IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: ADINYIRA (MRS) JSC (PRESIDING
OWUSU (MS) JSC
DOTSE JSC
YEBOAH
GBADEGBE JSC

CRIMINAL APPEAL
NO. J3/3/2011

18TH APRIL, 2012

GABRIEL JOANNE - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

J U D G M E N T

ADINYIRA (MRS.) JSC:

I have the privilege of reading beforehand the opinion of my eminent sister Justice Owusu and I agree with her conclusion that the appeal is without merit.

I also had the opportunity to read the dissenting opinion of my esteemed brother Justice Dotse which turned on ground (b) of the appeal. I wish his permission make some comments in relation to that ground.

Ground (b):

'"The Court of Appeal erred when it held that the trial High Court was right in accepting the plea of the appellant in the absence of her counsel without explaining the consequences to the appellant.'

His Lordship discussed Articles 14 (2) and 19 (2) (f) of the 1992 Constitution in relation to this ground of appeal.

Article 14 (2) provides that:

"14(2) a person, who is arrested, restricted or detained, shall be informed immediately in a language that he understands of the reasons of his arrest and detention and of his right to a lawyer of his choice."

I do agree with my brother Justice Dotse that our Courts must observe best practices in the administration of justice especially when it affects the liberty of the individual. It is fair to say that the best practice as envisaged in the Miranda rights referred to by Justice Dotse and what is called the Judges Rules in the UK have been applied and observed in the administration of criminal justice in this country. It is indeed a standard procedure and requirement. It is trite law that any breach of these rules in the course of the arrest detention and interrogation by the police or any

arresting officer or enquiry renders any confession statement given by a suspect or any evidence obtained in the process, inadmissible at a trial.

Article 14 (2) reflects these values that seeks to protect personal liberty. However this provision is with all due respect not applicable in this instant case as the appellant's complaint is that the judge erred in accepting the plea of the appellant in the absence of her lawyer.

The relevant article is rather Article 19 (2) (f) that provides:

(2) A person charged with a criminal offence shall

(f) be permitted to defend himself before the court in person or by a lawyer of his choice.

An accused person is vested under this article with the right to defend herself or by a lawyer of his choice. This Court in a unanimous decision in the case of **The Republic v. High Court (Fast Track Division) Accra: Ex parte Tsatsu Tsikata [2007-2008] SCGLR 1200** had the occasion to define the phrase "a lawyer of his choice".

The relevant facts as it appears in the headnotes of the law report are that the applicant Mr. Tsatsu Tsikata was the accused person in a criminal matter pending before an Accra High Court (Fast Track Division). The trial court fixed 18 June 2008 for judgment. On 10 June 2008 the applicant caused a motion to be filed on his behalf to adduce fresh evidence. According to the applicant, accompanying the motion paper and supporting affidavit was a letter addressed to the Registrar of the Court, informing him that his counsel would be out of the jurisdiction on 12 June 2008, and therefore requesting that, when the criminal matter came up for hearing it should be adjourned further to a date in the second half of 2008.

At the hearing on 18 June 2012, the applicant referred to counsel's letter and asked that the motion be adjourned. The learned Judge however insisted that the hearing of the matter must proceed. When the applicant declined to move the application himself, the court, after hearing the Attorney-General on behalf of the Republic struck out the application for want of jurisdiction. The applicant filed an application for certiorari to

quash the decision and on other matters not relevant for our purpose. One of the grounds inter alia was that the decision of the High Court to strike out his motion for want of prosecution was in breach of the applicant's constitutional rights under Article 19 (2) (f) for fair trial.

At page 1221 the Supreme Court unanimously held that:

"It is clear from the language of article 19(2) (f) that an accused person has a right to self-representation. On the affidavit evidence, the trial judge did indeed, in the course of the proceedings, draw the applicant's attention to that fact, and gave him the opportunity to do so, which the applicant insistently declined. Also under this provision, an accused person has the right to decide to be represented by counsel of his choice. This seems to be the option taken by the applicant. However the phrase "lawyer of his own choice does not mean a particular lawyer if such a lawyer knowingly absent himself from court. To hold otherwise would be to place the processes of criminal justice at the mercy of the whims and fancies of defence counsel and at the risk of grinding to a halt."

In this case the appellant on 15 September 2009 opted to exercise her right to be represented by a lawyer of her choice before she would plead to charges preferred against her and two others. The court granted her request and at the next hearing, she pleaded not guilty to the charges of attempt to commit an offence of exportation of narcotic drugs and possession of same in the presence of a lawyer of her own choice. On that day the other 2 co-accused who had on an earlier date pleaded not guilty changed their plea to that of guilty and they were convicted and sentenced to 10 years imprisonment IHL on both counts. The appellant was present when all these events occurred.

The case against the appellant proceeded to full trial on 23 February 2010 and the first prosecution witness gave evidence and was cross-examined. On 4 May 2010, the appellant was in court without her counsel and she without any prompting informed the court that she wanted to change her plea. The trial judge without any enquiries into her decision had the charges read to her and she pleaded guilty and she was convicted and sentenced to 10 years IHL on her plea.

I fully agree with Justice Dotse that our courts must follow the best practices in the administration of criminal justice in order to protect the liberties of the individual. Although no provision is made in the Criminal and other Offences Act, 1960, Act 30, as to what was required of a judge in a summary trial upon a change of change of plea in the course of hearing evidence, the best practice that has evolved in our courts and which the judge could have followed was to have explained the consequences of the change of her plea, or at least enquired the reasons for her decision to proceed without her counsel. This practice stems from Section 199 of Act 30 which applies to trials on indictment.

It is recommended that similar provisions are made in respect of summary trials as an accused person is entitled to full protection of his fundamental human rights to fair trial irrespective of the nature of the offence.

Having said that, is the omission of the trial judge to enquire into the appellant's change of plea in the absence of her lawyer so grave and weighty to result in a miscarriage of justice? This was a summary trial and proceedings could continue in the absence of counsel for an accused person; furthermore it was regular for the trial judge to record the plea of guilty and proceed to convict and sentence the appellant. It is only in capital offences that as a matter of practice the trial Court does not proceed in the absence of lawyer for the accused; and under section 199(5) of Act 30, a plea of guilty shall not be accepted and instead a plea of not guilty is entered on behalf of an accused.

Having regard to the facts on record, I find it difficult to conclude that this omission was so material as to vitiate the whole proceedings. The appellant was someone who was fully aware of her fundamental human right to counsel and she demonstrably insisted and exercised that right. On the other hand, the appellant also had the right to elect to conduct her case in person. See Tsatsu **supra.** The choice was hers and she made it on this occasion.

In any event it is not surprising that the appellant changed her plea having regard to the evidence of PW1 at the previous hearing. PWI's evidence was mainly that during a search on the appellant at the airport, some drugs

were found in her shoes and she herself removed some pellets of drugs from her vagina. Upon this evidence I do not think there was any cause or legal duty for the trial judge to enquire from the appellant the reason for her change of plea and as such there was no miscarriage of justice

I therefore do not find any merit in this ground of appeal.

The other grounds of appeal have been sufficiently dealt with by Justices Owusu and Dotse. I concur that the errors in the charge sheet were cured by the evidence of PW1 and that did not occasion any miscarriage of justice.

The appeal is without merit and it is dismissed.

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

OWUSU JSC.

The Appellant herein was charged together with two others on two counts of:

Count One

Attempt to commit an offence of exportation of narcotic drug without a licence issued by the Minister for Health: Contrary to section 56 (a) and 1 (1) of the Narcotic sanctions) Act of 1990 (PNDCL 236).

Count Two

Possession of Narcotic drug without licence issued by the Minister for Health: contrary to section 2 (1) of the Narcotic Drugs (Control, Enforcement and Sanctions) Law 1990 (PNDCL 236)

The particulars of the offences as set out in the charge sheet are as follows:

Count One

"1. Shadrack Bamfo Ntiamah, fire officer, 2. Abena Serwaa; student, 3. Gabriel Joanne; student, on 9th September, 2009 at the Kotoka International Airport in the Greater Accra Region and within the Jurisdiction of this court attempted to export to the United States of America 49.8932gms of cocaine, a narcotic drug without license issued by the Minister of Health.

Count Two

1. Shadrack Bamfo Ntiamah, fire officer, 2. Abena Serwaah, student, 3. Gabriel Joanne, student, on 9th September, 2009 at Kotoka International Airport, Accra in the Greater Accra Region and within the jurisdiction of this Honourable court had in your possession 491.8932 of cocaine, a narcotic drug without lawful authority.

On 15th day of September 2009 the Appellant together with the others was arraigned before the High court for the first time.

The charges were read and explained to them to which the 1st and 2nd accused persons pleaded not guilty to both counts. The Appellant refused to plead to the charges because her counsel was not in court.

Thereafter, the facts were given to the court. The accused persons were then remanded in custody and the case adjourned to 23/09/2009.

On 23/09/2009 when the accused persons reappeared before court, this time one Lawyer Adjei appeared as counsel for the accused persons.

The charges were read and explained to the 3rd accused, the Appellant herein whereupon, she pleaded not guilty to both counts.

They were again remanded in custody and the case adjourned to 8/10/2009.

On 28/01/2010 when the accused persons reappeared in court their counsel S. R. Brempong pleaded for a short adjournment for the accused persons to reconsider their plea.

The court obliged them and granted the adjournment to 03/02/10.

On 03/02/10, Lawyer Brempong appeared as counsel for the 1st and 2nd accused persons while Lawyer Effah Dartey appeared for the 3rd accused person.

The 1st and 2nd accused persons pleaded to change their pleas. The charges were re-read and explained to them to which each of them changed her plea on both counts to guilty.

Each of them was convicted on her own plea and sentenced to 10yrs I.H.L. The case of the Appellant was adjourned to 23/02/10.

On 23/02/10 the 3rd accused was in court with her counsel and hearing of the case began.

The first prosecution witness mounted the witness box and testified as to what happened on the 9th of August 2009 at the Airport leading to the arrest of the accused persons. P. w. 1, Timothy Abolimpo told the court he is a Narcotic Control Officer.

At the Airport, the Appellant was searched while going through departure formalities and substance suspected to be narcotic drug was found in her shoes. The Appellant then on her own brought out some pellets of drugs from her vagina.

When the substance was tested, it proved positive for heroin. She was thereafter handed over to the police at Nacob Headquarters.

The witness was cross-examined by counsel for the accused and the case was thereafter adjourned to 10/03/10.

It was not until the 4th day of May 2010 that the accused appeared in court. This time she was there without her counsel.

She informed the court that she wanted to change her plea.

The court ordered the charges to be re-read to her and they were so re-read to her and she pleaded as follows:

"COUNT 1: Plea: Guilty
COUNT 2: Plea: Guilty

Upon her plea of guilty on both counts, the court convicted her and sentenced her to 10 years I. H. L on both (sic) counts to run concurrently.

The sentences were to take effect from the day of her arrest under Article 14(6) of the 1992 constitution.

She was ordered to be deported from the country after serving her sentence.

On 19th January 2011, on application for extension of time within which to appeal, the Court of Appeal granted the Applicant extension of time to appeal and pursuant to the leave granted, the Appellant on 24/01/11 filed a Notice of Appeal against her conviction by the High Court on the following grounds:

"(a) The facts of the case do not support the charge leveled against the accused person.

(b) The charge sheet was incurably bad and could not be the basis of the Appellant's conviction and subsequent sentence.

(c) The Learned Judge erred when he accepted the plea of the Appellant in the absence of her counsel after she had refused to plead to the charges.

(d) The Appellant never intended to plead guilty to any charge as she had written in her statement to the police and for that matter to the prosecution that she knew nothing about the drugs.

(e) The Appellant did not understand the proceedings at the court below in that she is only 21 years, a U. S. A. National as well as a student and she was without any relative in court or Ghana.

On 19th May 2011, the Court of Appeal by a unanimous decision after both counsel have filed their written submissions, dismissed the appeal.

Dissatisfied with the decision of the Court of Appeal, the Appellant on 20/05/11 filed a Notice of Appeal to this court on the grounds that:

"(a) The Court of Appeal erred in its interpretation of sections 110 and 112 of the Criminal Procedure Code Act 30, 1960.

(b) The Court of Appeal erred when it held that the Trial High Court was right in accepting the plea of the Appellant in the absence of her counsel without explaining the consequences to the Appellant.

(c) The Court of Appeal erred when it held that the defect in the charge sheet was not fatal.

(d) The Court of Appeal erred when it failed to consider the effects of section 171 of the criminal procedure code 1960 Act 30 on the change in the plea of the Appellant of the Trial High Court.

(e) The Court of Appeal erred when it held that the prosecution would have amended the charge sheet if the Appellant had not changed its (sic) at the Trial High Court when there was no such evidence before the Court of Appeal.

(f) The Court of Appeal erred when it refused to follow a precedent from the Supreme Court.

(g) Additional grounds of appeal may be filed on receipt of a certified copy of the Judgment of the Court of Appeal.

No such additional grounds have been filed.

The facts of the case as presented by the prosecution are that the accused persons are all American nationals resident in the United States of America. They arrived at the Kotoka International Airport to board a Delta Airline flight to the United States of America.

While going through pre-departure formalities for the flight, operatives of Narcotics Control Board suspected them of carrying narcotic drug and therefore picked them for a search which revealed a powdery substance suspected to be narcotic drug hidden in their pants and the sole of their shoes. A further search on 2nd and 3rd accused persons revealed pellets of the same powdery substance hidden in their vagina. They were therefore arrested.

On interrogation, they mentioned one Abubakari Issaka in the U.S.A. as the one who contracted them for a fee to carry the substance to the United States. They named one Alhaji as their contact in Ghana and that the said Alhaji for whom they brought four envelopes containing money met them on their arrival in Ghana on 02/09/09. In Ghana, Alhaji took care of all their needs. It was he who gave them the substance to be carried to Abubakari in America.

From these facts, one can safely conclude that the accused persons acted together with a common purpose in committing the offence of attempt to commit an offence of exportation of narcotic drug without a license issued by the Minister for Health contrary to section 56(a) and 1 (1) of the Act.

Arguing the appeal, counsel had argued grounds (a) and (c) as filed in the notice of Appeal together.

In the court below, counsel had argued that the facts do not support the charge preferred against the accused persons and that the charge was incurably defective.

It was submitted that the facts as presented by the prosecution alleged that each of the accused persons had a narcotic drug independent of the other and therefore to put them together as if all three of them jointly held the drug in the particulars of offence is wrong and fatal to the prosecution's case.

It was in dealing with this submission that the court below per Acquaye J. A. referred to section 110 of the criminal and (other offences) procedure Act, Act 30.

Counsel submits that the issue before the court below was not joinder of accused persons but rather it centres on joinder of charges which was not addressed in its judgment.

Counsel referred to section 110 (1) (a) of the Act.

According to him the word "charge" in section 110 (1) does not mean "count". The "charge" here means joining other accused persons in the same charge sheet with different counts. In a very limited sense, it may mean a conspiracy charge involving several or more accused persons. Counsel further submitted that the section must be read in conjunction with section 109 of the Act.

Section 109 of the Act deals with joinder of charges.

109 (1) states that –

> "for each distinct offence of which a persons is accused there shall, subject to subsection (2), be a separate charge or count.
>
> (2) charges or counts for offences may be joined in the same complaint charge sheet, or indictment and tried at the same time if the charges or counts are founded on the same facts, or

form or are a part of a series of offences of the same or a similar character."

Having referred to section 109, Acquaye J. A. referred to section 110 (1) of the Act which deals with joinder of accused persons.

Section 110 (1) (a) states that "persons accused of the same offence committed in the course of the same transaction may be charged and tried together.

Under this subsection, the Court of Appeal found nothing wrong with their being charged jointly for the same offences because they were said to have arrived in the country together on the same date and were leaving together on the same date with each carrying the same narcotic drug in almost the same manner.

Counsel however submits that this is not the issue but rather the issue is one of joinder of charges which the Court of Appeal did not address.

The accused persons were charged on two distinct counts from the charge sheet. Indeed, if they acted together with a common purpose in committing crime, they should have been charged on a separate count of conspiracy. The fact that no such distinct charge was preferred against them does not detract from the fact that they acted together with a common purpose in committing crime. If they acted together with a common purpose in committing the offence of attempting to export the drug found on them without a licence from the minister, then the charge sheet cannot be said to be defective as counsel for the Appellant is urging upon the court.

In that case the quantity found on each of them becomes immaterial. Even if none was found on any of them, that person would have been equally blameable for the quantity found on the rest and all of them would be guilty of attempting to export the whole quantity of 491.8932gms found on all of them if the

prosecution succeeded in establishing that that person participated in the execution of a conspiracy.

In this case, the Appellant and the others had come to Ghana purposely to carry the drug to the United States of America and for that reason all of them are equally blameable. See the case of STATE VRS OTCHERE [1963]2 GLR 463.

The Court of Appeal saw nothing wrong with the accused persons being charged jointly for the same offences and this court sees nothing wrong with the charge on this score either. The appeal fails on these grounds.

Ground (b) to me is what merits consideration by this court. This ground attacks the Court of Appeal's holding that the trial Judge was right in accepting the plea of the Appellant without explaining the consequences of such a plea to the Appellant.

It is counsel's submission that Justice expected in summary trials is no lesser justice than in a trial on indictment. In this wise, he referred to "practice and procedure in the trial court and Tribunal of Ghana by the learned Author S. A. Brobbey JSC, in which he dealt with change of plea. The learned Author cited the case o YEBOAH VRS THE STATE [1964] GLR 715 at 717.

Counsel contented that if the trial Judge had asked for and recorded the explanation for the change in plea, the court would not have accepted the plea of guilty and convicted the Appellant.

In the case of YEBOAH, Supra, the Appellant was arraigned before the District Court on a charge of stealing. On his first appearance he pleaded not guilty and was granted bail. On the second occasion he was discharged for want of prosecution. He was re-arrested and appeared again before the same Magistrate on the same charge. He then pleaded guilty. He was convicted and sentenced to a fine of 25 or three months I. H. L. on all three occasions the appellant was not represented by counsel.

On appeal to the High Court against his conviction, it was argued on his behalf that the trial was irregular since the appellant was induced by the prosecution officer to change his plea and that he did not appreciate the import of the plea of guilty.

The court presided over by Kinsley Nyinah J. (as he then was) held, allowing the appeal that:

"(1) when the appellant suddenly changed his erstwhile plea of "**not guilty**" to "**guilty**" the magistrate "**ought to have paused for judicial thought**" and enquired from the accused the circumstances surrounding and leading to his sudden change of plea, and recorded his answers.

If his answers indicated that he had a defence, the court should proceed to try the case under section 199 (4) of the criminal procedure code, 1960 (Act 30) failure to do that was a neglect of duty.

(2) the appellate court can go behind the record of appeal to find out whether the accused "**deliberately and unequivocally**" pleaded guilty or he did so as a result of some misapprehension or inducement. If the latter, the appellate court ought properly to hold that there has been a miscarriage of Justice, and allow the appeal.

With all due deference to the appellate Judge, section 199(4) of the criminal procedure code 1960 (Act 30) is referable to trial on Indictment. It is not for nothing that two different procedures have been set out under the Act for trial. The procedure in summary trials so far as taking of plea and its consequences are concerned is not the same as trials on indictment. The procedure is as set out under section 171(3) of the Act.

The Appellant herein was tried summarily.

Under section 163 of the Act, a reference in an enactment to an offence as a summary offence, triable summarily, or punishable

summarily, means that the offence shall be tried in accordance with this part. Under section 164, this part applies to the summary trial of an offence by a District Court, a Circuit Court or the High Court.

> "(1) where the accused appears personally or - - - - - - - - - - - - - - - the substance of the charge contained in the charge sheet or complaint shall be stated and explained to the accused or - - - - - - - - - - - - - - - - - - -, and the accused or counsel of the accused shall be asked to plead guilty or not guilty." See section 171 (1) of the Act.

171 (3) states that –

> "A plea of guilty shall be recorded as nearly as possible in the words used or if there is an admission of guilt by letter under section 70(1), the letter shall be placed on the record and the <u>court shall</u> convict the accused and pass sentence or make an order against the accused <u>unless there appears to it sufficient cause to the contrary</u>." (emphasis mine)

Reference to section 199 (4) of the Act with all due respect to his

Lordship was wrong reference in a summary trial.

Under section 171 (3) what the trial Judge was legally bound to do was to have recorded the plea as nearly as possible in the words used so that if there was any explanation or words used which rendered the plea of guilty inconsistent with the words added then the court was bound to enter a plea of not guilty and proceed to try the case.

Section 199 laid down the procedure before the trial court in a trial on indictment.

PLEA OF GUILTY

199 (1) “where the accused pleads guilty to a charge, the court before accepting the plea shall, if the accused is not represented by counsel, explain to the accused the nature of the charge and the procedure which follows the acceptance of a plea of guilty.

(4) “ where the accused pleads guilty but adds words indicating that the accused may have a defence or so indicates in answer to the court, the court shall enter a plea of not guilty and record it as having been entered by order of the court.

I have had a look at the cases of REPUBLIC VRS BRIGHT [1974]2 GLR 12 and FORSON VRS. THE REPUBLIC [1976] 1 GLR 138 at 146 referred to by counsel for the Appellant.

In the Bright case His Lordship Andoh J. cautioned as follows:

> “It is imperative that ample care should be taken by the tried court to see that there should be no ambiguity in the plea of “guilty”. The trial court is to make sure that the plea is not imperfect or unfinished; for in law, a court ought not to take the Accused to have admitted his guilt unless he does so in unmistakable terms.”

The case was cited because of this caution but counsel did not relate the facts of the case to the present case. In Bright’s case, the plea of “guilty” was with explanation which indicated that the accused might have a defence to the charge. Under the circumstances the court’s acceptance of the plea and subsequent conviction of the accused was wrong and in contravention of s.173 (3) of the procedure Act.

His Lordship to whose court the accused was sent to be committed for sentencing was of the view that the trial magistrate was wrong in not entering a plea of not guilty in view of the explanation offered by the accused.

In the case of FORSON, the accused had pleaded not guilty, tried and convicted in two separate trials arising out of the same facts and circumstances.

In the second trial, the trial magistrate ordered that the evidence in the first trial be adopted "since the same evidence gave rise to the second. This was done. Judgment in both cases was delivered on 12 August 1974 when the accused was sentenced to a fine of GH50.00 or Six months imprisonment in the first trial and, in the second trial to nine months imprisonment on count 1 and 24 months imprisonment on count 2.

On appeal against his sentence which cumulatively came to 30 months imprisonment because of the separate trials, the appellate court suo motu concerned itself with the validity of the conviction in the second trial because of the procedure of adopting the evidence in the first trial as evidence in the second trial.

The court presided over by Taylor J. (as he then was) held that

> "(2) The conviction in the second trial was a nullity and could not support any sentence because the procedure of adopting the evidence in the first as evidence in the second trial was not justified by Act 30 or any decided case or practice. The procedure to be adopted in a summary trial on a plea of not guilty was provided in Act 30, S. 172, which was mandatory and made provision for the taking of evidence and cross-examination of witnesses."

The conviction was vitiated because the procedure adopted offended against section 172 which set down the procedure on a plea of not guilty in a summary trial.

I am unable to appreciate the relevance of this case to the instant case. When on the second appearance of the Appellant, she pleaded not guilty, the court in compliance with section 172 of the Act, set down the case for trial and proceeded to hear it.

When the Appellant changed her plea of "not guilty" to guilty, she added no words which necessitated a plea of "not guilty" being entered by the court for her.

I have already stated that section 199(4) of the Act is not applicable in summary trials. This does not mean that in a summary trial, the court's duty has been in any way lessened and therefore justice demanded lesser than in trials on indictment.

If the plea is recorded in as nearly as possible in the words used and it appears to the court that there4 is sufficient cause for which the plea of guilty should not be accepted, then the court will enter a plea of not guilty for the accused.

The duty being cast on a trial court to pause for "judicial thought" and inquire from the accused the circumstances leading to the sudden change of plea and record his answers is not a legal duty under the Act failure of which must in all cases vitiate the conviction.

I must admit such an inquiry may be desirable but not a necessity for non compliance of it to vitiate a conviction where having regard to all the circumstances of the case the appellate court finds no justification in doing that.

In YEBOAH'S case, His Lordship had this to say:

> "In all the circumstance, I find and am satisfied that the appellant did not deliberately and unequivocally plead "guilty" to the charge of stealing."

Indeed as Denning J. (as he then was) opined in MILLER VRS. MINISTER OF PENSION [1947] 2 AER 372, the court would fail in its duty to assist in clamping down this menace if it permitted such technicalities to deflect the course of Justice.

The Appellant's plea in this case was unequivocal. From the record one cannot say that the Appellant, aged 21 and an American National did not appreciate the consequences of the change of plea.

On the 1st day of her appearance in court without counsel, she refused to plead to the charges because she was unrepresented. On the day that she entered her plea of not guilty, she was in court with her counsel.

On the next appearance, counsel appeared for all the accused persons and pleaded for a short time to reconsider their pleas.

On the next adjourned date, counsel, who had pleaded for adjournment for the accused persons to consider their plea appeared for only 1st and 2nd accused persons while another counsel Effah Dartey appeared for the 3rd accused person, Appellant, herein.

The 1st and 2nd accused persons changed their plea to guilty simpliciter in the presence of their counsel and were convicted on their plea and sentenced to 10 years I.H.L.

At least from that, the Appellant got to know if she did not know before then the consequences of a plea of guilty.

After the conviction of the 1st and 2nd accused persons, the Appellant's case was set down for trial.

On 23rd day of February 2010, hearing started and p.w. 1, a narcotic control officer testified before the court.

Significantly, this change of plea was after the 1st prosecution witness had testified in court. To get what he said in court, I wish to reproduce his evidence verbatim as follows:

> "My name is Timothy Abolimpo. I am a narcotic officer stationed at the Kotoka International Airport. I know the accused person. My Lord, on the 9th of August 2009. I was on

duty at the Kotoka International Airport with Felix Akolgo, Issaka and others.

My Lord on that day while passengers were going through departure formalities to board Delta Flight from Accra to J. F. K. My Lord, Marine and Akolgo took some passengers and examined them for drugs. My Lord the accused person was one of them and Marine took her to the ladies room to examine her. My Lord, she found drugs in her shoes and then accused also voluntarily brought out some pellets of drugs from her vagina. My Lords, we tested the drug and it read positive for heroin. My Lord, I handed her over to the police investigator at NACOB Headquarters Office."

This piece of evidence was given in the presence of her counsel who took time to cross-examine the witness.

This is what transpired under cross-examination.

"Timothy to be sincere to the court, you were on duty at the Airport, you didn't examined (sic) the accused person. So you have nothing to say about her, you don't know anything."

My Lord I know something

What do you know?

My Lord when she was brought to me (sic) I ordered for (sic) her to be examined. I am not a lady so the lady took her to the private and brought me the report. So it was Marine Issaka who after examining her brought me the report.

So the only role you played was to order a female officer to examine her?

Yes my Lord and after examining her, I again ordered that the substances be tested in the presence of all. And we ran the

clarificates (sic) on them which work positive for heroin my Lord.

You are relying solely on the report given to you by your female officer is that it?

My Lord, I was a witness to everything that happened. Expect (sic) the fact that I did not go into the room with her. The drugs were brought, we all examined them together and I ordered that they should test them, they did the test.

Timothy I want you to accept the fact that you have nothing to do with the discovery of the substance on her.

You were not inside the room where the examination took place?

No my Lord.

So you don't know or you know?

My Lord I know.

My lord I think I am flaring (sic) a dead horse. I wont (sic) ask any further question.

The court then discharged the witness and the case adjourned to 10/3/2010. It was however not until 4/5/10 that the Appellant appeared again in court and pleaded to change her plea.

It is significant to note that the evidence that the substance was found in her shoes and that she voluntarily brought out some pellets of the drug from her vagina was not challenged by the Appellant's counsel who was then in court.

With this evidence, when the Appellant appeared on 4/5/10 and changed her plea I do not see the need for the trial court to have asked why the change of plea. At least the evidence of

p.w.1 if believed by the court is sufficient to sustain the conviction in line with the plea of guilty.

Counsel's contention is that the Appellant acted under a misapprehension and that if the court had asked her questions about whereabouts of her counsel and why the change of plea, the Appellant would have told the court that she knew nothing about the charge just as she told the police in her statement to the police. Where is this statement? Why did counsel not exhibit it in this appeal?

I am convinced that the Appellant who would not plead to the charges on her first appearance would not take what somebody told her to influence her to go to court and change her plea without consulting her counsel knowing very well what follows after a plea of guilty.

The Appellant before the court on 4/5/10 did not show that she did not appreciate or understand the charge or procedure and thus pleaded guilty by mistake.

As much as the constitution guarantees the Appellant's right to be represented by counsel of her choice, the same constitution permits the accused to defend herself before the court in person. Art. 19(2) (f) of the constitution states that:

"A person charged with a criminal offence shall be permitted to defend himself before the court in person or by a lawyer of his choice."

Where she chooses to defend herself in person that choice which is completely hers should not be "criminalized" and used under such circumstances to derail the course of Justice.

In the case of REPUBLIC VRS HIGH COURT KUMASI; EX-PARTE ATUMFUWA and Another [2000] SCGLR 72, Acquah JSC. (as he then was and now of blessed memory had this too say:

> "Our procedure rules have gone a long way in freeing this court from the clutches of pointless technicalities. The tendency now, is to look at eh substance of the case and ensure that substantial Justice is done on the merits within the four corners of the procedural rules. Of course, where parties and their counsel exhibit deliberate and reckless non-compliance of the rules, sometimes with a view to overreach their opponent's, the court's discretion would not be exercised in their favour - - - - - -"

This case is not on all fours with the instant one but it goes to support the fact that technicalities such as the one being urged on the court should not be allowed to derail the course of Justice.

Consequently I am satisfied that on the facts and especially having regard to the evidence of p. w. 1, the trial court committed no error as, the Court of Appeal found when it accepted the change of plea of guilty and convicted the Appellant accordingly without "**pausing for Judicial thought**" and explaining the consequences to her.

This ground of Appeal also fails and same is dismissed.

On ground (d), I am unable to appreciate counsel's submission on section 171 of the Act and thus attack on the Court of Appeal that it failed to consider the effects of the section on the change of plea of the Appellant in the trial court.

Section 171 (3) does not deal with a plea of "not guilty". Rather, it is 171 (4) which states that "where the plea is one of not guilty, the court shall proceed to hear the case.

171 (3) provides for the procedure to be followed on a plea of guilty but not a plea of not guilty as counsel has quoted in his statement of case.

I am unable to understand what counsel means by the trial court "applying reverse gears", upon indication by the Accused without counsel, to change her plea.

The Appellant is someone who knew what the whole trial was about and was very much aware of her rights. On her first appearance without counsel, she refused to plead to the charges because she had no counsel. The court in its duty to afford the Appellant fair trial in consonance with Article 19 (1) of the constitution, adjourned the case.

When she pleaded not guilty, the case was set down for trial for the prosecution to prove her guilt.

Under Art 19(2) (c), she was presumed innocent until she changed her plea and pleaded guilty on both counts. When she indicated she wanted to change her plea, the charges were read over to her again in a language she understood and she pleaded guilty to both of them.

Ground (e) of the appeal without much ado should and is hereby sustained.

The Court of Appeal erred when it held that the prosecution would have amended the charge sheet if the Appellant had not changed her plea at the trial court.

The court was of the view that even though the particulars of offence stated that the drugs carried was cocaine, when p.w.1 testified and stated that the drug carried was heroine, the prosecution should have amended the particulars of offence in line with p.w.1's evidence, the amendment could not be effected because of the change of plea.

This view of the Court of Appeal clearly is not supported by any evidence and same is based on conjecture. If anything at all, the defect i.e. that what the Appellant carried was cocaine, was

remedied by the evidence of p.w.1 and therefore that by itself occasioned no miscarriage of justice under section 406 of the procedure Act, S. 406 (1) (a) reads in part as follows:

> "--------- no finding, sentence, or order passed by a court of competent Jurisdiction shall be reversed or altered on appeal or review on account.
>
> (a) Of an error, omission, or irregularity in the complaint, summons warrant, charge, proclamation, order, Judgment or any other proceedings before or during the trial or in any enquiry or any other proceedings under this Act or unless such error, omission, irregularity or misdirection has in fact occasioned a substantial miscarriage or Justice.

Again under section 31(2) of the courts Acts of 1993, Act 459

> "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."

Coming to the last ground of appeal, that the Court of Appeal erred when it refused to follow a precedent from the Supreme Court, it is the contention of counsel that the court of Appeal bound to follow the decisions of the Supreme court on questions of law, erred when it refused to follow the decision of the court in the case of BONSU alias BENJILO VRS THE REPUBLIC [2000] SCGLR 112.

In this case, the Appellant and four others were charged with three drug related offences including unlawful possession of narcotic drug contrary to section 2 (1) of PNDC 236.

The 1st and 5th accused persons, Nigerians absconded and were tried in absentia. All the accused persons were convicted of the three offences. They appealed to the Court of Appeal against their conviction for the offence of unlawful possession of heroin. The Court of Appeal after making certain inferences on the issue of possession and knowledge of the contents of the parcel by the accused, dismissed the appeal.

On appeal to the Supreme Court, one ground was that the trial court had erred in holding that on the evidence the appellant has possession of the parcel and that there was sufficient evidence to convict him of the offence of possession of a narcotic drug.

The court per Atuguba J.S.C. listed the essential ingredients of the offence of possession of narcotic drug contrary to section 2 (1) of the Narcotic Drugs (Control, Enforcement and sanctions) Law of 1990 (PNDCL 236. This is what His Lordship said "from the foregoing. I hold that on a charge of possessing of narcotic drug under PNDC L236, the prosecution must prove (1) custody or control of the drug by the accused;

(ii) knowledge of the presence of the drug;

See WARNER VRS METROPOLITAN COMMISSIONER, R. V. BOYESON (supra) and AKOSA VRS THE REPUBLIC [1979] GLR 250 and (iii) knowledge of the nature and quality of drug possessed I hasten to say that proof of any of these ingredients may be actual or constructive - - - - - - -"

His Lordship referred to cases of REPUBLIC VRS MUNTALIA, WARNER VRS THE REPUBLIC, AMARTEY VRS THE STATE and Others.

It is counsel's submission that this decision is binding on the Court of Appeal.

However, the particulars of the present case did not state the nature and quality of the drug that the Appellant had in her possession to start with except that there is some insertion indicating the quantity of cocaine.

He submitted that the Appellant pleaded guilty to possessing cocaine the evidence of p.w.1 is that what the Appellant had on her was heroine.

Counsel then contended that the nature and quality of what the Appellant held is missing from the charge sheet and thus the Appellant was not charged with what she held but pleaded not (sic) to what probably the two other convicts held. At page 63 of the record, the Court of Appeal on this issue held as follows:

> "It should also be noted that the offence creating section of the Narcotic Drugs (control, enforcement and sanction) Law PNDCL 236/1990 does not speak of cocaine or heroin but Drugs. Since heroin and cocaine are all drugs the non amendment does not cause any embarrassment or prejudice the case of the accused and no substantial miscarriage of justice was occasioned there."

I have already dealt with this defect when dealing with ground (c) of the grounds of appeal together with ground (a).

From the record what the accused persons had on them is stated as cocaine but the evidence before the court is that what the Appellant had on her heroine.

What the Appellant pleaded guilty to from the record is not clear whether it was possession of cocaine or heroine since the change of plea was after the evidence of p.w.1.

I will agree with Acquaye J. A. that the offence is possessing of narcotic drug be it cocaine or heroine and for that reason the defect in the charge if stated as cocaine occasioned no miscarriage of

justice and for that reason the appeal will not be allowed on that ground.

The charge sheet from the record stated the nature and quantity of the drug held by the accused persons by the insertion and the court is bound by the record. When and how the insertion was effected for purposes of the appeal is immaterial.

For this reason, the case of Benjilo becomes irrelevant and of no use to the Appellant. This ground of appeal also fails and same is dismissed.

In the end, the appeal fails on all grounds except ground (e) and same is hereby dismissed.

I feel I will fail in my duty if I do not comment on the reckless manner in which the prosecution handled the case in the court below.

How could the charge sheet state that what the accused persons carried was cocaine when p.w.1 talked of heroine? The Appellant could have gotten away but for sections 406 (1) (a) of the criminal and (other offences) procedure Act and of the courts Act, Act 459.

The offence of possessing narcotic drug as stated under section 2 (1) is without authority but not without a license issued by the Minister.

I have not dealt with this in the judgment because that was not raised in the appeal. What is more the particulars of the offence correctly stated the offence and that defect again did not occasion any miscarriage of justice which would have vitiated the conviction.

(SGD) **R. C. OWUSU (MS.)**
JUSTICE OF THE SUPREME COURT

DOTSE JSC:

I have had the honour and privilege to have discussed the lead judgment just delivered by my respected Sister, Rose Owusu JSC. I have also tried my best to understand the reasons underpinning the said decision but has been unable to come to terms with it. I am reluctantly compelled, to come out with my reasons why I cannot with respect subscribe to the reasons behind the majority and lead judgment.

In the first place, it has to be noted that this is not only the Supreme Court, but is the Court of last resort and a Constitutional Court for that matter.

As a result, I am of the view that this court must always be very circumspect in the decisions it delivers especially when it has to do with the curtailment of the liberty of the individual.

It is therefore not surprising that the whole of chapter five of the Constitution 1992 has been devoted to securing the enjoyment of fundamental human rights and freedoms by the citizenry. It is in this light that I am of the opinion that provisions contained in articles 12, through to 33 of the Constitution 1992 can be said to be the philosophical underpinnings of the Constitution 1992.

For example, article 14 (2) of the Constitution 1992 provides as follows:-

> *"a person who is arrested, restricted or detained shall be informed immediately in a language that he understands, of the reasons for his arrest, restriction or detention* ***and of his right to a Lawyer of his choice."*** *emphasis*

My understanding of this provision is that, immediately a person is arrested, restricted or detained the arresting person or persons shall do the following:

i. Inform the suspect of the reasons for his or her arrest, restriction or detention.

ii. This must be done in a language he understands.

iii. Thirdly, and by far the most important, that the suspect is entitled to the services of a lawyer of his choice before he starts talking to the arresting officer or officers. This means that, before commencing investigations, the suspect must be made aware of these rights.

The achievement or attainment of the above even though might prove difficult is the path that Ghana endorsed by the promulgation of the Constitution 1992 and a Court of law such as this Supreme Court must be prepared to hold these ideals strictly.

It is the provisions of this article 14 (2) and those in articles 19 (2) (c) (d) (e) and (f) of the Constitution 1992 that has informed my decision and resolve to chart a different path from the majority. What then are the facts of this case?

On or about the 9th of September, 2009 the appellant herein, an American national, together with two other persons, now convicts were arrested at the Kotoka international airport in the Greater Accra Region for attempting to export to the United States of America, a quantity of narcotic drug without licence issued by the Minister of Health. Appellant and the other two persons were arraigned before the High Court, Accra, for trial. One charge sheet was prepared recounting the statement and particulars of offence of

all three persons. It is relevant to note that on the first day of trial, after the charges were read and explained to the three accused persons, while the other persons pleaded not guilty, **the appellant chose not to plead to the charge, her reason being that her lawyer was not present.** Subsequently, during the trial, the appellant with her lawyer present in court pleaded not guilty to the two counts, namely:

1. Attempt to commit an offence of exportation of narcotic drugs without a licence issued by the Minister for Health, contrary to Sections 56(a) and 1(1) of the Narcotic Drugs (Control, Enforcement and Sanctions) Law 1990, (PNDCL 236); and

2. Possession of narcotic drugs without licence issued by the Minister for Health contrary to Section 2(1) of the Narcotic Drugs (Control, Enforcement and Sanctions) Law 1990 (PNDCL 236)

On the next day of trial, the two other accused persons therein changed their "not guilty" pleas to "guilty" and were convicted on their own pleas. The trial judge then proceeded to a full trial of the appellant alone.

This he did by taking evidence from the Narcotic control officer, one Timothy Abolimpo with subsequent cross examination by counsel for the appellant.

Very surprisingly, while the trial was ongoing, the appellant on a later date, in the absence of her counsel, informed the court that she wanted to change her plea. The court reread the charges to her, after which appellant changed her plea to guilty, all in the absence of her counsel. The court thereafter proceeded to convict her on her own plea of guilty sentencing her to 10 years imprisonment with hard labour on both counts to run concurrently. The court again ordered that appellant be deported after serving her sentence.

Dissatisfied with her conviction and sentence, appellant unsuccessfully appealed to the Court of Appeal against her conviction and sentence.

The Court of Appeal dismissed appellant's appeal and confirmed the conviction and sentence on the basis, inter alia that there had been no miscarriage of justice, that the appellant reasonably understood the charges read to her and the consequences of her guilty plea. It is against the decision of the Court of Appeal that the appellant now further appeals to this court to set aside her conviction and sentence on the following grounds of appeal:

GROUNDS OF APPEAL

a. The Court of Appeal erred in its interpretation of Sections 110 and 112 of the Criminal Procedure Code Act 30, 1960

b. The Court of Appeal erred when it held that the trial High Court was right in accepting the plea of the Appellant in the

absence of her counsel without explaining the consequences to the appellant.

c. The Court of Appeal erred when it held that the defect in the charge sheet was not fatal
d. The Court of Appeal erred when it failed to consider the effects of Section 171 of the Criminal Procedure Code 1960, Act 30 on the change in the plea of the appellant at the trial High Court.

e. The Court of Appeal erred when it held that the prosecution would have amended the charge sheet if the appellant had not changed its plea at the trial High Court when there was no such evidence before the Court of Appeal.

f. The Court of Appeal erred when it refused to follow a precedent from the Supreme Court.

The main issue I identify as running through the grounds of appeal of the appellant is whether the intermittent errors and omission from the time the appellant was charged through to her conviction were weighty enough to occasion a miscarriage of justice. I shall proceed to discuss the grounds of appeal. Grounds (b) and (d) which border on the same issue, so I shall leave them for the last and discuss them jointly

Grounds A and C

The Court erred in its interpretation of Sections 110 and 112 of the Criminal and other Offences Procedure Act 1960 Act 30.

The Court of Appeal erred when it held that the defect in the charge sheet was not fatal.

In arguing these two grounds, counsel for appellant contends that a reading of Sections 110 (1) (a) in conjunction with Section 109(1) of Act 30 imposes a duty on the prosecution to lay a distinct charge or count for every separate offence that a person is accused of. Counsel for the appellant vehemently opposes the argument that accused persons arrested in the course of a joint illegal venture may be prosecuted on the same charge sheet under the same count. Counsel for the appellant quotes a paragraph of the judgment of the Court of Appeal to disagree with same, that:

> *"Since the accused persons were said to have arrived in the country together on the same date and were leaving together on the same date with each carrying the same narcotic drug(with emphasis) in almost the same manner we find nothing wrong with their being charged jointly for the same offence"*

Upon a careful reading of Sections 109 and 110, I cannot bring myself to agree with counsel for the appellant that, necessarily, every accused person where such person acts in consent with others and they are charged on the same facts, they must nevertheless be charged by distinct charge sheets and counts. If that were to be the case, there would not have been the need for

making Section 109(1) subject to subsection 2. Besides, the use of 'similar' in both Sections 109 and 110 suggests that in situations like the appellant's case, where the charges can be established on not only the same, but similar (with emphasis) facts, then there could be joinder of charges and accused persons.

The intense weight counsel for appellant also gives to his argument regarding Sections 109 and 110 is unexplainable looking at it in the light of Section 110 (2) which reads:

> *(2) A trial shall not be invalidated by reason only that two or more persons have wrongly been tried together on one complaint, charge sheet or indictment unless objection is made by any of the accused persons at the time or before the accused was called upon to plead".*

This provision was rightly quoted and interpreted by learned Counsel for the respondent that even if appellant had been wrongly tried with the other persons, appellant cannot now be heard to raise this objection. She should have done so before or at the time her plea was being taken. Thus, the issue of misjoinder, if any cannot now be heard at the time of appeal.

See cases of

i. **Togbe Fiti v State [1965] GLR 33** where it was held on appeal that it was counsel's duty to raise at the earliest possible time the submission that the charge was bad for duplicity i.e. before the case of the prosecution is closed. It

was thus held that where an appeal had been based solely on duplicity (in the middle of the trial of the appellant) that contention and objection would not be allowed.

ii. In **Darkwa v The Republic [1973] 1 GLR 431** it was held that putting the words "demanding" and "obtaining" in the same count was bad for duplicity but this was not fatal to the prosecution's case since there had been no miscarriage of justice.

iii. See also the case of **R v Asiegbu 1937 WACA 142**.

On the strength of the above cases and the combined effect of sections 109 and 110 (1) and (2) of the Criminal and other offences Procedure Act, 1960, Act 30, it is clear that even though the charge sheet is bad for duplicity and was not drafted in the best of terms, the provisions of section 110 (2) operate to nullify the type of submission learned counsel for appellant intends since no substantial miscarriage of justice has resulted thereby and most importantly, the objection to the charge sheet was not taken timeously. I will therefore dismiss grounds (a) and (c) of the appeal.

Ground F

The Court of Appeal erred when it refused to follow a precedent from the Supreme Court.

That the Court of Appeal is bound by decisions of the Supreme Court is well established. See articles 129 (1) and (2) of the Constitution 1992. According to Counsel for the appellant the

Supreme court in the case of **Bonsu alias Benjilo v The Republic, SC GLR 112** listed the essential ingredients of the offence of possession of narcotic drugs. Specifically, counsel for the appellant quoted my respected brother Atuguba JSC as follows:

> *"From the foregoing, I hold that on a charge of possessing of narcotic drug under PNDCL 236 the prosecution must prove: (i)* ***custody or control of the drug by the accused; (ii) knowledge of the presence of the drug;...****and* ***(iii) knowledge of the nature and quality of drug possessed.*** *I hasten to say that proof of any of these ingredients may be actual or constructive..."emphasis supplied.*

Counsel for the appellant argued that the respondent failed to state the nature and quality of the narcotic drug the appellant was accused of, and this omission, by reason of the decision in **Benjilo** is fatal as to render the conviction and sentencing a nullity which has to be quashed.

Admittedly, PNDCL 236 does not speak of cocaine, but drugs, as the Court of Appeal found.

However, with the peculiar facts of this case, where the appellant and the other accused persons found themselves in, whilst some carried cocaine and appellant carried heroin, and where also they were charged jointly by the same charge sheet, the best practice would have been to specify that the appellant carried heroin and

not cocaine like the other accused persons to avoid any embarrassment and confusion to the appellant.

Besides, I am drawn to the holding by my respected learned brother Atuguba JSC, that the prosecution must *prove* those ingredients (emphasis mine). Proving here does not suggest that, the prosecution must state the nature and quality of the drug possessed failing which the court would consider that omission so grave as to result in quashing of a conviction and sentence. The fact is that the appellant had been found in possession of a narcotic drug.

I am certain that Section 112 of Act 30 and the case of **Hodgson v The Republic [2009] SCGLR 642** is instructive on issues concerning the disclosure of the specific particular narcotic drug on the charge sheet. As the Court in **Hodgson** found, what is relevant is that the appellant knew the nature of the offence he was being tried for. Section 112 is quite elaborate on these issues;

> *"112 (1) Subject to the special rules as to indictments mentioned in this section, a charge, complaint, summons, warrant or any other document laid, issued or made for the purpose of or in connection with proceedings before a Court for an offence shall be sufficient if it contains a statement of the offence with which the accused person is charged together with the particulars necessary for giving reasonable information as the nature of the charge and although there may be a rule of law to the contrary*

it shall not be necessary for it to contain any further particulars other than necessary particulars."

Even prior to completion of the trial due to the U-turn plea the accused made, evidence of PW1 gave appellant reasonable information as to the offence she was being charged with. Ground (e) on the issue of amending 'cocaine' to read 'heroine' is partly answered by Section 112 of Act 30 and the Hodgson case.

Ordinarily, I would have considered these lapses on the part of the prosecution as serious enough to merit the quashing of the conviction and sentence. But considering the evidence of PWI the Narcotics Control Officer when he testified that the narcotic drug found on the appellant was heroin at the time that appellant had counsel in court, any irregularity should have been raised at that stage or subsequently.

In view of my opinion on the remaining grounds of appeal on the change of plea by appellant from not guilty to guilty during the course of the trial, it is my opinion that the decision of the Court of Appeal was not a refusal to follow a binding Supreme Court decision.

This is because if one considers the evidence of PWI Timothy Abolimpo which I have referred to, any lapses or irregularities in establishing the proof of the narcotic substance found on the appellant had been filled in by the evidence. This ground of appeal is also dismissed.

Grounds b and d

The Court of Appeal erred when it held that the trial judge was right in accepting the plea of the Appellant without explaining the consequences to the Appellant

"The Court of Appeal erred when it failed to consider the effects of section 171 of the Criminal Procedure Act 30, 1960 on the change in the plea of the Appellant at the trial High Court"

The case before the honourable court presents a peculiar problem of balancing the effect of an irregularity as against upholding strictly the liberty of accused persons. The need to uphold respect and uphold the liberty of an accused person, all in a bid to ensure that the appellant is dealt with justly, is without distinction a necessity as it applies in summary trials or trials by indictment. Counsel for the appellant makes strong argument against the lack of careful inquiry, as it were, by the learned trial judge when appellant made a U-turn plea of guilty. S A Brobbey in his invaluable book *"Practice and Procedure in the Trial Courts & Tribunals of Ghana"* lays it out succinctly on situations where an accused person suddenly changes his plea from 'not guilty' to 'guilty'. He writes:

> *"It sometimes happens that in the middle of a trial or after some appearances in court, an accused person suddenly changes his plea from not guilty to guilty with or without explanation. It is*

the duty of the magistrate or trial panel in such a situation to pause for "judicial thought" and inquire from the accused the circumstances leading to the sudden change of plea and record his answers…"

The present case before us presents the very situation envisaged by the learned author. Even more, this case presents a stronger argument for the need for "judicial thought". This is an accused person who at the first day of trial refused to plead to the charges read to her on the basis that her lawyer was not present. Then ironically in the absence of her lawyer, this same appellant changes her not guilty plea to guilty. I am of the opinion that the best practice was for the judge to have been placed on alert, and made further enquiries as to the sudden change of mind by the appellant and in the absence of her counsel.

Let me use this occasion to urge our prosecution team to adopt practices, best practices, as they are normally called, especially when issues arise that involve the respect for the freedom of the accused persons. Let me hasten to add that the balance between over-indulgence in technicalities and best practices may not always be simple. However, where these technicalities can have dire consequences on the freedom of the accused persons, this should enure to the benefit of the accused person. In advocating for best practices to be adopted by the prosecution, I can envisage examples like in this case, the omission to state the nature of the drug and the joinder of accused persons (as I have discussed already), which

are not so grave and weighty enough to result in miscarriage of justice, as against the omission to enquire into the appellants sudden decision to change her plea in the absence of her lawyer.

Let not a broader interpretation than is necessary be placed on Section 406 of Act 30. The limit should be where such irregularity is so grave and weighty as to unjustly take away the liberty of an accused person. As much as possible, let the Republic strive to adopt best practices that will seek to respect the freedom and liberty of an accused person that are enshrined in the Constitution 1992. After all, the Republic is better placed and much resourced to prove the guilt of the accused and must do so humanly possible without flouting well laid principles bordering on the protection of the liberty of the accused. Does this practice I am advocating for not share the same reason behind the well-known principle of *"proving the guilt of the accused person beyond all reasonable doubt."*

Needless to say, judges when they serve in their capacity are judges not just for the prosecution but to all citizens alike including accused persons, and so must be slow to take away the freedom of the accused person, more so in situations like we have before us. I am of the opinion that the judge should have done more than just re-read the charges to the appellant and convict her on her own plea. There is nothing on record to show the reason for the sudden change in plea. Who knows what could have accounted for the change in plea. Such best practices, I am also sure will eradicate most of the unproven allegations like what was being alluded to in

the present case that the appellant had been told that if she changed her plea the prosecutor will go and see the judge in 'chambers' and beg for her. If the judicial enquiry had been made, which would have been in open court, the reason will have been evident, and any such "begging in chamber" reasons may have come up for the judge to address accordingly.

I am fully aware that in advocating for these best practices, guilty persons might be escaping the course of justice as was done in the case of **Egbetowokpor v Republic [1975] 1 GLR 485**. In answer to counter-arguments by skeptics of the best practices I am propounding the dictum of the Court of Appeal in the **Egbetowokpor** case is suitable, that:

> *"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"*

Indeed, it is better for a hundred guilty persons to walk away than for an innocent person to be punished.

A similar situation like this arose in the U.S. Supreme Court Cases of **Miranda v Arizona 384, U.S 436 (1966)** and **Massiah v United States, 377 U.S. 201 (1964).**

FACTS IN THE MIRANDA CASE

Ernesto Miranda was arrested by the Police on suspicion of a kidnap and sexual assault. The victim identified the suspect,

Ernesto Miranda at the Police station. In accordance with U.S standard operating procedures, the suspect Miranda was taken into a private interrogating room. The suspect was not advised that he is entitled to be represented by a lawyer before he is interrogated.

Two hours later, the suspect signs a confession. There was no evidence that Miranda was physically or mentally abused. The confession statement includes a statement that, the suspect has *"full knowledge of his legal rights and understanding that any statement he makes may be used against him."*

But on appeal, the U.S Supreme Court held that once Miranda was taken into police custody and before any interrogation could begin, the Police had the constitutional duty under the 5th Amendment to advise him that he had the right to refuse to answer any questions and to be represented by a lawyer, and if Miranda chose to take advantage of those rights, the Police could not interrogate him in anyway. The Supreme Court further ruled that, and because the Police failed to advise Miranda of these rights now known in the U.S as ***"Miranda Rights",*** before they questioned him and obtained his confession, Miranda's conviction was thrown out, just as other convictions have been thrown out for similar reasons since the decision in Miranda had been handed down by the U.S Supreme Court.

See other cases like

Harris v New York 401 U.S 222 (1971) decided by a vote of 5-4 majority, where the U.S. Supreme Court per Warren Burger for the stated that:

> *"while Miranda can be read as prohibiting the use of an uncounseled statement for any purpose, such a reading was unnecessary to its logic and thus not controlling"*

Miranda case, Burger noted was not a license to use perjury with no risk of being confronted with prior inconsistent statements.

The rationale of the decision of the Court can be seen against the background of the fact that the courts seem to enforce the viewpoint that since it might be easier and quicker for law enforcement authorities to solve a crime by forcing a confession than it is to solve an offence through painstaking investigation, particularly where the evidence may be hard to come, by it is better to expect that the law enforcement agencies prove their case without the testimony of the suspects. This principle which is the bedrock of English law and is part of the common law principles which both the U.S and Ghana have enshrined in their Constitutions.

For example, the Fifth Amendment to the U.S. Constitution commands that no person *"shall be compelled in any criminal case to be a witness against himself."*

On the other hand, the Sixth Amendment to the U.S. Constitution among other rights, guarantee's the right to Counsel.

FACTS OF THE MASSIAH CASE

The case of Massiah v United States, already referred to is a case in point, where the court by a majority vote of 6-3 held that a defendant is entitled to the right of his Counsel.

This was an appeal where the U.S Sixth Amendment which guarantees a defendant the right to rely on Counsel as the medium between him and the investigating and law enforcement agencies was enforced and applied.

It should be noted that, the rationale of the Sixth Amendment is that, once adversary proceedings have begun, the government cannot by pass the defendant's lawyer and deliberately elicit statements from the defendant himself.

The facts in the Massiah case are that, after he had been indicted for federal narcotics violations, Winston Massiah, retained a lawyer pled not guilty and was released on bail. Jesse Colson, a co-defendant who has also been released on bail, invited Massiah to discuss their pending case in Colson's car. Unknown to Massiah, his Co-defendant had become a federal agent and had hidden recording gadgets in his car. Their conversation was broadcast to a nearby federal agent.

As expected, Massiah made several incriminating statements. These facts are different from a typical confession or self incriminating case as was observed in Miranda v Arizona. Nevertheless, a 6-3 majority vote of the U.S Supreme Court held that the **defendants**

statements could not be used against him. The main important feature of the decision was that after adversary proceedings had commenced against the defendant and at a time when he was entitled to a lawyer's help the government had deliberately set out to elicit incriminating statements from him in the absence of Counsel. This the court held, constituted a violation of the defendant's Sixth Amendment right to Counsel.

I wish to emphasise here that I am by no means by reference to these cases seeking to import wholesale, constitutional rights and their applications of the U.S. into this country. But it is sufficient to take note that, having embarked upon a constitutional system of government, then it behoves on us as a nation to attempt to practice it as best as we could by drawing useful lessons from the rich experience of countries like the U.S who have practiced it for well over 200 years. It is in this light that I believe we have fallen short of the best practices which will enable us as a country to rob shoulders with the big brothers like U.S and U.K.

Once an individual, in this case the appellant has evinced a clear intention to rely and insist on her right to Counsel, steps must be taken to ensure that the enjoyment of this right is not curtailed and or abused.

The principle in the Massiah case, referred to supra was also applied by the U.S Supreme Court with more potent force in the following case:

1. Brewer v Williams 430 U.S 387 (1977) 178

In our circumstances articles 14 (2) already referred to supra and 19 (2) (c) (d) (e) and (f) of the Constitution 1992 which provides as follows:-

> "A person charged with a criminal offence shall:
>
> (c) be presumed to be innocent until he is proved or has pleaded guilty
>
> (d) be informed immediately in a language he understands, and in detail of the nature of the offence charged.
>
> (e) be given adequate time and facilities for the preparation of his defence.
>
> (f) **be permitted to defend himself before the court in person or by a lawyer of his choice"**

are all provisions meant to protect the sanctity of the liberty of the individual facing criminal prosecution. It is therefore clear that the constitutional provisions dealing with the arrest, arraignment and trial of persons suspected of having committed crimes must follow a certain pattern or procedure.

In the instant case as stated many times in this judgment, the appellant has evinced a very strong and clear intention to be guided by a lawyer of her choice from the very beginning of the trial.

It should have struck the learned trial judge as odd, when only after her insistence that she will not even plead to the charges in the absence of her lawyer, she suddenly changes her not guilty plea to a guilty plea.

What I deduce from our constitutional provisions in articles 14 (2) and 19 (2) (c) (d) (e) and (f) of the Constitution 1992 and the Fifth Amendment of the U.S. Constitution is that, every person who is accused of having committed a criminal offence has the right and the power to insist that the government through its massive and coercive organs of state prove the accusations through real, substantive evidence and that every person is provided safeguards, like a lawyer, and an unbiased court, to resist the oppressive conduct and might of those in power when they want to get at you.

In the light of the above, it does appear to me sufficiently that those constitutional guarantees in our Constitution 1992 have been violated against the appellant in so far as the learned trial judge failed to make the necessary enquiries to help disabuse the minds of all and sundry that the protections afforded suspects in the Constitution 1992 have not been violated.

The vex question which I have to answer is, does this constitutional breach, technical though it might seem constitute a substantial miscarriage of justice such as would entitle the appellant to an acquittal?

In the Miranda case, even though the confession upon which his conviction was based was thrown out, the Police re-assembled the evidence, retried him and Miranda was convicted.

In the instant case, I observe from the record that the appellant was arrested at the Kotoka International Airport, Accra on the 9th of August, 2009. She was convicted on the 4th day of May 2010 by the High Court in the following terms:

> *"The accused person is convicted on her own plea of guilty to both counts of the offence levelled against her. She is sentenced to 10 years imprisonment on both counts to run concurrently. The sentences are to take effect from the day of her arrest under article 14 (6) of the 1992 Constitution of Ghana. The authorities of Narcotics Control Board are to return her belongings to her. She should be deported from the country after serving her sentence."*

In view of the fact that the appellant has been in custody since 9th August 2009 which is well over two and half years, no useful purpose will be served in ordering a re-trial in this case. Re-trials are ordered when the appellant has not served a substantial part of the sentence. I consider the period the appellant has served in prison as substantial of the 10 years sentence. I will therefore order that the appellant is acquitted and discharged on grounds (b) and (d) and she should be released forthwith.

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

ANIN YEBOAH, JSC

I had the opportunity of reading beforehand all the opinions of my esteemed colleagues. I am of the opinion that the appeal be dismissed.

I am of the view that all criminal proceedings in common law jurisdictions are regulated by statutes. In Ghana, criminal proceedings in both summary trials and trials on indictments are regulated by the Criminal and Other Offences (Procedure) Act, 1960 Act 30. Like my sisters in the majority, I find no provisions in the Act 30 which denied the appellant her rights under the existing constitution or any other law for that matter. Care must be taken not to import certain rights on accused persons which to me are not conferred by any existing law into our criminal procedure.

What my esteemed brothers in the minority are advocating appears to be a desirable requirement but not a statutory requirement which would lead to any

substantial miscarriage of justice for us to quash the conviction. I therefore vote for the dismissal of the appeal which to me is based on purely technical point which is without merits under the circumstances.

(SGD) **ANIN YEBOAH**
JUSTICE OF THE SUPREME COURT

GBADEGBE JSC:

I have had the advantage of reading the incisive opinion of my worthy brother, Dotse JSC and I agree entirely with him that the instant appeal be allowed. In view of the importance which I think the point touching the right to counsel for an accused person raises for our consideration, I wish to add a few words of my own for coming to the conclusion that the appeal herein be allowed. The right to counsel is provided for in article 14.2 of the 1992 Constitution as follows:

> "*A person who is arrested, restricted or detained shall be informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to counsel or lawyer of his own choice.*"

This provision is one of the fundamental human rights contained in Chapter Five the 1992. In the opening article to the said chapter of the Constitution it is provided 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 this Constitution."*

In my view, these are carefully drafted words that were provided for the protection of the rights of citizens and indeed every person within Ghana and place an onerous responsibility in particular on the Judiciary. When this provision is read together with article 14.2 of the Constitution, it is quite clear to say that the right to counsel for an accused person is of fundamental importance to our criminal justice system. Within the context of the 1992 Constitution, the right to counsel is the central element of our adversary criminal system. A constitution sets out in my opinion the values of any society informed by historical events and when as in this case we, as a nation have made these elaborate provisions as part of our criminal justice system, it behoves us all to do nothing that might be seen as undermining their efficacy and accordingly it becomes a valuable standard by which to measure the essentials of fairness in criminal adjudication.

Although the right of a person charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries having

regard to our constitution it is of fundamental importance. In my thinking, for a criminal trial to have the approbation of validity, it must satisfy due process requirements. The fundamental right to counsel provided for in article 14.2 of the Constitution in my view is substantive in its nature and not merely one of procedural due process only. As it seems, the right to counsel if not knowingly waived should be available to an accused in order that the trial should not only be fair but for the purpose of upholding the integrity and accuracy of the fact finding process by which a conviction might be reached with the resultant deprivation of the right to personal liberty, which is also one of the fundamental human rights provisions contained in the 1992 Constitution. What this means is that when there is a proven violation of the right to counsel, it like any other breach of the Constitution by article 2 .1 calls for the intervention of the Supreme Court in the exercise of its enforcement jurisdiction by making any order or such orders that it considers fit under article 2.2 to give effect to the declaration of invalidity of the act that might have been done in breach of the right to counsel as its breach impairs fairness of the proceedings. It is useful at this juncture to refer once again to article 12.1 of the 1992 Constitution in terms of the responsibility that is placed on us as judges; a responsibility that is reasonably expected from all persons within Ghana subject to the Constitution to be discharged in accordance with the provisions of the Constitution. See: **Okorie v The Republic [1974] 2 GLR 272**

In my opinion, although this is an appeal, we cannot close our eyes to the provisions of articles2.1 and 12.1 of the 1992 Constitution. In the event of a breach of the fundamental right to counsel, the court is enabled to enforce the constitution by taking cognisance of it to invalidate the act that is

founded on its breach. Now, from the record of appeal before us in the matter herein, it is undisputed that on the very first day that the parties were arraigned before the trial High Court, the appellant herein asserted her right to counsel whereupon the court adjourned the taking of her plea to the charges that she was facing along with others. At page 10 of the record of appeal, the court adjourned the taking of her plea on all the counts. The record of proceedings for the day regarding the taking of her plea is as follows:

> "*3rd accused says her lawyer is not present so she will not plead to the charge."*

Consequently, on the next adjourned date of 23 November 2009, she pleaded to the charges in the presence of her lawyer as appears at page 11 of the record of appeal before us. I think that in granting the appellant herein the opportunity to plead to the charges only in the presence of her counsel, the learned trial judge was not acting benevolently but properly as this was within the right of the appellant by virtue of article 14.2 of the 1992 Constitution. In my view, if the learned trial judge had not made an accession to the said request of the appellant regarding the presence of her counsel, the proceedings would have been vitiated. Indeed that the learned trial judge was aware of his limitations to proceed in the absence of counsel for the accused persons is borne out by the proceedings of 28 January 2010 at page 12 of the record of appeal wherein the following entry is made:

> "*ACCUSED COUNSEL: Pleading for a short time to reconsider their pleas.*
>
> *By COURT: Case is adjourned to 3rd February 2010."*

The record of appeal at page 14 discloses that indeed on the next adjourned date of 23 February 2010, the pleas of the 1st and 2nd accused persons were actually retracted in the presence of counsel after the charges had been read over and explained to them. Based upon their retraction, the learned trial judge proceeded to convict them and sentenced them to ten years imprisonment. It is interesting to observe that so far the right to counsel that is enshrined in the 1992 Constitution was respected by the learned trial judge regarding the presence of counsel at the proceedings at which the pleas were taken and subsequently retracted.

As the appellant herein did not retract her pleas of not guilty to the charges, the trial of the offences against her was commenced on the same date as appears at pages 15-18 of the record of proceedings with the further hearing adjourned to 10 March 2010. The record reveals that although the matter was adjourned to 10 March 2010, for no reason apparent from the record of proceedings the further hearing of the matter was continued on 4 May 2010.On that date, the record of proceedings at page 19 has the following entry for the proceedings of the day.

"Accused person present.

George K Ofori for the Republic present.

Accused person informs the court that she wants to change her plea.

By COURT: The charges should be re-read to her.

Charges read to the accused person.

COUNT 1: Plea: Guilty.

COUNT 2: Plea: Guilty.

BY COURT: The accused person is convicted on her own plea of guilty to both counts of the offence levelled against her. She is sentenced to 10 years imprisonment on both counts to run concurrently….."

Within the context of the record of proceedings that has been previously referred to in the course of this judgment, there is a noticeable departure by the court from what transpired at the initial taking of the pleas of the accused persons to the charges and also when their pleas were retracted or changed. The previous proceedings were in the presence of counsel but at that date she did not effect any change to her pleas.

In my thinking, having previously adjourned the proceedings in the presence of counsel for the pleas of the accused persons to be reconsidered over a period of one week, when in the absence of her counsel, the appellant indicated to the court that she desired to have a change of her plea, the learned trial judge mindful of her assertion of the right to counsel should have paused to inquire from her where her counsel was and whether she desired to proceed with the matter on her own. In my opinion, there was the need for the learned trial judge to have made an inquiry regarding the absence of counsel. If counsel was absent but still acting in the matter, I think this called for a short adjournment to enable counsel to be present in court to give meaning to article 14.2 of the 1992 Constitution. If, on the other hand, counsel was no longer acting in the matter and the appellant had indicated her wish to act on her own then in line with settled judicial opinion in such matters the court would have to

advise her of the consequences of a change of plea from not guilty to guilty.

It cannot be said having regard to the learned trial judge's previous course of conduct regarding the taking of the pleas of the accused persons and in particular, the appellant who had by her indication on the very first day of arraignment asserted her constitutional right to counsel that there was a compliance by the court with article 14.2 before the change of plea was received on 4 May, 2010. In my opinion, any reasonable person who was in court from the first day of the arraignment of the accused persons would have thought that the retraction of the plea in the absence of counsel was not fair. For myself, I think it was odd indeed if an accused who before then had insisted on asserting the right to counsel could lose that right without the court making any inquiry to establish if she desired now to proceed on her own. This becomes difficult to comprehend when instead of the further hearing being conducted on 10 March 2010 it was proceeded with long after the said date on 4 May 2010.

Although section 199 of Act 30, of the Criminal Procedure and Other Offences (Procedure) Act, which was referred to by the appellant in her submissions to us deals with trials on indictment, it is observed that the practice has crept into summary trials such as to be deemed to be part of the existing practice in criminal trials when there is a change of plea by an unrepresented accused person from not guilty to guilty. It being so, beyond the constitutional provision contained in article 14.2 one can say based on the practice of our courts in such cases that its violation is a good ground for avoiding proceedings based thereon. I do not think that our courts can

have different standards depending on whether or not a retraction of plea is in a trial that is proceeding by way of indictment or summarily and accordingly the failure to satisfy this statutory requirement is fatal to the conviction.

I am of the view that on the date that the appellant requested to retract her pleas to the charge, the learned trial judge did not afford her of the protection provided by article 14.2 of the right to counsel in criminal proceedings and that the violation of this fundamental right is sufficient to invalidate the entire proceedings founded thereon. It is to be observed that violations of provisions of the constitution are grave matters and once a court is satisfied that there has been such an infraction then the act which is based on the said infraction should be invalidated by the court, there being no discretion in the matter. For my part, the point on which this decision turns being one of non-compliance with due process requirements is not concerned with the merits of the case brought against the appellant and it being so "*the axe must fall where it falls."* It does appear to me that the right provided in article 14.2 has not been respected by our courts for a considerable length of time but that should neither give legitimacy to it nor fetter our enforcement jurisdiction in preventing its further breach, it being an act that is not sanctioned by the Constitution. I venture to say that beyond the decision of the Court of Appeal in the **Okorie** case (supra) which was applied by Taylor J (as he then was) in the **Republic v Akosa and Another [1975] 2 GLR 406**, when the right to counsel was considered one rarely comes across any other previously decided case in which the point came up for decision within the scope of this judgment regarding the

availability of the right to accused persons in the performance of their cases in court before conviction is entered against them.

It would appear to me from a fair reading of the constitutionally protected right to counsel for an accused person that its violation renders the plea accepted involuntary and consequently one that cannot be the lawful basis of a conviction in our criminal justice system. The scope of the right to counsel permits a plea to be taken from an accused only in the presence of counsel where as in this case the appellant has asserted her right to counsel and not waived same. Judges must recognise that once there has been a violation of a constitutionally protected right then there is inherent in the acts founded on the violation of those right other factors might come into play that cumulatively have the effect of rendering the guilty plea such as occurred in the case herein unreliable and indeed involuntary.

Before putting this matter to a rest, I wish to say that in the proceedings before the Court of Appeal particularly at pages 2-3 of the record of appeal herein, the appellant in her deposition in support of her application for extension of time to appeal made reference in paragraphs 18-20 to some matters that in my view were so grave that though denied by they tended to raise the issue of the retraction of the pleas having been induced by certain representations that were allegedly made to her. Perhaps, an inquiry into them might establish that they were not true but in its absence one cannot say that the retraction of the pleas was voluntary .I think article 14.2 of the 1992 Constitution is intended to prevent the state taking advantage of uncounselled accused persons who might be thought of as unable in the absence of counsel to prepare their cases. Our training as

lawyers is a special skill that the constitution makers in their wisdom think should be available to persons who are accused of crimes and we should uphold the fundamental right so provided in an effort to deepen constitutionalism in this country.

In my thinking even guilty persons are entitled to be advised of strategies for their defence in the conduct of criminal cases in the same way as innocent persons and as such the violation of this fundamental right when properly asserted must result insetting aside any conviction that is founded thereon. When people are accused of crimes and going through trials, the role of counsel is of utmost importance in ensuring that they are properly advised in preparing their defence and all the options that are available to them are explained to them to ensure that the trial process is fair and also to uphold the integrity of the judicial process by which their right to personal liberty might be curtailed following their conviction. I am of the opinion that the right to counsel for accused persons if not respected by our courts would render article 14.2 a mere expression of lofty principles that are devoid of any substance. Such a state of affairs would not only be regrettable from the point of view of our duty in terms of our oath to *"preserve, protect and defend the Constitution*" but undermine the corollary duty of our citizens to respect the Constitution.

In the circumstances, the appellant's appeal to this court on grounds that touch and concern the violation of her right to counsel is allowed.

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

COUNSEL

AUGUSTINE OBOUR FOR THE APPELLANT

K. ASIAMAH-SAMPONG (PRINCIPAL STATE ATTORNEY) FOR THE RESPONDENT