

IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA-GHANA

CORAM: KANYOKE, J.A (PRESIDING)
KUSI-APPIAH, J.A
ADJEI, J.A

SUIT NO. H2/6/2009

30TH NOVEMBER, 2016

THE REPUBLIC

RESPONDENT

VS.

TSATSU TSIKATA

APPELLANT

J U D G M E N T

ADJEI, JA:

This appeal emanated from the decision of the High Court Accra delivered on 18th June, 2008 in which the Appellant herein, then the accused person was convicted on counts one, two, three and four as contained in the charge sheet. The Appellant was sentenced

to a term of imprisonment for five years on each of the four counts and the sentences were to run concurrently. The Appellant dissatisfied with both conviction and sentence appealed to this Court to reverse the judgment contained in the Notice of Appeal filed on 18th June, 2008; the very day that the appellant was convicted and sentenced.

The brief facts of the case which culminated in this appeal were that three counts of offence for willfully causing financial loss to the State contrary to section 179A (3) (a) of the Criminal Code now the Criminal Offences Act, 1960 (Act 29) and a count of intentionally misapplying public property contrary to Section 1(2) of the Public Property Protection Decree 1977 (S.M.C.D 140) now Public Property Protection Act, 1977 (S.M.C.D) 140). The charge sheet containing the four counts of offences provided thus:

“THE REPUBLIC

VS.

TSATSU TSIKATA

COUNT ONE

STATEMENT OF OFFENCE

Willfully causing financial loss to the State contrary to Section 179A(3)(a) of the Criminal Code 1960 Act 29.

PARTICULARS OF OFFENCE

TSATSU TSIKATA the Chief Executive of Ghana National Petroleum Corporation (GNPC) IN OR ABOUT October,1996 in Accra in the Greater Accra Region willfully caused financial loss to the State by illegally authorizing and causing to be paid the sum of Two Million Three Hundred and Six Thousand Three Hundred and Seventy-Four French Francs Forty-One Centimes (FRF 2,306,374.41) equivalent of Seven hundred and Seventy-Five Million One Hundred and Twenty –six thousand Three Hundred and Ten Cedis (775,126,310) from the accounts of GNPC to Caisse Francaise de Development on behalf of Valley Farms Company Ltd., a private limited liability company which had defaulted on a loan it had contracted from the said Caisse Francaise de Development.

COUNT TWO

STATEMENT OF OFFENCE

Willfully causing financial loss to the State contrary to Section 179A(3)(a) of the Criminal Code 1960 Act 29.

PARTICULARS OF OFFENCE

TSATSU TSIKATA as the Chief Executive of Ghana National Petroleum Corporation (GNPC) in or about November,1996 in Accra in the Greater Accra Region willfully caused financial loss to the State by illegally

authorizing and causing to be paid the sum of Two Million Three Hundred and Six Thousand Three Hundred and Seventy-Four French Francs Forty-One Centimes (FRF 2,306,374.41) equivalent of Seven hundred and Seventy-Five Million One Hundred and Twenty –six thousand Three Hundred and Ten Cedis (775,126,310) from the accounts of GNPC to Caisse Francaise de Development on behalf of Valley Farms Company Ltd., a private limited liability company which had defaulted on a loan it had contracted from the said Caisse Francaise de Development.

COUNT THREE

STATEMENT OF OFFENCE

Willfully causing financial loss to the State contrary to Section 179A(3)(a) of the Criminal Code 1960 Act 29.

PARTICULARS OF OFFENCE

TSATSU TSIKATA as the Chief Executive of Ghana National Petroleum Corporation (GNPC) in or about December,1996 in Accra in the Greater Accra Region willfully caused financial loss to the State by illegally authorizing and causing to be paid the sum of Two Million Three Hundred and Six Thousand Three Hundred and Seventy-Four French Francs Forty-One Centimes (FRF 2,306,374.41) equivalent of Seven hundred and Seventy-

Five Million One Hundred and Twenty –six thousand Three Hundred and Ten Cedis (775,126,310) from the accounts of GNPC to Caisse Francaise de Development on behalf of Valley Farms Company Ltd., a private limited liability company which had defaulted on a loan it had contracted from the said Caisse Francaise de Development.

COUNT FOUR

STATEMENT OF OFFENCE

Intentionally misapplying public property contrary to Section 1(2) of the Public Property Protection Decree 1977 (S.M.C.D 140).

PARTICULARS OF OFFENCE

TSATSU TSIKATA the Chief Executive of Ghana National Petroleum Corporation (GNPC) in or about March,1991 in Accra in the Greater Accra Region intentionally misapplied the sum of Twenty Million cedis (20,000,000) belonging to Ghana National Petroleum corporation (GNPC) to acquire shares in Valley Farms company Ltd. A private limited liability Company.”

The accused was the former Managing Director and Chief Executive of the Ghana National Petroleum Corporation (GNPC) a statutory corporation established under PNDCL 64 of 1983. It had a seven member Board of Directors comprising the Board Chairman, the Managing Director and Chief Executive and five other members. The facts as presented by the prosecution were that notwithstanding the clear objectives and functions provided by PNDCL 64 for Ghana National Petroleum Corporation (GNPC) to, inter alia, undertake the exploitation, development, production and disposal of petroleum and to promote the exploration and the orderly planned development of petroleum resources of Ghana, the Appellant strayed into other areas not related to the objects and functions of GNPC. The stray areas the appellant was alleged to have undertaken including investing in banking, telecommunication, financial hedging and derivatives, Cocoa production and marketing. While the accused person was on stray, in 1991 he used Merban Investment Holdings Ltd, a subsidiary of Merchant Bank Ghana Ltd. to acquire shares on behalf of GNPC in Valley Farms Ltd; a private Company Limited by shares. The GNPC acting through the Appellant provided a guarantee for Valley Farms Ltd. without any indemnity or contract guarantee. The Appellant provided the guarantee for Valley Farms without the knowledge of the Board of Directors as a result of which financial loss was caused to the State. The Appellant on the other hand refuted the allegations levelled against him by the prosecution. Evidence was adduced and after the close of prosecution's case, the accused

person was called upon to open his defence. The Appellant subpoenaed a witness to testify on his behalf and which an objection was raised to the compellability of the witness to the jurisdiction of the Court. The Appellant appealed to the Court of Appeal and the interlocutory appeal was dismissed by this Court. The Appellant subsequently appealed to the Supreme Court. During the pendency of the interlocutory appeal before the Supreme Court, the Appellant was convicted by the High Court.

The Appellant's appeal to the Supreme Court succeeded and the Court held that the witness did not have immunity and was therefore a compellable witness. The Appellant dissatisfied with the decision of the High Court appealed to this Court to reverse the said judgment.

The grounds of appeal contained in the Appellant's Notice of Appeal filed on 30th June, 2016, pursuant to the leave granted by this Court on 27th May, 2016 are as follows:

- “a. The Verdict is unreasonable and cannot be supported by the evidence.***
- b. The trial judge erred in law in deciding that financial loss had been caused simply because payment of mines had been made by GNPC.***

- c. *Trial Judge erred in relying on the evidence of PW 5 to convict the accused.*

Particulars of error: Unreliable and discredited testimony cannot lawfully be the basis of a conviction. Pw5 was totally discredited in cross-examination and by reference to other testimony before the court.

- d. *Trial judge erred in law in referring to extraneous matters that were not part of the record in her judgment.*
- e. *The trial judge erred in law in pronouncing judgment when she had previously stated that she was awaiting the decision of the Supreme Court on the question whether the International Finance Corporation was amenable to the jurisdiction of the court of Ghana when the decision of the Supreme Court is to be pronounced on 25th June, 2008.*
- f. *Trial Judge erred in law in deciding that there was no provision for indemnity from Valley Farms for the guarantee.*

Particulars of error: The express terms of the guarantee agreement gave GNPC a right of subrogation over the assets of Valley Farms.

- g. Trial Judge showed manifest bias against the accused/appellant in the conduct of the trial and particularly in proceeding to deliver judgment on the morning of 18th June, 2008.***

Particulars of error: The 18th June had not been set for judgment in the case and no notice had been served on the accused to that effect.

- h. Trial Judge erred in deciding that an investment in a Cocoa project was unrelated to the business of GNPC.***

Particulars of error: Trial Judge failed to refer to the objects of the corporation in reaching that conclusion and there was uncontested evidence that funding from the export of cocoa was critical to the responsibility of GNPC to import crude oil for the country.

- i. The trial Judge erred in holding that the accused had admitted in a caution statement that he authorized PW4 the GNPC Head of finance to effect the payment in the charge sheet.***

- j. Trial Judge erred in law in holding that the defence should have called other members of the GNPC Board of Directors to testify as to an approval given by the Board of Directors”.***

This Court before delivering its judgment in the appeal invited the Appellant and the Attorney-General to address it on the effect of the prerogative of mercy granted to the Appellant by His Excellency President J.A. Kuffour after the Appellant had spent some time in lawful custody. The parties addressed the Court on the legal effect of prerogative of mercy granted by the President acting in consultation with the Council of State on an accused who had filed an appeal against both conviction and sentence imposed on him by the High Court. Prior to the order of this Court for the parties to address it on the legal effect of prerogative of mercy on appeal, the Attorney-General had concluded that the trial High Court Judge acted capriciously and the State cannot defend the appeal. The Attorney-General in her written submission filed pursuant to the order of this Court stated that she would withdraw the notice of cross appeal which was praying for the enhancement of the sentence imposed on the Appellant. We address the legal effect of the Notice of Appeal filed by the Attorney-General which she is asking for leave to withdraw. The Court had decided to strike out the Notice of Appeal filed by the Attorney-General on 8th August, 2008 against the judgment of the High Court delivered on 18th June, 2008 on legal grounds. Rules 15 of the Court of Appeal Rules, 1997 (C.I. 19) makes provision for the filing of Notice for Variation of judgment in civil appeals and shall be filed within one month after service of the Notice of Appeal on the respondent. There is no such provision made for a Respondent in criminal appeal and a

Respondent who wish to file an appeal against the decision of the High Court to the Court of Appeal shall file it in the form of appeal and not cross appeal as the Attorney-General did in the instant appeal and must be filed within the time prescribed for appeal. Section 11(6) of the Courts Act, 1993 (Act 459) provides that a party who desires to appeal against a judgment delivered by the High Court to the Court of Appeal shall give Notice of Appeal or Notice of an Application for leave to appeal within one month of the decision appealed against. The Attorney-General filed his Notice of Appeal against the sentence imposed on the Appellant for an enhancement barely one month three weeks from the date of the delivery of the judgment without the leave of the Court, and indeed, there was no appeal pending in the eyes of the law. The Notice of Appeal filed by the Attorney-General on 8th August, 2008 without the leave of the Court is incompetent and same is struck out as such.

The Attorney-General in her answer concluded that the appeal against the decision of the High Court should succeed. The concluding part of the Attorney General's written submission in answer to the Appellant's written submission stated thus:

“In conclusion, I would like to pray that the conviction of the Appellant be set aside.”

We are not bound by the submission of a party to a case unless we have satisfied ourselves that the submission was made in accordance with law.

With respect to the legal effect of prerogative of mercy on appeal, the Attorney-General responded that the grant of prerogative of mercy to a convict does not take out the constitutional right of the Appellant to appeal against either his conviction or sentence or both. We shall quote with emphasis the Attorney-General's position about the legal effect of prerogative of mercy.

The Attorney-General stated thus:

“I respectfully take the considered view that the issue about the pardon granted by former President J. A. Kuffour to the appellant is not before the Court of Appeal in this criminal appeal. What is before it, is substantive appeal by the appellant on a judgment that was delivered by the High Court in circumstances where it was patently clear to the trial High Court Judge herself, that there was still yet to be determined by the High Court a crucial very relevant to the outcome of the trial, whether or not the IFC which had been subpoenaed by the appellant to testify, was a compellable witness.

Having said that, in my respectful view, a pardon assumes that the person pardoned had been properly convicted and had accepted his conviction ... where, however, the convicted person is actively pursuing an appeal against his conviction, the issue then is whether the grant of a pardon by the President under Article 72 of the Constitution takes away the constitutional right of

the appellant to appeal against his conviction on the merits. In effect, can the President by his grant of pardon deprive an appellant of his right under the Constitution to pursue an appeal he has filed hotly contesting his conviction?

I think not, first, because the implication would be that by the grant of pardon in circumstances such as the present one, the President had taken away the constitutional right of an appellant who had appealed against his conviction, his right to pursue his appeal before the courts. With the greatest respect, the Constitution does not give the President such power. Of course, a pardoned person who has appealed against his conviction may elect whether or not to pursue the appeal once he has been pardoned.

It would be his choice. That choice cannot be imposed on him by the grant of a pardon...

The second point relates to the disabilities that attach to a pardon. While a pardon takes away the pain of incarceration or sentence, it does not wipe out the conviction."

The law generally is that pardon takes away the pain of incarceration or payment of money due to Government on account of any offence. It does not wipe out conviction. An example is

found under **Clause (b) of Article 62 of the Constitution** which disqualifies a person who has received Presidential pardon in some offences from becoming President of Ghana. *Article 62 of the Constitution* which is on qualifications of President provides thus:

“A person shall not be qualified for election as the President of Ghana unless;

a. He is a citizen of Ghana by birth

b. He has attained the age of forty years; and

c. He is a person who is otherwise qualified to be elected a Member of Parliament, except that the disqualification set out in paragraph (c), (d) and (e) of clause (2) of Article 94 of this Constitution shall not be removed in respect of any such person, by a presidential pardon or by the lapse of time as provided for in clause (5) of that Article.”

There is no doubt that persons who have been pardoned in some offences can never become President or Vice President in Ghana. There is a vast difference between prerogative of mercy and an appeal which if succeed sets aside conviction. Where a person's conviction is quashed, or set aside, the person is deemed not to have committed the offence and in some cases where the Appellant spent some time in lawful custody he may be entitled to compensation under clause (6) of Article 14 of the Constitution. In the case of ***Dodzie Sablah V. Attorney-General delivered on 11th June 2015 (unreported)***; the Supreme Court invoked clause 6 of

Article 14 after having set aside the conviction of the Appellant who had served part of his sentence before being acquitted on appeal by the Supreme Court.

Furthermore, where a person is pardoned under Article 72 and the offence upon which he was convicted was a crime involving dishonesty or false statement and ten years has not elapsed since the person was pardoned, the judgment or the examination led in the proceedings may be used to attack the credibility of that person.

Section 85 of the Evidence Act, 1975 (NRCD 323) provides thus:

- “1. For the purpose of attacking the credibility of a witness, a party may lead evidence by the examination of the witness or by record of the judgment that the witness has been convicted of a crime involving dishonesty or false statement, but shall not lead evidence as to a conviction for any other crime.***
- 2. Evidence as to a conviction shall not be led under Sub-section (1) if a period of more than ten years has elapsed since the date of conviction or the termination of the sentence imposed by the court for that conviction, whichever last occurs for that conviction.***

- 3. *The pendency of an appeal against a conviction does not prevent the leading of evidence as to the conviction.***
- 4. *Where evidence of a conviction is led, the pendency of an appeal against that conviction may also be led.”***

From the above, it is clearly discernible that if a person is granted a presidential pardon or prerogative of mercy and the offence for which that person committed involves dishonesty or false statements and ten years has not elapsed since the conviction of that person; the examination in the proceedings or the judgment in the criminal matter may be used to attack the credibility of the person in another suit when he appears as a witness. The records of conviction remain intact where a person is granted a prerogative of mercy and could be used to attack his credibility in a subsequent suit in which he may appear as a witness. Where a convict is given a pardon, it is the sentence which is varied but where a person is acquitted on appeal, all the adverse findings made against that person by the Court which were discussed and set aside are completely erased from the record of that person and cannot be used against him in any forum.

An appeal against a criminal judgment from the High Court to the Court of Appeal is a creature of Constitution and a person cannot be deprived of that right except where the person fails to file his appeal within the time prescribed by law and an application for

extension of time to file an appeal in that matter is refused by the High Court or the Court of Appeal or both. Even though it has become the position of the law that an appeal is a creature of statute, it does not truly represent the position of the law.

The law on appeal is that an appeal is a creature of statute. In the case of ***Karletse Panin Vs. Nuro [1979] GLR 194***; It was held that an appeal is a creature of statute and a person seeking to benefit from the statute that creates the appeal must come within the terms and conditions provided by the appeal before he can take benefit of same. In the case of an appeal in a criminal matter from the High Court to the Court of Appeal as in the instant appeal, an appeal is a creature of Constitution and not statute which is an ordinary law on the land and a person who files his appeal within the time prescribed by-law acquires a constitutional right and not a statutory right. The laws of Ghana as provided by Article 11 of the Constitution draws a distinction between the constitution and any other enactments or laws. Similarly, Article 1 of the Constitution makes the Constitution the Supreme law of Ghana and treats all other laws as inferior to the Constitution. The statutes of Ghana are made up of Acts and subsidiary legislations and the Constitution is not part of it. The laws of Ghana Revised Edition Act 1981(Act 562) appointed Statutes Law Revision Commission to revise all Acts and all subsidiary legislations in force on the 1st January, 2005 and they excluded the Constitution. The right to appeal against a decision of the High Court to the Court of Appeal is created by article 137 of the Constitution and section 11 © of the Courts Act

only provides for the time frame within which such an appeal may be filed. A person who files an appeal against the criminal decision of the High Court to the Court of Appeal under article 137 of the Constitution acquires a constitutional right and not a statutory right and cannot therefore say that an appeal is a creature of statute as pertains in the English Courts where they do not have a written Constitution.

We hereby state that the Appellant's appeal is a creature of Constitution as he derives his rights from the Constitution and not a statute. We therefore unambiguously state that we would not follow the English position which has been wrongly transported into our jurisprudence that all appeal are creature of statute. In Ghana, most of the appeals as in the instant appeal are created by the Constitution and a person who takes advantage of it acquires a constitutional right.

Article 137 is on appeal from the High Court and a Regional Tribunal to the Court of Appeal. It provides thus:

***“1. The Court of Appeal shall have jurisdiction throughout Ghana to hear and determine, subject to the provisions of this Constitution, appeals from a judgment, decree or order of the High Court and Regional Tribunals and such other appellate jurisdiction as may be conferred on it by this Constitution or any other law.*”**

2. *Except as otherwise provided in this constitution, an appeal shall lie as of right from a judgment, decree or order of the High Court and a Regional Tribunal to the Court of Appeal.*

The Appellant filed his appeal in accordance with the Constitution and therefore acquires a constitutional right to pursue his appeal and nothing can prevent him from pursuing same. It is an appeal which clothes an Appellant with capacity to invite the appellate court to determine all adverse findings made against the Appellant at the trial on merits. Where the Appellant is acquitted, all the previous findings of fact made against him and the judgment cannot be used in any forum to attack his credibility or to disqualify him from holding any public office where the law provides that a convict of a particular offence cannot hold. Where a person has been convicted by a court of competent jurisdiction, it is only a court with competent jurisdiction which can pronounce on the validity or otherwise of the conviction and not the President in the exercise of prerogative of mercy under article 72 of the Constitution.

The law is that where a matter is determined judicially, it is only a body with judicial power that can pronounce on it as being valid, invalid, void or otherwise. It is the Court of Appeal in the exercise of its judicial power which can acquit the Appellant or the Supreme Court in the exercise of its supervisory powers under Article 132 of the Constitution which may quash the conviction. By virtue of

Article 125 (3) of the Constitution which provides that judicial power of Ghana shall be vested in the judiciary and exercised exclusively by the Judiciary, no other person or body including the President nor Parliament can exercise judicial power. Article 125 (3) of the Constitution provides thus:

“The Judicial Power of Ghana shall be vested in the Judiciary. Accordingly neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power.”

We are satisfied that it is only the Court of Appeal which can exercise judicial power by the invocation of its appellate jurisdiction conferred on it by Article 137 of the Constitution to decide on the merits of the appeal. Justice would be meted out to the Appellant by the exercise of the appellate jurisdiction of the Court of Appeal when the appeal is reheard and determined by it. It is the only opportunity that the Appellant may take advantage to ensure that the Court of Appeal hears the appeal and correct all errors committed by the trial High Court and come to a conclusion as to whether the High Court was right or otherwise.

The position at common law is that pardon deals with sentence and payment of fine due to Government on account of any offence while appeals deal with both conviction and sentence. Prerogative of mercy and appeal are not mutually exclusive likewise appeal and judicial review in the nature of certiorari. In the case of **R. vs. Derek Bentley (deceased) [1998] EWCA Crim 2516** where the

victim was given posthumous pardon in 1993 when it revealed that his execution emanating from his conviction was wrong and unfair. On 30th July, 1998, the Court of Appeal held that pardon and appeal are not mutually exclusive and it is an appeal which clothes the courts with jurisdiction to determine the case on its merits.

Furthermore, in some instances prerogative of mercy may be used to cause injustice particularly where a person who has been wrongly convicted and appeals against the conviction is given a pardon and it is taken as a bar to the prosecution of his appeal.

We are of the candid opinion that we have jurisdiction to determine the appeal on its merits and we shall proceed to determine same.

The Appellant filed 25 grounds of appeal against the decision of the trial High Court. The Appellant in his written submission categorised the 25 grounds of appeal into four broad headings. The first category was titled errors of law in Court proceeding with judgment on 18th June, 2018 despite pendency of Supreme Court decision on International Finance Corporation (IFC) subpoena.

The grounds of appeal brought under the error or law stated above are: (e), (g), (p), (s), (t), (u) and (w). Grounds (i), (q), (r), (v) and (y) were brought under one heading which the appellant termed it as; errors of law in court striking out application for further evidence. The third heading is errors of law in misinterpreting what amounts to causing financial loss and the heading took care of grounds (b), (h), (n) and (d) of the appeal.

The fourth heading is errors of law in respect of assessment of evidence and it embraces grounds (a), (c), (f), (i), (j), (k) and (m) of the appeal. We would not strictly follow the various categories under which the appeal was addressed. The cumulative effect of grounds (e), (g), (l), (p), (q), (r), (s), (t), (u), (v), (w) and (y) of the appeal is that there was a miscarriage of justice and we shall address them together under that heading. The Appellant applied to the trial High Court to compel the attendance of International Financial Corporation to give evidence and produce documents in respect of Valley Farms Project promoted by the Africa Project Development Facility from 1987-1990.

The Court's notes regarding the order made by the trial High Court on the subpoena *duces tecum* directed to the Country Director of the International Finance Corporation are as follows:

“By Court: Let the Registrar of the court issue subpoena duces at tecum directed at the Country Director, IFC to appear before this court on the 15th instant in respect of the Republic V. Tsatsu Tsikata. Let him also bring along the following documents:

a. Documents in respect of Valley Farms Project promoted by the Africa Project Development Facility from 1987-1990.”

An objection was subsequently raised to challenge the jurisdiction of the Courts in Ghana to compel International Finance Corporation to testify when a statute has conferred immunity on it. The lawyer

for International Finance Corporation raised an objection to the compellability of either the Corporation or its Country Director as well as the documents kept at its archives. The trial High Court Judge upheld the objection raised by the International Finance Corporation and held that **Section 8 of the Legislation Notification (LN) 9 of 1958** is quite specific that all governors, directors and other officials of IFC are immuned from legal process with respect to acts performed by them in their official capacity. Regarding the documents the Applicant subpoenaed the Country Director of International Finance Corporation to tender to support the Appellants defence, the trial High Court Judge held that the documents were dealt with almost twenty (20) years ago and could be safely presumed that they were in the archives of the International Finance Corporation and therefore inviolable as prescribed by Section 5 of LN 9 of 1958.

The trial High Court Judge finally held that the process sought to be served on International Finance Corporation to appear and give evidence cannot be enforced as the Corporation was unwilling to waive its immunity conferred on it by statute and the Court too lacked jurisdiction to compel it to submit to its jurisdiction. The applicant dissatisfied with the ruling of the trial High Court appealed against same to the Court of Appeal.

The combined effect of the grounds of appeal contained in the notice of appeal was that the failure by the trial High Court to compel International Finance Corporation to tender documents in

respect of Valley Farms Project promoted by the Africa Project Development Facility was an affront to **paragraph (g) clause 2 of Article 19 of the Constitution of Ghana**. The Appellant's position was that the trial High Court failed to fulfill its constitutional mandate by affording the Appellant facilities to obtain the attendance of his witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution.

The Appellant filed an application for stay of proceedings at the trial High Court to stay proceedings until the appeal to determine the compellability of the International Finance Corporation whose evidence was vital was determined. The application was initially dismissed on technicality that by **Rule 27 (A) of the Court of Appeal Rules C. I. 19**, an application for stay of proceedings against the proceedings before the High Court pending the determination of an interlocutory appeal against its ruling shall be filed at the Court of Appeal and not the High Court.

At a subsequent hearing date, the trial Judge saw the importance of the outcome of the interlocutory appeal filed against the Court's ruling that the International Finance Corporation (IFC) is not compellable witness and, furthermore, the documents the Appellant was subpoenaing IFC to tender were archived documents and were also clothed with immunity. The trial High Court Judge appreciated the outcome of the interlocutory appeal on her judgment should her position be reversed by the Court of Appeal. It is important to quote the reasoning that influenced the trial Judge's

decision to stay its own proceedings to await for the outcome of the decision to be rendered by the Court of Appeal. The trial High Court Judge held thus:

“Since the outcome of the decision of the Court of Appeal will have a bearing on the final outcome of this case, and in order that there will not be any mistrial or any miscarriage of justice, I will grant the application of learned defence counsel and await for the final decision of the Court of Appeal. In the event that the appeal is won, the trial will have to be re-opened and the witnesses of defence called. On the other hand, however, if the appeal is lost, the court can go ahead and give its judgment.”

From the above reasoning, the trial High Court Judge admitted that if the appeal is won when she had delivered the judgment in the matter there will be a mistrial or will occasion miscarriage of justice to the Appellant. The Court of Appeal dismissed the appeal and the appellant appealed against the decision of the Court of Appeal to the Supreme Court. The reasoning upon which the trial High Court Judge stayed the proceedings will still be relevant because if the judgment of the High Court is delivered and the Supreme Court reverses the decision of the Court of Appeal, it will occasion miscarriage of justice or amount to mistrial as previously held by the trial High Court Judge.

The trial High Court Judge in her efforts to avoid mistrial or miscarriage of justice *suo motu* decided to wait and abide by the outcome of the Supreme Court decision on the interlocutory appeal which emanated from the ruling of the High Court. The trial High Court Judge who had earlier on decided to await for the outcome of the Supreme Court's decision to avoid mistrial or miscarriage of justice had a change of mind to rescind its earlier decision. This is clearly discernible from the proceedings of 18th June, 2008. Part of the proceedings regarding the High Court Judge's determination to revoke her earlier decision on the stay of proceedings is reproduced hereunder:

“Judge: Mr. Tsikata when did you appeal against the ruling of the Court of Appeal to the Supreme Court?”

Tsikata: On the 19th of December

Judge: Pardon

Tsikata: I believe on the 19th of December, 2006. I do not have the brief on the case, so...

Judge: I wouldn't know about it because I wasn't served with the notice of appeal from the Court of Appeal to the Supreme Court.

Tsikata: All I am saying is that...

Judge: *But if you have a rough idea because I need to incorporate it in my ruling.*

Tsikata: *I cannot vouch, for that date because I do not have the brief with me today. My counsel has the brief and...*

Judge: *suffice it to say that the appeal has been pending since December, 2006, not so?*

Tsikata: *Well, the appeal has been pending and your Ladyship, respectfully, your Lordship has indicated that she would await the decision of the Supreme Court.*

Judge: *I rescind, I rescind that decision.*

Tsikata: *And, and...*

Judge: *In the absence of any stay of proceedings from the Supreme Court ordering me to stay proceedings, formal order...*

Tsikata: *With respect*

Judge: *I intend going on this morning."*

The trial High Court Judge thereafter ruled that the Court *suo motu* decided all along to stay its proceedings to abide by the decision of the Supreme Court before delivering its judgment and the Court

could not wait any longer. The Court immediately vacated its order and read the judgment of the Court. The law generally is that where a suit is adjourned to a date for proceedings to be taken, it is that proceedings alone that must be taken. The suit was not adjourned to 18th June, 2008 for the issue of vacating of the stay of proceedings to be determined and judgment delivered. On 17th June, 2008 when the suit was adjourned to 18th June, 2006, it was meant for a motion to take further evidence in the matter to be determined. The proceedings of 17th June, 2006 are as follows:

BY COURT: ***“The accused per his counsel has filed a motion on notice for taking further evidence. Counsel has written to say that the is currently gone outside the jurisdiction. It is noteworthy, however, to note that counsel for the accused is operating from Azinyo Chambers in the premise, I presume there are other competent lawyers in the chambers who can handle this motion for him.***

I shall therefore, adjourn this application to Wednesday, 18th June, 2008 at 8.00 am for hearing”.

We are of the considered opinion that the trial High Court Judge failed to exercise her discretion fair and candid when she revoked the stay of proceedings granted by her and furthermore, delivered

the judgment when the business for the day did not include any of them. In the case of ***Atta v Nkrumah [1963]1 GLR 432***, it was held that where a matter is adjourned to a date for a certain proceedings to be considered it is that proceedings alone that should be considered unless the Order for adjournment provides otherwise.

The trial High Court Judge should have given the Appellant a hearing before vacating her order which had been pending for over one year. Article 296 clauses (a) and (b) of the Constitution of Ghana provides for the modes by which discretionary power vested in a person may be exercised.

It provides thus:

“Where in this Constitution or any other law discretionary power is vested in any person or authority

a. That discretionary power shall be deemed to imply a duty to be fair and candid;

b. The exercise of the discretionary power shall not arbitrary, capricious or biased either by resentment, prejudices or personal dislike and shall be in accordance with due process of law; and”.

We are satisfied that the trial High Court Judge in vacating the order for stay of proceedings did not exercise her discretionary

powers in accordance with due process of law and therefore occasioned miscarriage of justice to the Appellant.

We further hold that the suit was adjourned to 18th June, 2016 for the hearing of an application to adduce further evidence and the trial High Court Judge erred when she vacated the stay of proceeding and delivered the Judgment of the Court when the two activities were not part of the business to be transacted on 18th June, 2008. The anticipation by the trial High Court Judge on the legal effect of the decision of the Supreme Court on her ruling on the grant of immunity and its consequences to IFC was right and should not have vacated her order not in accordance with law. It is now patently clear that the High Court has excluded material evidence from the Appellant and thereby renders the High Court's decision unreasonable and must be set aside. Section 31 (1) (a) of the Courts Act, Act 459 empowers an appellate court to set aside a judgment on the ground that the judgment is unreasonable. Grounds (a), (b), (d) and (e) of the appeal succeed. The trial High Court Judge in granting the application for stay of proceedings when the interlocutory appeal was pending before the Court of Appeal was that the outcome of the decision might have serious consequences on the proceedings. If she gave Judgment and the appeal succeeded, it would constitute mistrial or miscarriage of justice because the decision would be based on incomplete proceedings. The Supreme Court ruled in favour of the Appellant and held that IFC is a compellable witness under the laws of Ghana. The decision is reported of **Tsatsu Tsikata vrs The**

Republic [2011] 1 SCGLR 1. The Supreme Court in holding 2 of the headnotes at pages 4 and 5 held thus:

“The Supreme Court would, however, unanimously hold that the International Finance Corporation (IFC) itself as an international financial institution, under the International Bank, finance Corporation (Immunity and Exchange Contracts) Order, 1958 (LN9), was not entitled to the same immunity from any form of judicial process like other international organizations and its directors and officers. In effect, the IFC had no immunity under LN9. Consequently, the Court of Appeal had gravely erred when it relied on a statutory provision granting immunity to the International Monetary Fund (IMF) from judicial processes to decide the issue relating to immunity of the IFC. The appeal would therefore be allowed on that ground.

Per Atuguba Jsc. It is clear from section 3 of LN 9 that the IFC can be sued in the situation therein stated. The parties do not dispute that this situation obtains in Ghana in respect of the IFC. There is no other legal barrier with regard to legal process as to the IFC. Clearly then legal process like a subpoena duces tecum can issue to the IFC itself and the courts below erred in holding otherwise”.

The position of the Judgment delivered by the High Court is that the witness of the Appellant was erroneously prevented from giving evidence and tender all relevant documents in its custody to supplement the evidence of the Appellant. We are satisfied that the legal effect of the Supreme Court's decision is that IFC is a competent and compellable witness of the Appellant. The decision of the High Court without the evidence of IFC demonstrates that the High Court infringed upon the fundamental human rights of the Appellant by denying the appellant a fair hearing. Paragraph (g) clause (2) of article 19 of the Constitution provide this:

“A person charged with a criminal offences shall be afforded facilities, to examine, in person or by his lawyer, the witnesses called by the prosecution before the Court, and to obtain the attendance and carry out the examination of witnesses to testify on the same conditions as those applicable to witnesses called by the prosecution”.

We are of the considered opinion that the High Court Judge failed to provide facilities to enable IFC to testify and tender evidence to support the case for the appellant. From the evidence on record, IFC was a material witness to the Appellant but the Appellant lost that vital evidence as a result of the wrong ruling by the trial High Court. It is our decision that the fundamental human rights of the Appellant was breached regarding the role of the Court in providing

facilities for the witnesses called by the accused person before the Court and to obtain the attendance and carry out the examination of witnesses to testify in the same conditions as witnesses called by the prosecution. It is a provision under the fundamental human rights and freedoms with specific reference to fair trial. We hold that the accused person was not given a fair trial required by paragraph (g) Clause (2) of article 19 of the Constitution.

The trial High Court Judge in her judgment made seven findings of fact and came to the conclusion that based on the seven findings made by the prosecution that the prosecution had established a prima facie case. The seven findings made by the trial High Court Judge in her judgment of 18th June, 2008 are as follows:

- “1. That the accused Tstasu Tsikata was a former chief Executive and two times Chairman of the Board of Directors of GNPC.***
- 2. That during his tenure of office GNPC bought shares in Valley Farms Company Limited.***
- 3. That the guarantee was signed by the accused person.***
- 4. that it was upon the instructions of the accused that the share in Valley Farms Company were bought and***

- 5. It was the accused who instructed the payment of the principal loan acquired by valley Farms company Limited.**
- 6. That the loan was paid in three tranches in October, November and December, 1996.**
- 7. It was the accused who instructed PW5 to acquire to ₦20 million equity share in Valley Farms Company Limited, a company whose activity is wholly unrelated to petroleum.**

I, therefore, found as a matter of law and fact that the prosecution had established a prima facie case against the accused and I called upon him to open his defence”.

Apart from the first finding of fact made by the trial High Court Judge, all the six other findings of fact were based on transactions undertaken on behalf of GNPC by the Appellant which Valley Farms company Limited was a contracting party. The Appellant's prayer to the High Court to compel the Country Director of IFC to produce documents in respect of Valley Farms project promoted by the Africa Project Development Facility from 1987-1990 should have been granted by the trial High Court and failure to grant same occasioned miscarriage of justice. These documents may be material to the resolution of the findings of fact made by the Judge and the exclusion of that evidence has indeed occasioned injustice to the Appellant.

There are three basic grounds upon proof of any one of them in an appeal may allow that appeal on substantial miscarriage of justice. These grounds have been codified under section 31 of the Courts Act, Act 459 as follows:

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

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

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

c. That there was a miscarriage of justice and in any other case shall dismiss the appeal”.

As said in the judgment, we have grouped together all the grounds of appeal that allege that there was a miscarriage of justice under one heading. Miscarriage of justice is a term of art and has been interpreted in several decisions and may have persuasive effect on our courts. In the case of ***Herbert v Lankershim 71 (2d) 220 (1937)*** the Supreme Court of California described what amounts to miscarriage of justice at pages 253-254 thus:

“The phrase miscarriage of justice used as a descriptive of that condition of a cause which justifies the reversal of a judgment. It seems assured, however, that where errors have been committed and where the appellate Court finds that upon the record it is seriously doubtful that without such errors the defendant would have been convicted, then it may well be that error’s which otherwise would not be considered to be seriously prejudicial, require a reversal”.

Taking into consideration the decision rendered by the trial High Court in which the accused person was denied the right of subpoenaing IFC to tender the documents regulating the transaction between the Appellant and Valley Farms Company Limited to raise doubt to the prima facie case established by the prosecution, we are satisfied that without the error committed by the trial High Court Judge, the accused person would not have been convicted. There is a doubt as to whether the evidence of the IFC would have exonerated the Appellant of the offence or not if IFC had given evidence. Such a doubt in criminal matters is always resolved in favour of the accused person(Appellant).The gap created by the doubt by not allowing IFC to tender has occasioned a miscarriage of justice which goes to the roots of the appeal.

The Canadian Federal Supreme Court in the case of ***Fanjoy v R [1985]2 SCR 233*** stated that denying an accused person a fair

trial as may be said in the case in point amounts to miscarriage of justice. The Court at page 239 held thus:

“A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice”.

The Appellant was denied a fair trial when his case was not fixed for judgment and the Court arbitrary vacated its order for stay of proceedings, read the judgment and convicted the accused person. The witness who should have been called after the Supreme Court’s decision was not given the opportunity to be heard. It affirms the position by the trial High Court Judge if the appeal before the Supreme court succeeds, it will render her judgment in the matter a miscarriage of justice or mistrial. The conduct of the Judge in the matter as she rightly stated has occasioned miscarriage of justice and the appeal shall succeed.

Miscarriage of justice also includes any departure from the rules of Court, practice or procedure which permeates all judicial procedures, rules of court or practice to make that which happened not in the proper use of the word judicial procedure, rules of court or practice at all. This position was espoused by ***Justice Dundedin of the Privy Council in the case of Robbins v National Trustee Company [1927]2DCR 97.*** We are satisfied that

the trial Judge in revoking the stay of proceedings without reference to law and gave judgment which was not part of the business for the day thereby denied the Appellant a fair hearing permeate all judicial procedures to take that which happened not in the proper use of the word Judicial at all.

In the case of **Lin vrs Tang 147 DLR (4th) 577 [1997]** the British Columbia Court of Appeal explained miscarriage of justice as any Judgment or procedural taken in a matter which is not Justice according to law and does not limit itself to niceties of words or mere technicalities or where actual substantial justice has not been occasioned or where there is an evidence to support the conviction even though procedural irregularities have occurred. The above ratio falls on all fours with section 30(2) of the Courts Act, Act 459.

It provides thus:

“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 defect in the charge or indictment but there is evidence to support the offence alleged in the statement of offence on the charge or indictment or any other offence of which the accused could have been convicted on the charges or indictment”.

The Appellant's appeal does not demonstrate that miscarriage of justice has merely occurred but rather provides that a substantial wrong occurred during the trial and has infected the proceedings as to merit its setting aside to ensure that fairness is meted out to the Appellant. The miscarriage of Justice occasioned to the Appellant as a result of the procedure adopted by the trial High Court Judge goes to the root of the trial and the conviction and sentence emanating from such a Judgment cannot stand.

We are of considered opinion that all the grounds treated under miscarriage of Justice succeed and it will not serve any useful purpose to discuss the other grounds of appeal.

The trial Judge admitted that if the Supreme Court reversed her ruling and Judgment has already been given, it will render the Judgment a mistrial or may cause substantial miscarriage of Justice. The appeal before us cannot be set aside on the grounds of mistrial. A mistrial is a trial that has been terminated before its conclusion and therefore lacks legal effect and such a trial is always rendered nugatory or nullity. It is our decision that the procedure adopted by the trial High Court Judge has occasioned miscarriage of Justice and not mistrial as it departed from the rules which permeates all Judicial procedure to make the conviction and sentence not in the proper use of the word judicial procedure or at all.

In conclusion, the judgment of the trial High Court delivered on 18th June, 2008 in which the Appellant was convicted and sentenced is

set aside. The Appellant is hereby acquitted and discharged on all four counts.

(SGD.)

**DENNIS ADJEI
JUSTICE OF APPEAL**

(SGD.)

KANYOKE,J.A

I agree

**S.E.KANYOKE
JUSTICE OF APPEAL**

(SGD.)

KUSI-APPIAH,J.A

I also agree

**F.KUSI-APPIAH
JUSTICE OF APPEAL**

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