; and if he failed to do so that evidence would be rejected on appeal, because it is the duty of the courts to arrive at decisions based on legal evidence only."

From the jurisprudence, it is only evidence that is inadmissible per se that may be excluded by the court on its own motion when delivering final judgment or on an appeal. Therefore, the question in this case is whether the exhibits that were ordered to be expunged are evidence that is inadmissible per se? The interested party in this application refers to section 116 of NRCD 323 which defines hearsay evidence as follows;

Hearsay defined

116.For the purposes of this Part,

(a) a statement is an oral or written expression or conduct of a person intended by that person as a substitute for oral or written expression;

(b) a declarant is a person who makes a statement;

(c) hearsay evidence is evidence of a statement other than a statement made by a witness while testifying in the action at the trial, offered to prove the truth of the matter stated;

(d) a hearsay statement is a statement, evidence of which is hearsay evidence;

It is apparent from the ruling of the trial judge that the reason he described the exhibits in question as hearsay evidence is the fact that PW7 through whom they were tendered is not the person who personally perceived the matters referred to in the statements but it is rather the makers of the statements. The contention is therefore, that to the extent that the statements were tendered by the accused person to prove the truth of their contents, they are hearsay. That may well be so but the correct legal position is that it is not every hearsay evidence that is inadmissible and under NRCD 323, hearsay evidence is not inadmissible per se. In **Edward Nasser & Co Ltd v McVroom and Another [1996-97] SCGLR 468** at page 477 Acquaah, JSC pointed out the following;

"Our Evidence Decree 1975 has made a number of major in-roads into our law of hearsay, and consequently hearsay evidence cannot under the Evidence Decree, 1975 be said to be inadmissible per se."

Section 117 of the Evidence Act, provides as follows;

"Hearsay evidence is not admissible *except as otherwise provided by this Act or any other enactment or by the agreement of the parties."* (emphasis supplied).

There are about fourteen exceptions in NRCD 323 covering sections 118 to 132 which provide for hearsay evidence to be admissible under the Act. There are other enactments such as section 31 of the Chieftaincy Act, 2008 (Act 759) that makes hearsay evidence admissible, but that does not apply in this case. The Memorandum to the Evidence Act at paragraph 19 states as follows;

"19. Section 117 makes clear that parties can agree to the admission of otherwise hearsay inadmissible evidence."

Hence, in **Edward Nasser v McVroom (supra)** Acquaah, JSC further noted that hearsay evidence is made admissible by section 117 *"(c) by agreement of the parties. Thus parties may by agreement waive the rules against admissibility of hearsay and so make admissible any such evidence. And the agreement may be express or by implication. So that where a party fails to object to the admission of hearsay evidence, he may may be deemed to have consented to its admission."* Similarly, in **Kuo-Den Alias Sobti & Ors v The Republic [1984-86] 2 GLR 42,** the Court of Appeal in Holding (1) of the Headnote of the Report held as follows;

"(1) sections 117 and 118 of the Evidence Decree, 1975 (N.R.C.D. 323) provided that hearsay evidence became admissible in the case where no objection was raised to it at the trial at the time when the said hearsay evidence was given; for such cases clearly connoted an implied agreement to the admission of the said hearsay evidence. In the instant case, the hearsay evidence of the doctor so admitted without objection corroborated the evidence of the police officer's actual examination which revealed a cut on the forehead and another big cut on the chest quite consistent with stab wounds. There was therefore admissible evidence as to the cause of death."

Therefore, there is authority to hold, that in this case, by not raising objection to the tendering of the exhibits that were ordered to be excluded by the trial judge, the prosecution agreed with the Accused person to the tendering of those otherwise hearsay statements so they are admissible as an exception to the hearsay rule and ought not to have been excluded. **Ekow Russell v The Republic**, was not decided on hearsay evidence that was tendered without objection so this case is different but it appears the full ambit of section 117 of the Act eluded the trial court.

In excluding the police statements tendered by the investigator PW7, the trial judge did not expunge the statements of the Accused persons that were tendered by the same investigator though those statements meet the definition of hearsay statements under section 116 of the Act in that they were tendered by the investigator who did not personally perceive the matters talked about. The applicant has complained about this apparent discriminatory treatment of the police statements where those tendered by the

prosecution have been accepted but the others by him are rejected. But the interested party has rightly argued at paragraph 48 of his statement of case in respect of the caution statements of the accused persons, that they are admissible hearsay evidence as an exception provided for under section 119 of NRCD 323. I notice that the interested party however does not attempt a justification for retention of the other witness statements, Exhibit "PP", "LL" and "MM" series, tendered by the prosecution. When it comes to those witness statements that have been rejected by the trial court, the interested party claims that those exhibits are not covered by any of the exceptions to the hearsay rule. But this is where the interested party and the trial judge fall into an unfortunate fundamental error, in that, besides section 117 itself and the jurisprudence on agreement to admit hearsay evidence already stated above, there are sections 118, and 126 of the Evidence Act which cover the exhibits in question in this case as exceptions to section 117 and make the statements admissible. Section 118 is as follows;

118. First-hand hearsay

(1) For the purposes of section 117, evidence of a hearsay statement is admissible if

(a) the statement made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence, and

(b) the declarant is

(i)unavailable as a witness, or

(ii) a witness or will be a witness, subject to cross-examination concerning the hearsay statement, or

(iii) *available as a witness* and the party offering the evidence has given reasonable notice to the Court and to every other party of the intention to offer the hearsay statement at the trial and that notice gave sufficient particulars (including the contents of the statement to whom it was made and if known

when and where) to afford a reasonable opportunity to estimate the value of the statement in the action. (Emphasis supplied).

At paragraph 20 of the Memorandum to the Evidence Act it is stated as follows;

"20. Section 118 involves a radical reform of the law of hearsay evidence, which has previously been one of the most complex and confused areas of the law of evidence. First hand hearsay evidence is now made admissible subject to the conditions set out in the section."

First-hand hearsay evidence is a statement or representation made outside the trial in which it is sought to be introduced which if it had been made by the declarant herself while testifying in the case, would have been admissible. It is obvious that if the makers of the statements in the exhibits in question in this case had made those statements while testifying in the case, the statements would be admissible since they concerned matters perceived by the declarants themselves. A close reading of section 118 would reveal that it makes first-hand hearsay evidence admissible under three different situations; (i) where the hearsay declarant is not available as a witness, or (ii) where the hearsay declarant is already a witness in the case or an intended witness, or (iii) where the hearsay declarant is available as a witness in that she is available to be called to be examined on the statement. Therefore, as the trial judge himself said in his ruling quoted above that the declarants of these statements were available as witnesses, the third situation that enables first-hand hearsay evidence to be admissible is applicable to these statements. Furthermore, the interested person by submitting at paragraph 32 of his statement of case that the declarants of those statements can be called to testify admits that they are available as witnesses.

What the interested party must realise is that it is not only where the declarant is unavailable as a witness that her statement is admissible as First-Hand hearsay under section 118. Subsection (1)(b)(ii) of the section talks of where the declarant is a witness or will be a witness, and subsection (1)(b)(iii) covers where the declarant is available as a witness and particulars of the statement are provided to the court and the opposite

party. Subsections (1)(b)(ii) and (iii) are stated to be alternative provisions to subsection (1)(b)(i) on where the declarant is unavailable as a witness. By the use of the word "or" between subsection (1)(b)(i) and subsection (1)(b)(ii) and also (iii), any one of those three situations would qualify a statement to be admissible first-hand hearsay under section 118 as an exception to section 117.

Admittedly, in **Ekow Russell v The Republic** the Supreme Court (a bench that included my good self) appeared to create the impression that it is only where the declarant is unavailable as a witness that the exception in 118 applies. In that case, in a police caution statement one Maxwell Antwi, a co-accused who was charged with possession of narcotic substances without lawful authority stated that the appellant, a police officer, was the one who supplied him the drugs to sell for him. The appellant was thus charged with possession and supply of narcotic drugs. The co-accused himself pleaded guilty to the charges against him and was convicted and sentenced to a term of imprisonment. The appellant pleaded not guilty and contested the charges against him. As part of the case of the prosecution against the appellant, the investigator tendered that statement of the co-accused pointing to the appellant as the source of his supply. However, the prosecution closed their case without calling the co-accused declarant to testify in confirmation of his statement. The Supreme Court held that statement indicting the appellant by the co-accused to be hearsay as it was tendered by the investigator and not the co-accused. But the court did consider whether the statement was admissible first-hand hearsay under section 118 of NRCD 323 and held as follows at page 483 of the Report;

"Section 118 of NRCD 323, would also not avail the prosecution because at the time the PW6 testified in the matter Maxwell Antwi was available and yet not called as a witness. ***This section avails the prosecution where the declarant is unavailable as a witness" (Emphasis supplied).***

Further in the judgment at page 488 the court stated as follows*;*

"Here we pause to ask why the prosecution failed to call Maxwell Antwi as a witness. All the issues about hearsay would have been out of the question. We have read what purports to be the prosecution's answer to this question but that is unconvincing. Fact of the matter is that following his conviction and sentence on 7th February 2008, Maxwell Antwi was available if the prosecution was minded to invite him to be their witness".

Having regard to the clear provisions of subsection (1)(b)(iii) of section 118 concerning where the declarant is available as a witness, which is an alternative provision to subsection (1)(b)(i) on where the declarant is unavailable as a witness, it seems to me that **Ekow Russel v The Republic** was not correctly decided. By saying Section 118 would avail the prosecution "where the declarant is unavailable as a witness", the court confined itself to subsection (1)(b)(i) of section 118 and failed to consider subsection (1)(b)(iii) of the section which was applicable in the Ekow Russel case as the evidence was that the first-hand hearsay declarant was available and could be called as a witness. Furthermore, the court did not advert its mind to the applicability of section 126 of the Act in the case, which I shall consider shortly. It therefore seems to me that our decision in **Ekow Russel v The Republic** was per *in curiam* so I am not bound by it. Unavailable as a witness and available as a witness have been defined in section 116 of the Act as follows;

Section 116;

(e) unavailable as a witness means that the declarant is

(i)exempted or precluded on the ground of privilege from testifying concerning the matter to which the statement of the witness is relevant; or

(ii) disqualified as a witness from testifying to the matter; or

(iii) dead or unable to attend or to testify at the trial because of a then existing physical or mental condition; or

(iv) absent from the trial, and the Court is unable to compel the attendance of the declarant by its process; or

(v) absent from the trial and the proponent of the statement of the declarant has exercised reasonable diligence but has been unable to procure the attendance of the declarant by the court's process; or

(vi) in a position that the declarant cannot reasonably be expected in the circumstances (including the lapse of time since the statement was made) to have a recollection of matters relevant to determining the accuracy of the statement in question;

(f) "available as a witness" means that the declarant is available as a witness.

The combined effect of the provisions is that available as a witness means the declarant of the statement is within the jurisdiction of the court, she is not disqualified under any law from testifying in the case and can be compelled by the use of the processes of the court, e.g. subpoena, to appear to be examined on the statement. So, provided a party satisfies the conditions under subsection (1)(b)(iii), she can put a statement containing first-hand hearsay into evidence and it would be admissible as an exception to section 117 without the party calling the declarant to give evidence-in-chief. For that reason, the Act in section 134 makes provision for a first-hand hearsay declarant to be called and cross-examined on her hearsay statement without first giving evidence-in-chief. It is as follows;

134. Examination of declarant

(1) The declarant of a hearsay statement admitted in evidence may be called and examined, as if under cross-examination concerning the statement, by a party adverse to the party who introduced the statement.

(2) Subsection (1) does not apply if the declarant is

(a) a witness who has testified in the action concerning the subject matter of the statement; or

(b) a party; or

(c) a person whose relationship to a party makes the interest of that person substantially the same as that of a party.

(3) Subsection (1) does not apply if the statement is hearsay evidence admissible only under section 119, 120, 121, or 127.

Section 118 is conspicuously left out of the exceptions in subsection (3) above. What it means is that, a first-hand hearsay declarant must not be called by the party who offers her statement before the statement will be admissible in evidence. Of course, the weight to be accorded such evidence by a first-hand hearsay declarant may be enhanced if she testifies and confirms what is stated therein and subjects herself to cross-examination, but that would be for purposes of weight of the evidence and not its admissibility as implied by the court in **Ekow Russell**. However, every lawyer knows that the admissibility of evidence is a totally different question from the weight of that evidence. The court in **Ekow Russel** by saying that the issues of hearsay would not have arisen if the first-hand hearsay declarant had been called as a witness by the prosecution that offered his statement made the admissibility of the statement dependent on the declarant testifying but that is not my understanding of the effect of the statutory provisions. First-hand hearsay evidence is admissible if the evidence meets the conditions in any one of the three different situations provided for under section 118.

From the record before us, I am unable to know if the declarants of the statements in question were stated to be intended witnesses. This information may be contained in the proceedings of the Case Management Conference pursuant to Paragraph 4 of the **Practice Direction [2017-2020] SCGLR 362** but those proceedings have not been exhibited to this application. I am therefore unable to determine the admissibility of the exhibits under subsection (1)(b)(ii) of section 118. What is clear from the record is that the declarants are available as witnesses so subsection (1)(b)(iii) is applicable to the expunged statements. Considering the conditions for the admissibility of first-hand hearsay statement under subsection (1)(b)(iii) of section 118, the question is did the accused persons who offered the statements in evidence in this case give reasonable notice of their intention to offer the statement at the trial with sufficient particulars? The

particulars that are required by the provision includes the content of the statements, who made them, when and where they were made. The particulars would enable the court to assess the weight to give to the statements and for the opposite party, if minded, to subpoena the declarants under section 134 of the Act. From the record, the accused actually obtained the statements from the prosecution through the process of disclosures under the new Practice Direction on Disclosures in Criminal cases, paragraph 2(1)(d) so the court and the prosecution had notice the Accused person intended to use them in evidence and the prosecution knows the declarants, even better than the Accused person. Consequently, these statements qualify for admission under subsection (1)(b)(iii) of section 118 and their exclusion is in clear violation of the Evidence Act.

From the analysis that has been done above, it is clear to me that the rules on hearsay evidence are still a troublesome area of the Law of Evidence despite the effort by NRCD 323 to simplify it. No wonder in **Ekow Russell** the court appears to have slipped and has unfortunately derailed the trajectory of the trial judge in this case.

Besides section 118, section 126 of NRCD 323 is usually considered to be the statutory basis for police investigators to tender statements written by them which relate matters the investigator has no personal knowledge of and which would otherwise be hearsay evidence. It is as follows;

126. Official records

(1) Evidence of a hearsay statement contained in writing made as a record of an act, event or condition is not made inadmissible by section 117 if

(a) the writing was made by and within the scope of duty of a public officer;

(b) the writing was made at or near the time the act or event occurred or the condition existed; and

(c) the sources of information and method and time of preparation indicate that the statement contained in the writing is reasonably trustworthy.

(2) Evidence of a hearsay statement contained in a writing made by the public officer who is the official custodian of the records in a public office reciting diligent search and failure to find a record, is not made inadmissible by section 117.

(3) A hearsay statement admissible in evidence under this section is not made inadmissible by the fact that it is not based on the personal knowledge of the declarant

Exhibit "PP" exhibited to the applicants affidavit in support of the application is a police investigation witness statement tendered by the prosecution at the trial and it is there recorded as follows;

"Witness stated in twi language and same recorded down as follows….."

The investigator made that record in the course of his official duties as required of him by the Police Service Instructions. In my view, such a statement comes under section 126 and is admissible and though the investigator has no personal knowledge of the matters stated in the statement so cannot answer questions on those matters in cross-examination. Nonetheless, subsection (3) of section 126 makes the statement admissible. The concern expressed by the trial judge in his ruling that the investigator cannot answer questions on the statements should not border the court in this case because the Act has made provision for the hearsay declarants to be subpoenaed and cross-examined without giving evidence-in-chief. It is therefore my view that the excluded exhibits, as well as the police witness statements tendered by the prosecution, exhibits "LL", "PP", "MM" series are admissible as exceptions to the hearsay rule.

In conclusion, I am of the firm opinion that the exhibits excluded by the trial judge are indeed admissible under sections 117, 118 and 126 of NRCD 323 and that the judge purported to exclude them in error. By excluding them the trial judge acted in clear violation of the statute and that is a ground for which this court would exercise its supervisory jurisdiction in respect of a decision by a superior court.

The interested party however has referred to us some decisions of the court to the effect that certiorari is a discretionary relief and it may be refused if even grounds for it are made out. That is correct statement of the law but the authorities are in unison that where a fundamental error of law involves violation of statute then the court would quash the decision. See **Republic v High Court; Ex parte Commission on Human Rights and Administrative Justice (Addo Interested Party)(supra) and Republic v High Court Ex parte National Lottery Authority (supra).** Furthermore, where the application for certiorari is premised on miscarriage of justice then the court would exercise its discretion to grant the application to cure the injustice and would not refuse it. From the record I reviewed above, the excluded evidence is crucial to the defence of the applicant and their exclusion definitely would occasion a substantial miscarriage of justice to him.

This application, on a wider plane, is a complaint by an Accused person that his criminal justice rights guaranteed under statute as well as Article 19(2) of the Constitution, 1992, to effectively defend himself have been denied him and the court, as the protector of rights, has a duty to consider it in earnest.

Article 19(1) (2) (e) and (g) provides:

(1) A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.

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

(e) be given adequate time and facilities for the preparation of his defence;

(g) be afforded facilities to examine, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution.

This case in particular should be of great concern to the court for the reason that the discoveries that yielded the statements that the trial judge has excluded are a product of

this court's decision interpreting and enforcing Article 19(2) in the case of **Republic v Baffo-Bonnie & Ors, [2017-2020] SCGLR 327.** It bears stating for the record that Chief Justice Sophia Akuffo issued the Practice Direction for Disclosures and Management of Criminal Case, to which reference has been made in this opinion, pursuant to the Supreme Court's decision in Republic v Baffo-Bonnie & Ors,(supra). In the unanimous judgment in that case the court, speaking with one voice through Adinyira, JSC, said as follows at pages 343/345 of the Report;

"Accordingly, we hold that an accused person must be given and afforded opportunities and means so that the prosecution does not gain an unfair advantage; so that the accused is not impeded in any manner and does not suffer disadvantage in preparing his defence, confronting his accusers and arming himself in defence, so that no miscarriage of justice is occasioned. Non-disclosure is a potent source of injustice as it is often difficult to say whether an undisclosed item of evidence might have shifted the balance or opened up a new line of defence."

The interested party argues at paragraph 32 of his statement of case that irrespective of the order rejecting the statements the applicant is at liberty to call the declarants to give evidence for him. I do not understand the interested party to be saying that those statements that the court in clear terms stated as 'rejected' can still be tendered in this trial without that order of rejection being quashed. Unless by that the interested party is indicating a withdrawal of his defence of the order of exclusion of the exhibits by the trial judge.

It must be appreciated by the interested party that first statements about an event or a matter made close to the time of occurrence of the event or matter that is subject of an inquiry, particularly statements made to a law enforcement officer as we have in this case, would attract more credibility than statements made much later in the course of the litigation. That is the justification for the Evidence Act making such evidence admissible and to accede to the approach being recommended by the interested party would be to undermine the policy of the law. It is on account of that same advantage

that dying declarations and contemporaneous statements in general are allowed by the law as an exception to the hearsay rule. Section 122 of NRCD 323 provides as follows;

122. Past recollection recorded

Evidence of a hearsay statement is not made inadmissible by section 117 if

(a) the statement is contained in a writing and constitutes a record of what was perceived by a witness who is present and subject to cross-examination; and

(b) the statement would have been admissible if made by the witness while testifying; and

(c) at a time when the matter recorded was recently perceived and clear in the memory of the witness, the witness recognised the written statement as an accurate record of what the witness had perceived or the witness stated what the witness perceived and the written statement, by whomever or however made, correctly sets forth what the witness stated.

In my considered opinion, the order of the trial judge is in clear violation of the Evidence Act, 1975 and to not quash it would be condoning the violation of statute which no court has power to do unless express or implied provision exists. See **Republic v High Court Ex parte National Lottery Authority (supra).**

It is pertinent for judges to recognize that the power given under section 8 of the Act is a discretionary one that the Act itself expects to be exercised cautiously and in a fair manner that maintains a balance between the parties. Hence it is provided in section 178(2) of the Act as follows;

(2) In applying this Act, and in particular in determining whether and to what extent to exercise its power under section 8, the Court shall have special regard to the fair application of this Act in respect of a party not represented by a lawyer.

Where both parties are represented by lawyers as in this case and evidence is led without objection, a court ought to be slow in invoking its powers under section 8 *suo moto* unless it is patent on the record that substantial miscarriage of justice has been occasioned.

Having concluded that the trial judge's error was fundamental and his order rejecting the exhibits in question ought to be quashed on that ground, I will not spend much time on the issue of the applicant not heard by the court before the order expunging the exhibits was made. It is trite law that no person should be condemned without a hearing. The effect of the trial judge expunging these exhibits that were admitted without objection and which appear crucial in the defence of the accused person was clearly so serious and damning to the case of the applicant that he ought to have been given a hearing before the order excluding them was made. See **Ankumah v City Investment Co Ltd [2008-2008] SCGLR 1064.**

On the prayer for prohibition, the applicant alleges real likelihood of bias on the part of the judge. It is a cardinal principle of law that for a person to have a fair hearing, which is guaranteed for every accused person in Ghana by Article 19(1) & (2) of the Constitution, 1992, the court hearing her case must be impartial and free from any bias. Bias takes different forms as there are many factors that may cause a decision-maker not to be impartial. She may have a pecuniary interest in the subject matter of the enquiry, or she may be related to one party or a witness by family or friendship, or may have dislike for one party or her witness, or may simply have a prejudiced opinion of the issue to be decided. In this case, the nature of bias we are concerned with is an allegation that the trial judge has a prejudiced mind about the case and cannot be expected to be impartial. The other types of bias do not apply in this case as there is nothing to suggest even remotely that the judge has any interest in the case. The law is settled that where an allegation of bias is proved to exist before the decision is taken, the decision-maker may be restrained from hearing the matter. It is also the law that the court is concerned about the real likelihood of bias and not necessarily actual bias which is extremely difficult to prove. Furthermore, a court will not act on an allegation of real likelihood of bias unless there is compelling evidence in proof of the allegation. **Attorney-General v Sallah**

(1970) 2 G&G 487, Republic v High Court, Denu; Ex parte Agbesi Awusu II (No 2) (Nyonyo Agboada (Sri III) (interested party) [2003-2004] SCGLR 907, and Republic v High Court, Kumasi; ex parte Mobil Oil (Ghana) Ltd Hagan (interested party) [2005-2006] SCGLR 312.

In **Republic v High Court, Kumasi; ex parte Mobil Oil (Ghana) Ltd (supra)** the Supreme Court stated that an order of prohibition would lie where there is a real likelihood of bias. The court stated as follows in Holding (2) of the Headnote:

"(2) At common law, a judge, magistrate or an independent arbitrator would be disqualified from adjudicating whenever circumstances pointed to a real likelihood of bias, by which was meant "an operative prejudice whether conscious or unconscious in a relation to a party or an issue before him. That would apply in particular where the circumstances pointed to a situation where a decision might be affected by pre-conceived views."

Georgina Wood JSC(as she then was) in that same case said at page 339 of the report that:

"...where as in the instant case, a judge has unequivocally made known his views about the merits of the critical disputed issues he would be called upon to adjudicate, in a very direct or forthright manner as to suggest prejudgment or predetermination, I would think that he must be disqualified on the grounds of a real likelihood or danger or possibility that he would not apply his mind impartially to determining the very matter(s) on which he has formed an unqualified opinion."

There have been various tests applied by common law courts in determining the existence of a real likelihood of bias which is also referred to as 'apparent bias' but the contemporary dominant approach is to consider whether if a fair minded and reasonably well informed observer, taking account of all the circumstances under which the decision-maker is to take a decision in the case, would conclude that the decision-maker would have an open mind? See the case of; **Nana Yeboa-Kodie Asare II & 1 or. v Nana Kwaku Addai & 7 ors unreported, RM J7/20/2014, Supreme Court, dated 12/02/2015.**

The law on bias is based on the higher principle that it is in the public interest that the citizens should have confidence in the impartial administration of justice. **See Reg v Comborne Justices & Ano Ex parte Pearce [1955] 1 QB 41.**

Now what are the pronouncements of the trial judge in this case that the applicant is complaining about? With reference to the applicant the trial judge said as follows;

Page 54 of the ruling. **"All these were perpetuated to facilitate the 2nd and 3rd accused's business and defraud COCOBOD. Indeed these acts were all perpetuated to facilitate and intentionally, voluntarily to aid the 2nd and 3rd accused to perpetuate fraud on COCOBOD by supplying a different product from what was tested and approved."**

Page 54 again. **"...However, the 1st accused although he knew the correct state of affairs and knowingly facilitated and aided the 2nd and 3rd accused to defraud COCOBOD."**

Page 55 of the ruling. **"The 1st accused made things easier for the 2nd and 3rd accused to succeed in their enterprise of defrauding."**

Page 59 of the ruling. **"The 1st accused a scientist with all his knowledge and skill had the benefit of an original Lithovit Foliar Fertilizer submitted, tested and approved by him yet knowingly he agreed and caused the state to lose millions of Cedis in foreign exchange by paying these monies to the 2nd and 3rd accused persons. The 1st accused thus caused financial loss through this action"**

The applicant submits that after these comments, there is no way this same judge will impartially consider the evidence he would lead in his defence. But the interested party justifies these pronouncements of the trial judge by arguing as follows at paragraph 36 of his statement of case;

"In determining whether or not a prima facie case has been made against the applicant, the trial judge was required by law not just to identify all the

essential ingredients of the offences charged but to also determine whether the prosecution had established all the ingredients of the offences. There is nothing legally wrong with the trial judge's assessment of the evidence led by the prosecution in relation to the elements of the various offences charged and the conclusions reached by him to the effect that the prosecution has established the ingredients of those offences."

This calls for us to remind ourselves of the powers of a trial judge under section 174(1) of the **Criminal and Other Offences (Procedure) Act 1960 (Act 30)** that cover no case to answer in a summary trial such as in this case. The provision is as follows;

174. The defence

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

So, at this stage of the trial the duty of the judge is limited to a determination of whether on the evidence adduced on behalf of the prosecution, a sufficient case has been made against the accused person to require her to open her defence. This involves a review of the evidence led against the accused person and an assessment of it to determine if the evidence sufficiently connects the accused person to the charge and if, in the absence of any exculpating evidence by the accused person, the evidence proves the ingredients of the offence the accused is charged with. At this stage too the judge is also required to determine if the evidence led by the prosecution can be relied upon in law to sustain a conviction of the accused person in the absence of exculpating evidence by the accused person. This is where the trial judge would consider whether the evidence of the prosecution is lawful evidence and whether that evidence has been so discredited by

cross-examination as to render it unsafe to convict on. See **The State v Ali Kassena [1962] 1 GLR 144.**

But clearly, at the stage of considering whether a case sufficient to warrant the accused to open her defence, the judge is not required to decide if the evidence has proved that the accused person committed the offence he is charged with. For an accused to be proved to have committed the offence charged with, the evidence against her must satisfy the standard of proof beyond reasonable doubt but the court cannot make that determination without receiving the evidence of the accused person in her defence. That evidence may create a reasonable doubt as to the guilt of the accused person and that in law will require the judge to acquit the accused. For that reason, section 11(2) of the Evidence Act directs that a determination of whether the guilt of an accused person has been proved beyond reasonable doubt or not must be made on all the evidence and not just on the evidence of the prosecution alone. The section provides as follows;

Section 11

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

Therefore, until the totality of the evidence is before the judge, meaning the evidence led by the prosecution and the defence, any pronouncement that connotes the guilt of the accused person will be inconsistent with section 11(2) of NRCD 323 and prejudicial.

What I understand the applicant to be complaining about in this case is that the trial judge jumped the gun. In my view, a reasonably well-informed observer, taking account of the exclusion of the exhibits that appear to favour the accused person and the pronouncements made by the judge which connote that the 2nd and 3rd accused persons have defrauded Cocobod and it would not have happened but for the applicant herein deliberately and knowingly facilitating it and that by that he has caused financial loss to

the state, would come to the conclusion that the judge would not be impartial in the consideration of the any defence of the accused person has to put forward. A reasonable woman is likely to conclude that this judge's mind is made up about the 2nd and 3rd accused persons haven committed those crimes against the people of Ghana which but for the deliberate facilitation of the applicant would not have happened. As judges we have been reminded over and over again to exercise judicial reticence when hearing cases and talk little until final judgment but from time to time we do slip. But when we do, it erodes the confidence of parties in the administration of impartial justice and we ought to recognize these things.

The interested party argues that the fact that the trial judge stated that a prima facie case has been made against the applicant does not mean that the accused person cannot by an explanation of his actions raise a reasonable doubt in the prosecution's case. But the interested party needs to appreciate that the case of the applicant is not about the establishment of a prima facie case against him but about the apparent conclusiveness of the pronouncements such as that "he made things easier for the 2nd and 3rd defendants in their entreprise of defrauding".

In the recent case of **Republic v High Court (Land Division) Accra, Ex parte Kennedy Ohene Agyepong CMJ5/62/2020,** in the unreported ruling of the Supreme Court dated 20th October, 2020, the court expressed concern about the apparent bias of a High Court Judge and issued an order of prohibition against his continued hearing of a case of contempt against the applicant. In that case Kulendi, JSC said as follows;

*"On the 29th of September, the Court, on a date to which the proceedings were not previously adjourned, again, **suo motu**, issued an "Order For Variation Of Order To Appear Before Court" [Exhibit 8]. On a totality of the circumstances, we are concerned to note that the entire proceedings fell short of the standard of decorum and due process that ought to characterize proceedings in court and more so intended to ultimately vindicate the dignity of the court and its processes and bolster public confidence in the administration of justice.*

These considerations, coupled with the trial judges express language regarding the gravity of punishment, he contemplates against the Applicant, smacks of prejudice and bias. In context, the word severely is a single but defining word that betrays the judges intention if it comes to punishment of the Applicant. That kind of subjective language and moreover coupled with the conduct reflected in the proceedings as enumerated above, puts a judge in a position where he or she cannot be presumed to be objective, and/or impartial."

In that case the judge preceded his intention to deal seriously with the applicant by the proviso that if he was found to have committed the offence of contempt he was charged with. Nonetheless the court concluded that there was the appearance of prejudice against the applicant. What the law against bias is concerned about is whether a reasonable person, listening to these pronouncements and considering all the circumstances would consider that any evidence to be given by the applicant in this case will be capable of creating a reasonable doubt to this judge's mind. It is not possible to know whether the judge would actually be prevented by these comments from according the right weight to any evidence the applicant has to offer so the law doesn't require the applicant to prove that. The test is an objective one based on the principle that not only must justice be done but it must be seen to be done. As the authorities say, bias is so insidious that the judge himself may not even be aware that he has a bias in the matter under consideration.

It is for the reasons explained above that I hereby grant the prayer for prohibition in order that justice will be seen to be done in this case. In conclusion, the application succeeds on both counts and is accordingly granted as prayed.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DORDZIE JSC:-

I have read the ruling of my respected brother Pwamang JSC which considered the issues in this application. I share the same views and totally agree with the analysis of questions of both law and fact and conclusions drawn. I have nothing more to add.

A. M. A DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

AMADU JSC:-

I have had the advantage of a preview of the opinion of my learned brother Pwamang JSC in this ruling. I entirely agree with the reasoning and conclusion reached which I respectfully adopt as mine. There being nothing useful to add, I too will grant the reliefs sought by the Applicant.

I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

DOTSE JSC:-

PROLOGUE

The facts of this case admit of no controversies whatsoever. The Applicant herein as 1st Accused, and two others, namely, Seidu Agongo, 2nd Accused and Agricult Ghana Ltd., 3rd accused are facing prosecution on twenty-seven (27) charges or counts, at High Court, Criminal Division 1, Accra, presided over by Honyenuga JSC, sitting as an additional High Court Judge.

At the close of the prosecution's case a submission of no case to answer was submitted on his behalf by learned Counsel, Samuel Codjoe.

On the 7th of May 2021, the learned Judge, presiding over the High Court as an additional High Court Judge, in a well considered ruling, evaluated the evidence led by the

Prosecution against the key ingredients of the offences with which the Applicant and the others were charged, vis-à-vis the laws under which the Applicant was charged. The learned presiding Judge also evaluated the evidence vis-à-vis the requirements of proof beyond reasonable doubt that is required of the prosecution in such a criminal trial. At the end of this endeavour, the learned Judge concluded thus:-

> *"In conclusion, the prosecution has succeeded in proving the ingredients of the offences charged in counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 26, and 27 against the 1st , 2nd and 3rd accused respectively."*

By this, it meant that the Applicant was called upon to answer the charges he was directed to respond to, and that is by opening his defence.

THIS APPLICATION

The Applicant herein, by this application has invoked the supervisory jurisdiction of this court pursuant to Article 132 of the Constitution 1992, Section 5 of the Courts Act, 1993 (Act 459) as amended, to quash part of the ruling of the High Court, dated 7th May 2021 referred to supra and also to prohibit the said Judge from continuing to hear the case.

CERTIORARI APPLICATION

The Applicant specifically seeks an order of certiorari directed at the High Court, (Criminal Division 1) Accra presided over by his Lordship, the Presiding Judge, to bring into this court for the purpose of being quashed, part of the ruling of the said High Court dated 7th May 2021 which rejected exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75 from evidence.

PROHIBITION

The Applicant also seeks for an order of Prohibition to prohibit the Presiding Judge from continuing with case No. CR/158/2018, intitutled ***Republic v Stephen Kwabena Opuni, Seidu Agongo and Agricult Ghana Limited.***

GROUNDS FOR THE RELIEFS

Grounds for the Certiorari

1. That the learned Judge committed grievous error of law apparent on the face of the record when contrary to the express provisions of Section 6 of the Evidence Act, 1975, (NRCD 325) he suo motu rejected the exhibits referred to supra.
2. That the learned Judge committed a grievous error of law apparent on the face of the record when after admitting the exhibits already referred to supra, he suo motu in his Ruling rejected the same exhibits without giving the Applicant an opportunity to be heard, thereby breaching rules of natural justice.

Grounds for the Prohibition

1. That there is a real likelihood of bias on the part of the learned trial Judge in that he has made final findings of facts and has predetermined and prejudged the case before hearing the Applicant.
2. Real likelihood of bias on the part of the learned trial Judge in the sense that he exhibited patent bias against the interest of the applicant in his rejection of the exhibits already referred to supra which are favourable to the Applicants case, whilst retaining the exhibits PP, LL and MM series which are statements obtained in identical fashion but favourable to the Prosecution's case which were all tendered by P.W.7, the investigator and the witness of the Interested party.

APPLICANTS AFFIDAVIT IN SUPPORT

The Applicant personally swore to a 25 paragraphed affidavit in support of the above grounds for the Certiorari and Prohibition applications.

The crux of the depositions in the Applicants affidavit can be briefly summed up in substance as stating the following facts.

1. That the basis of the rejection of some of the exhibits tendered by PW7 which are favourable to the Applicants case are contrary to Section 6 of the Evidence Act, 1975 (NRCD 323), and not consistent with the decision of this court in the case of

Ekow Russel v Republic [2017-2020] SCGLR 469 as was erroneously contended by the learned trial Judge.

2. The Applicant, based on the above phenomenon therefore concluded that by the said conduct, the learned trial Judge, committed an error of law which is apparent on the face of the record and this needs to be quashed by Certiorari.
3. That the refusal of the learned trial Judge to give the Applicant a hearing before suo motu rejecting the said exhibits also amounted to breach of the rules of natural justice as he was not given a hearing, and that the said Ruling therefore has to be quashed.
4. Finally, by referring to various portions of the Ruling of the learned trial Judge dated 7th May 2021 specifically on pages 54, 55, 59,66, 67 and 75, the Applicant concluded that, the learned trial Judge purportedly made final determination of facts in issue against him. Based on the above, Applicant prays this court to prohibit the learned trial Judge from continuing to hear the case on the grounds of real likelihood of bias against him.

1ST INTERESTED PARTY'S RESPONSE IN THEIR AFFIDAVIT IN OPPOSITION

In a 29 paragraphed incisive affidavit in opposition, sworn to by Stella Ohene Appiah, learned State Attorney of the office of the Attorney General, (Prosecution Division), the following salient facts come out very strongly.

1. That the Applicant and the other two accused persons are being prosecuted before the trial court on 17 counts of abetment of crime, namely defrauding by false pretense, willfully causing financial loss to the state, contravention of the Public Procurement Act and corruption by a public officer.
2. That the Interested Party called seven (7) witnesses who have been able to establish a prima facie case against the Applicant by proving all the essential ingredients of the offences charged as per the charge sheet.
3. According to the Interested Party, a trial court is under a duty to disregard wrongly admitted evidence admitted during the course of the trial when evaluating the case at the end of the trial. Learned State Attorney then added that learned trial Judge

disregarded the said exhibits because they were hearsay statements which should not have been admitted.

4. The Interested Party then stated that, the essence of a submission of no case is basically for the trial court to determine whether a prima facie case had been made or established by the Prosecution against the Applicant, i.e. whether the prosecution had established all the essential ingredients of the offences under which the Applicant is charged. They concluded that, what is contained in the Ruling is consistent of the duty that is required of a trial Judge at this stage of the trial.
5. The Interested Party further deposed to facts in the affidavit to the effect that, the statements alluded to by the Applicant does not amount to real likelihood of bias upon which the learned trial Judge should be prohibited.
6. Finally, the Interested Party has deposed to the fact that the grounds urged upon this court by the Applicant are not patent errors of law on the face of the record which will result into the grant of the reliefs being asked by the Applicant, if these grounds exist at all, the remedy is an appeal which the Applicant has filed anyway.

ISSUES FOR DETERMINATION

1. Whether the ruling of the learned trial Judge in rejecting some of the exhibits referred to by the Applicant, amount to apparent errors of law on the face of the record and for which they should be quashed on the grounds urged upon the court by the Applicant.
2. Whether on the strength of the facts of the case and the law, sufficient legal basis has been established to enable the learned trial Judge to be prohibited from further hearing this case.

SCOPE OF A SUBMISSION OF NO CASE

A submission of no case to answer is made when the prosecution has called evidence and closed its case and in which a prima facie case has been estalished and before the defence gives evidence. Circumstances justifying such a submission are well stated in

several decisions such as ***State v Ali Kassena [1962] 1 GLR 144, at 149 S.C, The State v Annan [1965] GLR 600 at 603 per*** Hayfron-Benjamin J. See also sections 173, 174 and 271 of the Criminal and other Offences Procedure Act, 1960 (Act 30).

The principle upon which the above procedure firmly grounded in our section 173 of Act 30 seems to take its root or genesis is the case of ***Storey v Storey, [1960] 3 ALL E.R. 279 at page 282 C. A*** per Ormerod L J, where it was laid down as follows:-

> *"There are, however two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case, there may be a submission that, accepting the Plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the Plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged."*

WHAT THEN IS PRIMA FACIE CASE?

The Dictionary of English Law, edited by Earl Jowitt (1959), Vol. 2 pp. 1401-1402 defines prima facie as

> *"Prima facie [means] at first sight; on the face of it". It then goes further to distinguish the literal definition from the legal one, as follows:-*
>
> *"Prima facie evidence [means] that which, not being inconsistent with the falsity of the hypothesis,* ***nevertheless raises such degree of probability in its favour that it must prevail if believed by the jury unless rebutted or the contrary proved.*** *(compare this with)*
>
> *"Conclusive evidence, on the other hand is that which excludes or at least tends to exclude, the possibility of the truth of any other hypothesis than the one attempted to be established. Emphasis supplied.*

I have referred to the above theoretical definitions of what a prima facie evidence means to put in context, the ruling of the learned trial Judge dated 7th May 2021. It is worth taking note of the fact that, the learned trial Judge was very conscious of the task that he was required to perform when the submission of no case was made to him by the Applicant and the other accused persons.

On page 23 of the Ruling, the learned trial Judge referred to Sections 173 (1) and 174 (1) of the Criminal and other Offences (Procedure) Act 1960 Act 30 and quoted them verbatim. The learned trial Judge then noted the following on pages 23 – 24 of the Ruling as follows:-

> ***"If the court finds that the prosecution has not made out a sufficient case to warrant calling on the defence in respect of all or any of the charges, the charge or charges may be dismissed and the accused acquitted and discharged.*** *The court suo motu may also make the ruling to acquit the accused or call upon him to open his defence when the prosecution established a prima facie case. Emphasis*

The learned trial Judge then on page 25 referred in extenso to Lord Parker CJ in the *Practice Note (Magistrates, No case to Answer Criminal Charge 1962).*

This Practice Note was followed by our Supreme Court in the cases ***of State v Ali Kassena, supra and Asamoah and Another v Republic Crim. Law Report of Ghana, 306 dated 26th July 2017.***

It therefore bears sufficient emphasis that the learned trial Judge was very much conscious of the legal duty that was cast on him when the Applicant through his lawyers filed a submission of no case.

I have looked at the entire Ruling in context and am satisfied that, the learned trial Judge stayed on course in his task of seeking to establish whether the prosecution has indeed established the key ingredients of the offences with which the Applicant is facing before the trial Court.

The question that begs for an answer is, this:-

IS CERTIORARI AN APPROPRIATE REMEDY UNDER THE CIRCUMSTANCE?

I am satisfied that the Applicant has properly invoked the supervisory jurisdiction of this court under Article 132 of the Constitution 1992, Section 5 of the Courts Act, 1993 (Act 459) and Rule 61 (1) of the Supreme Court Rules, C. I. 16. It remains to be established whether the said application has been well founded.

Learned counsel for the Applicant, Samuel Codjoe has referred the court to a plethora of cases which according to him lays down the basis upon which this court's jurisdiction under the circumstances as narrated elsewhere in this rendition should be granted.

Cases such as the following have been cited in support of the basic underlying principle which learned counsel for the Applicant correctly stated by referring to Wade and Bradley: *Constitutional and Administrative Law (Eleventh Edition) by A. W. Bradley and Keith Ewing at 706, paragraph 2,* where the learned authors state as follows:-

> *"Certiorari served originally to bring a case or decision from an inferior court into the court of king's Bench for review.* ***Today it is means of quashing decisions by inferior courts, tribunals and public authorities where there has been (a) an excess of jurisdiction or an ultra vires decision, (b) a breach of natural justice, or (c) an error of law****. Certiorari serves a purely negative purpose, since by setting aside a decision it prepares the way for a fresh decision to be taken.* Emphasis supplied.

See cases of ***Republic v High Court, Human Rights Division, Ex-parte Swayne (Amoabeng Interested Party) [2015-2016] 2 SCGLR 1130 at page 1141*** per Anin-Yeobah JSC (as he then was) where he relied and referred to Apaloo C.J's decision in ***Republic v Cape Coast District Magistrate's Court Grade II, Ex-parte Amoo [1979] GLR*** at page 160.

See also Dotse JSC's decision in the unreported case of ***"In the matter of an Application for Judicial Review & Others v Judicial Committee of Brong-Ahafo***

Regional House of Chiefs & Others, dated 23rd January 2013 Civil Appeal No. J4/25/2012.

- ***Republic v High Court (Financial Division), Ex-parte Xenon Investment Company Limited, CM No. J5/46/2012***
- ***Republic v High Court (Land Division) Accra, Ex-parte Al-Hassan Limited (Thaddeus Sory – Interested Party) [2011] 1 SCGLR 478 @ page 484.***
- ***Republic v High Court, Sekondi; Exparte Ampong [2011] 2 SCGLR 716.***

In all these cases, learned counsel forcefully argued that, for the reasons stated therein, the grounds upon which this application has been brought for Certiorari must succeed.

On the other hand, learned counsel for the Interested Party, Yvonne Atakora Obuobisa, the Director of Public Prosecutions, in her brief but incisive statement of case, stated rightly in my view that the supervisory jurisdiction of this court under Article 132 of the Constitution 1992, is a very limited one.

She stated further that, this court has always been very careful to prevent an abuse of this special jurisdiction especially where it has been argued that from the grounds urged, an appeal is a better and suitable remedy than the supervisory jurisdiction.

The learned D.P.P, continued that, in such instances, the court has refused to grant the application and therefore urged this court to refuse the invitation to grant it, because there is no merit in the application.

The Director of Public Prosecutions then referred to the following cases in support of her arguments.

- ***The Republic v High Court (Commercial Division) Accra, Ex-parte The Trust Bank Ltd. (Ampomah Photo Lab and 3 others Interested Party) [2009] 22 M.L.R 134***
- ***Republic v High Court, Accra, Ex-parte Industrial Fund for Developing Countries and Another [2003-2004] 1 SCGLR 348***

- ***Republic v High Court, Ex-parte CHRAJ, (Addo Interested party) [2003-2004] 1 SCGLR 312***
- ***Republic v Court of Appeal, Accra, Ex-parte Tsatsu Tsikata [2005-2006] SCGLR 612***

ORAL ARGUMENTS BY COUNSEL

Upon the reception of arguments in this case, learned counsel for the Applicant, Samuel Codjoe elaborated his arguments by inferring that the conduct of the learned Judge was a breach of statute, i.e. Section 6 of the Evidence Act, 1975, NRCD 323.

In this instance, learned counsel argued that, at the time the rejected exhibits were tendered, any objections to them should have been raised at that time.

The reliance on the case of ***Ekow Russel v Republic*** supra according to learned Counsel therefore should not apply. Learned counsel also reiterated the same grounds of breach of the rules of natural justice.

Learned counsel argued that, per Section 8 of the Evidence Act, supra, before the learned trial Judge could reject the exhibits, there was supposed to have been an objection from the prosecution. In the instant case, learned counsel argued that there was no such objection, nonetheless, the learned trial Judge rejected the documents without hearing the Applicant, therein breaching the rules of natural justice.

On his part, learned Deputy Attorney-General Mr. Tuah-Yeboah urged this court to dismiss the application because the Applicant had failed to meet the requirement for the invocation of the court's supervisory jurisdiction. The Deputy Attorney-General further argued upon reception of arguments that the learned trial Judge did not violate any law when he rejected an *"illegal evidence"* and that before the Judge could decide on whether or not a prima facie case had been made against the accused persons, he must evaluate the evidence on record. In evaluating the evidence, the learned trial Judge must consider only legal and not illegal evidence.

The learned Deputy Attorney General concluded that even if the learned trial Judge made a mistake, the remedy was an appeal and not this supervisory jurisdiction in this court.

On the issue of Prohibition, the learned Deputy Attorney-General submitted that there has been no real likelihood of bias to entitle the learned trial Judge from being prohibited in hearing the case.

ANALYSIS

I have perused in detail all the processes filed by the learned counsel on behalf of the Applicant and the Interested Party. I have also considered in detail the cases and legal materials referred to and others in order to form an opinion in this case.

I have looked at Sections 6 and 8 of the Evidence Act supra. What is important to observe is that, **whilst Section 6 states, that objections to the admissibility of evidence shall be made at the time of tendering, Section 8 on the other hand reiterates the power of the court to exclude inadmissible evidence on the courts own motion even if not objected to by the parties**.

In the instant case, there is absolutely no controversy that the rejected exhibits had been tendered and admitted without any objection. **However, it is at the evaluation of the submission of no case Ruling that the learned trial Judge had been given the first opportunity to evaluate all the evidence that had been led up to that stage. That is when the court was considering whether a prima facie case had been established for defence to open.**

If there had been no such submission, and the defence had opened, the learned trial Judge would have been required to evaluate the entire evidence at the end of the trial before judgment. But when the Applicant exercised his right at the time he did, the learned trial Judge was also bound to evaluate the evidence led up to that stage.

This court has firmly laid down the rule in ***Ekow Russel v The Republic*** supra, where our distinguished brother Akamba JSC at page 495 of the report stated as follows:-

"*Our attention has also been drawn to the case of* ***Antoh v The State, [1965] GLR 676.*** *We have no doubt that the statement of principle therein made is correct.* ***It is correct to state that the admission of a statement by a court does not necessarily mean that the statement is of evidential value so as to automatically result in conviction. A statement that is admitted into evidence must be weighed to determine whether it is valuable enough to sustain the conviction sought."*** *Emphasis supplied.*

The only point of difference is that, as stated earlier, the evaluation was made at the consideration of the ruling of submission of no case. My understanding is that, and this has been recognised by the learned trial Judge that, the persons from whom the PW7 took the statement from, are present and available and can therefore be called by the Applicant to testify on his behalf if he so desires.

Indeed a reference to the earlier case of Antoh v The State supra, where Ollennu JSC speaking for the Supreme Court was emphatic in stating the principle that

"...a statement though admitted as having been voluntarily made, might nevertheless be worthless in evidential value*." Emphasis supplied*

I am therefore of the considered view that the reliance of the learned trial Judge on the case of ***Ekow Russel v The Republic*** supra is appropriate. If the Applicant complains about the ruling, it is his right, **but then the error complained of is definitely not apparent or latent on the face of the record for him to apply to this court to invoke this courts supervisory jurisdiction under Article 132 of the Constitution.**

DID THE LEARNED TRIAL JUDGE DENY THE APPLICANT A HEARING?

It should be noted that, at the stage where the learned trial Judge delivered a ruling upon the submission of no case the duty of the learned trial judge was only to evaluate the evidence led and render a decision whether the prosecution has established a case for the accused to be called upon to open his defence. There is nothing in the Evidence Act

supra and the Criminal and Other Offences (Procedure) Act, supra that require or stipulate that a presiding Judge should further give hearing to a party before the court determines the admissibility, or non admissibility or weight that is to be attached to a document that has been admitted without objection. These considerations are in the domain of the trial court Judge and he cannot be faulted for what he did.

I am of the view that the case of Ekow Russel supra is on point. In this respect therefore, I am of the view that the decision of the learned trial Judge rejecting some of the admitted exhibits did not infringe or breach the audio alteram principle of the rules of natural justice. The Applicant if he does open his case will still be at liberty to call the declarants of those statements made to PW7 since they are available and capable of answering questions under cross-examination.

Having apprised myself of the arguments and all the cases referred to by both learned counsel for the parties on the issue of whether Certiorari should lie in this case or no, I am compelled to conclude the matter by reference to the Consolidated unanimous decision of this court, in the ***Republic v High Court, Kumasi, Ex-parte Bank of Ghana & Others, (Sefa & Asiedu Interested Parties) No. 1 Republic v High Court, Kumasi, Ex-parte Bank of Ghana & Others, Gyamfi & Others Interested Parties) No. 1 Consolidated [2013-2014[1 SCGLR 477*** where the Court in holding 1 at page 480 laid down the principle as follows:-

> *"It was well settled that the Supreme Court would exercise its supervisory jurisdiction on grounds of: want or excess of jurisdiction; failure to comply with the rules of natural justice; breach of the Wednesbury principle, namely that an administrative action or decision would be subject to judicial review on grounds that it was illegal, irregular or procedurally improper****; and the superior court***

must have made an error patent on the face of the record. In case of an error not patent on the face of the record, the avenue for redress was by way of appeal. Furthermore, an erroneous decision of a High Court, acting within its jurisdiction, would normally be corrected by appeal whether the error was one of fact or law*, and that the supervisory powers of the Supreme Court under Article 132 of the Constitution was wide…" Emphasis Supplied.*

Having explained the nature of the ruling which the leaned trial Judge delivered upon the submission of no case, it bears emphasis that the duty cast on the Judge at that stage of the trial was adequately performed within the remit of the law. It is quite clear that, the instant application is definitely not one that is patent on the face of the record to merit the invocation of this court's supervisory jurisdiction under Article 132 of the Constitution and the other statutes referred to supra. This is primarily due to the fact that one would have to strain himself to understand the arguments of the Applicant about the details of the case being made for certiorari. Anything that is not apparent upon first reading does not merit the supervisory powers of this court. At any stage of a court's evaluation of evidence, the Judge of fact and law as in the special circumstances of the instant case is required to consider whether the key ingredients of the offence have been proven against the Applicant.

By parity of reasoning, the duty of the learned Judge was to consider whether the key ingredients of the crime which the Applicant and the others had been charged had been established by admissible evidence of a requisite degree of belief concerning the facts in issue in the mind of the court. Even though these essential findings have been established, the Applicant if he does give evidence can under the authority of the case of ***Amartey v State*** [19640 GLR 256, throw doubts into the case of the prosecution. The ruling calling upon the Applicant to open his defence does not amount to a conviction and the learned trial Judge in my mind was conscious of his role at that stage of the trial, period.

I will therefore dismiss the application for Certiorari to quash parts of the decision on 7th May 2021 as complained off.

The application thus fails on this grounds.

HAS THE APPLICANT MADE OUT A CASE FOR PROHIBITION?

The crux of the arguments of learned counsel for the Applicant is that the learned trial Judge, acted contrary to Sections 174 (1) and (2) and the provisions contained in the Practice direction reported in [2017-2020] 1 SCGLR 362 at page 371 which stated the directives and guidelines necessary upon a ruling on a submission of no case such as was required in this case.. Learned counsel for the Applicant then concluded that, contrary to the provisions of Sections 174 (1) and 5 (2) of the Practice direction referred to supra, the Judge made final findings of fact against the Applicant. In his opinion, the learned trial Judge has pre-judged and predetermined the matter even before the Applicant opens his defence. After referring to impugned portions of the ruling supra, learned counsel concludes that, "this act of prejudging and predetermining the case when the Applicant has not yet opened his defence is evidence of a real likelihood of bias on the part of the trial Judge.

Learned counsel then referred to the dictum of our respected brother Kulendi JSC in the unreported decision of this court in the ***Republic v High Court, (Land Division) Accra, Ex-parte Kennedy Ohene Agyapong*** as follows:-

> *"As has been discussed above, there need not be actual bias in a matter to disqualify a Judge, but the presence of a real likelihood of bias will also disqualify a Judge from adjudication on a mattre. This rationale for this rule against bias is reflected in the time honoured legal cliché that* ***not only must justice be done, it must also be seen to be done."*** *Emphasis supplied*

Learned counsel also referred to the dictum of this court per Wood JSC (as she then was) in the celebrated case of ***Republic v High Court, Kumasi, Ex-parte Mobil Oil Ghana Limited [2005-2006] 1 SCGLR at holding 2, at page 339***.

On the other hand, learned Director of Public Prosecutions, Yvonne Atakora-Obuobisa in her Statement of Case argued that if one considers the remit of a submission of no case and the resultant ruling therein delivered in context, one would immediately realise that the prayer of the Applicant to prohibit the learned trial Judge has not been well founded. See ***Ali Kassena v State*** supra and Sections 173-174 of Act 30.

Learned counsel for the Interested Party in my opinion has justifiably and admiringly distinguished the unreported Kennedy Agyapong case as well as the relevant Practice Directions 5 (2) referred to supra and the conclusion reached therein.

In the Kennedy Agyapong case, even before the plea of the accused was taken, the learned trial Judge made very prejudicial comments. In the instant case, the comments which the learned trial Judge made were at the end of the prosecution's case where the Judge is entitled under the rules of procedure in Sections 173, 174 (1) and (2) of Act 30 when a submission of no case is made to consider whether to call upon the accused to open his defence or not. In any case, I am of the considered view that the statement alluded to the learned trial Judge as prejudicial had completely been taken out of context.

It is indeed like putting the cart before the horse.

I am of the considered opinion that, having considered the totality of the arguments made out by the learned counsel for the parties, to uphold the arguments of counsel for the Applicant will amount to permitting parties and their counsel to forum shop for their convenient courts and or Judges.

As a matter of fact, this position has been strengthened by the unanimous decision of this court in the unreported case of ***Suit No. J5/32/2019 intitutled The Republic v The High Court (Financial Div. 3), Accra – Respondent, Ex-parte Ms. Arch Adwoa Company Limited – Applicant, The Auditor-General & The Attorney-General – Interested Parties/Respondents dated 10th April 2019*** where in a similar prohibition application, the court declined the grant of the relief in the following terms:-

"We however do not find any reason to grant the order of Prohibition against the learned trial Judge. There are clear legal grounds upon which a court or Judge might be prohibited from determining a suit. To disqualify a Judge the ground of the objection had to be supported by cogent and convincing evidence. A mere or reasonable suspicion of bias was not enough. The law recognized not only actual bias, but also that interest other than direct pecuniary or proprietary nature which gave rise to a real likelihood of bias. The fact of the trial Judge serially giving Rulings against the Applicant by itself does not qualify to disqualify the Judge on the basis of real likelihood of bias which is the standard test in this jurisdiction."

I will therefore under the circumstances also like the Certiorari, dismiss the grounds upon which the prohibition has been brought.

CONCLUSION

In conclusion, the application by the Applicant seeking to quash part of the ruling of the learned trial Judge in Suit No. CR/158/2018 entitled ***Republic v Stephen Kwabena Opuni and 2 Others***, dated 7th May 2021 and prohibition to restrain the said Judge from continuing the said criminal trial fails and is accordingly dismissed.

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

LOVELACE-JOHNSON (MS.):-

I agree with my learned brother Dotse JSC that both the application for certiorari and prohibition should fail. I find that there is no error apparent on the face of the record and that being so an appeal is the appropriate remedy. I am also of the opinion that in respect

of the latter, that is the application for prohibition, no satisfactory evidence of a real likelihood of bias has been provided the court.

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

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ALFRED TUAH-YEBOAH, (DEPUTY ATTORNEY-GENERAL), FOR INTERESTED PARTY WITH HIM MRS. YVONNE ATAKORA OBUOBISA (DIRECTOR PUBLIC PROSECUTOR).