IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ATUGUBA, JSC (PRESIDING)
ANSAH, JSC
ADINYIRA (MRS), JSC
DOTSE, JSC
YEBOAH, JSC
GBADEGBE, JSC
APPAU, JSC

REFERENCE
NO. J1/06/2018
7TH JUNE, 2018

THE REPUBLIC

VRS

1. EUGENE BAFFOE-BONNIE	…	1ST ACCUSED
2. WILLIAM MATHEW TETTEH TEVIE	…	2ND ACCUSED
3. NANA OWUSU-ENSAW	…	3RD ACCUSED
4. ALHAJI SALIFU MAMINA OSMAN	…	4TH ACCUSED
5. GEORGE DEREK OPPONG	…	5TH ACCUSED

J U D G M E N T

ADINYIRA (MRS), JSC:-

This case is a reference to the Supreme Court of a question relating to the interpretation of article19 (2) (e) and (g) of the 1992 Constitution, on 1st February, 2018, by the High Court, Coram Kyei Baffour J, pursuant to Article 130(2) of the Constitution.

The case emanated from a criminal trial of the five accused person who are facing various charges ranging from conspiracy to causing financialloss to the State contrary to sections 23(1) and 179(A), willfully causing financial loss to the State contrary to section 179(A), conspiracy to steal contrary to sections 23(1) and 124, Stealing contrary to section 124, using public office for profit contrary to section 179(c) all of the Criminal and Other Offences Act, 1960, (Act 29). Other charges include contravention of theProcurement Act contrary to sections 92(1) and 134(1)(a) of the Public ProcurementAct, 2003, (Act 663), money laundering contrary to section 1(1)(c) of the Anti-Money Laundering Act, 2007, (Act 749) and intentionally misapplying public funds contrary to section 1(2) of the Public Property Protection Act, 1977, (SMCD 140). The amount involved and for which the Republic claim to have lost is Four Million United States Dollars (USD$4,000.000.00). All the accused persons have pleaded not guilty. A rendition of the facts in support of the seventeen charges against the accused persons are irrelevant for purposes of the case stated for the interpretation of article19 (2) (e) and (g) of the 1992 Constitution.

Before the prosecution called its first witness the defence lawyers made an oral application on 9 January, 2018, for the documents that the prosecution will rely on in the summary trial. The DPP acceded to the request and indicated that the prosecution would supply the lawyers with the documents available and as when more documents come into their custody in the course of the trial. The lawyers for the fourth and fifth accused persons, respectively, filed applications before the High Court praying for all the evidence the prosecution will rely on to be furnished them before a witness starts to give evidence. What they were requesting forwere, a summary of evidence, police witness statements, documents discovered by the prosecution including those that will not be tendered. The lawyer for the fourth accused further wanted a declaration that any document or other material evidence that the prosecution may attempt to tender in evidence without first giving the same to the accused at least three clear days before attempting to tender such evidence is inadmissible.

The prosecution opposed the application on the grounds that it has already met with the order of the court for them to be provided with the necessary documents that they will rely on at the trial. That the documents were made available to the Registrar of the Court on the 10 January 2018 and that as the trial proceeds, the documents that came into their possession would be made available to the accused persons before a witness tenders them in court. And this to the prosecution is in accord with the nature of the trial which is a summary one that does not require laborious preparation of summary of evidence and a list of witnesses together with all the documents they will rely on at the trial.

These two applications which were consolidated were founded on article 19(2) (e) and (g) of the Constitution. The applicants urged the trial court to stay the trial and refer the meaning of article19 (2) (e) and (g) to the Supreme Court for interpretation.

The High Court therefore in compliance with Article 130 (2) referred the matter to the Supreme Court to determine the following issues:

1. **Whether on a true and proper interpretation and/or construction of article 19(2) (e) and (g) an accused person in a summary trial conducted in accordance with Part III of the Criminal and Other Offences Procedure Act, Act 30, was entitled to comprehensive pre-trial disclosures as the accused persons have argued.**
2. **If the answer is yes, then at what point should prosecution make the disclosures available to the accused person in view of the fact that summary trial may commence within 48 hours upon arrest and charges being proffered against the accused.**
3. **Whether on a true and proper interpretation and construction of article 19(2)(e) (g) of the Constitution, an accused in a summary trial was entitled to full disclosure of documents in the possession of prosecution that would not even be tendered by the prosecution as exhibits before a trial court**

It is necessary for purposes of clarity to set out article 19(1) in addition to the relevant clauses the Supreme Court has been called upon to interpret.

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

> (1) *A person **charged with a criminal offence** shall be given a **fair hearing** within a reasonable time by a court.*
>
> *(2) A person charged with a criminal offence shall -*
>
> *(e) be given **adequate time and facilities** for the preparation of his defence;*
>
> *(g) be afforded **facilities to examine**, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution.*[Emphasis supplied]

Ghana is a State party to major international conventions prescribing fundamental human rights including the **Universal Declaration of Human Rights[UDHR],** and **the International Covenant on Civil and Political Rights [CCPR]** adopted by the General Assembly of the United Nations on 19 December 1966. Ghana ratified the CCPR on 7 September, 2000**.** Our Chapter 5 on Fundamental Human Rights and Freedoms is a direct incorporation of the international bill of rights based on universal human rights and freedoms contained in the UDHR. Our Article 19 which reflects article 10 of the UDHR is in pari materia with article 14 of CCPR. It will therefore be useful to set out the relevant provisions of these international conventions as well.

Article 10 of the Universal Declaration of Human Rights provides:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his right and obligation of any criminal charge against him"*

Article 14 (1) (3) (b) (e) of CCPR provides:

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

Similarly**, Article 6 (1) (2) (b) (d) of the European Convention and Fundamental Freedom [ECFF], Rome 4th November 1960** provides:

1. *In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…*

2. *Everyone charged with a criminal offence has the following minimum rights:*

(b) To have adequate time and facilities for the preparation of his case

(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

General Observations

The right to a fair hearing is a *jus cogens,* a peremptory norm of general international law, which is defined in Article 53 of the Vienna Convention of the Law of Treaties as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character.

In **Re Effiduase Stool Affairs (No 2), Republic V Oduro Nimapua, President of the National House of Chiefs; Ex Parte Ameyaw II (No. 2) [1998-99] SCGLR 630 at 670**, this Court referred to the right to a fair trial as one of the basic principles of any civilized system of justice. Acquah JSC (as he then was) on behalf of the Supreme Court said as follows:

> *"For one of the basic principles of any civilized system of justice is that a person is entitled to a fair trial free from prejudice. No system of justice can be effective unless a fair trial to both sides is ensured… This common law right to a fair trial is now elevated to a fundamental right in the 1992 Constitution of Ghana."*

In addition to the right to fair trial, are other guarantees such as equal access to justice and equality of arms, which require that the parties to the proceedings in question are treated without any discrimination and or distinction based on the nature or mode of the trial in both civil and criminal proceedings.Consequently, we are of the view that access to administration of justice and the enforcement of the constitutional right to fair hearing shall be enforced in a manner that ensures that no individual is deprived, in procedural terms, of his/her right to seek justice.

With the enactment of the **High Court (Civil Procedure) Rules, 2004, (C.I.47**) Ghana follows best practices and our civil procedure is in compliance with article 19 (13) which provide that:

> *(13) An adjudicating authority for the determination of the existence orextent of a civil right or obligation shall, subject to the provisions of this Constitution, be established by law and shall be independent and impartial; and where proceedings*

for determination are instituted by a person before such an adjudicating authority, ***the case shall be given a fair hearing within a reasonable time.***

Presently, in civil cases, full discovery of documents and witnesses' statements between the contesting parties are mandatory at the pretrial stage.Therefore, the element of surprise in civil cases which was once the accepted weapon in the arsenal of adversaries is now a thing of the past.

Unfortunately this is not the position in criminal trials where the liberty and freedom of the person is at stake. Currently pretrial disclosure in criminal trials only exists under Part Four of **the Criminal and Other Offences Procedure Act, 1960, (Act 30)**which relates to trials on indictment. Even then the disclosure is not comprehensive as it does not extend to some of the materials, counsels herein were demanding from the prosecution at the High Court.

The element of surprise in summary trials should be a matter of concern for this Court as the bulk of criminal and other offences under Act 29 and other enactments are tried summarily. It is only in respect of offences, the punishment for which is death or imprisonment for life, which are tried by jury, [article 19 (2) (a) (i) and (ii)] and the offence of high treason or treason which is tried by the High Court constituted by three justices of the High Court [article 19 (2) (*l*)].

We take note that the same provisions existed under the 1969 and 1979 Constitutions before the 1992 Constitution was adopted, and no effort was made to initiate reforms to bring Act 30 of 1960 in conformity with the provisions of the Constitution or otherwise to give effect to or enable effect to be given to the changes effected by the Constitution in respect of fundamental human rights to fair trial.The controversy which gave rise to this case indicates the lack of certainty with respect to disclosures in criminal trials.

Until now the Supreme Court has not been given the opportunity to interpret the scope and dimension of the right of an accused person under article 19(2) (e) and (g) though it had in a couple of cases called for certain procedures available in trials by indictment

to be extended to summary trials for the effective protection of the liberty of the individual on trial.

Even though this reference emanated from a summary trial, we deem it appropriate and necessary to consider the whole ambit of the provision in its application in all criminal trials as by the express provision of article 12 (2): *"Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for public interest";* the fundamental human rights contained in Chapter 5 of the Constitution shall be enforced and enjoyed by every person in Ghana.Furthermore, by the clear wording of the article 19 (1) that: "*A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court,"* no distinction, can legitimately be made in the application or enforcement of this basic right, by the nature of the offence or mode of trial.

It is our considered opinion that, it would be contrary to the clear wording of the said article and also to its objective - which is to ensure, through a broad definition of the concept of fair trial, effective and complete protection of this human right; to limit the constitutional right to a fair trial of an accused person to trials on indictment. We will therefore not be constrained by the provisions in the Act 30 as to pre-trial procedure known as committal proceedings under Part IV and summary procedures under Part III of Act 30, as the said Act is subordinate to the Constitution. Our interpretation which will be in general terms applies to all modes of criminal trials and the details with respect to their application remain to be worked out in the context of concrete situations and by subsequent legislation.

Question 1

By question 1, which it is appropriate to examine first, the referring court asks, in essence, whether article 19(2) (e) and (g) is to be interpreted as meaning that an accused person in a summary trial is entitled to a comprehensive pretrial disclosure. Question 3 which in

essence is, whether disclosure includes unused materials in the possession of the prosecution, can be conveniently added while answering question1.

Article19 (2) (e) and (g)***supra,*** when paraphrased reads: "**a person charged with a criminal offence shallbe given adequate time and facilities to prepare his defence… and be afforded facilities to examine… the witnesses called by the prosecution…"** These are some of the minimum rights of a fair trial guaranteed under article 19 of the Constitution of Ghana.

Before proceeding with the interpretation of the constitutional provisions let us sum up the submissions made on behalf of the parties. For purposes of convenience, we will refer to the lawyers for the five accused persons as first counsel, second counsel, third counsel, fourth counsel and fifth counsel respectively and counsel for the Republic as the Director of Public Prosecution (DPP).

Submissions by parties

First counsel submits that "in order to enjoy the full panoply of the right to adequate time and facilities for the preparation of an accused person's defence, the accused must be furnished with all materials that the prosecution is in possession of whether inculpatory or exculpatory to ensure equality of arms between the prosecution and the accused.".

Second counsel did not file any arguments.

Third counsel expressed similar views as first counsel did and adds that this constitutional requirement for discovery does not impose any extra burden on the prosecution as the prosecution would have completed investigations before arraigning an accused before court and would have in their possession documentary evidence including statements it has obtained from the investigation of the alleged crime and statements which might support the case of the accused. Drawing an analogy from the rules of civil procedures he contends that the natural interpretation of article 19(2) (e) can only mean that an accused person in a criminal trial and whose liberty is on the line has to be given all

materials which the prosecution intends to use at trial within a reasonable time; to enable the accused to adequately prepare his defence.

He submits finally that in view of article 19(2) (e) and (g) even though the third accused is being tried under Part III of Act 30 in a summary trial, he is entitled to be given all documents which the prosecution would make available to an accused being tried under indictment otherwise, and according to counsel, it would be discriminatory to deny an accused person on summary trial such facilities.

Fourth counsel submits that the omission or the absence of a provision in Act 30 to compel the prosecution to furnish the fourth accused person undergoing summary trial, with a list of witnesses and documents to be relied on by the prosecution has been cured by the provisions of article 19(2) (e) and (g). He contends that to confine the pre-trial disclosures which are fundamental ingredients of fair trial only to trials on indictment to the total exclusion of summary trials which is the most common form of trial in our criminal justice system 'is an aberration of justice'. He concludes that proper disclosure of evidence of great force may cause the accused to plead guilty, to the advantage of both the administration of justice and of the accused.

Fifth counsel submits that the 5th accused, must be on the same footing as the prosecution, and that whatever evidence the prosecution intends to rely on for trial should be placed at the disposal of the fifth accused so that no surprises is sprung on him. He contends that the current practice whereby pretrial disclosure is restricted to indictable trials suggests that the quality of justice and fairness of the hearing one gets in criminal trial depends on the mode of trial. He concludes that article 19(2) (e) and (g) is meant to rectify this error.

The DPP on her part declared that in principle, the Republic is not opposed to disclosure of relevant information reasonably necessary for an accused person in a summary trial but is opposed to absolute disclosure and calls for restrictions in the public interest and national security. She submits that the position of the prosecution was demonstrated by

their readiness to file all documents in their possession at the Court Registry and their intention to file other documents as and when they have them. She considered as misconceived and totally unsupportable, the suggestion that the distinction between the mode of trial of summary offences and trial on indictment amounts to setting two different standards for justice delivery. The DPP submits that such distinctions are not unconstitutional especially when under the provisions of the said article 19 there are distinctions in mode of trial for certain offences and the type of punishment .She contends these differences confer a greater right on the accused persons standing trial in respect of those offences, which are listed as murder, manslaughter and high treason or treason.She considered the application unwarranted and intended to delay the trial.

Consideration

The rules of disclosure owe their origin to the elementary right of every defendant to a fair trial. In **R v DPP ex parte Lee [1999]2 ALL ER 737 at747** the Court of Appeal in adopting the earlier House of Lords decision in **R v Brown [1997] 3All ER 769at 778,** said:

> "*The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against hm. Fairness also requires that the rules of natural justice must be observed."*

Although in relation to trial on indictment there is some element of disclosure before committal proceedings take place under Part Four of Act 30, the extent is limited. The accused person is only given a bill of indictment and a summary of the evidence of the witnesses and just a list of the documents the prosecution intends to rely on at the trial, but not the actual documents. He is even denied a copy of his own statement made to the police.

Some of the reasons made against disclosure in summary trials are that it is not provided for under Act 30; that it would cause delays, expense and place a burden on overburdened prosecutors, in addition to concerns for maintaining national and state security. The question we pose is: "Does the expediency of prompt and less expensive trials in summary trials be more important than the liberty of the accused which is at stake to justify non-disclosure?"

Respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure its observance. The question of delay may soon become a thing of the past when e-filing becomes fully established in the administration of justice in Ghana.

With the consensus on the issue at the bar that an accused person in a summary trial is entitled to pretrial disclosures in accordance with article 19(2) (e), our task is therefore simplified.

What is 'Adequate Facilities'?

The matter for consideration then is what is '**adequate time and facilities'** which formed the basis of the conflictthat called for the reference.It is pertinent to restate article 19 (2) (e) and (g) that provides as follows:

> (2) *A person charged with a criminal offence shall -*
>
> *(e) be given **adequate time and facilities** for the preparation of his defence;*
>
> *(g) be afforded **facilities to examine**, in person or by his lawyer, the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution.*

The first counsel urged on us that the words contained in article **19 (2) (e) and (g**) are plain and therefore invited us to adopt "the true plain, ordinary and grammatical meaning of the words used". However giving the words 'adequate time and facilities' its plain,

ordinary and grammatical meaning does not give the true purpose and intent of the rights they are supposed to entail. For example, in **Black's Law Dictionary, [Ninth Edition]** the word 'adequate' is defined as 'legally sufficient' and 'facilities' or 'facility' is not defined. Its verb to'facilitate' is defined as (Criminal Law) to make the commission of a crime easier. In the **Oxford Advanced Learner's Dictionary 7th Edition** the word 'adequate' has been defined inter alia as: 'enough in quantity, good in quality for a purpose or need' and 'facilities' defined as, 'buildings, services, equipments etc that are provided for a particular purpose'. It is obvious from these illustrations that adopting the ordinary dictionary meanings of the words adequate facilities would not aid us.

We will therefore, as has been the practice and jurisprudence of this Court, rather choose the liberal, generous, benevolent or purposive approach. Accordingly in our context, **'facilities'** is to be understood as resources, or means, which makes it easier to achieve a purpose, an unimpeded opportunity of doing something, favourable conditions for the easier performance or doing of something, Its verb **'to facilitate'** means to render easy or easier the performance of doing something to attain a result, to promote, help forward, assist, aid or lesson the labour of one; to make less difficult; or to free from difficulty or impediment.

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.

In determining the nature of the disclosure to be made by the prosecution we bear in mind the principle that the Constitution is premised on openness, transparency and accountability and the spirit of equality before the law. Central to the principle of fair trial is the principle of equality of arms. A trial cannot be fair, just and balanced if the

prosecution is allowed to keep relevant materials to its chest and thereby hope to spring a surprise on the defence for purposes of securing a conviction. This would place the accused at a disadvantage in relation to the prosecution. Such a disadvantage in our view does not accord with the tenor and spirit of equality before the law as enshrined in the Constitution. The function of the prosecutor is a public duty and if we may refer to Rand J's observation in **Boucher v The Queen [1955] SCR 16 at pp 23-24:**

> *"It cannot be over-emphasized that the purpose of criminal prosecution is not to obtain conviction it is to lie before [the Court] what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of a prosecutor excludes any notion of winning or losing; his function is a matter of public duty…."*

Determining the scope and intent of article 19 (2) (e) and (g

We do not intend to engage in any abstract discussions as it may result or tend to blur the nature and scope of obligations in respect of protecting this right to fair trial; however we have to find out the true intent and purpose of***article 19 (2) (e) and (g.***

Interpretation involves determining the scope of constitutional provisions and discovering the intent of the framers of the Constitution. See **Republic v High Court (Commercial Division), Accra: Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Ors Interested Parties) [2011] 2 SCGLR 1183 at page 1191. "***This Court is not permitted in any way to give an interpretation which seeks to tamper in any way with the fundamental rights but rather to see that they are respected and enforced"* per Bamford Addo JSC in **New Patriotic Party v Inspector-General of Police [1993-94] GLR 459.**

So in order to make a meaningful and purposeful interpretation and to determine the scope of article 19 (2) (e) and (g) we propose a **five point discussion**: (1) Determine the material to be disclosed, (2) whether the duty to disclose is absolute, (3) timing, (4) whether there must be a formal request for disclosure and (5) the legal consequences flowing from failure to disclose. We take this approach as the precise way in which the fundamental duty of disclosure is construed by us, may have significant consequences for the operation of the system by the prosecutor, police, defence and even the courts.

1. **We must determine the materials to be disclosed**

What is needed here is a firm statement or rule which can in the first instance provide the police and prosecutors with a proper basis of judgment of what to disclose.Our Constitution, unlike some other countries, does not specifically provide for the kind of materials to be disclosed. We take note that, the Constitution of Kenya expressly makes provision for that in article 50 (2) (j) which provides:

> *"Every accused person has the right to a fair trial which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and have reasonable access to that evidence."*

The counsels for the accused persons advocate for comprehensive pretrial disclosure which should include a list of witnesses, summary of evidence, names of witnesses, documents and any other relevant material in the custody of the prosecution whether inculpatory or exculpatory. The DPP agrees in principle and not opposed to disclosure of relevant information reasonably necessary which she lists as follows, copies of the charge sheet, statement of facts, documents to be tendered at the trial, copy of an accused person's own statement and all of these are to be provided upon demand by the accused.

The words **'adequate facilities'** as used in our article19 (2) (e) is more or less a legal term commonly used in international conventions in relation to fair trial, Notable examples are found in article 6 of the **ECFF *supra*** and in article 14 of the **CCPR *supra*.**

'Adequate facilities' was clarified by the Human Rights Committee in General Comment No. 32[CCPR/C/GC 32, of 23 August 2007] on Article 14 'on theright to equality before courts and tribunals and to a fair trial;' in paragraphs 32 and 33 as follows:

> 32. "*Subparagraph 3(b) provides that accused persons must have adequate time and facilities for the preparation of their defence. This provision is an important element of the guarantee of a fair trial and the application of the equality of arms…*
>
> 33. '*Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that assist the defence (e.g. indications that confession was not voluntary)*"

Since our Chapter 12 of the Constitution is based on universal principles and conventions of human rights and freedoms, and as a State Party to CCPR it is legitimate for this Court to adopt and adapt the interpretation or clarifications made by the Human Rights Committee of the United Nations in General Comment No. 32. [CCPR/C/GC 32].Moreover, this meaning has been applied by jurists and law makers in other common law jurisdictions in constitutions, statutes and judicial pronouncements as illustrated in the host of authorities referred to us by all the counsels in the cases cited from South Africa, Kenya, Lesotho, Uganda, Botswana, UK, Canada etc. Some of these cases are **Lepoqo Seoehla Molapo v Director of Public Prosecution, High Court Of Lesotho (CRI/T/1/97)[1997] LSHC 52 (18June 1997), Edward X Louis v United Kingdom(2005) 40 EHRR 5993 R v. Ward [1993] 2 All ER 577 CA , R v, Stinchcombe [1991] 3SCR 326, Attorney-General v Ahmed 2003(1) BLR 154 (CA)** ; **Shabalala and five others v A-G of the Transvaal &Another, 1996 (1) SA 725 (CC)**, **Juma and Others v Attorney-General [2003] AHRLR , 179 (KeHC] 2003;** which are all of persuasive authority.

What is considered 'adequate facilities' is understood to mean the duty of the prosecution to disclose to the accused materials in his possession to enable the accused prepare his defence, examination of any witnesses called by the prosecution and securing witnesses to testify on his behalf. He should not be denied something the result of which denial will hamper his defence as it is one of the principles of fundamental justice to ensure that the innocent are not convicted.

From the foregoing we hold that, in order to meet the requirement of fair trial in criminal matters, it is the duty of the prosecution in both indictment and summary trials, to disclose to the defence, statements made to the police by persons who will or may not be called to testify as witnesses for the prosecution, as well as copies of exhibits and documents which are to be offered in evidence for the prosecution.The list of documents specified by the DPP in her brief would therefore not meet this requirement.

We reject submissions by the counsels for the accused persons that witness statements be summarised, as this would culminate in delays in summary trials. Experience has shown the Bar's preference for copies of original police witness statements when conducting cross-examinations. In order to avoid delays in summary trials, copies of witness statements should suffice and these materials may be filed at the Registry of the trial court for service on the accused.

We can at this point conveniently deal with **Question 3: Whether on a true and proper interpretation and construction of article 19(2) (e) (g) of the Constitution, an accused in a summary trial was entitled to full disclosure of documents in the possession of prosecution that would not even be tendered by the prosecution as exhibits before a trial court"**

With reference to Question 3 the answer is in the affirmative. Obviously the constitutional right of the accused person to adduce evidence in his defence cannot be exercised properly unless disclosure of material includes all the evidence which may assist the

accused even if the prosecution does not propose to adduce it. The accused person may discover potential witnesses from such disclosure.

The Scopeof Article19 (2) (g)

We proceed to determine the scope of Article19 (2) (g)that provides:

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

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

The Constitutional right of an accused person to be represented by a lawyer of his own choice [article 19 (2) (f)] would be meaningless if it did not mean informed representation. The right of an accused person to challenge witnesses called by the prosecution and to adduce evidence in his defence cannot be exercised properly unless he can determine form the statements and exhibits of the prosecution witnesses whether they are witnesses favourable to him. A fair hearing requires by its nature equality of arms and the absence of surprise, as it is the liberty of the individual which is at stake. None disclosure is a potent source of injustice; as an undisclosed item might have shifted the balance or open up a new line of defence.

In paragraph 39 of the General Comment 39 **supra**, 'facilities to examine' is explained to mean:

> *"Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective*

defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution."

It seems to us that the right of compelling the attendance of witnesses by the accused implies reciprocity of a disclosure by the accused to the prosecution of the names and addresses of his witnesses especially when an alibi is raised. This usually happens at committal proceedings under Act 30.This would enable subpoenas to be issued on his behalf. However the accused need not disclose the nature of the evidence the witness is to give.

2. Are there limits to the duty of disclosure?

Is article19 (2) (e) and (g) limited in its terms? What is the extent of the limitation, if any? We pose these questions as the accused's right to a fair trial ultimately takes precedence over any person's right to privacy. The right to fair trial under article 19 is unqualified whereas the right to privacy under article 18(1) is qualified under clause (2) by reference to the need to protect the right and freedom of others. In **Raphael Cubagee V Michael Yeboah Asare & Ors, Suit No J6/04/2017unreported dated 28 February 2018**, the Supreme Court in considering the scope of article 18 (1) observed through Pwamang JSC as follows: "The enforcement of human rights is not a one way street since no human right is absolute. There are other policy considerations that have to be taken into account when a court in the course of proceedings is called upon to enforce human rights by excluding evidence and that explains why more jurisdictions have now adopted the discretionary rule approach."

When appraising the conditions for the application of these provisions, it should be examined, whether the fundamental rights of the accused to disclosure, is subject/qualified by the preponderant general interest of rights and freedoms of others and the public interest as is provided under Article 12 (2):

"(2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter ***but subject to respect for the rights and freedoms of others and for the public interest".*** *[Emphasis supplied]*

This provision in our opinion is an explicit direction to the court to undertake a balancing exercise in the enforcement of the human rights provisions of the Constitution. We must therefore consider whether, the competing rights of others to immunity and privileges as well as public interest in respect of, state secrecy, and national security, when compared with the duty or right to disclosure, constitutes legitimate grounds for restriction of disclosure.

This Court recalls the case, **Civil and Local Government Staff Association of Ghana [CLOSAG] v The Attorney-General and 2 Ors, Suit No J1/16/2016 dated 14 June 2017, (unreported),** whereSophia Akuffo CJ said:

"Prima facie, constitutional rights and freedoms are to be enjoyed fully but subject to the limits which the Constitution itself places thereon, in the terms of Article 12(2). *However, in recognition of the fact that the enjoyment of political rights must be also governed by certain regulations and standards Article 21(3) makes room for 'laws and qualifications' so as to assure that, in the enjoyment of the fundamental freedom to form or join political parties, there will be order as well as proper service to the public good. This is an important aspect of good governance. Hence, in determining the validity of any statutory or other limitation placed on a constitutional right, the questions that need to be determined are:*

a. Is the limitation necessary? In other words is the limitation necessary for the enhancement of democracy and freedoms of all, is it for the public good?

b. Is the limitation proportional? Is the limitation over-broad such as to effectively nullify a particular right or freedom guaranteed by the constitution? [Emphasis supplied]

Guided by this learning, it is important for us to consider whether any limitation placed on the duty to disclose is proportionate and necessary for the public good.

Respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure its observance. However its enforcement is balanced against the legitimate interests of others as well as public interest as stated under article 12 (2). It is obvious that disclosure of some types of information has the potential to expose victims and witnesses to harm, intimidation or reprisals; and that a blanket disclosure of information and documents is indeed not realistic or practical because different stakeholders in the criminal justice system such as complainants, witnesses, informants, police intelligence and investigation, national security and public interest equally need protection.

In this context, it will suffice to say that .the right of the defence to disclosure is not unlimited as explained in paragraph 39 of the Human Rights Committee in their General Comment:

"It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.

…Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7 ***it is primarily for the domestic legislatures of States parties to determine the***

admissibility of evidence and how their courts assess it." [Emphasis supplied]

As said earlierthe obligation of the prosecution to disclose is not absolute. The prosecution must be able to retain discretion in this matter; which extends to the timing and manner of disclosures. In some situations, the absolute withholding of information relevant to the defence may be justified on the basis of relevance, admissibility, and witness protection or the existence of a legal privilege which excludes the information from disclosure. Statutory provisions under the **Evidence Act, 1975, (Act 323), the Whistleblowers Act, 2006 (Act 720)** and other relevant enactments are necessary for the enhancement of democracy and freedoms of all and for the public good and the prosecution has a duty to respect them. Consequently our view is that these limitations are not over-broad and would not nullify the particular right guaranteed by the constitution.

The discretion of the prosecution to withhold disclosure is however reviewable by the trial judge or magistrate and in appropriate cases by the Supreme Court in respect of public documents. See Article 135 (1) that provides:

> *"The Supreme Court shall have exclusive jurisdiction to determine whether an official document shall not be produced in court because its production or the disclosure of its contents will be prejudicial to the security of the State or will be injurious to the public interest".*

Counsel for the accused can initiate a review with respect to the exercise of discretion by the prosecution. On review the prosecution must justify its refusal to disclose.

3. We must consider timing

The word 'adequate' connotes the notion of reasonableness, so that on the true and proper meaning and application of this constitutional right we hold that disclosure should be made within such time and space so as to enable theaccused to prepare for the

commencement of proceedings. What counts as **"**adequate time**"** depends on the circumstances of each case such as the complexity of the case.

Since we do not have pre-trial in summary trials, we cannot give a definite time period within which the prosecution must serve the accused with the materials so this should be left to appropriate legislation to be initiated by the Law Reform Commission. However it is reasonable to require that the most opportune time for disclosure to be made in summary trial is after the accused has beencharged and put before court for his plea to be takenThis would assist the accused to know the strength and weaknesses of the prosecution case and to prepare his defence before the trial starts. Where the accused is not represented by counsel, it is the duty of the prosecution and or the court to advise him of this right to disclosure.

One of the major criticisms against disclosure is that it causes delay and overburdens the prosecution. We appreciate this concern, but if the prosecution voluntarily discloses materials to the accused, there would be fewer delays. In any event, the system of administration of criminal justice will benefit from early disclosures as it will foster the resolution of many cases without trial and promote reconciliation in cases where the offence does not amount to felony and not aggravated in degree as provided by **section 73 the Courts Act, 1993, (Act 459**). Disclosures may also lead to plea bargaining (**Section 239 of Act 30**) or a plea of guilty by the disclosure of a good case by the prosecution.

The obligation to disclose is a continuing one and disclosure must be done when additional information is received or come to the knowledge of the prosecution in the course of the trial,as was promised by the DPP at the trial court

. If counsel reasonably feels that the time for the preparation of the defence is insufficient, it is his duty to request the adjournment of the trial. There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.

3. Should there be a formal request for disclosure

The provisions under consideration are stated in mandatory terms and the prosecution is obliged to comply. It is therefore the duty of the prosecution to do disclosure voluntarily andit is to be made at all stages until the final judgment on appeal. The disclosure, whether in first instance or on appeal must take place "without undue delay."

5. We must determine the legal consequences flowing from the failure to disclose

Contrary to the submissions by counsels for the accused persons, failure to disclose should not automatically render the material inadmissible. Failure to disclose should only lead to an adjournment to enable the defence to study the material before it is tendered or given in evidence to enable the accused effectively answer and defend the evidence contained therein.

When an appellate court is called upon to review a failure to disclose, all the circumstances of the case would have to be taken into account to determine whether the failure to disclose such evidence resulted in an unfair trial.

We now turn to the last reference.

ISSUE 2 If the answer is yes, then at what point should prosecution make the disclosures available to the accused person in view of the fact that summary trial may commence within 48 hours upon arrest and charges being proffered against the accused.

The fact that a trial may commence within 48 hours does not alter the position that an accused person is entitled to full disclosure. Completion of investigation before proceeding with prosecution of a charge or charges is very much within the control of the prosecution. The prosecution by commencing the hearing of evidence in support of a charge against an accused person within 48 hours of arrest clearly demonstrates that it has completed

its investigation and thus would be obliged to provide copies of the necessary documents. On the other hand where investigations may still be on- going, the prosecution's brief will often not be complete and disclosure will be limited by this fact. There may also be situations in which early disclosure may impede completion of an investigation. The obligation to disclose is however a continuing one and disclosure must be completed when additional information is received in the course of the trial. In all such situations the prosecution has the discretion to determine the time and manner of disclosure.

CONCLUSION

In conclusion therefore, we answer the questions referred to us as follows:

On a proper and true interpretation of article 19 (2) (e) and (g), we hold that it is inherent in the right to a fair trial, of an accused person's right to be given adequate time and facilities for the preparation of his defence as well as facilities to examine in person or by his lawyer, the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses on the same condition as those applicable to witnesses called by the prosecution.

Consequently, we hold that to give meaning to this right to a fair trial, the accused person in a summary trial is entitled to be given or have access to copies of witnesses' statements, copies of documents and exhibits in the possession of the prosecution, including materials they do not intend to tender before a trial court.

The duty to disclose is to be made before the commencement of the trial or within a reasonable time in the course of the trial, before they are tendered as evidence in court by the prosecution.

The duty to disclose is not absolute; the prosecution has discretion to withhold material on grounds of relevance and privilege. The need to preserve the information must outweigh the need for disclosure in the interest of justice. This discretion is subject to review by the trial judge or magistrate and in the appropriate case by the Supreme Court

in accordance with Article 135. The duty to disclose is a continuing one and disclosure must be completed when additional information or material comes into the possession of the prosecution.

Failure to disclose a material before tendering it in evidence does not render the material inadmissible, but should result in an adjournment to enable the accused to study the evidence or material before it can be used by the prosecution.

Failure to disclose does not automatically nullify a trial. When the issue is raised on appeal, the court must consider whether such failure impaired the right of the accused to make a defence, which in turn depends on the nature of the information withheld and whether it might have affected the outcome or the failure has occasioned a miscarriage of justice under **section 31 of the Courts Act, 1993 (Act 459)**

Law Reform

This decision is yet another urgent call to the Law Reform Commission to overhaul Act 30 which is an earlier and subordinate legislation to bring it in line with the Constitution, the supreme law of the land. In view of the numerous clarification and interpretation of Constitution by this Court in contradiction with provisions of the said Act 30, there is the need for urgent reforms in the administration of criminal justice in the country. This call is urgent in view of the on-going reforms and restructuring of the Judiciary by way of case management, e-filing and electronic tracking of criminal cases. Rules of Civil Procedure have been exhaustively reformed in 2004, by the C.I. 47; an overhaul of Act 30 must follow suit in respect of trial on indictment and summary trials for it to be in compliance with the Constitution. Legislation on disclosure of information and documents will give a clear guide to all stakeholders and thereby reduce the number of unnecessary cases put on trial, and applications for disclosures as well as minimize delays and the miscarriage of justice.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

ATUGUBA, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

GODFRED YEBOAH-DAME, 1ST DEPUTY ATTORNEY-GENERAL, JOSEPH DINDIOK KPENKA, 2ND DEPUTY ATTORNEY-GENERAL, MRS YOUNNE ATTAKORA OBIOBISA, DIRECTOR OF PUBLIC PROSECUTION, MRS EVELYN KEELSON, CHIEF STATE ATTORNEY, MRS FRANCES MULLEN ANSAH, PRINCIPAL STATE ATTORNEY, MRS SAFAKOR BATSE, SENIOR STATE ATTORNEY, RICHARD GYAMBIBI, SENIOR STATE ATTORNEY AND MRS PENNINAH ANSAH DANQUAH, SENIOR STATE ATTORNEY FOR THE REPUBLIC.

THADDEUS SORY FOR THE 1ST ACCUSED WITH HIM THERESA TALATA KUNLIE AND ABU JUAN JAGIARRA.

SAMUEL CUDJOE FOR THE 3RD ACCUSED WITH HIM JOHNSON NORMESINU.

BAFFOE ASAASE GYIMAH FOR THE 4TH ACCUSED WITH HIM KODJO YANKSON AND GODWIN TAMAKLOE.

OSAFO BUABENG FOR THE 5TH ACCUSED WITH HIM REINDORF TWUMASI ANKRAH.