WHEN WHAT MATTERS NOT, MATTER! – A REVIEW OF THE LAW ON PRIVACY AND ADMISSIBILITY OF EVIDENCE SECRETLY AND UNLAWFULLY OBTAINED, IN CIVIL PROCEEDINGS, VIS A VIS ARTICLE 18(2) OF THE 1992 CONSTITUTION OF GHANA.

By

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"It matters not how you get it, if you steal it even, it would be admissible in evidence" Crompton J in R v Leatham (1861) 8 Cox CC 498.

Introduction

The secret tape of Chief Bugri Naabu,[1] *('the IGP Konkonsa tape')* with some senior police officers in the Ghana Police Service, relative to the Inspector General of Police (IGP), and the subsequent Parliamentary committee hearing has brought to the fore another time the importance of this question of Privacy rights of citizens and the admissibility of evidence secretly and unlawfully obtained. On that tape, it is alleged that the said Chief Bugri Naabu and some two senior Police Officers were discussing the possible removal and replacement of the current Inspector General of Police (IGP), Dr. George Akuffo Dampare. The known actors on that tape include three 'Georges', namely the IGP Dr. George Akuffo Dampare, Commissioner of Police George Alex Mensah and Supt. George Asare. One wonders whether Chief Bugri Naabu deliberately assembled only 'Georges' for this alleged conversation. Due to the alleged security implications and concerns, it was suggested that Parliament establishes a committee to look into the issue and make recommendations. The Deputy Minority leader in Parliament,[2] made a call for a probe[3] and the Speaker of Parliament, Right Honourable A.S.K. Bagbin, set up a seven (7) member committee[4] to investigate these matters and the committee has heard from all the persons of interest and is yet to finalise its work and present its report. The Committee was under the Chairmanship of Honourable Samuel Atta Akyea, Honourable James Agalga as Vice Chair, Honourable Patrick Yaw Boamah, Honourable Ophelia Mensah Hayford, Honourable Eric Opoku and Honourable Peter Lanchene Toobu.[5]Among the persons who have appeared before the committee are the IGP himself, Commissioner of Police George Alex Mensah and Supt. George Asare. Some of the persons who appeared before the committee have said due to the security implications and sensitive nature of some of the issues, they preferred to comment on the issues in camera, which request was graciously granted by the Committee and in camera proceedings held. This paper is in no way an attempt to discuss the veracity or otherwise of the allegations on the tape as the author has no capacity and competence to so determine. It is also not an attempt to advocate for any of the witnesses before the 7-member committee or argue for their interest, since they all are competently represented by Counsel of their choices, but rather attempt to comment on the issue of secret recording and illegally obtained evidence in breach of privacy rights, (which to the Author's mind is becoming rampant[6]), and their admissibility in civil proceedings or otherwise according to the principles known to law under Ghanaian jurisprudence and remedies available to persons who may suffer from such breaches.

In establishing a fact or otherwise, the tribunal or persons before whom the issue arise make use of evidence in arriving at a resolution. In civil proceedings, parties may file pleadings

1 Former Northern Regional Chairman of the New Patriotic Party
2 Honourable Emmanuel Armah Kofi Buah, MP for Ellembele Constituency
3 https://gna.org.gh/2023/07/minority-urges-parliamentary-enquiry-into-secret-recording-of-alleged-plot-to-remove-igp/
4 https://citinewsroom.com/2023/07/bagbin-sets-up-7-member-committee-to-probe-leaked-igp-tape/
5 https://www.myjoyonline.com/igp-leaked-tape-bugri-naabu-to-appear-before-committee-today-after-thursdays-no-show/
6 Oliver Barker Vormawor's allegation that the Honourable Minister for National Security at one time sought to bribe his movement in a meeting which unknown to the government was recorded (secretly), https://opemsuo.com/kan-dapaah-runs- to-court-after-barker-vormawor-bribery-claim/

(Statement of Claim, Statement of Defence and Reply (if any)), out of which issues are drawn at the application for directions stage. Orders are made for parties to file witness statement as their evidence in chief with exhibits attached. It is in the establishment of the facts in issue that evidence is required. It is therefore essential that parties have evidence to support their claims before the tribunal failing which, they are deemed unable to establish their claim and hence the issue before the tribunal or the court. Evidence in the author's view therefore is the vehicle through which a court or a tribunal arrives at the conclusion on the existence or otherwise of a fact in issue. In so doing parties resort to ways of obtaining and presenting their evidence before the court. The process of obtaining the evidence may be lawful or otherwise, the challenge appears when relevant and otherwise material evidence is obtained, but through unlawful means, hence a challenge to its admissibility in the proceedings.

The debate on whether evidence obtained illegally must or can be admitted or otherwise is one that keeps engaging the minds of students of law, practitioners, legal scholars, jurists and even adjudicators. Some believe and argue that no matter how the evidence was obtained, as long as it is relevant same must be admitted, a position which other schools disagree. While adjudicators or judges are interested in getting the evidence to resolve issues in dispute, there are laws that govern admissibility or otherwise of same. The Common law position, is that evidence that is relevant must be admissible even if illegally obtained. The Author discusses in this paper the law on admissibility of evidence illegally obtained in civil proceedings, the privacy and confidential rights of citizens under the law both common law and statute or constitution, review some judicial decisions and restate the position of the law to the Author's mind regarding this subject under Ghana law. The author may, time permitting, express a brief view on the IGP leaked tape relative to the subject matter under discussion.

Evidence

Evidence is defined as "*testimony, writing, material objects, or other things presented to the senses that are offered to prove the existence or the non-existence of facts.*"[7] According to Phipson on Evidence, "*Evidence as used in judicial proceedings has several meanings. The two main senses of the word are first; means apart from arguments and inference whereby the court is informed as to the issues of fact as ascertained by the pleadings. Secondly, the subject matter of such means, the word is also used to denote that some fact may be admitted as proof and also in some cases that some facts has relevance to the issues of fact. In real sense, evidence is that which may be placed before the court in order that it may decide the issues of fact in the case. Evidence in the first sense means testimony, whether oral, documentary or real which may be legally received in order to prove or disprove some fact in dispute.*"

Evidence is therefore useful in the establishment of a fact or a matter in dispute. It is through evidence that parties use to establish their case before the court. In his seminal book[8], the respected former Supreme Court Judge, Justice Stephen Alan Brobbey, elaborates this when he said in page 2 of the book in relation to a lawyer that, **"For the practicing lawyer, no serious case can be made by way of prosecution, claim or defence unless one is sure of the evidence in support of or against the claim, prosecution or defence to be made."** Relative to Judges,

7 Evidence Act, 1975 (Act 323), section 179(1)
8 The Essential of the Ghana Law of Evidence

this is what the learned jurist and author said, **"For the judge or magistrate, no decision can be made on the merits or demerits of a case when one is not certain of the evidence in support of or against that decision."** Parties to disputes in proving their case do not just mount the witness box to repeat their evidence on oath, they go beyond just repetition of pleadings on oath. In defining Proof, this is what the learned Ollennu J. (as he then was) said in the oft cited case of **Majolagbe v Larbi**[9] that, **"Proof in law, is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence."**[10] This dictum of Ollennu J. implies that it is not anything that is admissible as evidence. There may be evidence which cannot be admitted by legal means and those must be rejected by the court or tribunal. It is what is established by proper legal means, as was said by the same Ollennu J. (as he then was) in the same case that, in proving an issue, one produces legally admissible evidence and not just a repetition of one's pleadings in the witness box or for now witness statement.

Right to Privacy of citizens and persons in Ghana

Certain fundamental rights are conferred on persons in a country by virtue of their humanity and existence. Those rights are not conferred on the persons by the Constitution, the Constitution rather guarantees the exercise of those rights. So it is, that the 1992 Constitution guarantees certain rights of persons under the law of Ghana. There is the right to freedom of speech and expression which shall include freedom of the press and other media,[11] there is freedom of association,[12] freedom of thought, conscience and belief including academic freedom[13] among several others. For purposes of this paper, the Author suggests that the right to privacy is one such important right the exercise of which the 1992 Constitution guarantees. The Constitution provides in that regard that, **"No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedom of others."**[14] *(emphasis mine.)* This therefore means that a person has the right to privacy, no one can interfere with another's communication or privacy of his or her home and the only instance that right can be breached is when it is done in accordance with law and as may be necessary in a free and democratic society for public safety etc. and such exceptions must be prior to the breach and not after the breach of the right to privacy. It is in this regard, that the Author agrees with the contention of Counsel[15] for the Applicant in the case of **Abena Pokua Ackah v Agricultural Development Bank**[16], (details of which case will be discussed later in this paper) when he argued that "it is only by judicial scrutiny that a private conversation can be interfered with."[17]

9 [1959] G.L.R 190
10 supra
11 Article 21(1)(a) 1992 Constitution
12 Article 21(1)(e) 1992 Constitution
13 Article 21(1)(b) 1992 Constitution
14 Article 18(2) 1992 Constitution
15 Godfred Yeboah Dame Esq. (the current Attorney General)
16 Suit No. J4/31/2015
17 supra

Admissibility of Evidence

The general rule which is trite and *communis opinio* among lawyers is that, any evidence which is sufficiently relevant to an issue before the court or tribunal is admissible, and evidence that is irrelevant is not admissible and same must be rejected. This means that the test for admissibility is relevance. The Evidence Act of Ghana, defines relevant evidence thus, **"For the purpose of this Decree, "relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, which makes the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without such evidence"**.[18] By implication, relevant evidence is one which assist a tribunal or a body arrive at a determination of a fact that is in dispute or issue and includes the credibility or reliability of the witness. On the issue of what kind of evidence is admissible or acceptable by the court or the body before whom that evidence is tendered, the law developed a test for admissibility and that test is Relevancy. It is provided in the law in this regard that, **"All relevant evidence is admissible except as otherwise provided by any enactment."**[19] By this provision therefore, once the evidence is relevant and establishes or disproves the existence of a fact in dispute, the court would have to admit it, unless it is so prohibited by an enactment. It presupposes further that evidence that is irrelevant must not and should not be tendered and if so tendered the court must reject same. The law is that, **"No evidence is admissible except relevant evidence."**[20] If the evidence is not relevant same ought to be objected to and ruled upon by the court to either reject or admit same[21]. In the case of **Amoah v Arthur**,[22] the Court of Appeal, coram, Abban J.S.C, Osei Hwere and Lamptey JJA held in holding 5 thereof that in this regard that, **"It was the duty of the trial judge to reject inadmissible evidence which had been received with or without objection, during the trial when he came to consider his judgment; and if he failed to do so that evidence would be rejected on appeal, because it was the duty of the courts to arrive at decisions based on legal evidence only."** See also the case of Tormekpey v Ahiable.[23]

Regarding admissibility of evidence, the law gives a discretion to the court under certain circumstances to exclude or reject evidence even though it is relevant and may assist the court in its determination of the issues before it. This means that, the fact that the court is interested in getting evidence to resolve an issue in dispute before it does not mean it will admit every evidence hook, line and sinker. The basis or test for the rejection of relevant evidence or exercise of discretion by the court is clearly spelt out in law thus, **"The Court in its discretion may exclude relevant evidence if the probative value of the evidence is substantially outweighed by (a) considerations of undue delay, waste of time or needless presentation of cumulative evidence; or (b) risk that admission of the evidence will create substantial danger of unfair prejudice or substantial danger of confusing the issues; or (c) the risk, in a civil action, where a stay is not possible or appropriate, that admission of the evidence will**

18 Section 51(1) of Evidence Act 1975 (Act 323)
19 Section 51(2) of Evidence Act 1975 (Act 323)
20 Section 51(3) Evidence Act 1975 (Act 323)
21 Section 5 and 6 of Evidence Act 1975 (Act 323)
22 [1987-88] 2 G.L.R 87
23 [1975] 2 G.L.R 432

unfairly surprise a party who has not had reasonable ground to anticipate that such evidence would be offered."[24](emphasis mine.) The Author suggests that the import of this provision is vesting a discretion to the court to exercise in the admission of relevant evidence. That discretion must be exercised judicially and in accordance with law, without more. The 1992 Constitution itself has provisions of the exercise of discretionary powers.[25] Article 296 of same provides that, **"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 be arbitrary, capricious or biased whether by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of that discretionary power."** The respected learned Maxwell Opoku Agyemang,[26] in his book,[27] commenting on section 52 of the Evidence Act said, **"Even though the discretion is statutory provided, there are skepticisms as to how far it should go. It must however be stated that the discretion given to the judge does not mean he is free to act in any way he chooses."** It is instructive that the grounds for the rejection includes the fact that the admission of such evidence will unfairly surprise a party who did not have a reasonable ground to anticipate that such evidence would be tendered.

Does it still matter how evidence is obtained?

Under this heading, the Author shall discuss the common law position and juxtapose same with the constitutional provision and how same have been interpreted by the apex court in at least two recent decisions. The Author suggests that, under the Constitution, it indeed matters how evidence is obtained. At common law, the position was that once the evidence is relevant, it will be admitted to assist the court in establishing or disproving a fact in issue. It did not matter how the evidence was obtained, whether legally or otherwise. The *locus classicus* for this position is the celebrated common law case of *R v Leatham* cited supra, where the common law position was that evidence that was relevant would be admitted by the court in establishing or disproving a fact in issue, so long as the evidence is relevant and material to the establishment of the fact in issue. In that regard, the evidence could even be stolen or obtained through subterfuge or any illegal means and same would be admitted. It did not matter at common law that in obtaining the evidence, certain rights of some persons were infringed upon.

Under the 1992 Constitution however, there is an indication to the contrary in the Author's view that evidence unlawfully obtained may be challenged with regard to its admissibility. The Constitution 1992, guarantees certain fundamental rights of persons in Ghana and those rights are entrenched provisions[28] such that it would only take a lot including referendum to amend or take away such rights[29]. One of such right is the right to privacy of homes, communication, correspondences etc. At the risk of sounding repetitive, the Constitution provides in this regard thus, **"No person**

24 Section 52 of Evidence Act 1975 (Act 323)
25 Articles 23 and 296 of the 1992 Constitution
26 A foremost authority on Law of Evidence in Ghana, A former lecturer and former acting Director of the Ghana School of Law
27 Law of Evidence in Ghana p.254
28 Article 290 (1)(b) of the 1992 Constitution
29 Article 290(2)(3)(4)(5) of the 1992 Constitution

shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedom of others."[30] The import of this provision which is entrenched is that nobody not even the President has the power to interfere with the privacy of someone's home, communication or correspondence except in accordance with law. The President with all his powers cannot sidestep this and interfere with this right except in accordance with law. One such provision in the law is, **"The President may by executive instrument make written requests and issue orders to operators or providers of electronic communications networks or services requiring them to intercept communications, provide any user information or otherwise in aid of law enforcement or national security."**[31]

Judicial Interventions and Pronouncements in Ghana

The Courts in Ghana have had the opportunity to deal with this subject in a few cases worth discussing to ascertain the judicial minds of Ghana on this dicey and important subject. The question before the courts in such cases has been whether or not secret tape conversations obtained in breach of the rights of persons can be admissible merely because same is relevant. The Author proposes to discuss first the case of **Abena Opoku Ackah v Agricultural Development Bank**,[32] where their Lordships in the Supreme Court speaking through Dotse JSC, espoused with admirable clarity the law on admissibility of evidence obtained in breach of the privacy rights of persons. Combing through the law reports, it appears to the Author that this is the first time their Lordships at the apex court had had an opportunity to make a pronouncement on article 18(2) of the Constitution 1992. The facts of this case as seen in the report were that, In or around May and June 2011, one Abena Opoku Ackah (Applicant), an employee of Agricultural Development Bank (ADB) (Respondent) engaged in a private conversation with a certain Journalist by name Nana Yaw Yeboah. The said Nana Yaw Yeboah secretly recorded the conversation wherein, Abena Opoku Ackah was heard complaining about the restructuring of the Agricultural Development Bank (ADB) (Respondent), as well as the fat bonuses received by the Managing Director of the Respondent. The secretly recorded conversation found itself in the hands of the Respondent, who then made it known to the Applicant and invited her through Respondent's Human Resource Department to discuss her current debt profile. Upon honouring the invitation, she was rather asked to meet the Board of Directors, at which meeting an edited version of the secretly recorded tape was played to her. The Board Chairman described the Applicant's comments as vulgar, abusive, qualifying her conduct for disciplinary proceedings of the Respondent. After this encounter, she received a letter of suspension, which characterized her language as vulgar, intemperate among others, giving her half salary pending the completion of the disciplinary proceedings and asking her to show cause why disciplinary actions should not be taken against her.

The Applicant, obviously advised by counsel in the Author's view, had a dual reaction to the letter. One was to submit a letter to the Chairman of the Board through her lawyers asserting her right to

30 Article 18(2) of the 1992 Constitution
31 Section 100 of Electronic Communications Act 2008 (Act 775)
32 Suit No. CA. J4/31/2015 judgment on 19th December 2027 coram Dotse, Gbadegbe, Akoto-Bamfo, Benin and Pwamang JJSC

privacy and freedom of speech. The other reaction was to initiate an application in the High Court for the enforcement of her fundamental rights and freedom of speech. Upon appearing before the Disciplinary Committee of the Respondent with her counsel, the secretly recorded tape was played to her, wherein her lawyer contended and objected to the tape on the basis that the recording and use of same in such disciplinary proceedings amounted to a contravention of her rights to privacy and freedom of speech. Beyond this objection, the Applicant and her counsel offered no further comment. Respondent thereafter per a letter to the Applicant terminated her appointment with immediate effect. The Applicant then abandoned her earlier suit and commenced a fresh suit in response to her dismissal. Relative to this subject, the crux of her claim among others were that, the whole action of the Respondent using a 3rd party to clandestinely record a private conversation between her and a third party and using same as a ground for her dismissal constitute a severe constitutional violation of her rights to privacy, that she cannot be punished for merely expressing an opinion and though on the restructuring exercise and how the financial resources of the bank are used among others. It was the contention of the Respondent that the Applicant was bound by the Respondent's Human Resources Policy Manual and argued that Applicant had breached her oath of secrecy, tarnished the image of the Respondent etc. The Learned High Court Judge erroneously in the Author's view dismissed Applicants application and held that, "*the applicant's conversation with the journalist which was used to penalize her at the committee sitting was proper and cannot be said to be an infringement of the applicant's freedom of speech, expression. From the available facts, the applicant admitted making those remarks which were found to be a breach of her oath of secrecy and amounted to divulging information about her employer to a third party. All along, in her submission, she admitted making those remarks but she tried to justify them by saying that it was her opinion on the respondent's operations, and that it was a matter of public concern and so she was not at fault. Having admitted that she appeared before the committee where the admitted conversation was made, the applicant in my view cannot say that she was not given a hearing especially so when she decided to remain silent before the committee. In my view, her subsequent refusal to comment after the admitted tape had been played further buttressed her admission of the conversation. The law requires that persons must be given a hearing but it does not demand that they must be forced to speak at the hearing, therefore since the applicant decided to remain silent, the respondent could not force her to speak but to proceed with its proceedings. The applicant also contended that her lawyer raised the issue of inadmissibility of the tape and demanded a copy but the respondent's lawyer refused to rule on it and subsequently the respondent proceeded to terminate her employment, we share the respondent's view that the committee gave the applicant the chance to defend herself but she refused to take it up. This is because, applicant's counsel had the chance and duty to submit her defence before the Committee and raise the issue of admissibility or veracity of the tape as alleged by the applicant in her supplementary affidavit in support. Having failed to offer any defence before the committee, the applicant, in my view, denied herself the chance to open her defence. Following all this we find that the applicant was invited to attend the committee sitting; she was offered the chance to be heard and so this satisfies the audi alteram rule about fair hearing.*" Dissatisfied with the decision of the High Court, the Applicant appealed to the Court of Appeal, which upheld the decision of the High Court.

After an unsuccessful appeal to the Court of Appeal, the Applicant filed a further appeal to the Supreme Court on eight (8) grounds but for purposes of this paper the author shall limit himself to two being,

(1) the Court below erred in holding that the secret recording of the telephone conversation between the applicant/appellant/appellant, and its subsequent delivery to the respondent/respondent/respondent did not amount to a breach of the appellant's right to privacy enshrined in the 1992 Constitution, (2) The Court below committed an error of law in holding that the applicant/appellant/appellant's right to privacy could be curtailed without recourse to a judicial action. The Supreme Court as the second appellate court upheld the Applicant/Appellant's appeal and found that the courts below erred in their decision and awarded her some damages for wrongly terminating her employment. Their Lordships were clear in their mind that such breaches ought not to be tolerated without judicial scrutiny. After review of some constitutional provisions including Article 12(2), 18(2), 21(1) and (4) of the 1992 Constitution, the apex court speaking through Dotse JSC said, **"There is a school of thought, that under the above constitutional provisions, some of the rights of the applicant on privacy can be curtailed and or interfered with, without necessarily resorting to judicial scrutiny. It is further argued that the involvement of the courts will be cumbersome and inconvenient. Even though this view looks attractive, it is not convincing as it has the tendency of wittling away the rights of individuals as guaranteed under the Constitutional provisions."** The Author takes the view, that the argument is not even attractive since it is a fundamental breach of an important right of a person and such breaches cannot be attractive, at least in the eye of the law. His Lordship Dotse JSC, goes on to make reference to the preamble to the 1992 Constitution and states emphatically that, **"Taking the above declarations into consideration, our views are emboldened in deciding that the reference to the phrase "in accordance with law" in article 18 (2) can only be a reference to a prior judicial endorsement. We are not prepared to accept any arbitrary or any unilateral curtailment of the rights of individuals in this enjoyment of the said rights without judicial activism. In the light of the above analysis, we are of the considered view that, much as the secret recording between the applicant and the third party (Nana Yaw) and the disclosures that have been brought out may amount to a breach of the applicant's oath of secrecy, it is only a judicial scrutiny that the said action can be said to be in violation and breach of article 18(2) of the Constitution.**" In finding fault with the decision of their Lordships at the Court of Appeal, Dotse JSC delivered himself thus, **"We are also of the considered view that, the Court of Appeal was wrong in holding that it will be cumbersome and inconvenient for the courts to make a determination on a case by case basis. It is for this reason that the Courts have been established under the Constitution with the hopes and aspirations espoused in the Preamble referred to supra. We will therefore hold and rule that the court below also erred in deciding to contrary that the applicant's right to privacy and others could be curtailed and interfered with, without recourse to judicial action"** *(emphasis mine)*. His Lordship makes the point further that, **"In coming to the conclusions we have come to, we are not unaware of the requirements in Section 51(2) of the Evidence Act 1975 (NRCD) 323 which stipulates that** *"all relevant evidence is admissible except as otherwise provided by an enactment.* **Under the circumstances, we hold that the delivery of the secret recorded conversation between the Applicant and Respondent amounted to a breach of the Applicant's right to privacy as provided for in article 18(2)."** Their Lordships went on to offer guidance to trial and appellate courts before whom such interpretative issues on the constitution arise to make a referral and seek guidance from the apex court as required by the Constitution in

Article 130(2). This is what Dotse JSC said, **"Applying the above principles to the circumstances of the instant case suggests quite clearly that since there were rival and irreconcilable interpretations placed on the meanings ascribed to the phrases in articles 12(2) 18(2) and 21(1) and (4) of the Constitution as used in the context referred to supra, and also because there appears to be no authoritative judicial pronouncement by this court on the meaning of these provisions as used in the particular contexts, the proper and correct exercise of judicial discretion in line with sound judicial pronouncement in tune with article 130 (1) and (2) of the Constitution should have been to have referred the matter to this court, and stayed any further action to await it's outcome. Not having done so, we are of the opinion that, the trial courts erred, particularly the Court of Appeal. This is because, to us the Court of Appeal itself recognised the interpretive nature of the provisions therein contained, but unilaterally concluded that it would be cumbersome and convenient. This is unacceptable. The failure to refer the interpretation to this court is therefore fatal..."** The said Article 130 (2) of the 1992 Constitution provides that, **"Where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme Court for determination, and the court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."** It is therefore encouraging to note that the Honourable Magistrate in the Cubagee case (infra), stayed proceedings and sought the guidance of the apex court.

Raphael Cubagee v Micheal Yeboah Asare and Others,[33] is another Ghanaian case in which the apex court has had the opportunity to pronounce on this all important issue. This case is one in which the District Magistrate[34] made a reference to the Supreme Court of a question relating to the interpretation and enforcement of article 18(2) of the 1992 Constitution pursuant to Article 130(2) of the Constitution. The facts of which case were that during the course of trial in a land case before the Magistrate, the Plaintiff sought to tender in evidence an audio recording of a conversation he had with one John Felix Yeboah a Superintendent Minister who was representing the 3rd Defendant in the case (his church). It was the claim of the Plaintiff that the conversation was in relation of matters that were in issue in the case before the court and as a result sought to use the recording to prove that the Superintendent Minister had in a conversation admitted the Plaintiff's side of the case. Counsel for the Defendant objected to the tendering of the recorded conversation on the basis that same was surreptitiously obtained by the Plaintiff without the consent of the Superintendent Minister and therefore a sin against Article 18(2) of the Constitution 1992. The Magistrate before making a ruling on the objection had the recording played in open court whereupon he ruled that the recording was authentic and contained materials that were relevant to the matters in contention before the court, but same was recorded without the consent of John Felix Yeboah. On the question of whether the said recording constituted a breach of Article 18(2) of the 1992 Constitution and whether that evidence must be excluded, the learned District Magistrate took the view, for which the Supreme Court highly praised and recommended him, that he required guidance from the apex court. Their Lordships in making a decision in the reference commended the Magistrate thus, "We

33 Reference No. J6/04/2027 coram Akuffo (Ms), CJ (Presiding), Atuguba, Adinyira (Mrs), Dotse, Gbadegbe, Akoto-Bamfo and Pwamang JJSC
34 His Worship Joojo Hagan sitting at Sunyani District Magistrate Court A

say the Magistrate was right in seeking guidance of the Supreme Court because the issues that arise call for an interpretation of Article 18(2) of the 1992 Constitution." In dealing with the issue, the Apex Court speaking through Pwamang JSC emphasized the importance of the right to privacy under Article 18(2) of the 1992 Constitution. His Lordship for instance said thus, **"In construing Article 18(2) of our Constitution to determine its scope in relation to the question referred to us, we wish to underscore the elements of the right of privacy we stated above. The right protects the individual against unwanted intrusion, scrutiny and publicity and guarantees his control over intrusions into his private sphere. This means that it is up to the individual, subject of course to statutory laws made for the public good as stated in Article 18(2) itself, to decide if there should be any intrusion into, scrutiny or publicity of his private life including hos communication. It is further up to the individual to determine the extent and manner of such permitted intrusion, scrutiny or publicity. When a person talks on telephone to another the conversation is meant to be oral since of the speaker wanted the speech in a permanent for he could elect to write it down or record and send to the other person. It would be wrong for the person at the other end to assume that the speaker has waived his rights of privacy and consented to him recording the conversation and rendering it in a permanent state. Therefore, to record someone with whom you are having a telephone conversation is to interfere with his privacy beyond what he has consented to. In similar vein, it would amount to breach of privacy to put your phone on loudspeaker for the listening of third parties when you have a telephone conversation with another person because to do so would be causing an intrusion into the caller's private sphere beyond what she has consented to. Before recording someone or allowing third parties to listen to what he says on telephone, his consent must be sough or he must be informed such that he can decide to end the call if he does not want to be recorded or heard by third parties."** The learned Pwamang JSC did not hesitate in stating the fact that the recording was a breach of the right to privacy. He said thus, "**Clearly therefore, on the facts of this case the secret recording of the Superintendent Minister amount to a violation of his right to privacy which has been guaranteed by Article 18(2) of the Constitution."** On the question as to whether such relevant evidence ought to be admitted, the Supreme Court after review of several decisions both local and foreign said that, **"In Ghana and many other countries there are statutes that disallow evidence obtained in specific circumstances. An example is confession statements procured through the use of torture which are not admissible on account of section 120 of the Evidence Act but torture is equally forbidden by Article 15(2) (a) of the Constitution. There is also privileged communications between lawyer and client and doctor and patient which are not admissible in evidence by virtue of section 100 and 103 of the Evidence Act respectively and which really are intended to protect the privacy rights of the party claiming the privilege."** In the Author's view, this is indicative that the court can in accordance with law exclude relevant evidence if it was obtained in breach of statute like the evidence Act and more importantly the Constitution, no matter the relevance or the probative value of same. The mode of obtaining that evidence is important and cannot be overlooked. His Lordship Pwamang J.S.C in the Cubagee case continued to deliver himself thus, **"Applying the above principles to the facts of the case at hand, it appears from the record that the plaintiff secretly recorded the Superintendent**

Minister with a view to using the evidence in court against him. To allow such deliberate violation of rights would encourage litigants to side step the rules of evidence and thereby undermine the integrity of the court proceedings and bring the administration of justice into disrepute. The plaintiff certainly would have alternative means of adducing evidence in proof of his case and he should not be allowed to benefit from this intentional violation of the human rights of his opponent in the case. Our conclusion could have been otherwise if there were countervailing factors but on the facts of this case the secret recording ought not to be allowed…" In conclusion, the Supreme Court disallowed the secretly recorded tape and held that, **"In conclusion therefore, we answer the question referred to us as follows; the secret recording of John Felix Yeboah, the Superintendent Minister and representative of the 3rd defendant by the plaintiff amounted to violation of the privacy rights of the said John Felix Yeboah. In all the circumstances of this case the secret recording ought to be excluded from the evidence in the case."** The Author agrees and endorses this view and suggest the views of their Lordships as discussed in the cases above points to the fact that under Ghana law, it really matters how evidence is obtained.

Intercourse between Article 18(2) of the 1992 Constitution and Section 52 of Evidence Act

There is a legal intercourse between the two provisions which intercourse in the Author's view gives birth to the current and correct position of the law in Ghana. The Evidence Act under section 52 provides the court with the discretion to exclude relevant evidence. The exercise of such discretion must be in accordance with law. The Constitution in Article 18(2) indicates that one cannot interfere with another's privacy of home, correspondence or communication. The combined effect of these two provisions is that the judge can exclude relevant evidence if it is obtained in breach of the Constitution. To admit any such evidence on the sole ground of relevancy without paying attention to how it was obtained in breach of statutory and Constitutional rights of person is a sin against the Constitution and would be inconsistent with the judicial oath. It is suggested that it would also be against the obligation for the exercise of discretionary power imposed by law. His Lordship Pwamang J.S.C could not have put it any better when he said in the Cubagee case that, **"The exercise of discretion in the determination of whether to exclude evidence obtained in breach of human rights appears inevitable under our Constitution because even Article 18(2) which is the subject of interpretation in this case states several exceptions to the individual's right to privacy and a court confronted with an objection to evidence on the ground that it was obtained in breach of privacy would need to consider if any of the exceptions are applicable in the circumstances of the case".**

Conflict between Common Law and Constitution 1992

The laws of Ghana are derived from several sources. The 1992 Constitution provides for the sources of law in Ghana as follows "(1) The laws of Ghana shall comprise (a) this Constitution; (b) enactments made by or under the authority of the Parliament established by this Constitution; (a) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law."[35] It is trite that the Constitution of the Republic of Ghana is the Supreme law of the land[36] by which all laws must conform and

35 Article 11 (1) of the 1992 Constitution
36 Article 1(2) of the 1992 Constitution

to which all laws must bow in obeisance. Any law or enactment that is not consistent with the Supreme law is to that extent void[37] and shall be struck down by the Supreme Court.[38] Enactments are basically legislation enacted by the Parliament of the Republic, an example of such enactment being the Evidence Act 1975 (Act 323). For purposes of this paper, the Author shall focus on common law which is constitutionally defined as, **"The common law of Ghana shall comprise the rules of law generally known as common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature."**[39] There are instances when there will be a conflict and inconsistencies between two laws and the law must of a necessity provide for which one must prevail. For instance, when there is a conflict between a provision of an Act of Parliament and a provision in the Constitution, the provision in the Act of Parliament must give way to the constitutional provision, to the extent that the Constitution is the supreme law of Ghana and any law that is inconsistent with the constitution shall be void to the extent of that inconsistency. The Author submits as trite that when there is a conflict between a principle at common law and a provision of a Constitution, it is the Constitutional provision that must prevail, without more. The Author contends that, the principle that it matters not how evidence is obtained, even if stolen, is a common law position. At common law, it may not matter that evidence is stolen or obtained by unlawful means, once relevant and material same will be admissible. The 1992 Constitution provides otherwise by giving an indication that one cannot obtain and use evidence in the breach of another's constitutional rights. It is the view of the Author that a reading of Article 18(2) of the 1992 Constitution quoted supra suggests that evidence cannot be obtained in breach of the law and hence any such evidence so obtained must not be admissible for failure to meet the test of Constitutionality. Such evidence in the Author's view is tainted and must not be entertained on the sacred altar of justice. In the event of a conflict between the Common Law position and the Constitutional position, the Common law must give way and unimpeded access to the Constitutional provisions to take its supreme place in the hierarchy of laws. There is no way therefore that the principle of *R v Leatham* being a common law principle shall or can prevail in the face of Article 18(2) of the 1992 Constitution or any such similar legislation.

It is trite that, what the law makes unlawful no one can make it lawful[40] neither can anyone, judge or otherwise has the authority grant immunity from consequence of statutory breaches.[41] The author agrees with their Lordships in the celebrated case of **Tuffour v Attorney General** that, **"This court does not think any act or conduct which is contrary to the express or implied provisions of the Constitution can be validated by equitable doctrine of estoppel. No person can make lawful what the Constitution says is unlawful. No person can make unlawful what the Constitution says is unlawful. The conduct must conform to due process of law as laid down in the fundamental law of the land or it is unlawful and invalid."** The author suggests in that regard that if the equitable doctrine of estoppel cannot make lawful what the Constitutional makes unlawful, then one wonders the potency of a common law position in that regard. It has also been held in the

37 supra
38 supra
39 Article 11(2) of the 1992 Constitution
40 Tuffour v Attorney General [1980] GLR 637
41 Torkornoo JSC (as she then was) in Republic v High Court (Criminal Division 1) Accra, Ex Parte: Stephen Kwabena Opuni (Attorney General Interested Party) Civil Motion No. J7/20/2021, citing Ex Parte National Lottery Authority

case of **Republic v High Court (Fast Track Division) Accra; Ex Parte National Lottery Authority (Ghana Lotto Operators Association and Ors Interested Parties)**[42] wherein the legendary Atuguba JSC said emphatically thus, **"It is communis opinio among lawyers that the courts are servants of the legislature. Consequently, any act of a court that is contrary to a statute…… is unless expressly or impliedly provided, nullity."** At page 405 of the report, his Lordship Date-Bah JSC in his characteristic fashion delivered himself thus, **"…. No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament. But this is the effect of the order by the learned judge. The Judicial Oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows; "I will at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana." This oath is surely inconsistent with any judicial order that permits the infringement of an Act of Parliament."** A judge can therefore not disregard the rights of a person under the Constitution and other legislation and admit evidence illegally obtained on the basis of relevance. The author agrees with the position of their Lordships Atuguba and Date-Bah JJSC and suggests that if their Lordships said this of an Act of Parliament, the there is a higher duty when it comes to the Constitution which is the supreme law of the land.[43] The effect of the above dicta is that if Article 18(2) protects the right of privacy of communication, property etc, then same could not be breached and evidence obtained from the breach used or admitted by a Court which is supposed to uphold the law.

Importance of Human Rights under the Constitutional dispensation.

It is worth emphasizing the fundamental human rights under the 1992 Constitution is one of the most important aspect of our constitutional democracy that cannot be overemphasized. The Constitution itself in that regard provides that **"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 enforced by the Courts in Ghana as provided for in this Constitution"**[44] **(emphasis mine).** This shows the pride of place these rights guaranteed by the Constitution occupies in the constitutional democracy. Indeed, the author concedes that these rights are not absolute but there are limitations as the Constitution lends itself to that when it provides in clause 2 of Article 12 that **"Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedom of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest."** Article 18 falls within the purview of the rights guaranteed under Chapter 5 of the Constitution, which Article 12 makes reference to and that right must be respected and protected. Therefore, it will be a sin against that provision if evidence is obtained unlawfully or unconstitutionally and same is admitted in evidence no matter the relevance or the security implications. It is not for nothing that rights are guaranteed and the law provides for the exceptions to the exercise of those rights and it is suggested by the author to be the law that

42 2009 SCGLR 390
43 Article 1(2) 1992 Constitution
44 Article 12(1) 1992 Constitution

if the law provides for the means of doing something, it is only in that way that that thing must be done as has been held severally by our court in cases like Boyfio v NTHC[45] where the court speaking through Acquah JSC (as he then was) had this to say, **"The law was clear that where an enactment had prescribed a special procedure by which something was to be done, it was that procedure alone that was to be followed."** The Author agrees with Kpegah JSC when he said in the case of Awuni v WAEC infra that, **"We may accept some limitation on the fundamental rights of the individual only if it is justified and appropriate."** The author submits that being appropriate includes being in accordance with law both statutory and constitutionally.

It is important to place this subject in the contest of our constitutional historical contest and in so doing the author could not resist the temptation to cite the dicta of Kpegah JSC in the case of Awuni v WAEC cited supra where he said that, **"The historical and political development of the country as demonstrated by the landmark case of In Re Akoto (1961) 2 GLR 523, SC not only made it paramount but inevitable that the fundamental rights of the individual be enshrined and entrenched in the 1992 Constitution, but also desirable that a mechanism be provided for their enforcement. Therefore, in enacting the fundamental rights of the citizens in articles 12 to 32 of the Constitution coupled with a provision in article 33(1) empowering the High Court to enforce these rights, the framers of our Constitution have not only demonstrated their resolve and determination to confer rights on the individual but also that these rights be enforced as well. It may be that is it this mechanism that the framers of our Constitution intended to use to avoid, in the future, a similar decision like the one in In *Re Akoto*. Through the provision of article 33(1), the framers of the Constitution have, as pointed out by Robert Hayfron-Benjamin (as he then was), in the case of Peoples Popular Party v. Attorney-General [1971] 1 GLR 138 where a similar provision in the 1969 Constitution was considered, clearly expressed their intention that the courts should be the custodians and the protectors of the right and liberties of the individual citizen of the country. When, however, it is a law which infringes any of these rights and liberties, that law is pro tanto void and proceedings have to be initiated under articles 2(1)(a) and 130(1)(b) for such a declaration rather than a resort to article 33(1) of the Constitution."** Sophia Akuffo JSC (as she then was) on her part in the same case, said in the introduction of her reasoning that, **"In our collective and national quest for overall good governance, the rights and freedoms set out in chapter five of the 1992 Constitution constitute, by far, some of the most crucial mechanisms created by the Constitution for assuring the attainment and sustenance of the political, social, economic and cultural foundations of a modern democracy. The Committee of Experts (Constitution), in their Proposals for a Draft Constitution if Ghana gave comprehensive justifications for the formulation of chapter 5, and the inclusion of provisions on fundamental human rights and freedoms in our Constitution. Of their numerous reasons, one may refer, in particular, to those set out in paragraph 132, 133 and 139 of the Report, which respectively read as follows: 132. Throughout Africa and indeed, a significant part of the Third World, there has been, in recent years, a sustained public clamour for the promulgation and enforcement of human rights**

45 [1997-98] 1 GLR 768

and freedoms as a critical ingredient of the democratization process…133. This resurgence of interest in human rights is hardly surprising. Apart from the obvious desire for a more democratic order and universal yearning for human dignity, there is growing realisation that the enjoyment of the basic freedoms is conducive to the development and purposeful application of human resources, and indeed, the establishment of an environment that enhances development…139 The Committee also elaborated the social and economic aspects of human rights – aspects which are of particular relevance to the conditions of Africa and the developing world generally. Some of these rights are included in the proposed Directive Principles of State Policy, except that here they are more precisely elaborated as rights…" The above dicta of the respected jurists, Kpegah and Sophia Akuffo JJSC (as they then were) underscore the importance of the fundamental human rights and freedoms that are not only enshrined in the Constitution but also entrenched. The Author suggests that to the extent that Article 18 falls under chapter 5 of the 1992 Constitution, the above dicta applies to it and same cannot be disregarded because of the principle at common law in **R v Leatham** that it matters not how evidence is obtained, once relevant it will be admissible, a position the author disagrees with. Such right must be respected by all and Her Lordship Sophia Akuffo JSC (as she then was) could not have said it any better when she said in the Awuni case that, **"Thus, the judiciary is also required to do everything constitutionally and legally possible to ensure that, in the exercise of its functions, these rights and freedom are upheld and respected; subject of course to a concomitant respect for the rights and freedoms of others and for the public interest. The Constitution, in chapter five, does not only proclaim the fundamental rights and freedoms but goes on, in article 33, to provide, through the High Court, effective means for assuring the protection of these rights…"**

Is there a Remedy for a person whose right have been breached?

One of the maxim of equity is that, "Equity will not suffer a wrong to be without remedy". This means that once there is a wrong, there must be a remedy under the law or equity available to the person who has been wronged as long as he or she wants to vindicate his or her rights under the law, after all, another maxim of Equity is that "Equity follows the law…."

In fact, the author suggests that, anyone who breaches a person's privacy by obtaining evidence in an unconstitutional manner, by breaching the privacy requirements or recording private communication without the consent is liable for a suit in the High Court by the person whose right is breached under Article 33(1) of the 1992 Constitution or in any other forum the affected person deems fit. The said Article 33 (1) provides that, **"Where a person alleges that a provision of this Constitution on the fundamental human rights and freedom has been, or is being, or is likely to be contravened in relation to him, that without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress."** Although the Constitution provides a remedy in the High Court as the proper forum, it is also possible for such a person to present a complaint or petition to the Commission on Human Rights and Administrative Justice (CHRAJ) as the Courts have held and rightfully so, in the view of the author that there is a right option available to the person to either proceed to the High Court or other similar fora, the word in Article 33(1)

…..may apply to the High Court…. being discretional, the person affected has options from which to choose particularly when the Constitution says *"…without prejudice to any other action that is lawfully available"*.[46] The Long title of the Commission on Human Rights and Administrative Justice Act,[47] illustrates that the High Court may not be the only for a for persons whose human rights have been violated. It states the purpose of the Act thus, **"AN ACT relating to the Commission on Human Rights and Administrative Justice to investigate complaints of violations of fundamental human rights and freedoms, injustice and corruption, abuse of power and unfair treatment of persons by public officers and to provide for related matters."** *(emphasis mine)*. The Author's view on this is endorsed by the learned legal Scholar, Professor Raymond Akongburo Atuguba,[48] who in his invaluable book, The New Constitutional and Administrative Law of Ghana: From the Garden of Eden to 2022, when he stated at page 689 thus, **"The High Court's exclusive original jurisdiction in the enforcement of human rights does not preclude resorting to other means of redress such as submitting a complaint to the Commission on Human Rights and Administrative Justice (CHRAJ), which under article 218 of the Constitution is duty- bound to investigate complaints of violations of fundamental human rights and to take action for the remedying, correction and reversal of these violations. Neither does it preclude resorting to the National Media Commission, which has a constitutional mandate of investigating, mediating and settling of complaints made against or by the press or other mass media. Indeed, the Constitution provides for the human rights enforcement jurisdiction of the High Court *"without prejudice to any other action that is lawfully available"*"**. In the case of Awuni v West African Examination Council[49] supra the Supreme court speaking through Kpegah JSC said that due to the importance of these rights, **"It is clear to me that the intention of the framers of our Constitution is that the individual who alleges that his fundamental rights have been breached or is threatened to be breached, should have cheap and unimpeded access to the High Court".** The law therefore provides remedy for such breaches and the Author suggests that the remedy may include being compensated by monetary damage if its established that the individual is so entitled. In the Awuni case cited supra, the Apex Court inter alia said, "The question whether the appellants are entitled to some compensatory award may therefore be resolved by the interpretation we put on the word "redress" as used in article 33(1)." In the case of **Maharaj v Attorney General of Trinidad and Tobago,**[50] the Privy Council confronted with a similar issue held that the award of some damages could be a component of the redress the court is entitle to give to an affected person. The relevant facts of the Maharaj case were that a lawyer had been cited and convicted of contempt and imprisoned for seven days without due process. He filed an application to the High Court of Trinidad & Tobago for redress for the violation of his rights guaranteed under section 1(a) of the Constitution relative to deprivation of his liberty without due process. The majority in the Privy Council held the view that an order for payment of compensation when a right protected under section 1 "has been" contravened is clearly a form of "redress" which a person is entitled to claim under section 6(1), section 6(1) of the Constitution of Trinidad & Tobago is the equivalent of Article 33(1) of the 1992 Constitution. Lord Diplock in that case relative to this

46 Article 33(1) 1992 Constitution
47 1993 (Act 456)
48 Dean of the University of Ghana School of Law
49 [2003-2004] SCGLR 471
50 [1978] 2 WLR 902

point said inter alia, "What then was the nature of the 'redress' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary, (3rd ed) 1944 is given as: Reparation of, satisfaction or compensation for a wrong sustained or loss resulting from this. At the time of the original notice of motion, the appellant was still in prison. His rights not to be deprived of his liberty expect by due process of law was still being contravened; but by the time the case was reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation." The author agrees with the view that damages can be awarded in such cases when the facts and evidence so suggest.

Comments on admissibility and usage of the Bugri Naabu IGP konkonsa tape.

It is beyond doubt that the IGP Konkonsa tape was a private conversation between some senior Police officers and Chief Bugri Naabu. The parties engaged in a conversation that was not meant for the public neither was anyone's consent sought to even record same and make same available to the public. There was no indication in rendering the conversation in a permanent form by recording same. The recording and leaking was not done in accordance with law as required by law and the other parties in the conversation could not have anticipated the recording of same and the leakage. It is the Author's view that the persons aggrieved can actually have a cause of action against the person who recorded and leaked same without their prior consent. The Author humbly suggests that that tape cannot stand the test of admissibility and cannot be used for any purpose beyond the 7-member committee. The persons on the tape, whose constitutional rights, the author suggests have been violated can object to the tendering and admissibility of same in any proceedings and their objection will be upheld, they may even maintain an action against whoever breached their rights as discussed above.

Conclusion

From the above discussion, one can safely say that the law on admissibility of secretly recorded tapes is settled in Ghana law. The common law position of it matters not in the author's view as expressed supra cannot stand the constitutional test and therefore must not be cited in support of admission of evidence unlawfully obtained. The discretion exercisable by the judge or tribunal must be exercised in accordance with law and if the law prohibits the admission of such in evidence so be it. It is apposite to end with the dictum of G. Pwamang JSC in the case of Raphael Cubagee v Micheal Yeboah Asare, when he said that **"We are in an environment where people take the rights if their neighbours very lightly. We are therefore not persuaded to join those jurisdictions that permit secret telephone recording by a party to the conversation"**. It therefore matters how evidence is obtained under Ghana law. Under Ghana law therefore, What matters not, may Matter.!