IN THE SUPREME COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – GHANA

CORAM: ATUGUBA, J.S.C. (PRESIDING)
ANSAH, J.S.C.
ADINYIRA (MS), J.S.C.
DOTSE, J.S.C.
YEBOAH. J.S.C.
B. BONNIE, J.S.C.
ARYEETEY, J.S.C.

CM. NO: J7A/1/2010

20TH JANUARY, 2011

ELLIS TAMAKLOE	**- - -**	**PLAINTIFFS**
VRS		
THE REPUBLIC	**- - -**	**DEFENDANT**

R U L I N G

ATUGUBA, J.S.C:

The applicant was convicted by the High Court (Fast Track Division) Accra of two charges of attempted exportation and possession of a narcotic drug, namely Cannabis Sativa weighing 695 grammes and sentenced to a minimum mandatory sentence of 10 years IHL on each count to run concurrently. His appeals to the Court of Appeal and to this court were dismissed.

The applicant now applies for review of this court's ordinary decision on the grounds that;

"(a) The Supreme Court occasioned a grave miscarriage of justice in its interpretation and application of the nature and quality of circumstantial evidence used in convicting an accused person.

(b) The Supreme Court inadvertently fell into grave error in its consideration of the requisite mental blameworthiness for convictions under Section 2 of the Narcotic Drug (Control Enforcement and Sanctions) Law, 1990 (PNDCL 236), resulting in a grave miscarriage of justice."

In his supplementary statement of case he identifies the issues raised for review as follows:

"Summary of the Argument

Your Lordships, the gist of our argument is that on all four issues raised above, this Court committed fundamental errors of law that have resulted in a miscarriage of justice in the sense that its verdict, as a whole, undermined the constitutionally guaranteed liberty interest of the Applicant. On the issue of possession, this Court erred fundamentally when it held that the Applicant was in legal possession of a narcotic drug *because he engaged in acts that were inconsistent with innocence*. We submit that *disbelieving the Applicant is not an automatic call to guilt- the defence may be incredible but that is not synonymous with proof beyond reasonable doubt*, a burden squarely placed on the prosecution with respect to the offence of possession of a narcotic drug.

With respect to the second issue, Your Lordships, we argue that this Court fundamentally erred in its judgment when *it glossed over the critical issue of the reversed burden of proof placed on the Applicant under section 2 of PNDC Law 236, to wit, proof of the lawfulness of the possession of a narcotic drug*. The gravamen of our argument on this issue is that *this Court should have held the aforesaid reverse onus clause unconstitutional because it is an unreasonable, arbitrary and disproportionate limitation on the right of the Applicant to be presumed innocent until proven guilty and his right to a fair trial under article 19 of the Constitution*.

Your Lordships, we argue with respect to the third issue that *this Court has power, **ex proprio motu**, to have held that a critical element of the offence created under section 2 of PNDC Law 236, to wit, proof of lawful possession of a narcotic drug, was not established at the trial and therefore the conviction and sentence of the Applicant were unlawful*. Having glossed over that issue of law, this Court committed a fundamental error that has resulted in a miscarriage of justice.

Finally, we argue that this Court erred fundamentally in law when *it endorsed the unsubstantiated inferences drawn by the lower courts from facts which the prosecution patently failed to establish at the trial and in fact drew inferences itself from such facts and proceeded to make conclusions that were not supported by the Record of Appeal*. In all this, this Court misapplied the law on the use of circumstantial evidence in criminal trials."

In view of the principles governing our Review jurisdiction the natural question is whether the application is within them. The relevant principles have been stated in several cases and have been forcefully summed up by Dr. Date-Bah JSC in *Chapel Hill Ltd v the Attorney-General & Anor*,J7/10/2010 (5/5/2010) as follows:

"I do not consider that this case deserves any lengthy treatment. I think that *it represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application*. It is important that *this Court should set its face against such endeavour in order to protect the integrity of the review process*. This court has reiterated times without number that *the review jurisdiction of this court is not an appellate jurisdiction, but a special one*. Accordingly, *an issue of law that has been canvassed before the bench of five and on which the court has made a determination cannot be revisited in a review application*, simply because the losing party does not agree with the determination. This unfortunately is in substance what the current application before this court is.

x x x

I would like to reiterate the view that I expressed in *Gihoc Refrigeration (No. 1) v Hanna Assi* (No. 1)[2007 – 2008] SC GLR 1 at pp.12-13 that:

"*Even if the unanimous judgment of the Supreme Court on the appeal in this case were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error*. This is an inherent incident of the finality of the judgments of the final court of appeal of the land. The brutal truth is that *an error by the final court of the land cannot ordinarily be remedied by itself*, subject to the exception discussed below. In order words, *there is no right of appeal against a judgment of the Supreme Court, even if it is erroneous*. As pithily explained by *Wuaku JSC in Afrainie V Quarcoo* [1992]2 GLR 561 at pp. 591-592:

"*There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court*."

However, in exceptional circumstances and *in relation to an exceptional category of its errors, the Supreme Court will give relief through its review jurisdiction*. The grounds on which this Court will grant an application for review have been clearly laid out in the case law. Notable in the long line of relevant cases are *Mechanical Lloyd Assembly Plant v Nartey* [1987-88]2 GLR 598; *Bisi and others v Kwayie* [1987-88]2 GLR 295; *Nasali v Addy* [1987-88]2 GLR 286; *Ababio v Mensah (No.2)* [1989-90]1 GLR 573; *Quartey v Central Services Co. Ltd*. [1996-97] SC GLR 398; *Pianim (No. 3) v Ekwam* [1996-97] SC GLR 431; *Koglex (Gh) Ltd. v Attieh* [2001-2002] SC GLR 947; and *Attorney General (No. 2) v Tsatsu Tsikata (No. 2)* [2001-2002] SC GLR 620. The principles established by these cases and others are that *the review jurisdiction of the Supreme Court is a special jurisdiction and is not intended to provide an opportunity for a further appeal. It is a jurisdiction which is to be exercised where the applicant succeeds in persuading the Court that there has been some fundamental or basic error which the Court inadvertently committed in the course of delivering its judgment and which error has resulted in a miscarriage of justice*. This ground of the review jurisdiction is currently exercised by the Court pursuant to rule 54(a) of the Supreme Court Rules 1996 (CI 16), which refers to "exceptional circumstances which have resulted in miscarriage of justice." *This is a high hurdle to surmount."*

The public interest in avoiding the protraction of litigation requires that this Court should continue to uphold these principles."

However it has to be remembered that this court has consistently held that the categories of exceptional circumstances cannot be exhaustively stated. Thus in *In Re Effiduase Stool Affairs (No. 3)' Republic v Numapau, President of the National House of Chiefs and Others; Exparte Ameyaw II(No. 3)* [2000]SC GLR 59; this court stated as in holding (1) of the headnote as follows:

> "the application herein was made under the first ground specified in rule 54(a) of the Supreme Court Rules, 1996 (C.I 16), namely, the existence of "exceptional circumstances which have resulted in a miscarriage of justice." Therefore, to succeed, the applicant must demonstrate to us the existence of exceptional factors which show that the decision of the majority has manifestly resulted in a miscarriage of justice. *What constitutes exceptional circumstances cannot be comprehensively defined*. It was incumbent on the applicant to *show that his substantial rights in the matter that came before this court have been prejudiced by some fundamental or basic error made by the majority.* Therefore, *whatever factors the applicant relies on must be such that the exercise of our power of review becomes extremely necessary to avert irreparable harm to him. A mere re-arguing of his original application would not suffice.*"

Since before an application for review can be brought the matter would have been argued invariably, it would be inconceivable that a Review application is entirely free from

re- argument. The formulation in the *In Re Effiduase* case, supra, lends support to this line of reasoning. Obviously if the pursuant judgment does not contain a palpably serious error a review application in that situation can aptly be described as "*A mere re-arguing* of his original application." However if that is not the situation the argument on Review cannot be described as "*a mere re-arguing*...."

Perverse Decision

It would emasculate the Review jurisdiction if too much emphasis is put on the question whether the matter has previously been argued rather than on the character of the judgment emanating from the matter argued. If despite argument on the matter a court arrives at a decision that is so palpably unsustainable as to be describable as perverse, is that not an exceptional circumstance? One has only to consider the meaning of the word "perverse" in order to see its implications.

The Oxford Advanced Learners Dictionary (Fifth edition) defines perverse, inter alia, as follows;

> "**perverse** *adj.* (of people or their actions, intentions, etc) showing *a deliberate and STUBBORN* (1) *desire to behave in a way that is wrong unreasonable* or unacceptable: ..... *a perverse decision /judgment* (ie one that ignores the facts or evidence)."

Even judges have shown great revulsion to judgments that are so palpably wrong and unsustainable that they have described them as perverse. Thus in *Adji & Co v Kuming* (1982-83)2 GLR 1382 C.A. at 1394 Francois J.A said "*The judgment* appealed against *is clearly perverse*. *Even the counsel for the respondent, hereafter called the defendant, could not help labelling the judgment as an "unhappy one*." This *charitable description* stretches *euphemism to extreme limits*."

Again in *Brutuw v Afeniba* (1984-86)I GLR 25 C.A at 30, Francois J.A (Edusei and Mensah Boison JJ. A concurring), said: "The judge decided firmly on *what appeared overwhelming evidence in the defendants' favour*. As already pointed out, that judgment received the unalloyed support of the Court of Appeal. Indeed *on the basis of the evidence on record it would have been bizarre and perverse had the judgment been otherwise*"

So also in *Gyamerah v Brefo* (1984-86) 1 GLR 110 C.A. at 115, Abban J.A said "As matters stood, the defendant's right to the house was based on documents *which were proved to be nothing but forgery* and *we do not see how any court of law or equity could allow the defendant to hold on to the disputed house*..."

See also *Kambey v The Republic* (1989-90) 1 GLR 213 C. A. at 220 and *Akyea-Djamson v Duagbor* (1989-90) 1 GLR 223 S.C. at 259.

<u>Inadequate Consideration of a Case</u>

A decision may be the product of very serious inadequate consideration of the case presented and can be a ground for review. Let me hasten to clarify this proposition by saying that such a situation involves the overlooking of very material and practically decisive matters. As there are precedents on this aspect I better go on to them. Indeed r.54(a) of C.16 has no pretence to originality. It is a lift over from r.33 of the then Supreme Court Rules, 1962 L.I. 218 which provided thus:

"*The Court shall not review* any judgment once given and delivered by it *save where* it is satisfied that *the circumstances of the case are exceptional* and that in *the interest of justice there should be a review*."

This provision was first applied in *Marfo v Adusei*, Supreme Court, 24 February 1964 unreported, in which an application for review was granted by the court because as explained by Azu Crabbe C.J in *Benneh v The Republic* (1974)2 GLR 47 C.A (Full Bench) at 59:

"... it was satisfied that it was influenced by *some typographical errors on the record*, and consequently *it omitted to consider certain issues in the appeal*. In its ruling the court said:

"[T]his is a proper case for a review in compliance with the specific provision as contained in rule 33 of the Rules of Supreme Court, 1962. The judgment of this court [reported [1963]1 G.L.R. 225] is in our view *per incuriam* occasioned by *incorrect court notes* from the court below quite apart from *incoherent passages in the plaintiff's evidence in which there are also obvious omissions*.

Accordingly, *we are of the opinion that there are special circumstances and in the interest of justice the said judgment should be vacated* and it is hereby vacated and the appeal will be relisted and heard de novo by this court as constituted."

Again in *Swaniker v Adotei Twi II* (1966) GLR 151 S.C at 162 Ollennu JSC held as follows:

"As earlier pointed out, *none of the reasons which the trial court gave for its judgment received any attention in the judgment which is now sought to be reviewed*; and that makes it apparent that it escaped the court to deal with the very task it set itself, i.e. to demonstrate the fallacy in the reasoning of the trial court. There is therefore an error evident in the judgment. Moreover, the arguments advanced and the points discussed in the judgment are so clear that the contention of counsel for the opposer that *the matters omitted to be considered must be deemed to have been impliedly included in those points and arguments* is, in my view, untenable, and must be rejected. In my opinion *the circumstances of this case are obviously exceptional, and in the interest of justice warrant a review."*

At 163 Apaloo JSC (concurring) said:

> "I agree with my brother in thinking that *it would not be wise to lay down what are exceptional circumstances for the purpose of this rule and that each case would be left to be judged on its own merits*. But where litigants submit their dispute to a judicial tribunal which determines it with full reasons, I should myself regard it as *exceptional if any appellate tribunal disturbed that conclusion without itself demonstrating the fallacy of the trial court's reasoning*.
>
> I think that is what happened in this case. The judgment of this court proceeded on the footing *that the reasoning of the trial court on the various controverted matters on which it pronounced a decision was fallacious*. That being so, it behoves this court to show this by its own independent reasoning. That clearly has not been done and this omission is apparent on the face of the judgment. In these circumstances, *ordinary fairness requires that this court should make good its omission and have a fresh look at its judgment*. Accordingly, like my brother Ollennu, I also think that the judgment of this court should be reviewed and I concur that orders be made in the manner he has proposed."

Obviously in such cases the record of appeal and not just the bare judgment delivered will be required for the determination of the Review application. See *A/S Norway Cement Export Ltd. v Addison* (1974)2 GLR 177 (Full Bench) at 181.

In *In Re Gomoa Ajumako Paramount Stool (No.2); Application for substitution, Acquah Applicant; Kwa Nana v Apaa and Another* [2000] SC GLR 394 the facts of the case were as stated per Charles Hayfron-Benjamin JSC at 396 as follows:

> "*Ordinarily this court would not entertain an application for review unless such an application was brought within the ambit of the rules of this court*, now clearly spelt out in the Supreme Court Rules, 1996 (CI 16), r 15(2). But *in this case, the applicant by his statement of case prepared on his behalf by counsel, raises an important issue worthy of consideration*.
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> X X X
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> To buttress ....., *counsel argued that if their lordships had carefully examined the record, they would have noticed that by 20 August 1991, when the registrar*

of this court issued the notice to strike out and directed the said notice for service on Kwa Nana, the said Kwa Nana was already dead, and in the submission of counsel, the registrar "therefore could not have taken any step in this case."

Upon these facts this court held as per the headnote as follows:

"Held, *unanimously granting the application for review of the ruling of the court given on 26 June 1992, dismissing the applicant's motion for substitution and an order of re-listment in respect of the appeal which was deemed to have been struck out under rule 13(2) of the Supreme Court Rules, 1970 (CI 13):* the object of rule 13(2) of CI 13 was to notify all parties mentioned in the notice to strike out, that the appeal has been stuck out. In the instant case, *even though the appeal was deemed to have been struck out for failure by the previous appellant to file statement of case as required by rule 13(2), notice thereof was never served on the appellant because he had died before the issue of the notice. The purported service of the notice on a person who was, in fact, dead was a nullity. Consequently, the applicant* for the instant review *is entitled* ***ex debito justitiae*** *to have the earlier ruling set aside*. The court would, therefore, order that the applicant be substituted for the deceased appellant and further order that the appeal be re-listed."

Again in *Republic v High Court, Kumasi; Exparte Abubakari (No. 3)* [2000]SC GLR 45 this Court reviewed its earlier decision mainly because this court had overlooked certain basic and material facts relating to the election of a Moshiehene. Thus it is stated in holding 2 thereof as follows:

"(2) *On the undisputed evidence or facts as found by the trial judge, the question of headship of the Moshie Community in Kumasi did not fall within the definition of "chief" under article 277 of the 1992 Constitution"*.

Furthermore in *NTHC Ltd v Antwi* (2009) SC GLR 117 the *Editorial Note* thereto shows that this court was compelled to review its previous order as to interest because of certain factual errors relating to its duration and computation. In *Baiden v Ghana National Trading Corporation* [1989-90] 2 GLR 79 the headnote vividly states thus:

"*Held, granting the application for review: since exhibit P upon which the court relied to fix the period for the award of damages for wrongful dismissal was never brought to the knowledge of the plaintiff* (as it never left the defendant-corporation) *there was an obvious error on the part of the court when it assumed that from January 1985 the plaintiff had had notice of the regularisation of his termination.* There was therefore an error or mistake apparent on the face of the record in terms of Order 39, r 1 of the High Court (Civil Procedure) Rules, 1954 (LN 140A), and that *failure to review the judgment would amount to a denial of justice".* (e.s)

I do not think that in view of the ratio decidendi therein it matters anything that the Review was made under 0.39 r.1 of L.N. 140A. See also *Koglex Ltd. (No. 2) v Field* (2000) SC GLR 175.

All this should not be surprising because as a matter of principle, since it is trite law that this court can review a decision which is *per incuriam* as to the law why can't it also review a decision that is *per incuriam* as to compelling facts. After all the expression *per incuriam* simply means through oversight. It is also trite law that a statute must be construed as a whole and purposively. The second ground of this court's Review jurisdiction, namely r.54 (b) relates to "*discovery of new and important matter or evidence* which, after the exercise of due diligence, *was not within the applicant's knowledge or could not be produced by him at the time when the decision was given*." Quite clearly then the legislature is anxious that any fact that could have altered the decision of the court, were it known, should be given effect even after judgment has been delivered. Very clearly then it stands to reason that if "*important matter or evidence*" was adduced but was overlooked by the court such a situation should qualify as an exceptional circumstance under r.54(a) of CI 16. After all it is trite law that the spirit of a statute cannot be divorced from its true construction. This means that if the substance of an application for Review is that a different decision from the earlier one is merely preferable and not that the earlier decision is starkly wrong, it is a proper matter for appeal not Review.

For all the foregoing reasons the submissions filed by the applicant's counsel raise the questions whether (1) the ordinary decision of this court in this case was perverse or (2)

whether it overlooked important and substantial matters of fact which, were they considered, would have compelled a different decision by this court. One such fact was that a similar fake air waybill standing in the name of Friesland West Africa had been used on the 30th day of August 2006 to dispatch a parcel described as containing documents by the DHL Company which found nothing suspicious about its alleged contents. Clearly therefore the use of a fake air waybill by the appellant does not necessarily point to a criminal purpose or mind in relation to the charges against him. Another fact is that the first accused indeed had with him several of such air waybills for the purpose of facilitating the theft of the postal fees of the parcels concerned.

Nonetheless every incident must be ultimately decided upon its own peculiarities if any. So far as the facts of this case are concerned the courts below have concurrently found that it was the appellant's executed intent so to distance the identity of the sender from the criminal parcel as to avoid detection. For this purpose though the appellant supplied the consignee's name and address on the fake exhibit 'A' he never disclosed the name and/or address of the consignor, Harry Campbell in the documentation for processing and dispatching the said parcel. There is nothing on the evidence to show that these circumstances are the same as those surrounding the use on 30/8/2006 of the other fake Friesland West Africa airwaybill for the successful and unsuspected dispatch of a parcel allegedly containing documents.

Assuming that the 1st accused used the fake airwaybills to steal the postal fees of the parcels to be dispatched by D.H.L. there is nothing in the evidence to suggest that the appellant was privy to that design of the 1st accused. Indeed the appellant alleged that he joined issue with the 1st accused over the use of that airwaybill. It follows that the residue of any improper intent on the part of the appellant with regard to the criminal parcel was for his own purposes either directly or as agent for and on behalf of his principal Harry Campbell. It is quite clear on the evidence that exhibit 'B' the parcel containing the Indian Hemp, is clean shaven, as far as bearing any name and/or address of the consignor(be he the applicant or Harry Campbell) is concerned despite the contrary avowal by the appellant. Again the contention of the appellant that the 1st accused undertook to post the particulars of exhibit 'A' unto a blank airwaybill at the DHL office is most incredible since if he did not sign exhibit 'A' as he contends, the

parcel would have had to be dispatched without any consignor's signature on the airwaybill, a thing that is not done on his own evidence, since he positively testifies that he until this particular criminal parcel always filled in the requisite particulars on the air waybill and signed the same. In the alternative if he did sign exhibit 'A' as contended by the 1st accused then his signature would have been incapable of being transferred unto the pursuant blank air waybill which the 1st accused is said to have promised to substitute for exhibit 'A' by transferring the particulars of the parcel thereunto in carbon copies.

A resort to the original exhibits transmitted to this court, inter alia, clearly establishes the foregoing facts against the appellant.

The anonymity of the consignor's identity in the documentation for the purpose of the postage of the criminal parcel is explicable only in terms of the need for concealment thereof because of the criminal contents of the parcel in question. Therefore the presence of the Indian hemp in the criminal parcel to the knowledge of the appellant and the 1st accused has been proved even before that parcel could reach the DHL offices. Therefore the possibility of any implanting of that narcotic drug in the parcel delivered by the appellant to the 1st accused by any of other persons who have to handle the same at the DHL offices has been eliminated before hand. Also as held in the head note in *Bonsu@Benjillo v The Republic*(2000) SC GLR 112:

> "The proof of knowledge or ***mens rea*** is not capable of direct proof but same may be inferred from established facts as stated in Section 18(2) of the Evidence Decree, 1975, NRCD 323. S.18(2) states as follows: 'An inference is a deduction of fact that may logically and reasonably be drawn from another fact found or otherwise established in the action."

Whether or not acts of an accused that are inconsistent with innocence necessarily point to guilt depends on the facts of each case. See *Otsiba v The Republic* (1978) GLR 290 C.A.

It is to be expected that narcotic drug traffickers would use very subtle methods in their dealings. Even the starkly plain divergence of the handwritings of the appellant in his statements to the Police and in exhibit 'A' portrays the appellant as a person of no innocent ability. The foregoing analysis of the facts in this case only portrays the

contrivance of the appellant and the 1st accused in the words of Graham Paul C.J in *George Mattouk v Elie Masad* (1941) 7 WA CA 91 at 96 as "*deliberate downright lying showing at once a marvellous though debased talent for invention* and a total disregard of truth and of [their] oath to tell the truth". Consequently on the facts of this case even if exceptional circumstances have been established they are not exceptional circumstances "*which have resulted in a miscarriage of justice*" as required by r.54(a) of C.I. 16."

As to the applicant's counsel's contention that the onus of proof has been unconstitutionally shifted to an accused person with regard to the requirement of lawful authority for the possession of a narcotic drug, we disagree. It is a fair onus since certainly the obtention of such authority would have been in the knowledge and possession of the accused person and in any event, it is trite law that its discharge is far easier than the discharge of any onus on the prosecution. As Edward Wiredu J. (as he then was) said in *Donkor v. The Republic* (1974) 2 GLR 254 at 258 "where a statute creates an offence, it is the duty of the prosecution to prove each and every element of the offence which is a ***sine qua non*** to securing conviction. *Unless the same statute places a particular burden on the accused*, the fundamental and cardinal principle as to the criminal burden of proof on the prosecution should not be shifted even slightly: see *Woolmington v Director of Public Prosecutions* [1935] A.C. 462 per Viscount Sankey L.C. at pp. 481-482, H.L. and *R. V Abraham* [1973] 3 All E.R. 694, C.A.". In any case if the appellant had lawful excuse for possessing the narcotic drug it is incomprehensible that he should take all the pains to ensure the anonymity of the consignor or sender of this parcel or of himself.

As to counsel for applicant's contention as to the need for a special dispensation with regard to the principles for Review in this court in criminal cases, we think the principles expatiated above do adequately redress his concerns. The Review jurisdiction is a unitary one. The federal approach advocated by the applicant's counsel was urged on this court unsuccessfully in *Pianim (No.3) v Ekwam* (1996-97) SC GLR 431.

We are however suspicious of the circumstances in which Harry Campbell the alleged Principal of the appellant escaped arrest. Indeed in her judgment at P.183 of the record

the trial judge said: "*it is in evidence that an attempt was made to effect the arrest of Campbell but this was bungled by the police*."

We are however not versed in police tactics in such matters. It is obvious however that if the cloudy escape of Harry Campbell is scrutinised with regard to the facts on record by those with the requisite expertise and found to have been orchestrated then some executive intervention by way of the presidential prerogative under article 72 of the constitution in respect of at least the appellant (as opposed to the 1st accused who on the evidence is a factory of criminality) might be relevant. This is however entirely a matter for the appellant and his advisors.

It is for the foregoing reasons that though we came close to granting this application, upon a full and anxious consideration of the same we are constrained to dismiss the same.

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

ANSAH, J.S.C. I agree:

(SGD) J. A. ANSAH
JUSTICE OF THE SUPREME COURT

ADINYIRA (MS), J.S.C. I also agree:

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

YEBOAH. J.S.C. I also agree:

[SGD] ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

AYEETEY, J.S.C. I also agree:

[SGD] B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

JONES DOTSE JSC:

This is to confirm that I have been privileged to have read the well considered and erudite opinion of my respected brother and president of this court, Atuguba JSC and I am in complete agreement that this review application must fail and should be dismissed.

I am also in complete agreement with the reasons given for the dismissal of the review application.

However, as I have been scheduled to be out of town on the date of the judgment, which is 20th January 2011, I have accordingly requested my respected brother Anin-Yeboah JSC to read this concurring opinion on my behalf to validate the opinion of the court, just delivered by the President of the Court, Atuguba JSC.

Dated in Accra at the Supreme Court, this 19th day of January 2011.

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

BAFFOE-BONNIE:,J.S.C.

I have had the benefit of reading beforehand the judgment read by the president of the court Atuguba JSC and concurred in by my brothers and sister. I am unfortunately unable to agree with them in the conclusion for reasons which I will articulate hereafter.

In the case of Afranie v. Quarcoo Wuaku1992] GLR 561at pgs 591-592 JSC said,

"There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court"

Then in the case of GIHOC **Refrigeration (no 1) V. Hanna Assi(1) (2007-2008) SCGLR 1** Dr. Justice Date-Bah said;

"Even if the unanimous judgment of the Supreme Court on the appeal in this case were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. This is an inherent incident of the finality of the judgments of the final Court of Appeal of the land. The brutal truth is that an error by the final court of the land cannot ordinarily be remedied by itself, subject to the exceptions discussed below. In other words, there is no right of appeal against a judgment of the Supreme Court, even it is erroneous"

These and a long line of cases are often cited as militating against the use of the review process to overturn decisions given by the Supreme Court except for exceptional circumstances that has occasioned a miscarriage of justice.
Ordinarily one should not have any problem with any rule of procedure that seeks to bring finality to the adjudicatory process and which is based on a rule of law like Rule 54 of CI 16. But all these authorities harping on the need for the existence of exceptional circumstances, etc followed by this court have been on civil cases.

The Constitution 1992 which is the basic law of the land was promulgated to regulate and promote good governance and the rule of law. And at the heart of the rule of law is the liberty of the individual. I cannot see any rule of law or procedure which should take precedence over the promotion and sustenance of the liberty of the individual.
I therefore cannot see my way clear refusing to review a decision .of the regular court on the grounds that there must be finality in judgments of the final court of the land, even if clearly in my humble view the judgment was wrong

For my part, keeping the applicant in jail on the parroted grounds that there are no exceptional "circumstances that has occasioned a miscarriage of justice", and that to review means giving him a second chance to re-argue, is a violation of the constitution which we swore an oath to uphold.

I believed then, and I still believe, that the applicant was wrongly convicted by the trial High Court and same confirmed on appeal. We piled a multitude of suspicions together and made proofs out of them. We failed to give the benefit of the doubt to the applicant and most importantly we misapplied the rule on the use of circumstantial evidence, which this court has laid in down in its previous decisions.

Seethe cases of;

LOGAN V. REPUBLIC [2007-2008] 1SCGLR 76
ANANE V FIADZO 1961 1 GLR 416
DUAH V. REPUBLIC1987-881 GLR343 and a host of others.

It is my humble view that the applicant is in jail serving a term of imprisonment for an offence which the prosecution did not fully prove he committed. His continued incarceration is a breach of the constitution. If these are not exceptional circumstances that call for a review of our decision, then I do not know what else is.

For my part I humbly believe that, the desire to achieve the liberty of the human person should not be sacrificed on the alter of expediency of finality of judgments. After all it is often said that it is better to set free 99 guilty persons than to convict one innocent person.

It is for these reasons that I will grant the application and quash the conviction.

(SGD) P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

<u>COUNSEL</u>:

SAM OKUDZETO WITH NENE AMEGATCHER, ASINI OKUDZETO, PATRICK BOAMAH, KWESI KELLY DELATA FOR THE APPLICANT.

EVELYN KEELSON (MRS) P. S. A. FOR THE RESPONDENT.