IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

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

CIVIL MOTION
NO. J7/20/2021

26TH OCTOBER, 2021

REPUBLIC

VRS

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

EXPARTE: STEPHEN KWABENA OPUNI ..... APPLICANT/RESPONDENT

ATTORNEY-GENERAL ..... INTERESTED PARTY/APPLICANT

RULING

MAJORITY OPINION

TORKORNOO (MRS.) JSC:-

BACKGROUND TO THE CURRENT APPLICATION FOR REVIEW OF THE SUPREME COURT'S DECISION OF 28TH JULY 2021

The parties to this application first came before the Supreme Court when the Accused persons in Suit No CC No. CR/158/2018 in the High Court and the Applicants/Respondents in this court,(hereinafter referred to as Respondents) invoked the supervisory jurisdiction of the Supreme Court pursuant to Article 132 of the 1992 Constitution and Rule 61 of the Supreme Court Procedure Rules 1996 CI 16.

The Respondents sought an order of certiorari and prohibition against the high court(Criminal Division) coram Honyenuga JSC (sitting as an additional high court judge) on four grounds. That application will hereafter be referred to as 'the first application'.

It was the case of the Respondents in the first application that in dismissing a submission that the prosecution had failed to make out a case for the accused persons to answer before the high court, the court had '*committed a 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 323), the judge suomotu rejected eighteen exhibits after earlier admitting same without any objection from the court or the interested party'*. The *State*(hereafter referred to as Applicants), was the interested party in the first application.

The second ground was that, the court had *committed a grievous error of law apparent on the face of the record when after earlier admitting the eighteen exhibits, the learned judge suomotu rejected those exhibits'* in his ruling without giving the Accused persons an opportunity to be heard before the rejection of the exhibits as required under the rules of natural justice

The third ground sought an order prohibiting the trial judge from continuing with the trial of the Respondents on account of real likelihood of bias, because in his decision on the submission of no case to answer, the trial judge had made '*final findings of facts and therefore predetermined and prejudged the case' before hearing* the accused persons.

In their fourth ground seeking the prohibition order, the Respondents alleged that there was a real likelihood of bias on the part of the trial judge because he had exhibited patent bias against the interest of the Respondents when he rejected the eighteen exhibits, but retained three other series of exhibits that were obtained in identical circumstances. According to the Respondents, the eighteen exhibits supported their case, and the three series of exhibits supported the case of the prosecution.

The Applicants resisted the first application with the primary contention that the accused persons had not legitimately invoked the supervisory jurisdiction of the Supreme Court. They submitted that regarding the relief of certiorari, '***it is only errors which are so serious and affect the jurisdiction of a court as regards the proceedings in question, or are so obvious as to make the decision a nullity***', which will warrant the invocation of the Supreme Court's jurisdiction under Article 132 of the Constitution. They contended that *where the proceedings are regular,* ***a charge that a court has improperly misread, misconceived a point of law or misdirected itself or had improperly exercised its discretion*** *did not constitute a sufficient ground for an order of certiorari*.

Further, the Applicants urged that the high court judge's decision to reject the eighteen exhibits, did not go to the core of the dismissal of the submission of no case to answer, and was not the reason on which the decision of the court to dismiss the submission of no case to answer turned.

The Applicants also submitted that the position of the Respondents that they were not heard before the exclusion of the eighteen exhibits is not supported by any known law or practice.

On the claim for Prohibition order, the Applicants cited the decisions in **Republic v High Court, Denu Ex parte Agbesi 11 (No 1) (Nyonyo Agboada Sri 111) Interested Party 2003 – 2004 SCGLR 864**, **Republic v High Court, Accra Ex parte Concord Media Ltd & Ogbamey (Ghana Ports &Harbors Authority & Owusu Mensah) Interested Parties 2011 1 SCGLR 546**, **Republic v High**

Court, Land Division Accra Ex parte Al-Hassan Ltd (Thaddeus Sory) Interested Party 2011 1 SCGLR 478 to reiterate the settled position that prohibiting a judge requires credible evidence and proof of actual bias or a real likelihood of bias. It was the submission of the Deputy Attorney General as counsel for the State that the case of the Respondents was premised on mere allegations and suspicions that could not suffice to ground an order for prohibition.

After considering the applications and submissions, the ordinary bench of this Court in a majority of three to two dissenting opinions held that the high court's order excluding the eighteen exhibits was '*contrary to statute*' and the trial judge had fallen into '*fundamental error*' in excluding the exhibits, and so the decision could not be allowed to stand.

The majority further held that in their 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 he has caused financial loss to the state, would come to the conclusion that the judge would not be impartial in the consideration of any defence of the accused has to put forward*'.

Though the majority ruling agreed that '*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'* the ruling went on to say that*, '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*'.

On the basis of the above, this court per the majority decision prohibited the trial judge from continuing to sit on this suit. This is what has precipitated the current application.

THE CURRENT APPLICATION

The second application to which the current ruling speaks invokes the Review jurisdiction of the Supreme Court under **Article 133 (1)** of the 1992 Constitution that reads:

133 (1) *The Supreme court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court*.

The relevant rules of court prescribing the conditions for this court reviewing its decisions are found in **Rule 54 of the Supreme Court Rules 1996 CI 16**. It provides:

54. *The court may review any decision made or given by it on any of the following grounds –*

a. *exceptional circumstances which have resulted in miscarriage of justice.*

b. *discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given*

GROUNDS FOR REVIEW APPLICATION

Pursuant to Rule 54(a), the Applicant is first urging that the majority decision of 28th July 2021 ignored the time honoured fundamental and mandatory preconditions for invocation of the Supreme Court's supervisory jurisdiction over a decision of the superior courts. It urges that to the extent that the decision departs from recognised principles, it was bad in law, works manifest injustice, and constitutes an exceptional circumstance that should warrant a review by the Court.

Counsel for the Respondents disputes this position and submits that the application for review lacks no merits and presents the same submissions that were dismissed on the first application for certiorari and prohibition. Inter alia, counsel for Respondent insists that to the extent that at the time the exhibits in issue were tendered by the

prosecution there was no objection from the Respondent, the court should have allowed the Respondent to address the court on whether the exclusion was acceptable to the Respondent. Having failed to do so, the learned trial judge violated the fundamental rule of natural justice that requires the giving of a hearing to a party before a court takes a decision on any issue.

CONSIDERATION AND ANALYSIS

I have carefully read the record from the high court and the decision of the high court judge. I have also read the two majority and minority decisions of this Court on 28th July 2021. I agree that the majority decision to grant certiorari to quash the trial judge's decision to exclude the eighteen exhibits be reviewed on account of having occasioned miscarriage of justice through exceptional circumstances.

The exceptional circumstance is that the decision of the majority panel did not reflect the constitutional edict on how the doctrine of stare decisis is to be effected. **Article 129 (3)**of the 1992 Constitution reads:

129 (3) *The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law*

Again, the premise for the grant of prohibition against a judge acting within jurisdiction, and conducting the judicial function of evaluating the law regarding exhibits, on the basis that his evaluation '*appears to favor*' one party, and connotes a determination that a case has been made against an accused person, is an exceptional circumstance that will have grave consequences on the administration of justice. This is because this particular premise negated what is actually intrinsic to the judicial function of ruling on a submission made to a trial judge.

It has always been understood in the administration of justice that the judicial function of interpreting and applying law may lead to errors in law. If and when errors in law

occur, the proper step is to appeal to the next level of court for an expected correction of that alleged error of law. This position underscores the multiple layers of courts we have, ensuring such access to justice that, by the time a litigant has gone through the higher levels of court, every error of law ought to have been corrected.

Second, within this structure of our legal system, the Supreme Court does not have appellate jurisdiction over decisions of the high court. Thus if a high court in the proper exercise of jurisdiction misconceives the appropriate import of a law, or misinterprets a law, thereby committing an error of law, that decision may only be corrected by an appeal to the court of Appeal, and never by the Supreme Court.

The supervisory jurisdiction of the Supreme Court over the high court as established by this very court over years of constitutional law application, is a very narrow one. It does not seek to correct general errors of law. It only seeks to remove illegalities and nullities from the work of courts, arising from courts operating without jurisdiction or in excess of jurisdiction, or making fundamental and patent errors such as using procedures that have no basis in relevant law or the rules of court, anchoring decisions on law that has been repealed, or exhibiting patent conduct that cannot lead to an outcome that is just. As succinctly submitted by the Attorney General in this application, '*it is only errors which are so serious and affect the jurisdiction of a court as regards the proceedings in question, or are so obvious as to make the decision a nullity*' that the supervisory jurisdiction of this Court is exercised over.

Of course, as is always pointed out, no list is ever exhaustive, because human conduct has been known to come in all shades and colors, but the parameters of the exercise of the supervisory jurisdiction have been settled in our jurisprudence, and they never include corrections of errors of law generally, and errors in the weight to be given to evidence and facts. These corrections have been left to appellate courts. This position has been reiterated over and over in the considerations of the pre-conditions that can provoke an exercise of the Supreme Court's supervisory jurisdiction over the high court pursuant to Article 132 of the 1992 Constitution.

As well as several other cases, the **Republic v Court of Appeal; Ex Parte TsatsuTsikata2005-2006 SCGLR 612** clarified the essence of a decision that can allow this court to exercise its supervisory jurisdiction in the following words on page 619:

'*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 on the face of the record, which errors either go to jurisdiction or are so plain as to make the impugned a complete nullity. It stands to reason then that the error(s) of law alleged must be so 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….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*'.

This has been reiterated over and over and in the case of **Republic v High Court (Commercial Division) Accra; Ex Parte The Trust Bank Ltd (Ampomah Photo Lab & Three Others Interested Parties) 2009 SCGLR 164**, this court had this to say regarding its supervisory jurisdiction: *'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*.'

In the same vein, when it comes to the review jurisdiction of the Supreme Court, the foremost point to note is that the Supreme Court does not sit in appeal over itself to correct errors of law. There must be an end to litigations on errors of law and the import of evidence in the settling of legal disputes.

The review jurisdiction of the Supreme Court is confined to the narrow conditions set out in Rule 54 of CI 16 – exceptional circumstances that result in miscarriage of justice (54 (a), or discovery of new and important matter or evidence (54(b). As cited in the Applicant's Statement of Case, this Court conducted a discussion of the jurisprudence on the review jurisdiction of the Supreme Court and pointed out in **Arthur (No 2) v Arthur (No 2) 2013 – 2014 1 SCGLR 569**, that in an application for review of the court's decision on the basis of Rule 54(a), it is imperative that there exist exceptional circumstances, and the exceptional circumstances must lead to fundamental or basic error (not just error of law, but error that is evident or patent on the face of the record) in the decision of the ordinary bench. So at every material time, the supervisory jurisdiction and review jurisdiction of the Supreme Court, being jurisdictions that are distinctive from its appellate jurisdiction, are concerned with the structural pillars on which the edifice of judicial function is exercised, and seek to deal with nullities and dislocations in the pathway of arriving at a decision lawfully.

EXCEPTIONAL CIRCUMSTANCES

In the 28th July 2021 majority decision of this court under review, the decision of the majority panel appreciated that the high court judge was acting within jurisdiction when he examined the question of whether or not the court could exclude exhibits as part of the court's ruling on the Respondents' submission that the prosecution had not presented a case for them to answer.

Citing from **Ekow Russell v The Republic 2017 -2020 SCGLR 469**, the authority relied on by the high court judge to exclude the exhibits in issue, the majority ruling said on page 7 '*The authority of a court to suomoto exclude inadmissible evidence pursuant to Section 8 of NRCD 323* ***is not in doubt***'(emphasis mine). The ruling went on to buttress this appropriate judicial function with the authority of **Juxon-Smith v KLM Dutch Airlines 2005-2006 SC GLR 438.** In essence, the decision recognized that there was no jurisdictional error in the exercise undertaken by the learned trial judge that should have rendered the high court ruling on the exclusion of the exhibits a nullity.

Notwithstanding the appreciation that the trial judge properly exercised the jurisdiction given to him to review exhibits as part of a determination of whether the Respondents had a case to answer, and underscored the exercise of proper jurisdiction with authoritative precedent established by the Supreme Court, (as required by the doctrine of judicial precedent and the Constitutional direction of Article 129(3), the majority decision of 28th July 2021 undertook an extraordinary exercise to ground their decision that the judge had committed a fundamental error in excluding the exhibits'*contrary to statute*'.

The majority decision cited **Republic v High Court; Ex Parte Commission on Human Rights and Administrative Justice (Addo Interested Party) 2003 – 2004 SC GLR 312**and **Republic v High Court (Fast Track Division) Accra; Ex Parte Ghana Lotto Operators Association (National Lottery Authority Interested Party) 2009 SCGLR 372**, on the legal principle that no court could commit an error that amounted to violation of statute and to do so would invite the exercise of the supervisory jurisdiction of the Supreme Court.

The ruling stated these words found on page 6 that '*one type of error of law that this court has consistently held to be fundamental and would warrant the exercise (of) 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*'

The decision went on to quote the relevant ratio for this principle from **Ex Parte National Lottery Authority** in these words '*No judge has authority to grant immunity to a party from the consequences of breaching an act of parliament'*.

Following this, the ruling went on to say on page 8 that '*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 appeal. Therefore, the question in this case is whether the exhibits that were ordered to be expunged are evidence that is inadmissible per se*?'

But with all respect, the determination of whether or not evidence expunged is inadmissible per se, or it is not, is an absolutely legal question that is not related to jurisdiction, nullity, or patent error.

Thereafter, the ruling went on to review the legal issue of inadmissibility of evidence per se, and determined that the high court decision to exclude the relevant evidence was 'contrary to statute'. The decision further considered whether or not the learned trial judge's reliance on the decision in **Ekow Russell** (cited supra)and Section 117 of the Evidence Act NRCD 323 to ground his order excluding evidence, was proper in law, or he should have also considered the import of sections 116, 118 and section 126 in his legal evaluations.

I must very respectfully say that this exercise undertaken by the majority ruling is not known to the supervisory jurisdiction of the Supreme Court. My understanding is that it is a fundamental error for a court exercising supervisory jurisdiction to examine and evaluate a legal question such as '*whether exhibits ordered to be expunged are evidence that is inadmissible per* se' when such a legal question is not before the court.

It must be remembered that the only question brought to the court was whether the trial judge had committed a jurisdictional error by failing to call on the accused person to speak to the excluded exhibits before ruling that the exhibits could be excluded, and not whether the exhibits were admissible or inadmissible per se. Determining whether a court is required to call on a party that has made a submission of 'no case to answer' to address it on exhibits that have been tendered before the judge determines suomotu, that they should be excluded on grounds of inadmissibility, would have been the dispositive answer to the alleged failure to abide by the rules of natural justice before the court.

I must agree with the learned Attorney General that in conducting this exercise of legal review of admissibility and inadmissibility per se, when the jurisdiction of this court that was invoked is the supervisory jurisdiction, the majority ruling of this court did not address the time honoured fundamental and mandatory preconditions for invocation of

the Supreme Court's supervisory jurisdiction over a decision of superior courts. My candid opinion is that through this, the majority decision committed fundamental errors that would lead to miscarriage of justice.

The determination of what constitutes evidence that is inadmissible per se or whether any evidence is inadmissible per se, is a legal exercise that can be conducted only if such an issue has been brought to the court to resolve – and indeed, can only be subject of an appeal, because appeals are grounded on resolution of the legal and factual issues resolved by the decisions appealed against. Since no issue of the admissibility or inadmissibility of evidence was submitted to the ordinary bench of this court, the legal review conducted by the majority panel from pages 8 to 10 of this court's ruling, and the outcome of that review, constituted obiter. This is because the basic position of the law is that the jurisdiction to resolve any issue of law must itself derive from the proceedings before the court.

To the extent that the only issue before the court was whether or not the high court's decision 'suomotu' to exclude evidence was grounded on failure to abide by the rules of natural justice, or reflected a fundamental error on the face of the record or bias, this was the only matter the court had jurisdiction to resolve. To arrive at a decision on any principle of law when the question before the court does not turn on that principle of law means that the ruling stepped out of the court's own jurisdiction regarding the proceedings before it.

The second extraordinary step taken in the ruling of the majority panel was the evaluation of whether the decision in **Ekow Russel** was wrong or right in law, in order to resolve the legal question the ruling set regarding whether the learned trial judge's decision to exclude the evidence was 'contrary to law'. To do this, the court evaluated the import of sections 116, 117, 118 and 126 in the determination of the scope of the hearsay rule over pages 10 to 18 of the ruling. In the course of this review on the law on hearsay and admissibility of evidence the majority decision expressed three positions in these words:

'*It therefore seems to me that our decision in Ekow Russel v The Republic was per incuriam so I am not bound by it*' (page 14)

'*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 of 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*' (page 17)

'*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*' (page 18)

Thus it would seem that without any such issue being submitted to the court regarding the propriety of the Ekow Russell decision, and the scope of the Ekow Russell decision, the majority panel anchored the determination that the trial judge had gone contrary to statute on the position that Ekow Russell had been wrongly decided, and the trial judge had failed to consider the full scope of the rules on hearsay in the Evidence Act NRCD 323.

I must in all humility and deference state my understanding that the examination of the merits of any judicial evaluation is an exercise reserved only to an appellate court called on to specifically determine whether that particular judicial evaluation was erroneous in law or not. This is the meaning of this court's own clarification in **Ex Parte TsatsuTsikata and Ex Parte Trust Bank**(cited supra) that whatever error the court finds to ground the grant of certiorari must be fundamental, patent, and found on the face of the judgement or ruling, and not an error of law arising from the contents of the ruling. The kind of error that grounds the supervisory jurisdiction of the Supreme Court under Article 132may not be found only after an evaluation of the legal merits of a lower court's reasoning or decision and a conclusion that it was wrong in law.

May I humbly keep reiterating that from the authorities established, in the exercise of supervisory jurisdiction for the purpose of quashing a decision, the merits of judicial evaluation of a point of law may not be considered. This is why a trial judge following a settled principle of law settled by this court could not act contrary to statute.

There is a distinction between the ratio in **Republic v High Court (Fast Track Division) Accra; Ex Parte Ghana Lotto Operators Association (National Lottery Authority Interested Party) 2009 SCGLR 372**, and the case in hand.

In **Ex Parte Ghana Lotto Operators Association,** a trial judge had purported to assume jurisdiction over a pending case presided over by another judge without assignment or transfer to him by the Chief Justice, contrary to the directions of **section 104 (1) to (3) of the Courts Act 1993 Act 459**. This court declared that act of presiding over the case without proper transfer to the judge as the act that removed jurisdiction in the judge. This lack of jurisdiction was patent on the face of the record, and it was fundamental to the lack of validity in the decisions made by the judge who literally seized jurisdiction over the case. This is what the Supreme Court quashed as 'contrary to statute'.

My lords, the doctrine of judicial precedent, with the basic rule being that "Like Cases be Treated Alike' as already indicated, is a foundational doctrine of the common law system of administration of justice that Ghana operates. The doctrine is the thread of coherence that ensures consistency and predictability in the legal principles used to decide the myriad fact diverse cases that are brought to court. It eschews arbitrariness of a judge, and is therefore a bedrock of assuring justice to the one who comes to the seat of justice. It requires that when a higher court, and definitely the highest court, in our jurisdiction being the Supreme Court, has outlined the contours of a legal principle, that decision upon a question of law is conclusive, and becomes an authoritative precedent that must stand, or stare decisis, and bind all lower courts. To quote **Salmond on Jurisprudence**,11th Ed 1957, Sweet and Maxwell, p.165an authoritative precedent is "*one which judges must follow whether they approve of it or not*."

In Article 129 (3), this common law doctrine of judicial precedent and principle of stare decisis has been elevated to a constitutional pillar on which our legal system operates, and so I do not need to discuss its development from seminal cases such as **London Street Tramways v London County Council 1898 A.C. 375.** To reiterate **Article 129 (3)**, it reads:

129 (3) *The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law*

From the record before us, the trial judge whose decision to exclude exhibits has been quashed was doing exactly what he was required to do by reason of this constitutional edict derived from the common law doctrine of judicial precedent. He was following the principles directed by this very court in the cases of **Ekow Russell** and **Juxon Smith**, (cited supra). To quash his decision for being 'contrary to statute' would therefore be an exceptional a circumstance.

Further, in line with the silence of the majority panel on the invitation to find the judge's failure to call on the accused persons in the middle of his ruling to speak to admitted exhibits as a breach of the rules of natural justice, I can agree with the Attorney General that this position from counsel for the Respondents is not known to any rules of practice in our legal system.

It is for the above reasons that I would hold that the order granting the application for certiorari constitutes an exceptional circumstance, and also works substantial miscarriage of justice against the parties, and the directions of Article 129 (3).

Prohibition

Our duty is not to determine whether the decision of the Supreme court under review was correct in law or erroneous in law. Our duty is to determine whether the order of

prohibition triggered exceptional circumstances, or would occasion substantial miscarriage of justice.

My lords, I am clear in my mind that the ruling that the final findings of the Judge that the prosecution had established evidence enough to trigger a conviction unless the accused persons were able to shift the weight of weight of evidence by opening their defence, was an indication that the Respondents would not obtain justice in the court of the learned trial judge is another exceptional circumstance that occasions injustice. This is because, the ruling put the judicial duty of arriving at a concrete holding at the end of a submission of no case to answer, in the same category of prejudicial statements by a judge in the course of a trial. In the matter before us, it was imperative for the trial judge to render a concrete opinion on the quality of evidence before him.

In re Appenteng (Decd), Republic v High Court, Accra; Ex parte Appenteng and another (2005-2006) 18, the Supreme Court held that the rules on the scope of the order of prohibition are that:

a) Prohibition is not meant to prevent a person or a court from exercising general judicial functions
b) It is rather to challenge an attempted exercise of the judicial function in specific jurisdictional situations i.e. for excess or absence of jurisdiction, or departure from the rules of natural justice such as the existence of actual bias or strong likelihood of bias or interest and
c) An applicant for prohibition or certiorari is not restricted by notion of locus standi, i.e. he does not have to show that some legal right of his at stake.

The authorities establish that the duty of a judge when called on to rule on a submission of no case to answer is one that must be considered in accordance with well-established principles. These principles were considered in **The State v Ali Kassena 1962 1 GLR 144,** acknowledged and set out by the trial judge on page 25 of the ruling as the locus classicus of precedents on the principles to apply when an accused person urges that the prosecution has not made out a case for him to answer.

The trial judge went on to consider these principles and cited their restatement in **Asamoah& Another v The Republic, 2020 Criminal Law Report of Ghana, 306** as whether:

a. there had been no evidence to prove an essential element in the crime
b. The evidence adduced by the prosecution had been so discredited as a result of cross-examination
c. The evidence tendered by the prosecution was so manifestly unreliable that no reasonable tribunal could safely convict on the strength of it
d. The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt and one with innocence

From the principle of legality in criminal law **(nullumcrimen, nullapoena sine lege)** that requires that the elements of any criminal offence must be fully stated before a person is charged with an alleged criminal offence, and put to any obligation or penalty under criminal law, the learned trial judge was duty bound to conduct an evaluation of the weight of the evidence before him, and the legal import of the evidence before him and make a determination of whether the prosecution has established the ingredients of the offences that the Respondents had been charged with, or the evidence had been discredited, or could lead to a dual conclusion of guilt or non-guilt of the accused persons, before he could even call on the accused persons to open their defence. In the absence of that prior clarity, he was obligated to discharge the accused persons. From the record before us, it was in the process of discharging that duty imposed on a trial court from the practice direction adopted in **Ali Kassena**, and restated in **Asamoah & Another (cited supra**), that he made the following statements quoted in the ruling of the majority of the ordinary bench as the basis for the finding of prejudice:

Page 54: 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 '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 'The 1st accused made things easier for the 2nd and 3rd accused to succeed in their enterprise of defrauding'

Page 59 '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.

My Lords, the ruling brought to us on review shows that the majority panel accepted on page 25 of the ruling that at the stage of the learned trial judge's ruling, his duty was to determine whether on the evidence adduced on behalf of the prosecution, a sufficient case has been made against the accused persons to require them to open their defence, and the duty of the court included reviewing the evidence led, an assessment of it and whether it proves the ingredients of the offence the accused is charged with and can be relied upon to sustain a conviction in the absence of exculpating evidence. The ruling said:

'*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 court set out the provision and went on)

'*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 person is charged with…*'

However, the ruling linked the exclusion of exhibits to the expected assessments of the trial judge, and held that '*a reasonably well-informed observer, taking into account the exclusion of exhibits that* ***appear to favour*** *the accused persons 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 any defence the accused person has to put forward* (page 26 to 27) (emphasis mine)

I have emphasised the words 'appear to favour' because to my mind, these words clearly reveal that the evidential and probative value and import of the exhibits that were excluded was not clear on the very face of those exhibits. To determine their import on the fortunes of the cases of the parties before the court required a closer examination of the contents of the said exhibits. But how can any person, including even a well-informed observer of judicial proceedings, use the prima facie indication of an exhibit to determine whether a pronouncement of its admissibility or non – admissibility was prejudicial? Further, such an assessment cannot match up to the standard of 'credible evidence of bias' that is needed for a judge to be prohibited from continuing the judicial duties properly assigned to them.

Essentially, in the above quote from the ruling of the majority panel, the law lords did not distinguish how the very duty that they had identified as arising from the settled law on what a ruling on a submission on 'no case to answer' called for, was discharged in a manner that revealed bias through the words quoted. They also linked the exclusion of evidence, another duty the ruling had recognised as lawful, with the assessment of the probative value of the evidence before the court. It is the combined effect of the two lawful duties that were described as being able to raise doubts with a reasonably well-informed observer.

What the above implies is that though a judge treating different sets of evidence differently is acting within their judicial remit, and a judge arriving at a finding that

evidence with enough weight to found a case against an accused person has been tendered by the prosecution, thereby meriting a call on an accused person to open a defence against the quality of that evidence, is also acting within their judicial remit, a combination of these two factors, could lead an observer to a conclusion that the judge will not do justice to the accused persons.

I must respectfully state that this evaluation focuses on duties that are intrinsic to the judicial function and not objective indices of bias.

In Republic v High Court, (Land Division),Accra Ex parte: Alhassan Limited, (Thaddeus Sory Interested Party) 20111 SCGLR 478 an application to quash the decision of a trial judge and prohibit the judge from continuing the hearing of a suit due to some statements he made during the delivery of a ruling, and on the premise that the statements exhibited bias against it, was refused by this court. This Court in its second holding stated that '*a charge of bias or the real likelihood of bias had to be established on balance of probability by the person alleging same. In the instant case, the reasons in the ruling complained of by the applicant did not constitute bias by the trial judge against the applicant and the case pending before him. The judge had merely given reasons for issuing that order and there was no evidence to suggest that the judge had been biased or that there was suspicion of a real likelihood of bias. If the applicant was dissatisfied with the reasoning, the remedy open to the applicant was to challenge the ruling on appeal to the court of appeal rather than to invoke the supervisory jurisdiction of the Supreme Court'*

Through Adinyira JSC, the court said on page 485: '*The learned judge may well be wrong in the decision made, but the avenue of remedy open to the applicant in such circumstances is not by way of certiorari. A complaint that there has been an improper exercise of the discretionary jurisdiction is insufficient. A charge that a court has improperly misconceived a point of law or misdirected itself cannot per se constitute sufficient ground for grant of certiorari, in the absence of any jurisdictional error on the face of the record*.'

My view is that the identified statements from pages 54, 55 and 59 of the trial judge's ruling only connote the discharge of the evaluative duty placed on a judge to connect the offences that an accused person is charged with, with the said accused, and an assessment of whether the prosecution has presented evidence on the state of mind of the accused, as they undertook the actions alleged to be the offences. The directions of **Ali Kassena** et al is for a court to do this, being mindful of the extremely high standard of proof required in criminal prosecutions, and nothing less.

May I also add the opinion that where the grounds for alleged bias are words that are intrinsic to the proceedings on which the judge's words are being examined, those words must show that the judge has stepped out of the jurisdiction imposed on him by the proceedings, and or that the judge is guiding his judicial functions with considerations that are out of the scope of the proceedings he is seised with, or in excess of the jurisdiction imposed on them by the proceedings and principles of law guiding those proceedings. But where the judge solely functions within the very principles that direct the judicial duty he is called on to discharge, it is an exceptional circumstance for a ruling of a trial court to be interpreted as acting in bias

To allow such a precept into our legal system will be to enunciate new standards of consideration for lower courts exercising supervisory jurisdiction. My humble view is that such a standard will dislocate the very ability of judges to perform the heavily technical and burdensome judicial function of determining what the law directs in the myriad fact situations that come to court.

On the issue of the Respondents not having been heard before the relevant exhibits were excluded, we note that the decision on review did not address it, and so it does not lie with us so to do.

In conclusion, I would review the decision of 28th July 2021 by restoring the high court's ruling excluding the eighteen exhibits and ordering the accused persons to open their defence before the court as currently assigned with the duty of hearing their case.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

DOTSE JSC:-

I have read the erudite rendition of my able and respected sister Gertrude Torkornoo (Mrs.) JSC and I agree with her analysis, reasoning and conclusions that the review application be granted.

Article 129 (3) of the Constitution 1992, has raised to a constitutional level, the doctrine of stare decisis. This Article reads as follows:-

> *"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so,* ***and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law****". Emphasis*

We must also bear in mind at this stage that, our brother Honyenuga JSC who presided over the Suit at the High Court, did so as an additional Judge of the High Court. This therefore meant that he was exercising the jurisdiction conferred on the High Court as by law established.

This therefore meant that, at all material times, when there is an authority on a subject matter from the Supreme Court, all courts lower than that court are bound to follow that decision of the Supreme Court. The case of ***Ekow Russel v Republic [2017-2020] SCGLR 469*** which was relied upon by the learned High Court Judge was actually a binding authority upon him.

There was no way he could have departed from it.

The majority decision of the ordinary bench which has now been reviewed, in their quest to arrive at their decision had to depart from the decision of the Supreme Court in the said ***Ekow Russel v Republic*** case supra. Quite an enormous task indeed.

Can it therefore be lawfully and reasonably inferred that a High Court Judge who is ordinarily bound under the provisions of Article 129 (3) of the Constitution to comply

with the decisions of the Supreme Court would be deemed to have erred by complying with a constitutional provision? I do not think so.

In order to ensure that, the constitutional provisions which guarantee the doctrine of Stare Decisis is not abused, we have to restore the dignity and respectability that this common law doctrine has done for the legal and judicial system.

For a majority panel to just write off an established principle of law as contained in *Ekow Russel decision* and depart from it under the exercise of the supervisory jurisdiction of the court is in my opinion not well founded. It is upon this and the other reasons contained in the Ruling of my sister Torkornoo (Mrs) JSC, that I concur in the decision that the 28th July 2021 majority decision of the ordinary bench be reviewed and the Applicant/Respondent herein be ordered to open his defence as ordered by the trial Judge, Honyenuga JSC sitting as an additional High Court Judge.

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

PROF. KOTEY JSC:-

I have read the ruling of my respected sister Gertrude Torkornoo JSC. I agree with the reasons and conclusion reached by her.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

LOVELACE-JOHNSON (MS.) JSC:-

I agree with the ruling of my sister Gertrude Torkornoo (Mrs.) JSC. I am also of the opinion that the application for review be allowed.

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

DISSENTING OPINION

AMADU JSC:-

(1) **BACKGROUND TO THE APPLICATION**

On the 28th day of July, 2021 this court per a majority decision granted an application in Civil Motion No. J5/58/2021 in the case of **Republic Vs. High Court(Criminal Division 1) Accra, Ex- parte Stephen KwabenaOpuni** *(Attorney-General, - Interested Party)* in the exercise of the supervisory jurisdiction of the court.

(2) In that case, the Respondent to the instant proceedings *(Mr. Stephen Kwabena Opuni)* prayed the Court for orders of certiorari and prohibition to issue. The prayer for certiorari was specific and limited to that part of the ruling of the said High Court (Criminal Division 1), Accra dated 7th day of May, 2021 which expunged several exhibits tendered by the Applicant in that case which the application sought to quash. In support of his prayer for certiorari, the Respondent contended that the High Court committed a grievous and fundamental error of law when it expunged the said exhibits just referred to in its ruling on the Respondent's submission of no case to the High Court. Further that, in so doing, the High Court violated his right to be heard on the matter before expunging the exhibits.

(3) The Respondent's prayer for prohibition required the Court to prohibit Justice Clemence Jackson Honyenuga (JSC) sitting as an additional High Court Judge from continuing to preside over the case. The Respondent argued that the presiding Justice sitting as an additional Justice of the High Court be so prohibited on the ground that his right to have his matter determined by an impartial and unbiased judge was in danger of being violated.

(4) The facts on which the double-barreled application before the Court was grounded are not in dispute at all as same is not in contestation by the parties. It

was agreed between the parties that at the close of the prosecution's case in the criminal trial which is still pending before the High Court, the Respondent made a submission of no case. In its ruling, the High Court dismissed the Respondent's submission of no case. In the said ruling, the High Court ordered that some documentary evidence which the Respondent's lawyers tendered through the prosecution's witness *(an investigator, PW7)* during cross-examination, be expunged from the record. This evidence comprised of police witness statements obtained during investigations into the case which though available to the prosecution, they decided not to tender.

(5) The prosecution (Applicant herein) had however tendered some documents through its prosecution witness (PW6) which were admitted on the ground that by virtue of Sections 118 and 126 of the Evidence Act 1975, (NRCD 323) the said (PW6) was qualified to tender them because he was the official custodian of the said exhibits and could answer questions pertaining to them. In the said ruling, the Trial Judge found nothing wrong with the prosecution's documents. However, the Respondent's exhibits comprising police witness statements procured during the course of investigations were tendered without objection during cross-examination of a witness for the prosecution (PW7), an investigator who also had official custody of the said statements. The said statements were rejected and expunged on grounds that they constituted hearsay evidence without giving the Respondent the opportunity to be heard on the issue. In effect, the Trial Judge simply refused to apply the requisite parity of judicial reasoning when he retained the prosecution's exhibits as part of the record, but expunged the exhibits tendered by the Respondent thereby depriving the Respondent the opportunity of relying on the said investigation statements tendered without objection in his defence.

(6) The Respondent took the view that the High Court's decision to reject and expunge the evidence which was admitted without objection breached his right to natural justice that is; the *audi alteram partem* rule, not having been heard

before the Trial Court proceeded so to do. The Respondent argued further that, in the ruling of the High Court, there was an error on the face of the record. It is for this reason that the Respondent applied to the Court for certiorari and prohibition. The majority of the Ordinary Bench of the Court acceded to the application. The Respondent's application to the Court set out the following grounds;

"1. The Learned High Court Judge committed a grievous error of law apparent on the face of the record when contrary to the express provisions of statute and more specifically Section 6 of the Evidence Act, 1975 (NRCD 323), he suomotu rejected exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75 after earlier admitting same during the hearing of the case without any objection from the Court or the Interested Party.

2. The Learned High Court Judge committed a grievous error of law apparent on the face of the record when after earlier admitting Exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75, he suomotu in his judgment rejected these exhibits without giving Applicant an opportunity to be heard before the subsequent rejection as required under the rules of natural justice and for Prohibition.

3. There is a real likelihood of bias on the part of the Trial Judge, Clemence Jackson Honyenuga (JSC) sitting as an additional High Court judge in view of the fact that he has made final findings of facts and has predetermined and prejudged the case before hearing Applicant.

4. There is a real likelihood of bias on the part of the trial judge, Clemence Jackson Honyenuga (JSC) sitting as an additional High Court judge in that in the said ruling he exhibited patent bias against the interest of the Applicant when he rejected exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75 which support the case of the Applicant but retained Exhibits PP, LL series, and MM series which are statements obtained in identical circumstances to support the case of

the Prosecution and which were tendered through the same PW7 by the Interested Party."

The majority decision of the Ordinary Bench of the Court found merit in some of these grounds on which the application was anchored. I shall now proceed to discuss the said decision within the context of the instant application on the grounds articulated by the Applicant in the statement of case.

(7) **MAJORITY DECISION OF THE COURT.**

From the grounds of the application just set out, the application before the Court provoked three main questions. First, did the High Court violate the Respondent's right to a fair hearing when it expunged the evidence without according the Respondent right to address the points on which the High Court justified its decision expunging the evidence? Secondly, did the High Court commit an error of law when it ordered that statements obtained by the investigator in the course of his investigations in the matter and which were tendered through the investigator *(without objection)* during cross-examination be expunged? Finally, did the High Court's conduct of the proceedings give cause to Respondent to be concerned that the presiding Judge acted prejudicially, against him? And therefore the impartiality of the judge can righty be called into question?

(8) A reading of the majority's decision will confirm that it gave five main reasons for acceding to the Respondent's application for certiorari. First, the majority decision of the court agreed that the decision to reject and expunge the evidence without giving the Respondent an opportunity to address the legal points on which the High Court rested its decision breached the Respondent's right to natural justice*,* the *audi alteram partem* rule. The majority took the view that to the extent that the decision to expunge the evidence which led to the application before the court resulted from a decision taken by the trial High Court *suomotu,* and did not arise from submissions made by the parties on the matter before the High Court, there was a bounden obligation upon the High Court to give the parties or at the very least the Respondent, a hearing on the point before expunging the evidence.

(9) The majority decision of the court however proceeded to give other reasons. The majority decision held that the decision of the High Court did not accord with the provisions of Section 117 of the Evidence Act, 1975 (NRCD 323). The reason, as the majority explained is that although under section 117 of the said Act, hearsay evidence is generally inadmissible, the same rule exempts from exclusion, hearsay evidence, which the parties agree, should be admitted.

(10) Thirdly, the majority took the view that the decision of the High Court was out of accord with the fair trial provisions of the 1992 Constitution as expounded by this court in the case of **Republic Vs. Baffoe-Bonnie &Ors.,[2017-2020] SCGLR 327** as well as subsequent practice directions issued in respect thereof. The majority specifically noted thus; "***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."***

(11) Fourthly, the majority decision of the court found that the High Court committed an error of law when it justified its decision to expunge the evidence complained about on the basis of this Court's decision in the case of **EkowRussel Vs. The Republic[2017-2020] SCGLR 469**. The majority of the Court took the view that the said decision provided no legal justification for the High Court's decision. Finally, the majority decision agreed with the Respondent that the High Court's conduct of the proceedings provided good grounds to be concerned that his rights will not be determined impartially.

(12) Given the grounds on which the majority of the Ordinary Bench rested its decision, it is necessary to undertake a preliminary enquiry into the allegations on which the majority decision is assailed as erroneous on points of law, for the purposes of making a determination of whether or not the allegations cross the first threshold on which applications of this kind before the Court must be grounded.

(13) **THE APPLICATION FOR REVIEW**

I have noted that the application before the Court is targeted at the majority decision of the Court. I make this observation although the application before the Court does not clearly state as such. The application prays the Court ***"for an order reviewing the decision of the Court"*** without indicating whether it was the majority or minority decision of the Ordinary Bench of the Court.

(14) However, reading the application in its entirety, it is obvious that the application before this court is targeted at the majority decision of the Court. I will nevertheless caution that in applications to the Court, parties must demonstrate to the court that they are clear in their minds as to the exact relief they seek and not leave such crucial ingredient to speculation. As the court has time without number preferred to lean in favour of the substance of applications and to prevent them from suffering any perdition as a result of errors which do not go to the root of the proceedings, this glitch will not engage a lot of my attention. There is good reason however to sound the caution that practitioners cannot keep relying on the lenient posturing of the Court in proceedings which are adversarial in nature to survive procedural issues especially if they are raised by their opponent.

(15) Secondly, it is noted that the application does not indicate clearly which leg of the grounds on which the Court will usually consider applications for review as clearly set out in rule 54 of the rules of this Court. The leg on which the application for review is founded, can however be gleaned from the grounds of the application which are set out in paragraph 8, at page 5 of the Applicant's statement of case. It is there formulated as follows:-

"8. My lords, the Applicant canvasses four (4) main grounds in support of this application:

a. The decision of the ordinary bench of this Honorable Court dated 28th July 2021 contained fundamental and grave errors which have manifestly resulted in a substantial miscarriage of justice, as it

effectively ignored the time honored fundamental and mandatory preconditions for an invocation of this Honorable Court's supervisory jurisdiction for an order of certiorari to quash an alleged error contained in a decision of a Superior Court.

b. A decision which erroneously departs from recognised principles regarding the invocation of this Honorable Court's supervisory jurisdiction is bad in law, works manifest injustice and constitutes an exceptional circumstance warranting a review by the Court.

c. That the ordinary bench committed a fundamental error resulting in a substantial miscarriage of justice when it wrongly construed Sections 118 and 126 of the Evidence Act, 1975 (NRCD 323) on the law on hearsay evidence. The effect of the erroneous construction of Sections 118 and 126 of the Evidence Act was to, without compelling reasons, change the law on hearsay. This constitutes an exceptional circumstance resulting in a gross miscarriage of justice.

d. That the ordinary bench committed a fundamental error in prohibiting the trial judge who rightly performed his duty as required by law to evaluate the evidence adduced by the prosecution in order to make a determination whether a prima facie case had been made against the Respondent. This error has occasioned a substantial miscarriage of justice."

(16) It is provided by rule 54 of the rules of the Court that the:- ***"Court may review a decision made or given by it on the ground of;***

a. exceptional circumstances which have resulted in a miscarriage of justice; or

b. the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by the Applicant at the time when the decision was given."

(17) The rules of the Court set out above, provide only two grounds on which this Court may review its decisions. From the grounds set out above, it is obvious that the application before the Court invokes rule 54(a) of the rules of the Court to justify the application. This is because all the grounds relied on by the Applicant state that the majority decision of the ordinary bench is plagued by fundamental and grave errors of law which have resulted in a miscarriage of

justice against the Applicant. A reading of the Applicant's affidavit in support of the application and his statement of case will confirm that there is no instance in which the Applicant contends that the application before the Court is grounded on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by the Applicant at the time when the decision was delivered.

(18) **DISCUSSION OF GROUNDS OF THE APPLICATION**

The Applicant contends in the application before the Court that the decision of the ordinary bench dated 28th July 2021 contains:-

a. fundamental and grave errors, and which
b. have manifestly resulted in a substantial miscarriage of justice.

The first of the grounds on which the application before the Court is urged on us as set out above is that the majority decision is fraught with fundamental and grave errors because the said decision: ***"ignored the time honored fundamental and mandatory preconditions for an invocation of this Honorable Court's supervisory jurisdiction for an order of certiorari to quash an alleged error contained in a decision of a Superior Court."*** See paragraph 19 at page 12 of the Applicant's statement of case. The Applicant's argument is that:- ***"from the numerous decisions of this Honourable Court on the exercise of its supervisory jurisdiction…only errors patent on the face of the record and which affect the jurisdiction of the court or a nullity that qualify for the invocation of the Court's jurisdiction…."***
See paragraph 20 at pages 12-13 of the Applicant's statement of case.

(19) The Applicant has impressively albeit, extravagantly quoted a number of decisions to support his submission. The first is the decision of AmuaSekyi JSC *(of blessed memory)* in the case of **Republic Vs. High Court, Accra; Ex-parte Laryea[1989-90] 2 GLR 99**where the learned Justice stated as reported on page 101 of the report, the principle that certiorari will lie to quash the decision

of the court on the ground among others of error of law on the face of the record where such error of law among others ***"is so obvious as to make the decision a nullity."*** The same statement is made in the case of **Republic Vs. Court of Appeal; Ex-parte TsatsuTsikata[2005-2006] SCGLR 612** at 619 per Wood JSC *(as she then was)* also cited by the Applicant, the Learned Attorney-General.

(20) It is clear from the decisions just referred to that the nature of the error of the High Court which is vulnerable to the writ of certiorari by the Court is the error which is;

a. obvious, and which
b. makes the decision a nullity."

I will in due course return to the subject of error of law as the basis for the exercise of this Court's supervisory jurisdiction over decisions of the High Court later. The reason for which I defer the discussion at this stage is to examine and set one simple fact straight. The errors of law alleged in this application against the majority decision of the Court completely overlook a basic ground on which the Court will intervene by certiorari against decisions of the High Court. This ground is founded on breaches of the rules of natural justice. It is trite that the Court will and must intervene by certiorari where an Applicant establishes breaches of the rules of natural justice against them. I make this observation conceding the fact that the majority decision of the Court did not make capital of the point although it noted it. In my view, the majority decision of the Court could have disposed of the application more simply. This is because breach of the rule of natural justice *audialterampartem* alone which the Respondent raised was sufficient to have disposed of the application for certiorari.

(21) In the Respondent's application invoking the supervisory jurisdiction of the Court the Respondent expressly stated the breach of the rule of natural justice as one of his grounds. He contended as follows;

"2. The Learned High Court Judge committed a grievous error of law

apparent on the face of the record when after earlier admitting Exhibits 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, and 75, he suomotu in his judgment rejected these exhibits without giving Applicant an opportunity to be heard before the subsequent rejection as required under the rules of natural justice."

(22) The majority decision of the Court acknowledged this ground on which the application for certiorari was grounded in the following words:- ***"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 suomoto expunging from the record evidence that had been tendered without objection by the prosecution."***

(23) The fact that the High Court never gave the Respondent the opportunity to address it on the expunged evidence is apparent on the face of the record. The order expunging the evidence was made in the course of delivering a ruling resulting from a submission made by the Respondent to the High Court that at the close of the prosecution's case, no case had been made against the Respondent to justify calling on the Respondent to open his case. There is a deluge of settled authorities which support the point that a court ought not to rest its decision on a point without giving the parties an opportunity to be heard on the matter. To do so is tantamount to denying the person adversely affected by the decision the right to be heard on the point before passing judgment. The denial of the right to a hearing *pro tanto* attracts the supervisory power of the Court. The majority decision considered this as trite and did not belabour it. In the opinion of Pwamang JSC, the position of the majority was expressed in the following words:- ***"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 Vs. City Investment Co Ltd. [2007-2008] SCGLR 1064."

(24) It is noted that in the minority decision of the Ordinary Bench of the Court, a contrary view was expressed in the following words:- ***"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."*** With all due deference and profound respect, I will disagree with this position. In the first place, the statement quoted above raises two main issues. First, the question as to the admissibility of the evidence and secondly, the weight to be attached it. As to the weight to be attached it, the parties are always heard on it before the court makes a determination. This is because the parties have an opportunity in their addresses to make a submission on the weight and probative value to be attached to the evidence so admitted. With the question of admissibility, it is different. Therefore, subject to the provisions of the Evidence Act, where evidence is admitted without objection, it is the weight to be attached in decision making which is the exclusive preserve of the court. To exclude such evidence admitted without objection, the parties, in particular the proponent of that evidence, has a right to be heard because the statutory power to exclude such evidence pursuant to Section 8 of the Evidence Act is conditional upon that evidence ***"if objected***

to" at the time it was proposed for admission and not thereafter. *(Emphasis mine).*

(25) Where therefore evidence is admitted without objection, the parties proceed with the matter and are confident that at the time they are required to address the court on the probative value of the evidence adduced ***without objection***, they will have the opportunity to submit to the court on the weight to be attached to that evidence admitted ***without objection***. At this stage, there is no need to draw the court's attention, in the exercise of a party's right to a hearing, that the evidence is admissible or not. It is therefore not appropriate to mix up the determination of the question of admissibility and the weight to be attached thereto. In the latter case, the party would actually have the opportunity to address the issues of weight or probative value. In the former case, if the court does not allow the parties to address on it, they have lost the opportunity to be so heard at the appropriate time as provided under Section 6of the Evidence Act(1975)NRCD 323 which must be read together with Section 8 of the Act. In our adjudication process, criminal proceedings like any other judicial proceedings are equally regulated by the Evidence Act 1975 (NRCD 323).

(26) It is in this regard that I also respectfully disagree with the minority decision that, because under Section 8 of the Evidence Act, 1975 (NRCD 323) the Judge is allowed *suomotu* to exclude inadmissible evidence, the Judge could exercise this power subsequently even if the admissibility of the evidence was not objected to without giving the parties the opportunity to be heard since the opportunity to take an objection under Section 6 of the Act has been lost. In the instant case, the Trial Judge was presiding over the matter at the time the evidence was offered. Like the parties, he is presumed to have assessed the evidence with the proper perception before it was admitted. The Trial Judge could have exercised his power to reject the evidence at the time it was offered for admission, as the parties would have been heard on the grounds on which that power was exercised and could take further steps. Why should the Trial

Judge be permitted to have the benefit of a reflection on evidence admitted without objection behind the parties and exclude same at a time when a party in the case was yet to testify in the proceedings? That in my view will not serve the interest of justice at all. Such a situation would have vested in the Trial Judge powers contrary to the provisions of Sections 6 and 8 of the Act and would be prejudicial to a fair trial and an affront to the rule of natural justice.

(27) Any contrary view, which compromises a party's right to be heard will work grave injustice to that party affected. If a court were to decide *suomotu*, somewhere in the middle of a case or at the end of it, that a party who relied on some evidence admitted without objection to support his case cannot rely on that evidence because it is inadmissible, that will be contrary to the provision of Section 8 of the Evidence Act 1975 (NRCD 323) which expressly provides that:- ***"Evidence that would be inadmissible <u>if objected to</u> by a party may be excluded by the court on its own motion".****(the emphasis is mine)* Otherwise, the exercise of the power will not only leave the affected party stranded but even worse off when that party is deprived of the opportunity to be heard before the power of the court to exclude the evidence is so exercised.

(28) Whereas it is always the exclusive preserve of the court to decide on an issue one way or the other, that power is always subject to the right of the parties to be heard on it. This is a trite principle of the common law jurisprudence. It is for this reason that I state without any fear of contradiction whatsoever that, there is actually no need for the Evidence Act 1975 (NRCD 323) and the Criminal and Other Offences (Procedure) Act 1960 *(as amended)* to expressly stipulate that, a presiding Judge should give hearing to a party before determining the admissibility, or non-admissibility of a document. My reason is that it is indeed trite law as it is part of our common law jurisprudence that before a court can rest its decision on a point on which the parties have not invited the court for a determination but which the court considers crucial, the court must give the parties the opportunity to address it on that point. The basic rule of law is that it

is the fundamental duty of a court to address all factual and legal questions arising from the admitted evidence, which is lawful evidence, received without objectionand apply the law correctly. In that exercise, the court ensures the law is upheld and not undermined. See the case of**Grumah Vs. Iddrisu[2013-2014] 1 SCGLR 413**, per Wood CJ at page p424. In the Grumah case, the learned Chief Justice emphatically stated that the duty to address all factual and legal questions arising is subject to one rider; ***"The only rider is that parties must be given fair opportunity to address the issue."***

(29) The need to give parties a hearing before making a determination that affects them if the court should take a point *suomotu* is also emphasized in the context of appeals. The case of **Richard Peprah Vs. Director General, Prisons &3OthersCivil Appeal No. J4/03/2020** dated the 2nd day of December 2020 supports this point. In that case Gbadegbe JSC explained the meaning of rule 6(8) of the rules of natural justice in the context of appeals. His Lordship held as follows:- ***"The power of determining appeals is derived both from the Constitution and the Courts Act, (Act 459) and accordingly what the rules provide is only to regulate how the court may take a point of law not raised by the parties into account; it is limited only to ensuring that the Court does not without affording the parties before it the opportunity of responding thereto to base its decision on it."***

(30) The obligation to give parties the opportunity to address the Court on matters on which the Court considers necessary to deal with in its judgment accords with the time honoured principle of natural justice, *audialterampartem*. The courts take the breach of this rule of natural justice seriously and swiftly intervene in the exercise of the supervisory jurisdiction of the Court where it is established. Certainly, and once again, the breach of the rules of natural justice cannot be deemed"***minor, trifling, inconsequential or unimportant".***

(31) As I have earlier observed the ground alleging breach of the rules of natural justice alone could have settled the matter. I dare say that no one in the legal community would have questioned the majority decision if it rested the decision of the Court on this ground only. It is not surprising in the instant application before the Court the Applicant has failed to address this point although it was well articulated by the Respondent in his application for certiorari and clearly considered in the majority decision of the Court which is the subject matter of the instant application before the Court.

(32) Having said that, one cannot shy away from the errors of law alleged against the majority decision of the Court. I have already discussed the error of law principles on which the Court will exercise its supervisory jurisdiction. In the light of those principles, I ask the following questions;

a. ***Did the High Court commit any error in deciding that the statements tendered through the investigator be expunged for having offended the hearsay rules set out in the Evidence Act?***
b. ***Was the error obvious?***
c. ***Did the error render the High Court's decision expunging the said evidence a nullity?***

(33) The answer to the first question is unquestionably in the affirmative. The High Court not only failed to uphold the principles of natural justice, it also wrongly applied Section 117 of the Evidence Act in particular and further failed to apply the constitutional provisions on fair trial which by virtue of article 12 of the 1992 Constitution, the High Court was bound to apply. It would seem that the Learned Attorney-General himself concedes that the High Court committed an error in its decision quashed by the majority of the Court. This is because in his submissions to the Court he contends that:- ***"It is clear from the decision of the Court that the alleged error...was neither an error patent on the face of the record nor one which affected the jurisdiction of the High Court or rendered the proceedings a nullity."*** See paragraph 25 at page 16 of the Applicant's statement of case.

(34) Inherent therefore in the above submission are two points. First, the argument that the High Court did not commit an error of law patent on the face of the record, and secondly that the error was not one which affected the High Court's jurisdiction. Embedded in both arguments is the subtle admission that there is probably an error in the decision of the High Court but the error was not patent on the face of the record, nor did the error affect the High Court's jurisdiction. The conclusion I have reached is reinforced by the further submission of the learned Attorney-General that:- "***even if the decision is in error, same does not amount to a non-jurisdictional error*** *(sic)* ***patent on the face of the record amenable to certiorari.*** *"* ***See paragraph 2 at page 16 of the Applicant's statement of case.***

(35) The error in my view is definitely obvious. I make this statement in reference to my next question above set, which is whether or not the error complained about was obvious. Consequently, I cannot agree with the Applicant's argument that the error complained about was not ***"an error patent on the face of the record".*** Failure to have regard to the constitutional provisions on fair trial and also breach of the rules of natural justice are clear errors on which the Court readily intervenes in the exercise of its supervisory powers over the High Court.

(36) Further, in the interpretation of statutes, the time honoured rule is to read the statute as a whole. In this case, the High Court simply failed to read the whole of the specific statutory provision in contention, let alone its other component parts. The High Court glossed over that part of Section 117 of the Evidence Act which says that hearsay evidence is admissible ***"by the agreement of the parties."*** There cannot, in my view, be an error less obvious than one that is made patently manifest by a cursory reading of a very short statutory provision and omitting six key words which define the provision. In so doing the learned Trial Judge glossed over a phrase that was crucial to the matter before him. This phrase is; ***"or by the agreement of the parties."*** I have already pointed out that even if the court could at a later stage exclude that evidence, it

must be subject to the parties' right to be heard once it was admitted ***without objection***.

(37) Finally, was the decision expunging the evidence complained of such as to render the High Court's decision on the point a nullity? The authorities cited by the learned Attorney-General point to two main types of errors which justify the exercise by this Court of its supervisory jurisdiction over a decision. These are:-

> ***"a. errors which are jurisdictional in nature, and***
>
> ***d. errors which are not jurisdictional but are obvious as to make a decision a nullity or are fundamental, substantial, material, grave or so serious as to go to the root of the matter".***

(38) Significantly, the Learned Attorney-General referred to the case of **Republic Vs. Court of Appeal, Ex-parte TsatsuTsikata[2005-2006] SCGLR 612.** See paragraph 24 at page 16 of the statement of case. The learned Attorney-General quoted the principles of law outlined by Wood JSC *(as she then was)* for the grant of certiorari by this Court as follows:- ***"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 as alleged must be fundamental, substantial, material, grave or so serious as to go to the root of the matter. A minor, trifling, inconsequential or unimportant 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 courts supervisory jurisdiction".*(Emphasis mine).

(39) I underscored the Learned Attorney-General's reference to the judgment of Wood JSC *(as she then was)* above quoted because, in the judgment of Her Ladyship, it is clear that it is not only errors of law which render a decision a

nullity which may be the subject of the supervisory jurisdiction of the Court but also errors of law which are ***"fundamental, substantial, material, grave or so serious as to go to the root of the matter".***

(40) The majority decision of the Court dealt more with the latter kind although it is evident from some observations made by the majority that there were clear jurisdictional errors arising from breaches of the rules of natural justice. The majority decision therefore never contended that the error of the High Court against whose decision the certiorari was issued, was jurisdictional in nature.The Applicant's submissions obfuscate the crux of the majority's decision. The majority decision dealt with a fundamental error of law patent on the face of the record. The majority decision said nothing about the jurisdiction of the High Court. It is therefore misleading to submit that even if the High Court committed an error of law such an error:-"***does not amount to a jurisdictional error patent on the face of the record amenable to certiorari."***

(41) I wind up this point by saying that the principle in the decision of this Court in the case of **Ex-parte Laryea**, referred to by the Applicant appears to have been selectively quoted. The reason is that AmuaSekyi JSC also made the following statement in the said decision:- ***"Where as in this case, jurisdiction is not in issue, the only ground on which the court can interfere is the unreasonableness of the decision, which must be patent."*** For this reason, if the **Ex-parte Laryea** authority is relied upon by the Applicant to fault the majority decision on the ground that the error on the basis of which the High Court decision was quashed was such as did not affect the jurisdiction of the High Court or did not amount to a nullity, the High Court decision must also pass the test of reasonableness which was also stated in the **Ex-parte Laryea** decision.

(42) As the highest court of the land and last gate keepers of the rule of law and guardians of the fundamental rights provisions enshrined in our constitution, we can least afford a situation of inconsistency in the manner in which we apply the

law or any legal principles we have applied in our previous decisions.This final watchdog role is even more imperative wheneverthere is before us an allegation that those fundamental rights have either been violated or are threatened.Therefore,unless as provided by the constitution or any other enactment, there ought to be consistency with the very principles and precedents on which we have previously decided especially where doing otherwise, would compromise those fundamental rights enshrined in the constitution which by our judicial oaths we have sworn to uphold. I find it unnecessary to explore and determine the questions whether the High Court's failure to uphold its constitutional obligation to apply the provisions on fair trial enshrined in the 1992 Constitution, and having failed to offer the Respondent the opportunity to address it on a key matter affecting him in a criminal prosecution, and further ignoring the exception to the admission of hearsay evidence as stated in Section 117 of the Evidence Act was fair and reasonable in the circumstances of this case. These questions in my view are easily settled in the mind of reasonable and fair-minded person.

(43) A position that is not supported by law or is contrary to the correct legal position is vacuous and certainly a nullity. It means that it sits on nothing and is supported by nothing. It is for this reason that Lord Denning is reputed to have said that you cannot put something on nothing and expect it to stand, it will collapse.See **MacFoy Vs. United Africa Co., Ltd.[1961] 3 All E. R. 1169, P.C.**It is in this vein that I ask the following question, having regard to the uncontroverted fact that the evidence expunged by the High Court was tendered without objection, is the decision of the High Court which was quashed by the majority decision supported by the constitutional provisions on fair trial and Section 117 of the Evidence Act?. Further, did the attitude of the High Court to the evidence accord with the *audialterampartem* rule of natural justice? The answers to these questions are clearly in the negative.

(44) The question as to whether or not the statutory provisions relied upon to expunge the evidence the subject matter of the Respondent's application to the Court supported the High Court's position was at the heart of the application determined by the Ordinary Bench of the Court and clearly went to the root of the Respondent's matter before the Court. Indeed, the **Ex-parteTsatsuTsikata** decision has been cited with approval in several subsequent decisions of this court in explaining the circumstances under which the Court will accede to a prayer for certiorari. I cite just two very recent decisions. The cases of **Republic Vs. High Court(Commercial Division) Ex parte Environ Solutions & Others (Dannex Limited & Others-Interested Parties).Civil Motion No J5/20/2019** dated the 29th day of April 2020 and **Republic Vs. High Court, Cape Coast, Ex parte John BondzieSey(University of Education-Interested Party).Civil Motion No. J5/74/2019**dated the 12th day of February 2020 are instructive.

(45) A cursory reading of the majority decision of the Court will confirm that the majority was clear on the reasons for which it thought it proper to accede to the prayer for certiorari. The Court noted that a judgment given in contravention of a statute is of a fundamental error. The reason simply is that the violated statute is the measure by which the justice of the case was to be delivered. A judicial position taken in violation of statute therefore cannot deliver the justice for which the parties are before the Court. In the majority decision, it was first observed as follows:- ***"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."***

(46) In the decision under review, the majority first noted that the High Court's decision was inconsistent with the constitutional provisions on fair trial as expounded by the Court in the case of **Republic Vs. Baffoe-Bonnie**

&Ors.,[2017-2020] SCGLR 327. The majority also held that the decision to expunge the evidence breached the Respondent's right to a fair trial constitutionally guaranteed to him by the provisions of article 19(2) of the 1992 Constitution. The majority decision held on this point as follows:-

"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 ofRepublic Vs. Baffoe-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 inRepublic Vs. Baffoe-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."*** As earlier observed, a decision which undermines a person's right to fair trial cannot be a ***"minor, trifling, inconsequential or unimportant error".*** Such an error in criminal proceedings cannot also be said to be such an error as ***"does not go to the core or root of the decision complained of."***

(47) There is yet another point on which the majority based its decision. There is a sound and consistent precedent on the issue. The majority cited the case of **Republic Vs. High Court;Ex parte Commission on Human Rights and**

Administrative Justice *(Addo Interested Party)***[2003-2004] SCGLR 312** to support its decision. The majority also referred to the case of **Republic Vs. High Court(Fast Track Division) Accra; Ex Parte National Lottery Authority** *(Ghana Lotto Operators Association &Ors. Interested Parties)***[2009] SCGLR 390.** Recounting the facts of that case the majority recalled that in the said case, 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). This court unanimously quashed the order of the High Court. In two seminal opinions by Atuguba and Dr. Date-Bah, JJSC, declared the law in very definite terms. At page 397 of the report, Atuguba, JSC said as follows:- ***"It is communisopinio 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."*** In further support of this legal position, PwamangJSC quoted the statement of Dr. Date-Bah JSC in the case under reference as follows:- ***"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."***

(48) It is on the basis of the authorities and the statutory and constitutional provisions referred to that the majority took the view that to the extent that the decision of the High Court is faulted on the ground that the order expunging the evidence breached provisions of the Evidence Act, 1975 (NRCD 323), then the error was fundamental. The case law authorities cited by the majority in support of its decision quashing the decision of the High Court clearly lay to rest the anxieties expressed by the Applicant in this application that the decision of the majority completely ignored the time honoured fundamental and mandatory preconditions for invoking the Court's supervisory jurisdiction. The majority decision is replete with authorities which confirm that the Court deemed it justifiable in line with its statement, restatement and multiple restatements of the principles on which this Court will exercise its supervisory jurisdiction in that, where the impugned decision was delivered in violation of a statutory or constitutional provision, this Court must deploy its supervisory powers on the impugned decision. There is a plethora of decisions of this Court that support the decision of the majority on this point.

(49) Finally, it must be pointed out that the argument that certiorari must be refused where the error complained about was not grave was made by the Applicant in the earlier proceedings from which the instant application results but was dismissed upon its consideration. This is evident from the ruling of the majority where it noted as follows:- ***"The interested party however has referred us to 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 Vs. 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."

(50) It is worthy of note that in his submissions on the first ground of the application, the Learned Attorney-General did not demonstrate how the decision the subject matter of this application, which I have painstakingly demonstrated contains an error, let alone of a fundamental and grave nature, ***"manifestly resulted in a substantial miscarriage of justice"*** as stated in the ground.

(51) The Learned Attorney-General's argument on the second ground of the application dwelt on precedent. It is his contention that a decision which erroneously departs from recognised principles regarding the invocation of this Court's supervisory jurisdiction is bad in law, works manifest injustice and constitutes an exceptional circumstance warranting a review by the Court. The crux of this ground is that the High Court committed no error of law when it relied on the decision of the Court in the case of **Ekow Russel Vs. The Republic (supra)** to expunge the evidence tendered through the prosecution's witness by the Respondent. The reason as contended by the Applicant is that the High Court was constitutionally bound to follow the decision of the Court in **Ekow Russel.**

(52) It has further been urged on this court by the Applicant that it will certainly amount to a grave error on the part of a court lower than the Supreme Court to refuse to apply a principle of law settled by the Supreme Court. Applying the *stare decisis* principle therefore, even if the Supreme Court subsequently finds its earlier position to be erroneous, it cannot justify faulting the lower court which only acted in accordance with its constitutional obligation to follow the decision of the Supreme Court. Thus, granted therefore it is accepted that following a

decision of the Supreme Court which is subsequently departed from by the same Court is deemed erroneous, such error cannot be grave enough to justify deploying the supervisory powers of the Court against the lower court. These are the arguments of the Applicant in the proceedings before the Court which I have summed up with my own words. *(See paragraphs 28 to 30 of the Applicant's statement of case).*

(53) I refer briefly to the Learned Attorney General's arguments at paragraph 29 of his statement of case as follows:- ***"It is, with respect, bewildering how reliance by the High Court on a binding decision of this Honourable Court can give rise to the side of prerogative writ of certiorari by this Honourable Court."*** He further submits in paragraph 30 thus:- ***"If not corrected by this Honourable Court, the decision possesses the very grave consequences of emboldening lower courts to determine which decisions of this Honourable Court they are to follow dependent on their own understanding of what the law is . . ."***

(54) It is surprising that the Applicant makes the arguments set out above, but still reciprocates the respect extended to the Court in the submission. In the first place, it must be emphasised that the majority decision of the Court faulted the decision of the High Court on several grounds other than failure to follow binding precedent. This fact is undisputed and cannot be overemphasized. Key among them is the violation of the Respondent's right to a fair trial as firmly entrenched by the Court in the *Baffoe Bonnie* case, breach of the rules of natural justice and further glossing over the provisions of Section 117 of the Evidence Act which permits hearsay evidence to be admitted where the parties agree that it should be admitted. The judicial precedent argument therefore just formed part of the majority's determination but was not the point on which the decision turned.

(55) In any event, the judicial precedent argument has its drawbacks. The **Ekow Russel** case may have stated a position but for purposes of precedent, the first obligation of a court is to commit its fidelity to a statutory position to take

precedence over and above the decision of the Court which states the principle of law relevant to the point determined by the court. Our courts have therefore laid down the law that, where there are competing arguments before a court as between statute and case law authority, the provisions of the statute must take precedence over case law, no matter how exalted the court which delivered the decision is. This is the effect of the decision in **Edusei Vs. Dinners ClubS.A[1982-83] 2 GLR 804.** In that case, it was held that:-***"No matter how exalted a judicial precedent is, it cannot take precedence over statute law."*** In the **Edusei**case, the court highlighted the dilemma it faced as follows:-***"This forces an invidious choice on us of obeying precedent or complying with the terms of statute."*** The Court delivered itself thus:-***"In my view, where there are competing calls on a court, as to which authority to comply with, obeisance is due to statute rather than the decision of a higher court however exalted." Per Francois JSC at page 814".*** It is therefore not the law that when a court has to determine a legal issue, judicial precedent, however eruditely expressed, is applied to take precedence over the provision of a relevant applicable statute on that issue.

(56) Without a doubt, the majority decision considered the application before it in this context. The majority stated the crux of the application before the Court as follows:- ***"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 Vs. The Republic (supra) that the judge used as authority for expunging the exhibits."*** The majority spoke with resounding clarity as follows:-***"Ekow Russell Vs. 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."***

(57) As already noted, the majority decision of the Court took the view that the High Court's decision violated provisions of the 1992 Constitution and the Evidence Act. The majority found that the **Ekow Russel** case did not consider specific constitutional and statutory provisions upon which the application before the Court turned. The High Court was bound by law to give precedence to those aspects of the statutory provisions relevant to the matter before it, above the **Ekow Russel** case. The proper application of the principle of *stare decisis* therefore required the High Court to have followed statute rather than the decision of this Court in **Ekow Russel**. Reliance on the case law decision of this Court in **Ekow Russel** rather than statute was not done in accordance with the principle of *stare decisis.* There is therefore no need to dwell on this ground of the application. The reason as already pointed out is that the majority decision of the Court did not make it the only ground in determining the application.

(58) The third ground of the application contends that the majority decision of the ordinary bench of the Court committed a fundamental error resulting in a substantial miscarriage of justice when it wrongly construed sections 118 and 126 of the Evidence Act, 1975 (NRCD 323) on the law on hearsay evidence. It is contended by the Applicant that the effect of the erroneous construction of Sections 118 and 126 of the Evidence Act was to, without compelling reasons, change the law on hearsay. This it is argued, constitutes an exceptional circumstance as it results in a gross miscarriage of justice.

(59) The first answer to this contention, as already noted is to reiterate the point that, breaches of the Constitution and the rules of natural justice are good grounds for this Court to exercise its supervisory powers over the decision of the other Superior Courts. The majority decision established these breaches in its delivery. Granted that the majority erred in its decision on construction of Sections 118 and 126 of the Evidence Act, the decision can still not be faulted in the light of the established breaches. Even in the case of lower courts, the settled law is that a higher court can affirm the decision of a lower court which is correct but

founded on the wrong reasons. It is on the basis of this principle that Apaloo JA *(as he then was, of blessed memory)* a celebrated jurist, and former Chief Justice said in the case of **Seraphim Vs. Amua-Sekyi [1971] 2 GLR 132** at **134** as follows:-***". . . Indeed, in this court, no judgment is upset on the ground that its ratio is erroneous if there is another sound basis on which it can be supported."*** See also the recent decision of this Court in the case of **Republic Vs. Judicial Committee of The Asogli Traditional Council, Ho; Ex parte Avevor & 6 Others** *(Azameti & 3 Others-Interested Party)***[2019-2020] 1 SCLRG 311.**

(60) In addition to the point above, I reiterate another point earlier made in response to the argument that the majority decision of the Ordinary Bench of this Court committed an error of law in its analysis of the meaning and effect of Sections 118 and 126 of the Evidence Act. This point is the reference to Section 117 of the Evidence Act. The majority of the Court also held that the expunged evidence is admissible by virtue of Section 117 of the said Act. The majority decision was actually based more on Section 117 of the Act. For this reason, the majority decision stated as follows:-***". . .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".***

(61) The subsequent discussion of Sections 118, and 126 of the Evidence Act were only additional arguments made by the majority. The Court had already decided the point based on Section 117 of the Act. In its conclusion on the applicable provisions of the Evidence Act, the Court repeated the fact that Section 117 of the Act was one of the provisions which was overlooked by the High Court. The position of the majority on this point is captured as follows:-***"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."

(62) Clearly therefore, Section 117 is not the subject of this ground of the instant application. The majority decision has therefore not been faulted by the Applicant on this ground. For this reason, even if it is conceded that the majority erred in its analysis of Sections 118 and 126 of the Act, the decision is still justifiable by reference to Section 117 of the Evidence Act. The Applicant's argument on this point therefore will still not sway the Court into reviewing the majority decision of the Court. With regard to Sections 118 and 126 itself, the Learned Attorney-General must be commended on the arguments on the meaning of the two statutory provisions. They appear to have blunted our view of the same sections in the majority decision. There is however a missing link in the two views, the first of which was expressed in the majority decision of the Court and the second, in the learned Attorney-General's submissions. The missing link is the context in which the said sections of the Evidence Act were applied. The evidence which provoked the consideration of the two sections arose in the context of cross-examination. Given that the evidence was tendered during cross-examination rather than examination in chief, it is questionable that Sections 118 and 126 of the Evidence Act will apply in the same way as laid down in the majority decision of the Court, and as canvassed by the Learned Attorney-General before us.

(63) It is a well-established and settled legal concept that cross-examination has two main purposes. First to advance the case of the cross-examiner and secondly to undermine his opponent's case. To advance his case regarding the fertilizers, the Respondent tendered through the police investigator, statements which the police investigator had in his proper custody and which supported the Respondent's case, but which the prosecution refused to tender in evidence. My

view is that if sections 118 and 126 of the Evidence Act are to be applied properly, they must be interpreted and applied to take into account the importance of cross-examination in our system of justice. In this regard, if the investigator, as the learned Attorney-General and the High Court appear to suggest, can tender in evidence statements he obtained from others, without those persons testifying themselves, in support of the prosecution's case, cross-examination permits the accused person *(in this case Respondent)* to advance his case by tendering other statements the same investigator obtained and which support the accused person's case but which the investigator was not led in evidence to tender while testifying for the prosecution.

(64) Apart from advancing the case of the party cross-examining, I have also noted that the purpose of cross-examination is to undermine the case of an opponent. This is done usually, in three main ways; (i) limiting the testimony of the witness, (ii) discrediting the testimony of the witness and (iii) attacking the credibility of the witness on good grounds. In the instant case, the very investigator who tendered in the statements favourable to the prosecution, also had in his custody, statements which undermined the prosecution's case, but refused to tender them in evidence although all the statements were obtained by him in the official course of his duty during the investigation. This being the case, is the cross-examining party not allowed to tender in evidence through the same investigator statements which are within his knowledge and possession to show that he has partisan interest in the matter and so should be discredited? In this regard, would the statements then be properly excluded in terms of the hearsay rules contained in Sections 118 and 126 of the Evidence Act?

(65) My respected view is that the majority decision did not factor this aspect of evidence into our interpretation of Sections 118 and 126 of the Evidence Act and the Learned Attorney-General has also not taken that into account in his attack on the majority decision of the Court. For the reasons just stated, I am not persuaded by the Learned Attorney-General's arguments on the meaning and

application of sections 118 and 126 of the Evidence Act. In context, the majority decision of the Court, even if there is good reason to disagree with the interpretation of the said sections of the Evidence Act, arrived at the right conclusion. For reaching the right conclusion, the majority decision must remain undisturbed.

(66) It is also for the reasons stated above that I will not agree with the Learned Attorney-General's submission in paragraph 42 of his statement of case that the majority of the Court erred in its interpretation of Section 118 of the Evidence Act. This is because this provision when taken within the context of the circumstances of cross-examination and its purposes will not serve the cross-examining party any purpose. The notice requirement of section 118(b)(iii) is difficult to operationalize in the circumstances of cross-examination. It is the reason for which cross-examination is at large. This decision not being one for the purposes of determining the admissibility or otherwise of the evidence in question, there will be no need to belabour the point in explaining the application of Sections 118(b)(iii) in cross-examination.

(67) Further, I do not agree with the Learned Attorney-General's argument in the same paragraph 42 of his statement of case that the majority of the Court fell into further error when it equated the disclosure of the documents to the Respondent in compliance with this Court's decision in the **Baffoe-Bonnie** case to the notice requirements of Sections 118 and 126 of the Evidence Act. This submission is not entirely fair to the majority. To emphasize my point, I reproduce the statement made by the majority in reference to the **Baffoe-Bonnie** decision. It was quoted earlier in this decision. Pwamang JSC speaking for the majority said:- ***"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 Vs. Baffoe-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 Vs. Baffoe-Bonnie &Ors, (supra). . ."

(68) Thus the argument attributed to the majority of the Court by reference to the **Baffoe-Bonnie** case to the effect *(that it equated the decision with the disclosure of document)* cannot be extracted from the statement quoted above and there is nothing in it to suggest that what the majority meant was to seek to equate the rule on disclosure of documents affirmed by this Court in the **Baffoe-Bonnie** case with the notice requirements of Sections 118 and 126 of the Evidence Act.

(69) It is important to address the submission made in paragraph 47 of the Applicant's statement of case. It is there argued as follows; ***"It is our contention that the majority bench in their construction of Section 126(1) would have given a different construction to Section 126(1) if they had read Sections 126(1)(a)(b) and (c) in their entirety and paid particular attention to the use of the conjunctive "and" after section 126(1)(b) . . ."*** The majority's alleged error is founded on this submission. These submissions are neutralized by the earlier observations on the purposes of cross-examination. These observations point to the fact that if the rules are to be applied in the manner in which it is canvassed by the learned Attorney-General to support the High Court's decision which was quashed by the majority decision, then the very purposes of cross-examination and its invaluable role in our justice system would be undermined.

(70) This leads me to paragraph 48 of the Applicant's statement of case where it is also submitted as follows:-***"My lords, it is our submission that a police investigator is not in a position to indicate that the contents of a statement given by an individual in the course of his investigations are***

trustworthy. He can confirm that the statements are given by those persons, but he is not in a position to confirm that the contents of the statements are trustworthy." This submission in my view is intriguing. It presupposes that when the investigator is tendering the statements of the said individuals at the instance of the prosecution then it is because he is "***in a position to indicate that the contents of a statement given by an individual in the course of his investigations are trustworthy."***

(71) My conclusion on the submission quoted above, is justified by this simple question; if the prosecution can tender statements obtained by the investigator in the course of his investigations through the investigator, even though the ***"investigator is not in a position to indicate that the contents of a statement given by an individual in the course of his investigations are trustworthy"***, should the accused person be precluded from tendering the same statements through the same investigator who obtained them in the course of his investigations? Is the investigator capable of indicating that:- "***the contents of a statement given by an individual in the course of his investigations are trustworthy"*** only because they have been tendered in evidence by the prosecution but the converse obtains in the case of the accused? The answer to these questions must point in one direction.

(72) Further, it is obvious that the argument made in paragraph 48 of the Applicant's statement of case is based on the personal knowledge rule of evidence. This requires that a party may testify only where the party has personal knowledge of the matters in respect of which he testifies. This is statutorily provided for in section 60 of the Evidence Act. A reading of this provision will leave no one in doubt that it is not an inflexible rule. A person may testify to a matter although they have no personal knowledge of the matters in respect of which they testify if no objection is raised. See section 60(3) of the Evidence Act. Needless to emphasize that the prosecution did not object to the evidence in question being tendered through the investigator.

(73) In any event, to the extent that the evidence is tendered to undermine the prosecution's case, it may well be that the accused seeks to undermine the prosecution's case in limiting the testimony of the investigator by exposing its shortcomings and also to discredit him in cross-examination. These principles of cross-examination are well settled in our jurisprudence. The correct legal position is that, in cross-examination, the hearsay rules of evidence cannot be deployed with inflexible force. They must be interpreted and applied taking into account the time-honored principles and practice of adducing evidence before our courts. After all, the long title of the Evidence Act itself says that its purpose is to ***"provide for the general rules of evidence …"*** Being general in nature, they must be supplemented by the common law and practice and also the demands of justice. It is for this reason that although one may relate to the learned Attorney-General's ground (c) which assails the majority decision of the Court on grounds of fundamental error by reason of an erroneous construction of Sections 118 and 126 of the Evidence Act, 1975 (NRCD 323) on the law on hearsay evidence, I do not agree, as contended that the:- ***"effect of the erroneous construction of sections 118 and 126 of the Evidence Act was to, without compelling reasons, change the law on hearsay"*** as those rules must themselves be construed in a general sense as the Evidence Act itself provides, taking into account the common law and the practice. In the light of my discussion so far, I will not delve deep into the interpretation of Sections 118 and 126 of the Evidence Act by the majority. The reason is that it has been demonstrated that even if the argument is unassailable, the majority decision was correct on several other grounds and the law requires that the Court endorse it in consequence of which this application must fail.

(74) The final ground of this application is that the ordinary bench of the Court committed a fundamental error in prohibiting the Trial Judge who rightly performed his duty as required by law to evaluate the evidence adduced by the prosecution in order to make a determination whether a *prima facie* case had

been made against the Respondent. This error as alleged by the Applicant, has occasioned a substantial miscarriage of justice.

(75) The logic inherent in this ground appears to suggest that where the Court is duly performing its duty but in the course of it breaches the rule of natural justice *nemojudex in causasua*, then it is not proper to invoke the supervisory jurisdiction of the Court against the Court because the Court was rightly performing its duty. The Applicant contends that the Court was only discharging its obligation pursuant to Sections 173 to 174 of Act 30. With all due respect to the Learned Attorney-General, this submission is untenable. In instances in which the principle of natural justice referred to is relied upon by a party seeking justice, the allegations relied upon do not usually contend that the Court was performing its duty wrongly. The allegation usually is that granted that the Court is dutifully discharging its duty, there was a grave likelihood that extraneous factors will influence the final decision of the Court. The majority pointed out in its decision that in allegations of bias:- ***"The court is concerned about the real likelihood of bias and not necessarily actual bias . . ."***

(76) In this regard, the majority decision was not concerned with the question whether or not the ruling of the High Court on the submission of no case was right or wrong. This is not the business of the Court when it considers an application in the exercise of its supervisory jurisdiction. It is trite that the Court's approach in applications invoking its supervisory jurisdiction is to be oblivious of the merits of the case. In the case of **Republic Vs. High Court, Sekondi; Ex-parte Ampong[2011] 2 SCGLR 716** it is recorded in holding (2) and also at page 717 of the report that:- ***"It was well settled that certiorari was not concerned with the merits of the decision; it was rather a discretionary remedy which would be granted on grounds of excess or want of jurisdiction and/or some breach of rules of natural justice; or to correct a clear error of law apparent on the face of the record..."***

(77) It is conceded, as submitted by the Learned Attorney General that, the High Court was legitimately discharging its constitutional duties when it delivered its decision. This Court is not justified on any ground to interfere with the High Court's constitutional mandate when it is discharging its duties in accordance with law as provided by the same Constitution. The application to the High Court for prohibition against the presiding Justice of the Court did not allege that the Court was exceeding its jurisdiction. It alleged that the presiding Judge conducted proceedings in a manner that leaves the Respondent with no confidence that the presiding Justice will deliver justice in the case fairly, neutrally and impartially. This being the allegation, I doubt whether the formulation of the Applicant's last ground of the application addresses the issue the Court was confronted with. This is because, this ground contends that the error committed by the majority of the ordinary bench is that the trial judge was wrongly prohibited because all that he did was to rightly perform "***his duty as required by law to evaluate the evidence adduced by the prosecution in order to make a determination whether a prima facie case had been made against the respondent***." As already pointed out, the allegation against the High Court raises no issue as to the performance of its statutory mandate. The allegation raises issues relating to the manner in which that mandate is being carried out. The ground therefore misses the point as it is clearly misconceived. They are simply thus:-

(78) Refreshingly, the facts of the instant case are not in dispute. A police investigator whose official duties formed an integral foundation on which the prosecution is proceeding against the Respondent was called to give evidence. The investigator was undoubtedly testifying in support of the prosecution's case. The investigator tendered in evidence some statements obtained in the course of the investigations. These statements supported the prosecution's case that the fertilizers supplied to a State institution was of bad quality. The investigator however failed to mention the fact that the investigations also obtained

statements from others who stated that the fertilizers were of good quality. The agreed facts are that in the course of cross-examination, the Respondent tendered in evidence through the said investigator, the statements he failed to tender during his examination-in-chief. This, as already pointed out, the Respondent was entitled to do in order to achieve the purpose for which the law accords him the right to cross-examine the investigator, a witness called by the prosecution.

(79) It is also agreed that at the close of the prosecution's case, the Respondent made a submission of no case to answer. In his ruling, the presiding Judge expunged all the statements tendered by the Respondent through the investigator which formed part of the Respondent's case. The Respondent's case against the Trial Judge is that if some of the expunged statements fall within the definition of hearsay evidence, then the statements tendered in evidence by the prosecution also fall within the same definition and should have been expunged as well on the same parity of reasoning and delivery of justice. The consequence of expunging the evidence tendered through the police investigator during cross-examination will deny the Respondent the opportunity of relying on the said statements in his defence. This disparate treatment of the prosecution and the Respondent in respect of these exhibits obtained in the course of the investigation is the reason for which the Respondent suspects the Trial Judge to have taken a position against his interest in the case. A judicial step which creates an imbalance in identical circumstances and gives an advantage to one party against the other, must definitely leave one of the parties apprehensive whether the same law applies to all persons as the constitution and the judicial oath demands.

(80) Having regard to this observation, it is clear that when an allegation of bias is made against a judicial officer, it must not arise from whether he is doing the right thing or not. That determination is made using another process such as appeal or review among others. The judge may be doing the right thing but if it

is done in such a manner that suggests that one party is being given an advantage such as the Respondent successfully argued, and where the determination of a particular matter affecting parties similarly circumstanced is made in such a way that it adversely affects one party while the other is put in a more advantageous position, an inference of bias may be drawn and for good reason.

(81) In the case of **Republic Vs. High Court (Land Division) Accra, Ex- parte Kennedy OheneAgyapongCMJ5/62/2020**, dated 20th October, 2020, referred to in the majority decision of the Court, it was not alleged against the Trial Judge that the decision to issue an order calling upon the Applicant in that case to show cause why he should not be severely punished for making some statements was wrong. The reason is that in making the order, the High Court Judge was heavily supported by weighty authorities in cases such as **Abu Ramadan & Nimako Vs. Electoral Commission & Attorney-General (No.4)[2015-2016] 2 SCGLR 1105.**

(82) In the **Ex-parte Kennedy Ohene Agyapong** case, this Court prohibited the High Court Judge because we expressed concern about the apparent likelihood of bias of a High Court Judge. In so doing, this Court drew inferences from previous orders made by the High Court and the language applied by the Judge. The majority of the Court therefore noted that in **Ex-parte Kennedy Ohene Agyapong**, it was noted that the Judge preceded his intention to deal seriously with the Applicant by the proviso. If he was found to have committed the offence of contempt he was charged with and held as follows:- ***"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."

In the instant case, as in **Ex-parte Kennedy Ohene Agyapong**, the Trial Judge also made certain statements which justify an inference of bias. The majority decision took note of specific statements made by the Trial Court in its ruling on the Respondent's submission of no case. These are set out in the decision of the majority 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."***

. . .However, the 1st accused although he knew the correct state of affairs 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".***

(83) The above pronouncements were made by the Trial Judge in his ruling in the submission of no case and have been placed on record. They constitute findings

and conclusions made before hearing the defence of the Respondent. These pronouncements at that stage of the proceedings are definitely prejudicial and disturbing to say the least. For a better appreciation of the effect of the pronouncements of the Trial Judge on the statutory and constitutional rights of the Respondent, it is important to reproduce the relevant statutory and constitutional provisions in which those rights are expressed. It is provided under Articles 19(2)(c) and 19(10) of the 1992 Constitution respectively as follows:-

"19(2) (c) A person charged with a criminal offence shall-
(a)……
(b)……
(c) be presumed to be innocent until he is proved or has pleaded guilty;

19(10) No person who is tried for a criminal offence shall be compelled to give evidence at the trial".

Section 96(1) of the Evidence Act 1975 (NRCD 323) provides;

"96 (1) "The accused in a criminal action shall not be called as a witness and shall not be compelled to testify except on his own application".

Contrary to the above provisions, the Trial Judge further statedin the said ruling as follows:-

(i) "2nd and 3rd accused's business was carried on to perpetuate fraud on COCOBOD.

(ii) indeed, these acts were all perpetuated to facilitate and intentionally, voluntarily to aid the 2nd and 3rd accused to perpetuate fraud on COCOBOD.

(iii) 1st accused although he knew the correct state of affairs and knowingly facilitated and aided the 2nd and 3rd accused to defraud COCOBOD.

(iv) 1st accused made things easier for the 2nd and 3rd accused to

succeed in their enterprise of defrauding.

(v)1st accused knowingly agreed and caused the state to lose millionsand thus caused financial loss through this action".

Given the inherently ominous implications of the above statements on the Respondent's statutory and constitutional rights at a stage of the trial when he has not exercised an election on how to proceed in his defence, the said statements are clearly prejudicial. And it is inconsequential if the Trial Court was not actuated by malice or any ill motives. It is sufficient that the statements were made and placed on record. Wherein therefore lies the presumption of innocence of an accused until proven guilty of an offence as enshrined and guaranteed under Article 19(2)(c) of the 1992 Constitution and the right of silence provided under Section 96 (1) of the Evidence Act, 1975 (NRCD 323) which latter provision is given constitutional gravitas in Article 19(10) of the Constitution? Obviously that presumption of innocence and the right to be silent have been prejudicially compromised by the statements contained in the ruling of the Trial Judge. Undoubtedly, by these conclusive statements which are inferences of guilt, should the Respondent elect to be silent, he stands already guilty on the basis of those prejudicial and premature pronouncements even before he exercised that election.

(84) The consensus of judicial authority is that certiorari will properly lie to quash proceedings of any adjudicating tribunal or court of law conducted in a manner which contravenes any of the rules of natural justice. And where any conduct of the tribunal or court during the proceedings demonstrates on the evidence, a real likelihood of bias, or actual bias, an order for prohibition is an appropriate remedy if jurisdiction as properly invoked. In the instant case, the proceedings during the trial of the Respondent which gave cause for the orders of certiorari and prohibition to be issued by the majority decision of this court on 28th July 2021, is no exception to this cardinal principle of the rule of law. I find nothing persuasive in the instant application to warrant a review of those orders.

(85) In our criminal jurisprudence, courts exercise jurisdiction on a presumption of innocence and not a presumption of guilt. As the evidential burden to be discharged is on the prosecution and it never shifts, this presumption of innocence must operate on the mind of the Trial Court where the accused has pleaded not guilty to the offence charged until the conclusion of the trial when the accused is on the totality of the evidence proved guilty beyond a reasonable doubt in accordance with Section 13 of the Evidence Act. These presumptions are therefore both statutory and constitutional requirements which the Trial Court in the instant case failed to uphold, when all that was required of the Trial Judge in determining the submission of no case made at the close of the prosecution's case was to decide whether or not a *prama facie* case had been made by the prosecution for which the Respondent shall be called upon to testify in his defence unless the Respondent exercised an election to be silent in accordance with Section 96 (1) of the Evidence Act 1975 (NRCD 323) and Article 19(10) of the 1992 Constitution. In the instant case, the said prejudicial and premature statements which are inferences of guilt even before the Respondent has testified in his defence, unquestionably provoke a reasonable and justifiable apprehension of bias on the part of the Trial Judge. Indeed, as aforesaid, the disparate manner in which the Trial Judge treated Exhibits (investigation statements) by accepting evidence tendered by the prosecution from a witness who did not author them but had official custody of them, and expunging those tendered by the Respondent without objection on ground of they being hearsay evidence only because the investigator who also had official custody of them without giving the Respondent the opportunity to be heard, reinforced the Respondent's case based on the settled common law threshold of **"real likelihood of bias"**. For the above reason, the prayer by the Applicant for an order for review of the order for prohibition against the Trial Judge must fail.

(86) In the majority decision of the Court, it referred to several previous decisions of this Court to justify its position in granting the order for prohibition. In **Ex-parte**

Kennedy Ohene Agyapong, (supra)for example, Kulendi JSC restated the correct position of the law thus; ***"...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 adjudicating on a matter. The rationale for this rule against bias is reflected in the time-honored legal cliché that not only must justice be done; it must also be seen to be done . . .***" In delivering the unanimous decision of this court, His Lordship further observed as follows:-***"The conduct of the Trial Judge leaves much to be speculated about his disposition to dealing with the Applicant impartially. Among others, he refused an oral application for adjournment to abide the outcome of an application before this Court seeking to quash the proceedings before him and to prohibit him from continuing the trial. He also continued the trial on 25th day of September, 2020 when in fact there was an application for stay of proceedings pending before the court with a return date of 12th October, 2020."***

(87) In the **Ex-parte Kennedy Ohene Agyapong** decision therefore, the Trial Judge was also discharging his constitutional duties and the question was not whether he was right or wrong. The question was whether his conduct gave reason for concern about his partiality or otherwise in the matter. Having been unanimous in our application of the law in **Ex-parte Kennedy Ohene Agyapong,** we cannot do a *volte face* on the very principles on which we justified our decision in that case without placing on record our reasons for a departure if we have to so depart. I am therefore not in agreement with the Applicant who submits in paragraph 64 of his statement of case that it was fundamentally wrong to prohibit the Trial Judge from further hearing of a case when all he did was to perform a duty placed on him by law. I am not aware of any case in which this Court has prohibited a Judge, save for want of jurisdiction,

on the ground that he was doing otherwise than what was placed before him in accordance with law.

(88) Nearly a century ago, Lord Chief Justice Hewart in an appeal on judicial review in the celebrated case of **R. Vs. Sussex Justices Ex-parte McCarthy[1924] IKB.256, [1923] ALL ER. REP.233** made a statement on the impartiality and recusal of judges. The case has since become famous in all common law jurisdictions for its precedence in establishing the principle that the mere appearance of bias is sufficient to overturn a judicial decision. That statement which was as relevant then, as it is today has given birth to the common judicial parlance often simply quoted as ***"not only must justice be done, it must manifestly be seen to be done".*** This means among other things that in the administration of justice, a judge should not say or do anything prejudicial to the interest of a party and ought not permit extraneous matters to influence his decision even if those matters are inarticulate. See **Mechanical Lloyd Assembly Plant Vs. Nartey[1987-88] 2 GLR 598** Per Amuah-Sekyi at page 648. In **Ofei Vs. The State [1965] GLR. 680, SC** where an irreverent remark by the judge when passing sentence on the Appellant, a clergyman, led to his being discharged. In such a situation, it is irrelevant that the decision was correct.

(89) **MISCARRIAGE OF JUSTICE.**

In addition to exceptional circumstances, rule 54(a) of the rules of the Court requires that the Applicant must also demonstrate that the result of the exceptional circumstances has been a miscarriage of justice. It is noted that in his arguments on the alleged errors of law committed by the majority of the Ordinary Bench of this Court, the Applicant failed to demonstrate the miscarriage of justice that was suffered as a result of the said errors. This is the requirement of the provisions of rule 54(a) of the rules of the Court. They must be demonstrated together. It cannot be assumed that to the extent that an error of law is alleged, then a miscarriage of justice automatically arises. It is in the latter

parts of the submission that the Applicant addressed the ***"miscarriage of justice***" statutory condition.

(90) The **Revised 4thEdition of Black's Law Dictionary** defines ***"miscarriage of justice"*** to mean, "***prejudice to the substantial rights of a party".***We find this definition very useful in these circumstances as it was incumbent on the Applicant to show that his substantial rights in the matter that came before this court have been prejudiced by some fundamental or basic error made by the majority in its decision. See **In Re Effiduase Stool Affairs (No.3); Republic Vs. Numapau, President of the National House of Chiefs and Others; Ex-parte Ameyaw II(No.3) [2000] SCGLR 59,** Per Edward Wiredu JSC *(as he then was)* at page 62.

(91) In the case of **GIHOC Refrigeration & Household Products Ltd.(No 2)Vs. Hanna Assi (No.2) [2007-2008] SCGLR 16** in which it was held *(by six to one majority Dr. Date-Bah JSC dissenting)*allowing the application for review of the majority decision of the ordinary Bench in **Gihoc Refrigeration & Household Products Ltd. Vs. Hanna Assi[2005-2006] SCGLR 458**, Per Prof Ocran JSC adopted the definition of miscarriage of justice as ***"prejudice to substantial rights of a party.***" The acid test remained always the existence of exceptional circumstances and the likelihood of a miscarriage of justice that: ***should provoke the conscience to look at the matter again.*** See **Agyekum Vs. Asakum Engineering And Construction Ltd,[1992] 2 GLR 635***(as stated in holding (2) at page 637).*

(92) The Applicant's affidavit in support of the application and statement of case set out some matters which in the Applicant's view will occasion the Applicant a substantial miscarriage of justice. In the light of the authorities just reviewed the question is whether the Applicant has demonstrated that there is occasioned ***"prejudice"*** to his **"substantial rights"** which provokes the conscience of the review bench of the Court to look into the matter again? The paragraphs of the

Applicant's statement of case in which the salient aspects of his arguments on miscarriage of justice are made are as follows;

"***65. We respectfully submit that the order prohibiting the trial judge will work substantial miscarriage of justice in the trial of the accused person. The decision has the effect of placing the case in the hands of a judge who has not had the benefit of the entire trial, observing the demeanor and composure of the various witnesses called by the prosecution in order to assess their credibility. It is our contention that, regardless of the course to be adopted by a new judge to whom hearing of the matter is entrusted, the further conduct of the case will suffer.***

66. If the new judge orders an adoption of the evidence led so far rather than a commencement "de novo", he would definitely have lost the benefits of the conduct of a full trial by him observation of the demeanor, countenance and composure of witnesses, etc.

67. If the new trial judge orders a trial de novo of the Respondent too, that will occasion substantial miscarriage of justice as the constitutional requirements of fair and expeditious trial will not only be violated, but also, the prosecution will be put to enormous expense, inconvenience and hardship in commencing a new trial. This undoubtedly will amount to a miscarriage of justice."

(93) These arguments, though interesting, do not meet the statutory threshold for review. With regard to the arguments in paragraph 65 of the statement of case that the order prohibiting the Trial Judge will work substantial miscarriage of justice in the trial of the accused person, the point is that, the matter is now required to be placed before another Judge who will labour under the disability of not having the benefit of observing the demeanor and composure of the various witnesses called by the prosecution in order to assess their credibility. To assess the merit of this argument to the Applicant, the interrogatory is that: who stands to lose the Applicant or the Respondent if the new Judge fails to assess

the credibility of the witnesses called by the prosecution? The answer is obvious. It is the Respondent. The Respondent is the accused person. It is he who needs to question the credibility of the prosecution's witnesses. If their demeanor cannot be assessed by a new Trial Judge because he did not participate in the trial, then he *(the new Judge)* cannot fault the testimony of these witnesses on grounds of demeanor and composure.

(94) The Applicant *(the prosecution)* cannot be questioning or assessing the credibility of its own witnesses. The biggest loser therefore if the point made in paragraph 65 of the statement of case is not upheld is the Respondent. It is the Respondent whose substantial rights stand to suffer prejudice if the opportunity of assessing the demeanour and composure of the prosecution's witnesses, is lost. The Applicant therefore suffers no miscarriage of justice if the application before the Court is refused. The Respondent, who may suffer prejudice to his substantial rights if the application before the Court is refused, insists however, by its opposition to the application that the application before the Court be refused. This Court cannot force parties who appear before it to take the benefit of orders they openly reject.

(95) The point contended in paragraph 66 of the Applicant's statement of case is a virtual repetition of that already discussed in respect of paragraph 65 of the statement of case. I will therefore deal with paragraphs 67 of the Applicant's statement of case. It is there argued that if the new trial judge orders a trial *de novo* of the Respondent too, that will occasion substantial miscarriage of justice because,

i. the constitutional requirements of fair and expeditious trial be violated, and;

ii. the prosecution will be put to enormous expense, inconvenience and hardship in commencing a new trial.

(96) The first question in respect of this contention is this; for whose benefit are the constitutional requirements of fair and expeditious trial? They are without a

doubt for the benefit of the accused person, in this case the Respondent. As for the argument about enormous expense, inconvenience and hardship in commencing a new trial, this will not only be suffered by the prosecution. The Respondent too will suffer inconvenience and hardship if a fresh trial is commenced. In the Respondent's case, he bears his expenses all by himself should his trial start *de novo.* The machinery of the state is in my view far too robust for this submission to have any persuasive effect once the fundamental rights as enshrined in the 1992 Constitution are in issue. It is in the overriding public interest and for that matter the interest of the State for due processes of law to be prevail regardless of insignificant expense to the State.

(97) The Respondent has in his statement of case contested vehemently each and every ground on which this application is anchored. He has in my view impressively addressed the question of enormous expense, inconvenience and hardship in commencing a new trial. He has not only cited authority to counter it, but has referred to the convenience with which the Applicant has relied on same. The Respondent referred to the case of **Sarimbe alias Olala Vs. The Republic [1984 -1986] 2 GLR 13** where the Court of Appeal held that administrative or other in convenience has never been held sufficient justification for depriving a person of his rights. This is a case in which the majority decision has upheld the Respondent's right to a fair trial and also his right to have his case determined by an impartial adjudicating body as provided for in article 19(13) of the Constitution. It is therefore untenable to use expense and hardship as justification to compromise these rights.

(98) The Respondent also refers to the convenience of the Applicant's arguments on this point by drawing the Court's attention to instances in which the Applicant has aborted proceedings which have reached an advanced stage, oblivious of the financial implications and hardship. The Respondent refers to the case of **Republic Vs. Gregory Afoko(Case No. CR 180/16)** where after four years of proceedings the Applicant filed a *nolleprosequi* to discontinue the case. The

reference to the **Gregory Afoko** case in the circumstances of this application is misleading and totally misconceived. There are no parallels to be drawn between the statutory power vested in the Attorney General under Section 54 of the Criminal and Other Offences Procedure Act 1960 (Act 30) *(as amended)* and the review jurisdiction of this court. The entry of a *nolleprosequi* by Attorney General is not a judicial act for it to be referred to as precedent worthy of consideration. The Respondent's submission on the issue may at best raise a moral issue which is not relevant in the determination of this application. It deserves no judicial attention. Having said that however, I do not think the Applicant has made a persuasive case that the state will suffer any miscarriage of justice if the application for review is refused.

(99) **REVIEW JURISDICTION OF THE COURT**

The discussion of the application before the Court reveals clearly that much as I am impressed with the Applicant's arguments for review of the majority decision of the ordinary bench. There is no basis to disturb the status quo in so far as applications for review of the decisions of the Court are concerned. This Court has noted that all persons who have lost a case are likely to make one complaint of a miscarriage of justice or the other but in the absence of exceptional circumstances such complaints are a poor foundation for the exercise of the power for review. For, it is only in exceptional circumstances that the *interestrepublicaeutsit finis litium* principle yields to the greater interest of justice. See the case of **Nasali Vs. Addy [1987-1988] 2 GLR 286,** per Taylor JSC at page 288. Therefore, whatever factors the Applicant relies on must be such that the exercise of our power of review becomes extremely necessary if irreparable harm to the Applicant is to be averted.

(100) As strict as this Court has been in its deployment of its review powers, the Court has on deserving occasions granted such applications as observed by my brother **Baffoe-Bonnie** JSC in the case of **Samuel Bonney& Others (No.2) Vs. Ghana Ports and Harbours Authority[2013-2014] 1 SCGLR 457.** He

noted in the said case as stated in page 460 of the report as follows: ***"However, it must be said that difficult as it is to get the Supreme Court to overturn its own decision, it is not an impossibility, and that whenever the Supreme Court has found exceptional circumstances, it has readily conceded and reviewed its decision. In the recent case of Glencore AG Vs. Volta Aluminum Company Ltd, Review Motion No J7/10/2014 dated 15 April 2014 reported in [2013-2014] 1 SCGLR 473, the Supreme Court graciously accepted an error it had made that had occasioned a miscarriage of justice and readily reviewed its decision while commending counsel for the industry he put in his application for review. In that case, the ordinary bench had struck out the appeal as withdrawn when the court, relying on the repealed Interpretation Act, had come to the conclusion that the appeal was filed out of time, albeit by one day. In the application for review, the court's attention was drawn to the fact that under the current Interpretation Act, 2009 (Act 792), s 44(3), computation of days was to start from a day after the decision being appealed against and not from the day of the decision. Calculated that way, the Applicant was within time."***

(101) The above is one case in which the Applicant's constitutional right of appeal was denied by an obvious error of the Ordinary Bench of the Court. The right of appeal being a constitutional right, where the Court erroneously deprives a party of this right, which is a right in pursuit of justice, the affected party has suffered a miscarriage of justice and the prejudice to his substantial right to appeal, is obvious. Also, in the case of In **Re Gomoa Ajumako Paramount Stool (No.2); Application for substitution, Acquah Applicant; Kwa Nana Vs. Appa and Another[2000] SC GLR 394**, this honourable court, reviewed its decision to strike out an appeal when the court's attention was drawn to the fact that the court's Registrar failed to notify a party mentioned in the notice to strike out, that the appeal had been struck out. These instances abound. Suffice it to

say therefore that the errors of law resulting in the alleged miscarriage of justice as already demonstrated, do not fall within the circumstances in which the Court accedes to applications for review.

(102) There is a suggestion that over the years, this Court has been a little flexible in review applications to the Court. See the case of **Internal Revenue Service Vs. Chapel Hill School Ltd.[2010] SCGLR 827**, per Atuguba JSC at pages 834 onwards. It is suggested that initially the Court was stringent in the exercise of its review jurisdiction but there is a recent modification of this stringent principle. This view was the minority view in the case just cited. I discern no such paradigm shift from the cases cited to justify this supposed new thinking of the Court. In all the cases cited for this proposition, the test for deciding whether the application for review is meritorious has remained the same. The applications which have succeeded were not granted because this Court took a more lenient view but because they satisfied the criteria. In my view, entertaining any such motions of stringent approach and a modification of same may lead to ambivalence in how the review jurisdiction of this Court is perceived to be exercised.

(103) **CONCLUSION.**

Undeniably, the stark reality is that this Court has been consistent in the manner in which it deals with applications invoking its review jurisdiction. The Court's position is that even where it is demonstrated that the judgment of the Court is wrong, it would not necessarily mean that the Applicant would be entitled to correct that error by review. This is an inherent incident of the finality of the judgments of the final court of the land. See the cases of **Internal Revenue Service Vs. Chapel Hill School Ltd.[2010] SCGLR 827** at **852** and **Gihoc Refrigeration & Household Products Ltd (No.1) Vs. Hanna Assi (No.1)[2007-2008] SCGLR 1 at 12-13**, per Date Bah JSC.

(104) This Court has long laid down the principle that the mere fact that a judgment can be criticized is no ground for asking that it should be reviewed. The review

jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where a fundamental and basic error must have occasioned a gross miscarriage of justice. See **Penkro Vs. Kumnipah II[1987-88] 1 GLR 558 SC.**

(105) For all the reasons hereinbefore set out, I hold that the Applicant has failed to urge any special circumstances to warrant a review of the majority decision of this court dated 28th July 2021. The application must fail and same is hereby dismissed.

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

PWAMANG JSC:-

I had the benefit of reading beforehand the comprehensive and well written opinion of my diligent brother, Tanko, JSC and I agree with his reasoning and conclusion to dismiss the application by the Attorney-General praying for a reversal, by means of a review, of the judgment of the court delivered on 28th July, 2021.

Nonetheless, I consider it important for the consistency of our jurisprudence on hearsay evidence, to point out in my own words, that beyond the fact that a majority of the review bench has decided to set aside the decision of the ordinary bench, the grounds the Attorney-General urged in his application for review ought to be noted carefully in order not to create uncertainty about what the law on hearsay evidence in Ghana is. One of the tenets of the doctrine of rule of law, which is at the base of our constitutional governance, is predictability of the law and the Supreme Court should be the last institution to provoke unpredictability in respect of Ghanaian law on any subject.

The ordinary bench held, in line with the Supreme Court decision in **Edward Nasser v McVroom [1996-97] SCGLR 468**, that hearsay evidence is not inadmissible *per se*

and that hearsay evidence not objected to is admissible under section 117 of the **Evidence Act, 1975 (NRCD 323)**. **Ekow Russel v Republic [2017-2020] SCGLR 469**was not decided on non-objected hearsay evidence under section 117 of the Evidence Act so it was not applicable in the case the trial judge was dealing with as the hearsay evidence in this case was not objected to. In the circumstances, the trial judge erred blatantly by relying on **EkowRussel v Republic** instead of **Edward Nasser v McVroom** and thereby failed to uphold the criminal justice rights and the right to a fair trial of the Accused Person provided for under section 117 of the Evidence Act and Article 19(2) of the Constitution, 1992, respectively. It is not sufficient for a lower court to quote a decision of a higher court in support of its opinion and claim to be bound by it. The higher court must have decided a point of law on similar facts to those of the case before the court. This fundamental error where the trial judge relied on an inapplicable decided case to violate the Evidence Act and the Constitution howls at any informed legal mind that reads his ruling and can never be described as non-apparent. The impression must not be given to lower courts that the mere mention of a Supreme Court decision, even if it is not applicable to the facts of a case, can justify the violation of statutory and constitutional rights.

At paragraph 8 (c) of the statement of case filed by the Attorney-General in the present application, he stated the grounds on which he alleges that the ordinary bench committed fundamental errors of law in the following words;

"That the ordinary bench committed a fundamental error resulting in a substantial miscarriage of justice when it wrongly construed sections 118 and 126 of the Evidence Act, 1975 (NRCD 323) on the law on hearsay evidence. The effect of the erroneous construction of sections 118 and 126 of the Evidence Act was to, without compelling reasons, change the law on hearsay. This constitutes an exceptional circumstance resulting in a gross miscarriage of justice."

First, by excluding section 117 of the Evidence Act from the sections allegedly wrongly construed, the Attorney-General does not contest the interpretation the ordinary bench placed on that section, which in fact benefits the prosecution as well since it also

tendered police witness statements without objection through the same witness. So, since the police witness statements, both those tendered by the Attorney-General and those by the Accused Person are admissible under section 117, I can never accept that a court of law should permit only those tendered by the Accused Person to be expunged while the same type of statements tendered by the prosecution allowed to remain part of the record upon which the Accused Person would be judged. If this state of affairs does not evoke apparent bias, then I don't know what circumstances would ever constitute real likelihood of bias to an objective reasonably informed by-stander.

Second, in arguing the allegations of wrongful construction of sections 118 and 126 of the Evidence Act, the Attorney-General states that the ordinary bench did not properly apply section 118(b)(iii) because the Accused Person did not file a formal notice of his intention to tender the first-hand hearsay statements contained in the police witness statements in question in the case. Never mind that the prosecution too did not file such notice. This argument is made notwithstanding the undisputed fact that the Accused Person filed a notice upon which the prosecution disclosed those statements to him and the court before he tendered them. The Attorney-General also argued without justification that the statements in question in this case do not qualify as official records under section 126 of the Evidence Act. Clearly, these are not allegations of wrongful construction but are rather arguments alleging misapplication of the sections to the facts of this case. Therefore, hearsay evidence is still admissible under sections 118(b)(iii) and 126 of the Evidence Act as exceptions to the hearsay rule and no ambiguity ought to be created about what Ghanaian law on hearsay evidence is.

It is for these additional reasons that I maintain that the order of the trial judge excluding only the police witness statements tendered by the Accused Person ought to be quashed and the judge restrained from further hearing of the case.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS.) JSC:-

I have read the minority view of this Court in this review application written by my respected brother Amadu JSC. The issues arising in this application have been well considered. I share the same reasoning and conclusions drawn; the review jurisdiction of this Court has not been properly invoked by the Applicant the application therefore must fail.

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

COUNSEL

GODFRED YEBOAH DAME (ATTORNEY-GENERAL) FOR INTERESTED PARTY/APPLICANT WITH HIM ALFRED TUAH-YEBOAH (1ST DEPUTY ATTORNEY-GENERAL), DIANA ASONA DAPAAH (2ND DEPUTY ATTORNEY-GENERAL), MRS. YVONNE ATAKORA OBUOBISA (DIRECTOR PUBLIC PROSECUTOR) AND MRS. EVELYN KEELSON (CHIEF STATE ATTORNEY).

SAMUEL CODJOE FOR THE APPLICANT/RESPONDENT WITH HIM JOHNSON NORMESINU AND TONNY NYARKO ACHEAMPONG.