WRITE-UPS

RETROGRESSION IN RETROSPECTIVITY: A CRITIQUE OF THE SUPREME COURT CASE OF OBENG GYEBTTI

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Abstract

*The decision of the Supreme Court in the case of **Obeng Gyebi v The Republic**[1] on the application of the provisions of a statute to affect criminal convictions of persons serving sentences when at the time of sentence, such a statute had not been enacted has raised a lot of issues in the field of legal hermeneutics. A court in the general scheme of interpreting a statute cannot be faulted for having recourse to the general guidelines to render a decision that advances human rights and fundamental freedoms or promote the rule of law, the values of good governance or the creative development of the provisions of the Constitution as well as the laws of Ghana or that seeks to avoid technicalities and recourse to the niceties of form and language[2]; it is however not the case that it is license to a court in its quest to do justice to choose to set aside the specific rules that by the settled principles of interpretation govern a given subject matter. The consequence of the Obeng Gyebi decision raises the stakes on correct interpretative approach regarding the effect of repeal legislations and retrospective application of enactments.*

This article sets out to examine the case of Obeng Gyebi,[3] the reasoning and conclusion of the apex court in applying the Criminal Code (Amendment) Act, (Act 646)[4] retrospectively to the sentence of life imprisonment of the appellant. The writer argues that the retrospective application of the Criminal (Amendment) Act, 2003, (Act 646) on the basis of section 35(2)(e) of the Interpretation Act, 2009, Act 792 may have overstretched the meaning and intendment of that provision. The persuasive foreign cases relied on from Australia and some of the States within the United States are examined to be inapplicable in the Ghanaian context and make the foundation of the Obeng-Gyebi decision weak-kneed. The article concludes with a critique of the burden on the legal system of Ghana that the decision under consideration portends for the nation and the possible "legal china syndrome"[5] that could flow from the aftermath of that decision.

1 OBENG GYEBI vs. THE REPUBLIC [2021]DLSC10691
2 See section 10(4) of the Interpretation Ac, 2009, Act 792.
3 Supra
4 Act 646 amended section 149 of the Criminal Offences Act, 1960, Act 29 by setting out the minimum sentence upon conviction for robbery when committed with just the use of force ten years and fifteen years when committed with offensive weapon.
5 The phrase is employed in its connotative sense to indicate the possible legal confusion and legal meltdown of the repeal of a legislation under which a person was convicted.

Introduction

The background facts for an excursion into the Obeng Gyebi decision may be summarised as follows: the appellant was charged together with five others for the offence of conspiracy to commit robbery and robbery under section 23(1) and 149 of the Criminal Offences Act, 1960, (Act 29). The appellant and the other accused persons were stated by the prosecution to have entered the house of one Kofi Tawiah in Obuasi on the 1st January, 1999 around 1:30am. The accused persons met co-workers of the intended target of the robbery. Encountering the workers of Tawiah, the appellant and the other robbers subjected the persons in the house to severe beatings. They eventually took away gold and cash from the house. The persons were subsequently arrested based on information to the various chiefs in surrounding villages by the complainant to look out for suspicious persons.[6]The appellant and the five others were apprehended and identified by the victims. They were arraigned before the High Court, Kumasi. The accused persons were tried and convicted of the two offences of conspiracy to commit robbery and robbery in August, 2000.[7] An appeal to the Court of Appeal was dismissed in 2012.[8] It was not until the 28th of April, 2020 that the appellant filed an appeal pursuant to leave granted him to appeal to the Supreme Court.

At the time of conviction of the appellant in the year 2000 by the High Court the applicable law was the Suppression of Robbery Decree, NRCD 11. Section 2 of that law was to the effect that a person convicted for robbery was liable to suffer death or life imprisonment.[9]That prescribed sentence being the applicable provision at the time of conviction and sentence of the appellant, the Court of Appeal took it for granted that it was needless to consider the application of a sentencing regime that was in operation at the time the appeal was heard. The first appellate court accordingly dismissed the appeal. That appellate court reasoned that Act 646 which was the relevant law at the time the appeal was heard after extension of time had been granted to file the appeal, could not be applied retroactively as that was not within the intendment of sections 34 and 35 of the Interpretation Act, 2009 (Act 792)[10]. At the Supreme Court the appellant submitted that notwithstanding the relevant law at the time of his conviction, which was NRCD 11 for which the only mandatory sentence that could have been imposed under that law was life imprisonment or death, the sentence of life imprisonment imposed on him was harsh and excessive.[11]

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6 The facts as related by Korbieh JA writing for the Court of Appeal stated that even though it does not appear in the facts related in the decision of the Supreme Court.
7 See page 2 of the unedited judgment of the Obeng Gyebi case
8 The date of dismissal of the appeal by the first appellate court is seen on the face of the judgment of the Court of Appeal
9 Notwithstanding the provisions of section 149 of the said Code and section 296 of the Criminal Procedure Code, 1960 (Act 30), where a person is convicted of the offence of robbery the Court shall impose on him a sentence of death or life imprisonment and no less."
10 Supra
11 Supra

The decision of the Supreme Court

In dealing with the appeal, the Supreme Court set for determination the question *"what happens when a person is convicted and sentenced under a provision that is repealed and/or replaced with a reduced sentence while the person appeals the sentence?*.[12]The Supreme Court answered this question by relying on a foreign case from Australia being **Da Costa v. Cockburn Salvage & Trading Pty. Ltd.**[13] It is to the effect that an appeal being by way of re-hearing a court was to consider the "*issues the trial judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him, **but applying the law as it** is when the appeal is heard **not as it was when the trial occurred***"[14]

On the authority of this Australian case, the apex court then set for resolution first not the harshness of the sentence imposed but the necessity of the application of the relevant law at the time when the appeal was heard. Obviously, by this claim that a re-hearing of an appeal empowers a court to apply a new law that was not in existence at the time the conviction and sentence was imposed, the foundation had been laid for the application of the provisions of section 149 of the Criminal Offences Act, 1960, (Act 29) as substituted by way of an amendment of the Criminal Code (Amendment) Act, 2003, (Act 646). This provision is to the effect that upon conviction for robbery a person is liable to a term of imprisonment of not less than ten years. However, where the offence was committed by the use of an offensive weapon or offensive missile, the minimum sentence was to be fifteen years imprisonment.

The Supreme Court accordingly substituted a sentence of thirty years for life imprisonment of the appellant taking into consideration aggravating and mitigating factors. It further relied on section 35(2)(e) of Act 792. The court itself acknowledged that the section 35(2)(e) of Act 792 deals with a situation where a person has been convicted but not yet sentenced when the law that deals with the sentence is repealed and substituted with a less harsh sentence. The Supreme Court reasoned that the provision could be applied *"mutatis mutandis"* to situations where there had been conviction and sentence passed but the right of an appeal has not been exhausted before a less harsh sentencing regime is enacted by Parliament.

Re-hearing

It is only apt to begin an examination of this decision with the hackneyed principle that an appeal is by way of re-hearing. The apex court found dearth of scholarship on the full extent of what was meant by an appeal being a re-hearing in Ghanaian jurisprudence and latched on to the definition of re-hearing set down by Windeyer J. at page 209 of the Australian case. Expressing his opinion in the Australian High Court[15] on what was a re-hearing, the learned Judge noted:

12 Paragraph 1 of page 6 of the judgment
13 Da Costa v Cockburn Salvage & Trading Pty Ltd. [1970] HCA 43; (1970) 124 CLR 192, at pp 208-209
14 Page 7 of the judgment

15 In Australia the highest court is called the High Court. The Justices that presided over the matter were Barwick CJ, Menzies, Windeyer, Walsh and Gibbs JJ.

> *"that the case is to be determined by the Full bench, it means members considering for themselves the issues the trial Judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him,* ***but applying the law as it is when the appeal is heard not as it was when the trial occurred.***"[16] *[emphasis mine]*

The learned Windeyer J. of Australia relied on cases such as **Attorney-General v Birmingham Tame and Rea District Drainage Board,**[17]**Attorney-General v Vernazza**.[18] The Australian decision on the meaning of re-hearing and how on appeal a new law that was not in existence can be considered by the appellate court must be placed in its proper context: There is no express or implied exclusion in the Constitution of Australia that forbids its Parliament from making laws to have retrospective effect. This fact has been underscored in a number of Australian cases such as **R v Kidman**[19]; **Mutual Pools and Staff Pty Ltd v Commonwealth.**[20]

Contrary to this position by the Australian highest court that a re-hearing of an appeal meant that a court was mandated to take into consideration or apply the law as it is at the time the appeal was being heard; that is a different approach taken by the courts of Ghana, the Constitution, 1992 and relevant statutory provisions. For the position of the Australian authorities are correct to the extent that their Constitution does not proscribe such application of legislation in its retrospective sense. The fairly settled position of the law on re-hearing in our jurisdiction, however, has been that an appellate court was only confined to the evidence on record and the law at the time the trial court adjudicated the suit but nothing more. This view finds expression in the well- known case of **Nkrumah v Ataa**[21] where on appeal in a defamation suit the appellate Judge, Osei-Hwere J (as he then was) needed to determine the applicable law to the issue. For at the trial court the applicable law was the paragraph 64(1) of the Courts Decree, 1966 (N.L.C.D 84). However, when the appeal came on for hearing NLCD 84 had been repealed by the Courts Act, 1971, (Act 372).

It was submitted by counsel for the respondent that an appeal being by way of re-hearing, the law that ought to be applicable was the customary law by virtue of the Act 372 which had repealed the NLCD 84 before the determination of the appeal. In other words, it was urged on the appellate court that a re-hearing meant that the appellate court ought to apply a new legislation that had come into force at the time the appeal was being heard but which was non-existent at the conclusion of the trial.[22] The court reasoned correctly that if the new law was one of procedure then it could be considered but if it was one of substantive law then the appellate court had no power to apply the new law in the following words:

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16 Page 209 of the report
17 Attorney-General v Birmingham Tame & Rea District Board Drainage (1912) AC 788;
18 Attorney-General v Vernazza (1960) AC 965
19 R v Kidman (1915) 20 CRC 425
20 Mutual Pools and Staff Pty Ltd v Commonwealth (1993) 179 CLR 155
21 Nkrumah v Ataa (1972) 2 GLR 13
22 See page 18 of the Report

> *"Whenever an appeal is said to be "by way of re-hearing" it means no more than that the appellate court is in the same position as if the re-hearing were the original hearing, and hence may receive evidence in addition to that before the court below, and it may review the whole case and not merely the points as to which the appeal is brought, but evidence that was not given before the court below is not commonly received. The words also indicate that the appellate court may also consider what facts have occurred since the trial, and what relevant change has been made in the law. But in the exercise of its power to consider changes in the law since the trial, the appellate court will apply legislation, since enacted, which is sufficiently retrospective, and which extends to pending proceedings or gives new remedies.* ***It cannot, however, determine the substantive rights of the parties by applying subsequent legislation which is not retrospective.***"[23]

This authoritative pronouncement has been affirmed in a plethora of decisions by the apex court as correct and the Nkrumah decision stands as good law till this day. For instance, in the case of **In Re Asamoah (Decd); Ageyiwaa & Others v Manu**[24]; the apex court adopted the ratio in the Nkrumah case that when a ground of appeal impeached a trial court judgment for being against the weight of evidence, that in essence was a re-hearing. That "*the appellate court is placed in the same position as if the exercise was original re-hearing. The court may, in exceptional cases, receive evidence in addition may review the whole case and not merely the points as to which the appeal is brought.*"[25]

What the above has come to represent in our jurisdiction as opposed to Australia is that in matters of law as opposed to facts, the appellate court should apply a new law that has been enacted after the completion of trial, but before the appellate court's determination when the law clearly indicates that it is retrospective in nature. The presumption under common law and which our courts applied vigorously has been that a law was not to have retrospective effect unless it was clearly indicated otherwise. This presumption was the basis of judicial decisions in cases such as **Republic v Judicial Secretary; Ex Parte Torto**[26]when the Judicial Service (Amendment) Regulations, 1978, (L.I. 1168) was given retrospective application.[27]

However, the current dispensation beginning with the Constitution, 1979[28] and repeated in almost identical language under the Constitution, 1992 has changed the position under common law when a law could have retrospective effect if that was indicated on the face of the law. It is argued below that save in some limited exceptions, an enactment that deals with the substantive rights of parties cannot be applied retrospectively in Ghana to affect rights, privileges, immunities and liabilities that has vested or accrued before the coming into force of the new legislation. Parliament of Ghana has no such power to enact any such legislation as it has been precluded by the Constitution to do so. The foundation therefore, upon which the Obeng Gyebi decision was anchored that a re-hearing implied an opportunity for the appellate court to apply a new law that was not in existence at the time the trial was concluded, quite respectfully, may not be the position that reflect the dictates of the Constitution, 1992.

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23 Page 18 of the Report

24 In Re Asamoah (Decd); Agyeiwaa v Manu [2013-2014] 2 SCGLR 909

25 See page 917 of the In Re Asamoah judgment.

26 Republic v Judicial Secretary; Ex Parte Torto [1979] GLR 444 @459

27 The Judicial Service (Amendment) Regulations, 1978, L. I. 1168 came to amend Judicial Service Regulations, L. I 319 by reducing retirement age for Judicial Officers from sixty years to fifty-five years.

28 Article 89(1)(b) of the Constitution, 1979 was to the effect that: "Parliament shall have no power to enact law which operates retrospectively either in intent or content".

Retrospectivity

A much stronger reason why the case under reference appears difficult to justify as to the correctness of the reasoning is rooted in the constitutional and statutory positions in Ghana in respect of the principles of retrospectivity. It is provided under Article 107(b) of the Constitution, 1992, that:

"Parliament shall have no power to pass any law -

(*a*) …

(b) which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liberties of any person or to impose a burden, obligation or liability on any person except in the case of a law enacted under articles 178 to 182 of this Constitution."[29]

Retrospectivity is loosely meant a law that is applied to adversely affect rights, privileges and liabilities that existed before the coming into force of the legislation. Therefore, an enactment that takes effect from the date that it was not in existence to affect rights and liabilities that had accrued before the coming into force of that legislation will be deemed to be retroactive legislation. Where liabilities in the form of punishment, penalty and forfeiture had also vested and a new law tended to affect it, same is also deemed to be retrospective. Thomas Hobbes, writing in his work, "The Leviathan", had noted that *"harm inflicted for a fact that before there was a law that forbade it, is not punishment but an act of hostility: for before the law there was no transgression of the law."*[30]According to Driedger[31], a retrospective law changes present legal rights and obligations with reference to past events or statutes. A law that is applied to past events when the law was not in existence would be deemed as retrospective in its application.

There are exceptions to the Ghanaian position in the Constitution, 1992 that all laws are to be retrospective in its effect. The first exception is found in the Constitution specifically Articles 178 to 182 of the Constitution, 1992. Those provisions relate to financial matters of appropriation,[32] budget,[33]approval of loan out of public funds[34] and the public debts of Ghana.[35] The second exception to Article 107 on the principle against retrospectivity is in respect of the rules on procedure. The rule is that laws or rules on procedure can have retrospective effect as no one has a vested right in procedure; but the right for a case to be conducted in accordance with the rules of procedure in force at the time. This rule known in the case of **Yew Bon Tew v Kenderaan Bas Mara**[36]still remains good law in our jurisdiction. The case of **Abdulai III v The Republic**[37]affirms the correctness of the position that procedural enactments are an exception to the rule against retrospectivity. There is also the need to state the laws of evidence, consolidating Act by way of re-enactment as well as declaratory enactments as the other exceptions to the principle of retrospectivity[38]**.** Beyond these all laws are to be prospective in its operations. The effect of repeal and what the new legislation is not

29 Article 107(b) of the 1992 Constitution
30 Thomas Hobbes, Leviathan page 207.
31 Driedger, Statutes: Retroactive Retrospective Reflections (1978) 56 Canadian Bar Review 264
32 Article 178 of the Constitution.
33 Article 179 of the Constitution.
34 Article 181 of the Constitution
35 Article 182 of the Constitution.
36 Yew Bon Tew v Kenderaan Bas Mara (1982) 3 All ER 833
37 Abdullai III v The Republic (1989-90) 1 GLR 348
38 See Dennis Dominic Adjei's work Modern Approach to the Law of Interpretation in Ghana, chapter 5, 3rd Edition.

allowed to do have clearly been set out in section 34 of Act 792. That may be summarized as follows: that the repeal of an enactment by a new law shall not affect the previous operation of the repealed enactment and all acts done or rights accrued or all liabilities and punishment incurred under the repealed enactment remains despite the repeal.

Section 35(2)(e) of Act 792 for the purpose of the case under discussion adds a new twist. That is to the effect that where a new enactment revokes or repeals an enactment[39] and substitutes by way of a penalty, forfeiture or punishment, if the new penalty, forfeiture or punishment is lesser in degree and falls to be imposed after the new law came into force even though conviction was before the repeal of the old enactment; then a court was to consider imposition of the less harsher sentence under the new law. However, if a person has been convicted and sentenced, then by virtue of section 34(1)(b)(d) Act 792 the punishment or the penalty suffered remains notwithstanding the repeal of the law under which the punishment was incurred.

Misapplication of the *Nullum Cremen* Principle

In an attempt to justify the need to apply the mitigated sentence under Act 646 that amended section 149 of Act 29 to the sentence of life imprisonment on Obeng Gyebi, the apex court found umbrage in an article captioned *"Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation"* published in the November 1972 edition of the University of Pennsylvania Law Review by the editors of that law review.[40] The first case cited and quoted by the court and found in that article was the case of **Commonwealth v Kimball.**[41] With due deference, it is submitted that it was not of much relevance as that case was purely on implied repeal[42] which was not applicable to the Obeng Gyebi case. The second case in the article being that of **State v Daley**[43]which the Supreme Court relied on as a foundation to apply the sentencing regime of minimum of fifteen years may have strained the ratio in the Daley case.

The appellant convict was acquitted and discharged on appeal after his conviction. The basis for the acquittal was that in the course of his trial for manslaughter the law for which he was standing trial was repealed and a new offence created. The new law did not save ongoing trials or legal proceedings. Nonetheless, the trial court proceeded with the trial as if the offence has not been repealed. On appeal against conviction the appellate court held that if the new legislation did not specifically save ongoing trials then the prosecution and conviction of the appellant could not be sustained.

This is referred to as the *nullum crimen sine praevia lege*[44] principle which is to the effect that one cannot be convicted of an offence unless the offence is defined, and the punishment is prescribed

39 It is referred under section 35(2)(e) of Act 792 as an "old enactment".

40 Page 10 of the unedited judgment

41 Commonwealth v Kimball [38 Mass. (21 Pick) 373 (1838).]

42 Implied repeal as opposed to express repeal of an enactment may be either of generalia specialibus non derogant which is the effect that general laws would not override specific laws on the same subject matter in the event of con flict. The second is leges posteriones prones contrarias abrogant rule. That is also to the effect that where two laws are inconsistent with each other relating to the same subject matter, then the latter would be deemed to speak the mind of Parliament and would prevail over the former.

43 State v Daley [29 Conn. 272 (1860)

44 The full principle in Latin is nullum crimen sine praevia lege poenale which is simply no punishment without law

under a written law. This directly flows from the fact that it may be true that at the time the act took place there might have been an enactment that proscribed it but if there had been no conviction at the time of the repeal of the enactment; then technically there was no law in place that proscribed the act at the time of conviction. And the new law that has come into effect when applied to the act of the accused would have sinned against the rule on retrospectivity in the sense that the new law was being applied to events that took place before its birth. To avoid persons slipping throw the net of this legal hiatus; new laws usually contain what is called *"saving provisions"*. A saving provision may be to the effect that notwithstanding the repeal of an Act, any investigation, legal proceedings or actions that were pending before the repeal of the enactment shall continue as if the law had not been repealed.[45]

This principle was applied in the case of **British Airways v Attorney-General.**[46] In this case, the background facts may be necessary to throw more light on the Obeng Gyebi case under consideration. The plaintiffs were arraigned before the Circuit Tribunal, Accra on two counts of refusal to pay rent in convertible currency in respect of immovable property contrary to sections 4 and 9(1)(3) of the External Companies and Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986 (PNDCL 150). In the course of the trial, PNDCL 150 was repealed by the Statute Law Revision Act, 1996 (Act 516). The plaintiffs, claiming that their continued prosecution under PNDCL 150 was contrary to article 19(11) of the Constitution, 1992 invoked the original jurisdiction of the Supreme Court under articles 2(1)(a) and 130 of the Constitution for: (a) a declaration that PNDCL 150 was inconsistent with the provisions of articles 17(1) and (2), 18(2), 36(4) and 125(3) of the Constitution, 1992 and consequently void with effect from 7 January 1993 when the Constitution, 1992 came into force; (b) a declaration that their prosecution under PNDCL 150 was unlawful; and (c) an order to the Circuit tribunal to discontinue the prosecution. Article 19(11) is to the effect that *"no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law."*

The Supreme Court upheld the objection on the grounds that under Article 19(11) of the Constitution, 1992 it was unconstitutional to convict or punish any person unless a written law defined or provided sanctions for the offence, the provision of section 8(1)(e) of the Interpretation Act, 1960 (CA 4)[47] dealing with the effect of a repeal, revocation or cesser of an enactment was unconstitutional in respect of criminal offences contained in a repealed law such as PNDCL 150 and therefore inapplicable to the criminal case pending against the plaintiffs. It would have been different if the plaintiff had been convicted before the repeal of PNDCL 150 by Act 516 or if Act 516 had saved offences committed before the repeal of PNDCL 150. As Act 516 was silent on that issue and merely repealed PNDCL 150 the provisions of article 19(11) became applicable to the criminal case pending against the plaintiffs.[48] And consequently on the *nullum crimen* principle the plaintiffs should be discharged.

45 Section 34 of the Interpretation Act, 2009, Act 792 appears to be general saving provisions subject to the exception under article 19(11) of the Constitution, 1992 regarding ongoing criminal trials where a new law fails to specifically save the pending trial; then one cannot be deemed to rely on the general saving provisions

46 British Airways v Attorney-General [1997-98] GLR 55

47 The Interpretation Act, 1960 (C.A 4) was repealed by section 52 of the Interpretation Act, 2009, Act 792.

48 An attempt to invoke this nulla crimen rule in the case of Tsikata v The Republic [2003-2004] SCGLR 1061 failed as the court held that the essence of the rule was not intended to provide a lexicon of offences but if the offence has been prescribed in a written law it was sufficient.

The Daley case referred to by the Supreme Court in the article relied upon; had nothing to do with the conviction and sentence of a prisoner who waits for twenty years or even less after the repeal of the law under which he was sentenced, to come to court to claim that the sentence for the offence under which he was convicted while in prison has been mitigated. And that the new mitigated sentence has to be applied to him. On the contrary, the issue involved in the Daley was about the repeal of a substantive enactment under which the appellant was being tried and yet in the absence of a saving provision the trial court proceeded with the trial and convicted the appellant. The application of the Daley case to the Obeng Gyebi's appeal appears to be an unbefitting persuasive authority. For the Daley case and the principle it espouses is on all fours with the British Airways case decided earlier by the Supreme Court.

Exhaustion of the right of Appeal

One important ground which the apex court also rested its decision to apply the provisions of section 32 of the Criminal Offences (Amendment) Act, 2003, Act 646, which amended section 149 of Act 29 was that at the time of the filing of the appeal in April, 2020, the law that governed sentence in relation to conviction for robbery was the section 149 of Act 29 as amended by Act 646. That in the view of the court, the appellant had not yet exhausted his right of appeal. The appellant was convicted after trial on the 18th of August, 2000 by the High Court, Kumasi. Appellant did not appeal until the year 2011 when he sought leave and same was granted him to appeal to the Court of Appeal. His appeal to the Court of Appeal was dismissed on the 24th of February, 2012[49]. By the time the appeal at the Supreme Court was determined on the 26th of May, 2021, after another leave was granted, it had taken over two decades from the time of conviction to the date the final appeal was heard.

The power of the Court of Appeal or the Supreme Court to grant leave for extension of time to appeal in a criminal matter is clear, what was at stake was whether the right to seek leave for extension of time persists as along as the period of incarceration has not been spent. This is relevant as part of the reasons the apex court gave was that the appellant had not exhausted his right of appeal by the time the sentencing regime regarding robbery had changed.

The Criminal Procedure Act, 1960, (Act 30) spells out a period of one month for a person to appeal against a decision of a lower court to the High Court.[50] Similarly under Part III of the Court of Appeal Rules, (1997), C. I. 19, an appellant has a period of thirty days to file an appeal against a decision of a High Court in a criminal trial. There could however, be an application for extension of time within which notice of criminal appeal may be filed.[51] Again, an examination of Part III of the Supreme Court Rules, (1996) C. I. 16 would reveal that an appellant in a criminal cause or matter, who intends to appeal against a decision to the Supreme Court, shall give notice of appeal within one month of the decision of the court from which the appeal is emanating from.[52] It makes much

49 Coram Mariama Owusu (Miss), F. G. Korbieh and Irene Danquah (Miss) JJA in a unanimous judgment authored by F. G Korbieh, JA.

50 Section 325 of Act 30 set this time frame. However, the court is allowed to grant leave for any just cause for an extension of time to file an appeal.

51 This is made clear by Rule 40 of the Court of Appeal Rules, 1997, C. I. 19.

52 Rule 31(1) of C. I. 16 is to the effect that "Where the Republic or any person desires to appeal to the Court in a criminal cause or matter he shall give notice of an application, for leave to appeal within one month of the decision of the court below

logical sense for one to argue that if an appeal has been filed within the statutory period of one month after the determination of the trial by the trial court or the Court of Appeal for one to say that an appellant has not fully exhausted his right of appeal. However, where a party has waited for almost two decades while in jail to realise one day that the law that convicted and sentenced him has changed for him to be emboldened to seek leave for extension of time to appeal against sentence; would only create uncertainties in the law. That seems to be the precedent that has been set by the case of Obeng Gyebi.

In any case, section 35(2)(e) of Act 792 which provided for an application of a new sentencing regime to a convicted person is only limited to situations where sentence had not been imposed before the repeal and re-enactment of a new sentence which is lesser in degree. The said section is to the effect that where an enactment repeals an existing law, and substitutes, by way of amendment or any other form a penalty or forfeiture or punishment which is mitigated or lesser in degree than the punishment prescribed under the old enactment, the punishment to be imposed shall be under the new enactment. As the writer has sought to argue that an appeal in Ghana, being by way of hearing, unlike Australia, was limited in consideration of the law, to what prevailed at the time of the trial due to the constitutional injunction against retrospectivity. Any attempt therefore to apply the law as it existed at the time of appeal without a clear constitutional or statutory right to do so would have flouted the essence of re-hearing in Ghana. Pre-1979 views on retrospective application of an enactment when there was no constitutional bar was in tandem with what prevails in Australia today. And if Ghana's last two Constitutions had not introduced injunction against retrospectivity it would have justified the stance taken by the Supreme Court.[53]

Call on Parliament to provide for the fate of convicted persons

In concluding remarks by the apex court it reasoned that *"whenever Parliament embarks on legislation that reduces or mitigates, a penalty or punishment by way of an amendment to existing law, the administration of justice would be enhanced if express saving provisions are included to provide for the fate of persons already sentenced and still serving a punishment, penalty or forfeiture under the statute that has been amended or repealed"*. One thinks that such a call, quite humbly, may be needless in the face of section 34(1)(d) of Act 792. For that section is to the effect that the repeal of an enactment shall not *"affect an offence committed against the enactment that is repealed or revoked, or a penalty or a forfeiture or a punishment incurred in respect of that offence"*.

Once there is even a mitigation or punishment of the sentence suffered or being suffered; its repeal has no impact on what the repealed law accomplished in the life of the person that suffered the liability. If that were not so; then persons who have even completed service of a term of imprisonment, would not bear the burden as *"an ex-convict"* simply because the law has been repealed. What a repealed law came to do whether for good or bad remains as it is even when repealed or amended. As that becomes an accrued right or liability. What specifically is meant by accrued right or liability has been stated to be an illusory concept. However, where it is a right as opposed to a mere expectation, and it has become particularised and acted upon, then it would be deemed to be an accrued or vested right.[54]

53 Cases like Republic v Judicial Secretary; Ex Parte Torto [1979] GLR 444

54 See Vancise J in Scott v College of Physicians & Surgeons of Saskatchewan (1992) 95 D, 4th Ed 706 @ 727

Conclusion

The Obeng Gyebi decision anchored on the Australian notion of re-hearing which encompasses the relevant law at the time of appeal but not during trial has been demonstrated in this paper not to be the same in Ghana. Just as in other foreign jurisdictions, where there is a conviction but when an appeal is filed, the convict need not apply for bail pending appeal but the right to enjoy freedom was automatic; such is not the situation in Ghana, and one is of the view that any importation of foreign notions suitable to their constitutional and statutory structure must be adopted with healthy appreciation of the legal framework of such a foreign country. Besides, the Daley case cited by the apex court only re-inforce the correctness of the decision in the British Airways case[55] but not a carte blanche for a court to impose a sentence under a new enactment that was not in force at the time of conviction. For now, all that a convict has to do is to wait patiently for the repeal or mitigation of a sentence and seek leave of court to launch an appeal against sentence long after the time allowed by the law for an appeal to be filed has expired. A fairly settled area of Ghanaian jurisprudence seems now to have been stirred and muddied with its attendant introduction of unpredictability.

55 See supra