IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D 2024

CORAM: BAFFOE-BONNIE JSC (PRESIDING)
PWAMANG JSC
OWUSU (MS.) JSC
AMADU JSC
KULENDI JSC
ACKAH-YENSU (MS.) JSC
ASIEDU JSC

CIVIL MOTION
NO. J7A/02/2023
7TH FEBRUARY, 2024

THE REPUBLIC ... RESPONDENT

VS.

EDMUND ADDO ... APPLICANT

RULING

AMADU JSC:

BACKGROUND

1) The Applicant was the Appellant in Criminal Appeal No.J3/04/2022, intituled **THE REPUBLIC VS. EDMUND ADDO**. This was an appeal grounded on the principal complaint that, following the repeal of Section 136 of the Electronic Transactions Act, 2008 (Act 772) by Section 98 of the Cybersecurity Act, 2020 (Act 1038), his continuous prosecution at the High Court, on the three counts of Child Pornography contrary to Section 136(b) of the Electronic Transactions Act, 2008, Act 772 is wrongful in law.

2) For purposes of emphasis and necessary reference, I hereby reproduce the grounds of the appeal argued before the ordinary panel of this court.

(a) "That the honourable Court of Appeal erred in law in holding that a person may be convicted on a criminal offence which has been repealed, which holding has occasioned a miscarriage of justice.

(b) That the honourable Court of Appeal erred in law in holding that the Appellant can be convicted on the repealed Section 136(b) of the Electronic Transactions Act, 2008, Act 772, which holding has occasioned a miscarriage of justice.

(c) That the decision is unreasonable and cannot be supported having regard to the evidence.

(d) That the Court of Appeal erred in law when it held that judge-made law is 'written law' within the intendment of Article 19(11) of the 1992 Constitution.

(e) That the Court of Appeal erred in law when it applied the Interpretation Act, 2009, Act 792 to interpret Article 19(11) of the 1992 Constitution.

(f) That the Court of Appeal erred in law in applying the Interpretation Act, 2009 Act 792.

(g) That the Court of Appeal erred in law when it failed to distinguish between the effects of a repeal on criminal matters from effect of a repeal in civil cases."

3) In determining the appeal, this court speaking unanimously through our revered brother, Asiedu JSC, dismissed the appeal. In that judgment of the

ordinary panel, this court set out the key issue for determination, at page 6 of the judgment as follows:

> ***"Whether the repeal of a crime creating enactment under our laws, means that an accused person can no longer be prosecuted for the offence which he had, allegedly, committed and was being prosecuted for, before a court of competent jurisdiction? Does the repeal of an offence creating enactment, automatically bring to an end, the prosecution of an accused person for an offence which he had, allegedly, committed before the repeal of the enactment under which he was being prosecuted ?"***

4) In determining the issues giving rise to the appeal against the background facts, the ordinary panel concluded the judgment as follows:

> ***"We wish to state in conclusion that it is very correct that Section 98 of the Cyber Security Act, 2020, (Act 1038) had repealed Section 136 of the Electronic Transactions Act, 2008, Act 772. It is also correct that the accused person who is the Appellant in this matter is alleged to have committed the offence of Child Pornography as a result of which the was charged and is being prosecuted under Section 136 of the Electronic Transactions Act, 2008, Act 772. We hold that notwithstanding the repel of Section 136 of Act 772 under which the accused is being prosecuted, Section 34(1) (d) and (e) of the Interpretation Act, 2008, Act 792 had save Section 136 of the Electronic Transactions Act, 2008, Act 772. Consequently, the prosecution of the accused person is not contrary to Article 19(11) of the 1992 Constitution or any provision of the Constitution. Flowing from the above, the existing law, that is, Section 136 of the Electronic Transactions Act, 2008, Act 772 allows the prosecution of the accused person as charged. We therefore find no merit in the appeal lodged by the accused person. The appeal is, therefore, dismissed.***

Consequently, we hereby order that the learned trial Judge shall continue with the trial of the accused person according to law."

THE REVIEW APPLICATION

5) Per his review motion on notice dated the 29th of June 2023, the Accused/Appellant/Applicant *(hereinafter referred to as the "Applicant")* applied to the court to review the judgment of the ordinary panel. The grounds of the review are particularly set out in paragraph 9 of the affidavit in support of the application as follows:

" 9. That I am advised by counsel, and I verily believe the same to be true, amidst trembling respect, that this honourable Court committed fundamental errors of law when it ordered my continu[ous] trial under the repealed Section 136 of Act 772, which errors have occasioned a miscarriage of justice.

Particulars of Error

a. That the honourable Court committed a fundamental error when it relied on English authorities to hold, contrary to well-established precedent of this honourable Court, that a general interpretation Act may be applied to save a repealed crime-creating law in Ghana or criminal proceedings thereunder.

b. That the honourable Court committed a fundamental error when it failed to distinguish between the applications of Section 34(1) of Act 792 to civil matters from its application to criminal matters.

c. That the honourable Court committed a fundamental error when it ignored Section 98(2) of Act 1038, which, by saving some matters in Act 772, ought to, by law, be deemed to

have expressly refused to save ongoing trials under Section 136 of Act 772."

EVALUATION

6) It is worth reminding lawyers who invoke our review jurisdiction under Article 133(1) of the 1992 Constitution that, same is specially created, and distinct from our jurisdiction to hear and determines appeals. The review jurisdiction of the Supreme Court is not one that vests the court with the power to engage in a re-hearing of a lost appeal determined by the same court. For this reason, it is rudimentary that, review ***is not an appeal***. Therefore, having urged certain grounds on the court through an appeal, which grounds were evaluated and dismissed, a dissatisfied Appellant, cannot guise the same grounds and re-argue the case rejected by the Court. To succeed on review, the Appellant must show that the court committed a fundamental error, which error was so crucial, that if same were not committed, the decision would have concluded differently.

7) Such an Applicant, must demonstrate that the error as committed has occasioned him or her a miscarriage of justice. It follows therefore, that, even where it is demonstrated that, the court slipped in error, but the error so committed, never occasioned the Applicant a miscarriage of justice, an invitation to this court to review the decision of it's ordinary panel would not succeed. Rule 54 of C.I. 16 provides that:

"The Court may review any decision made or given by it on any of the following grounds-

a. ***exceptional circumstances which have resulted in the miscarriage of justice; or***

b. ***the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by the Applicant at the time when the decision was given".*** *[Our Emphasis]*

8) In the case of **THE REPUBLIC VS. HIGH COURT HO EX-PARTE: ATTORNEY GENERAL & ORS. [2021] DLSC 10693** at Page 7, this Court speaking through Torkornoo JSC *(as she then was)* relying on the decision in **QUARTEY VS. CENTRAL SERVICES [1996-97] SCGLR 398** re-echoed the grounds of our review jurisdiction as follows:

"We would first state, that the settled position of the law that allows the Supreme Court to review its decisions under Article 133 is as stated in QUARTEY VS. CENTRAL SERVICES [1996-97] SCGLR 398 at 399, 'A review of a judgment is a special jurisdiction and not an appellate jurisdiction conferred on the court; and the court would exercise that special jurisdiction in favour of an Applicant only in exceptional circumstances. This implies that such an application should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment; and which fundamental error has thereby resulted in gross miscarriage of justice. Consequently, a losing party is not entitled to use the review process to prevail upon the court to have another or a second look at his case."

9) Earlier in time, Sowah, C.J explained in the case of **PENKRO VS. KUMNIPAH II [1987-88] 1 GLR 558, SC** at **603-604** that:

The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances…It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where there is a fundamental and basic error.

10) On the apparent abuse of the review jurisdiction, this court cautioned in the case of **ARTHUR (NO.2) VS. ARTHUR (NO.2) [2013-2014] 1 SCGLR 569:** as follows:-

"We are therefore constrained to send a note of caution to all those who apply for the review jurisdiction of this court under Rule 54(a) of the Supreme Court Rules, 1996 (C.I. 16), to be mindful of the following which we set out as a road map. It is neither an exhaustive list nor one that is cast in iron such that it cannot be varied depending upon the circumstances of each case:

(h) in the first place, it must be established that the review application was filed within the time limits specified in Rule 5 5 of C.I. 16, i.e. it shall be filed at the Registry of the Supreme Court not later than one month from the date of the decision sought to be reviewed.

(i) That there exist exceptional circumstances to warrant a consideration of the application;

(j) That these exceptional circumstances have led to some fundamental or basic error in the judgment of the ordinary bench;

(k) That these have resulted into miscarriage of justice (it could be gross miscarriage or miscarriage of justice simpliciter);

(l) The review process should not be turned into another avenue as a further appeal against the decision of the ordinary bench; and

(m) The review process should not be used as a forum for unsuccessful litigants to re-argue their case.

It is only when the above conditions have been met to the satisfaction of the court that the review panel should seriously consider the merits of the application."

11) Regrettably, contrary to the afore-stated guidelines to invoking our review jurisdiction, what the Applicant essentially engaged in, was to re-argue the grounds in the substantive appeal as evident from the grounds of the present application as well as the arguments articulated in the statement of case in support thereof.

12) Be that as it may, we deem it necessary to reiterate the conclusion reached in the judgment of the ordinary panel which we do not find any exceptional situation to vary, that:

a. *The principle and practice of legislative cessation upon repeal of an enactment is not carte blanche. Therefore, although it is a general principle of law, that upon the repeal or revocation of an enactment, the repealed or revoked enactment ceases to operate whether in relation to a criminal or a civil suit comes with exceptions.*

b. *The exceptions include, that where the repealing enactment saves a part or all of the repealed enactment or where an enactment sanctions the continuous investigation, prosecution etc. under the repealed enactment. As was referred to by the Ordinary Bench, Section 34(1)(c),(d) and (e) of our Interpretation Act, 2009 (Act 792) puts this in no doubt when it enacts* as follows:

"34. Effect of repeal

(1) Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

> ***(c). affect a right, a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked;***

(d). 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; or

(e) affect an investigation, a legal proceeding or a remedy in respect of a right, a privilege an obligation, a liability , a penalty, a forfeiture or a punishment;

13) In the statement of case in support of the application, counsel for the Applicant submitted that, the ordinary panel erroneously relied on Bennion's work on **Statutory Interpretation (5th ed, 2008)** as if the United Kingdom **Interpretation Act** on a repealed provision is in *pari materia* to that of Ghana with the effect that; Section 34(1)(e) of Act 729 permits a prosecution which had begun before the repeal took effect, to be completed. In further justifying the alleged error, the Applicant's Counsel cited the case of **BRITISH AIRWAYS VS. ATORNEY-GENERAL [1997-98] 1 GLR 55** and submitted in the Applicant's statement of case as follows: ". . .*In **British Airways**, your Lordships may recall that Bennion's English position of the law was canvassed and urged on your Lordships. In that case, the Prosecution (just like the prosecution here) sought to apply the then general Interpretation Act (CA. 4) to save the repealed crime in question. Bamford-Addo, JSC, who spoke for your Lordships, at page 64 of the report, rebuffed the proposition in the following words:*

"The Defendants sought to justify the continuation of the criminal trial by resort to the provisions of Section 8 of the Interpretation Act, 1960 (CA.4) dealing with the effect of a repeal, revocation or cesser of an enactment, but in view of Article 19 (11) of the Constitution, 1992, Section 8 of CA.4 is inapplicable to the criminal cases pending against the Plaintiffs. It is unconstitutional today to convict or punish any person unless a written law defines the offence or provides sanctions for same as required under Article 19(11) of the Constitution, 1992, and the criminal case against the Plaintiffs falls within

the prohibition in Article 19(11). For this reason, the provisions of Section 8 (e) of CA.4 is inapplicable to the criminal matters pending against the Plaintiffs at the Circuit Tribunal."

14) In the judgment of the ordinary panel of this court, and in specifically addressing similar arguments by counsel for the Applicant, this court rejected an earlier interpretation of the ***British Airways case*** and had this to say:

"Counsel seems to have placed much reliance on just a portion of the decision of this court in ***BRITISH AIRWAYS & ANOTHER VS. ATTORNEY GENERAL [1997-1998] 1 GLR 55*** *without adequate consideration of the entire case. At page 5 of his statement of case, counsel referred to page 63 of the report where the Court, through Bamford Addo JSC, said that:*

"Even before 7th January 1993 when the Constitution, 1992 became effective, Section 8 of the Criminal Code, 1960 (Act 29) provided that:

"8. No person shall be liable to punishment by the common law for any act. "The exception to this rule is in the case of contempt. It means that criminal offences must be so designated in a written law."

And, after making references to a few cases, counsel submitted that:

"The decision of the Court of Appeal in the face of the above argument, however, is that the crime-creating law in question-section 136 of the Electronic Transactions Act, 2008, Act 772-is saved by Section 34(1)(d) of the Interpretation Act, 2009, Act 792. In other words, the Court of Appeal has held contrary to your Lordships' reasoning in British Airways, that a law which is the product of interoperation or construction-a judge-made law, a common law, a law which is not on the statute book-is 'written law' and, thus, may create a crime in Ghana. Accordingly, we pray your Lordships, respectfully, to adjudge and hold that the honourable Court of Appeal erred in this regard".

This argument by Counsel is fundamentally flawed in one major respect, in that, in the British Airways case the accused person was being tried for an offence committed under the External Companies Diplomatic Missions (Acquisition or Rental of Immovable Property) Law, 1986 (PNDCL 150) which was subsequently repealed by the Statute Law Revision Act, 1996, Act 516. The then Interoperation Act, CA 4, unlike the Interpretation Act, 2009, Act 792, did not have a saving clause like section 34 of Act 792. The Court then reasoned thus, on page 70 of the report that:

> ***"Under Section 8(1)(e) of C.A.4, once an individual has committed an offence under a law, the subsequent repeal of that law would not bar investigation and prosecution of the offence under that repealed law. But then the repealing law may either repeal entirely the law creating the offence together with the punishment, or the repealing law itself or any other enactment may save the offence and the punishment. The former situation will result in leaving no existing law to support the offence and the punishment. Whereas the latter situation will result in saving the enactment constituting the law, to justify continued investigation and prosecution of the offence. In other words, in the latter situation, the saving law will be a written law within the content of the Article 19(11) formulation to satisfy the requirement in that formulation. Whereas the former situation is caught by the prohibition in the Article 19(11) formulation sine there is no saving law to justify the continued investigation and prosecution of the offence. For the Article 19(11) formulation in effect requires that at this very stage of the investigation and prosecution of an offence, there must be a written law creating the offence and prescribing the punishment for it.***

Now, for a fuller appreciation of the import of the Article 19(11) formulation, will once more quote the Article: (11) "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 emphasis is mine). Note that the verb used is, "is" and not "was". If it had been was, the formulation would have referred to the past and not the present. The use of "is" clearly shows that the formulation looks beyond the time of the commission of the offence to ensure the legality of what happens thereafter. If at any stage before the conviction, the law creating the offence and the punishment is totally repealed without any saving, the investigation and proceedings cannot be continued. Now, Article 19(5) and (11) by virtue of Article 1(2) of the same Constitution, 1992 overrides Section 8(1)(e) of CA.4 in respect of criminal investigations and trials. The two formulations, therefore represent the current legal position, and Article 19(11) of the Constitution, 1992 applies to the pending criminal trial of the Plaintiffs at the Circuit Tribunal Accra.

There is no doubt that this criminal trial had not concluded. And Act 516 which is stated to be "an Act to repeal certain statutes that are no longer applicable or have become spent" repealed the entire PNDCL 150, without saving either the offence or the punishment for it. Neither is there any other legislation re-enacting the offence and punishment in PNDCL 150. The position, therefore, is that as from 13 September 1996 when Act 516 received Gazette notification, the offence the Plaintiffs were facing at the Circuit Tribunal, Accra ceased to be denied and the punishment thereof equally cased to be prescribed in any written law. The continued prosecution of the Plaintiffs for the said offence will therefore be inconsistent with Article 19(11) of the Constitution, 1992 and same can therefore to be legally permitted."

Thus, as clearly explained in the British Airways case quoted above, if at the time of the repeal of PNDCL 150 by Act 516, there was in existence, an enactment which had preserved or saved the law under which the accused was being tried, this court would not have declared the trial an illegality. It is incorrect for counsel to say that by holding that the prosecution of the accused person in the instant matter can continue by virtue of Section 34(1)(d) of Act 792, the Court of Appeal had thereby stated that the written law is the common law.

It is the Courts that give flesh to statute law and without the interpretation and application of the law by the Court, no legally cognizable meaning and effect may attach to any statute however plain the language of a statute may seem to be.

15) Clearly therefore, what Applicant's counsel is pursuing is merely to re-argue the dismissed appeal which is not permissible under our review jurisdiction. As is clearly evident from Section 34(1) of Act 792, the legislature intended, and did expressed clearly, that the repeal of an enactment may not lead to the automatic cessation of the enactment if any of the conditions afore-referred to under Section 34(1) of Act 792 is present. In simple terms, per the facts at hand, there is an ongoing prosecution of the Appellant, albeit under the repealed enactment. Since the prosecution had already commenced; same does not become unlawful to continue in the absence of a legislative proscription by the repealing legislation. Further, the continuance of the prosecution will not defeat the constitutional prohibition against the non-existence of a written penal law defining a specific offence for which an accused stands trial as per Article 19(11) of the 1992 Constitution. The reason, as expressed by the ordinary panel which we find as a correct exposition of the law.

16) Therefore, in the absence of a contrary legislative statement in a repealing enactment about the effect of the enactment it repealed, the repeal, will not affect any ongoing investigations or prosecutions. Once same has started, it may

continue under the repealed enactment as if it had not been repealed at all. The situation would have been different, if the conditions for sanctioning the repeal to be a lawful basis for the criminal investigations or prosecutions were absent or that there was a contrary expressed legislative intention.

17) We equally reject the other arguments of Applicant's Counsel to the effect that, the ordinary panel committed a fundamental error when it failed to distinguish between the application of Section 34(1) of Act 792 to civil matters from its application to criminal matters and that, if indeed the legislature sought to save the repealed law, it would have done so in express language and cannot be implied. These were arguments put before the ordinary panel and same rejected. For specificity and avoidance of doubt, the ordinary panel held that:

> ***"What the above provision [Section 2(1) of Act 792] means is that until one is able to identify under an enactment, a legislative measure continued in force by the 1992 Constitution or an instrument made under an enactment, a provision excluding the application of the Interpretation Act, 2009, Act 792, the Interpretation Act shall apply in the interpretation of that enactment, legislative measure or the instrument. In other words, to oust the application of the Interpretation Act, there must be a specific provision in an enactment, legislative measure or an instrument which actually prohibits the application of the Interpretation Act, 2009, Act 792.***
>
> ***Counsel in his submission, failed to point to any provision in the repealed Section 136 of Act 772 or the repealing Cybersecurity Act, 2020, Act 1038 which proscribes the application of the Interpretation Act. Thus, as stated in Section 2 of Act 792, the provisions of the Interpretation Act apply to the provisions in Act 772 and Act 1038."***

CONCLUSION

18) From the foregoing, we do not find from the decision of the ordinary panel any fundamental or grievous error of law that may have occasioned a miscarriage of justice to the Applicant to justify and authorise a review. The application fails, and is accordingly dismissed.

I. O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

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

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

B. F. ACKAH-YENSU (MS.)
(JUSTICE OF THE SUPREME COURT)

S. K. A. ASIEDU
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

PWAMANG JSC:

My Lords, the applicant for review before us is insisting that the decision of the ordinary bench in the appeal they considered is inconsistent with a true and proper interpretation of article 19(11) of the Constitution, 1992 and this court's previous decision in **British Airways v Attorney-General [1996-97] SCGLR 547.** The respondent on the other hand maintains his argument, which found favour with the ordinary bench, that the statutory landscape changed after the decision in **British Airways v Attorney-Attorney** so article 19(11) of the Constitution has been rightly interpreted in the judgment of the ordinary bench.

In **British Airways v Attorney-General,** the respondent had argued that section 8(1) of the **Interpretations Act, 1960 (CA 4),** saved criminal investigations and proceedings commenced on the basis of an enactment that created a criminal offence which was repealed subsequent to the commencement of the proceedings. Accordingly, he submitted that it was lawful to continue with the prosecution of British Airways under the law that had ceased to exist. The provisions of CA 4 relied on were as follows;

8. Effect of repeal, revocation or cesser

(1) The repeal or revocation of an enactment shall not

(a) revive anything not in force or existing at the time when the repeal or revocation takes effect;

(b) affect the previous operation of the enactment or anything duly done or suffered under that enactment;

(c) affect a right, privilege, an obligation or a liability acquired, accrued, or incurred under that enactment;

(d) effect a penalty, forfeiture or punishment incurred in respect of an offence committed under that enactment;

(e) effect an investigation, a legal proceeding or a remedy in respect of a right, privilege, an obligation, a liability, penalty, forfeiture or punishment, and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed or revoked.

The Supreme Court in that case answered the respondent by stating, that notwithstanding the saving of pending proceedings under subsection 8(1)(e) of CA 4, there was no saving of offences created under a repealed enactment. The Act only saved punishment that may be imposed under a repealed enactment by its provisions under subsection 1(d) and 1(e) of section 8 but it did not save the offence itself. That meant that if at the time of repeal of an enactment creating a criminal offence, someone had been tried and convicted, then the punishment may be imposed notwithstanding the repeal since imposition of punishment was saved. The court, through Bamford-Addo and Acquah, JJSC stated, that unless there is a saving of the **offence** itself created under the repealed enactment, that **offence** will cease to exist on repeal so there will be no existing offence of which a person may be convicted as required under article 19(11) of the Constitution, 1992 which provides that;

No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed in a written law.

The court interpreted "written law" to refer to an existing valid written law which a repealed law is not. However, if the offence is saved or re-enacted, then despite a repeal, it would be an existing valid law and a person can be convicted of it. But if the offence is not saved or re-enacted, and a person cannot be convicted of it, then there will be no point in continuing to prosecute an accused person since the Constitution forbids his conviction under article 19(11).

At 556 of the report Bamford-Addo, JSC explained as follows;

"This provision [section 8(1)(e) of CA4] is now inconsistent with article 19(11) of the Constitution in respect of criminal ***offences*** *contained in a repealed law such as PNDCL 150. It would have been a different matter 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 but Act 516 was silent on this; it merely repeals PNDCL 150, and consequently the provision of article 19(11) came into play in respect of the criminal case pending against the plaintiffs. *It should be noted, however, in respect of civil matters the consequences of a repeal in section 8(1)(e) CA 4 still applies."* (Emphasis supplied)

To similar effect, Acquah, JSC at 562 said as follows;

"There is no doubt that this criminal trial had not concluded. And Act 516 which is stated to be "an Act to repeal certain statutes that are no longer applicable or have become spent" repealed the entire PNDCL 150, ***without saving either the offence or the punishment for it.*** *Neither is there any other legislation re-enacting the offence and punishment in PNDCL 150. The position therefore, is that as from 13 September 1996 when Act 516 received Gazette notification, the offence the plaintiffs were facing at the circuit tribunal ceased to be defined and the punishment thereby equally ceased to be prescribed in any written law."* (Emphasis supplied)

Going by the decision in **British Airways v Attorney-General,** the question that arises in this case is; whether the offence of Child Pornography under Section 136 of the Electronic Transactions Act, 2008, Act 772 has been saved despite the repeal of that section under Section 98 of the Cyber Security Act, 2020, Act 1038.

The applicant has limited his search for an answer to the above question to the provisions of Act 1038 alone and argues that though certain offences under the repealed Act 772 have been specifically saved or re-enacted in Act 1038, there is no provision in that Act which saves or re-enacts the offence of Child Pornography that existed under section 136 of Act 772. But the respondent argues that the new **Interpretation Act, 2009 (Act 792)** contains a general saving provision for all offences under repealed enactments. This, the respondent contends, was done by the addition of a provision that saves offences committed under a repealed enactment to the saving provisions in section 8(1)(d) of the previous Interpretations Act, 1960 (CA 4) which was limited to saving only punishment for an offence under a repealed enactment. The new provisions on effect of repeal are as follows;

34. Effect of repeal

(1) Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

(a) revive an enactment or a thing not in force or existing at the time at which the repeal or revocation takes effect;

(b) affect the previous operation of the enactment that is repealed or revoked, or anything duly done or suffered under the enactment;

(c) affect a right , a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked;

***(d) 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; or**

(e) affect an investigation, a legal proceeding or a remedy in respect of a right, a privilege an obligation, a liability , a penalty, a forfeiture or a punishment...; (Emphasis supplied).

The new saving of an **offence committed against the repealed enactment** has been added to subsection (1)(d) which was not there in the original language of Section 8(1)(d) of CA 4**.** The original provision simply stated as follows;

[A repeal shall not]

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed under that enactment; but the new provision is:

[A repeal shall not]

(d) affect an offence committed against the enactment that is repealed or revoked, or .....

The effect of the argument of the respondent is that the law maker in the new Act responded to the pointing out of the gap that existed under the 1960 Interpretation Act. I find force in the argument that the new provision in Act 792 evinces an intention by the legislature to now go beyond punishment incurred in respect of an offence under the repealed enactment to saving the **offence itself** committed under it. In this way, Parliament filled the gap that the Supreme Court detected in **British Airways v Attorney-General**. Of course, the saving could have been provided for in the repealing enactment itself but there is no law that says that it cannot be done otherwise. In this case, if the saving was not done in Act 1038, then the general saving in section 34(1)(d) of Act 792 would apply, unless a contrary intention appears from the language of Act 1038. For it is provided in section 2(1) of the Act 792 as follows;

Application of this Act

2. (1) This Act applies to an enactment whether enacted before or after the coming into force of this Act, to a legislative measure continued in force by the Constitution, and an instrument made directly or indirectly under an enactment *unless a contrary intention appears in that enactment, measure or instrument.*

The applicant draws attention to the failure by Parliament to add the offence of Child Pornography to the offences saved or re-enacted under Act 1038 as if to mean that Parliament by the repeal without saving or re-enacting section 136 intended to grant amnesty to persons who were under investigation or on trial for the offence of Child Pornography prior to the repeal. That, to me, is a far fetched intention to impute to Parliament and I do not deduce any such intention on the face of Act 1038.

The aid to interpretation that states that; *generalia specialibus non derogant* is what it is, an aid and does not override the cardinal objective of all interpretation; ascertainment of the intention of the law maker or the author of a deed. As Lord Reid said in **Maunsell v Olins [1975] 1 All ER 16 at 18;**

"Then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers."

In this era of purposive interpretation of statutes, the failure to save the offence of Child Pornography or re-enact it in Act 1038, in my considered opinion, could only have been a draftsman's slip and not a deliberate intention of Parliament to abolish that offence when it is committed by electronic means. *Generalia specialibus non derogant* would not apply in circumstances where a provision in a specific enactment on a matter that is covered by a general enactment can be shown not to have been intended to exclude, under all circumstances, application of the provision in the general enactment on the same matter. In this case, there is nothing that convinces me that Parliament intended by sections 98 and 99 of Act 1038 to exclude the application of section 34(1) of Act 792 on effect of repeals.

I shall therefore apply the general saving provision in section 34(1)(d) of Act 792 in this case to uphold the legality of the continued prosecution of the applicant. Where judges have pointed out a gap in legislation and the legislature acts to fill the gap, it

becomes the duty of judges to implement the corrective measure enacted by the legislature and not to defeat it.

In conclusion, the judgment that the ordinary bench came to in this case is not inconsistent with the decision in British Airways v Attorney-General. At the time the applicant is alleged to have conducted himself in violation of the provisions in Act 772 on Child Pornography, he is deemed to have been aware that it was an offence with stated punishment. Since the offence has been saved by section 34(1)(d) of Act 792, his continued prosecution is constitutional since he can be convicted without a violation of article 19(11) of the Constitution.

It is for the reasons explained above that I join my colleagues to dismiss this application for review.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

DR. JUSTICE SREM-SAI ESQ. FOR THE APPLICANT WITH HIM RACHEL DINSEY ESQ. & REV. FATHER SAMUEL AGYEMAN

STELLA OHENE APPIAH (PRINCIPAL STATE ATTORNEY) FOR THE RESPONDENT.