IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA A.D. 2021

CORAM:

JUSTICE VICTOR OFOE (MR.) J.A (PRESIDING)

JUSTICE JANAPARE A. BARTELS-KODWO (MRS.) J.A.

JUSTICE SOPHIA R. BERNASKO ESSAH (MRS.) J.A.

CIVIL APPEAL NO.: H1/8/2017

25TH JUNE, 2021

THE REPUBLIC - RESPONDENT/APPELLANT

VRS.

THE CIRCUIT COURT, TAMALE - APPLICANT/RESPONDENT

ABDULAI SIRTA - INTERESTED PARTY

EX-PARTE AYAABA

J U D G M E N T

BARTELS-KODWO J.A.

This is an appeal by the Respondent/Appellant (to be known here as the Appellant) i. e. the Republic against the Ruling of the High Court, Tamale dated 24th February, 2017 granting the Applicant/Respondent (to be known here as the Respondent) an application for Judicial Review in the nature of Certiorari quashing the conviction and

sentence of the Respondent by the Circuit Court, Tamale dated 7th September, 2016. This conviction had earlier been affirmed by the High Court on 15th February, 2017 in its judgment in respect of an Appeal by the Respondent on 28th September, 2016 against his conviction and sentence.

FACTS

Upon a complaint by the interested party employer of the Respondent to the police the Respondent was charged with one count of stealing and put before the Circuit Court, Tamale. It is the case that the Complainant, a licensed gold buyer installed a machine for crashing gold bearing rocks at his mine site in Wasipe where he engaged the Respondent as a site Manager. The gold byproduct of the crasher popularly known as 'over' was normally sold by the Complainant without incident however upon the accumulation of the by product on an occasion and in the absence of the Complainant the Respondent sold same without the knowledge of the Complainant and kept the sum involved claiming ownership of the byproduct.

He was arraigned before the Circuit Court, Tamale and found guilty on a charge of stealing after trial and convicted. He was thus sentenced to 300 penalty units or in default two years imprisonment on the 7th of September, 2016. Whilst he appealed against the conviction and sentence the Appellant appealed for the enhancement of the sentence. Both Appeals were heard but before judgment could be delivered by the High Court, Tamale, Commercial Division on 10th February, 2017, the Respondent filed an application for Judicial Review before another High Court in the form of Certiorari seeking to quash the judgment of the Circuit Court pertaining to his conviction and sentence though at his instance he had earlier adjourned the Judgment in his Appeal to the same date. His Appeal was however dismissed on 15th February, 2017 and the sentence rather enhanced to a fine of 5000 penalty units or in default 5 years imprisonment with hard labour.

The High Court 2 which was dealing with the Certiorari application was informed by the Registrar that the conviction in respect of which the Certiorari was being sought had been affirmed by another High Court, the Commercial Division, see page 90 of the Record of Proceedings (ROA). Despite this information it still dealt with the Certiorari application and went ahead to quash the conviction and sentence by setting aside the fine imposed with a further order that the amount be refunded to the Respondent.

It is in respect of this ruling of the High Court 2 quashing the earlier decision of the Circuit Court which had been affirmed by the High Court, Commercial Division that the State brings this Appeal on the following grounds.

GROUNDS OF APPEAL

a. That the judgment of the Circuit Court, Tamale dated 7th September, 2016 (per His Honour William Appiah Twumasi) having been affirmed by the High Court, Tamale (Commercial Division) presided over by His Lordship Daniel K. Obeng on 15th February, 2017 became a judgment of the High Court and was therefore not amenable to Certorari from another High Court.
b. That the Learned Judge did not have jurisdiction to order the refund of the fine of 300 penalty units paid by the Applicant/Respondent, same having been set aside and substituted with a fine of 5000 penalty units or in default 5 years imprisonment by the High Court, Tamale.
c. That the learned Judge erred when he quashed the conviction and sentence of the Applicant/Respondent on the ground that the Circuit Judge exceeded his jurisdiction when he convicted the Applicant/ Respondent which conviction was in breach of the Minerals and Mining Act, 2006 (Act 703) and the Constitution even though the Applicant/Respondent was charged under the Criminal Offences Act, 1960 (Act 29).

d. That the decision of the learned judge in quashing the conviction and sentence of the Applicant/Respondent is unreasonable and cannot be supported having regards to the fact that the Applicant/Respondent admitted in his affidavit in support of the Motion for Judicial Review that he was not the owner of the subject matter of the charge (which he admitted selling in his investigation caution statement).
e. That the learned judge erred in quashing the Applicant/Respondent's conviction and sentence when the Applicant/Respondent did not demonstrate in his application that any of the grounds for Certiorari to issue existed in his case.
f. That being a Court of coordinate jurisdiction, the Learned Judge erred when he declared in his ruling that the judgment of His Lordship Mr. Justice Daniel K. Obeng affirming the conviction and sentence of the Applicant/Respondent by the Circuit Court was a nullity.
g. Further grounds of Appeal may be filed upon receipt of the ruling.

The Appellant seeks these reliefs; that the Judgement of the Circuit Court, Tamale convicting the Respondent of stealing, which judgment was affirmed by the High Court, (Commercial Division) be restored. Secondly a declaration that the sentence of 5000 penalty units imposed by the High Court, Tamale, (Commercial Division) in the Applicant/Respondent's appeal is the sentence the Applicant/Respondent must serve.

Grounds (a), (b), and (f) were argued together by both parties since they substantially touch on the same issues and determination of (a) will settle (b) and (f).

APPELLANT'S ARGUMENTS

The Appellant in arguing these grounds reiterated the fact that constitutionally the High Court has supervisory jurisdiction over all lower courts and other adjudicating

bodies. See Article 141 of the 1992 Constitution of the Republic of Ghana. This he submitted has also been made plain in academic textbooks as can be found in the book THE MODERN LAW OF INTERPRETAION IN GHANA written by his Lordship Mr. Justice Dennis Adjei at page 228 of his book. Consequently, no matter how erroneous or unreasonable the decision of a High Court is, another High Court being a court of coordinate jurisdiction cannot impugn that decision. See the case of PUNJABI BROTHERS V NAMIH (1962) 2 GLR 46 @ 49 where Adumua-Bossman JSC as he then was stated the position of the law thus: - "(1) as long as a judgment of a superior court remains undischarged and of full force and effect, it is not competent to another court of co-ordinate jurisdiction to pronounce against its validity, however palpably erroneous it may appear to be". See also the case of KARIYAVOULAS AND ANOTHER V OSEI [1983-83] GLR 656 @ 668.

Learned Counsel argued that the purported quashing of the conviction and sentence of the Respondent on 24th February, 2017 was of no effect because at that time the conviction had earlier been affirmed by the High Court and the sentence enhanced on 15th February, 2017. It had then become a decision of the High Court and was therefore not amenable to be brought under an application for Certiorari by another High Court being a court of coordinate jurisdiction. He submitted that though Appeals and Certiorari are not mutually exclusive as can be seen from Articles 132 and 141 of the 1992 Constitution making it possible for a person aggrieved by the decision of a court to appeal that decision and also apply for Certiorari or vice versa, the circumstances under which that may occur are different. He stated that each case must be looked at on its merits. Hence in this matter, the peculiar circumstances are that the conviction and sentence having been upheld by one High Court another High Court cannot be seen to be quashing same because that has the effect of a court of coordinate jurisdiction exercising supervisory jurisdiction over another High Court.

He submitted further that the Appeal judgment was to be delivered on 17th January, 2017 yet was adjourned to the 10th of February, 2017 at the instance of the Respondent's counsel who prayed for extension of time to file his written submission since he had just been engaged. Earlier to this, the Appeal had been filed on 28th September, 2016 and both counsel had been asked to file their written submissions by 28th November, 2016. Despite the Respondent's prayer being granted to enable him file his written submissions for judgment on 10th February 2017, rather on the 1st of February, 2017 he filed an application for Certiorari which in learned counsel for the Appellant's view was an abuse of the Court process. This was so because the Respondent knew he had a judgment pending yet chose to file his application for judicial review before a different judge. In the case of REPUBLIC V CIRCUIT COURT ACCRA; EX PARTE KOMELEY ADAMS AND OTHERS (KOMIETEH ADAMAS (substituted by) OTSIATA IV INTERESTED PARTY) 2012 1 SCGLR 111 @ 115-116 Atubuga JSC as he then was had this to say "*There is judicial anxiety that if the certiorari lies side by side with an existing right of Appeal there is the danger that the decision on certiorari will avail nothing if the same order has been confirmed on appeal(which is ready to be heard) it is, if anything an abuse of process in the nature of lis alibi pendes to convoke the supervisory relief…*" .

Learned counsel for the Appellant also submitted that it was not proper for the High Court judge that heard the Certiorari application to have caused the Registrar to write on the 7th of February, 2017 to the High Court judge before whom the Appeal was pending to suspend delivering his judgment and await the outcome of the application before him. See page 90 ROA. This he stated is a judge seeking to stop another judge of coordinate jurisdiction from reading his judgment and same is unknown to the law. To make matters worse even after the Appeal judgment had been delivered and same was brought to the attention of the judge who was considering the certiorari application by a letter dated 21st February, 2017 (see page 99 of the ROA) he proceeded to quash this same conviction stating that the High Court which dealt with the Appeal had no

jurisdiction to hear the Appeal. This learned counsel respectfully stated was not the prerogative of the coordinate court to determine but rather the duty of a court higher than the High Court. Learned counsel submitted that with the setting aside of the initial fine payment and enhancement of same it was no longer available to be refunded to the Respondent as was ordered by the other High Court.

He then proceeded to argue Grounds (c), (d) and (e) together since a determination of one brings the others to rest. He reminded us of the discretionary nature of a Certiorari application which is administered by a Superior court over the decision of an inferior court /tribunal/ administrative body if need be. This normally does not determine the merits of the case since the test is whether the judgment in issue is in conflict with the law or breaches some statute or rule. See Justice Dennis Adjei's book on the "MODERN APPROACH TO THE LAW OF INTERPRETATION IN GHANA" pages 230 & 239. Counsel then took on the judgment in the Certiorari matter (see page 112 of the ROA) where the learned judge quashed the conviction and sentence of the Respondent by stating that in the Appeal judgment the learned judge exceeded his jurisdiction by ruling contrary to Article 257 (6) of the 1992 Constitution and the Minerals Act, 2006 (Act 703).

According to the Respondent Counsel the High Court judge in the Appeal matter, despite having knowledge of the above provisions which state that every mineral in its natural state is vested in the President in trust for the people of Ghana disregarded these provisions by stating that gold was ownerless in Ghana. He disagreed with him on this because no where did the judge state that "gold was an ownerless commodity" He referred to the judgment of the judge at page 47 of the ROA. Counsel argued that in as much as the charge against the Respondent was stealing it was essential that the ownership of the gold 'over' is determined before there can be a successful prosecution. See AMPAH V THE REPUBLIC (1977) 2 GLR 171 @ 175. Consequently, it cannot be said

that the trial judge was in conflict with the law in resolving the ownership of the subject matter. He therefore did not exceed his jurisdiction. Hence in quashing the conviction and sentence on grounds that the trial judge exceeded his jurisdiction in coming to the conclusion that the subject matter belonged to the interested party he was delving into the merits of the case which under an application for certiorari he was not expected to do. See the case of REPUBLIC V HIGH COURT, SEKONDI; EX PARTE AMPONG ALIAS AKBUFA KRUKOKO I (KYEREFO III & OTHERS INTERESTED PARTIES) [2011] 2 SCGLR 716 @ 717 holding 1 where the court delivered itself as follows *"it was well settled that certiorari was not concerned with the merits of the decision; it was rather a discretionary remedy which would be granted on grounds of excess or want of jurisdiction and or some breach of rules of natural justice, or to correct a clear error of law apparent on the face of the record. The error of law must be so grave as to amount to wrong assumption of jurisdiction; and it must be so obvious as to make the decision a nullity".*

Consequently, in his view the Respondent failed to demonstrate in his application for judicial review that there were compelling reasons for the judge to grant same. It is the Appellant's prayer that the conviction and sentence should be restored.

RESPONDENT COUNSEL

Learned counsel for the Respondent also argued Grounds (a), (b) and (f) of the Appeal together. He held the view that an Appeal and Review were not mutually exclusive, the fact that the Respondent had instituted an Appeal before the High Court Tamale, Commercial Division did not estop him from seeking a judicial Review of the same judgment of the Circuit Court, Tamale. He relied on the case of REPUBLIC V HIGH COURT CAPE COAST (J5/5/2009) 2009 GHASC 27.

He submitted that it is erroneous for the Appellant's counsel to hold the view that because the judgment of the trial Circuit Court had been affirmed by the Commercial

Division of the High Court the judgment became that of a court of coordinate jurisdiction and same could not be quashed by the other High Court under an application for certiorari.

He submitted further that due to the fact that the Commercial Division of the High Court delivered its judgment on 15th February, 2017 whereas the application for judicial review was filed on 1st February, 2017 meant that at the time the judgment was given the Certiorari application was still pending and the outcome of the Appeal on the same judgment pending did not automatically strip off the jurisdiction of the Court hearing the Certiorari application.

In making further submissions he stated that this court is faced with a novelty and has to make a determination on the effect of decisions made in an appeal and a certiorari which are in conflict. This is because whereas it is permitted under the law to pursue both an appeal and a certiorari simultaneously the rules failed to to provide mechanisms for dealing with the conflicting decisions from such simultaneous applications which are not mutually exclusive.

Therefore, in his view once the Commercial Division of the High Court was clothed with the Jurisdiction to entertain a certiorari application over the Circuit Court's judgment it also had jurisdiction to set aside the conviction and sentence by the Circuit Court. In his view every consequential decision flowing from the quashed judgment fell together with it. Thus, to him it is not the case that the earlier conviction and sentence of 300 units metamorphosed into a 5000-penalty unit because of the earlier conflicting appeal decision in respect of it.

Though learned counsel was in agreement with the EX PARTE KOMELEY case supra he drew the court's attention to the fact that the dictum therein was in reference to the Common law position that there is no resort to judicial review when there is a pending

Appeal. He submitted that it is significant to note that in that same case Atubuga JSC as he then was affirmed the existence of the right to appeal and review simultaneously thus; *"The reality however is that in practice the courts in recent times have liberalized the resort to these remedies to such an extent that the prejudice hardly arises from the incidence of appeal and certiorari or other remedies being pursued contemporaneously".* Similarly, he made reference to the text on the MODERN LAW APPROACH TO INTERPRETATION IN GHANA supra where at page 281 the learned author puts it aptly that "*By virtue of Article 132 and Article 242 of the Constitution of Ghana an appeal and certiorari may be filed against or impugn a decision at the same time and they are not mutually exclusive in Ghana.*" Thus, the KOMELEY case supra was not authoritative and conclusive on the simultaneous pursuit of an appeal and certiorari remedies in conflict.

With regard to ground "f" learned counsel submitted that it was raised on the erroneous impression that the obiter dicta of the judge in his certiorari ruling at page 115 of the ROA was part of his ruling on the certiorari i.e. "*before I conclude the court's attention has been drawn to the fact that the judgement in respect of that appeal…..The judgement would be declared a nullity at the appropriate forum but suffice it to say that where the original decision from which an appeal emanated has been quashed it automatically affects the outcome of the appeal* " this obiter he argued cannot be taken as part of the main ruling on the certiorari which has attracted this instant appeal since the judge made it very clear that he was not pronouncing on the High Court (Commercial Division) appeal decision. The grounds a, b and f ought to therefore fail as same are without merit.

With regards to grounds c, d and e learned counsel for the Respondent held the view that the learned High Court judge did not err in quashing the judgment of the lower court on grounds that it breached the 1992 Constitution and s.1 of Act 703 supra. He was of the view that the Respondent had demonstrated enough grounds for the award of his review reliefs and so the judge's decision was not unreasonable. He relied on the

case of REPUBLIC V HIGH COURT (COMMERCIAL DIVISION) SUNYANI EX PARTE: ADELINA OFORI AND NIKABS GBANDE AND ANOTHER [SUPREME COURT, ACCRA] CVAN J5/36/2016

In that case the court enumerated the grounds on which a certiorari application will be granted. In their case the Respondent per his affidavit evidence attached to his statement of case as can be found on pages 62 and 63 of the ROA demonstrated the grounds of appeal meticulously. These were amply backed by counsel's submissions in support of same as can be found at pages 68, 69 and 70 of the ROA. It is his submission that the High Court in the certiorari application found out that the Circuit Court judgment was in contravention of Article 257 (6) of the 1992 Constitution and s.1 of Act 703 and relied on the REPUBLIC V HIGH COURT, (FAST TRACK), ACCRA: EX PARTE NATIONAL LOTTERY AUTHORITY (HANA LOTTERY OPERATORS ASSOCIATION & ORS INTERESTED PARTIES) (2009) SCGLR 390. He referred to the dictum of Dr. Date Bah JSC as he then was in that case where he stated "*The learned Judge acted in obvious excess of his jurisdiction. No judge has authority to grant immunity to a party from breaching the consequences of an act of parliament but this was the effect of the order granted by the learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders.*" In that same case the Court stated further "*That a judge knowing very well that the law has made the carrying on of a particular business illegal authorizes a person to carry on with prohibited business pending the determination of their appeal is not in keeping with the judge's duty to uphold the law. The Respondent did not have the jurisdiction and power to authorize anybody to breach the law and any such decision will not only be a nullity but also unreasonable*".

With reference to the above statement, it is learned counsel's view that the Circuit Court judge having been made aware that the object of the crime was gold stolen in its natural state for which the Interested party did not have a license to mine same the Circuit

court judge ought to have ordered the proceeds of the sale to the State and not the interested party. In doing so he was endorsing that illegality. Better still the interested party and the Respondent should have been tried together for illegal mining or mining without a license. Furthermore, he submitted that they are entitled to a judicial review because the trial Court acted irrationally and unreasonably when it did not order for an Assay Report on the gold but chose to accept the mere claim of the interested party as to its value. He ended his submissions by stating that they had demonstrated reasonable grounds that entitled them to the grant of the relief of certiorari. In his view the judgment attracted the sanction or remedy of a certiorari because the decision contravened not only statute but also constitutional provisions. Thus, the judge was not unreasonable in quashing the decision of the Circuit Court, Tamale. It is his view that the instant appeal is incompetent and should fail on all the grounds raised.

THE COURT'S ANALYSIS

From the grounds of appeal filed and argued we have also looked at the following grounds together namely grounds (a), (b) & (f) and the determination of the first one puts the other two to rest:

(a) That the judgment of the Circuit Court, Tamale dated 7th September, 2016 (per His Honour William Appiah Twumasi) having been affirmed by the High Court, Tamale (Commercial Division) presided over by His Lordship Daniel K. Obeng on 15th February, 2017 became a judgment of the High Court and was therefore not amenable to Certiorari from another High Court.

(b) That the Learned Judge did not have jurisdiction to order the refund of the fine of 300 penalty units paid by the Applicant/Respondent, same having been set aside and substituted with a fine of 5000 penalty units or in default 5 years imprisonment by the

High Court, Tamale (Commercial Division) presided over by Mr. Justice Daniel K. Obeng in an Appeal filed by the Applicant/Respondent.

(f) That being a Court of coordinate jurisdiction, the Learned Judge erred when he declared in his ruling that the judgment of His Lordship Mr. Justice Daniel K. Obeng affirming the conviction and sentence of the Applicant/Respondent by the Circuit Court was a nullity.

Though both parties hold the view that an appeal and an application for judicial review are not mutually exclusive as set down by provisions of the 1992 Constitution earlier referred to in this judgment, it is the case of the Appellant that once the appeal was pending and judgment in same was expected to be delivered on 10th February, 2017 it was an abuse of process for the Respondent to file an application on 1st February, 2017 for judicial review of the same judgment before another High Court. See the case of REPUBLIC V CIRCUIT COURT ACCRA; EX PARTE KOMELEY ADAMS supra.

In any case the judgment was adjourned again at the instance of the Respondent to 15th February, 2017 when it was delivered. Hence once the High Court hearing the Appeal had delivered same and upheld the conviction and enhanced the sentence the judgment of the Circuit Court that judgment no longer existed since there was now a judgment of the High Court which was not amenable to an application for judicial review by a court of coordinate jurisdiction.

The Respondent not unnaturally was opposed to this. With his right belief that an appeal and a review are not mutually exclusive coupled with the fact that a High Court has jurisdiction over all lower courts learned counsel for the Respondent was of the firm view that the High Court 2 Tamale that exercised jurisdiction in granting the application for judicial review in respect of the Circuit Judgment committed no judicial sin in doing so since this was a Constitutional right. He disagreed with the Appellant's

position that once the judgment of the High Court had affirmed the Circuit Court judgment and in doing so upheld the conviction and enhanced the sentence it had overrun the Circuit Court judgment since it was now a High Court Judgment which was not subject to Certiorari by another High Court.

This is because the application for judicial review before the High Court 2 was one to quash the judgment of the Circuit Court dated 7th September, 2016 and not the judgment of the High Court dated 15th, February, 2017. Learned Counsel was of the opinion that the right of the High Court 2 to exercise its review jurisdiction was not taken away simply by the outcome of the Appeal on the same judgment that was pending a review. He submitted that though both an appeal and a review could be pursued contemporaneously the law failed to provide mechanisms for dealing with conflicting decisions from this kind of venture which provide conflicting decisions in an appeal and a review decision.

We therefore find ourselves at this crossroad. However, there are some questions that should guide us in doing away with this legal mischief. Is it the case that when both parties chose to appeal and cross appeal the Respondent could not have gone ahead to exercise his right to apply for certiorari against the Circuit judgment in the same High Court where he had cross appealed for his conviction and sentence to be set aside? We are of the firm opinion that he ought to have done that to avoid the legal gymnastics that has taken place.

Now that that did not happen what is the effect of the scenario before us where we have the appeal judgment of the High Court affirming the Circuit judgment whilst the other High Court 2 also exercised judicial review over same? It is clear from the ROA that the High Court, Commercial Division delivered its appellate judgment over the Circuit Court judgment in issue on the 15th of February, 2016. Indeed, from the ROA at page 99 we notice that counsel for the Appellant notified the Registrar that judgment had been

delivered and the conviction confirmed. Despite this the other High Court went ahead to entertain the review application and quashed the conviction. At this point which conviction was being quashed?

The question to be answered or asked now is, at the point when the High Court Commercial, Division upheld the Circuit Court's Conviction and enhanced the sentence what was the status of the Circuit Judgment? We find that the original fine was 300 penalty units in default two years imprisonment which the High Court had enhanced to 5000 penalty units or in default 5 years imprisonment. In our respectful view the Circuit Judgment had at this point been overtaken by the High Court decision enhancing it.

In that regard it was no longer available to be subjected to judicial review. Consequently, the Respondent cannot argue that the application for judicial review was in respect of the Circuit judgment. It is therefore not the case that the High Court 2 in exercising its jurisdiction to quash same was not touching the High Court judgment at all and as such being a court of coordinate jurisdiction it was not overturning the appellate decision of the High Court by its order for certiorari against the now non-existent Circuit Court judgment.

We find as a fact that at the time the High Court 2 delivered its certiorari ruling the Circuit judgment was no longer available. The events of its affirmation and enhancement by the High Court in its appeal judgment had overtaken it. The Certiorari ruling then availed nothing because at that point there was nothing to be quashed since that judgment no longer existed in the form in which it was delivered.

As a result, we are in agreement that the grounds of appeal (a), (b) & (f) are upheld hence the judgment of the Circuit Court, Tamale dated 7th September, 2016 having been affirmed by the High Court, Tamale (Commercial Division) on 15th February, 2017

became a judgment of the High Court and was therefore not amenable to Certiorari from another High Court.

Having come to this conclusion it is our decision as well that the Learned Judge did not have jurisdiction to order the refund of the fine of 300 penalty units paid by the Respondent, same having been set aside and substituted with a fine of 5000 penalty units or in default 5 years imprisonment by the High Court, Tamale (Commercial Division. It is also settled that being a Court of coordinate jurisdiction, the Learned Judge erred when he declared in his ruling that the judgment of His Lordship Mr. Justice Daniel K. Obeng affirming the conviction and sentence of the Respondent by the Circuit Court was a nullity.

We now move on to consider grounds (c), (d) & (e) together which are:

(c) That the learned Judge erred when he quashed the conviction and sentence of the Applicant/Respondent on the ground that the Circuit Judge exceeded his jurisdiction when he convicted the Applicant/ Respondent which conviction was in breach of the Minerals and Mining Act, 2006 (Act 703) and the Constitution even though the Applicant/Respondent was charged under the Criminal Offences Act, 1960 (Act 29).

(d) That the decision of the learned judge in quashing the conviction and sentence of the Applicant/Respondent is unreasonable and cannot be supported having regards to the fact that the Applicant/Respondent admitted in his affidavit in support of the Motion for Judicial Review that he was not the owner of the subject matter of the charge (which he admitted selling in his investigation caution statement).

(e) That the learned judge erred in quashing the Applicant/Respondent's conviction and sentence when the Applicant/Respondent did not demonstrate in his application that any of the grounds for Certiorari to issue existed in his case.

The sum of the Appellant's submissions in the matter of the certiorari ruling is that the learned trial judge exceeded his jurisdiction in stating that the subject matter belonged to the interested party. In doing so he was delving into the merits of the case. The Respondent disagreed with this and maintained that it had demonstrated sufficient grounds to warrant the grant of the remedy of certiorari and so the decision of the learned High Court judge should be affirmed. We have in the earlier part of this judgment looked at the submissions of both counsel in detail in respect of the grounds of Appeal pertaining to the certiorari ruling. We are in agreement that a Certiorari does not go to the merits of a case. Our view is that there was no need for the certiorari ruling in the wake of the Appeal judgment.

Having decided that once the Appeal had affirmed the Circuit Court Judgment same was no longer available to be subjected to a review application we are of the view that the present grounds under determination are otiose. The holding in respect of the earlier grounds disposes of these latter grounds as well as settle this appeal. The learned High Court judge erred in exercising a jurisdiction in respect of a non- existent judgment more so when the Appeal judgment had been brought to his notice. As a result, the High Court 2 ruling in respect of the certiorari is hereby set aside and the High Court Commercial Division Appeal judgment is sustained.

In conclusion we find merit in the Appeal and we allow same. The Judgement of the Circuit Court, Tamale convicting the Respondent of stealing, which judgment was affirmed by the High Court, (Commercial Division) remains as upheld by the High Court, Commercial Division consequently there is a declaration that the sentence of

5000 penalty units in default 5 years imprisonment imposed by the High Court, Tamale, (Commercial Division) is the sentence the Respondent must serve.

(Sgd.)

JANAPARE A. BARTELS-KODWO (MRS.)

(JUSTICE OF APPEAL)

CONCURRING JUDGMENT:

OFOE, J.A.:

This is a concurring judgment. I will adopt the facts narrated by my able sister in the lead judgment but will provide a summary for the purposes of this concurring opinion.

We are here dealing with a criminal case that had emanated from the Circuit Court. The accused was charged with stealing, contrary to section 124 of the Criminal Offences Act 1960, Act 29, and convicted accordingly. He was sentence to a fine of 300 penalty units or in default 2 years imprisonment. He was ordered to refund the money realized from the sale of the gold dust referred to as "over" to the complainant, Abdulai Sirta. The accused, Patrick Ayaba, was dissatisfied with his conviction and sentence and therefore on the 27th of September 2016, he filed a petition of appeal to the High Court (Commercial Division). His complaint was in substance against the finding of the circuit judge that his counterpart in the gold dust business, Abdulai Sirta, was the owner of the gold dust (over).

On the 28th of September 2016, the State also filed what I will call a cross petition of appeal against the decision of the Circuit Judge. Its grievance was that the choice of sentence by the trial judge of 300 penalty units, was too low. So we had both appellants before the High Court (Commercial Division). But on the 1st of February 2017, the appellant, Ayaba further filed an application for certiorari which was put before another High Court.

At this stage we had the two parties who were before the Circuit Court now before the High Court (Commercial Division) on appeal. Then the appellant, Sirta added another process, application for certiorari. From the record of appeal both processes were held within the same time. Whilst the appeal was being heard in the Commercial Division of the High Court the certiorari application was also being heard by the other High Court. The appeal processes ended on the 15th of February 2017 with the High Court dismissing the appeal and enhancing the sentence to 5000 penalty units or in default 5 years imprisonment. On the 24th of February 2017, the other High Court handling the certiorari application concluded, quashing the judgment of the Circuit Court and ordering an amount of GH¢3600 paid by the appellant, Ayaaba to be refunded to him. It is this outcome of the certiorari application that has birthed this appeal before us by the State.

GROUNDS OF APPEAL

a. ***That the judgment of the Circuit Court, Tamale dated 7th September, 2016 (per His Honour William Appiah Twumasi) having been affirmed by the High Court, Tamale (Commercial Division) presided over by His Lordship Daniel K. Obeng on 15th February, 2017 became a judgment of the High Court and was therefore not amenable to Certorari from another High Court.***
b. ***That the Learned Judge did not have jurisdiction to order the refund of the fine of 300 penalty units paid by the Applicant/Respondent, same having been set***

aside and substituted with a fine of 5000 penalty units or in default 5 years imprisonment by the High Court, Tamale.

c. ***That the learned Judge erred when he quashed the conviction and sentence of the Applicant/Respondent on the ground that the Circuit Judge exceeded his jurisdiction when he convicted the Applicant/ Respondent which conviction was in breach of the Minerals and Mining Act, 2006 (Act 703) and the Constitution even though the Applicant/Respondent was charged under the Criminal Offences Act, 1960 (Act 29).***
d. ***That the decision of the learned judge in quashing the conviction and sentence of the Applicant/Respondent is unreasonable and cannot be supported having regards to the fact that the Applicant/Respondent admitted in his affidavit in support of the Motion for Judicial Review that he was not the owner of the subject matter of the charge (which he admitted selling in his investigation caution statement).***
e. ***That the learned judge erred in quashing the Applicant/Respondent's conviction and sentence when the Applicant/Respondent did not demonstrate in his application that any of the grounds for Certiorari to issue existed in his case.***
f. ***That being a Court of coordinate jurisdiction, the Learned Judge erred when he declared in his ruling that the judgment of His Lordship Mr. Justice Daniel K. Obeng affirming the conviction and sentence of the Applicant/Respondent by the Circuit Court was a nullity.***
g. ***Further grounds of Appeal may be filed upon receipt of the ruling.***

From the facts and proceedings that had attended this case I see the need to isolate the issue what the status of the judgments of the two trial courts are for the purposes of enforcement or obedience since one will have to give way to the other. It is not in dispute that the certiorari proceedings concluded differently from the appeal judgment.

Its effect, in fact, was to quash the very basis and the whole bottom of the case that was determined on appeal by the Commercial Court, High Court. The other High Court in quashing the circuit court judgment did not specifically mention the appeal judgment as quashed. It could not have had jurisdiction to make such declaration though, being a court of coordinate jurisdiction. Thus, that judgment also prevails and is a subsisting judgment enforceable by law. It cannot be imagined that the authorities that permitted appeal and certiorari to co-exist contemporaneously, expected such situation where two judgments inconsistent with each other should result. Any such expectation will be a clear invitation to abuse the process of the court.

How could the conflicting situation we have here be avoided? It is worth noting that it was the respondent Patrick Ayaba who filed the appeal before the High Court and when proceedings were ongoing, he filed the certiorari application before the other High Court. It is also important to note that the subject matter before the two courts were the same- appropriation of gold dust and conviction of the respondent by the circuit court. Whilst the appeal court was considering whether the conviction and sentence should stand, the certiorari court was also considering whether the trial and conviction of the respondent was not in breach of statute and should therefore stand or not. It is my view, in support of the lead judgment, that immediately the appeal court made its determination the certiorari proceedings should have been truncated there and then since a determination had been made on the subject matter. There was nothing left for any other court to try and the certiorari proceedings should have been discontinued. In fact the principle of res judicata could have been applicable here since the subject matter had been determined in this earlier appeal court. That both proceedings could be resorted to at the same time by a party was a right conferred on a party but once one was determined the other ceased to have any legal relevance and merged into the one determined earlier, in our case the appeal judgment. The certiorari proceedings terminates for want of cause of action.

It is my conclusion also as in the lead judgment that the certiorari proceedings are hereby set aside to enable the judgment of the appeal

(Sgd.)

V. D. OFOE (MR.)

(JUSTICE OF APPEAL)

(Sgd.)

Bernasko-Essah (Mrs.) *I agree* ***SOPHIA R. BERNASKO ESSAH*** **(MRS.)**

(JUSTICE OF APPEAL)

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