IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: WOOD (MRS.) CJ, (PRESIDING)
ADINYIRA (MRS.), JSC
DOTSE, JSC
BENIN, JSC
AKAMBA, JSC

CRIMINAL APPEAL
NO. J3/3/2012

11TH JUNE 2015

DODZIE SABBAH……….. APPELLANT

VRS

THE REPUBLIC ………... RESPONDENT

JUDGMENT

WOOD (MRS.) CJ,

Article 14(7) of the 1992 Constitution provides an extra layer of protection to personal liberty, consolidating the guaranteed fundamental human right to liberty enshrined in article 14 (1) of the 1992 Constitution. It states:

"Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted."

The full scope and effect of article 14 (7) has however never been subjected to judicial scrutiny since the coming into force of the 1992 Constitution. The dominant question in this appeal centres on the grounds on which an appellate court, other than the Supreme Court, may certify to the Supreme Court, pursuant to article 14 (7), that an individual who has served either the whole or part of his sentence, and is subsequently acquitted, be paid compensation.

Central to this broad question is the true and proper construction to be placed on the article 14(7). This appeal thus involves an examination of the jurisprudence on:

(a) the public law remedy available to an aggrieved person under article 14 (7) and;

(b)the principles governing the payment and assessment of compensation, against the State.

What are the key facts which triggered this appeal? In January 1993, the applicant and his brother were arrested and charged with the offences of conspiracy to murder and murder one Amegbor Amedorme. They were convicted on both charges and sentenced to death on August 7th, 2001. He however successfully appealed his convictions on both charges on grounds of jury misdirection.

Following his acquittal, on the 8th of July 2004, he applied, under article 14(7), to the Court of Appeal differently constituted, for certification to the Supreme Court

that he be paidC400,000,000(four hundred million old cedis) as compensation for the losses he claimed he had suffered during the period of his incarceration. In opposing the application the State, inter alia, contended via affidavit evidence that the appellant was:

"*…lawfully convicted and sentenced according to law after a fair trial where the Natural Justice rule was fully observed."* Furthermore that;

"*…the mere fact that he had been acquitted on appeal does not give him right to make any claim for compensation unless he can prove that his trial, conviction and sentence were incongruous with legality therefore his human rights have been infringed by his unlawful trial, conviction and sentence…"*

The court dismissed his application, reasoning inter alia that:

"*...Article 14(7) of the Constitution, 1992 was intended to cover situations where the State had mounted oppressive prosecution against an individual and without basis and just cause at all. It would also apply in situations where the State mounted a prosecution, which clearly sought to infringe on the basic fundamental human rights of the individual. It could also arise in situations where the charge, which was preferred, was unknown to the law or the court of trial had no jurisdiction at all. The constitutional provision under consideration appears to be an innovation in our democratic dispensation and for that matter there are no precedents to guide this court. In our respectful opinion, we think that when an application is brought under Article 14(7) of the Constitution, 1992, the whole circumstances of the case must be taken into consideration ……. the above constitutional provision which is under consideration, imposes a discretion on this court and any other court for that matter. Such discretion like any judicial discretion is properly exercised when all the circumstances is (sic) taken into*

consideration. In this case, we are of the opinion that as the applicant went through a proper trial which observed all the statutory procedure in a court of law established by this very constitution and his arrest and prosecution were all regular devoid of any abuse of the law and breach of any human rights of the applicant, we are of the view that this application ought to be refused. For to allow any applicant who claims to have been acquitted to resort to this constitutional provision for redress will certainly defeat the purpose of this provision."

The court premised this conclusion on the primary finding that:

"…the above constitutional provision, which is under consideration, imposes a discretion on this court and any other court for that matter. Such discretion like any judicial discretion is properly exercised when all the circumstances are taken into consideration."

The Appellant being dissatisfied with the decision has appealed to us on two grounds:

i. *"Failure by the Court to appreciate that the award of compensation as provided for under article 14(7) of the 1992 Constitution is not hedged with any antecedent conditions other than the simple acquittal of the Applicant, and that this is no doubt based on the inherent injustice of arresting and detaining a person on inadequate or non-existent legal grounds.*

ii Failure by the Appellate Court to appreciate that the fundamental abuse of the rights of the Applicant took place at the very moment of his arrest and detention in Ada WITHOUT CAUSE, and that all other processes, whether "proper" or not, were nugatory."

I was minded to think, from the appeal grounds and the arguments advanced in support thereof, that one narrow and determinative question, namely, whether or not under article 14 (7), the duty to issue a certificate to the Supreme Court recommending that a person acquitted be paid compensation is discretionary and not mandatory, would substantially dispose of this appeal.

But, the slow yet steady evolution of compensation claims under article 14 (7), - there is another claim under article 14 (7) pending in this court-, makes it imperative that we do not restrict ourselves to this narrow compass. I believe that this apex court, in its dual capacity as the constitutional court and a court of last resort, has a duty to examine the full scope and effect of article 14 (7), and clarify it, for our future guidance and that of other courts, the legal community, and indeed the citizenry. I am thus constrained to address all the significant primary and subsidiary issues that I think are pertinent to a fair and just resolution of this novel case.

The first key issue a real interpretative question relates to the true and proper construction to be placed on article 14 (7). I find this the proper approach, if we must find answers to the following crucial issues.

Firstly, under article 14(7), does the acquittal *per se*(by itself) of a person who has served the whole or part of his sentence automatically entitle that individual to recompense, for which reason an appellate court (other than the Supreme Court) which orders his acquittal, is under a constitutional obligation to certify to the Supreme Court that he be paid compensation?

Secondly, where the appellate court certifies to the Supreme Court that the acquitted person be paid compensation, is the Supreme Court bound by the reference and is thus mandatorily required to order compensation against the State?

Thirdly, if the power exercisable by the two courts is discretionary and not mandatory, what are the eligibility criteria, under article 14 (7) for certification, for ordering that compensation be paid and finally for assessing the quantum?

These questions, some of which are interrelated, arise inescapably from the established law covering the grounds on which a discretionary decision may be interfered with by an appellate court. Thus, a conclusion that their Lordships of the Court of Appeal exercised their discretion judicially would preclude us from disturbing their order of dismissal.

I start off my analyses, by reference to article 14 (7),the subject of this enquiry, which for ease of reference I again reproduce:

"*Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted*."

This appeal, as already noted, turns on these two grounds, namely:

i "Failure by the Court to appreciate that the award of compensation as provided for under article 14(7) of the 1992 Constitution is not hedged with any antecedent conditions other than the simple acquittal of the Applicant, and that this is no doubt based on the inherent injustice of arresting and detaining a person on inadequate or non-existent legal grounds.

ii Failure by the Appellate Court to appreciate that the fundamental abuse of the rights of the Applicant took place at the very moment of his arrest and detention in Ada WITHOUT CAUSE, and that all other processes, whether "proper" or not, were nugatory."

The Appellant's main complaint stems from their Lordships key finding that under article 14 (7), the duty imposed on an appellate court to certify to the Supreme Court that a person acquitted, and who has served either the full or part of his sentence be paid compensation is discretionary, and not mandatory.

Appellant Counsel argued that this primary finding, arose from their Lordship's failure to read the article 14 (7) in tandem with the mandatory article 12 (1) of the 1992 Constitution. He contended that had their Lordships adopted this approach, and literally construed article 14 (7), they would not have been misled into rationalising that the word *"may"* in article 14 (7) is "*permissive and discretionary*". Neither would they also have concluded that both certification and the payment of compensation, were subject to conditions, since the mandatory letter and spirit of article 12 (1), does not lend itself to that interpretation.

This argument thus presupposes that, a person, who has served either the whole or part of his sentence, is, on his acquittal, automatically entitled to compensation, for which reason, the court which acquitted himhas a mandatory duty to issue a certificate to that effect.

Counsel stoutly defended the mandatory certification and compensation argument by reference to s. 133 (1) of Criminal Justice Act 1988, of the United Kingdom. He argued that given the similarities between this law, which provides for the payment of compensation to persons "manifestly wronged by operation of law", and the article 14 (7),the court should have been guided by the persuasive force of the UK law to rule in appellant's favour.

The appeal ground2 derived from the court's other finding that:

"…as the applicant went through a proper trial which observed all statutory procedures in a court of law established by this very constitution and his arrest and prosecution were all devoid of any abuse of the law and breach of any human

rights of the applicant, we are of the view that this application ought to be refused."

Counsel challenged the validity of this finding and conclusion on the ground that under article 14 (7), the propriety or legality of thetrial process which culminated, albeit in the wrongful conviction, is wholly immaterial. Equating the broad principles governing claims for damages for the private wrong of unlawful imprisonment with compensation claims underarticle 14 (7), he submitted that the overriding consideration in both situations is the fact per se of the denial of liberty. Furthermore, he contended that since right from the initial stages, the Respondent was seized with facts which plainly showed that the appellant was not in any way linked to the crime, his arrest and subsequent trial was absolutely without cause and unlawful, and it mattered very little that the subsequent trial followed due process.

What were the arguments presented on behalf of the Respondent? Counsel's countered the argument that article 14 (7) imposed a mandatory duty on the two respective courtsby reference tos. 2 of the Interpretation Act, 2009, Act 792,wherein "*may*" is construed as "*permissive and empowering*" and urged we do not reverse the order of the court below, since on all the peculiar facts, the court acted judicially.

He dismissed the arguments related to the alleged similarities between article 14 (7) and the s.133 (1) of the Criminal Justice Act 1988, on the ground that the laws are dissimilar, as the pre-requisites for compensation payment under the UK law is altogether different from those that obtain under our Constitution. Also, that among other things, a distinction be drawn between acquittal on mere technical grounds, and acquittals based on "*some failure or fault in the prosecution's handling of the case*", or upon any of the grounds identified by the court below, as follows:

"*…where the State had mounted oppressive prosecution against an individual and without basis and just cause at all. It would also apply in situations where the State mounted a prosecution, which clearly sought to infringe on the basic fundamental human rights of the individual. It could also arise in situations where the charge, which was preferred, was unknown to the law or the court of trial had no jurisdiction at all.*"

He argued that while an acquittal on mere technical grounds would not earn an applicant a certificate for compensation, acquittals on substantial grounds would.

Finally, Counsel's answer to the contention that the acquittal was clear evidence of unlawful conviction and indeed a fundamental abuse of the applicant's rights was that the prosecution led evidence at the trial, which proved that it was the applicant who dealt the final death blow to the deceased, by slashing him with a cutlass when he attempted to get up. He argued that this singular act, coupled with the police power of arrest, completely invalidates the appellant's claim to compensation on grounds of his innocence.

The constitutional provision on the payment of compensation to a person who is acquitted on appeal, and who has served either the whole or part of his prison term, is not new in our constitutional development. Article 14(7) is thus not a novel provision. The Constitutional Commission that drafted the 1969 Constitution clearly saw the need for compensation for unlawful interference with the liberty of the individual and consequently proposed per Paragraph 204 of the 1968 Proposals:

"*We need not hasten to add that any person who is unlawfully arrested or detained by any other person or authority be he Government or otherwise should be entitled to compensation from that person or authority for the unlawful arrest or detention*."

Based on this, provisions such as article 15(6) ofthe 1969 Constitution which stipulated:

"*Where a person who has served the whole or part of his sentence is acquitted on appeal,*

(a) by a Court, other than the Supreme Court, the Court may certify to the Supreme Court that the person so acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the Court concerned, award such compensation as it may deem fit;

(b) *by the Supreme Court, it may order compensation to be paid to the person so acquitted*."

Article 21(7) of the 1979 Constitution was couched in the same language. Thus, there is no substantial difference between the articles 15(6) and 21(7) of the 1969 and 1979 Constitutions respectively on the one hand, and article 14(7) of the 1992 Constitution. The existing difference between the two sets is minor and inconsequential as it relates to form rather than substance, namely, the drafting style in relation to the paragraphs (a) and (b) of the two previous provisions. The substance and effect of all three provisions however, is the same.

It is however clear on the face of the article 14 (7), coupled with the strong divergent views expressed by the parties, that article 14(7) is not as clear and unambiguous as not to warrant this court's intervention. To the contrary, the issues raised call firstly, for a proper construction of article 14 (7), an exercise that should settle the central question of whether the power conferred on the Supreme Court, and appellate courts below it is mandatory or discretionary.

Should we conclude that the jurisdiction conferred is discretionary and not mandatory, the next question relates to factors which an appellate court as well as

the Supreme Court would consider when exercising its discretionary jurisdiction. Equally significant, what factors would the Supreme Court take into account in assessing the quantum of compensation following certification, which essentially is a recommendation, from the court below?

This court has, through a line of cases consistently held that a written constitution being suis generis in character, must never be subjected to the ordinary rules of statutory interpretation. In his concurring opinion in the Kuenyehia v Archer [1993-4] 2 GLR 525 at 561, Francois JSC, observed:

"Any attempt to construe the provisions of the Constitution 1992…must perforce start with an awareness that a constitutional instrument is a document suis generis to be interpreted according to principles suitable to its peculiar character and not necessarily according to the ordinary rules and presumptions of statutory interpretation."

Another cardinal rule of construction requires that the constitutional text under consideration must not only be broadly and liberally interpreted, but purposively construed as a whole, in the context of its own wording. Constitutional adjudication does not therefore admit of piecemeal and out –of-context mechanical interpretation of words in the written text.

Thus, Acquah JSC (as he then was) in National Media Commission v Attorney General [2000] SCGLR1, at 17, opined:

"In interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together to form a rational, internally consistent framework …"

The equally highly instructive opinion of Dr. Date- Bah JSC in the case of Asare v Attorney –General [2003-2004] SCGLR 823, is worth mentioning. The learned Justice stated:

"What I have stated above has been merely to emphasise what I consider the purposive approach to be more likely to achieve the ends of justice in most cases. It is a flexible approach which enables a judge to determine the meaning of a provision and the broader legislative policy underpinnings and purpose of the text. Judicial interpretation should never be mechanical."

When article 14 (7) is purposively construed in the light of these well settled constitutional principles, it is obvious that the word "*may*" ought to be construed as permissive and empowering, rather than mandatory or imperative. My conclusion, which affirms the position of the court below, has not so muchbeen influenced by the Interpretation Act, 2009, Act 792, as by a purposive reading of the provision, understood in the context of the entire article 14, and indeed other fundamental human rights and freedom provisions captured under Chapter 5 of the 1992 Constitution.

It is clear that at both judicial levels, that is the certifying court as well as Supreme Court, the whole tenor of article 14 (7), as could be judged from the consistent use of the word "*may*", is on the exercise of discretionary power. Thus, even where the court below has issued a certificate, the Supreme Court is not bound to accept the court's recommendation on its face value. The Supreme Court's decision to award or not to award compensation, as well as the quantum of compensation, involves the exercise of discretionary jurisdiction. And so along the judicial chain, the only mandatory duty imposed on both the court which issues the certificate and this honourable court is the duty to act judicially. Beyond this, a person acquitted by an appellate court, who has served the whole or part of his sentence is not automatically, by the acquittal per se, entitled to compensation and a fortiori, the

appellate court is not under a mandatory duty to issue a certificate to that effect. Similarly, the Supreme Court is not under a mandatory duty, on receipt of the certificate, to order compensation in favour of the acquitted person.

It is noteworthy that whereas the word used in article 14(7) is "*may*", elsewhere in various constitutional provisions the word "*shall*" has been copiously utilised. Interestingly, the mandatory *"shall"*, not *"may"* is the word used in article 14(5), which guarantees the payment of compensation to persons unlawfully arrested and detained, and is therefore akin to article 14(7), by virtue of them both being compensation schemes. Indeed, the Chapter 5 Fundamental Human Rights provisions, is the quintessential example of a deliberately profound use of "*shall*", demonstrating the framers linguistic capability to use the word *"shall"* as and whenever necessary, to denote the imposition of a mandatory duty.

Kludze JSC, in affirming another interpretative principle enunciated by the majority in the case of Attorney –General (No 2) v Tsatsu Tsikata (No 2) [2001-2002] SCGLR 620, subsequently observed, in the case of Republic v Fast Track High Court; Ex parte Daniel [2003-2004] SCGLR 364, that:

"*We cannot, under the cloak of constitutional interpretation rewrite the constitution of Ghana. Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the law give dislikes its terms or because we suppose that the law giver was mistaken or unwise. Our responsibility is greater when we interpret the constitution.*"

Admittedly, the use of the word "*shall*", in article 12 (1)imposes an obligation to observe all human rights provisions, but only as provided under the constitution, and not otherwise. Reading article 14 (7) alongside the mandatory article 12 (1) does not confer jurisdiction on any court to substitute "*shall*" with "*may*" in article 14 (7) in order to give it a meaning clearly different from what the framers

intended; an act which would have amounted to judicial legislation, not judicial interpretation.

Again, we cannot subordinate the article 14 (7), a constitutional provision with its specific use of the word *"may"*, to s. 133 (1) of the Criminal Justice Act, 1988 of the UK, as amended by s.175 of the Anti-Social Behaviour, Crime and Policing Act 2014, a differently worded express statutory provision of another jurisdiction, in which the word used is *"shall"*.

The rule that a constitution being sui generis must be construed in the light of its own wording and not on the basis of words found in any other constitution, let alone the statutory provisions of another jurisdiction, would not permit this.

Finally, another reason why Counsel's claim to automatic certification must fail is that, the article 14 (7) does not intend that this honourable court acts mechanically, and routinely rubber stamp certifications from appellate courts below it. To the contrary, in what I believe is intended to validate the certificate, which, in my view,is, for all practical purposes only recommends the payment of compensation, this court is obliged to act in a principled manner by examining all the facts of the case in question, including the certificate, to guarantee its sanctity. The court is required to do this before proceeding to assess the quantum of compensation.

If all that were required of the Supreme Court were a mere robotic acceptance of the certificate issued by the appellate court below it, what is the logic behind the duty implicitly imposed on the court by the article 14 (7), which I restate for purposes of clarity:

"…*the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit;…"* (emphasis supplied)

In any event, in cases in which the acquittal is at the instance of the Supreme Court, the Constitution nevertheless provides:

"...where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted."

The point is this: if even the Supreme Court has no mandatory power to automatically order compensation payment to persons it acquits, on what basis can it be argued, in the absence of express constitutional authority, that a court below it, entrusted with only a limited reference jurisdiction, is endued with any such mandatory authority.

In sum I conclude that, article 14 (7) is not a blanket provision for the award of compensation, since the jurisdiction conferred on the Supreme Court and an appellate court, which certifies, is discretionary. Similarly, the power exercisable by the Supreme Court, on receipt of a certificate issued by an appellate court, is not mandatory, but discretionary.

As rightly held by the court below, this discretionary power in its proper legal context, is discharged only when it is exercised judicially, that is fairly andnot arbitrarily, with due regard to relevant matters only and notthe extraneous.

I now transition into what undoubtedly is one of the most vexed questions in this appeal. The question is: what principled criteria would inform the appellate court's decision to certify to the Supreme Court that a person acquitted be paid compensation? Under article 14 (7), the criterion which poses little difficulty is the requirement that the victim must have spent the whole or part of his sentence. Admittedly, it raises another troubling question, though, namely, can a person convicted for the offence of murder, and who is sentenced to death by hanging, and serves time in prison, awaiting execution, and who is subsequently acquitted, be categorised as a person who has served the whole or part of his sentence, in terms of article 14 (7), and consequently qualified to apply for compensation?

I should think so given the philosophy underlying compensation awards and our desire not to defeat, but advance, the object and purpose of the article 14 (7).

Even though the individual was not sentenced to a specific term of imprisonment, it is plain that years spent under cruel prison conditions awaiting execution of the death sentence, is in the nature of imprisonment, and is obviously bound to have a devastating effect on him. A contrary answer is indefensible, given this court's outright rejection of the mechanical doctrinaire approach to constitutional construction, as expressed by Sowah JSC (as he then was), in the famous case of Tuffuor v Attorney-General [1980] GLR 637, at 647-648.

Next, having established the fact that an acquittal per se, is not sufficient to automatically entitle a person to a certificate, which grounds of acquittal would influence the appellate court's critical decision to certify that the acquitted person be paid compensation? As a sequel, what factors would inform the Supreme Court's endorsement of the certificate and entitlement to compensation? Finally, what factors would the Supreme Court take into account in assessing the quantum of compensation? .

This admits of no easy answers or categorisation. A written constitution by its very character is the basic legal framework around which laws, rules and regulations passed by the legislature, as well as case law; including judicial interpretations of the various provisions, are woven. This explains why the article 14 (7) is completely silent and provides no relevant criteria, grounds, factors, standards or guidelines, some of which may overlap, for both the appellate court and this court. I think the policy reason behind this derives also from the rule that a constitution being a living political document, must always be construed as such, leaving it with sufficient space to grow to respond to the needs of or meet the exigencies of any given time.

Article 14 (7) cannot thus be tied to a fixed set of inflexible criteria; we can only provide indices that, on a case by case basis, may guide courts in arriving at fair and just conclusions.

The factors may be deduced firstlyfromthe rationale underlying article 14 (7).In every human activity, errors, mistakes and blunders are bound to occur. Some are glaring or gross others minor. They may be genuine or reckless. Imperfections are the bane of all human institutions and systems, our criminal justice system not exempted. But, at the same time we cannot gloss over the unpardonable blunders that are sometimes committed and gross recklessness that are exhibited by individuals and institutions, leading to irretrievable losses. Blatant violations of the guaranteed rights and freedoms of ordinary citizens, particularly, personal liberty, are clear examples of the anomalies that persist in liberal democracies. While we must not feign ignorance of the resource and logistical constraints and other challenges faced by law enforcement agencies and criminal justice administration, it is equally true that weak institutions undermine our democracy. So, one distinctive way of placing a check on, deterring and curbing the abuse and misuse of investigative, prosecutorial and judicial authority or power is by holding individuals and institutions accountable for their actions. Hence provisions such as articles 14 (5) and 14(7) of the 1992 Constitution on the one hand, and 14 (1) of the Criminal and Other Offences (Procedure) Act, 1960, Act 30 on the other, and which provides for the payment of compensation, inter alia, for unlawful arrests, detention, and frivolous or vexatious charges. As the chief guardian of individual liberties and freedoms, responsibility thus lies on this court, to uphold and defend allthe accountability related constitutional provisions and other laws of this land. Indeed, the establishment of a compensation scheme as exists under article 14 (7), is not only fair and just, but will advance the rule of law.

Secondly, reference may be made to s.31 (1) of the courts Act, 1993, Act 459, which stipulates the various grounds on which appeals may be allowed, by determining each application for certification or compensation in the light of these stated grounds. It is noteworthy that the categories are not closed. The omnibus

ground in paragraph (c), namely, "and in any other case…" implies that apart from the specifically listed grounds, a court may, on other valid grounds, acquit.

The s. 31 of Act 459 provides:

"*Subject to subsection (2), an appellate court on hearing an appeal in a criminal case shall allow the appeal if the appellate court considers.*

(a) that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or

(b) that the judgment in question ought to be set aside as a wrong decision on a question of law or fact, or

(c) That there was a miscarriage of justice,

and in any other case shall dismiss the appeal".

From our jurisprudence, I think that the miscarriage of justice that may significantly impact an appellate court's decision to certify is that which may be classified as substantial, serious, grave or gross. Thus, in compensation claims, the nature of miscarriage of justice complained of, would certainly be an influencing factor.

Thirdly, since it is permissible to resort to international treaties and conventions as a tool for constitutional interpretation, (see the case of Adjei-Ampofo v Attorney - General [2003-2004]411 at (418)), grounds of acquittal which would influence an appellate court to certify compensation for a wrongly convicted person, is by reference to article 14 (6) of the International Covenant on Civil and Political Rights 1966 (ICCPR), (ratified by Ghana on 7th September 2000) a compensation scheme, which specifically details the substantive grounds on which compensation may be paid. It provides:

"*When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned <u>on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.</u>*"(Emphasis Supplied)

It is from these sources I have highlighted that I think that an appellate court may draw guidance on the relevant factors. A primary consideration for example would be whether or not the acquittal was based on mere technicalities or on substantial grounds t hat has led to a gross miscarriage of justice. Did the evidence clearly show that the applicant was completely innocent? Were the charges trumped up, and was the evidence led at the trial falsely procured, are all relevant matters a court may take into consideration.

The ICCRP pre-conditions would constitute sufficient grounds which an appellate court may consider when called upon to certify. The grounds are that:

a) new material or substantial fact has been discovered, that conclusively shows that the person has been wrongly convicted or there has been a miscarriage of justice, and

b) the evidence clearly shows that the non-disclosure of the unknown fact in time is wholly or partly not attributable to him.

Also, I would not; as a general rule dismiss as irrelevant, those instances- factors- which the court below thought would apply in applications under article 14(7).

These include whether or not the offence with which the person was charged was known to our criminal law, whether or not the State had used its excessive might and coercive powers "*to mount an oppressive prosecution against an individual and without basis and just cause*".

Now, this instant application was without the full record of proceedings; meaning the court below was without that relevant evidence that could well have led to an altogether different final conclusion.

In the rather terse affidavit accompanying the motion, the appellant made no reference whatsoever to the reasons for his acquittal. It is apparent that Counsel approached the case from the wrong legal proposition that a bare acquittal, without more, would automatically entitle an applicant to a certificate and compensation. On the respondent's part, the factual allegation, that it was the appellant who finally butchered the deceased to death, is a matter that ought to have been proved in the court below. But, contrary to the known rules of law and procedure, this allegation of fact was never proven. This bare allegation was only raised by the Counsel in his arguments. It must be emphasised that facts which parties intend to rely on either in support (proof) of or opposition (disproof) to applications under article 14 (7), need to be properly introduced via affidavit evidence, or face rejection on grounds of inadmissibility.

In any event, the alleged fact is incorrect as is clearly borne out by the substantive findings of this honourable court, which heard and determined the substantive appeal filed by the other accused, in the case titled In Re Matthew Sarbah v The Republic [2009] SCGLR 728. Their Lordships of this court expressed the factual findings in these terms:

"*There is no doubt that the deceased died of injuries which from the evidence of the second and third prosecution witnesses, were inflicted on him by the appellant. The appellant admitted both in his statement to the police and in his evidence at the trial that he killed the deceased.*"

This clearly means there was no scintilla of evidence to link the appellant to the charge of murder. As Appellant Counsel, rightly argued, there was absolutely no just, reasonable or probable cause for the arrest, subsequent prosecution and

conviction and sentence of the appellant. Indeed, Appellant Counsel's concession that as rightly held by the Court of Appeal, oppressive prosecutions or prosecutions mounted without any basis or just cause ought to entitle an applicant to certification, justifies a decision in favour of the appellant in these proceedings.

How this patent and material fact escaped both the prosecution and the trial court defies logic. Be that as it may, it leads to the undoubted conclusion that crucially, in exercising its discretion, the court below excluded this material fact, that the appellant was completely innocent of the charge. That it was a court of competent jurisdiction which conducted the trial in accord with due process is no valid answer to the charge of grave miscarriage of justice. There was a complete failure of justice which clearly merits redress under article 14 (7).

On the basis of the rule that an appeal is by way of re-hearing, and also, that in an appeal against the exercise of discretion, an appellate court may reverse a decision where material facts have either been ignored, overlooked or excluded from the court's consideration, I will substitute the proper order, and certify the appellant is entitled to be paid compensation.

This case, by its peculiar nature, raises an interesting mix of constitutional and other legal and procedural issues. Had the court below concluded as we have, that the appellant was entitled to be compensated; it would have certified and referred same to us for our consideration; which essentially is in the nature of a verification exercise. Our role appropriately, would have been to examine all the facts, including the certificate, which on its face must contain relevant facts justifying the certifying court's decision, to enable us affirm or disaffirm the recommendation, and then proceed to assess the quantum of compensation. Of course, the procedure is different where the acquittal is by this court.

In this instance, by reversing the order of dismissal by the court below, in effect, it is as if his acquittal were at the first instance of this court, while sitting as an appellate court on the substantive appeal against his conviction.

In view of this court's decision that he is entitled to a certificate, I do think that a formal certification to ourselves in this court, followed by a ritualistic re-examination of all the facts and the certificate yet again is unnecessary. I doubt whether the constitution intended any such rigmarole. And the reason is simply this. It was an examination of all the facts that indeed led to a reversal of the order of dismissal. A formal repeat of that exercise, in my view, would not serve any practical or useful purpose.

Our final constitutional obligation under article 14 (7), an unchartered area of constitutional adjudication, is to undertake the equally difficult task of assessing the appropriate quantum of compensatory award in this instant case. In this regard, I find most instructive the opinion expressed by Dr. Date – Bah JSC in the case of Awuni v West African Examinations Council SCGLR [2003-2004] 471, where this court had to assess damages arising, albeit from, the breach of article 23 1992 Constitution. The learned jurist observed:

"This measure of damage is easier to apply in the traditional private law of torts area, where a plaintiff's loss may consist of personal injury, damage to property, financial loss etc. it is much more difficult to apply where a plaintiff's loss is that of a constitutional right. What is the lever of monetary payment that can return him or her to the status quo ante. A similar difficulty has been found in trying to apply restitution n integrum to the non-pecuniary elements of personal injury compensation, such as pain and suffering. In such situations, what the courts may end up with is not true compensation but what Romer LJ described in Rushton v National Coal Board (1953) 493 at 502 as "notional or theoretical compensation to take the place of that which is not possible, namely, actual compensation.'

In effect, the damages that are awarded for breach of a constitutional right under chapter five of the Constitution in cases where no actual damage is proved are damages which are "at large" in the sense in which Lord Hailsham LC used this expression in Cassell & Co Ltd v Broome (1972) AC 1027 at 1073, HL where he said:

"The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit was be set in extent. It would be convenient if, as the appellants' counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in Rookes v Barnard (1964) AC 1129, 1221, when he defines the phrase as meaning all cases where "the award is not limited to the pecuniary loss that can be specifically proved." But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated".

The determinant factors must necessarily include all the indices I have already identified, including but not limited to, the gravity of the offence with which this appellant was charged, the period of incarceration, the stigma associated with the offence charged, the seriousness of the injustice meted out to the applicant coupled with the nature of the sentence imposed. We may also take into account the specific pecuniary and proved losses suffered as a result of the incarceration.

In this instant case, a completely innocent man was wrongly and unjustly convicted. Not only was the prosecution oppressive, as indeed there was not a scintilla of evidence to connect him to the grave charge of murder, but he was nevertheless convicted, sentenced to death by hanging, left to languish in condemned cells, with the death sentence hanging round his neck, until his eventual exoneration. To say that this must have caused him the most agonizing

mental torture and anguish, psychological pain and suffering is no exaggeration, not to mention the attendant loss of consortium, reputation, economic, social and financial losses following his arrest, wrongful conviction and sentence of death. He catalogued a number of pecuniary losses and prayed for a specific monetary sum, but failed to prove same, as he was required by law to do.

For policy reasons, and in order to minimize the floodgate effect and also protect the public purse, I would affirm the position adopted by our brothers in the Awuni case and advocate a rationally reasonable sum, a global sum, to compensate for this manifest injustice.

Taking these and other factors that my respected brethren in their respective opinions have identified, we have decided that the sum of GH¢35,000.00 (Thirty – Five Thousand Ghana Cedis) is adequate compensation on the given facts.

This finally leads me to a couple of procedural issues. Certification to the Supreme Court under article 14 (7) could beat the instance of the appellate court acting suo motu, or on an application brought by an acquitted person. It is prudent that such formal applications, be made timeously to the same court, on account of its first-hand in depth knowledge of the full facts and its nuances. Even so, the law requires all relevant documents to be promptly made available to the court hearing the application. This duty is greater in those cases where it is not feasible to place the application before the court which reversed the conviction. Be that as this may, the production of the full record of proceedings and other relevant documents, is a sine qua non, if an applicant must avoid losing the application.

(SGD) G. T. WOOD (MRS.)
(CHIEF JUSTICE)

SOPHIA ADINYIRA (Mrs.) JSC:

Your Ladyship and Lordships, oblige me to start my opinion with this prologue:

By Guaranteeing Compensation to the Wrongfully Convicted and Imprisoned, a State Can Take an Important Step towards Ensuring the Integrity of its Criminal Justice System

Introduction

Protection of personal liberty is a fundamental human right, therefore one of the few instances, where a person can be deprived of his personal liberty as permitted by law is in execution of a sentence or order of a court in respect of a criminal offence of which the person has been convicted.

No system is perfect, and it happens that some innocent persons are wrongfully convicted and imprisoned. Imprisonment of an innocent person as a result of an unjust conviction has been described as the most serious deprivation of individual liberty that a society may impose.

Causes of wrongful conviction are generally systematic in nature. Common systemic causes of wrongful conviction are incorrect informer/complainant evidence, incorrect or false eye witness identification, flawed forensic evidence, police or prosecutor misconduct, overzealousness to secure a conviction, incompetent or faulty legal representation, wrong direction of jury, and tainting of jury for example by corruption or even by media influence.

Causes of wrongful conviction may also be specific to individuals such as the desire to shield another person; or a mental problem that may lead an individual to make a false confession

The appeal before us is the first time that a claim for compensation for wrongful conviction and imprisonment has been raised for determination in the Supreme Court and turns on the interpretation of Article 14(7) of the 1992 Constitution; even though the said article is not a novel provision as

similar provision existed in article 15(6) and 21(7) of the 1969 and the 1979 Constitution respectively.

In this opinion, I will consider the right to compensation for wrongful imprisonment under the 1992 Constitution while making a comparison with the International Convention on Civil and Political Rights and the implementation of the concept in the US, Canada, UK and Australian jurisdictions as well as a purposive interpretation of Article 14(7) and then proffer some guidelines as I proceed.

The Facts of the Case

Dodzie Sabbah (appellant) and his brother Mathew Sabbah were arrested in January 1993 for conspiracy to commit murder and murder.

They spent 8 years in remand custody before their trial began in March 2001 at the Accra High Court. They were convicted and sentenced to death on 7 August 2001.

The appellant's conviction and sentence were reversed by the Court of Appeal on 20 January 2004. His brother, Mathew Sabbah's conviction and sentence for murder were undisturbed and subsequently affirmed by the Supreme Court on 29 July 2009. See **Sabbah v The Republic [2009] SCGLR 728**.

The appellant spent 2 years 7 months and some weeks on death row before his acquittal on 20 January 2004. On 15 June 2004, the appellant applied by way of a motion to the Court of Appeal praying that the court certifies payment of compensation to him as provided by article 14 (7) of the 1992 Constitution.

On 8 July 2004, the Court of Appeal refused the application holding:

> "We are of the opinion that the above constitutional provision [article 14(7)] which is under consideration imposes discretion on this court and any other court for that matter. Such discretion like any judicial discretion is properly exercised when all the circumstances is taken into consideration. In this case we are of the opinion that as the

applicant went through a proper trial which observed all the statutory procedure in a court of law established by this very constitution and his arrest and prosecution were all regular devoid of any abuse of the law and breach of any human rights of the applicant, we are of the view that this application ought to be refused. For to allow any applicant who claims to have been acquitted to resort to this constitutional provision for redress will certainly defeat the purpose of this provision."

The appellant being dissatisfied appealed to the Supreme Court.

Grounds of Appeal

1. Failure by the [Appellate] Court to appreciate that the award of compensation as provided for under article 14(7) of the 1992 Constitution is not hedged with any antecedent conditions other than the simple acquittal of the applicant and this is no doubt based on the injustice of arresting and detaining a person on inadequate or non-existing legal grounds.
2. Failure by the Appellate Court to appreciate that the fundamental abuse of the rights of the Applicant took place at the very moment of his arrest and detention at Ada without cause, and that all other processes, whether "proper" or not were nugatory. [Emphasis in script omitted]

First Ground of Appeal

Submissions by Parties

Counsel for the appellant submits that the Court of Appeal should have interpreted article 14 (7) literally without attempting to impose conditions. He submits further that:

> "It is difficult to know what inspired the Court to say the payment of compensation was discretional. Obviously the Court did not read article 14(7) in tandem with article 12(1) which says:
>
> > "The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive,

> Legislature and the Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution."

The mandatory spirit in this provision does not allow for the discretion that the Appellate Court refers to. Perhaps, it might have been deceived by the use of the word "may". However, the spirit and letter of Art 12 (1) is that the provisions on human rights must have been violated, and the violation vindicated by the Courts"

The Principal State Attorney for the Respondent, is on the other hand of the view that the quashing of a conviction does not of itself prove the innocence of that person, and that the mere quashing of a conviction should not be the basis of payment of compensation to a person. She submits that by the use of the word "may" in article 14(7); that provision imposes discretion on the court in the grant for an application for compensation.

Consideration

It is pertinent to set out Article 14 (7) which says:

> "Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court *may* certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court *may*; upon examination of all the facts and the certificate of the court concerned, award such compensation as it *may* think fit; or, where the acquittal is by the Supreme Court, it *may* order compensation to be paid to the person acquitted."[Emphasis mine]

It is not difficult to see that this provision does not suffer from obscurity and equivocation, as its core purpose is to award compensation for persons wrongfully convicted and sentenced to imprisonment. Counsel for both side invited us to compare article 14(7) with what exist in UK criminal law, section 133 (1) of the Criminal Justice Act 1988. I will therefore examine the concept of compensation for wrongful imprisonment in international

conventions and as implemented in other jurisdictions in comparison with that of Ghana.

Concept of Compensation for Wrongful Imprisonment

The concept for wrongful imprisonment is not designed to compensate a claimant for a tort actually committed by the state, but rather views the state as the most appropriate party to assume liability for an unjust conviction. A criminal prosecution is, after all, brought in the name of the "State," a conviction is for an act made criminal by state law and a convicted person generally is confined in a state correctional facility.

As the Commission promoting New York's statute for compensation for wrongful imprisonment expressed it, "By imposing financial liability upon the State recognition is given to a proposition that would seem to be self-evident, namely that it is the State's obligation, and no one else's, to do what justice and morality demand when an innocent person is convicted of a crime he did not commit".

International Convention

Article 14(6) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him." [Emphasis added]

Under this convention compensation is to be paid where the conviction has been reversed on the grounds that new or newly discovered fact has been discovered that conclusively show there is a miscarriage of justice, and that the non-disclosure of the unknown fact in time is wholly or partly not attributable to him.

Practice in Other Jurisdictions

States Parties to the **ICCPR** meet their obligations under article 14(6) in one or more of the following ways: incorporation of the article (or a rewording of the article) directly into domestic legislation to create a statutory right to compensation; conferring a dedicated discretion on an administrative or judicial body to determine whether awards of compensation should be paid; or utilizing the general power of domestic governments to make ex gratia payments.

The United Kingdom for example directly incorporated article 14 (6) into its domestic legislation under the **Criminal Justice Act 1988, Section 133**. By its provisions a wrongfully convicted person must make an application to the Secretary of State who determines applications for compensation on the criteria set out in Section 133(1) of the Criminal Justice Act 1988. Section 133 (1) has been amended by section 175 of the **Anti- Social Behaviour, Crime and Policing Act, 2014** by inserting another sub-section that: "for the purposes of subsection (1) there has been a miscarriage of justice in relation to a person convicted of a criminal offence…if and only if the new and newly discovered facts show beyond reasonable doubt that the person did not commit the offence."

In the US, Criminal Law is written and administered by the States, instead of the Federal Government. Thus, of the 50 States in the US, 28 States have adopted laws providing for compensation of persons wrongfully convicted and incarcerated.

As an example, Texas has adopted a wrongful imprisonment statute that allows compensation where a claimant (1) "has served in whole or in part a sentence in prison under the laws of this state," and (2) "has been granted relief on the basis of actual innocence for the crime for which the person was sentenced."Tex. Civ. Prac. & Rem. Code Ann. § 103.001(a).

Canada does not have legislation designed to implement the requirement under Article 14(6) of the International Covenant on Civil and Political Rights to provide compensation for victims of miscarriage of justice. In an attempt to discharge this mandate, Canadian federal and provincial

governments issued guidelines in 1988 to provide for compensation which require statements either from an appellate court or from the executive that granted a pardon to the effect that the person seeking compensation did not commit the crime.

In Australia, individuals wrongfully convicted and imprisoned do not have a common law or statutory right to compensation in any jurisdiction other than the Australian Capital Territory (ACT). However, a state or territory government may choose to make an *ex gratia* payment either on its own accord or as a result of a request by a party for such a payment.

In the above countries, redress is provided to innocent persons who prove that they were unjustly convicted. The courts or the executive body that determines the award have emphasized that judgments of acquittal in criminal trials do not constitute determinations of innocence, and a claimant bears the burden of proof to affirmatively establish innocence. In these countries a person who receives an executive pardon is also considered for compensation.

Position in Ghana- A Constitutional Human Right

In Ghana compensation for a wrongfully convicted person is a constitutional right enshrined in Chapter Five of the Constitution which guarantees fundamental human rights and freedoms. Article 14 (1) of the 1992 Constitution guarantees the personal liberty of a person, which he can only be deprived of in accordance with procedure permitted by law in execution of a sentence in respect of a criminal offence of which he has been convicted and other cases specified under article 14 (1) (a) to (g). For our purposes I will state only subsection 14 (1) and (a):

> "Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law_
>
> (a) In execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted;"

And where an individual is wrongfully convicted and imprisoned and upon acquittal by a court, he has a constitutional right to compensation. This right to compensation for wrongful conviction is guaranteed and protected by article 14 (7) and the award is determined by the Supreme Court; (and not at the High Court as with other human rights and freedoms in Chapter Five of the Constitution).

It can be seen from the above discussion that the only similarity in all countries including Ghana is payment of compensation resulting from wrongful conviction and sentence. Article 14 (7) differs from the Criminal Justice Act, 1988 of UK and legislations and guidelines in other jurisdiction on the requirements to be met by an applicant. The article does not require the applicant to go through another process to prove his innocence as pertains in other jurisdiction. Here in Ghana, the right to compensation does not extend to a person granted a Presidential pardon. It is only the Supreme Court that determines the award and not the Executive.

Interpretation of Article 14 (7)

Is Compensation for Wrongful Conviction and Imprisonment Mandatory?

The challenge here is the proper construction to be placed on the wording of article 14(7). The appellant invites us to adopt a literal interpretation leading to the conclusion that an acquittal *per se* on appeal of a person who has served the whole or part of his sentence, the Court of Appeal is mandatorily required to certify to the Supreme Court that an award of compensation be made to the person.

Though this Supreme Court has not ruled out other techniques of interpretation, it has certainly departed from the mechanistic approach to a purposeful literal approach in the interpretation and enforcement of the Constitution. For example Dr. Date-Bah JSC in **Danso-Acheampong v Attorney-General [2009] SCGLR 353** at 358 said:

> "These days, a literal approach to statutory and constitutional interpretation is not recommended. Whilst a literal interpretation of a particular provision may, in its context, be the right one, a literal approach is always a flawed one, since even common sense suggests

> that a plain meaning of interpretation of an enactment needs to be checked against the purpose of the enactment, if such can be ascertained. A literal approach is one that ignores the purpose of the provision and relies exclusively on the alleged plain meaning of the enactment in question."

For purposes of clarity I will reproduce article 14 (7) which states:

> "Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may; upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted."

The word "may" appear in all the enabling parts of article 14 (7). Section 42 of the Interpretation Act, 2009, Act 792, defines "may" as follows: 'In an enactment the expression "may" shall be construed as permissive and empowering and the expression "shall" as imperative and mandatory.' Looking at the context in which it is used in article 14 (7) it means 'permitted to'. It therefore gives the appellate court the discretion to act or not. Thus where an appellate court has acquitted a person, it has discretion to issue a certificate to the Supreme Court to award compensation, where that person has served the whole or part of his sentence. Likewise the Supreme Court upon receipt of the certificate does not automatically make an award but is required to consider all the facts and the certificate and award such compensation as it may think fit. Where the Court was exercising it appellate jurisdiction it may order compensation which is also discretionary.

It is not the intention of the drafters of the Constitution that the award of compensation under the said article to be automatic upon acquittal per se, otherwise it would have used the word 'shall' as was done in all the other clauses under article 14 and other articles in Chapter Five on fundamental human rights and freedoms. Even by Article 14 (6) of the **International**

Covenant on Civil and Political Rights, 1966 (ICCPR) cited and quoted **supra** which we invariably adapted in our 1969, 1979 and 1992 Constitutions respectively, a person is not automatically entitled to compensation upon his mere acquittal; compensation is paid where the conviction has been reversed on the grounds that new or newly discovered fact has been discovered that conclusively show there is a miscarriage of justice, and that the non-disclosure of the unknown fact in time is wholly or partly not attributable to him. Thus the award of compensation for wrongful conviction and imprisonment is discretionary and not mandatory.

Accordingly, using a purposeful approach, I will hold that upon a proper construction, article 14 (7) confers a right to compensation for wrongful conviction and imprisonment, and it at the same time confers a discretion on both the appellate court and the Supreme Court to determine upon examination of all the facts, whether award of compensation should be paid. It is the Supreme Court that considers the quantum of the award. Appellate court includes the High Court when it exercises its appellate jurisdiction on criminal matters emanating from the Circuit and Magistrate courts. **See article 140 and section 15 (1) (b) and (c)** of the **Courts Act, 1993, Act 459.**

The courts in the exercise of their judicial discretion must act judiciously within the limits set in the article 14(7) itself; and also in accordance with the guidelines provided in article 296 that:

> "Where in this Constitution or in any other law discretionary power is vested in any person or authority_
>
> a) that discretionary authority shall be deemed to imply a duty to be fair and candid;
> b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; ...

Procedure for Enforcement

Unlike article 14(6) of the ICCPR or what pertains in some states in the USA, UK, Canada and Australia, there is no requirement in Ghana for a de novo determination of innocence or miscarriage of justice based on a new or newly discovered fact before compensation can be considered. After all, article 14 (7) empowers the appellate court to recommend an award to the wrongfully convicted person where it considers appropriate. Article 12 (1) imposes an obligation on the courts to enforce human right and freedom provisions as enshrined under Chapter Five of the Constitution. Article 12 (1) states:

> "The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and the Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution."

Furthermore, by the wording of Article 14 (7) it is the appellate court that heard the appeal and acquitted the person that is fully seized with all the facts of the case and has the record of the entire process leading to the wrongful conviction which in my view can properly consider whether the person should be compensated and then to issue a certificate to the Supreme Court to make an award.

It is also the duty of counsel for the appellant to prompt the court that heard the appeal to exercise its discretion to issue a certificate. Where the appellate court fails to consider article 14(7), the applicant may first apply to the same court to claim compensation and if it is refused then follow up with an appeal to the Supreme Court as has been done before us.

Similarly where the acquittal is by the Supreme Court, the Court is likewise obliged to make an award suo moto or when prompted. A refusal by the Supreme Court in this respect is subject to review.

Upon a receipt of the certificate the Supreme Court is required to examine all the facts and the certificate of the court concerned before deciding whether to award any compensation it deems fit. The word 'examine' used in this context ordinarily means to consider or study something carefully or in more detail. Chambers 21st Century Dictionary, Revised Edition defines 'examine as:' to inspect, consider or look into something clearly.' Thus by the use of the words 'examine all the facts and the certificate', the Supreme Court is required to scrutinize in detail all the facts and certificate issued by the appellate court. To enable the Supreme Court to carry out this task, at least the judgment of the Court of Appeal should accompany the certificate and at best the appeal record be added.

In addition, when the Supreme Court embarks on its assigned task to examine all the facts of the case and the certificate issued by the appellate court, it would be prudent and helpful for the Court to examine whether the acquittal was not based on any technicality or procedural error but on **section 31** of the **Courts Act, 1993, Act 459,** which sets out three grounds on which an appellate court **shall** allow an appeal in a criminal case on any of them. The section provides:

"31. **Appeal allowed on substantial miscarriage of justice**

(1) Subject to subsection (2), an appellate court on hearing an appeal in a criminal case shall allow the appeal if the appellate court considers

(a) that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or

(b) that the judgment in question ought to be set aside as a wrong decision on a question law or fact, or

(c) that there was a miscarriage of justice,

and in any other case shall dismiss the appeal.

(2) The appellate court shall dismiss the appeal if it considers that a substantial miscarriage of justice has not actually occurred or

> that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted on that charge or indictment."

It is my considered opinion that if an appellate court acquits a person on any of the grounds specified in section 31 (1), and the person has served the whole or part of his sentence then there is no question that the person was wrongly deprived of his personal liberty and therefore deserves to be considered for compensation by the court. However as indicated earlier the decision to make an award is discretionary and not automatic or mandatory, and it depends on the circumstances of each case.

The part of the decision of the Court of appeal that the award of compensation is not automatic but discretionary is affirmed

Following the above, I will dismiss the appeal on the first ground.

Second Ground of Appeal

Counsel for the appellant submits that the appellant was completely innocent of the charge of murder and his acquittal by the Court of Appeal raised the presumption of the unlawfulness of his conviction, and that his arrest and detention by the Ada police was without cause and as such all other process were unlawful. He submits further that if the Court of Appeal has considered what happened to the appellant goes to the very root of a person's dignity and liberty, they might have come to a different conclusion

The Senior State Attorney submits that from the facts of the case the appellant was not innocent and his arrest and detention and trial and conviction were therefore not illegal or unlawful. There was lawful justification for the restraint on his movements and he is therefore not entitled to compensation.

The issues that arise from the submissions of parties may be summarized as follows: What factors did the Court of Appeal take into consideration in

exercising its discretion? Was the Court justified in refusing the application?

The Court of Appeal in considering the merit of the application said:

> "As a constitutional provision has been the basis of this application, this court will proceed to consider the merits of the application. As said earlier, the applicant was arrested and put before a court of competent jurisdiction established by the constitution for committal proceedings before he was arraigned before a High Court constituted by a Judge and jury on charges of murder and conspiracy to commit murder, which are offences known to our criminal jurisprudence. He was convicted at the High Court only to be acquitted on grounds of misdirection by the trial judge.
>
> We are of the opinion that Article 14 (7) of the Constitution, 1992 was intended to cover situations where the State had mounted oppressive prosecution against an individual and without basis and just cause at all. It would apply in situations where the State mounted a prosecution, which clearly sought to infringe on the basic fundamental human rights of the individual. It could also arise in situations where the charge, which was preferred, was unknown to the law or the court of trial had no jurisdiction at all."

It is obvious from the above that the Court of Appeal took the view that the process that the appellant went through from the time of his arrest and to his prosecution, conviction and sentence was regular and properly done only to be acquitted on grounds of misdirection by the trial judge; and consequently he did not merit to be paid compensation.

This position of the Court of Appeal can be gathered from its conclusion in these words:

> "We are of the opinion that the above constitutional provision [article 14(7)] which is under consideration imposes discretion on this court and any other court for that matter. Such discretion like any judicial discretion is properly exercised when all the circumstances is taken into consideration. In this case we are of the opinion that as the

applicant went through a proper trial which observed all the statutory procedure in a court of law established by this very constitution and his arrest and prosecution were all regular devoid of any abuse of the law and breach of any human rights of the applicant, we are of the view that this application ought to be refused. For to allow any applicant who claims to have been acquitted to resort to this constitutional provision for redress will certainly defeat the purpose of this provision.

The application is accordingly dismissed."

With due respect to the learned justices of appeal, it seems to me that by considering only the regularity of the processes from the time of the arrest of the appellant to his remand in custody, through the period of prosecution to sentence, their lordships took a rather narrow approach, though these matters were relevant. The core purpose of article 14 (7) is to compensate innocent people who have been unjustly convicted and imprisoned; it is therefore my candid view that the threshold question their lordship should also have considered is whether the grounds for overturning the conviction rested upon facts and circumstances probative for the proposition that the appellant did not commit the crime especially when it was a differently constituted panel that handled the appeal. Then if the appellant's conviction was reversed for reasons other than his innocence then their lordships justifiably declined to issue a certificate to the Supreme Court to make an award.

I hasten to add that the learned justices of appeal not being the panel that acquitted the appellant were disabled from taking a more liberal and purposive approach due to the absence of the appeal record before them and also misled by the facts of the case as deposed to in the affidavits before them.

It is therefore recommended that in future as much as practicable such an application should be placed before the same panel that heard the appeal.

In the present case was there evidence to establish that the appellant conspired with his brother to commit murder and did murder Amegbor

Amedorme, the deceased? Or is the appellant innocent and therefore wrongfully convicted and sentenced to death?

The Court of Appeal in its judgment narrated the facts of case as:

> "To appreciate the basis of the ruling a brief summary of the facts culminating in this application will be necessary. The applicant and one Matthew Kwame Sabbah were arraigned before a High Court, Accra before a jury and charged with two counts of conspiracy to commit murder contrary to Section 23(1) of Act 29 of 1960 and murder, contrary to section 46 of the same Code. The facts which could be gleaned from a copy of the judgment of this court which was annexed to the application shows that on 21-1-93, one Amegbor Amedorme took two persons with him to inspect some palm trees he intended selling them to the two persons. One [sic] returning from the farm Amegbor who was leading them was suddenly attacked by the said Matthew Kwame Sabbah with a cutlass resulting in his death. The other two persons managed to escape but severe cutlass wounds were inflicted on another person in the company of the deceased.
>
> According to the eyewitness account, the applicant also slashed the deceased with a cutlass when the deceased had attempted to get up. As said earlier; the applicant and the said Matthew Kwame Sabbah were arraigned before the High Court and tried by a jury. They were both convicted on all the counts and were sentenced to death.
>
> The applicant lodged an appeal against his conviction to this court and it appears that on 20-1-2004, this court quashed the convictions of the applicant and dismissed the appeal of Matthew Kwame Sabbah. This application has been brought by the applicant to pray this court to certify to the Supreme Court for payment of compensation under the 1992 Constitution."

Similarly, the Principal State Attorney in her statement of case said:

> "Counsel also says that the Appellant should not have been arrested as all. My lord we disagree with counsel. It can be seen from the facts of the case as set out in the ruling of the Court of Appeal that the

> Appellant herein according to eye-witness account also slashed the deceased with a cutlass when the deceased attempted to get up after the deceased had been slashed earlier on by Matthew Kwame Sabbah. My lords, it was based on this that the Appellant was charged together with Matthew Kwame Sabbah with the offences of Conspiracy to commit murder, and Murder. Indeed it was based on this allegation that the Appellant was arrested in the first place. It was therefore not [sic] illegal nor unlawful for the Ada Police to have arrested and detained the appellant for investigations which eventually led to his trial and conviction."

The above narration by the Court of Appeal and the Chief State Attorney that : "***the Appellant herein according to eye-witness account also slashed the deceased with a cutlass when the deceased attempted to get up after the deceased had been slashed earlier on by Matthew Kwame Sabbah***;" is incorrect. This statement of facts is clearly in contradiction with the evidence upon which the Supreme Court rejected the plea of self-defence and provocation made by Mathew Kwame Sabbah in his appeal which is reported as **Sabbah v The Republic [2009] SCGLR 728**.

For clarity I refer to excerpts from the head notes and judgment at pages 730 and 738 respectively of the law report.

Head notes at page 730 of **Sabbah** *supra:*

> "The Supreme Court found, on the evidence, supported by the evidence of the specialist pathologist, that the deceased had died from multiple injuries inflicted on him by the appellant [Mathew Sabbah]. And in his statement to the police, [Mathew Sabbah] said he had gone to a land belonging to his family; and that whilst standing behind a palm tree looking for ripe palm fruits to harvest, he saw the deceased and the two prosecution witnesses coming towards him. He said the deceased, who was holding a cutlass and leading the other two, attacked him and cut him on the left hand wrist and left knee. In his evidence in court, [Mathew Sabbah] said all three pounced on him and in the process of brandishing his cutlass to ward off the combined

attack, the deceased sustained a cut on the neck and fell down whilst the other two attackers took to their heels.

The Supreme Court found that the evidence before the trial court raised the alternative defences of provocation and self-defence. The Supreme Court also found that [Mathew Sabbah] had inflicted multiple injuries on the deceased at the time when the appellant's life was apparently no longer in danger with his main assailant on the ground and the two assailants fleeing in a canoe."

At page 738, the Supreme Court in the course of the judgment which I wrote said:

"Looking at his evidence the impression [Mathew Sabbah] gave at the trial was that he had struck the deceased only one blow on the neck which almost decapitated him. In contrast we have the evidence of the second and third prosecution witnesses which showed that after the deceased had fallen down and they fled [Mathew Sabbah] more or less chased them but they escaped. And according to second prosecution witness, [Mathew Sabbah] went back and inflicted more cutlass wounds on the deceased who was still on the ground. The autopsy or post mortem report as well as the evidence of the specialist pathologist indicated that [Mathew Sabbah] inflicted multiple wound on the left shoulder, left side of upper neck, and left side of jaw through angle of mouth with partial amputation of right ear of the deceased. These injuries, in our opinion, are consistent with the evidence of the second prosecution witness that [Mathew Sabbah] slashed the deceased several times after the initial attack. These injuries were inflicted on the deceased at a time when obviously [Mathew Sabbah's] life was no longer in danger with his main assailant on the ground and the other two had fled in a canoe. It is therefore our considered opinion that the harm inflicted on the deceased could not be said to be said to be reasonable in the circumstances.

The plea of self-defence accordingly fails."

The above excerpts from the ***Sabbah case*** show the appellant was innocent and was not at the scene when Mathew Sabbah committed the offence and none of the eyewitnesses said he was present. The excerpts amply demonstrate the glaring misrepresentation or mistakes in the facts narrated by the Court of Appeal and the Principal State Attorney. There was no iota of evidence to support the charges and conviction and sentence that were slapped on the appellant. There was no evidence suggestive of any conspiracy with his brother Mathew Sabbah to commit murder. It is therefore not surprising that the appellant was acquitted by the Court of Appeal for misdirection by the High Court for non-direction of the jury to acquit the appellant for lack of evidence against him.

The appellant was completely innocent and therefore wrongly convicted and sentenced to death by the High Court. Upon the facts it is my candid view that had the Court of Appeal been properly apprised of the facts, it may not have dismissed the application as the arrest, detention of the appellant by the Ada Police, and his subsequent trial and conviction was without any reasonable and probable cause and was wrongful.

Counsel for the appellant shares the blame for not making available sufficient material to support the application. The wrong recanting of the facts invariably led to the wrong conviction of the appellant in the first place by the High Court and a rejection of his application for compensation by the Court of Appeal. Without mincing words this attitude borders on dereliction of duty by counsel.

Some wrongful convictions can be linked to bad 'lawyering' by defence counsel; but this problem can be controlled by the oversight of the courts and better funding of the legal aid program for poor defendants relying on court appointed lawyers.

This case is a clear example of a systemic cause of wrongful conviction due to lapses in the investigation, prosecution and by the trial court that had oversight over the case. The appellant's human right to his personal freedom was trampled upon and callously abused for no just cause.

Consequently, I hold that the appellant's arrest and detention was unlawful and unjustified in any way as he was innocent; and his trial, conviction and sentence was wrongful and is therefore entitled to be considered for compensation under article 14(7).

I will allow the appeal on this ground

Compensation for Wrongful Conviction and Imprisonment

When an innocent person has had his life stripped from him only to endure the horror of imprisonment, justice demands that upon his acquittal, the individual be compensated for the harm suffered. This is because, in spite of their proven innocence, the difficulty of reentering society is profound for the wrongfully convicted. With a criminal record that is rarely cleared despite innocence, the punishment lingers long after innocence has been proven. The agony of prison life and the complete loss of freedom are only compounded by the feelings of what might have been, but for the wrongful conviction. Society has an obligation to promptly provide compassionate assistance to the wrongfully convicted, to restore their lives. By guaranteeing compensation to the wrongfully convicted, a state can take an important step towards ensuring the integrity of its criminal justice system.

No guidelines were provided in the constitution for determination of compensation amounts. The Supreme Court is therefore at liberty to use its discretion in accordance with due process of law. Looking at practices elsewhere in the USA for example, courts in Ohio[1], New York[2] and Illinois[3]

[1] Fay v. State, 62 Ohio Misc. 2d 640, 610 N.E.2d 622 (Ct. Cl. 1988)

An Ohio court of claims held that a claimant who qualified as a wrongfully imprisoned individual was entitled to compensation, lost income, and attorney's fees. The plaintiff's conviction for aggravated murder and sentence of life imprisonment were reversed after new evidence led to other suspects who had committed the crime. The court found the plaintiff to qualify as a wrongfully imprisoned person and awarded him, pursuant to the statutory formula, a total sum of almost $130,000.

[2] Kotler v. State, 255 A.D.2d 429, 680 N.Y.S.2d 586 (2d Dep't 1998)

A New York appeals court affirmed an order granting damages to a wrongfully imprisoned claimant pursuant to N.Y. Ct. Cl. Act § 8-b. The court below had awarded the claimant the sum of $1.51 million, which the State appealed, and the claimant cross-appealed because the award failed to include future lost earnings and limited his past lost earnings. The claimant had been incarcerated for more than 10 years as

the amount of damages is determined in accordance with traditional tort and other common-law principles. Compensation may be provided for such damages as: lost wages, physical or mental problems caused by the incarceration, and non-pecuniary losses including the pain and suffering that inevitably arise from fear, lack of privacy, loss of freedom, separation from family, humiliation, interference with personal relationships, and damage to reputation and legal fees.

In Australia where ex gratia payment is made, factors such as long duration of imprisonment and the presence of negligence or malice of government officials would generally seem to increase both the likelihood and the size of an ex gratia payment. Factors that may lower the chances and/or size of an ex gratia payment are the presence of either prior criminality generally, or lesser criminal culpability in relation to the conduct surrounding wrongful conviction, although these factors are not rigidly adhered to.

Although the practice in other jurisdiction may be persuasive and help shape our thinking, I am of the view that a formulaic approach to compensation would be inappropriate given the variations between each individual's circumstances and the cause of imprisonment of other cases and levels of sentences that might come before us.

Coming back to our own jurisdiction, I refer to the case of **Awuni v West African Examinations Council [2003-2004] SCGLR 471 at 576**

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a result of a wrongful conviction for two counts of rape in the first degree. Based on the results of DNA testing, his conviction was vacated, and he brought this action for wrongful imprisonment under the statute. The State had contended that the DNA sample was contaminated but the court below rejected that contention and determined that the claimant met his burden of proving his innocence by clear and convincing evidence. Finding no error in the award of damages, the court affirmed.

[3] Dillard v. State of Ill., 31 Ill. Ct. Cl. 424, 1976 WL 19422 (Ill. Ct. Cl. 1976)

The Illinois court of appeals applied the statutory formula for damages to award a qualifying claimant compensation for wrongful imprisonment… finding him qualified for compensation under the statute, the court noted his previous employment and earnings. Noting that the wrongful conviction statute provided that awards may be granted for unjust imprisonment of five years or less for not more than $15,000, and with no discussion of the matter other than to state the facts, the court awarded the claimant $9,000 in damages.

where Dr. Date-Bah JSC had this to say on the principle involved in measuring damages arising from a breach of aricle23:

> The basic principle that the common law courts have applied for the measure of damages in the private law of tort (and indeed the law of contract) is that of restitutio in integrum. Lord Scarman expressed this principle thus in **Lim v Camden Health Authority [1980] AC 174 at 187:**
>
> > "…the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong."
>
> This measure of damages is easier to apply in the traditional private law of tort area, where a plaintiff's loss may consist of personal injury, damage to property, financial loss etc. It is much more difficult to apply where a plaintiff's loss is that of a constitutional right. What is the level of monetary payment that can return him to or her to the status quo ante?"

Dr Date-Bah ended up by reaching the conclusion that:

> "In effect the damages that are awarded for breach of a constitutional right under Chapter Five of the Constitution in cases where no actual damage is proved are damages which are 'at large' in the sense that Lord Halsham LC used this expression in Cassell & Co Ltd v Broome [1972] AC 1027 at 1073,Hl where he said:
>
> > "The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings…pain and suffering or loss of amenity."

In effect the nature of damages our courts have been awarding are either specific damages where actual pecuniary loss is or has to be proved and general damages which are considered to be at large and depends on the discretion of the court, the calculation of which is based on the facts and circumstances of the case and the quantum should not unreasonable or

irrational. From the references made from other jurisdictions, the same basic principles are used in awarding damages.

In our current case, the appellant was given the death penalty. The death penalty is the ultimate sentence in criminal sentencing. It is retaliatory, cruel, harsh, inhuman and irreversible when executed. Many countries have abolished capital punishment and it is a raging debate in this country whether it should be abolished.

Undoubtedly, anyone with a death penalty on his head would suffer some mental anguish and anxiety. In the circumstances of where a person is acquitted of a murder conviction, the likelihood of the award being substantial should be higher.

The appellant who was on a death row for 2 years, seven months and some weeks and before his trial has been on remand for 8 years; has not provided any evidence to aid us to determine compensation to fit his situation. But that should not swerve this Court away from making an award commensurate to the abuse of his human right to his personal liberty. It is just and equitable to make a reasonable award taking into account the years that he spent on remand before his trial for an offence he did not commit, the loss of liberty, mental anguish and anxiety, shame and degradation and despair the appellant suffered while on death row in prison as a result of wrongful conviction and imprisonment. These are all non-pecuniary losses suffered where in consequence no precise limit can be set in extent.

What I will like to stress is that an award for wrongful conviction and imprisonment should not be punitive or exemplary. It should also not be a mere pittance as that would add insult to injury. The Supreme Court should balance its obligation to be fair and just with its responsibility to ensure that the state is not burdened with enormous monetary liability.

In conclusion, the appellant is entitled to substantial damages for the fundamental breach of his human rights to personal liberty.

I will also allow the appeal.

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

DOTSE JSC:

Article 14 (7) of the Constitution 1992 provides as follows:-

> *"Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may,* ***upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit;*** *or, where the acquittal is by the Supreme Court,* ***it may order compensation to be paid to the person acquitted."****Emphasis*

The above constitutional provision is central and key to the issues that fall to be decided in this appeal.

UNDISPUTED FACTS OF THE CASE

This is an appeal by the Applicant/Appellant (hereafter appellant), against the ruling of the Court of Appeal, dated 8th July 2004 which rejected an application by the appellant, wherein he prayed the Court of Appeal to certify to the Supreme Court the payment of compensation to him, pursuant to article 14 (7) of the Constitution 1992 referred to supra.

In January 1993, the appellant was arrested and triedon indictment by the High Court, Accra, alongside his brother Mathew, on two counts of conspiracy to murder, and murder of one Amegbor Amedorme. The appellant and his brother were convicted by the jury which tried them whereupon they were accordingly sentenced to death as required by law on 7th August 2001.

The appellant successfully appealed against his conviction and sentence to the Court of Appeal which on 20th January 2004 allowed the appeal, set aside the conviction and sentence and thereby acquitted and discharged him. The appellant later applied to the Court of Appeal to certify to the Supreme Court for the payment to him of compensation under article 14 (7) of the Constitution 1992.

This appeal by the appellant has therefore been lodged against the Court of Appeal ruling of 8th July 2004 rejecting his application for the certification to the Supreme Court of payment of compensation pursuant to article 14 (7) of the Constitution 1992.

GROUNDS OF APPEAL

The following are the grounds of appeal that the appellant has filed to this court:

i. Failure by the court to appreciate that the award of compensation as provided for under article 14 (7) of the 1992 Constitution is not hedged with any antecedent conditions other than the simple acquittal of the Applicant, and that this is no doubt based on the inherent injustice of arresting and detaining a person on inadequate or non-existent legal grounds.

ii. Failure by the Appellate court to appreciate that the fundamental abuse of the rights of the Applicant took place at the very moment of his arrest and detention in Ada WITHOUT CAUSE, and that all other processes, whether “proper” or not, were nugatory.

In order to appreciate the basis of the appeal and the circumstances of the case in its entirety, I deem it expedient to set out in extenso the facts of the case from both the appellant and respondent’s perspectives as deposed to in affidavit’s sworn to by counsel acting for and on their behalf as follows:-

AFFIDAVIT OF AHUMAH OCANSEY IN SUPPORT OF THE APPLICATION BY THE APPELLANT FOR COMPENSATION UNDER ARTICLE 14 (7)

1. I am the Counsel for the Applicant and the Deponent herein.

2. I have his authority and consent to depose to this affidavit.

3. That Dodzie Sabbah, lived on an island called Adornukewuno, at Ada, when the incident resulting in his trial took place in ***1993.***

4. That he was a farmer and cropped things like cassava & coconut trees. He also fished in the river.

5. **That he limbed in his leg, and used a walking stick as an aid.**

6. **That he was arrested and unlawfully detained at the Ada Police Station in January, 1993 and charged with his brother with conspiracy to murder, and murdering one Amegbor Amedorme.**

7. **That he was remanded in custody at James Fort Prisons in 1993, where he remained without trial until eight years later, 2001, when he appeared before Her Lordship, Justice Mrs. B. A. Bempah for trial at the Criminal Session.**

8. **That on 7th August 2001, the jury found him guilty of the charges and the Court convicted him and sentenced him to death.**

9. **That he was taken to the condemned cells, at Nsawan Medium Security Prisons.**

10. **That he appealed to the Appeal Court, Criminal Division, on his conviction and sentence and his appeal was heard on 26th September, 2003.**

11. That on 20th January 2004, the Appeal Court, coram their Lordships R. C Owusu J.A (presiding) Akoto-Bamfo J.A, Asiamah J.A. acquitted him on both counts of conspiracy to murder and murdering. (Exh.1).

12. That he has since been released from Nsawan prisons

13. That Dodzie Sabbah is hereby asking for compensation from the State for the indescribable mental agony, physical destruction of property, spiritual distress, economic destitution, and deterioration in health that he suffered for 10 years inspite of his innocence.

14. Specifically, Dodzie has suffered these losses:

    1. Loss of income from fishing, sale of coconuts, cassava, palm tree fruits for palm wine.

    2. Destruction of his village and personal effects by their adversaries, who over-ran the island, when the two brothers were sentenced to death;

    3. The right limping leg has worsened out of disuse, whilst in cells; walking, is now more stressful than ever.

    4. Dislocation from his place of birth, growth, and family life, thus over turning his livelihood and sense of integrity.

    5. Discontinuation of children's education

    6. Loss of consortium and marital break-up.

15. For the aforesaid losses the Applicant asks for a ¢400 million compensation from the state." Emphasis supplied

On the part of the respondent, the following are the depositions sworn to by learned Chief State Attorney for the republic:

AFFIDAVIT IN OPPOSITION TO APPLICATION FOR COMPENSATION

"I Eric A. Agbolosu of Attorney-General's office make oath and say as follows:

1. That I have the authority of the Attorney-General to swear to matters which are peculiarly within my knowledge by virtue of being a law officer of the state.

2. That the applicant and his brother were charged for conspiracy to murder and murder.

3. That they were arraigned before an Accra High Court and prosecuted on indictment with a jury.

4. That at the close of the case the jury found them guilty of the offence and the presiding High Court Judge has no alternative but to sentence them to death.

5. **That they appealed against the sentence and conviction and the applicant alone was acquitted and discharged.**

6. That during their trial they had counsel and had the opportunity to cross-examine the prosecution witnesses.

7. That they subsequently opened their defence and produced witnesses to testify for them.

8. **That they were therefore lawfully convicted and sentenced according to law after a fair trial where the Natural Justice rule was fully observed." Emphasis supplied.**

The above then constitute in the main, the undisputed facts of the case from the perspectives of both parties.

Indeed, apart from the depositions on the claims for damages, the various depositions in the affidavits sworn to by both counsel represent in the main the undisputed facts upon which the case has been heard to date.

Even though the sworn affidavit of the respective parties is silent on the material evidence which formed the basis of the prosecution's case at the trial court, some attempt was made by counsel to put this material evidence through their statements of case.

Since it was the Respondent herein who had to establish the burden of proof against the appellant at the trial, I will commence this discussion of the narration of the facts from the Respondent's statement of case.

NARRATION OF DISPUTED AND UNCONFIRMED FACTS FROM RESPONDENT'S PERSPECTIVES

According to the respondents, the deceased Amegbor Amedorme, took some two persons with him to inspect palm trees he intended to sell to those persons. Upon their return from the farm, the deceased was attacked by Mathew Kwame Sabbah, (the co-accused and brother of the appellant) with a cutlass, resulting in his death. The two other persons managed to escape, but cutlass wounds were inflicted on another person in the company of the deceased. **According to an eye witness account, the Appellant also slashed the deceased with a cutlass when he attempted to get up**.

The above constitute the material facts upon which the respondents mounted their prosecution of the appellant and his brother.

NARRATION OF THE DISPUTED AND UNCONFIRMED FACTS FROM THE APPELLANT'S PERSPECTIVES

The Appellant's brother, Mathew Sabbah was presumed to have been attacked on his farm on an island by persons laying adverse claim to the

land on which the Sabbah family lived. In a fight that ensued, Mattew Sabbah overcame his attackers and cut off the head of one of them.

The Appellant only went to the farm to ascertain what had really happened when he met his brother Mathew returning from the farm with the head of the deceased. The Appellant and his brother reported the matter to the Ada Police. Mathew was detained in Police cells, whilst the Appellant was allowed to go.

Thereafter, the Appellant went to inform members of their family about the tragedy that had happened in Ada and beyond. He returned after a week and went to the Police cells to give food to his brother whereupon he was also arrested, thrown into Police cells on the allegation that he was one of those who killed the deceased.

Altogether, the Applicant was kept on remand from January 1993 to August 2001 when he was convicted of murder and sentenced to death accordingly. However, the Court of Appeal on 20th January 2004 quashed the Applicant's conviction and set aside the sentence and acquitted and discharged him.

DISCREPANCIES

There are a lot of discrepancies in the narration of the facts by the two parties stated above. Whilst the respondent's would want this court to believe that the Appellant herein was a participis criminis, in that he actively took part in the fight and participated in inflicting the injuries on the deceased from which he died, leading to the decapitating of his head, the Appellant denies any involvement.

On the other hand, the narration by the Appellant is as if he did not take any part in the fight and came onto the scene only after the tragic events had taken place.

Further examination of the facts recounted in the statements of case filed by the parties reveals a lot of illogicalities.

For example, who in the narration from the respondent's narration is the eye witness who saw the appellant slashing the deceased when he attempted to get up after having initially been slashed by his brother (the co-accused), and at a time the deceased was presumed already as having died.

Again, it is not clear whether there was another or third person apart from the two persons who accompanied the deceased to the Island to inspect the palm trees.

This is because, apart from the narration that, whilst the two persons managed to escape, cutlass wounds were nonetheless inflicted on another person and there is talk of an eye witness.

It is certainly unclear whether these facts had been picked up from the Bill of Indictment, the facts of the case as recorded in court during the trial and capable of having a proven source or not.

However, the decision of this court in the case of ***Sabbah v The Republic [2009] SCGLR 728*** which is the decision of the appeal lodged by the brother of the appellant herein Mathew, against the decision of the Court of Appeal to this court, gives very clear indications that the narration of the facts from the respondent's perspective is not correct. **It is certain from that decision that the appellant herein is completely innocent of the charges preferred against him and was prosecuted without any reasonable and probable cause**.

On the other hand, from the appellant's narration, some interesting facts stare me in the face. This is that, the appellant went to the Police station with his brother the co-accused to make the initial report. If that assertion is capable of proof, then it meant that the appellant was freely allowed to go away by the Police because they believed he was not connected with the crime at that stage. Indeed, nothing would prevent the Police from further arresting him if subsequent investigations connected and linked him to the offence.

From the appellant's narration, he went back to the Police Station with food for his brother, believing that he was innocent whereupon he was arrested and thrown into detention and remanded to stand trial for several years.

As stated earlier, learned counsel for the appellant should have done more for the appellant by trying to produce documentary evidence from the trial court to support his narration of the facts and also disprove the contentions in the respondent's narration as well.

RULING BY THE COURT OF APPEAL

On the 8th day of July 2004, the Court of Appeal, whilst rejecting the appellant's application for certification to this Court for payment of compensation held thus:-

> ***"We are of the opinion that Article 14 (7) of the Constitution, 1992 was intended to cover situations where the State had mounted oppressive prosecution against an individual and without basis and just cause at all. It would also apply in situations where the State mounted a prosecution, which clearly sought to infringe on the basic fundamental human rights of the individual. It could also arise in situations where the charge, which was preferred, was unknown to the law or the court of trial had no jurisdiction at all.***
>
> *The constitutional provision under consideration appears to be an innovation in our democratic dispensation and for that matter there are no precedents to guide this court. In our respectful opinion,* ***we think that when an application is brought under Article 14 (7) of the Constitution, 1992, the whole circumstances of the case must be taken into consideration." Emphasis supplied***

In essence, the Court of Appeal stated with some degree of clarity that article 14 (7) of the Constitution 1992 cannot be automatically applied to

cover all situations where the appeal of a convict had been allowed. I perfectly agree with such a rationalization.

Based on the material put at the disposal of the Court of Appeal, it concluded the application thus:

> *"We are of the opinion that the above constitutional provision, which is under consideration,* ***imposes a discretion on this court and any other court for that matter. Such discretion like any judicial discretion is properly exercised when all the circumstances is taken into consideration****. In this case, we are of the opinion that as the applicant went through a proper trial which observed all the statutory procedure in a court of law established by this very constitution and his arrest and prosecution were all regular devoid of any abuse of the law and breach of any human rights of the applicant, we are of the view that this application ought to be refused.* ***For to allow any applicant who claims to have been acquitted to resort to this constitutional provisions for redress will certainly defeat the purpose of this provision". Emphasis supplied***

I agree in principle with the observation and decision of the Court of Appeal that the article 14 (7) provision in the Constitution 1992 imposes a judicial discretion on the court, and like all judicial discretions has to be exercised when all the facts of the surrounding circumstances of the case have been taken into due consideration and exercised judiciously.

APPELLANT'S STATEMENT OF CASE

1. Learned counsel for the appellant Mr. Ahumah Ocansey, anchored his statement of case on the principle of tort, that, a person who is unlawfully restricted or detained is normally compensated for injury to his dignity and inconveniences suffered. These he submitted are similar to actions for damages for false imprisonment or malicious

prosecution. He therefore relied and referred to cases like **Atta v Amoasi** [1976] 2 GLR 201, CA. ***Amadjei and others v Opoku Oware*** [1963] 1 GLR 150 SC., **Mansour v EL Nass Export and Import** [1963] 2 GLR 316. See also ***Clerk & Lindsell on Torts (13th Ed) para. 681 at pg. 346.***

2. Secondly, learned counsel disagreed with the Court of Appeal that the Court has discretion in article 14 (7) situations because if the said provisions are read in tandem with article 12 (1) of the Constitution, there ceases to be any discretion on the court.

Article 12 (1) of the Constitution 1992 states as follows:

> *"The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of Government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in the Constitution." Emphasis*

I must point out immediately that, the Correlation that learned counsel sought to imply between articles 12 (1) and 14 (7) of the Constitution 1992, are not borne out by the letter and spirit of the Constitution, and I reject them as not applicable to the circumstances of the instant case.

In order to strengthen his arguments learned counsel for the appellant made reference to ***Section 133 (1) of Criminal Justice Act, 1988 of England*** which states as follows:-

> *"Subject to sub section (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay*

compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction."

(2)No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State." Emphasis

Learned Counsel also referred to ***Halsbury's Laws of England, 4th Ed. Vol. 11(2)*** paragraph 1521 and the following cases ***Murray v Ministry of Defence*** (1988) I WLR 692 at 703 HL where it was stated thus:

"The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty, it should remain actionable without proof of special damages."

Based on the above submissions, learned counsel for the appellant, Mr. Ahumah Ocansey made a case for payment of compensation and relied on cases such as **Appiah v Mensah [1978] GLR 342** which unfortunately with respect is not applicable under the circumstances of this case.

See also **H. West & Son Limited v Shepherd (1964) A.C. 326 at 345, Dumbell v Roberts (1944) 153 LT 384 at 386 HL.**

Learned counsel finally made a profound reference to the words in Proverbs 3, 27 which reads as follows:-

"Withhold not good from them to whom it is due, when it is in the power of thine hand to do it." *Emphasis*

With the above words of wisdom, learned counsel reiterated his quest for the payment of compensation to the appellant.

RESPONDENTS STATEMENT OF CASE

1. Learned counsel for the Respondent,argued in response to the appellant's statement of case that, it is wrong to conclude that once an appellate court has acquitted an appellant, it raises the presumption of the unlawfulness of his conviction.

Learned counsel submitted that, the presumption would depend on the grounds on which the appellate court acquitted the appellant which might have nothing to do with the merits of the case.

Learned counsel submitted that there was no false imprisonment as the appellant would want this court to believe.

2. Secondly, learned counsel for the respondent's submitted that article 14 (7) provision of the Constitution 1992 indeed imposes a discretion on the court which should be exercised judiciously.

   In expatiating on these submissions, learned counsel explained that, since the words used in the formulation is "may" and not "shall" it is therefore permissive and flexible and not the imperative and mandatory meaning ascribed to the word "shall". See section 42 of the Interpretation Act, 2009, Act 792.

   Learned counsel for the respondent's also drew the necessary linkages and differences between articles 14 (7) and 12 (1) of the Constitution 1992 as was contended to by learned counsel for the appellant.

   Learned counsel for the respondent also submittedthat, section 133 of the Criminal Justice Act 1988 of England which was copiously referred to by learned counsel for the appellant had been amended as follows:-

Section 175 of the U.K. Anti-Social Behaviour, Criminal Policing Act 2014 which came into force on 13th March 2014, amended section 133 of the Criminal Justice Act 1988 as follows:-

COMPENSATION FOR MISCARRIAGE OF JUSTICE

(1) "In section 133 of the Criminal Justice Act 1988 (compensation for miscarriages of justice) after subsection (1) there is inserted (IZA).

> "For the purpose of subsection (1) there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales or, in a case where subsection (6H) applies, Northern Ireland, **if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this part to a miscarriage of justice are to be construed accordingly)."** emphasis

In a supporting submission, learned counsel for the respondent stated as follows:-

> "The U.K Ministry of Justice's impact assessment for this change explained that the amendment was being made to ensure that eligibility to the compensation scheme was limited to applicants ***who could show that they were clearly innocent."*** It stated that the intended effect was to lessen the burden on taxpayers and reduce unnecessary and expensive legal challenges to Government decisions to refuse compensation. **By confirming a relatively narrow definition, the provision seeks to generate a more predictable and consistent approach to identifying cases where a miscarriage of justice has taken place."** emphasis

(Reference Ministry of Justice, Impact Assessment, clarifying the circumstances under which compensation is payable for miscarriage of Justice (England and Wales) 9th May 2013 page 2.)

Learned counsel finally reiterated her submissions and stated that payment of compensation under article 14 (7) of the Constitution is not automatic. She submitted that the provision should be read and construed as a whole.

With the above conflicting and contrasting positions taken of by learned counsel, it brings into focus, the determination of the issues identified by me as follows:-

ISSUES FOR DETERMINATION

1. Under what circumstances may courts lower to the Supreme Court certify to the Supreme Court that a convict, whose appeal against conviction and sentence has been allowed, is entitled to payment of compensation under article 14 (7) of the Constitution 1992.

2. The principles upon which the Supreme Court conducts the examination in arriving at a decision for the payment of the compensation under article 14 (7).

3. Whether the appellant is entitled to compensation.

PRELIMINARY LEGAL PRINCIPLES

I am aware of the caution in the memorandum to the Interpretation Act, 2009, Act 792 which states that the interpretation of the Constitution 1992 should not be tied down by the Interpretation Act or other principles of interpretation since the Constitution is on a higher pedestal than any ordinary law of the land.

The same memorandum states that in the Construction and interpretation of the Constitution, the following factors should be considered if the spirit of the Constitution is to be given its due prominence. These are: **cultural, economic, political** and **social developments** of the country. The memorandum states further as follows:-

> *"A Constitution is a scared document. It must of necessity deal with facts of the situation, **abnormal** or **usual**. It will grow with the development of the nation and face **challenging changes** and **new circumstances**. It must be allowed to germinate and develop its own peculiar conventions and construction not hampered by niceties of language and form that would impede its singular progress."*

Put in musical terms, the memorandum continues thus:

> *"The interpretation and construction of the Constitution should involve the interplay of forces that produce a melody and not the highlighting of the several notes. The country is an expanding*

society. Those who deal with the constitution must appreciate that concept."

The above principles have been followed in a long line of cases by this court see cases such as:

1. **Tuffuor v Attorney-General [1980] GLR 637 per Sowah JSC as he then was at 647** where the principles for constitutional interpretation were stated thus**:-**

"A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life.

The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses and exercises. It is a source of strength. It is a source of power. The executive, the legislature and the judiciary are created by the Constitution. Their authority is derived from the Constitution. Their sustenance is derived from the Constitution. Its methods of alteration are specified. In our peculiar circumstances, these methods require the involvement of the whole body politic of Ghana. Its language, therefore, must be considered as if it were a living organism capable of growth and development. Indeed, it is a living organism capable of growth and development, as the body politic of Ghana itself is capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of the principles and bring that consideration to bear, in bringing it into conformity with the needs of the time.

And so we must take cognizance of the age-old fundamental principle of constitutional construction which gives effect to the intent of the

framers of this organic law. Every word has an effect. Every part must be given effect. Perhaps it would not be out of place to remember the injunction of St. Paul contained in his First Epistle to the Corinthians, Chapter 12, verses 14-20 (King James Version):

> *"For the body is not one member, but many. If the foot shall say, Because I am not the hand, I am not of the body; is it therefore not of the body? And if the ear shall say, Because I am not the eye, I am not of the body; is it therefore not of the body? If the whole body were an eye, where were the hearing? If the whole were hearing, where were the smelling…? But now are they many members, yet but one body?"*

The decision of Sowah JSC (as he then was) in **Tuffuor v Attorney-General**, referred to supra in extenso, laid down the blue print for constitutional interpretation and construction in this country. It has had very profound effect on the Supreme Court's appreciation of the tenets of the principles which govern interpretation and construction of Constitutions and this has featured prominently in the interpretation of all constitutional provisions since 1979. It is therefore safe to state that the decision in **Tuffuor v Attorney-General** has become the bedrock of present day constitutional interpretation. It is therefore not surprising that all the underlisted cases refer to this locus classic us decision in **Tuffuor v Attorney-General**or some of it's derivatives.

2. **New Patriotic Party v Attorney General (31st December case) [1993-94] 2 GLR 35 per Charles Hayfron Benjamin at 168**

3. **Okofoh Estates Ltd. v Modern Signs Ltd. [1996-97] SCGLR 224 at 230 per Sophia Akuffo JSC**

4. **Nsiah v Amankwaah, Nsiah v Mensah (Consolidated) [1998-99] SCGLR 132 at 140 per Atuguba JSC**

5. **Attorney General (No. 2) v Tsatsu Tsikate No (2) [2001-2002] SCGLR 620 per Acquah JSC as he then was**

6. **Apaloo v Electoral Commission of Ghana [2001-2002] SCGLR 1, at 19 per Bamford Addo JSC**

7. **Awuni v WAEC [2003-2004] 1 SCGLR at 471 per Date-Bah at 556**

What I find most appealing is the invitation made in Section 10 (4) of the Interpretation Act, and reiterated in the memorandum that without prejudice, courts shall construe or interprete the Constitution in a manner

a. "That promotes the rule of law and the values of good governance,

b. That advances human rights and fundamental freedom

c. That avoids technicalities which defeat the purpose of the Constitution and of the ordinary law of the land.

d. That permits the creative development of the provisions of the Constitution and the laws of Ghana, and

e. That avoids technicalities which defeat the purpose of the Constitution and of the ordinary law of the land."

I will therefore bear in mind the above objectives and principles which have been stated and applied in constitutional interpretations over the years. It should be noted that when these principles are applied in dissecting the issues I have put together as arising for determination in this case, it should be clear that the entire Constitution must be read as a whole with the view to ensuring that no one part of the Constitution is highlighted more than the other. It is only in that respect that a melodious and harmonious tune can be achieved rather than loud individual notes

discordant in scope and character and not appealing and satisfying those to whom it is meant to soothe.
Indeed, in the circumstances of the instant appeal, one thing is clear, that the present request for payment of compensation from the state for embarking upon an unlawful and wrongful arrest and subsequent detention coupled with malicious prosecution is as abnormal in our judicial scheme of things as it is challenging.

The fact that it is abnormal and challenging should not make the courts shy away from doing what is expected of them.

In the end, an interpretation of article 14 (7) of the Constitution should be such as would promote the values of the rule of law and good governance as is enumerated above.

I now proceed with the analysis of the issues set out above as follows:

ISSUE 1

Under what circumstances then can the provisions of article 14 (7) of the Constitution 1992 be made to apply?

For article 14 (7) of the Constitution 1992 to be applicable, the following criteria must be satisfied:

1. The applicant must have been convicted and sentenced to a term of imprisonment by a court of Competent jurisdiction.
2. Must have served part or the whole of the sentence.
3. Must have been acquitted on appeal by a Court of competent jurisdiction.
4. If the acquittal on appeal is by a court other than the Supreme Court, **that court may certify to the Supreme Court that compensation be paid.**

5. Upon receipt of the certificate, (and in all other cases) the Supreme Court may upon examination of all the facts and the certificate award compensation as it may think fit or appropriate.

The crux of the matter here is, what are the factors that the Supreme Court is expected to examine to enable it come to a decision whether to award compensation or not? This is because, there are no rules of procedure regulating factors which should guide courts lower to the Supreme Court in the preparation of the certificate as well as guide the Supreme Court in conducting examination of the facts of the case under such applications.

I am of the considered view that whilst awaiting the Rules of Court Committee to come out with rules of procedure to cover applications under article 14 (7) of the Constitution, the Supreme Court itself should evolve flexible rules of procedure such as will permit applicants to take advantage of the provision therein contained just as the appellant has legitimately done.

It may therefore come by way of an appeal against the refusal of the Court of Appeal, or to the Supreme Court direct if the acquittal is by the Court itself.

Under the prevailing circumstances and especially with the peculiar facts of this case, I am of the considered opinion that courts lower to the Supreme Court may only certify to the Supreme Court payment of compensation under article 14 (7) when the following processes have been put before them:

1. The basic court processes upon which the (applicant) appellant was arraigned, and convicted before the trial court. This should include the judgment of the trial court, in the instant case, the summing up to the jury.

2. In the special circumstances of this case, other court processes like the Bill of Indictment, have to be exhibited to the application before the appellate court, and ***in appropriate circumstances the entire appeal record.***

3. The judgment of the appellate Court which acquitted the appellant.

4. The appellate court must then certify whether in its opinion, the prosecution of the applicant at the trial court was based on a reasonable and probable cause but acquitted on merely technical grounds as was held in the ***Egbetorworkpor v Republic [1975] 1 GLR, 485, case.***

In my understanding, it is only when the above court processes have been examined and found to be favourable in the opinion of the court that the certificate is made to the Supreme Court. For example there have been instances where oppressive prosecutions have been done at the whims and caprices of the rich and powerful in society. At other times, political considerations may have influenced the prosecution at the trial court which had been reversed on appeal. Some prosecutions are undertaken basically to pursue civil claims under the guise of a criminal prosecution. In examining the requisite record of trial and conviction as well as the judgment of the appellate court acquitting the applicant, the Supreme Court must determine whether the prosecution of the applicant was without any reasonable or probable cause. This will invariably determine whether the prosecution was malicious. If it was malicious, then the applicant in my opinion is entitled to compensation under article 14 (7).

For me, the test to apply in situations where applications are made for payment of compensation under article 14 (7) of the Constitution 1992 is to consider each case on its merits such as discloses gross injustice and miscarriage of justice to the applicant, especially when it is apparent there was no reasonable and probable cause for the prosecution of the applicant.

To conclude this discussion on this aspect of the case, it must be noted that apart from the basic information that the appellate court may certify to the Supreme Court following an acquittal which I have already set out, the appellate court must in addition state very concisely whether in its opinion, the prosecution of the applicant was without any reasonable or probable cause. It is therefore certain that the crux of the certificate of the appellate court should depend on it's assessment and evaluation of the acquittal of the applicant.

As has been stated, every case must be heard on case by case basis as no one formula or criteria can be applied wholesale for all cases.

It is the reasons of the acquittal that may determine whether the Supreme Court will favourably consider the certificate for compensation.

In view of the benefit which this court has had from the Supreme Court case of ***Sabbah v Republic***, already referred to supra, it is clear that if the appellate court had also had this benefit, it would have certified the case to the Supreme Court. This is because, the appellant did not furnish the appellate court with any court process or proceedings that would have afforded it an opportunity to evaluate the merits of the acquittal.

Whilst the decision of the appellate court was rendered in July, 2004 the Supreme Court decision in **Sabbah v Republic** which has turned the fortunes in this case was delivered in July 2009. Under the prevailing circumstances the appellate court if it had been furnished with the correct information would no doubt have certified to this court, for an examination of the award for payment of compensation under article 14 (7) of the Constitution.

ISSUE TWO

Fact of the matter is that, the wording of the provisions in article 14 (7) are so clear that an acquittal on appeal of a convict does not automatically entitle the person to payment of compensation. The Supreme Court is required to undertake an examination of the facts of the case as well as

the certificate of the lower court, if the acquittal is by a court other the Supreme Court.

What does examination in the context as used mean? The meaning that best suits the context in which the word has been used is defined in the following dictionaries as follows:-

1. Chambers 21st Century Dictionary, Revised Edition – "to inspect, consider or look into something clearly."

2. The Shorter Oxford English Dictionary on Historical Principles – Revised Edition states of the word thus: - *"investigation by inspection or experiment, scrutiny"*.

In all the two instances quoted supra, examination connotes detail and close consideration, or an investigation by closely inspecting and scrutinising something. This therefore means that, before the Supreme Court makes an order for the payment of compensation in circumstances as formulated in article 14 (7) of the Constitution, it behoves on the court to make detail analysis, study, scrutiny and or investigation into not only the facts of the case at the trial court, but also the reasons why the conviction and sentence were set aside by the appellate court. In other words, the bonafides of the initial prosecution of the convict must be gone into and good and sound basis and or reason must be shown to exist for the arraignment and prosecution. In other words, were there reasonable and probable causes for the arrest, detention and subsequent decision to prosecute the applicant?

For example, if the Bill of Indictment, the summing up of the Judge to the jury at the trial court, the caution statement of the Appellant, the evidence of the investigator during the trial and indeed the record of proceedings probably up to the Court of Appeal stage had been provided this court, the necessary documentary material would have been made available upon which the examination required under article 14 (7) of the Constitution

1992 would have been duly made without any difficulty from the inception of this appeal.

Hints were given learned counsel for the Appellant during the hearing of the case before this court about the insufficiency and inadequacy of the material provided for this examination. Unfortunately, those hints were not taken and the cue which learned counsel should have taken with a view to improving the appellant's case was lost.

If this had been done, the rival contentions as to the role played by the Appellant herein in the sordid events leading to the tragic death of the deceased would not have been in doubt, until resolved by the facts of the decision in ***Sabbah v Republic*** already referred to supra.

This court would then have been placed in a much better position to determine upon due examination of the facts of the case whether the acquittal of the Appellant by the Court of Appeal was based on a technicality.

The Court of Appeal per Apaloo J. A. (as he then was), in the case of **Egbetorwokpor v Republic** already referred to supra, whilst acquitting and discharging the appellants therein, spoke on behalf of the court thus:-

> "*We fully appreciate that in view of the result we have reached,* ***guilty persons may well be escaping justice.*** *If this be so, we cannot but regret it. But our duty is to do justice not according to our own lights, but in accordance with the law as we conceive it." emphasis supplied.*

It is to be noted that, the deceased in the ***Egbetorwokpor v Republic*** case was also gruesomely murdered. Unfortunately, all the convicts had to be acquitted on appeal after their conviction for murder by the jury and subsequent sentence to death by the High Court, Ho. The Court of Appeal

was quite clear in their minds that due to technical reasons, and the fact that courts have to do justice according to law, guilty persons may very well be escaping the long arm of the law.

The decision in the ***Egbetorwokpor v Republic case,*** supra has strengthened my decision that payment of compensation under article 14 (7) of the Constitution 1992 has to be done on a case by case basis and on their own merit, bearing in mind a lot of factors too numerous to conjecture at this stage.

It is now pertinent for an examination of some of the factors that the Supreme Court may consider in the article 14 (7) situations for the payment of compensation in appropriate circumstances.

FACTORS FOR CONSIDERATION

1. **The nature and or gravity of the offence**

   This will in turn reflect on the severity of the sentence. For example, in cases of murder, once the jury return a verdict of guilty of the offence charged, the sentence is mandatorily death.

This then means that the convict will have to be put in what is known as condemned cells. This will thus involve a consideration of the trauma and mental agony that the convict would have gone through before his acquittal on appeal.

2. **The second factor to be considered by the court is the length of the period that the applicant has served from arrest to acquittal**

   This will give an indication of the damages suffered by the applicant arising from the breach of the personal liberty i.e. right not to be

confined as is guaranteed by article 14 (1) of the Constitution 1992. In the instant case, I reckon the time of the arrest of the appellant in Ada in January 1993 up to and including the date of his acquittal in January 2004, a period of almost eleven (11) years as the length of time that this court has to compute and consider if compensation is to be paid to the appellant in terms of article 14 (7) of the Constitution.

See the case of **Adjei-Ampofo v A.G & President, National House of Chiefs [2011] SCGLR** 1104 where the personal liberties and freedom of movement of persons was guaranteed under the said article 14 (1).

3. The court may also consider whether an action in malicious prosecution by the applicant may have succeeded. In this respect, the court may have to consider

    (a) Whether there was **reasonable** and **probable cause** for the prosecution, or

    (b) Whether the prosecution of the applicant was malicious. This will be based on whether the prosecution was motivated by ill will, mere hatred, spite, political considerations, rather than a desire to contribute towards bringing an offender to book.

For example, in the case of ***Amadjei v Opoku Ware***, already referred to, the Supreme Court held that an arrest is malicious or unlawful if it is made without **reasonable** or **probable cause.** Similarly, Prempeh J, as he then was, in the case of ***Mansour v El Nasr; Export Import Company***, already referred to ***held that want of probable cause is evidence of malicious prosecution***. The court further held that in assessing damages in such cases, among other factors, the court must consider whether the action was bonafide or not. In the instant appeal, if the appellant had been arrested and detained by the Police within a period of say 6 to 12 months for investigations into the murder case involving his brother to determine whether he played any role, that would have been considered reasonable.

The failure of any evidence before the trial court linking the appellant to the crime meant that there was absolutely no basis for the arrest and prosecution of the appellant.

4. Fourthly, the court will have to consider whether the answer to (3b) above is in the affirmative, then the measure of compensation under article 14 (7) should be the same as the measure of damages in a successful action in malicious prosecution and considerations for breach of his fundamental human rights. However, if the answer to the question posed in (3a) is in the affirmative, then no issue arises, as no compensation will be paid.

5. The Court should also consider whether the applicant is completely innocent of the offence for which he was charged, that his arrest, trial and conviction, sentence and subsequent acquittal has resulted into a miscarriage of justice. In the instant, this is borne out by the judgment of the case in **Sabbah v Republic** already referred to.

6. The Court will also have to consider the effect of their decision on the public purse. The court must be mindful of their decision on the tax payer as is evident in the amended section 175 of the U.K Criminal Policing Act 2014, Anti Social Behaviour which came into force on 2014 and already referred to supra.

7. Finally, the Supreme Court should set guidelines for the payment of compensation under article 14 (7) which should reflect the courts appreciation of the value in money terms of the freedoms and personal liberties of citizens in a constitutional democrary vis-à-vis breaches of those guarantees of personal freedoms which finds expression in arbitrariness, wrongful, and unlawful arrest and malicious prosecution of citizens without reasonable and probable cause.

COMMENTARY ON THE ABOVE FACTORS

It would appear that, the first and second factors apply under the circumstances of this case. This is because murder is not only a grave offence, but also it carries the capital punishment of death.

The decision of this court in the case of *Sabbah v Republic* already referred to, where the court speaking through my respected sister Adinyira JSC whilst dealing with the appeal of the brother of the appellant herein against the decision of the Court of Appeal which dismissed his appeal against conviction and sentence to this court, recounted with clarity the facts of the case that led to the arrest and prosecution of the appellant herein as well. From those narrations, it is very clear that there was absolutely no basis whatsoever for the arrest, detention and prosecution of the appellant herein. This means that the 3rd, 4th and 5th factors supra are all resolved in favour of the appellant.

On the basis of the above mentioned factors in relation to how they apply to the appellant, it is clear that the appellant is entitled to payment of compensation under article 14 (7) of the Constitution 1992.

ISSUE 3

HEADS OF CLAIM FOR COMPENSATION

It is only when the court is of the opinion that compensation should be paid that an assessment is made of the heads of claims under which the appellant claims.

The appellant herein has not provided any credible basis for the payment of quantifiable compensation under any of the heads of claims under which he claims.

1. For example, the appellant claims in paragraph 14 (1) and (2) of the affidavit, loss of income from fishing, sale of coconut, cassava, palm tree fruits and for palm wine, and

2. Destruction of his village and personal effects by their adversaries, who over ran the island.

All the above are capable of proof, but the appellant was silent and did not quantify them.

The income from fishing could have been specifically pleaded, so also the amounts realized from the coconut farm, the size of the farm, and the number of harvest per year, and the prices at which these are sold, etc. could all have been stated and proven in court as special damages.

As a matter of fact, the appellant failed to give details of the village and the personal effects that were damaged, destroyed and or looted. The appellant took the issue of compensation award very lightly and did not satisfy the court as to whether any meaningful, and or credible assessment should be made in his favour.

However, from the affidavit evidence that the appellant proffered, a lump sum of ¢400,000,000.00 which is now equivalent to GH¢40,000.00 was pleaded, and this to me connotes general damages as opposed to special damages.

What criteria then should be applied in this case, now that I have upheld that the appellant is entitled to payment of compensation under article 14 (7) of the Constitution?

In setting out the criteria, reference must also be made to the factors I had already set out supra, and that is, this Supreme Court must set guidelines reflecting the courts appreciation of the value in money terms of the freedoms and personal liberties of citizens in a constitutional democracy in order to prevent arbitrary and wrongful exercise of the state's prosecutorial powers. In my opinion, this court should put greater premium on the abuse of the appellant's basic human and personal rights for the period of eleven years to the considerations of the effect any order of compensation will have on the public funds. This is because, in a constitutional democracy,

such as the one being practiced in Ghana, higher premiums should be placed on the guarantee of fundamental human rights and freedoms as well as the protection of all personal liberties in chapter 5 of the Constitution, than to any other matter.

In my mind, the protection of these rights, are the philosophical underpinnings upon which the Constitution 1992 revolves and are the soul, spirit and body of the constitution. The guarantee and protection of these should therefore be on a higher pedestal than any other considerations.

For a long time now, the authorties are well settled that damages that courts award to litigants in successful litigations are classified into two categories. These are **general** and **specia**l.

The courts have generally held as follows:-

> *"Special damages is distinct from general damages. General damages is such as the law will presume to be the natural or probable consequence of the defendant's acts. It arises from inference of law and therefore need not be proved by evidence. The law implies general damage in every infringement of an absolute right. The catch is that, only nominal damages are awarded.* ***Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate." emphasis***

See cases of ***Delmas Agency Ghana Ltd. v Food Distributors International Limited [2007-2008] 2 SCGLR 748*** and ***Tema Oil Refinery v African Automobile Limited [2011] 2 SCGLR 907 at 934,*** wherethe above principle was stated and applied respectively.

In the instant case, I have already pointed out that, because of the failure of the appellant to put values of the items mentioned in paragraph 14 of

the affidavit in support of his claims, this court is not in a position to quantify those damages as special damages.

However, the issues raised by the appellant for the consideration of this court for the award of damages are so important that, I am minded to take them seriously.

For example, it is clear that since January, 1993 when appellant was arrested and detained up to January, 2004 when his conviction and sentence to death were set aside, his fundamental human rights and freedoms as enshrined in article 14 (1) of the Constitution had been violently infringed upon.

The mental agony, trauma and the pain and suffering that he might have gone through is difficult to be quantified.

Considering the fact that compensation under article 14 (7) is a special jurisdiction conferred by the Constitution 1992 for the benefit of the citizens of this country in which we live, it follows that, basic fundamental principles of constitutional interpretation must be strictly adhered to. These are that, in construing the awards for payment of compensation, regard must be made to the need to promote the rule of law and the values of good governance.

Secondly, human rights and fundamental freedoms must be advanced.

Thirdly, an innovative and creative development which will take account of the cultural, economic, political and social development of the Constitution and laws of Ghana must be seen to be permitted and promoted.

Finally, in doing so, adherence to technicalities which have the potential of defeating the aims and purposes of the Constitution and ordinary laws of the land must be avoided.

For instance, this court must not only frown upon the practice whereby law enforcement agencies are quick to prefer criminal charges against persons whenever a crime is committed, but are slow or reluctant to withdraw the

same charges when proper investigations disclose that some of the persons initially arrested have no connection whatsoever with the offence.

Ghanaian cultural and social practices do not permit and allow the arrest, detention and virtual fabrication of criminal charges against persons for no apparent reason. Let alone abandoning such persons in custody without any due regard for their human rights which are paramount.

I think the time has come for law enforcement agencies, including trial and appellate courts to be very vigilant, and assertive in ensuring that all criminal charges or prosecutions that do not merit the standard are not made to see the light of day. This is the only way to prevent huge judgment debts under this article 14 (7) of the Constitution which has since seenan upsurge in our law courts.

The Supreme Court was called upon in the case of ***Awuni v WAEC***, already referred to supra to pronounce upon the principles applicable in the award of damages in giving redress for breach of article 23, of the Constitution 1992 which provides as follows:-

> *"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal."*

Date-Bah JSC, in delivering his opinion in the ***Awuni v WAEC*** case already referred to supra, on pages 576 to 577 of the report, dealt with assessment of damages arising from failure to apply or comply with constitutional provisions in article 23 referred to supra. Since article 14 (7) of the Constitution 1992, with which we are dealing with in the instant case is also part of the chapter Five of the Constitution which deals with Fundamental Human Rights and Freedoms, I deem it expedient and worthwhile to quote in extenso from that decision of Date-Bah JSC since it provides useful lessons and guidelines to be used in this particular case. He stated thus:-

"The basic principle that the common law courts have applied for the measure of damages in the private law of tort (and indeed of contract) is that of restitutio in integrum. Lord Scarman expressed this principle thus in ***Lim v Cameden Health Authority [1980] AC 174 at 187****.*

"…the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong."

This measure of damage is easier to apply in the traditional private law of torts area, where a plaintiff's loss may consist of personal injury, damage to property, financial loss etc. ***It is much more difficult to apply where a plaintiff's loss is that of a constitutional right****. What is the level of monetary payment that can return him or her to the status quo ante. A similar difficulty has been found in trying to apply restitutio in integrum to the non-pecuniary elements of personal injury compensation, such as pain and suffering. In such situations, what the courts may end up with is not true compensation but what Romer L.J. described in* ***Rushton v National Coal Board [1953] 495 at 502*** *as "notional or theoretical compensation to take the place of that which is not possible, namely, actual compensation."*

Similarly, how can there be actual compensation for the appellant's loss of his right to a fair hearing, on the facts of this case? What payment can restore him to the situation he was in before the respondents took their decision affecting him without hearing him? The difficulty of this question is compounded by the fact that it is to be answered without prejudice to the substantive rights of the parties to this dispute. On the facts of this case, I am not in a position to determine whether the applicant and his fellow students did or did not cheat. All that this court can determine is that the procedure the respondent employed to arrive at its decision is flawed and therefore

the decision is void. ***Assessing the monetary compensation to restore the applicant to his procedural status quo ante will to my mind, inevitably involve a "notional or theoretical" exercise. It is nevertheless worth carrying out in order to give substance to his constitutional right.*** *In undertaking this notional exercise of compensation, the courts will need to exercise their judicial discretion judiciously, taking into account the totality of the circumstances of each case. They would be well advised to restrict themselves to modest awards because of the inevitable subjectivity of the exercise.*

In effect, the damages that are awarded for breach of a constitutional right under chapter five of the constitution in cases where no actual damage is proved are damages which are "at large" in the sense in which Lord Hailsham LC used this expression inCassell & Co Ltd v Broome [1972] AC 1027 at 1073*, HL where he said:*

"The expression "at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants' counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in ***Rookes v Barnard [1964] AC 1129, 1221****,* ***when he defines the phrase as meaning all cases where "the award is not limited to the pecuniary loss that can be specifically proved."*** *But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated."*

In the Ghanaian context, use of the phrase may be convenient shorthand for describing the nature of the damages payable for

breach of a constitutional right, where no actual proximate pecuniary loss is proved." emphasis

The guidelines established from the Awuni case in assessing damages in breach of constitutional rights are:

1. Notional or theoretical compensation.This as the name implies is based on conjecture and is not actual compensation.

2. There must be moderation in the award of damages because of the inevitable subjectivity of the exercise.

3. Damages awarded for breach of a constitutional right under chapter five of the Constitution where no damages are proved are damages which are "at large".

This in essence includes heads of claims like, injured feeling, loss of reputation, pain and suffering etc. which are incapable of precise proof.

4. In the purely Ghanaian context the phrase damages "at large" may mean damages payable for breach of a constitutional right, where no actual proximate loss is proven. This can be referable to the exact circumstances of this appeal

Applying the above principles to the circumstances of this case which have been well stated supra, I am of the considered view that a global amount of GH¢35,000.00 is an adequate remuneration for the unquantifiable losses that the appellant has suffered. This is because unlike the Awuni case where it was doubtful whether the appellants therein cheated or not, in the instant case, it has been established that the appellant was innocent of all the humiliation he has gone through, i.e. the arrest, detention, prosecution for murder, subsequent conviction and sentence and eventual acquittal all spanning a period of 11 years.

CLOSING REMARKS

1. What is certain at the end of this case is that, a Judge definitely has discretion in applications under article 14 (7) of the Constitution whether to certify the case to the Supreme Court for consideration of the compensation, and the Supreme Court also has discretion in the examination it conducts in the matter. The caution is that, like all judicial discretions, it must be exercised judiciously.

   To the extent that the Court of Appeal rightly exercised it's discretion in the matter, that part of the appeal which suggests that the award of compensation payment under article 14 (7) of the Constitution 1992 is automatic and devoid of any discretion on the part of the courts concerned following an acquittal cannot be sustained and is accordingly dismissed.

2. The decision of the state institutions, the Police and the Attorney-General's Department, to undertake the prosecution of the appellant where there was absolutely no basis to link him with the offence is to be frowned upon and condemned in no uncertain terms.

   This case should be a wakeup call on all state institutions involved with arrest, detention and prosecution of citizens that, henceforth, their actions would be measured in terms of the article 14 (7) of the Constitution. Care must therefore be taken to prevent persons who have been acquitted on appeal proceeding under this article 14 (7) provision of the Constitution to obtain judgment debts against the Attorney-General. There is therefore the need for a lot of circumspection to be exercised by the state institutions involved in this aspect i.e. arrest, investigations and prosecutions of citizens

3. In considering the monetary compensation that the appellant has been awarded, all the items listed by the appellant in paragraph 14 of his affidavit were taken into consideration.

   Learned counsel for the appellant, Mr. Ahumah Ocansey, referred us to the words in proverbs Chapter 3 verse 27, I respond and state that

this court cannot be seen to preside over justice and have injustice meted out to persons who seek justice before us. In other words, when it is in our power to do good, we will not withhold it from those to whom it is due, only that, in all instances it must be according to law.

Save as stated supra, the appeal herein lodged by the appellant against the Court of Appeal decision dated 8th July 2004 succeeds.

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

BENIN, JSC:-

Article 14(7) of the 1992 Constitution which is at the centre of this appeal provides that:

'Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted'.

The core issue raised in this appeal is whether the payment of compensation under the above quoted provision of the Constitution is automatic and compulsory once a person has been acquitted on appeal after having served the full term or a part of it, or whether it is discretionary as the court may deem fit to grant. This divergent opinion has arisen for two reasons: firstly, there is no precedent by way of a local decided case to guide an applicant. Such foreign decided cases as are available do not turn directly on this provision in our Constitution so they are not germane to this discussion. Secondly, the provision under consideration is blank on what conditions or circumstances or grounds any such compensation may be awarded. It

is unlike article 14(5) of the Constitution which makes the unlawfulness of an arrest, restriction or detention the basis for compensation against the person liable. It is also unlike section 141 of the Criminal and other Offences Procedure Act, 1960 (Act 30) whereby compensation may be ordered to be paid to an accused against a complainant in a case of frivolous or vexatious charge. The court thus has an opportunity to determine the meaning and scope of this provision.

The brief facts of the case are as follows. The appellant and his brother were arraigned before the High Court on two charges, namely conspiracy to commit murder and murder contrary to sections 23(1) and 46 respectively of the Criminal Offences Act, 1960 (Act 29). The jury returned a guilty verdict on both counts and the trial judge convicted and sentenced them accordingly. On appeal to the Court of Appeal the appellant herein had his appeal allowed so his conviction and sentence were quashed and set aside and he was consequently discharged. The appellant then applied to the Court of Appeal for compensation under Article 14(7) of the 1992 Constitution, supra. The court did not accede to the request. The court, in dismissing the application, said this:

"We are of the opinion that the above constitutional provision, which is under consideration, imposes a discretion on this court and any other court for that matter. Such discretion like any judicial discretion is properly exercised when all the circumstances (sic) is taken into consideration. In this case, we are of the opinion that as the applicant went through a proper trial which observed all the statutory procedure in a court of law established by this very constitution and his arrest and prosecution were all regular devoid of any abuse of law and breach of any human rights of the applicant, we are of the view that this application ought to be refused."

It is against this decision that the appellant has appealed to this court on two grounds, namely:

1. Failure by the court to appreciate that the award of compensation as provided for under article 14(7) of the 1992 Constitution is not hedged with any antecedent conditions other than the inherent injustice of arresting and detaining a person on inadequate or non-existent legal grounds.

2. Failure by the Appellate Court to appreciate that the fundamental abuse of the rights of the applicant took place at the very moment of arrest and detention in Ada without cause, and that all other processes, whether proper or not, were nugatory.

I will consider the two grounds together. Arguing the first ground of appeal, Counsel for the appellant stated that the constitutional provision is founded on the principles of tort whereby a person who is unlawfully detained or restricted is entitled to compensation for injury to his personal dignity. Counsel then argued that the Court of Appeal concluded that payment of compensation under the Constitutional provision was discretionary because it did not consider it alongside Article 12(1) of the Constitution, which provides:

'The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution'.

Counsel submitted that "the mandatory spirit in this provision does not allow for the discretion that the Appellate Court refers to. Perhaps, it might have been deceived by the use of the word 'may'. However, the spirit and letter of Article 12(1) is that the provisions on human rights must be enforced in so far as it is apparent a person's rights have been violated, and the violation vindicated by the courts."

Counsel then proceeded to make a comparison between Article 14(7) and section 133(1) of the Criminal Justice Act, 1988 of Britain. It provides:

'Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction'.

Counsel's position on this was that "the similarity of the Ghanaian and the British provisions shows the importance that the law attaches to the rehabilitation of a person manifestly wronged by operation of law." He then cited some local and foreign authorities namely ***Appiah v. Mensah and others (1978) GLR 342; Murray v. Ministry of Defence (1988) 1 WLR 692 at 703 HL;*** on the premium the law places on individual liberty and if he suffers wrongful interference with it he is entitled to be compensated.

In concluding on this ground counsel stated that the Court of Appeal should have given the provision a literal interpretation, without imposing any conditions. In counsel's view if the decision by the court below is upheld, "that would introduce a subjective element in the payment of compensation to persons who are qualified to receive compensation and once subjectivity comes in, the intendment of the Constitution would be defeated."

On the second ground of appeal counsel's view was that "the fundamental law operative under this ground of appeal relates to the lawfulness or legality and unlawfulness or illegality of the acts of the Ada Police in arresting and detaining the applicant." Counsel went on to say that "once the Court of Criminal Appeal had acquitted the Applicant, it raised the presumption of the unlawfulness of his conviction."

Responding to these arguments, Counsel for the respondent supported the lower court's view that the provision imposes discretion on the court in deciding from all the circumstances of the case whether or not to grant an application for compensation. Counsel's view was that it was not intended to open the floodgates that every convicted person who serves a sentence should be compensated when he is acquitted on appeal. Counsel made reference to the fact that the legislator used the permissive word 'may' which allows for discretion therefore the court should be free to consider each application for compensation in the light of all the circumstances of the case.

Counsel then considered the argument that Article 14(7) when read together with Article 12(1) would show that the spirit of the law was to protect the fundamental rights of the individual by all state institutions including the court. In their view article 12(1) was subject to the limitations imposed by article 12(2) which reads:

'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'.

Counsel's submission was that the enjoyment of one's fundamental human rights was not absolute or unbridled, but it is subject to the rights and freedoms of others and the public interest, as stated in article 12(2).

On the similarity between article 14(7) and section 133(1) of the British Criminal Justice Act, 1988, supra, Counsel drew attention to the fact that under the latter legislation the award of compensation was not automatic but was subject to the discretion of the Secretary of State even where there was a miscarriage of justice. Counsel went on to mention that section 133(1) has been amended by section 175 of the Anti-social Behaviour, Crime and Policing Act, 2014 which has now made eligibility for compensation to be dependent on whether the claimant committed the offence or not. The relevant part of section 175 of the said Act reads:

'(1)in section 133 of Criminal Justice Act, 1988………after subsection (1) there is inserted

(1ZA) For the purposes of subsection (1) there has been a miscarriage of justice in relation to a person convicted of a criminal offence……..if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence…….'.

Counsel went to great length to cite a number of English cases; but I am afraid they are not relevant for the simple reason that both English legislations referred to above have specific condition or ground to satisfy in order to qualify to be paid compensation. Thus any attempt to compare them is not too helpful. However, we could employ the wisdom therein to delimit the scope of our own legislation in the sense that the British legislation of 2014, supra, has confined the scope of miscarriage of justice to the total innocence of a convicted person as the sole condition for compensation. Apparently it was done for financial reasons which are a sensible thing to do therefore we may also adopt it in a fragile economic environment as ours. But until specific legislation is made to delimit the scope of Article 14(7), the Supreme Court which is given the right to decide who qualifies

to be paid compensation should do so in accord with the mind and intention of the lawmaker.

Let me return to the grounds of appeal. I start off by erasing a false assumption by counsel for the appellant when he sought to say that once the appellant was acquitted it must be presumed that the conviction was wrongful and therefore the innocence of the appellant was undoubted. It is true that in law when an appellant's conviction is quashed he becomes a free man in the eyes of the criminal law. But it does not mean that in fact he was not culpable for he might have been acquitted on a technical ground only. Besides he is not innocent before a civil court in any subsequent claim for compensation following the acquittal whether the claim is against the complainant or the State, such that he can rely on the acquittal as proof of his innocence. His culpability may be proved in the proceedings before a civil court for compensation, so he must be able to satisfy the court, independent of his acquittal by the appellate criminal court, that he is innocent. Thus it is fallacious to assume that because he has been set free on appeal in the criminal court, an applicant is not obliged to establish his claim for compensation. It is this fallacy that underpins the key arguments contained in the grounds of appeal, especially the first ground. If counsel's argument is accepted, it will mean that every arrest, detention and prosecution inherently infringe a person's rights as enshrined in the Constitution. That is completely false and this could not be the intent and purpose of Chapter 5 of the Constitution, read as a whole or read vis-a-vis the other provisions of the Constitution, especially in matters affecting the security of the entire country or the rights of other citizens.

It is to be noted that the word 'may' appears four times in article 14(7), supra. By section 42 of the Interpretation Act, 2009 (Act 792) the word or expression 'may' when used in an enactment shall be construed as permissive and empowering, as opposed to the word or expression 'shall' which is imperative and mandatory. However, counsel for the appellant is of the view that notwithstanding the use of the word 'may' in Article 14(7) of the Constitution, the court is bound to award compensation to a convicted person who has served the whole or a part of the sentence and who is acquitted on appeal. Counsel's reason was that the provision only says that a person who is acquitted on appeal after serving the whole or part of his sentence is entitled to be compensated, that is applying a literal interpretation. Counsel's view appears to give a blank cheque to any person who is

acquitted after serving some amount of sentence to receive compensation. Is this the true intendment of the Constitutional provision?

I must point out that aword or an expression may appear several times in the same section or clause of an enactment but each may have been used differently in the sense that it has a different meaning, purpose and intent having regard to the context of its use. See the India case of ***Ramnarayan Mor v. State of Maharasira, AIR (1964) SC 949 at p. 953; (1964) 5 SCR 1064.***From the position of counsel for the appellant, he seems to be saying that the word 'may' bears a different meaning in one or more places that it appears in Article 14(7). That is legally possible but the proponent must satisfy the court as to why it must be interpreted as imperative and not permissive which is the normal meaning of the word. The word 'may' may be construed as imperative if the context of its use so dictates, that is if that alone would achieve the purpose and object of the legislation. But the general principle as stated by Justice G. P. Singh in his book Principles of Statutory Interpretation, 13th edition 2012, at page 749 is that **"when an Act conferring the power does not mention the conditions and circumstances in which the power is to be exercised it will be construed as discretionary and directory**."

Thus the court will have to look at the legislation to find out if there are conditions, circumstances and specific grounds to exercise the power; if they do exist then the legislation imposes a duty on the court to exercise that power if those circumstances, conditions and grounds are established, notwithstanding the use of an enabling word like 'may'. If not, it should be interpreted as discretionary and permissive, unless such interpretation will defeat the purpose and object of the legislation. Let me refer to a few decided cases on these principles.

In the words of Cotton L.J. in the case of ***In re, Nicolsvs. Baker, 59 LJ Ch 661 at*** p.663" 'may' can never mean 'must', so long as the English language retains its meaning, but it gives a power and then it may be a question, in what cases, when any authority or body has a power given it by the word 'may' it becomes its duty to exercise that power."

In the case of ***Julius v. Lord Bishop of Oxford (1874-80) All ER Rep 43*** at p. 49per Lord Cairns:"where a power is deposited with a public officer for the purpose of being used for the benefit of persons specifically pointed out with

regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."

The principle is the same even where the duty is cast upon the court to exercise the power. In the book cited above at page 748, the learned author writes that "**when permissive words are employed by the Legislature to confer power on a court to be exercised in circumstances pointed out by the statute, it becomes the duty of the court to exercise that power in proof of those circumstances."**

Per Beg J. in the case of the **Official Liquidator v. Dharti Dhan AIR 1977 SC 740** at 745: "If the conditions in which the power is to be exercised in particular cases are also specified by a statute then, on the fulfillment of those conditions, this power conferred becomes annexed with a duty to exercise it in that manner."

The appellant therefore has a duty to satisfy the court that despite the use of the enabling word 'may' in article 14(7) which is statutorily defined to be permissive and thus discretionary, and despite the absence of any conditions, circumstances or grounds specified therein, yet in the context of this constitutional provision it must have a different meaning, precisely that it is imperative and obligatory.

The word 'may' first appears in Article 14(7) in connection with the appellate court other than the Supreme Court; such appellate court 'may certify' to the Supreme Court that an applicant be paid compensation. The operative word here is 'certify'. What does 'certify' as used in the provision mean? There is no definition of that word in the Constitution; we thus have to resort to other sources to discover the ordinary and legal meaning of that word in order to appreciate what the appellate court concerned is required to do. First the ordinary meaning of the word 'certify' is to attest to as to the truth or meeting a standard. Synonyms of that word are words like witness, vouch for, approve and confirm.

As to the legal meaning, Black's Law Dictionary 9th edition at page 258 defines 'certify' as (1) to authenticate or verify in writing; (2) to attest as being true or as meeting certain criteria.

Whether in its ordinary or legal meaning the word 'certify' connotes some form of confirmation of the truth or existence of something. In the context of Article 14(7)

supra, what it means is that the appellate court is required to confirm, not the bare fact that the applicant has been acquitted on appeal after having served the whole or a part of the sentence, which the Registrar of the court is best placed to do but rather, whether following his acquittal the court considers that he should be recommended to be paid compensation. In other words the appellate court must be satisfied that given all the facts and circumstances of the case that it has examined in the course of hearing the appeal, the applicant deserves to be paid compensation. Thus the expression 'may certify' imposes a duty on the appellate court to examine the record in its entirety and come to a reasoned conclusion that the applicant should be recommended for payment of compensation. Consequently, it is not automatic or compulsory or imperative that once a person has served his sentence or a part of it and is acquitted on appeal he must be paid compensation. That is not the intention of the lawmaker hence the requirement of certification by the appellate court, which in itself is a process that involves the exercise ofdiscretion. It is observed that the certification by an appellate court to the Supreme Court is nothing more than a non-binding recommendation. After an appellate court has certified to the Supreme Court that the applicant may be considered for compensation, the Supreme Court is not bound to accept that recommendation. It has the right, and may examine the entire record including the lower court's certificate and satisfy itself that indeed it is a fit case to award compensation. The fact that this court is required to examine the facts, which I understand to mean the entire record of the case if it is available, as well as the lower court's certificate go to confirm that the award of compensation is not automatic following an acquittal.

Besides the foregoing, this interpretation of the provision accords with the ordinary meaning of the word 'may' which is affirmed in section 42 of Act 792 in as much as it accords with common sense. It is a rule of law that when considering the facts of a case which of the opposing constructions of the provision would give effect to the legislative intention, it is legitimate for the court to presume that the legislator intended common sense to be used in construing the enactment. The law maker could not have intended that every person who is acquitted after serving some amount of imprisonment should be paid compensation, if for nothing at all for its indeterminate and incalculable cost to the treasury and the burden it would place on the Supreme Court if all such persons were to have unfettered right based on open-ended ground to approach it for compensation. Thus the law maker expects

the Supreme Court to make award in deserving cases, without putting any fetter or clog on its discretion.

Obviously the question that will have to be addressed is this: on what grounds or conditions or in what circumstances may the appellate court consider in deciding whether or not to certify that an applicant should be recommended for consideration by the apex court for compensation, or for the Supreme Court to decide that the applicant should be paid compensation? Admittedly, the provision under consideration is silent on this issue. Hence being a matter of discretion the appellate court will be entitled to consider all the facts and circumstances, as the Court of Appeal rightly held. In the process the court must bear in mind that the State has a responsibility to protect all the inhabitants in the country, whilst at the same time ensuring that the individual rights and freedoms enshrined in the constitution are respected. Thus while the State may arrest, detain and prosecute any suspected criminals and possibly jail convicted criminals for infractions of the law, the provision in Article 14(7) of the Constitution ensures that where the State has crossed a certain boundary to the detriment of an individual, that person is duly compensated. The provision in Article 14(7), as well as Article 14(5), acts as a check on the dominant power of the State to arrest, detain, prosecute and to send to jail. Such considerations ensure that the balance of the various interests which Article 12(2) of the Constitution seeks to maintain in society is duly satisfied, that is individual rights vis-à-vis the rights and freedoms of others as well the interest of the public at large. They also achieve the purpose and object of Article 14(7) that those who have really suffered injustice in terms as determined by the Supreme Court are compensated.

Consequently I hold the view that among the factors that the court may take into account are the following:

i. In particular the court may consider whether the acquittal was based on the complete innocence of the applicant, without any shadow of doubt. In that regard an acquittal based on a technical ground will not pass the test.
ii. The court may also take into account, what I may consider to be a reckless prosecution of the applicant. Let us consider the case of an applicant who pleaded alibi and filed the required notice and provided all witnesses and made them available but the investigating authorities did

not investigate it and the prosecutor also ignored it and the applicant was convicted and sentenced. Then subsequent events go to exonerate the applicant on ground that the alibi was true. This will be a case of a reckless prosecution resulting in a miscarriage of justice. Here too the complete innocence of the applicant will have been established without any doubt. Thus the State must have a reasonable cause to embark on a prosecution.

It may be observed that in each of these instances listed above, there would be some form of failure in the criminal justice system that resulted in the conviction of the applicant or appellant, as the case may be. However, the category of cases in which compensation may be awarded under Article 14(7) cannot be exhausted so each case will depend on its own peculiar facts and circumstances, but certainly the bare fact that a convicted person has succeeded on appeal would not suffice.

Now an appellate criminal court has made a certification to the Supreme Court that an applicant qualifies for compensation. The provision states further that after examining all the facts and the certificate of the lower court and having satisfied itself of the applicant's claim, the Supreme Court may then decide that an applicant is entitled to be awarded compensation; the court then decides how much to award as compensation. It is still a discretion vested in the court even at that stage because there may be some factors present on the record that may sway the court to award minimal or nominal damages or none at all. For instance if the applicant contributed to the events leading to the prosecution and conviction or even to the term of imprisonment, the court will be entitled to take them into account in determining the issue of compensation payable. Thus an applicant has a duty to satisfy the Supreme Court that apart from being entitled to be paid compensation, that the court should indeed award him the compensation requested for, because there is nothing inhibiting the award. Thus Article 14(7) supra, gives the Supreme Court alone the right to determine whether a person is entitled to compensation and the quantum to pay; every other appellate criminal court has only the priviledge to make recommendation to the Supreme Court.

Before considering my decision in this appeal I must address three matters that immediately arise when this provision in article 14(7) is invoked; they are largely procedural in nature. To begin with, the provision does not state who may invoke

the court's jurisdiction. Obviously a prisoner who has served his sentence or a part thereof and has had the conviction quashed qualifies to apply for compensation. Can the court act on its motion? It appears from the wording of the provision that the appellate court can on its own decide that a person whose conviction and sentence it has quashed and set aside on appeal deserves to be compensated.

Next, it is certain that there are no rules in any of the courts to regulate the practice in respect of the jurisdiction conferred by Article 14(7) supra. But the State which stands to lose some revenue should an order be made for compensation to be paid is the person directly affected by an order for compensation and is indeed responsible to pay the compensation awarded and is thus the interested party. Therefore it is imperative to require that the State acting per the Attorney-General be served with notice by the applicant, or if the court is acting on its own motion that the Attorney-General is notified and to be heard. If the court below fails to do that the Supreme Court which is given the right to take the decision in respect of the question of compensation under Article 14(7) must invite the Attorney-General for a hearing.

Finally, the question arises as to what an applicant may do when the appellate court below rejects his application for the court to certify to the Supreme Court that he be paid compensation. Until such time that rules will be made to regulate the exercise of this jurisdiction, the applicant may come to the Supreme Court by way of a repeat application. Can an applicant appeal against such refusal? There are clear provisions that govern the appeal process. Article 131 of the Constitution provides in relevant part as follows:

(1) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court

(a) as of right in a civil or criminal cause or matter in respect of which an appeal has been brought to the Court of Appeal from a judgment of the High Court or a Regional Tribunal in the exercise of its original jurisdiction; or

(b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest.

(2) Notwithstanding clause (1) of this article, the Supreme Court may entertain application for special leave to appeal to the Supreme Court in any cause or matter civil or criminal, and may grant leave accordingly.

See also sections 4(1) and (2) of the Courts Act, 1993 (Act 459). The Court of Appeal does not have original jurisdiction, thus an application to that court under Article 14(7) can only be handled in the context of the appeal process in wherein the applicant was acquitted, in which case the court exercises a continuing jurisdiction which is conferred upon it by this provision. Therefore an appeal will lie from a refusal by the Court of Appeal as of right under Article 131(1)(a), supra, since the criminal appeal came to the Court of Appeal from the High Court.

As earlier held, Article 14(7) gives the Supreme Court the sole right to determine the question of compensation, thus in the absence of rules to govern the exercise of the jurisdiction conferred upon the court, an interested party should be given the unfettered right to come before the Supreme Court after exhausting the first opportunity given him to apply to the court which acquitted him. In my view therefore an applicant may come by way of a fresh application to this court following a refusal by the court below as earlier stated, be it the High Court or the Court of Appeal whichever of these courts finally acquitted and discharged the appellant, or by way of an appeal if it is coming from the Court of Appeal. A fresh application will be more cost effective and expeditious than an appeal and is thus to be encouraged. If the appeal procedure is the only mode to be employed, it will mean that following a refusal by the High Court the appellant/applicant will have to appeal to the Court of Appeal in the first place even though the latter court has no right to make any binding and enforceable decision in the matter. The Court of Appeal, like the High Court, only has the priviledge to make a non-binding recommendation to the Supreme Court, so why resort to this circuitous and expensive and time-consuming appeal process. But as stated earlier until specific rules have been put in place this court should accept any of the two modes either an appeal or a fresh application with all the necessary documentation annexed thereto.

Let me now apply the principles outlined above to the facts of this case. We have not had the benefit of the entire record. But as both parties have confined themselves to the record as we have it, we have to go by it. However, I think that if

this court is to make an award it is entitled to the benefit of the full appeal record as was placed before the lower court, by which I mean the first appellate court which heard the appeal and acquitted the appellant. However, in this appeal the absence of the record has not affected effective decision-making for the reason that we have had the benefit of the decision by the Supreme Court in the final appeal. I must remark that Counsel for the appellant was not helpful to the court for even when he was prompted to supply the judgment containing the full facts he said it was not necessary, apparently because he had taken a rather simplistic view of Article 14(7) that it applied automatically. The appellant has just been fortunate that the final appellate decision is available and is reported as **Sabbah v. The Republic(2009) SCGLR 728**.The facts recounted in the report demonstrate without a shadow of doubt that the appellant herein was not even at the scene of crime. The prosecution witnesses all mentioned his brother as the murderer and the said brother also admitted it even on oath before the trial court that he alone did kill the deceased. The appellant herein was thus completely innocent right from the beginning and was thus wrongfully arrested, detained, tried, convicted and sentenced. There was no reasonable cause for the arrest in the first place, there was a reckless prosecution and all the subsequent processes were detrimental to him. The appeal therefore succeeds on ground (2) but ground (1) fails for reasons explained above. I adjudge the appellant to be entitled to be awarded compensation, taking into account, inter alia, article 14(6) of the Constitution that is from the date of his arrest and detention up to the date of his discharge from jail that is for the period he was unlawfully incarcerated.

After I had concluded my decision, I had the priviledge of reading the opinions of my learned brethren and I am pleased we have not expressed any significant divergent views on this important matter. I particularly share the view expressed by the Honourable Lady Chief Justice that a global sum be awarded to the appellant herein in the circumstances that she has ably described in the lead opinion.

(SGD) A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

AKAMBA, JSC:

This novel application is premised upon two grounds of appeal raised for this court's determination, namely: (i) The failure by the court to appreciate that the award of compensation as provided in the 1992 Constitution is not hedged with any antecedent conditions other than the simple acquittal of an Applicant, and this is no doubt based on the inherent injustice of arresting and detaining a person on inadequate or non-existent legal grounds; (ii) Failure by the appellate court to appreciate that the fundamental abuse of the rights of the Applicant took place at the very moment of his arrest and detention by the Police at Ada without cause, and that all other processes, whether 'proper' or not, were nugatory.

Without any measure of doubt this application calls for an interpretation of the relevant provisions of the Constitution, given the circumstances of this case.

BACKGROUND

The appellant and Matthew Kwame Sabbah are brothers. They were both charged with the offences of conspiracy to murder and murder before the High Court Accra. They were tried and convicted and sentenced to death on 7th August 2001. Dissatisfied with the verdict, they appealed to the Court of Appeal which quashed the conviction of the appellant but dismissed the appeal of Matthew Kwame Sabbah. Following his release, the appellant applied to the Court of Appeal for an order to certify to this Court for the payment of compensation. The Court of Appeal found no merit in the application and dismissed it. The result is the present further appeal for our determination.

To begin with, the appeal record is very scanty. Not much information has been included in the record of appeal to enable one come to an informed view of the circumstances leading to the present application. Conspicuously absent is the record of proceedings from the trial court and all other relevant pieces of vital evidence that could assist a second appellate court deal with this very important issue that affects our criminal justice system and the way ahead. I think it is fair to observe that in order to ascertain whether or not the appellant is deserving of the relief sought for such appellant to attach the whole of the record of proceedings

in the court below for our examination in order to make informed opinions or decisions. Be that as it may, I will proceed to deal with whatever material that is available in this appeal record.

RELEVANT CONSTITUTIONAL PROVISIONS

Chapter five (5) of the 1992 Constitution regulates Fundamental Human Rights and Freedoms. The two relevant articles of the 1992 constitution i.e. articles 12 (1) and 14,for our consideration state as follows:

"**Art. 12(1**). The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, <u>and shall be enforceable by the Court as provided for in this Constitution."</u>

"**Article 14** (1) Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases <u>and in accordance with procedure permitted by law</u> –

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(7) Where a person who has served the whole or a part of his sentence is acquitted on appeal by a courtother than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted."

CONSIDERATION OF GROUND ONE

Counsel for the Appellant submits tenaciously that Article 14 (7) of the Constitution 1992 (supra) when read together with Article 12 (1) thereof, eliminates any element of discretion to the courts in the award of any compensation following the acquittal of a person. Does a close reading of Article

14 (7) (supra) and Art 12 (1) (supra) of the 1992 Constitution lend any support to the submission by Appellant counsel?

The Appellant's counsel is of the view that Article 12 (1) circumscribes or delimits the discretion given to the courts in the later provision of Article 14 (7). I think it prudent that caution is applied in jumping to such conclusions when it comes to the interpretation of legal documents not least a Constitutional provision. The Privy Council's caution in **Ditcher v Denison (1857) 11 Moo PCC 3224 at 337** is apposite, as follows:

"It is also a good general rule in jurisprudence that one who reads a legal document, whether public or private, shall not be prompt to ascribe, should not without necessity or some sound reason, impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose each word intended to have some effect, or be of some use."

Also the words of Lord Shaw rendering the unanimous opinion of the Privy Council in **Shannon Realties Ltd v Ville de St Michel[1924] AC 185 at 192-193 PC** are to the point wherein he stated thus:

"*Where the words of a statute are clear they must, of course, be followed; but,…where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."*

Luckily there are rules of construction which will assist us unravel the present stalemate whether the notion that there is an apparent removal of any discretion given to the court under Article 14 (7) by Article 12 (1) both of the 1992 Constitution, is correct, as contended by counsel for the applicant.

The first rule of construction for our consideration is that which states in Latin that *generalia specialibus non deroganti.e.general things do not derogate from specific things.*

The import of this rule is highlighted in the case of **Pretty v Solly (1859) 26 Beav 606 at 610** wherein **Romily MR** said:

"*The rule is that where there is a particular enactment, and a general enactment in the same statute and the latter taken in its most comprehensive sense would override the former, the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. Again whenever two parts of a statute are contradictory, the court endeavours to give distinct interpretation to each of them, looking at the context.*"

By this rule where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. See **Churchill v Crease (1828) 5 Bing 177 at 180 per Best C.J**. quoted with approval in this court's decision in **FEDYAG V Public Universities of Ghana (2010) SCGLR 265 at 278 SC.**

Undoubtedly, Article 12 (1) of the 1992 Constitution is clear in its general requirement that the fundamental human rights and freedoms enshrined in the chapter be respected and upheld by the three arms of government as well as all other organs of government and its agenciesand where applicable, by all natural and legal persons in Ghana. The requirement does not end there. They shall be enforceable by the courts as provided for in this Constitution.[Underlined for emphasis]. The Article 14 (7) of the 1992 Constitution for its part employs the use of certain words that denote the intention of the framers. The employment of such terms as 'may' in contradistinction from 'shall' denotes what the intention is.

Significantly, Article 12 (1) mandates the courts to enforce the rights in the manner provided for in the constitution. In any case, this court has over the years adopted the purposive and literal approach in the interpretation of the constitution instead of the purely mechanical or literal approach that pays no heed to the legislative purpose or intent. This approach to the interpretation of our Constitution enables a holistic consideration of the document which is sui generis, as a whole, rather than piecemeal. In **National Media Commission v**

Attorney General [2000] SCGLR 1, Acquah JSC, (as he then was), underscored this position wherein he succinctly stated at page 11 of the report as follows:

"Accordingly, in interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form rational, internally consistent framework. And because the framework has a purpose, the parts are also to work dynamically, each contributing something towards accomplishing the intended goal."

What then is the essence of Article 14 (7) of the 1992 Constitution? It does appear to me upon reading the article under reference a desire to put in place a measure of compensation to be paid to persons who have suffered the humiliation of being incarcerated under our criminal justice system without just cause only to be later pronounced innocent and acquitted by our courts. The words used in the article do not render the compensation automatic as counsel for the applicant appears to understand it. By the employment of 'may' in the article it seem to me that the intendment is obviously to grant the courts discretion or some permission in the determination of who qualifies for a grant of compensation and who does not. I come to this view mindful that under the Interpretation Act, Act 792 of 2009 by its section 42, it is stipulated that the expression 'may' in any enactment shall be construed as permissive and empowering whereas the expression 'shall' shall be construed as imperative and mandatory. This view is further strengthened by the fact that where a court other than the Supreme Court certifies that a person acquitted ought to be paid compensation, the Supreme Court is obliged to examine all the facts and the certificate of the court below and award such compensation as it deems fit or appropriate. Even in this, the Supreme is obliged to exercise discretion as to what is appropriate. It is not a fait accompli or automatic. The award is not intended to be a capricious award based on guesswork but one informed by the circumstances of the totality of events leading to the acquittal on appeal.

The article under reference also envisages that the Supreme Court sets out guidelines to courts below in fashioning out appropriate instances for complying with the article. In these days of economic uncertainties and crunches it would be

suicidal to resort to the unfettered interpretation advocated by the appellant with its dire consequences and without due regard for the true purpose of the provision. **Aharon Barak, former President of the Supreme Court of Israel**, stated in his book *Purposive Interpretation in Law (Princeton Univerity Press, 2005) Chapter 15,* under constitutional Interpretation, and *quoted with approval by* ***Wood, CJ*** in **Brown v A/G (Audit Service Case) (2010) SCGLR 183 @ 207**, the learned author writes:

"A constitution is a legal text that grounds a legal norm. As such, it should be interpreted like any other legal text. However, a constitution sits at the top of the normative pyramid. It shapes the character of society and aspirations throughout history. It establishes a nation's basic political points of view. It lays the foundation for social values, setting goals, obligations, and trends. It is designed to guide human behavior over an extended period of time, establishing the framework for enacting legislation and managing the national government.

It reflects the events of the past, lays foundation for the present, and shapes the future. It is at once philosophy, politics, society and law. The unique characteristics of a constitution warrant a special interpretive approach to its interpretation."

Against the background of the above considerations, my answer to the first part of the firstissue posed, that the award of compensation based upon Article 14 (7) of the 1992 Constitution is not hedged with any antecedent conditions other than the simple acquittal of an Applicant, is inconsistent with and contrary to the purpose of the article in question. The true meaning ascribed and emergent from the article is for an appropriate court to satisfy itself of the merit for compensation. The recommending court should satisfy itself that the person, acquitted on appeal, has served a part or the whole sentence imposed by a court. The court should be satisfied that the circumstances of the case warrant that the person, so acquitted, be paid compensation. The certifying court must attach all relevant records of the facts and any relevant information to enable the ultimate court make an informed opinion on compensation, if any. The second segment of the first issue is that which suggests that the essence of such compensation arose the moment his client was arrested and detained on inadequate or non-existent

grounds. Appellant counsel has not provided any basis for his conclusion that his client was arrested and detained on inadequate or non-existent grounds. I have perused the record of appeal before me and find nothing that throws any light on what prompted the appellant's arrest, how he was arrested, what transpired upon his arrest, what statements he gave - either at the investigation stage or upon his charge, and what transpired thereafter. Everything is left for this court to exercise our guesses, yet this application is seeking the payment of compensation to an appellant who complains about inadequacies of the criminal justice system without demonstrating what the inadequacies are. As it stands I do not find any merit in the first issue raised for determination.

CONSIDERATION OF GROUND TWO

The second issue posed by the appellant is that the "*Failure by the appellate court to appreciate that the fundamental abuse of the rights of the Applicant took place at the very moment of his arrest and detention by the Police at Ada without cause, and that all other processes, whether 'proper' or not, were nugatory."*

In my consideration of this relief I must point out as did **Acquah, JSC** (as he then was) in **National Media Commission vs Attorney General [2000] SCGLR 1**, (supra) that"*in interpreting the Constitution, care must be taken to ensure that all the provisions work together as parts of a functioning whole. The parts must fit together logically to form rational, internally consistent framework. And because the framework has a purpose, the parts are also to work dynamically, each contributing something towards accomplishing the intended goal."*

In construing Articles 14 (7) and 12 (1) of the constitution sight must not be lost of article 12 (2) in particular to the effect that the fundamental human rights and freedoms contained in the chapter five are made subject to respect for the rights and freedoms of others and for the public interest. State institutions entrusted with the responsibility for law and order must be given such liberty within the law to safeguard the public interest and respect for other peoples' rights. As long as the appropriate institutions are guided by the law they are at liberty to function to the fullest to safeguard individual liberties. Should they go beyond their powers they are amenable for redress through such requirements as for compensation.

I agree with the learned authors **De-Smith, Woolf and Jowell**, in their book, **Judicial Review of Administrative Action, Fifth Edition -19-008 at Page 758-761,** writing on what should be considered in determining an alleged failure of a public body or institution to act in accordance with public law principles in administrative law, that the real question in such situations in our modern times, is whether a system of remedies can be complete without the provision of rights to compensation and restitution to people harmed by *ultra vires* acts or omission of public bodies. If compensation is to be provided for some losses caused by such action, the question arises as to how best this can be achieved. I think that we cannot escape considering issues such as the lawful scope of a public body's discretion. It will also not be expedient to impose a duty of care which will be inconsistent with, or fetter a statutory duty. This is so because where a statute confers discretion on a public body as to the extent to which and the methods by which, a statutory duty is to be performed, only if the decision complained of is outside the ambit of the lawful discretion, may a duty of care be imposed.

Counsel for the Appellant has quoted for our consideration the **Criminal Justice Act (1988**) which provides for compensation for miscarriage of justice as follows:

"133 (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction….

(2) No payment of compensation under this section shall be made unless an application has been made to the Secretary of State."

The only similarity between the above quoted section 133 of the Criminal Justice Act of 1988 and Article 14 (7) of the 1992 constitution is that they both relate to the payment of compensation resulting from a miscarriage of justice. They however diverge firstly, on the requirements to be met by an applicant. They also differ as to the duty imposed upon the individual or the implementing body. In the case of the former, the Secretary of State is mandated to pay the

compensation whereas in the latter, the courts of Ghana have discretion in determining whether the applicant is eligible for compensation.

Appellant counsel also cited the Sekondi High Court decision in **Appiah vs Mensah & Ors (1978) GLR 342** as providing the reasons for the award of damages. A close reading of the holding (3) of the above decision does not state a blanket requirement that whenever a person is arrested and subsequently released, the person is automatically entitled to compensation. The decision stresses that "no one should be arrested unless the particular circumstances justified the arrest."

It is thus in instances of the arrest being without justification that the award would be granted by the courts for damages for trespass.

In answer to the second issue it is appropriate to satisfy whether the detention was for cause or not in the first place.

Just as I begun to try to resolve this issue of factual lapses in the appeal record pertaining to what role, if any, the appellant played in the events under consideration, my attention was drawn to the reported decision of this court in **Sabbah v The Republic (2009) SCGLR 728,** which sets out clearly that the deceased died of injuries inflicted on him by the appellant therein, Matthew Kwame Sabbah. The appellant herein Dodzie Sabbah was never mentioned by any eye witness as being present during the scuffle between his convicted brother and the prosecution witnesses. The fact narrative in the above cited decision counters any speculation attributing any role played by the appellant herein in the unfortunate and gruesome attacks resulting in the decapitation of the deceased that fateful 21st January 1993. In the light of the above referred decision and having just been privy to the draft of my revered Chief Justice Wood's opinion especially, on this second count, I associate myself with her analysis and conclusion to award a global sum. Considering the evidence and the circumstances of the case as a whole available to this court, a lump sum as was stated by the President of the court would be appropriate under the circumstances.

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

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