IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA A.D. 2020

CORAM: *IRENE C. LARBI (MRS), JA (PRESIDING)*

ALEX B. POKU-ACHEAMPONG, JA

OBENG-MANU JNR, JA

SUIT NO.: H2/5/2018

DATE: 2ND JULY, 2020

THE REPUBLIC	**-**	**RESPONDENT**
VRS		
1. STEPHEN KWABENA OPUNI	**-**	**1ST ACCUSED PERSON**
2. SEIDU AGONGO	**-**	**2ND ACCUSED PERSON / APPELLANT**
3. AGRICULT GHANA LTD	**-**	**3RD ACCUSED PERSON / APPELLANT**

RULING

POKU- ACHEAMPONG, JA:

This is an interlocutory appeal against the ruling of the Accra High Court, Criminal Division of 25th February 2019 by the 2nd and 3rd Accused persons.

The Notice of Appeal filed on 1/03/19 has the following grounds of appeal.

1. The Trial Court gravely erred in ruling that an official report of an Investigation Committee of the Cocoa Research Institute of Ghana (CRIG) which report and its attachment were filed by the lawyer for the Executive Director of CRIG on the orders of the Court itself cannot be tendered through the 2nd Prosecution witness who is an officer of CRIG because it will be unfair to the 2nd Prosecution witness thereby occasioning a substantial miscarriage of justice to the Appellants.
2. The Court below misdirected itself in holding that since 2nd Prosecution witness did not appear before the Investigative Committee and was not the author of the report and therefore the official report of CRIG and its attachment cannot be tendered through the said PW2, thereby occasioning substantial miscarriage of justice to the 2nd and 3rd Accused persons.
3. The Trial Court seriously erred in its interpretation of Sections 117, 118 and 126(2) of the Evidence Act when it ruled that tendering the official documents through PW2 will offend against the hearsay rules to the detriment of the Appellants and as such occasioned substantial miscarriage of justice to the 2nd and 3rd Accused persons.
4. The decision of the Trial Court to reject the report and attachments from CRIG describing the product as Lithovit Liquid fertilizer on the grounds that the defence can call the authors of the report to tender same is highly prejudicial to the case of the 2nd and 3rd Accused persons thereby occasioning them a substantial miscarriage of justice.

The Appellants who are the 2nd and 3rd accused persons in the Trial Court are together with the 1st Accused facing the following charges:

1. Defrauding by False Pretences contrary to Section 131(1) of the Criminal Offences Act 1960, Act 29.

2. Wilfully causing Financial Loss to the State contrary to Sections 23(1) and 179(3)(a) of the Criminal Offences Act.
3. Corruption of Public Officer contrary to Section 239 (2) of the Criminal Offences Act 1960, Act 29.
4. Money Laundering contrary to Section 1(1)(c) of the Anti-Money Laundering Act 2008 (Act 749).
5. Manufacturing fertilizer without registration contrary to Sections 68(1) and 28(1)© of the Plants and Fertiliser Act 2010 (Act 803).
6. Selling misbranded fertilizer contrary to Sections 114(1)(b) of the Plants and Fertiliser Act, 2010 (Act 803).
7. Selling adulterated fertilizer contrary to Section 114(1)(c) of the Plants and Fertiliser Act 2010 (Act 803).
8. Contravention of the Public Procurement Act contrary to Sections 92(1) and 40(1) of the Public Procurement Act 2003 (Act 663).

The brief facts of the case as put forward by the Prosecution are as follows:

The Appellants who are the 2nd and 3rd Accused Persons in the Trial Court submitted a sample of fertilizer product known as Lithovit Foliar Fertilizer made in Germany, through COCOBOD, to be tested by the Cocoa Research Institute of Ghana (CRIG) a subsidiary of COCOBOD for its suitability for use on matured cocoa. The Material Safety Data Sheet (MSDS) which accompanied the product described it as a fine greyish powder.

After conducting the test a report was sent to the 1st Accused the then Chief Executive of COCOBOD. The report described the substance tested by CRIG as a fine greyish powder and prescribed the appropriate usage of the substance on cocoa.

On the basis of this report the 1st Accused directed that a certificate be issued to the Appellants on the use of the Lithovit Foliar Fertilizer on Cocoa. The certificate issued to the Appellants herein, after the testing by CRIG, also described the product as powdery.

It is the case of the Respondent that in spite of the above in January 2014, February 2015 and December 2015 the Appellants at the instance of the 1st Accused supplied COCOBOD with large quantities of a liquid substance known as Agricult Lithovit Liquid Fertilizer a substance which was different in form and content from the one presented for testing and approved by COCOBOD. This substance had not been tested by CRIG and had neither been recommended and approved nor certified by CRIG and COCOBOD for use on cocoa.

This liquid substance which COCOBOD had paid large sums of money for was found after forensic examination to contain low amount of Lithovit contrary to the chemical composition of the Lithovit Foliar Fertilizer which the Appellants had presented for testing and which had been recommended, approved and certified by CRIG and COCOBOD for use on cocoa. The Prosecution claim the liquid substance supplied by the Appellants was in fact hazardous to cocoa.

PW2 is the soil scientist at CRIG who conducted the test on the Lithovit Foliar Fertilizer the sample the Appellants sent to COCOBOD together with its Material Safety Data Sheet (MSDS) for testing.

He stated in his evidence to the court that the sample which was handed over to him was powdery and tendered in evidence the remainder of the sample he worked with, which was identified by the witness in court, and marked as ID1.

The Appellants on their part provided the following background to their interlocutory appeal in their written submission.

The trial started on 26th March, 2018 and the Prosecution called the Second Prosecution Witness (PW2) Dr. Alfred Arthur a soil scientist at the Cocoa Research Institute of Ghana (CRIG) a division of COCOBOD.

PW2 had testified that neither the CRIG, nor COCOBOD itself had ever in any correspondence referred to the fertilizer in respect of which the Appellants had been charged as LITHOVIT LIQUID FERTILIZER. During the course of the trial however and on the orders of the court for Discovery of Documents it became clear that one of the documents which had evidence of CRIG having referred to the said fertilizer as LITHOVIT LIQUID FERTILISER had been removed from the files at CRIG. CRIG therefore set up a committee to investigate the disappearance of the said document.

This information was given to the Trial Court by the Lawyers of COCOBOD on behalf of the Executive Director of CRIG. The Trial Court ordered that the report of the Investigation Committee be filed in the Court. The report was filed in the court on 1st February 2019 by the Lawyers of COCOBOD on behalf of CRIG.

Under cross-examination PW2 admitted knowing of the setting up of the committee and its work of investigating the missing document. He also, according to the Appellants (relying on the record of Vol.2 pages 255 to 260) admitted that he was aware of the filing of the said report in the Trial Court by CRIG Lawyers.

It is further the case of the Appellants that this report had attachments and two of these attachments labelled as Appendix II and Appendix III which can be found on pages 203 to 205 of Vol. 2 of the record contained evidence of the description of the said fertilizer as Lithovit Liquid Fertiliser. They tried in the course of the cross-examination to tender the report and its attachments through PW2.

The Respondent Counsel objected to this and the Trial Judge upheld the objection.

The Trial Court went on to mark the rejected document as Exhibit "R1". This, Counsel claims had occasioned substantial miscarriage of justice to the Appellants and hence the instant appeal.

The Appellant's Counsel argued Grounds 1 & 2 together.

In arguing grounds 1 and 2 Counsel for the Appellants quoted in extenso Section 126 of the Evidence Act, 1975, (NRCD 323) as follows:

(1) *Evidence of a hearsay statement contained in a writing made as a record of an act, event or condition is not made inadmissible by section 117 if –*
   (a) *The writing was made by and within the scope of duty of a public official;*
   (b) *The writing was made at or near the time the act or event occurred or the condition existed; and*
   (c) *The sources of information and method and time of preparation were such as to indicate that the statement contained in the writing is reasonably trustworthy.*

(2) *Evidence of a hearsay statement contained in a writing made by the public official who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by section 117.*

(3) *A hearsay statement admissible in evidence under this section is not made inadmissible by the fact that it is not based on the personal knowledge of the declarant.*

Counsel put forward the following arguments in support of his position that the Trial Judge gravely erred in his ruling.

Exhibit "R1" was made by public officers acting in their official capacities as within the intendment of Section 126(1)(a) of Act 323 being staff of CRIG. PW2 was undoubtedly testifying due to the fact that he was an official of CRIG and therefore a public officer. The Trial Court thus erred when it ruled that admitting Exhibit "R1" will offend against the hearsay rules of Act 323.

Counsel for Appellant then gave the background of the events relating to the discovery of the documents referring in particular to the statement of the Deputy Director Legal of COCOBOD that in trying to trace a particular letter they got the file that contains the letter and folio 44 of that file to folio 47 seems to have been misfiled or the records tampered with and that the letter was not on the file.

The court then ordered that the report by the Ad Hoc Committee to investigate the Disappearance of Missing Document dated 31/1/2019 should be filed and this was done.

The said report was marked as Exhibit "R1" and can be found at pages 178 – 208 of the Record Vol. 2.

It will be worthwhile to find out the contents of "R1" the subject matter of the dispute at this stage.

Typical of Investigation Committee reports of organisations or institutions like the COCOBOD the report has the following contents:

a) Covering letter by Lawyers for CRIG forwarding the report to the Court – page 178.
b) A covering memo submitting the report to the Head of Department or Chief Executive in this case the Executive Director of CRIG – page 179.
c) The actual report stating the membership of the Committee, it's terms of reference, methodology used, the list of people who appeared before the Committee and who were interviewed – pages 180 -181.
d) The Findings, Observations and Recommendations of the Committee pages 181 – 183.
e) Signature page, page 184.
f) Appendix 1 which is the actual proceedings of the committee, the questions and responses of those who appeared before the committee, pages 185 – 202.

g) Appendix II - a Pro-Invoice of CRIG on which the key phrase or words LITHOVIT LIQUID FERTILISER ON COCOA appears – page 203.

h) Appendix III page 205 a Pro-Invoice which also has the key words: LITHOVIT LIQUID FERTILISER ON COCOA.

i) Appendix IV – A handwritten document giving details on the subject matter of letters received and the receiving officers and their signatures, page 206.

j) Appendix V – A handwritten minute or memo by Mr. A. A. Afrifa, former Head of the Soil Science Division of CRIG.

k) Appendix V page 208 an official receipt issued by the CCSVD Control Unit (COCOBOD) to Agricult Ghana Ltd the 3rd Accused in the Court below or 2nd Appellant herein.

We have gone to this length to help us in the determination as to whether "R1" i.e. the report with its attachments as spelt out above was a document that could be tendered through PW2, a determination that will be made in due course.

Counsel for Appellant in taking issue with the ruling of the Trial Judge referred to the following portion of the ruling.

> *"As to the document being an official document as stated by Counsel, I will not repeat myself but state that the document is a committee report with its attachments were written by CRIG officials who are still in their official employment and would have been better witnesses to tender this document in evidence. I must state that although PW2 is an official from CRIG he has not been served and noticed to testify as to the document in that capacity and in any case he was neither a party, nor appeared before that Committee and or testified. I think that it would be most unfair to tender the document through the witness who does not know anything about the document".*

Relying on the judgment of **Yeboah Vrs Amofa 1997 – 98 1GLR 674 per Wood JA,** (as she then was) where the case of **Twifo Oil Plantation Project (TOPP) Vrs Ayisi** [1982-83] GLR 881 CA was cited, Counsel contends strongly that the above quoted statement of the Trial Judge is not the position of the Law on admissibility of official documents.

He argues that the necessary conditions for the admissibility of such documents are as set out in Section 126(1) referred to supra. Wood JA citing the case of TOPP Vrs Ayisi observed as follows:

> *"The case of TOPP Vrs Ayisi held that these conditions were conjunctive and the "gravamen of the provision was that the witness should satisfy such foundation as to indicate that the statement contained in a writing was reasonably trustworthy".*

Counsel contends that all these conditions or criteria have been fulfilled conjunctively in the instant case and there was never an issue about the trustworthiness of the contents of the report at the court below.

PW2 identified the authors of the report as CRIG employees, he admitted he knew CRIG had set up the Ad Hoc Committee, he admitted he knew the authors of the report were members of the Committee and that the Committee visited his department to examine their files as part of its work.

He concludes that the foundation to establish that the contents of the report were reasonably trustworthy per the **Twifo Oil Plantation Project Vrs Ayisi, and Yeboah Vrs Amofa** cases was duly established and neither the authority of the report nor its source could be questioned.

The Trial Judge in the view of Counsel for the Appellants therefore erred in his ruling which ruling has occasioned a substantial miscarriage of justice to the Appellants.

In their riposte Counsel for the Respondent contends that the Learned Trial Judge was right in rejecting the document "RI" which the Appellants sought to tender through PW2.

It is, according to Counsel, clear from the Record that PW2 had no knowledge of the report of the Ad Hoc Committee that investigated the issue of the missing documents from CRIG records.

PW2 played no role at all in the work of the committee. He was neither a member of the committee nor did he appear before the committee. He had nothing to do with the report which was issued by the Committee and neither was he served with a copy of the report.

Counsel contends further that the report of the Ad Hoc Investigation Committee is more of a technical report than an official report. It was technical in nature and cannot be tendered in evidence by any employee at all.

Counsel contends that PW2 had no knowledge of the report, had no means of authenticating the contents of the said report, let alone be in a position to defend it or answer any questions on it.

Having considered in detail the arguments of both Counsel, for the Appellants and Respondent we are of the opinion that the learned Trial Judge was right in his ruling and did not err in his determination that "R1" could not be tendered through PW2.

The responses of PW2 during his cross-examination by lead Counsel for Appellants, showed clearly and emphatically that he was not the proper person through whom the document, "R1" could be tendered.

We will like to refer to excerpts of the cross-examination to support this point:

"Q: Now, you have in your hands the document filed on behalf of the Executive Directors of CRIG and CHED pursuant to an order of the High Court presided over by His Lordship C. J. Honyenuga J.A. dated the 21st day of January, 2019 that is correct.

A: Yes My Lord.

Q: It was filed in the Registry of this court on the 1st of February, 2019. That is correct.

A: Yes My Lord.

Q: And it was signed by a lawyer for the Directors for CRIG that is correct.

A: My Lord, I am not familiar with this signature though I see lawyer for Directors for CRIG.

Q: And you have solicitor's license number embossed on the document. That is correct.

A: My Lord, I see some number and alphabet there but I don't know what they mean.

Q: And Sir, you were in this court on the 6th of February, 2019 when Mr. Vegba, lawyer for the Directors for CRIG and CHED informed this court that he had filed the report of the Ad hoc Committee to investigate disappearance of a missing document dated 31st January, 2019 on the orders of this Honourable court.

You were in court were you not?

A: Yes My Lord.

Q: Now, turn to the very first page of that document, it's on the letter head of Cocoa Research Institute of Ghana that is correct.

A: My Lord, this is not the letter head of CRIG, it was a memo the letter head will have Executive Director, telephone numbers, fax numbers of the institute.

Q: And it is true that this memorandum has the heading Cocoa Research Institute of Ghana at the top.

A: Yes my Lord.

Q: And it is supposed to be signed by one Evans Anim that is correct.

A: My Lord, I know Evans Anim as Deputy Audit Manager of CRIG but the signature I am not familiar with it.

Q: The question is there a signature supposed to be that of Evans Anim as it is signed directly above his name that is correct.

A: My Lord as I have stated the name Evans Anim I know but the signature I cannot confirm.

Q: Now, open the fourth page, the signature page the document is supposed to have been signed by the three committee members that is correct.

A: Yes My Lord, but the signature I cannot confirm.

Q: You have a photocopy of the document in your hands.

A: Yes My Lord.

NUTSUKPUI: My Lord, we wish to tender the document through the witness as an official document.

The witness was emphatic in his responses that he did not know the signatures of the authors of the report. Some of which responses, for purposes of emphasis, are repeated below:

> *"A: My Lord, I am not familiar with this signature though I see lawyer for Directors for CRIG*

A: My Lord, I know Evans Anim as Deputy Audit Manager of CRIG but the signature I am not familiar with it.

A: Yes my Lord, the signature I cannot confirm."

In the case of **Selormey v. The Republic [2001-2002] SCGLR 848** the apex court in holding 2 stated as follows:

> ***"Even though Section 54 of NRCD 323 provides that except as provided in the Decree every person is competent to be a witness, competency alone does not make a statement admissible per se. the other relevant tests, e.g. competence of a witness relating to the admissibility of a document etc. must be considered as well.***
>
> ***Thus, for example, a competent witness must under Section 60 (1) of NRCD 323 have personal knowledge of matters about which he intends to testify before he can be allowed to do so."***

We agree with the Trial Judge's suggestion in his ruling that Counsel should have applied to the court for an order for the authors of the report in question to be invited to tender it and be subjected to cross-examination.

We further agree with the Trial Judge that the **Yeboah Vrs Amofa and the Topp Vrs Ayisi** cases can be distinguished from the instant case.

In the TOPP vrs Ayisi case, as rightly pointed out by Counsel for Respondent, the Court of Appeal in upholding the decision of the High Court which rejected the evidence of the Senior Lands Officer held, inter alia, that the Officer did not testify as having come by the information he had by virtue of his office and that the document he spoke of was not prepared by his office. The Cape Coast office where he worked was not consulted in the acquisition of the land. The Regional office had been engaged only in enumeration of crops

for payment of compensation to the various owners. The court also held that even though the fact of the acquisition was public knowledge and was available to anyone who sought to know the evidence of the officer was hearsay.

Applying the above to the instant case, the fact that PW2 is a CRIG employee and the Committee was set up by CRIG does not make PW2 the proper official to tender the document in evidence in the sense of **Section 126 of the Evidence Act.**

We have laid bare the contents of "RI" and are convinced that PW2 has no special knowledge of the contents of "RI".

Neither the findings, observations, recommendations of the Committee and the key item (Appellants' Trump Card) in the report i.e. the Appendix II and III which mentioned the Lithovit Liquid Fertilizer are peculiarly within his knowledge.

PW2 did not acquire any special knowledge of the contents of the document by virtue of his position at CRIG. The Trial Judge in our opinion is right in distinguishing the Yeboah v. Amofa case from the instant case on the basis of the fact that the authors of the document, three of them are available and they, more than anybody can provide the assurance to the court that the document "R1" is reasonably trustworthy as required under **Section 126 (1) of Act 323.**

In view of the above, we agree with the Trial Judge that it will be unfair to allow the document "R1" to be tendered through PW2. The Trial Judge therefore did not err in so ruling.

Grounds 1 and 2 are therefore dismissed as unmeritorious.

Ground 3

"The Trial court seriously erred in its interpretation of Section (sic) 117, 118 and 126 of the Evidence Act when it ruled that tendering the official documents through PW2 offend against the hearsay (sic) rules to the detriment of the Appellants and as such occasioned a substantial miscarriage of justice to the 2nd and 3rd accused persons."

In arguing this ground, Counsel for the Appellant quotes in extenso **Sections 117, 118 and 126 (2) of the Evidence Act NRCD 323.** He contends thereafter that the reasonable notice required to be given under **Section 118 (1) (iii)** is not required to be served on the witnesses involved and faults the Trial Judge for stating that *"although PW2 was an official of CRIG it was improper to tender the document through him because he had not been served notice to testify on the document."*

He contends that the report rejected by the Trial court falls within the purview of **Section 126 (2) of the Evidence Act** which is an exception to the hearsay rule.

He contends further that the missing document was in the custody of CRIG and that the report in question was a report on CRIG's unsuccessful bid to find the said document that has been in its custody and opined that such a report ought to be admissible under **Section 126 (2) of NRCD 323**.

In response, Counsel for the Respondent agrees that Exhibit '"R1"' the rejected document constitutes a hearsay statement under **Section 116 of the Evidence Act 1975, NRCD 323** which could only be admissible if it fell under any of the exceptions under the hearsay rule provided under **Sections 117, 118, 126 of the Act** referred to supra.

Counsel repeats their earlier arguments that the authors of the hearsay statement i.e. the signatories to the Adhoc Committee report are available. The Appellants laid no foundation at all to suggest that these persons are unavailable. The tendering of the

document in their view did not fall within the purview of **Sections 117 and 118 of the Evidence Act**.

Respondents' Counsel again repeat their arguments made in response to Grounds 1 and 2 that the investigation report was not an official report or official record and that even if it was determined to be an official report, it did not satisfy the necessary conditions set out under *Section 126 (1)* and applied in the Topp case.

We are persuaded by the arguments of Respondent Counsel that the authors of the hearsay statement are available and that no foundation was laid to indicate that they were unavailable. The tendering of the said document therefore did not fall within the purview of **Sections 117 and 118 of the Evidence Act**.

In respect of Section 126 1 (c), we maintain our position that the "reasonably trustworthy" test has not been satisfied.

In the case of the **Republic v. Abdul Halik Hamza, Ghana Monthly Judgments Part 137 (2017) 137 GMJ Page 34** this Honourable Court had the opportunity to pronounce on the circumstances under which a hearsay statement could be admissible under Sections 117 and 118 even though the person tendering it is not the author.

It was a murder case in which the pathologist Dr. Der was unavailable to tender the postmortem report and another Doctor, Dr. Mohammed tendered the report. This Honourable Court per Agbevor, J.A. stated as follows in admitting the report through Dr. Mohammed.

> *"Although Dr. Mohammed did not author the postmortem report, his professional standing as a pathologist equips him to understand and tell the contents of the postmortem report. In fact, Dr. Mohammed in his evidence has said he knows the handwriting and signature of Dr.*

Der, that the report is from lawful custody and he indeed narrated what the report Exhibit 'E' contained."

The situation in the instant case is completely different and compels us to agree with the Trial Judge. Ground 3 is therefore found to be without merit and is dismissed.

Ground 4:

"*The decision of the Trial court to reject the report and the attachments from CRIG describing the product as Lithovit Liquid Fertilizer on the grounds that the defence can call the authors of the report to tender same is highly prejudicial to the case of the 2nd and 3rd accused persons thereby occasioning a substantial miscarriage of justice".*

The statement by Counsel for the Appellants that the Trial Judge's ruling that the authors of the document could be called to tender the document when necessary means that the Trial Judge had already concluded that there is a case for the Appellants to answer even before the said court had heard the whole evidence is far-fetched and is not borne out by the record. It is also difficult to accept the conclusion that the ruling or decision is highly prejudicial to the defence of the Appellants.

We have gone through the record, as we are required to do as an Appellate Court, and can say without any equivocation that the Trial Judge has been fair in his handling of the case so far. There are several instances where objections by the prosecution were overruled.

The Trial Judge also fairly managed the Trial by ensuring that almost all the necessary documents required by the accused Appellants were made available to them in accordance with the Supreme Court decision of **Republic v. Baffoe Bonnie & 4 Ors. Suit No. J1/06/2018** dated 6th June, 2018. For instance it was based on the order of the Judge made on 1st February, 2019 that the document "R1" was filed by the Lawyers for Directors of CRIG.

We do not agree with the Counsel for Appellants that "the posturing of the Trial Court sins against the fair trial provisions in Article 19 (2) (4) and Article 19 (10) of the constitution".

Indeed, there has been no "posturing" by the Trial Judge or court but rather there has been an impartial and even-handed way of trying a major criminal case.

In this regard we agree with the Respondent Counsel's submission that there is nothing prejudicial about the statement by the Trial Judge that the authors of the document should have been called to tender the report.

It is a standard practice that when an objection is raised in the course of a Trial, the Trial Judge or Magistrate is enjoined to take arguments for and against the objection and thereafter rule on it. This is exactly what the Judge did.

On 1st November 2018, a Practice Direction was issued by the office of the Chief Justice following the decision in the Baffoe Bonnie case referred to supra. It is titled the PRACTICE DIRECTION (DISCLOSURES AND CASE MANAGEMENT IN CRIMINAL PROCEEDINGS) 2018.

The introductory part describes it as "A direction to provide for disclosures and witness statements in criminal proceedings and to provide for the official management of criminal cases and for related matters". It has the "overriding objective to ensure that criminal cases are resolved fairly, justly, efficiently and expeditiously".

In our opinion the Trial Judge has complied fully with this practice direction.

The issue of occasioning a substantial miscarriage of Justice is one which appears in all the 4 grounds of appeal. It is therefore imperative that we comment on it. The Courts Act 1993 Act 459 provides in Section 31(1) as follows:

"Section 31 – Appeal in Criminal Matters Allowed on Substantial Miscarriage of Justice.

(1) Subject to subsection (2) of this section an appellate court on hearing any appeal before it in a criminal case shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

(2) The court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted upon that charge or indictment."

Section 5 of the Evidence Act, 1975 NRCD 323 also deals with the issue of Erroneous admission or exclusion of evidence.

See the case of Ghana Ports & Harbours Authority & Captain Zeini Vrs Nova Complex [2007 – 2008] 2 SCGLR 806 at page 831 where Wood CJ (as she then was) stated as follows:

"The law is that a party who fails to object to the admission of evidence, which in his opinion is inadmissible would be precluded on appeal under Section 5(1) of the Evidence Act 1975 (NRCD 323), from complaining about the erroneous reception, unless it can be demonstrated that the wrong reception has occasioned a substantial miscarriage of justice". The criteria for determining what constitutes a substantial miscarriage of justice, have also been set out in Section 5(2) of the Act……"

Section 5(2) provides as follows:

"(2) In determining whether an erroneous admission of evidence resulted in a substantial miscarriage of justice the court shall consider:-

(a) Whether the trial court relied on that inadmissible evidence; and

(b) Whether an objection to or a motion to exclude or to strike out the evidence could and should have been made at an earlier stage in the action; and

(c) Whether the objection or motion could and should have been so stated as to make clear its ground or grounds; and

(d) Whether the admitted evidence should have been excluded on one of the grounds stated in connection with the objection or motion; and

(e) Whether the decision would have been otherwise but for that erroneous admission of evidence.

See also the case of **Wassef Sadallah Dakmak Substituted by Fady Fatal Dakmak Vrs 31st December Women's Movement Appeal No. H1/42/2019**

Section 5(3) of the Evidence Act, NRCD 323 provides as follows:

5(3) *No finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review because of the erroneous exclusion of evidence unless –*

(a) The substance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; and

(b) The court which decides on the effect of the error also determines that the excluded evidence should have been admitted and that the erroneous exclusion of the evidence resulted in a substantial miscarriage of justice.

It is our position that the exclusion or rejection of "R1" has not resulted in a substantial miscarriage of justice to the Appellants as defined above.

We associate ourselves with the observation made by the Trial Judge, Kyei Baffour, J.A. sitting as an additional High Court Judge in the case of **The Republic vrs Eugene Baffoe**

Bonnie & 4 Others case No CR 904/17 dated 12th May 2020 unreported, an obiter dicta which he refers to as his recommendations, as follows:

> ***"Admission or rejection of a document does not mean that a substantial miscarriage of justice has occurred. A document may be admitted alright but may have little or scant probative value. And if under Section 31 of the Courts Act, Act 459, where even there has been a conviction or acquittal and there is an appeal, the appellate court is enjoined to dismiss the appeal unless the Appellant can demonstrate that any technical defect or the point being canvassed was weightier enough to have occasioned a substantial miscarriage of justice. I posit that a decision by a trial court to admit or reject a document or admit or overrule a question at the trial, its impact on the outcome of the case in either sustaining a conviction or acquittal is very difficult to determine at that stage".***

It is our position that no substantial miscarriage of justice has been occasioned to the Appellants by the decision taken by the Trial Judge.

The fourth ground of appeal is therefore without merit and fails.

Conclusion:

In conclusion, the interlocutory appeal fails in its entirety and all the grounds are dismissed.

The Trial Court is hereby ordered to continue with the hearing of the case.

(SGD)

ALEX B. POKU-ACHEAMPONG

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I agree, **IRENE C. LARBI (MRS)**

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I also agree **OBENG-MANU JNR.**

(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

Nutifafa Nutsukpui for Appellants

Stella Ohene Appiah for Respondent