IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: ANSAH, JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
PWAMANG, JSC
MARFUL-SAU, JSC
DORDZIE (MRS.), JSC
KOTEY, J.S.C

REFERENCE NO. J6/01/2019

28TH MAY, 2019

THE REPUBLIC

VRS

1. KWAME AMPONSAH
2. BISMARK KOOMSON
3. ISSRIS FATAU
4. ISAAC OHENE AGYEKUM
5. CHRISTOPHER OBEREKE ..... ACCUSEDS

JUDGMENT

PWAMANG, JSC:-

My Lords, this case comes before us upon a reference pursuant to Article 130(2) of the 1992 Constitution by Afia Serwah Asare-Botwe J, sitting in the Financial Division "2" of

the High Court, Accra. Before the court is Suit No FT/0012/2017 in which the accused persons stated in the title of the case, at all times material to the reference, were being tried on the offences of conspiracy to commit crime, defrauding by false pretences, money laundering and uttering forged documents, all in relation to a claim by the accused persons that they had gold which they offered to sell to the complainants who are foreigners.

In the course of the trial, the prosecution sought to tender evidence in the form of a DVD-CD Rom which contained information extracted from computers and mobile phones belonging to the accused persons and a pen drive containing footage from a CCTV camera at HFC Bank, Accra, which captured some of the accused persons in circumstances alleged to be related to the commission of the offences for which they were being tried.

In apparent compliance with Rule 67 of the Supreme Court Rules, 1996 (C.I.16), the referring Judge presented us with a case stated but in the summary of the action pursuant to R 67(2)(a), we are not specifically told that there was an objection to the tendering of these pieces of evidence. However, the case stated went ahead to state arguments of counsel which implies that an objection was taken against the tendering by counsel for the accused persons on stated grounds and counsel for the prosecution responded to the grounds of the objection. This is what has been recorded in the case stated by the judge;

" *THE ARGUMENTS OF COUNSEL, IF ANY;*

(a) No foundation was laid to the effect that, the prosecution had an order of the court to enter or access the devices of the accused persons and as such they cannot seek to tender the content of the devices.

Mr Akuffo submits that any tampering with electronic devices without the proper and adequate safeguards when it is left alone to the prosecution, can lead to contamination of the evidence. He states that when leave is obtained for the

purposes of invading privacy, the court will set parameters to set the supervisory network so they know what they were extracting.

According to Mr Akuffo, it is unsafe for the prosecution of a case of this nature for the police investigator to go to EOCO without the accused persons or their representatives and obtain documentation that has never been seen before.

(b) With respect to the CCTV footage from the HFC Bank, Mr Akuffo states that the proper thing to have been done would have been to obtain the leave of the court for an order directed at HFC Bank to bring the recording into the custody of the court. This he says would have been a safer and direct channel.

Mr Akuffo also raised the issue of proper custody and source of the CCTV recording from the HFC Bank…."

After the above narration of the arguments of Mr Kwame Boafo Akuffo, of counsel for 1st and 5th accused persons, the judge set out the arguments in response by Mrs Stella Ohene Appiah, Seniour State Attorney. Basically, her response was that the evidence sought to be tendered had been disclosed to the accused persons and that their lawyers even went to EOCO to obtain copies of the information direct from there. As to the CCTV footage, the Seniour State Attorney said they did obtain a court order for its production in court. In respect of the computers and the mobile phones, she stated that those devices were taken from the accused persons in the course of their arrest and being things that were used in the commission of the crime, the police could search them by virtue of power conferred on them by Section 93 of the **Criminal and Other Offences Procedure Act, 1960 (Act 30).**

It is provided by Article 130 of the Constitution as follows;

"130 (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in -

(a) all matters relating to the enforcement or interpretation of this Constitution; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.

(2) Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination; and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

From the above record of the proceedings in the case stated, we are unable to see any issue or question involving interpretation or enforcement of a provision of the Constitution arising before the trial judge so as to require a reference to this court under Article 130 (2). It was rather the referring judge who in a ruling dated 4th December, 2018, *sua sponte*, made reference to Sections 10, 88, and 94 of Act 30, then Sections 7, 98 and 99 of the **Electronic Transactions Act, 2008 (Act 722)**. Furthermore, she discussed Articles 12 and 18(2) of the 1992 Constitution and the Supreme Court decision in the case of **Raphael Cubagee V Michael Yeboah Asare & Ors; Suit No J6/04/17 dated 28th February, 2018.** With due regard to the trial Judge, in none of the grounds relied upon by Mr Kwame Boafo Akuffo in the proceedings before her did he base an objection on a general breach of privacy of the accused persons pursuant to Article 18(2) of the Constitution.

Counsel's argument, from the record of the trial judge herself, was that the prosecution required a court order before producing the video footage in court to which the prosecution answered that they did obtain an order for that. The other concern of counsel was that it was unsafe for the court to use the evidence from the computer and mobile phones of the accused persons because the searches were not

conducted in their presence. The answer of the prosecution was that, under Section 93 of Act, 30 the police could search items taken in the course of arrest without requiring the presence of the suspects. Act 30 being a statute and not a provision of the constitution, the High Court judge had jurisdiction to construe it and rule on that ground of objection. Even if the judge were to hold that the search of the computers and mobile phones was not justifiable under Section 93 of Act 30 and that it amounted to a breach of privacy of the accused persons, the Supreme Court has given more than sufficient guidelines for determining the admissibility of such evidence in the cases of **Raphael Cubagee v Michael Yeboah Asare (supra) and Madam Abena Pokua v Agricultural Development Bank, Suit No CA/J4/31/2015; unreported Judgment dated 20th December, 2017.** There was absolutely no need to refer this case to us.

In the circumstances, the trial judge committed a grievous error in making this reference and same is set aside. Article 130(2) of the Constitution does not warrant judges in courts other than the Supreme Court inventing issues and questions by themselves for constitutional interpretation by the Supreme Court when the issues do not arise on the face of proceedings before them.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

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

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

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

COUNSEL

KWAME AKUFFO FOR THE 1ST ACCUSED PERSON.

DAVID KATO FOR THE 2ND AND 3RD ACCUSED PERSONS.

JERRY AVENOGBO FOR THE 4TH ACCUSED PERSON.

PROSPER DOE, SENIOR STATE ATTORNEY FOR THE REPUBLIC.