THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
A.D 2011

CORAM: S.K. DATE-BAH JSC (PRESIDING)
R.C. OWUSU (MS) JSC
J. DOTSE JSC
ANIN-YEBOAH JSC
B.T. ARYEETEY JSC

CRIMINAL APPEAL
Suit No: J3/3/2010
Date: 16TH MARCH, 2011

DEXTER EDDIE JOHNSON **APPELANT**

VRS

THE REPUBLIC **RESPONDENT**

J U D G M E N T

DR. DATE-BAH JSC:

On the 18th day of June 2008, the appellant was convicted of a grisly murder by a jury at the Fast Track High Court, Accra. The appellant appealed against his conviction and against an order by the High Court forfeiting his Mercedes Benz car. The appellant also filed supplementary grounds of appeal contending that the death sentence imposed on him violated the prohibition of inhuman and degrading treatment under article 15(2) of the 1992 Constitution; the right to protection from arbitrary deprivation of life under article 13(1) of the Constitution; and the right to a fair trial under artlcle 19(1) of the Constitution. The appeal was dismissed by the Court of Appeal, resulting in the present further appeal to this Court.

Before this Court, the appellant has appealed against both conviction and sentence. His grounds of appeal are as follows:

"**(a) Grounds of appeal against Conviction:**

1. The dismissal of the Appellant's appeal against conviction for murder is unreasonable or cannot be supported having regard to the evidence on record.
2. The judgment of the Court of Appeal occasioned a substantial miscarriage of justice as the Trial High Court Judge's acquittal of the Appellant on the charge of conspiracy to commit murder rendered the conviction on murder unsafe.
3. The judgment of the Court of Appeal occasioned a substantial miscarriage of justice due to the complete failure by the trial High Court Judge to give a proper direction on circumstantial evidence.
4. The Court of Appeal erred in ignoring the inadmissible hearsay evidence that was admitted by the trial High Court with severe prejudice for the defence.
5. The Court of Appeal should have quashed the Appellant's conviction as the toll ticket allegedly recovered from the appellant's car was obtained in breach of the rules regarding searches of a suspect's property and should not have been admitted.

(b) Grounds of appeal against Sentence:

1. As sentencing is a question of law to be solely determined by the Trial High Court Judge at the jury trial, the Court of Appeal erred in holding that the challenge to the mandatory death penalty for murder could only be dealt with on appeal if it was raised as an issue before the Trial High Court Judge.
2. The mandatory imposition of the death penalty on the Appellant for murder cannot stand since section 46 of the Criminal Code, 1960 (Act 29) is in utter contravention of Articles 15(2) and 33(5) of the 1992 Constitution that prohibits inhuman and degrading treatment.
3. The mandatory imposition of the death penalty on the Appellant for murder cannot stand since section 46 of the Criminal Code, 1960 (Act 29) is in violation of Article 13(1) of the 1992 Constitution of Ghana that guarantees protection from arbitrary deprivation of life.
4. The mandatory imposition of the death penalty on the Appellant for murder cannot stand as section 46 of the Criminal Code, 1960 (Act 29) is in violation of Article 19(1) of

the 1992 Constitution of Ghana that guarantees the right to a fair trial.

5. Further grounds of appeal to be filed upon receipt of the certified true copy of the judgment of the Court of Appeal."

I will first consider the grounds of appeal against conviction before examining the issue of the constitutionality of the sentence of death in murder cases. If the appeal against conviction succeeds, it will not be necessary to consider the constitutional question.

The appeal against conviction

The jury convicted the appellant of the murder of one John Kragness, who was killed at Salem, near Old Ningo, in the Greater Accra region on 27th May 2004. The conviction was on the basis of the circumstantial evidence led by the prosecution. As already mentioned above, the appellant appealed against both sentence and conviction to the Court of Appeal and then to this Court, when the Court of Appeal affirmed the decision of the High Court.

The Bill of Indictment against the appellant contained two counts: one was for conspiracy to commit murder and the second was for murder. After the trial of the appellant by jury before the Fast Track High Court Accra, presided over by Her Ladyship Irismay Brown JA, sitting as an additional High Court Judge, the learned judge directed the jury to acquit the appellant on the count of conspiracy to murder, but the jury returned to deliver a verdict convicting the appellant on both counts. The learned judge then acquitted and discharged the appellant on the count of conspiracy and proceeded to sentence him to death on the count of murder.

The prosecution's case was that the deceased Kragness came to Ghana on a business trip with his father, Leonard Kragness. They had an interest in buying gold in Ghana and it was in connection with this business that they developed a relationship with the appellant. On 27th May 2004 the appellant drove to the Indo Hotel in Accra with his cousin. The deceased left his room in the Hotel and went out with the appellant. They all three left in the appellant's Mercedes Benz car. It was the deceased's understanding that the appellant was taking him to Tarkwa to buy gold and he had obtained US$90,000 in cash to enable him to do so.

The appellant and the deceased left the Hotel at about 5pm. Unknown to them, they were followed by security agents from the Bureau of National Investigations (BNI), (PW7 and PW8). At some point on the route, however, the surveillance agents lost the deceased and appellant. It was after this that the appellant drove to a place near Old Ningo; took the deceased out of the car; attacked him with a cutlass; shot him and set his body alight. The cause of death was severe haemorrhage and asphyxia resulting from the deceased's throat being cut. The time of death was around 8.30 pm on 237 May 2008. There was, however, no direct eye-witness evidence of this murder.

On 29th May 2008, the appellant was invited to the Homicide Unit of the Police, in the company of his lawyer. He was there arrested on suspicion of murder and questioned by the Police. The circumstances relied on by the Police as evidence of his guilt included: the fact that on the day after the murder, the appellant had given $12,000 in cash for safekeeping to a former girlfriend and that the appellant's explanation for the source of this cash was untrue.

The appellant pleaded alibi by way of defence. His story was that on the day of the murder, he went to the Indo Hotel and gave the deceased a lift in his Mercedes Benz car. From there he drove to the Golden Tulip Hotel in Accra and dropped the deceased off. That was at about 6 pm. The appellant claimed that he saw the deceased being given a lift in another Mercedes Benz car and driven away. From the Golden Tulip Hotel, the appellant proceeded to visit his octogenarian aunt at Kanda in Accra. He spent the evening there and did not leave Accra that day. His alibi was supported by two witnesses: his aunt and her househelp.

Only two of the grounds of appeal against conviction filed by the appellant were argued by him. The first of these grounds argued by the appellant in his Statement of Case was that the Court of Appeal erred in rejecting the complaint that highly prejudicial hearsay evidence was wrongly admitted.

The appellant complained that PW 10, Hansen Dogbe, gave inadmissible hearsay evidence on matters which were highly prejudicial to the defence; that he objected to this hearsay evidence but that his objection was overruled. This complaint was based on the following passage, *inter alia,* from the evidence in chief of the said witness (see pp.174-175 of the Appeal Record):

"Q: You just told the court that when you interrogated him this is what he had told you but you are the investigator what did you do after getting that information form (*sic)* him.

A: My Lord I discovered during my investigation that on the 27th day of May 2004 at about 5:pm the accused person that is Dexter Johnson and Telley Johnson drove to Indo Guest House picked the late John Kraggness in the Mercedes Benz number **RT 9716Y** drove to the Ring Road and to the Dankwa Circle to the cantonments back to the International School back to the Indo Guest House made a turn over there came back to the Indo Guest House made a turn over there came back to the same route to Dunkwa (*sic)* Circle drove through the Ring Way and to the Kanda High Way, and bought fuel at the cost of Two Hundred and Fifty Thousand Cedis, at the Mobil filling station there where the deceased paid the two hundred and fifty thousand cedis thereafter the deceased bought two 'Yes' mineral bottle water from the Mobil Max over there then they drove to Kanda High Way, back to TV3, through to Kaukudi junction to West Airport through to continental plaza hotel.

SENANU: My Lord P.W. 10 is he relating what he is telling the court My Lord, I have an objection to what he is speaking as if he is speaking from his own experience, what he witnessed but the way he is saying it, it is as if he was there and the way he is relating the issue ..

BY COURT: Please sit down and raise this when you are doing your cross-examination. This is what his investigations revealed. Please contitnue.

WITNESS: They drove through to Continental Plaza Hotel then to untarred road came through the Gulf House to the Madina Accra Motor Way through Tetteh Quarshie, and then to Motor Way road to Prampram junction and then branch to Prampram then to New Ningo and then to Salem where the deceased was murdered."

The response of the Court of Appeal to a similar argument before it was (*per* Akoto-Bamfo JA (as she then was) at p. 450):

> "With regard to the issues raised on the pieces of evidence learned counsel classified as hearsay, it is of significance that there was no objection raised when the prosecution sought to lead those pieces of evidence at the trial, aside from a feeble complaint that the investigator was narrating the events as if he were an eye witness.
>
> Undoubtedly the Evidence Act expressly sets out the procedure for objecting to inadmissible pieces of evidence.
>
> **It states**
>
> Section 6: In every action and at any stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time the evidence is offered.
>
> 2. Every objection to the admissibility of evidence shall be recorded and ruled upon as a matter of course."
>
> There is nothing on record to show that an objection was raised and ruled upon. It is therefore too late in the day to lodge a complaint."

The appellant in his Statement of Case rejected this interpretation of what had transpired at the trial, insisting that his counsel had raised an objection and the court had rejected it. I do not accept the appellant's interpretation of the passage from PW 10's evidence set out above. At most, counsel's intervention was an incipient objection which was not followed through. Counsel should have been more insistent in clarifying that he was making an objection on the ground of hearsay and demanded a ruling on his objection. On the basis of the actual entry of the episode on the record, I have no option but to agree with the Court of Appeal that no effective objection to the alleged hearsay evidence was raised and no ruling was made on any such objection. The learned trial judge's statement can only be construed as advice to counsel, which he should have rejected and insisted on formally raising his objection.

Accordingly, I would dismiss this ground of appeal against conviction.

The only other ground against conviction that the appellant argued in his Statement of Case was that based on the learned trial judge's alleged failure to give a proper direction on circumstantial

evidence. The appellant stressed that nowhere in the summing up did the learned trial judge make any reference to the approach the jury should adopt towards circumstantial evidence. The appellant contended that he was entitled to a clear direction by the learned trial judge as to how the jury should approach circumstantial evidence.

Again, the appellant raised a similar argument before the Court of Appeal whose response to it was as follows (*per* Akoto-Bamfo JA, as she then was, at p. 451 of the Record):

> "Even though there is no format when summing up, it is clear from the record of proceedings that the learned judge did not adequately direct the jury on the circumstantial evidence; the issue is whether the omission is fatal. I think not; for the principle is that no matter the misdirection if the court is satisfied that there is overwhelming evidence against the appellant and that properly directed the jury could not have given any other verdict than that of guilty, the misdirection will not avail the appellant. **Yirenkyi v STATE 1963 1GLR 66** Addai v Rep 1973 1 GLR 312. Indeed in the Yirenkyi case supra at page 75, the Supreme Court stated "The law, as we understand it, is that whatever the nature of the misdirection complained of (whether it be an omission by the judge to put the defence adequately to the jury or a misdirection on a point of law) if it can be predicted that properly directed the jury must have returned the same verdict, then, there being in that case no substantial miscarriage of justice, the appeal fails.
>
> In the case under consideration it is obvious from the evidence that there was abundant evidence on record, particularly those of pws 7 and 8 which were rightly relied upon, to link the appellant to the commission of the crime. The omission is therefore not fatal and the appeal accordingly fails on that limb."

This is an unexceptionable statement of law and I fully endorse it. It follows that I do not consider that the non-direction on circumstantial evidence occasioned any substantial miscarriage of justice. Accordingly, I would dismiss this ground of appeal against conviction as well. The appellant's conviction on the count of murder is thus affirmed.

The appeal against sentence.

Having dismissed the appellant's grounds against conviction, I now owe an obligation to consider his grounds against sentence. Before this Court, the appellant repeated his argument before the Court of Appeal that the mandatory imposition of the death penalty for all offences of murder violates the Constitution of Ghana on three grounds: first, it violates the prohibition of inhuman and degrading treatment or punishment under article 15(2) of the Constitution; secondly, it violates the right to protection from arbitrary deprivation of life under article 13(1); and, thirdly, it violates the right to a fair trial under article 19(1).

Before discussing the merits of these grounds, let me first deal with the objection by the Court of Appeal to considering the constitutional issues raised by the appellant before it. The appellant's first ground of appeal against sentence is based on the Court of Appeal's decision on this issue. The appellant's complaint is that the Court of Appeal erred in holding that the challenge to the mandatory death sentence could only be dealt with before them if it had been raised before the trial High Court judge. Akoto-Bamfo JA, as she then was, had said (at p. 452-3 of the Record):

> "It is my view that this is not the appropriate forum. It must be pointed out that this being purely an appellate court; it has *(sic)* can properly exercise its jurisdiction where it undertakes to have a decision by a lower court reconsidered or reviewed. In the exercise of this discretion, it may either re-open or reconsider issues and facts raised before the trial court and satisfy itself that the verdict is supported by the evidence on record.
>
> In the case under consideration none of the issues raised in those grounds were raised before the trial court; they were indeed not reflected in the record of proceedings.
>
> More importantly, it is my view that the appellant is seeking for a declaration that capital punishment be declared null and void as being inconsistent with the provisions of constitution."

The appellant is right to point out that the issue of the constitutionality of the mandatory death sentence is an issue of law that could be raised before the Court of Appeal, even if not argued in the court below. It was an issue of law that arose from the facts of the case and could therefore be raised before the appellate tribunal. However, the Court of Appeal was right in pointing out

that it was not the right forum for the ventilation of that issue. Nonetheless, the Court could have referred the issue to this court for interpretation pursuant to Article 130(2) of the 1992 Constitution. Be that as it may, this Court has jurisdiction to consider the issue and resolve it. *Attorney-General* v *Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271 is authority for the proposition that an appellate court can deal with a constitutional issue arising from the record before it, even if the issue was not raised in the court below. The barrier to the Supreme Court considering the constitutional issue raised on the facts of the *Faroe Atlantic* case was stronger than in this case, nevertheless, it found its way clear to deciding the issue in that case. In that case, I said (at p. 293-4 of the report) :

> "Although the Attorney-General did not appeal against the summary judgment entered against him, if this Court finds that that judgment was based on a contract that was null and void as being in conflict with the Constitution, the question will arise whether this Court can ignore that non-compliance with the Constitution.
>
> It may be cogently argued that *res judicata* does not apply in these circumstances since the suit is not yet concluded. An issue has arisen within the same proceedings as to whether damages can lawfully be assessed on a contract which may have been concluded in breach of the Constitution. I believe that it is the duty of this Court to interpret the relevant constitutional provision and determine its applicability to the facts of the present case, in spite of the summary judgment awarded earlier by the trial judge."

Similarly, Sophia Akuffo JSC, in her judgment, said (at p. 305):

> "Whilst there is no doubt that the manner in which the defendant has dealt with this issue, as if it were an after-thought (which he force-fed into this appeal under the ground of the judgment being against the weight of the evidence) is regrettable and even execrable, the fact still remains that, as a constitutional issue, it is a fundamental one which we cannot ignore. Indeed, had the Principal State Attorney not introduced it one way or the other, we should have been duty bound, as a court existing under the 1992 Constitution, to raise it *suo motu* and directed both counsel to address us on it."

Wood JSC (as she then was) also enunciated the applicable principles as follows (at p. 309):

> "The salutary and well-known general rule of law is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being one of them. A jurisdictional issue can therefore be taken or raised at any time, even for the first time, on appeal. Another exception is where an act or contract is made illegal by statute....Again, the well-established general rule is that where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence, it should be allowed. Substantial constitutional issues, such as the one raised before us, falls neatly into this category."

From the above discussion, it is clear that there is authority to support this court considering the constitutional point of law raised by the appellant against his sentence. I accordingly propose to do so next.

After a careful consideration of the merits of the appellant's case against the constitutionality of his sentence, I have reached the conclusion that his case is unanswerable. The soundness of the arguments adopted in numerous persuasive authorities from other common law jurisdictions on this issue is irrefutable. The weight of these persuasive cases from Commonwealth jurisdictions and the United States of America is irresistible. These arguments will be summarised below.

In response to the appellant's case, the argument made on behalf of the Attorney-General for the Republic was quite lame. In the Respondent's Statement of Case, it argues as follows (at p. 6):

> "In any case, laws are made by Parliament, and since the death penalty is found in the Criminal Offences Act 29/1960 it is only Parliament which can change it if there is the need for it. Until that is done nobody had the right to abolish the death penalty."

With respect, this is a disappointing proposition of law and is quite incorrect. Although it is obvious that Parliament makes laws, that does not imply that all the laws it makes, or has made, are valid and constitutional. Under the 1992 Constitution, what Ghana has is supremacy of the Constitution and not of Parliament.

Accordingly, this Court has authority to invalidate even law existing as at the time of the coming into force of the Constitution, if this Court considers such law to be in conflict with the Constitution. Article 11(6) expressly provides for this in the following terms:

> "The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution, or otherwise give effect to, or enable effect to be given to, any changes effected by this Constitution."

The Statement of Case of the Respondent thus signally fails to address the crucial issue in this case, which is whether the mandatory sentence of death for the crime of murder is compatible with the constitutional provisions referred to by the appellant. It is also worth pointing out that what the appellant is seeking to do is not to "abolish the death penalty" as claimed in the Respondent's Statement of Case. His attack is on only the mandatory death penalty for murder. Since his challenge is not to the death penalty in general under our Constitution, this opinion should not be considered as expressing a view on that issue. It is important that the narrow constitutional issue under consideration in this case is not confused with the wider question of the constitutionality of the death penalty in general, which is not an issue in this case.

The appellant's case against sentence may be summarised as follows: the common law crime of murder, which is, with some refinement relating to the primacy of intention, the basis of the statutory crime of murder embodied in section 46 of Ghana's Criminal Offences Act 1960, encapsulates a wide range and array of prohibited conduct with different degrees of culpability. As the Royal Commission on Capital Punishment 1949-1953 said in its Report (Cmd 8932, September 1953), p.6:

> "Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder."

This feature of murder is also stressed by the Privy Council in *Reyes v The Queen* [2002] UKPC 11 , [2002] 2 AC 235, where their Lordships said (at paras 9-11 of UKPC):

9. "The penalty for murder

10. Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was sentence of death. This simple and undiscriminating rule was introduced into many states now independent but once colonies of the crown.

11. It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous".

The appellant argues that this blunderbuss nature of murder under the common law and under section 46 of the Ghanaian Criminal Offences Act, 1960 renders its mandatory penalty of death open to constitutional challenge. He contends that the penalty of death is disproportionate to some of the conduct coming within the general offence of murder and is thus a breach of the prohibition in the 1992 Constitution against inhumane and degrading punishment or treatment. For this contention, he relies heavily on the Kenyan Court of Appeal case of *Mutiso v Republic*, Crim. App. No.17 of 2008, Judgment of 30th July 2010, which is reported in [2010] eKLR. *Mutiso* is an emphatic persuasive authority that supports the appellant's contention.

In *Mutiso,* as in this case, the appellant had been convicted of murder and the mandatory sentence of death had been applied to him by the Kenyan High Court. The appellant there also argued that such a mandatory death sentence infringed the constitutional protection, under the Kenyan as under the Ghanaian Constitution, against inhuman and degrading treatment or punishment. The Kenyan Court of Appeal upheld this argument. Indeed, the Kenyan Attorney-General was so overwhelmed by the force of the argument that he conceded this point of law before the Court. The Court nevertheless thought it was such an important point that it went ahead to pronounce on it. A passage from the judgment of the Court of Appeal would be instructive for the purposes of this appeal. The Court said:

“The issue for determination:

27) The issue raised by the appellant therefore revolves around the *“right to life”* and the constitutional guarantees for its enjoyment. He complains about the notion, so freely pronounced by the courts in this country upon a conviction for murder, that the death penalty is mandatory. He holds the position that although the death penalty may not itself be inhuman and degrading, not everyone convicted of murder deserves to die, and therefore, a sentencing regime that imposes a mandatory sentence of death on all proven murder cases, or all murders within specified categories, is inhuman and degrading because it requires sentence of death, with all the consequences such a sentence must have for the accused person, to be passed without any opportunity for the accused to show why such sentence should be mitigated; without consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such sentence might be wholly disproportionate to the accused’s criminal culpability.

28) The Constitution of Kenya provides for protection of all fundamental rights and freedoms of the individual and in relevant part, as follows: -

> “70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty, security of the person and the protection of the law;”

Section 71 (1) specifically provides for protection of "right to life" in the following terms: -

> "71. (1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."
>
> (emphasis added).

It is evident that *sections 203* and *204* of the Penal Code reproduced in paragraph 2 above, are envisaged in the emphasized portion. There is further constitutional protection from inhuman treatment in *section 74 (1)*, thus:-

> "74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment."

That protection however has a claw back provision in subsection (2) thus:

> "74 (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."

The appellant also invokes *section 77* of the Constitution which makes provisions to secure protection of the law and includes the provision that a person charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

It is the appellant's case that all those provisions have been violated in his case.

29) The issue raised by the appellant is not a novel one and he did not pretend that it was. That is why learned counsel for him placed a wealth of authorities in a huge volume covering decisions made on the issue in other jurisdictions of the globe

and particularly the Commonwealth. We are indebted to counsel for that assistance but we are unable to cite all the authorities at the risk of elongating further this long judgment. We have carefully read them and perhaps we may simply list them for the record:

1. *Twoboy Jacob vs. Republic Misc. (Criminal appeal No. 18 of 2006)*
2. *Susan Kigula & 414 (sic) others vs. A.G. (unreported) Constitutional Petition 6 of 2003 (Malawi)(sic).*
3. *Francis Kafantayeni & 5 others vs. A.G (unreported) Constitutional case 12 of 2005 (Malawi).*
4. *Reyes vs. The Queen (2002) 2 AC 235.*
5. *Fox vs. Republic (2002) 2 AC 284 (Appeal from St. Christopher and Nevis).*
6. *Boyce and Joseph vs. The Queen (2005) 1 AC 400 (appeal from Barbados).*
7. *Republic vs. Hughes (2002) 2 AC 259 (appeal from St. Lucia)*
8. *Woodson vs. North Carolina (1976) 428 US 280.*
9. *Bowe and Davis vs. The Queen (2006) UKPLC 10 (appeal from the Bahams).*
10. *Mithu vs. Punjab (1983) 25 CR 690.*
11. *Yassin vs. Attorney General of Guyana 347 – 460.*
12. *Lubuto vs. Zambia (Communication No. 390 of 1990; 17/11/95).*
13. *Chisanga vs. Zambia (Communication No. 1132 of 2002; 18th November, 2005.*
14. *Albanus Mwangi Mutua vs. Republic (Criminal Appeal No. 120 of 2004 (Kenya).*
15. *Attorney General vs. Susan Kigula & 417 Others* (Constitutional appeal 63 of 2006).

30) In making their submissions on the basis of those authorities Mr. Wameyo and Mr.Bryant took turns to persuade us, in summary, that: -

- The imposition of the mandatory death penalty for particular offences is neither

authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of the sentence.

- Mandatory death sentence is antithetical to fundamental human rights and there is no constitutional justification for it. A convicted person ought to be given an opportunity to show why the death sentence should not be passed against him.

- The imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum. Making the sentence mandatory would therefore be an affront to the human rights of the accused.

- Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively the word *"shall"* ought to be construed as *"may".*

- There is a denial to a fair hearing when no opportunity is given to an accused person to offer mitigating circumstances before sentence, which is the normal procedure in all other trials for non-capital offences. Sentencing was part of the trial and mitigation was an element of fair trial.

- Sentencing is a matter of law and part of the administration of justice which is the preserve of the Judiciary. Parliament should therefore only prescribe the maximum sentence and leave the courts to administer justice by sentencing the offenders according to the gravity and circumstances of the case.

31) Those are the submissions conceded by the Attorney General when the DPP stated:
"We now concede that notwithstanding the mandatory provisions of section 204 of the

> *Penal Code, a trial Judge still retains a discretion not to impose the death penalty and instead impose such sentence as may be warranted by the circumstances and facts of the particular case. That is our position. The word "shall" in section 204 should now be read as "may".*

32) The common thread running through the authorities cited before us is that the provisions of the law invoked by the appellant herein are in *pari materia* with those considered in other jurisdictions and were largely influenced by, and in some cases lifted word for word from international instruments which Kenya has ratified. We are satisfied therefore that those decisions are persuasive in our jurisdiction and we make no apology for applying them. We particularly find persuasive force in the decisions of the Privy Council on matters which emanated from the Caribean Islands of Bahamas, Belize, Barbados, St. Lucia, Guyana and St. Christopher and Nevis. We allude to the cases of *Bowe* and *Davis*; *Reyes; Boyce and Joseph; Hughes*; *Yassin*; and *Fox* (supra) respectively. Those cases were considered and applied in jurisdictions which are closer home in Malawi (*Kafantayeni* (supra) (High Court) and *Twoboy Jacob* (Supreme Court of Appeal), and in Uganda (the *Kigula* case) in two courts.

33) In all those cases, the mandatory nature of the death penalty was considered and the court held that it violated the protection against subjection to inhuman or degrading punishment or treatment."

I am persuaded by the cogency of the position adopted by the Kenyan Court of Appeal and propose to follow it for the reasons I am about to lay out. Article 15(2) of the Ghana Constitution 1992 provides that:

> "No person shall, whether or not he is arrested, restricted or detained, be subjected to –

a) torture or other cruel, inhuman or degrading treatment or punishment;
b) any other condition that detracts or is likely to detract from his dignity and worth as a human being."

When this enactment is interpreted in the light of the case law from other Commonwealth jurisdictions on provisions *in pari materia* with it, one has to come to the conclusion that the mandatory death sentence is inconsistent with it. This is so, despite the provision in Article 13(1) that:

> "No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted."

As pointed out earlier, not all murders have the same culpability. Accordingly, section 46 of the Criminal Offences Act, 1960 (Act 29), by lumping together, without distinction, all murders and making them all punishable by death, infringes article 15(2) of the 1992 Constitution. It will be recalled that section 46 of the Criminal Offences Act, 1960 provides as follows:

> "Any person who commits murder is liable to suffer death."

The mandatory death sentence prescribed by this provision falls foul of the constitutionally protected principle immanent in article 15(2) that the punishment imposed on a convicted murderer should be proportionate to the gravity of the particular crime of which he has been convicted. This principle has quite a history in the common law, as recalled by Lord Bingham of Cornhill, when delivering the unanimous judgment of the Privy Council in *Bowe and Davis v The Queen* [2006] UKPC 10 and [2006] 1 WLR 1623, a case which came on appeal from the Court of Appeal of The Bahamas. He there said (at para. 30 of [2006] UKPC 10):

> 30. "The principle that criminal penalties should be proportionate to the gravity of the offence committed can be traced back to Magna Carta, chapter 14 of which prohibited excessive amercements and, in the words of one commentator, "clearly stipulated as fundamental law a prohibition of excessiveness in punishments" (Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning" 57 Calif Law Rev (1969), 839 at 846). It indeed appears that the cruel and unusual punishments clause of the Bill of Rights 1689 was intended not only to

prohibit unauthorised punishments (such as Jeffreys CJ had inflicted on Titus Oates) but also to reiterate the English policy against disproportionate penalties (ibid, p 860). During the century which followed the "Bloody Code" held sway in England, with capital penalties for over 200 offences, prompting Professor Radzinowicz to observe (*A History of English Criminal Law*, 1948, vol 1, "The Movement for Reform", p 14):

> "The other main characteristic of this system was its rigidity. Practically no capital statute provided any alternative to the death penalty, which thus had to be pronounced irrespective of the special circumstances of particular cases. This method disregarded the fundamental principle which is essential to any effective system of crime-prevention and which has been aptly defined by Raymond Saleilles as *le principe de l'individualisation de la peine".*

The eighth amendment to the Constitution of the United States, adopted in 1791, reproduced the language of the Bill of Rights 1689, and was concerned primarily with selective or irregular application of harsh penalties: *Furman v Georgia* 408 US 238 (1972), 242. In *O'Neil v Vermont* 144 US 323 (1892), 339-340, three justices held that the amendment was directed, not only against punishments which inflict torture "but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." In *Weems v United States* 217 US 319 (1910), 366-367, McKenna J speaking for the Supreme Court said:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

> Is this also a precept of the fundamental law? We say fundamental law, for the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning."

Since article 3 of the European Convention on Human Rights, article XXVI of the American Declaration of the Rights and Duties of Man 1948 and section 3 of the 1963 and 1969 Constitutions derive, despite differences of language, from the same source, the core meaning of each is the same. Lord Denning recognised the long-standing power of the court to quash a penalty which was excessive and out of proportion (*R v Northumberland Appeal Compensation Tribunal, Ex p Shaw* [1952] 1 KB 338, 350-351; *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052, 1057-1058). The matter was clearly and succinctly put by Saunders JA (Ag) in the Eastern Caribbean Court of Appeal in *Spence v The Queen* and *Hughes v The Queen* (unreported, 2 April 2001, Criminal Appeals Nos 20 of 1998 and 14 of 1997) when he said in para 216 of his judgment:

> "It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime".

The Board is of the same opinion, and is not aware that the principle has ever been authoritatively controverted."

I would accordingly uphold the second of the appellant's grounds of appeal against sentence. Of course, the authorities I have referred to above are merely of persuasive authority in this jurisdiction and not binding on this court. However, in matters of human rights, this court, when interpreting Ghanaian constitutional provisions *in pari materia* with provisions in other Commonwealth jurisdictions and international human rights instruments, should depart from the discernible trend of decisions in those Commonwealth jurisdictions and international human rights *fora* only for tangible policy reasons. I do not see any countervailing persuasive policy reasons against following the discernible trend I have sketched out above. The countervailing argument that all murders are murders and should be treated equally is an unreasonably inflexible ideological position, belied by actual

human experience, which should be rejected by this court. This court is, of course, master of what interpretation is to be put on provisions in the 1992 Constitution. In exercising that jurisdiction, however, it should be mindful of not turning this court into a philistine one, out of touch with enlightened human rights decisions made elsewhere, unless the imperatives of the Ghanaian context require it, which is not what the facts of this case indicate. It has to be remembered that human rights have a universal and international quality. These are rights which are supposed to inhere in all humans, unless there are compelling local reasons to displace them. Because of this universalist dimension of human rights, this court should be very slow to reject interpretations of human rights provisions *in pari materia* with provisions in our Constitution, when these interpretations have become widely-accepted orthodoxies in jurisdictions with a similar history to ours.

The fact that the 1992 Constitution provides for the penalty of death for high treason (article 3) is not determinative of the issue before this court, which is the quite distinct one of whether the mandatory nature of the death penalty for ***murder***, a criminal offence with a very wide range of moral culpability scenarios, is compatible with specific provisions in the Ghana Constitution which are *in pari materia* with constitutional provisions in other Commonwealth jurisdictions. The range of moral culpability associated with high treason is of a more limited nature. Accordingly, the same arguments cannot be deployed against the mandatoriness of the high treason penalty. Moreover, no specific mention is made of murder in the Constitution. In other words, the discussion on whether the fixed penalty for murder is constitutional or not should not be confused with arguments based on the constitutionality of the penalty of death for high treason, since the crime of murder is different from high treason and the validity of arguments made against the constitutionality of the mandatory sentence of death for murder will not necessarily hold in relation to high treason.

What I have said above is enough to require a quashing of the mandatory sentence of death imposed on the appellant. In its place, I would construe the applicable penalty in section 46 of the Criminal Offences Act 1960, in consonance with the approach adopted in other Commonwealth jurisdictions, to be one "imposing a discretionary and not a mandatory sentence of death." Per Lord Bingham in *Bowe and Davis v The Queen* [2006] UKPC 10 at para. 43. This Court has the option of either remitting the case to the High Court for this discretion to be exercised by the High Court

or to exercise the discretion itself, deploying the authority that it has under article 126(4). I prefer this Court to exercise the discretion itself. I will state what I consider to be the sentence appropriate on the facts of this case after I have considered the other grounds of appeal against sentence.

The next ground of appeal against sentence is that the mandatory imposition of the death penalty on the appellant is in violation of article 13(1) of the 1992 Constitution (*supra)* that guarantees protection from arbitrary deprivation of life. The appellant's argument here is that it is implicit in the right to respect for life under article 13(1) of the Constitution that life shall not be taken away in an arbitrary fashion. He contends that depriving a convict of his life without regard for the circumstances of his crime is profoundly arbitrary. A punishment that does not distinguish between the gravity of the particular cases that trigger the punishment is inherently arbitrary. I find support for this proposition in a passage from a judgment of the Indian Supreme Court which was quoted with approval by Lord Bingham of Cornhill in the *Reyes case (supra).* He there said ([2002]UKPC 11 at para 36):

> "In *Mithu v State of Punjab* [1983] 2 SCR 690 the Supreme Court of India considered a provision of the Indian Criminal Code which required sentence of death to be passed on a defendant convicted of a murder committed while the offender was under sentence of imprisonment for life. The court addressed its attention to article 21 of the Indian constitution, which protects the right to life. Certain observations made by Chandrachud CJ, at pp. 704, 707 and 713 are relevant to the present discussion:
>
> > "But, apart from that, a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair ... Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, of that too in the form of a sentence of death, fails to take into account the facts and circumstances of each

> particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case ... Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws."

Furthermore, in the Statement of Case filed before the Court of Appeal, which is incorporated by reference in the Appellant's Statement of Case before this Court, the appellant seeks to invoke Article 6(1) of the International Covenant on Civil and Political Rights, asserting that Ghana has been a party to this Convention since 23 March 1976. This Article provides that:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Although the appellant accepts that the International Covenant is not incorporated in Ghana's domestic law, he nonetheless invites the court to treat article 6(1) of it and the emphatic jurisprudence of the United Nations Human Rights Committee as a powerful persuasive guide to the interpretation of the Constitution of Ghana and in particular article 13(1).

I accept that in the context of the international human rights jurisprudence on this issue it would be reasonable to construe article 13(1) of the 1992 Constitution purposively as prohibiting arbitrary deprivation of life, although the express language in article 6(1) of the International Covenant is absent from Article 13(1) of the 1992 Constitution. Accordingly, on this ground also, I find that the appellant's appeal against the constitutionality of his sentence must succeed.

Finally, I will consider the appellant's ground of appeal against sentence on the ground that the mandatory death sentence violated article 19(1) of the 1992 Constitution. Article 19(1) provides that:

> "A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court."

The Ugandan Supreme Court has propounded a compelling argument on this issue of a fair trial where a mandatory death penalty is applicable. In the leading case of *Attorney-General v Susan Kigula and Others* (No. 03 of 2006, available at www.unhcr.org/refworld/docid/499aa02c2.html), the Court said:

> "A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the Court is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases. In our view, this compromises the principle of fair trial."

The Court went on later in its judgment to state that:

> "Furthermore, the administration of justice is a function of the Judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution.
>
> We do not agree with learned counsel for the Attorney General that because Parliament has the powers to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2(2) of the Constitution.
>
> Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the

> Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution... .
>
> We are of the view that the learned Justices of the Constitutional Court properly addressed this matter and came to the right conclusion. We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provide for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence."

I am in entire agreement with this analysis and it holds true in the Ghanaian context as well. The *Kigula* case was one in which several convicts had filed a petition before the Ugandan Constitutional Court, which under the Ugandan Constitution is subordinate to the Supreme Court. The petition challenged the constitutionality of the death penalty under the Constitution of Uganda. This failed both in the Constitutional Court and, on appeal, before the Supreme Court. However, on the issue of the constitutionality of the mandatory sentence of death for murder, the petition succeeded, on account of, among other reasons, this fair hearing argument. The Kenyan Court of Appeal in the *Mutiso case (supra)* cited the *Kigula* case with approval and followed it and I propose to do the same.

In the Ghanaian context also, it would be a fair interpretation of the law to hold that a person charged with murder fails to be given a fair hearing in respect of the particular mitigating circumstances of his case if he is unable, in consequence of the overriding peremptory force of section 46 of the Criminal Offences Act, 1960, to persuade the trial judge to impose any other sentence than death. This constitutes a violation of article 19(1) of the 1992 Constitution. The inability of trial judges to exercise a discretion to make the punishment fit the crime in cases of murder infringes the right of the accused to a fair trial.

Furthermore, the imposition of a mandatory sentence by the legislature that constrained the discretion of the learned trial judge infringes the principle of the separation of powers, which is one of the underlying features of the 1992 Constitution. Article 125(3) of the Constitution provides that:

> "The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power."

This provision is inconsistent with the imposition by Parliament of any mandatory sentence on convicts. It is judges who must exercise final judicial power and this power includes the power to determine what sentence is appropriate on the facts of individual cases.

Accordingly, I would uphold all the appellant's grounds of appeal against sentence and quash his mandatory sentence of death. In its place, I would substitute a sentence of life imprisonment. This severe sentence is commensurate with the gravity of the cold-blooded, gory and ruthless murder of the deceased in this case and the fact that it was motivated by greed.

In conclusion, I would like to commend counsel for the appellant, Mr. Senanu, for the excellent quality and depth of research of his submissions which have greatly assisted this Court. It is true that he was aided by extra-territorial counsel, but then it was he who made himself open to the external assistance and thus he has to be commended for his initiative in seeking and accepting the assistance that he received. These submissions have reminded us of our responsibility, even in criminal appeals, to discharge this court's role as a constitutional court, in addition to its role as the final court of appeal of this land. It is a sacred duty of this court always to remember this dual role of the Supreme Court. Declaring a statutory provision void to the extent of its inconsistency with the Constitution is widely recognised locally and internationally as a quintessential judicial act of a constitutional court and not as an usurpation of a legislative role and we must not be timorous about performing that duty. It also behoves this Court not to recoil from audacity in the protection of human rights and in keeping alive the hope of those who seek this Court's enforcement of their constitutional rights.

DR. S.K. DATE-BAHJ.S.C

JUSTICE OF THE SUPREME COURT

OWUSU JSC.

The Appellant was charged with others (at large) on two counts of conspiracy to commit crime, namely, murder and murder contrary to sections 23(1) and 46 and 46 respectively of the Criminal Offences Act 1960 (Act 29).

He was tried by Jury, found guilty on both counts and sentenced to death on the charge of murder. Even tough the jury convicted him on the conspiracy charge, the trial Judge acquitted and discharged him on that count. I will come back to the acquittal later in the course of this Judgment. Dissatisfied with his conviction on the murder charge, he appealed to the Court of Appeal. As many as 18 grounds of Appeal were filed all of which were abandoned except ground 1 which states that the conviction of the appellant by the jury on 18/06/2008 on the charge of murder contrary to section 46 of Act 29 of 1960 is unreasonable or cannot be supported, having regard to the entire evidence adduced before the trial Fast Track High Court, Accra.

These supplementary grounds were also filed:

1. "That inadmissible hearsay evidence was admitted with severe prejudice for the defence.

2. "The toll ticket allegedly recovered from the appellant's car was obtained in breach of the rules regarding searches of a suspect's property and should not have been admitted."

3. The Judge failed to give proper direction on circumstantial evidence.

4. The Jury's verdict on count 1 rendered conviction on count 2 unsafe.

5. The death sentence violates prohibition of inhuman and degrading treatment under the Article 15 (2) of the 1992 constitution.

6. The death sentence violates the right to protection from arbitrary deprivation of life under Article 13 (1) of the Constitution

7. The death sentence violates the right to a fair trial under Article 19(1) of the 1992.

The Court of Appeal dismissed the appeal against both the conviction and sentence. It is against this Judgment that the Appellant has appealed to this court on the ground that:

1. "The dismissal of the Appellant's appeal against conviction for murder is unreasonable or cannot be supported having regard to the evidence on record.

2. The Judgment of the court of Appeal occasioned a substantial miscarriage of justice as the Trial High Court Judge's acquittal of the Appellant on the charge of conspiracy to commit murder rendered the conviction on murder unsafe.

3. The judgment of the Court of Appeal occasioned a substantial miscarriage of justice due to the complete failure by the trial High Court Judge to give a proper direction on circumstantial evidence.

4. The Court of Appeal erred in ignoring the inadmissible hearsay evidence that was admitted by the trial High Court with severe prejudice for the defence.

5. The Court of Appeal should have quashed the Appellant's conviction as the toll ticket allegedly recovered from the appellant's car was obtained in breach of the rules regarding searched of a suspect's property and should not have been admitted."

Grounds of appeal against sentence:

1. As sentencing is a question of law to be solely determined by the Trial High Court Judge at the jury trial, the Court of Appeal erred in holding that the challenge to the mandatory death penalty for murder could only be dealt with on appeal if it was raised as an issue before the Trial High Court Judge.

2. The mandatory imposition of the death penalty on the Appellant for murder cannot stand as section 46 of the Criminal Code, 1960 (Act. 29) is in utter contravention of Articles 15(2) and 33(5) of the 1992 Constitution that prohibits inhuman and degrading treatment.

3. The mandatory imposition of the death penalty on the Appellant for murder cannot stand since section 46 of the Criminal Code,

1960 (Act. 29) is in violation of Article 13(1) of the 1992 Constitution of Ghana that guarantees protection from arbitrary deprivation of life.

4. The mandatory imposition of the death penalty on the Appellant for murder cannot stand as section 46 of the Criminal Code, 1960 (Act. 29) is in contravention of Article 19(1) of the 1992 Constitution that guarantees the right to a fair trial.

5. Further grounds of appeal to be filed upon receipt of the certified true copy of the judgment of the Court of Appeal as filed in the notice of Appeal.

These grounds were however summarized in a supplementary statement of case as follows:

Against conviction –

1. "The Court of Appeal erred in rejecting the complaint that highly prejudiced hearsay evidence was wrongly admitted."

2. "The Court of Appeal erred in upholding the safety of the appellant's conviction, notwithstanding the learned Judge's failure to give a direction on circumstantial evidence, in a case entirely reliant on such evidence."

Against sentence –

3. "The Court of Appeal erred in its conclusion that the Court of Appeal was not the appropriate forum for considering the appeal against sentence."

4. "The Court of Appeal erred in rejecting the appellant's challenge to the constitutionality of his sentence on the basis that capital punishment is compatible with the constitution."

Before I set out to consider the grounds of Appeal against conviction, I feel obliged to comment on the Appellant's acquittal by the trial Judge on the 1st count of conspiracy to commit murder contrary to sections 23(1) and 46 of the Criminal Offences Act even though there is no cross appeal against it.

At the end of the trial, after the trial Judge had summed up the evidence and directed the Jury on the relevant law, the Jury returned a verdict of guilty on both counts as charged.

In her summing up, the trial Judge had, after dealing with the offence of conspiracy, directed the jury as follows:

> **"There is no evidence before you pointing to an agreement between the accused and the persons said to be at large or implicating another person in the commission of the offence of murder. The prosecutor in other words did not establish beyond reasonable doubt, the charge of conspiracy in this case. You are therefore directed to find the charge of conspiracy not proven against the accused person and to pronounce him not guilty of count 1 (one) accordingly."**

Inspite of this direction, the Jury however returned a unanimous verdict of guilty on the charge of conspiracy following which the trial Judge, inspite of the verdict of the jury, proceeded to find him not guilty. This is what her Ladyship said:

> **"Your peers have found you guilty of the charge of conspiracy. The court had directed however, that there was no evidence before the court upon which conviction can be based. You are therefore acquitted and discharged."**

With the greatest respect to the learned trial judge she erred in acquitting the Appellant on count 1.

Under section 285 of the Criminal and Other Offences Procedure Act of 19960, (Act. 30) the side note of which reads "*Action on verdict*," there are four things that the trial Judge shall do –

1. "When the jury are unanimous in their opinion, the Judge shall give Judgment in accordance with the opinion."

2. "Where the accused is found not guilty, the Justice shall record a judgment of acquittal.

3. "Where the accused is found guilty, the judge <u>shall pass sentence on the accused according to law.</u>" (Emphasis supplied)

4. "Where the Jury are not unanimous in their opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the Jury."

After the verdict of guilty it was therefore incumbent upon Her Ladyship to have passed sentence on him according to law at that stage of the

proceedings and if indeed there was no evidence in support of the charge of conspiracy, the Judge at the conclusion of the case for the prosecution, under section 271 of the Act should have directed the jury to enter a verdict of not guilty and acquitted the accused at that stage. Section 271 of the Act reads –

> **"The Justice may consider at the conclusion of the case for the prosecution whether there is a case for submission to the jury, and if of the opinion that a case has not been made that the accused has committed an offence of which the accused could be lawfully convicted on the indictment on which the accused is being tried, the Justice shall direct the jury to enter a verdict of not guilty and shall acquit the accused."**

The facts on which the prosecution was mounted have been sufficiently set out in the Judgments of my respected brothers for which reason I do not find it necessary to repeat them. I will however refer to them as and when I deem it fit.

On ground 1 the evidence which counsel classifies as inadmissible is that of p.w.10 Hansen Dogbe who was the investigator in the case. The witness was testifying to what came to his knowledge in the course of his investigation as to the movements of the Appellant, Telley Johnson and the deceased after the Johnsons had picked him from the Indo Guest House in Mercedes Benz Car No. RT 9716 Y. It is in the course of this narration that counsel for the Appellant objected to what the witness was talking about saying that he was relating to the movement as if he was present and was speaking from his own experience.

Under section 116(c) of the Evidence Act of 1975 (N.R.C.D.323)

Hearsay evidence is –

> **"Evidence of a statement, other than a statement made by a witness while testifying in the action at the trial, offered to prove the truth of the matter stated."**
>
> **"Hearsay evidence is not admissible except as otherwise provided by this Decree or by any other enactment or by agreement of the parties."**

There are however exceptions to this rule and counsel's contention is that evidence given by a police investigator is not otherwise exempted.

This same ground of Appeal had been argued before the Court of Appeal and same had been dismissed rightly in my view.

This is how the Court of Appeal dealt with that ground –

> **"With regard to the issues raised on the pieces of evidence learned counsel classified as hearsay, it is of significance that there was no objection raised when the prosecution sought to lead those pieces of evidence at the trial, aside from a feeble complaint that the investigator was narrating the evidence as if he were an eye witness."**

Undoubtedly, the Evidence Act sets out the procedure for objecting to inadmissible pieces of evidence.

It states:

> **Section 6: in every action and at any stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time evidence is offered.**
>
> **2. Every objection to the admissibility of evidence shall be recorded and ruled upon as a matter of course.**
>
> **There is nothing on record to show that an objection was raised and ruled upon. It is therefore too late in the day to lodge a complaint."**

From the record, when p.w.10, the investigator sought to narrate what came to his knowledge in the course of his investigations, counsel for the Appellant indicated to the court that he had an objection to what he (the investigatory) was saying. This is what transpired –

"(A) My Lord I discovered during my investigation that on the 27th day of May 2004 at about 5:pm the accused person that is Dexter Johnson and Telley Johnson drove to Indo Guest House picked the late John Kraggness in the Mercedes Benz number **RT 9716 Y** drove to the Ring Road and to the Dankwa Circle to the cantonments back to the International School back to the Indo Guest House made a turn over there came back to the same route to Dankwa Circle drove through the Ring way and to the Kanda High way, and bought fuel at he cost of Two Hundred and Fifty Thousand Cedis, at the Mobil filling station there where the deceased paid the Two Hundred and Fifty Thousand Cedis thereafter the deceased bought two 'Yes' mineral

bottled water from the Mobil Max over there then they drove to Kanda High Way, back to TV3, through to Kaukudi junction to West Airport through to continental plaza hotel.

Senanu: My Lord P. W. 10 is he relating what he is telling the court My Lord, I have an objection to what he is speaking as if he is speaking from his own experience, what he witnessed but the way he is saying it, it is as if he was there and the way he is relating the issue.

By Court: Please sit down and raise this when you are doing your cross-examination. This is what his investigations revealed. Please Continue."

If counsel was mindful of objecting to the evidence of the witness, he should have properly registered his objection based on grounds for so doing and insisted on the court recording the objection and ruling upon it as a matter of course. This he failed to do and when he was asked by the court to sit down, he obliged and allowed the witness to continue with his evidence.

With regard to the evidence on the movements of the appellant, Telley Johnson and the deceased, how prejudicial was it? That piece of evidence had already been given by p.w.7, David Tawarah Banye, the officer from the Bureau of National Investigation.

I agree with the Court of Appeal per Akoto-Bamfo J. A. (as she then was) that there was no proper objection raised and for that reason none can be raised before this court. The appeal against conviction on that ground is therefore dismissed.

The second ground of Appeal against conviction is the Judge's failure to properly direct the jury on circumstantial evidence. Admittedly, the Appellant by his plea of alibi, put his identity in issue. In a criminal trial, for the prosecution to discharge the burden of proof which lies on it to establish the guilt of the accused beyond reasonable doubt, sufficient evidence must be led to prove the identity of the accused. It is not enough for the prosecution to prove that an offence has been committed. There must be further evidence to connect the accused with the commission of the offence.

However, it is not in all cases that direct evidence may be led to prove the identity of the accused. As in the instant case, there was no eye witness to the murder. However, the prosecution led sufficient evidence from which the guilt of the Appellant was proved beyond reasonable doubt for which reason the jury rightly found him guilty of murder.

P.w.s 7 and 8 were trailing the Appellant from the time that he picked up the deceased from Indo Guest House. The Appellant who acted as an informant to the Bureau of National Investigation had informed them that the deceased had a machine for printing fake currency notes at Aburi. When the Appellant and the deceased set out from the Guest house in the company of one Telly Johnson unknown to them, that the officers from B.N.I. were trailing them, the officers thought they were going to Aburi. From about 5pm to 7pm when the deceased was picked up in the Appellant's car, they did not head towards Aburi but went round Accra until they finally got to Prampram Junction, branched to Prampram then to Old Ningo and to New Ningo and then to Salem where the deceased was murdered.

The Appellant's statement that he had dropped the Appellant at the Golden Tulip Hotel after picking him from the Guest house, turned out to be false. His plea of alibi also failed because at about 6pm when he said he was with his auntie could not be true as he was on the way to Prampram junction driving his Mercedes-Benz Car RT 9716Y and being followed by p.w. 7 and 8.

Investigations revealed that at about 7p.m. on 28/05/2004 the Appellant gave an amount of twelve thousand dollars to one Emefa Kamasa at caprice for safe keeping. The Appellant could not explain how he came by the money as the source from which he claimed he had the money turned to be incorrect.

Admittedly, where the prosecution's case is based on circumstantial evidence rather than direct, which is often the case when the accused person's identity is in issue, the law requires such high degree of proof as to lead to one and only one irresistible conclusion that it was the accused who committed the offence.

In the case of R. V. ATTER [the Times, 22nd March, 1956] Devlin J. (as he then was) gave the following direction which is of vital importance.

> **"Where one has a case where the evidence is purely circumstantial then I must satisfy myself, in my Judgment, that there is some piece of evidence that is more than mere suspicion, that there is some piece of evidence which would justify in saying that points to the accused. You cannot put a multitude of suspicions together and make a proof of it."**

Admittedly, the trial Judge failed to direct the Jury on this high degree of proof as the prosecution's case was based on circumstantial evidence.

All the same, short of using the word circumstantial, Her Ladyship took pains to direct the Jury on the totality of the evidence led by the prosecution which if believed would support the conviction. In the end I agree with the Court of Appeal that the non direction did not occasion any miscarriage of Justice. Would the Jury have returned a different verdict if they had been directed on what the law requires of the prosecution where the prosecution's case is based on circumstantial evidence? On the totality of the evidence before the trial court, I do not think the verdict of the Jury would have been any different. This same ground of appeal was argued before the court of Appeal but same was dismissed on the authority of YIRENKYI VRS THE STATE [1963] 1 GLR. See also the case of ADDAI VRS THE REPUBLIC.

In the YIRENKYI case this is what the Supreme Court said:

> **"The law, as we understand it, is that whatever the nature of the misdirection complained of (whether it be an omission by the Judge to put the defence adequately to the Jury or a misdirection on a point law) if it can be predicted that properly directed the Jury must have returned the same verdict, then there being in that case no substantial miscarriage of Justice, the appeal fails."**

Under section 406 (1) of the Criminal and Other Offences (Procedure) Act, such an omission to the Jury, unless same has occasioned a substantial miscarriage of justice will not avail the Appellant on appeal.

The section reads as follows:

> **". . . a finding, sentence or order passed by a court of competent Jurisdiction shall not be reversed or altered on appeal or review on account.**
>
> **(a) of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement, or any other proceedings before or during the trial or in an enquiry or any other proceedings under this Act, or**
> **(b) . . . or**
> **(c) of misdirection in a charge to a jury."**

In the circumstance the misdirection by non-direction will not vitiate the conviction of the Appellant and the appeal against conviction on that ground also fails. The appeal against conviction is therefore dismissed as unmeritous.

Appeal against sentence –

> In my view it is the Appellant's appeal against conviction that merits any consideration by this court. If I may borrow words from the introduction to the Judgment of the Kenyan Court of Appeal in the case of GODFREY NGOTHO MUTISO AND REPUBLIC (Criminal Appeal No. 17 of 2008, **"the appellant before us raised an issue of singular historical moment in this country in relation to the offence of murder and the penalty of death attendant thereto."** - - -

In the Court of Appeal, the Appellant sought to argue that the mandatory imposition of the death penalty for all offences of murder violates the Constitution of Ghana. In doing so, he advanced three grounds as follows:

> **"(i) the mandatory death penalty violates the prohibition of inhuman and degrading treatment or punishment under article 15 (2) of the constitution.**
>
> **(ii) it violates the right to protection from arbitrary deprivation of life under article 13(1) and**
>
> **(iii) it violates the right to a fair trial under article 19 (1)."**

The Appellant by his submissions is not challenging the constitutionality of the death penalty per se. His attack is against the mandatory punishment of death in all cases where the accused is found guilty of murder.

The Court of Appeal refused to consider these constitutional challenges with the reason that the court was not the appropriate forum for considering the appeal against sentence.

This statement to me is correct to some extent. This is what the court said per Akoto-Bamfo J.A (as she then was)

> **"It is my view that this is not the appropriate forum. It must be pointed out that this being an appellate court; it has (sic) can properly exercise its jurisdiction where it undertakes to have a decision by a lower court reconsidered or reviewed. In the exercise of this discretion, it may either re-open or re-consider issues and facts raised before the trial court and satisfy itself that the verdict is supported by the evidence on record.**

In the case under consideration, none of the issues raised in those grounds were raised before the trial court; they were indeed not reflected in the record of proceedings.

More importantly, it is my view that the appellant is seeking for a declaration that capital punishment be declared null and void as being inconsistent with the provision of constitution."

This statement is to some extent correct not because the court was not the proper forum because the issues were being raised for the first time. It is not correct to say that as an appellate court it could only deal with issues raised in the trial court. Generally, the Court of Appeal sits on issues dealt with in the court below but matters of law and jurisdiction can be raised for the first time on appeal and even in this court.

The Appellants challenge to the mandatory death penalty raises constitutional issues of law and could be raised at anytime in the proceeding. As constitutional issues the court was right in saying that it was not the proper forum to determine them. It could have considered them and if found to be needing interpretation and enforcement refer them to this court under Article 130 (1) (a) and (2) of the constitution for determination.

The said Article reads as follows:

"(1) subject to the Jurisdiction of the High Court in the enforcement of the fundamental Human Rights and freedoms as provided in article 33 of this constitution, the Supreme Court shall have exclusive original Jurisdiction in

(a) all matters relating to the enforcement or interpretation of this constitution.

(2) where an issue that relates to a matter or question referred to in clause (1) of this article arises in any proceedings in a court other than the Supreme Court, that court shall stay the proceedings and refer the question of law involved to the Supreme court for determination and the Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court."

Where the constitutional issue is not raised by either party, this court in the exercise of its original exclusive jurisdiction will raise it on its own.

In the case of ATTORNEY-GENERAL VRS FARORE ATLANTIC CO. LIMITED [2005-2006] 271 the Supreme Court held that a constitutional issue arising from the record can be dealt with on appeal, even if the issue was not raised in the court below.

The Court per Sophia Akuffo JSC. Had this to say –

> **"whilst there is no doubt that the manner in which the defendant has dealt with this issue, as if it were an after-thought (which he force – fed into this appeal under the ground of the judgment being against the weight of the evidence) is regrettable and even execrable, the fact still remains that as a constitutional issue, it is a fundamental one which we cannot ignore. Indeed, had the Principal State Attorney not introduced it one way or the other, we should have been duty bound, as a court existing under the 1992 Constitution, to raise it suo motu and directed both counsel to address us on it."**

Per Wood JSC (as she then was) –

> **"The salutary and well-known general rule of law is that where a point of law is relied on in appeal it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being one of them. A jurisdictional issue can therefore be taken or raised at any time, even for the first time on appeal. Another exception is where - - - Substantial constitutional issues, such as the one raised before us, falls neatly into this category."**

The learned justices of the Court of Appeal therefore erred when they failed to consider these issues because they were not raised in the High Court.

The Appellant has properly raised these issues before this court which doubles as a constitutional court. The Appellant has based his case on numerous decided cases from other common law jurisdictions on these issues of what he termed violations of his fundamental human rights. Among these are:

1. BOWE AND DAVIS VRS THE QUEEN [2006] 1 WLR 1623 P.C.
2. REYES VRS THE QUEEN [2002] A. C. 235
3. SOERING VRS UNITED KINGDONM [1989]11 EHRR 439
4. TWO BOY JACOB VRS THE REPUBLIC [Criminal Appeal Case No. 18 of 2006] Court of Appeal of Malawi Judgment 19 July 2007.
5. SUSAN KIGULA VRS. ATTORNEY-GENERAL
6. GODFREY MUTISO VRS THE REPUBLIC [Criminal Appeal No. 17 of 2008] C.A.

The Appellant's case is that the imposition of the death penalty for all categories of the offence of murder violates Article 15(2) of the constitution of Republic of Ghana.

Article 15 (2) reads as follows:

> "No person shall, whether or not he is arrested, restricted or detained, be subjected to –
>
> torture or other cruel, inhuman or degrading treatment or punishment
>
> (b) Any other conditions that detracts or is likely to detract from his dignity and worth as a human being.

Under section 46 of the Criminal Offences Act,

> "**A person who commits murder is liable to suffer death**."

Murder is defined under section 47 of the Act as follows:

> "**A person who intentionally causes the death of another person by an unlawful harm commits murder, unless the murder is reduced to manslaughter by reason of such extreme, provocation or any matter of partial excuse as is mentioned in section 52."**

This Act was in existence before the coming into force of the 1992 Constitution and for that reason forms part of the Laws of Ghana under Article 11 (1) (d) of the constitution.

Under Article 11 (1) (6) as such existing law, it *"shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this constitution.*"

The Appellant's second challenge is that it violates the right to protection from arbitrary deprivation of life under Article 13(1) which states that:

> **"No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a Criminal Offence under the laws of Ghana of which he has been convicted**."

Thirdly, the Appellant argues that the mandatory death penalty violates the right to a fair trial under Article 19(1) which stipulates that:

> **"A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court."**

It is his case that hearing extends to sentencing and that Article 19(1) is violated where he is denied the right to say anything in mitigation.

Against these challenges, the Attorney for the Republic who did not appear to appreciate the Appellant's submission posed the question –

"What did the appellant seek to do when he appealed against the death sentence on the grounds listed above? Obviously, he was challenging the constitutionality of his sentence.

Having misinformed herself of the Appellant's case, she argued on the constitutionality of the death penalty per se by reproducing section 46 of the Criminal Code already referred to and submitted that in her considered opinion **"the Court of Appeal in its judgment stated the legal and constitutional positions of the death penalty when they stated in no uncertain terms at page 453 that:**

> **"Even though the basis of this assertion is not readily ascertainable having regard to Art. 13 (sic) of the constitution which provides, no person shall be deprived of his life intentionally . . . of which he has been convicted."**

Under section 46 of the Criminal Offences Act appears the following; **a person who commits murder is liable to suffer death."**

For this reason, she stated that

> **"In any case laws are made by parliament, and since the death penalty is found in the criminal offences Act of 1960, Act 29, it is only parliament which can change it if there is the need for it, until that is done, no body had the right to abolish the death penalty."**

This is clearly a misconception and I will therefore proceed on the premise that the Attorney for the Republic offered no useful contribution to the court in determination of the constitutional issues raised by the Appellant.

In Mutiso case, the Court of Appeal concluded that the Appellant's challenge should succeed. The court, had gone ahead to determine the challenge even though there was no opposition from the Attorney-General to the Appellant's submission.

The court followed the consistent line of authorities in other common law Jurisdictions on the constitutionality of the mandatory death penalty.

This is what the court said:

> **"The common thread running through the authority cited before us is that the provisions of the law invoked by the appellant with those considered in other Jurisdictions and were largely influenced by, and in some cases lifted word for word, from international instruments which Kenya has ratified. We are satisfied that those decisions are persuasive in our jurisdiction and we make no apology for applying them."**

The Appellant herein like Mutiso has lifted word for word from the cases on which his case is based and international Instruments and is inviting this court also to conclude that the Mandatory death penalty is unconstitutional.

Under the penal code of Kenya, section 203 reads as follows:

> **"Any person who of malice aforethought caused death of another person by an unlawful act or omission is guilty of murder."**

Section 204 like our section 46 of the Criminal code states that

> **"any person who is convicted of murder shall be sentenced to death**"

The constitution of Kenya provides for the protection of all fundamental rights and freedoms of the individual and in relevant part provisions similar to those in our constitution which the Appellant seeks to canvass as having been violated by the imposition of the mandatory death penalty on him.

These provisions are sections 70, 17, and 74 (1)

Section 70 provides that –

> **"whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is**

> **to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –**
>
> **Life, liberty, security of the person and the protection of the law"**

71 (1) provides for protection of "*right to life*" as follows:

> **"No person shall be deprived of his life intentionally save <u>in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted</u>."** (emphasis added)

74 (2) however is a proviso to 74 (1) and is in the following terms:

> **Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963.**

Section 77 provides for the protection of the law and includes a provision that *"a person charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time."*

My brother Dotse JSC has in his judgment re-echoed his view expressed in the case of WILLIAM BROWN VRS ATTORNEY-GENERAL and two others that where our constitutional provisions on a subject matter are clear and there is no ambiguity, there should be no hesitation in interpreting them without reference to decided cases from other Jurisdictions which may be of persuasive authority only.

By the definition of murder under section 47 of the Criminal Offences Act, in this country, we do not have varying degrees of the offence of murder. A conduct which satisfies all the ingredients of murder as defined constitutes murder and the punishment for it is death. However, under the definition, murder can be reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as mentioned in section 52, the side note of which reads *"cases in which intentional homicide is reduced to manslaughter."*

> Under section 295 (1) of the Criminal and Other Offences (Procedure) Act, **"sentence of death shall not be pronounced on or recorded against a juvenile offender, that is to say, an offender who in the opinion of the court, is under the age of seventeen years."**
>
> **"295 (2) in lieu of the death sentence the Court shall order the detention of the juvenile during the pleasure of the President and the juvenile shall be detained in a place and manner which is legal custody."**
>
> Under section 312(1) **"where a woman is convicted of an offence punishable with death, the question whether the woman is pregnant or not shall be determined by the court or Jury (if the trial has been by Jury) upon such evidence as may be laid before it either on the part of the woman or on the part of the state, and the court or Jury shall find that the woman is not pregnant unless it is proved affirmatively to the satisfaction of the court or Jury that she is pregnant, in which case the court shall pass on her a sentence of imprisonment for life."**

Under section 137(1) of the Criminal and Other Offences (procedure) Act, Act 30 where the accused is found guilty of an offence charged in a trial by jury e.g. murder and **"it appears to the jury that the person did the act charged but was insane at the time when the act was committed, the court, or jury shall return a special verdict to the effect that the accused is guilty of the offence charged but was insane when it was done."**

It is therefore not correct to argue that imposition of the mandatory death penalty in Ghana is rigid and admits of no alternatives.

The other reason for which the mandatory death penalty has been declared unconstitutional in some Jurisdictions is that it is excessive, harsh and cruel and offends against the protection against subjection to torture or other cruel, inhuman or degrading treatment or punishment.

Article 13(1) of our 1992 constitution stipulates that –

> **"No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted."**

The Criminal Offences Act being an existing law before the coming into force of the constitution, must be construed with any modification, adaptations,

qualification and exceptions necessary to bring it into conformity with Article 13 (1) of the Constitution.

Under this Article, a person shall be deprived of his life intentionally in the exercise of the execution of a sentence of a court in respect of a criminal offence of which he has been committed.

The Appellant is therefore not challenging the constitutionality of death penalty per se but the mandatory death penalty. I have already stated that section 47 of the Criminal Code does not admit of different categories of murder. In my opinion therefore it must be construed with qualifications and exceptions necessary to bring it into conformity with Article 13 (1).

If the death penalty itself is constitutional, then I do not appreciate how under some circumstances it can be said to be violating some provisions of the same constitution. Consequently, this court in my view cannot strike section 46 of the Criminal Code down as Legislation which offends against the constitution.

Parliament has the primary duty to make laws and this duty can be interfered with only when the law so made is inconsistent with the constitution which is the supreme law of the land. The court's duty is to apply and interpret the laws so made. It must refrain from making laws under the cloak of interpreting them.

Where the law made is inconsistent with the constitution, then the court can so declare it.

The Appellant's second challenge is that the mandatory death penalty violates the right to protection from arbitrary deprivation of life under article 13 (1).

The word arbitrary is not used in the said Article. The Oxford Advance Learners Dictionary defines arbitrary (of an action, a decision, rule etc) not seeming to be based on a reason, system or plan.

It seems to me that this challenge is linked to the third one which is against the violation of Article 19(1) i.e. the right to a fair trial. With the conclusion that I have reached that the mandatory death penalty is in conformity with Article 13(1) the deprivation of life cannot be said to be arbitrary as same is sanctioned by the constitution.

In the case of FURMAN VRS. GEORGIA [408 US 238] Furman, bringing an eight Amendment challenge, argued that capital cases resulted in arbitrary and capricious sentencing. In 9 separate opinions, and by a vote of 5 – 4, the court held that Georgia's death penalty statute, which gave the Jury complete sentencing discretion without any guidance as to how to exercise

that discretion, could result in arbitrary sentencing. The court held that the scheme of punishment under the statue was therefore "*cruel unusual and violated the Eight Amendment.*"

Thus on June 29, 1972 the Supreme Court effectively voided 40 death penalty statutes, and suspended the death penalty because existing statutes were no longer valid. Here it was death penalty itself which was voided.

The Appellant in this case is not challenging the constitutionality of the death penalty itself as indeed any such challenge would have failed. What he is doing to me is throwing the challenge through the back door. With regard to violation of his right to fair hearing which extends to sentencing, my answer is that it is not true that after conviction the accused was denied the right to say anything in mitigation.

Under section 288 of Act 30, the accused is asked whether he has anything to say why sentence should not be passed according to law. Whatever he says will be recorded and transmitted, as part of the record of proceedings with a report in writing signed by the Justice containing the recommendations or observations on the case which the Judge thinks fit to make. It is upon this report that a decision will be taken by the president whether the sentence is to be carried out. Admittedly, whatever he says will not affect the sentence to be passed. So until section 46 is amended to make room for different punishments to be imposed for varying degrees of murder rather than the mandatory death penalty, the court cannot do much in this regard.

May I however say that at the trial, the accused is given every opportunity to state his case to the extent that in some circumstances the murder may be justified for which reason it will be reduced to manslaughter or in extreme circumstances, lead to acquittal.

I must admit that the decided cases relied upon by the Appellant are very forceful and attractive but I am not persuaded by them in the light of the provisions of the constitution and section 46 of the criminal offences Act which I have found to be in conformity with Article 13(1) of the constitution.

Let me emphasize that even if this court had come to the conclusion that the mandatory death penalty is unconstitutional and that as in the Mutiso case, the *shall* should be construed to mean *may*, given the court the discretion to decide on the sentence, I am of the view that nothing short of death shall be the appropriate sentence that any court of law should impose on the Appellant having regard to the gruesome nature of the murder and the motive behind it.

R. C. OWUSU (MS) J.S.C

JUSTICE OF THE SUPREME COURT.

JONES DOTSE JSC:

I feel compelled to begin this judgment with the following quotation attributed to Anonymous which was delivered to the Massachusetts Body of Liberties in 1641,on **due process,** which is applicable in this appeal and also because of the horrendic and gory nature of the facts of this case and the ingenious and bold attempt inviting this court to reconsider and set aside the time tested mandatory death sentence in section 46 of the Criminal and other offences Act, 1960 Act 29 which provides thus:

"A person who commits murder is liable to suffer death"

Now let me revert to the quotation attributed to Anonymous in 1641. It states thus:

> "***No man's life shall be taken away, no man's honour or good name shall be stayned, no man's person shall be arrested, restrained, banished, dismembered, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estate shall be taken away from him, nor any way indamaged under colour of law or countenance of Authoritie, unless it be by vertue or equitie of some expresse law of the country warranting the same, established by a general court and sufficiently published, or in case of the defect of a law in any partculer case by the word of God. And in capital cases, or in cases concerning dismembering or banishment according to that word to be judged by the General Court".***

FACTS

The appellant was tried on two counts of conspiracy to commit murder and murder. The charge sheet read as follows:-

COUNT 1

Conspiracy to commit murder contrary to section 23 (1) and 46 of the Criminal Code 1960. The accused (appellant herein) and others at large, on or about the 27th May 2004 at Salom, near Old Ningo in the Greater Accra Region, did act together to intentionally cause the death of Jon kragness by unlawful harm.

COUNT 2

Murder contrary to section 46 of the Criminal Code: the accused (appellant herein) and others at large, on or about 27 May 2004 at Salom, near old Ningo in the Greater Accra Region, did intentionally cause the death of Jon Kragness by unlawful harm.

The appellant who was tried on indictment by a jury, was found guilty on the above two counts despite clear directions from the learned trial Judge to the jury to acquit him on the charge of conspiracy. Accordingly, the learned trial Judge Mrs. Iris May Brown JA, sitting as additional High Court Judge on 18th June 2008 acquitted the appellant on the charge of conspiracy whilst she convicted the appellant on the murder charge and sentenced him to death as is mandatorily provided under section 46 of the Criminal and other Offences Act, 1960, Act 29.

An appeal against both conviction and sentence filed by the appellant to the Court of Appeal was unanimously dismissed by the Court on 16th July, 2009 coram: Akoto-Bamfo JA *(as she then was)*, presiding, Ofoe and Danquah (Ms) JJA.

Dissatisfied with the decision of the Court of Appeal, the appellant has since 31st July 2009 filed the instant appeal to the Supreme Court.

Before dealing with the grounds of appeal, I consider it worthwhile to narrate very briefly the circumstances as to how the deceased Jon Kragness met his death, allegedly at the hands of the appellant.

On 27th May 2004, at about 3.00 pm or thereabout, the appellant went and picked up the deceased at the Indo Guest House where the deceased was lodging. Evidence on record indicates that the deceased before departing the Guest House informed the staff of the Guest House that he was going to Tarkwa with the appellant to buy Gold. The vehicle used by the appellant was identified as a Mercedez Benz Caravan Car number RT9716 Y.

Some events happened after the appellant picked up the deceased. They stopped at a Mobil Filling Station at Kanda to buy fuel which the deceased was reported to have paid for. Thereafter, the appellant made a number of detours and unknown to them, they were being trailed by security agents.

However, due to the speed of the appellants vehicle, the security agents who were trailing them lost track of the appellants vehicle at a place which was close to where the deceased's body was later found butchered with a cutlass, shot and burnt. The deceased's body was found at a place near Old Ningo, and it is instructive to note that the firing of gun shots and the screams apparently of the deceased attracted the villagers to the scene who saw a vehicle drove off from the scene in darkness.

The partially burnt body of the deceased was removed, examined and later buried. Police investigations implicated the appellant, hence his arrest after investigations, he was successfully indicted on a charge of murder and sentenced to death. His appeal to the Court of Appeal, having been dismissed, the appellant now appeals to this court on the following grounds: The appeal to this court is in two parts, namely appeal against (1) Conviction and (2) Sentence.

GROUNDS OF APPEAL AGAINST CONVICTION

1. The dismissal of the appellants appeal against conviction for murder is unreasonable or cannot be supported having regard to the evidence on record.

2. The judgment of the Court of Appeal occasioned a substantial miscarriage of justice as the trial High Court Judge's acquittal of the appellant on the charge of conspiracy to commit murder rendered the conviction on murder unsafe.

3. The judgment of the Court of Appeal occasioned a substantial miscarriage of justice due to the complete failure by the trial High Court Judge to give a proper direction on circumstantial evidence.

4. The Court of Appeal erred in ignoring the inadmissible hearsay evidence that was admitted by the trial High Court with severe prejudice for the defence.

5. The Court of Appeal should have quashed the appellant's conviction as the toll ticket allegedly recovered from the appellant's car was obtained in breach of the rules regarding searches of a suspect's property and should not have been admitted.

GROUNDS OF APPEAL AGAINST SENTENCE

1. As sentencing is a question of law to be solely determined by the Trial High Court Judge at the jury trial, the Court of Appeal erred in holding that the challenge to the mandatory death penalty for murder could only be dealt with on appeal if it was raised as an issue before the trial High Court Judge.

2. The mandatory imposition of the death penalty on the appellant for murder cannot stand as section 46 of the Criminal Code 1960 (Act 29) is in utter contravention of articles 15 (2) and 33 (5) of the 1992 Constitution that prohibits inhuman and degrading treatment.

3. The mandatory imposition of the death penalty on the appellant for murder cannot stand since section 46 of the Criminal code, 1960 (Act 29) is in violation of Article 13 (1) of the 1992 Constitution of Ghana that guarantees protection from arbitrary deprivation of life.

4. The mandatory imposition of the death penalty on the appellant for murder cannot stand as section 46 of the criminal code, 1960 (Act 29) is in contravention of article 19 (1) of the 1992 Constitution that guarantees the right to a fair trial.

5. Further grounds of appeal to be filed upon receipt of the certified true copy of the judgment of the Court of Appeal.

No further and additional grounds of appeal have been filed, it is thus to be safely concluded that the above constitute the grounds of appeal on conviction and sentence.

I take the privilege at this stage of the judgment to commend learned Counsel for the appellant Kwabla Senanu and his associate Joseph Middleton Esq, of whom Counsel has acknowledged as having received a lot of assistance from in the preparation of his brief before this court which brief has been properly and well researched. I can only hope that this high standard will be emulated by Counsel in all cases not only when they are assisted by Counsel from foreign jurisdictions.

PROOF

Our system of criminal justice is predicated on the principle of the prosecution, proving the facts in issue against an accused person

beyond all reasonable doubt. This has been held in several cases to mean that, whenever any doubts exist in the mind of the court which has the potential to result in a substantial miscarriage of justice, those doubts must be resolved in favour of the accused person.

I believe this principle must have informed William Blackstone's often quoted statement that

> "***Better than ten guilty persons escape than one innocent suffer"***

which was quoted and relied upon by me in the unanimous decision of this court in the case of ***Republic vrs Acquaye alias Abor Yamoah II, ex-parte Essel and others [2009] SCGLR 749 at 750.***

The principle enunciated in the above case had been followed in a long line of Ghanaian cases which appear to have taken their root from the locus classicus case of ***Woolmington vrs DPP (1934) AC 462, or 25 CR.App. R. 72*** which is on accepted standard of proof in criminal prosecutions.

This is what was stated by Lord Sankey in the above case:-

> ***"Throughout the web of the English Criminal law, the golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's quilt – if at the end of, and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner… the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."***

See also the case of ***Commissioner of Police vrs Isaac Antwi [1961] GLR 408***, where the principle in Woolmington's case was applied.

This principle has been applied in a long line of cases in Ghana to ensure that justice is not only seen to be done, but manifestly fairly and justly seen to be done in all criminal cases.

See also the case of ***Lutterodt vrs Commissioner of Police [1963] 2 GLR 429 holding 3*** which sets out three stages that a court must use to examine the case of the defence in criminal cases. These are:

> ***(3)"In all criminal cases where the determination of a case depends upon facts and the court forms the opinion that a***

> ***prima facie case has been made, the court should proceed to examine the case for the defence in three stages***
>
> ***a. if the explanation of the defence is acceptable, then the accused should be acquitted;***
>
> ***b. if the explanation is not acceptable, but is reasonably probable, the accused should be acquitted;***
>
> ***c. if quite apart from the defence's explanation, the court is satisfied on a consideration of the whole evidence that the accused is guilty, it must convict."***

See also the following cases ***R vrs Abisa Grunshie (1955) 1 WALR 36 W.A.C.A*** and ***R vrs Wunua (1957) 3 W.A.L.R 303, CA*** which was applied in the Lutterodt case supra.

This was followed by the Supreme Court laying down the principle in the celebrated case of ***Amartey vrs Republic [1964] GLR 256 at 295*** which when applied to the circumstances of this case should read like this:

> ***"In a criminal case where an issue arises as to what standard of proof is acceptable to merit a conviction, the Judge should apply a test like the following"***
>
> ***'First the prosecution's case or version should be considered, applying thereto all the principles governing credibility of witnesses and requisite standard of proof, it is only when the court is satisfied that the prosecution's witnesses are worthy of belief and that the standard has been met that consideration should be given to the accused's story as a second leg of the test. Thirdly, even if the accused's story is disbelieved, the court should consider whether despite it's inability to believe the accused's story, it is reasonably probable."***

This principle of the prosecution having a duty to prove the guilt of an accused person beyond reasonable doubt, was given serious attention by Amissah J.A, sitting as an additional High Court Judge in the case of ***Darko vrs Republic [1968] GLR 203***, ***holding 2*** as follows:-

> ***(2) "The principle that an accused person should be acquitted if his defence was believed or if it was reasonably probable did not call for uniformity of expression by judges or the use of any particular form of words. The crucial question relevant to the point in any ordinary criminal trial would turn upon whether the judge or tribunal of fact upon consideration of the***

> ***whole evidence found that the case of the prosecution had been proved beyond reasonable doubt. Where a court convicted only because it took the view that the accused person's defence was not to be believed this would be equivalent to shifting the burden of proof on to the defence. For it would in effect amount to saying that he was entitled to be acquitted only if he proved his defence to the satisfaction of the court. By implication the court would then have relieved the prosecution of its duty to prove its case beyond reasonable doubt which it was not entitled to do. A court could not therefore stop short at saying that it was convicting the accused because it did not believe its story. It must go further and show whether his story did not create a reasonable doubt either."***

These principles have now been incorporated in sections 11 and 13 of the Evidence Act, 1975, NRCD 323.

The courts have over the years been very firm and resolute in the evaluation of the rules of evidence and acceptable standard of proof in criminal cases that in some instances they have stated as was done in the case of ***Egbetowokpor vrs Republic [1975] 1 GLR 485***, that guilty persons might well be escaping the course of justice, arising from a strict application of these principles.

In the above case the Court of Appeal, Coram: Apaloo JA (as he then was) presiding, Jiagge JA and Sowah JA (as he then was) in reviewing an appeal against the conviction of the appellants for murder by the High Court, Ho held in allowing the appeal as follows:-

> "***We fully appreciate that in view of the result we have reached, guilty persons may well be escaping justice. If this be so, we cannot but regret it. But our duty is to do justice not according to our own lights but in accordance with the law as we conceive it."***

It should be noted that the right of an accused to a fair trial has also been guaranteed by various constitutional provisions contained in articles 14 (2) and 19 of the Constitution 1992 just to mention a few.

The principle can very well be formulated that despite the seriousness of a crime just as happened in the instant case, if the acceptable principles and requirements on burden of proof set down by law are not satisfied and or applied as laid down in the Constitution, the Evidence Act and the decided cases, then, just like happened in the Egbetorwokpor case, it is

better for guilty persons to walk away free than for an innocent person to be punished or incarcerated.

However, the non satisfaction or breach of the principles formulated above must be such that will cause or lead to a substantial miscarriage of justice.

The Grounds of Appeal against conviction have been subsumed under two broad grounds. These are:

1. The Judge failed to give a proper direction on circumstantial evidence.

2. Inadmissible hearsay evidence was admitted with severe prejudice for the defence.

I will take the first ground on the conviction first.

GROUND ONE

THE JUDGE FAILED TO GIVE A PROPER DIRECTION ON CIRCUMSTANTIAL EVIDENCE

Admittedly, there appears to be no straight direction to the jury on the dangers of acting on circumstantial evidence.

I am equally mindful of the dangers in acting on circumstantial evidence. Lord Normand, in the case of ***Lejzor vrs The Queen [1952] AC 489 at 489,*** stated on circumstantial evidence as follows:-

> ***"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined if only because the evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing inferences of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

In this appeal, the learned trial Judge did not use the magic word circumstantial. Is this court being requested here to hold and rule that because the learned trial Judge did not refer to the word ***CIRCUMSTANTIAL*** it has become so fatal to the entire prosecution's case, despite the reference to the many pieces of evidence on record which together make up the prosecution's case?

I certainly do not think so. This is because, quite apart from failing to refer to the magic word circumstantial if I may be permitted to refer to it as such, the learned trial Judge took pains to refer in great detail to

pieces of evidence from both the prosecution and defence satisfying in my view the test laid down in the case of Amartey vrs The Republic already referred to supra and in our Evidence Act, 1975 Act 323 and in many other cases, such as the following which demonstrates what constitutes proper summing up to a jury:

1. ***State vrs Kwame Amoah [1961] GLR (part II) 637 S.C.***

2. ***R vrs Afenuvor [1961] GLR (part II) 655 SC***

3. ***Barkah vrs State [1966] GLR 590 SC***

4. ***Yankey vrs State (1968) CC 115 on what duty of Judge is in a summing up***

5. ***State vrs Amuah [1961] GLR 195 S.C Practice Direction***

CASE FOR THE PROSECUTION

For example, the following pieces of evidence on record were amply referred to by the learned trial Judge to the jury in her summing up.

1. **PW1- Evidence of Evelyn Odarkai Aryee**

   One of the workers at the material time at the INDO Guest House on the issue of appellant picking up the deceased for a trip to Tarkwa. This had been confirmed by the appellant himself and other witnesses especially PW2, PW5,PW7 and PW8.

2. **PW2 - Veronica Yamgah**

   This was a female acquaintance of the deceased whom the deceased informed about the ill fated trip to Tarkwa with the appellant, who had been introduced to the deceased as a business partner.

3. **PW3- Michael Oduro Kwarteng**

   He had worked at the Continental Hotel, where the deceased and his father had once stayed. Infact, it was this witness who introduced the appellant to the deceased and his father.

4. **PW4 – Leonard Wayne Kragness**

   Father of the deceased and he confirmed that the appellant was introduced to them by PW3 and that they were into Gold business.

5. **PW5 – Naomi Sai**

   She was a housekeeper at the Indo Guest House at Labone where the appellant came to pick the deceased on his journey of no return. Infact, PW5 and PW1 corroborated each other, just as the appellant also corroborated them.

6. **PW6 – Wilfred Tei Quanor**

   It was this witness who gave a somewhat graphic account of what happened at the place where the deceased was killed. He stated that at about 8.30 pm he heard a loud noise around a gravel pit near their village.

He continued thus:

> *"My Lord, the shout sounded like the person was in pain, but we did not hear what the person was saying".*
>
> *"…at the end of the shout in pain, my Lord I heard two gun shots, and at that juncture the shout went off. My Lord, just at the time the shouting died off my Lord we saw a flame, just at that juncture we saw a vehicle move from that area. My Lord we did not see the headlight of the vehicle but the tail light was one driving from the area."*

This witness also described the crime scene as it looked like when they went there. The following are the items he mentioned as having seen at the scene:-

i. Torchlight
ii. Black Polythene bag
iii. Bottle of mineral water
iv. Mobile phone
v. The deceased was lying flat on the ground
vi. Finger was cut off and lying on the ground
vii. Clots of blood
viii. That the throat of the deceased was slit open and that the body was partially burnt
ix. That there was a wrist watch on the deceased.

7. **PW7 – David Jawarah Banye, Bureau of National Investigations Operative**

   He confirmed that the appellant made himself an informant to the BNI, and reported that the deceased and his father were US Citizens who had come to the country to print fake currency notes.

Based on this information, the appellant was advised to feign interest in the deal for the B.N.I to clamp down on them. But as later and coming events unfolded, this information by the appellant to the BNI was a hoax. It however, afforded opportunity to the BNI to have monitored a significant part of the events of that fateful 27th May 2004 from about 3.00 p.m when the appellant picked the deceased at the Indo Guest House to Kanda Mobil Filling Station up to the many detours in Accra until they ended up close to the spot where the deceased was killed after they lost sight of the appellant's vehicle.

8. **PW8 – Julius Aboagye**

   This witness is also an operative of the B.N.I and he corroborated the evidence of PW7 in all material particulars about the record of events of 27/05/2004.

9. **Prof. Edwin Kwame Wiredu – Consultant Patholoigst at the Korle bu Teaching Hospital**

   This witness confirmed in all material particulars the injuries described by PW6 as those he found on the deceased at the crime scene. He performed autopsy on the deceased and issued a medical report on the cause of death.

10. **PW10 Hansen Gove - Police Investigator at Homicide Unit at the C.I.D Headquarters**

    From this witness, it is clear the appellant went to pick the deceased in his Merecedez Benz Car No. RT 9716Y from the Indo Guest House at about 5.00pm when they drove to Kanda Mobil Filling Station.

The narration by the investigator is very significant as his evidence corroborates those of PW's 7 and 8, the B.N.I Operatives about the several detours that the appellant made with the deceased before finally settling on the motorway through to the Prampram Road and to the crime scene.

The Investigator revealed the visit of the appellant and one Telly Johnson to one Nana Abena Frempomaa a girlfriend to the appellant and the deposit of an amount of $12,000 US dollars with one Emefa Kamasa a former girlfriend of the appellant for safekeeping and its collection by Abena Frempomaa later.

The Investigator also disclosed the withdrawal of an amount of $75,000 from Barclays Bank, High Street by the deceased prior to his death.

The witness also disclosed that a further amount of $15,000 was collected by the deceased from a Chinese Yon Who to whom the deceased paid by cheque and this cheque had been cleared by the 28th May 2004 at the Bank.

The witness also mentioned the retrieval of toll tickets from the car of the appellant by F.B.I staff of the U.S.

DEFENCE

The appellant gave a statement from the dock and as is provided by law was not cross-examined. He however called two witnesses in respect of his plea of alibi.

1. DWI - Phyllis Akroboto, 88years old aunt of the appellant

She was definitely called in respect of the alibi and testified that the appellant visited her three times on that day. These were:

a. 6.30am -7.00 a.m
b. 6.00pm -8.00pm
c. 11.00pm

2. DW2 – Kwashie Latsu, Househelp to DWI

He confirmed in material particulars the times that DWI alleged the appellant visited her house on the 27th May 2004.

It is significant to note and observe that the evidence of the B.N.I operatives, PW7 and PW8 is very significant. This is because, acting on information freely given them by the appellant that the deceased and his father were dealing with and printing fake currency notes, they decided to mount surveillance on the deceased with the appellant acting as an agent.

The testimony of these witnesses as to the time the appellant picked the deceased, and the long period they drove in town making all the detours until they finally hit the motorway completely destroys the alibi of the appellant as regards his second visit to DW1 at about 6.30pm to 8.00 pm. This can certainly not be the truth.

I had taken the trouble to make all these references just to point out the fact that, the learned trial Judge indeed made references to all these pieces of evidence including the appellants defence of alibi and asked the jury to consider all of them. Indeed the jurors were in court, and as

men and women of the world, heard the witnesses themselves and were in a better position to evaluate the evidence.

As a matter of fact, the learned trial Judge in my estimation covered every blade of evidence and drew the jurors attention to them.

For example, the closing address of the learned trial Judge to the jurors states thus:

> "***All that is stated above is for you to consider and find whether it was the witnesses for the prosecution or the accused who were telling the truth. I reiterate however what has been repeatedly emphasised above, the accused merely has to cast doubt on the evidence of the prosecution whereas the prosecution has to prove facts essential to the guilt of the accused beyond reasonable doubt. If you have detected any lies in the defence, remember that does not prove the case of the prosecution.***
>
> ***The fact that other persons charged with the accused are alleged to be at large has nothing whatsoever to do with the accused you cannot use the absence of other accused persons to prove the quilt of the accused. <u>The only thing you can use is the evidence established by the prosecutor against the accused which leaves you in no doubt that the accused committed the crimes charged.</u>"***

In fairness to the learned trial Judge and the learned Judges of the Court of Appeal, I think the principles to be followed in such cases had been sufficiently followed. See cases of:

1. **Darko vrs Republic (supra)**

2. **Yankey vrs State (supra)**
3. ***State vrs Amuah*** supra and all the other cases on the required standard of proof and the reformulation of the principle in ***Amartey vrs Republic*** already stated supra.

It therefore beats my imagination why anybody should question the lack of proper direction to the jurors on circumstantial evidence and the failure of the Court of Appeal to uphold same.

In my opinion, the Court of Appeal was right in dismissing this issue the way and manner they did.

Amissah JA, in his erudite opinion in the ***Darko vrs The Republic*** case already referred to supra stated thus:

> "***I do not think that the Judge's opinion on the defence need to be stated in any particular formula of words."***

Even though the Darko case was not a trial on indictment, the principle stated therein is very significant. This is because, once the trial Judge or court has adverted the mind of the court, in this case the jury to the pieces of evidence on record which together and cumulatively make a case against the appellant, the absence of the use of any particular formula of words cannot denigrate those pieces of evidence and direction.

The Supreme Court speaking with one voice through me in the unanimous decision in the unreported case of ***G/Cpl Valentine Gligah and Anr vrs The*** Republic CRA/J3/4/2009, dated 6th May 2010, stated thus:-

> "***We have also taken serious note of the submissions by learned Counsel for the accused persons that the credibility of the prosecution witnesses is suspect and the court should have given the necessary directions and caution to the jury. Unfortunately, we are unable to agree to such a submission. This is because, quite apart from the fact that the case of the prosecution, especially PW1 is one of oath against oath, there are pieces of evidence which if put together make a very strong case against the accused persons. It is like series of small threads and when put together make a very strong rope. The same with circumstantial evidence. It is generally accepted that when direct evidence is unavailable, but there are bits and pieces of circumstantial evidence available, and when these are put together they make a stronger, corroborative and convincing evidence than direct evidence".***

I am therefore of the considered opinion that once the learned trial Judge had taken into consideration all the pieces of evidence on record both for and against the appellant, and appeared sufficiently to have directed the jury to consider them as well as the defence of alibi put up by the appellant, the duty cast on the learned trial Judge had been performed satisfactorily.

It is also my considered opinion that the reliance by the Court of Appeal on the case of ***Yirenkyi vrs State 1963 1 GLR 66*** and ***Addai vrs Republic 1973 1 GLR 312*** are really appropriate and relevant.

AN APPEAL IS BY WAY OF A RE-HEARING

Just like a civil appeal where it has been decided in a long line of cases that an appeal is by way of re-hearing. See cases like:

i. **Tuakwa vrs Bosom [2001-2002] SCGLR 61**

ii. **Sarkodie vrs FKA Co. Ltd [2009] SCGLR 65 and**

iii. **Fosua & Adu-Poku vrs Dufie (Deceased) and Adu-Poku Mensah [2009] SCGLR, 310**

Criminal appeals are also by way of re-hearing. In the case of ***Apaloo and others vrs The Republic [1975] 1 GLR 156 at 169 C.A*** Azu-Crabbe C.J, stated the powers of an appellate court in the determination of criminal appeals as set out in the Courts Act 1971 Act 372, as follows:-

> ***"The powers of this court on the hearing of an appeal are conferred by the Courts Act, 1971 (Act 372), and these are set out in subsection (12) of section 26 which may be summarised as follows:***
>
> ***On the hearing of an appeal against conviction, the Court of Appeal***
>
> ***(a) may allow the appeal where it is of the opinion that***
>
> ***(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence***
>
> ***(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or of fact, or***
>
> ***(iii) on any ground there was a miscarriage of justice***
>
> ***(b) may dismiss the appeal where, notwithstanding that the court is of the opinion that on any ground mentioned in (a) above, the appeal might be decided in favour of the appellant, it is of the opinion that***
>
> ***(i) no substantial miscarriage has actually occurred ,or***
> ***(ii) 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 of any other offence of which the accused***

could have been convicted upon that charge or indictment."

The above provisions have been virtually repeated in Section 30 of the Courts Act, 1993, Act 459 which states as follows:

30 "Orders available to appellate court

Subject to this Act, an appellate court may in a criminal case,

(a) on an appeal from conviction or acquittal

(i) reverse the finding and sentence and acquit and discharge or convict the accused or order the accused to be retried by a court of competent jurisdiction, or commit the accused for trial; or

(ii) alter the finding, maintaining the sentence or with or without altering the finding, reduce or increase the sentence; or

(iii) with or without the reduction or increase and with or without altering the finding, alter the nature of the sentence; or

(iv) annul the conviction and substitute a special finding to the effect that the accused was guilty of the act or omission charged but was criminally insane so as not to be responsible at the time when the act was done or the omission was made, and order the accused to be confined as a criminally insane person in a mental hospital, prison or any other suitable place of safe custody; or

(v) annul or vary an order of imprisonment or any other punishment imposed on the person convicted; or

(vi) annul or vary an order for the payment of compensation, or of the expenses of the prosecution, or for the restoration of property to a person whether or not the conviction is quashed;

(b) on an appeal from any other order, alter or reverse the order, and make an amendment or a consequential or an incidental order that may appear just and proper".

It can therefore be seen that, the powers which an appellate court, such as this court has in determining a criminal appeal are the following:

1. On an appeal from a conviction or an acquittal, the court can do any of the following things:

    i. Reverse the finding of conviction and sentence of the trial court and instead acquit the accused.

    ii. Convict the accused or order a trial de novo

    iii. Alter or vary the findings of the trial or first appellate court by maintaining the sentence or reduce or increase the sentence.

    iv. Annul the conviction and substitute a special finding that the accused was guilty of the act or omission but was criminally insane so as not to be responsible at the time for the crime and order the accused to be confined to a mental hospital, prison or other suitable place.

    v. Annul or vary an order of imprisonment or any other form of punishment.

    vi. Annul or vary an order for payment of compensation or for restoration of property.

2. Generally, the appellate court has powers to alter, vary, or reverse the order and or make consequential or incidental powers whenever necessary.

It has to be further noted that, by section 2 (4) of the Courts Act, 1993, Act 459 an appellate court, such as this Supreme Court has all the powers, authority and jurisdiction vested in a court established by or under the Constitution or any other law. That is to say it has the powers from all the courts below i.e. trial and appellate court.

This means that, apart from the special powers vested in this appellate court by section 30 of the Courts Act, Act 459, it also has all the powers of the trial court and the Court of Appeal for that matter.

Therein lies the fact that, as a way of re-hearing, this court not only has the powers of the trial and the first appellate court, to wit the Court of Appeal, but it also has special powers which enables it to vary, alter, reverse the entire conviction and sentence.

This power works in a reverse situation as well, in that it can lead to increase punishment by enhancing the punishment or sentence that the accused has been given.

What is therefore meant by an appeal being by way of a re-hearing is therefore that the appellate court has the powers to either maintain the conviction and sentence, or set it aside and acquit and discharge, or increase the sentence.

If the above contention is correct which I think it is, then I am of the considered view that it behoves on this court to consider in its entirety the appeal record before it, and substitute itself as the trial court and the Court of Appeal. In that respect, having evaluated the appeal record I am of the considered view that, based upon the decision in the ***Yirenkyi and Addai cases*** referred to supra, the appeal against the conviction on the grounds of lack of proper direction to the court on circumstantial evidence ought to be dismissed and is accordingly dismissed.

This is because there are sufficient pieces of evidence on record to link the appellant irresistibly to the committing of this crime. Besides, the trial Judge adequately directed the jury on the law and facts.

Finally, there is no substantial miscarriage of justice resulting thereby from the directions to the jury and their verdict and sentence need not to be disturbed. The Court of Appeal was right in dismissing the appeal.

GROUNDS ON HEARSAY EVIDENCE

If I understand the submissions of learned Counsel for the appellant, on these grounds of appeal, it is to the effect that, the Court of Appeal erred in not rejecting highly prejudicial evidence that was led by PW10, the Police Investigator.

The point had been made by learned Counsel for the appellant that evidence such as was led by PW10 that the motive the appellant had in killing the deceased was because of the money. And that PW10 led this evidence which was stated in the appeal record and that meant it constituted hearsay evidence which was inadmissible under section 116 (c) and 117 of the Evidence Act, 1975 Act 323 which states as follows:-

116 (c) hearsay evidence is

> *"evidence of a statement made by a witness while testifying in the action at the trial, offered to prove the truth of the matter stated"*

117 *"hearsay evidence is not admissible except as otherwise provided by this decree or by any other enactment or by agreement of the parties."*

Learned Counsel for the appellant made a very strong case in his statement of case that there was a strong possibility that the admission of these pieces of inadmissible hearsay evidence had a very significant impact on the jury in their decision to convict the appellant. He concluded further that, the failure of the Court of Appeal to have made a definite finding of fact as to whether these pieces of evidence were hearsay evidence and therefore inadmissible had rendered the appellant's trial and conviction unsafe.

In perusing the appeal record, I have realized that the only objection taken by defence Counsel to the evidence being led by PW 10 Hansen Gove, the Police Investigator is recorded like this:

> *"My Lord, PW10 is he relating what he is telling the court. My Lord I have an objection to what he is speaking as if he is speaking from his own experience, what he witnessed but the way he is saying it, it is as if he was there and the way he is relating the issue."*

It is interesting to observe the terse ruling given by the learned trial Judge.

> *"Please sit down and raise this when you are doing your cross-examination. This is what his investigations revealed. Please continue"*

It must be noted that, no where in the objection raised by the learned Counsel for the appellant did he refer to the PW10 testifying on hearsay evidence.

Secondly, it must also be noted that PW10 is a special class of witness. This is because, he was the Police Investigator who investigated the crime in which the appellant was a suspect, later to become an accused person and appellant following his conviction and sentence.

Thirdly, a proper distinction has to be drawn between what matters came to the knowledge of the Investigator during the course of his investigations as an Investigator, pure and simple.

It must further be noted that, in this respect, as an Investigator, the witness must be able to show the source of any matter of which he has made a substantial statement upon.

For instance, has the witness PW 10 been able to explain on record the fact that the deceased had withdrawn various sums of money from the Bank and other sources prior to the ill fated trip to Tarkwa?

These are questions and issues which should be interrogated properly before a conclusion can be reached as to whether or not the evidence of the witness is hearsay evidence or not.

Let me briefly tabulate the pieces of evidence led by PW 10 before the "lame objection" was raised by learned Counsel for the appellant.

The salient points in the evidence in the appeal record which the appellant informed PW10 in the course of his investigations about are as follows:

1. He established that the deceased and his father were introduced to the appellant by Michael Oduro Kwarteng (PW3) a worker at the Continental Plaza Hotel where the deceased and his father first lodged after their arrival in Ghana.

2. He also established that the deceased and his father came to transact Gold business in Ghana.
3. That the appellant and one Telley Johnson went to pick the deceased at the Indo Guest House where the deceased had re-located at about 5.00p.m.

4. That the appellant was driving a green Mercedez car No. RT9716Y

5. That he drove to the Mobil Filling station where the appellant ***bought fuel at the cost of ¢300,000.00 now GH¢30.00 which was paid for by*** the deceased.

6. Thereafter, the appellant alleged they dropped the deceased at the Golden Tulip Hotel where the deceased was alleged to have a meeting with other business partners.

The above was the statement the appellate gave the PW10, the Investigator. The following are the pieces of evidence that PW10 in his role as Investigator found out during his investigations:-

1. That the appellant and Telley Johnson drove in a green Mercedez Benz car registration No. RT 9716Y to the Indo Guest House on 27/5/2004 at about 5.00 pm and picked up the deceased.

Comments:- The above piece of evidence has been corroborated throughout the appeal record by almost all the witnesses including the appellant. It therefore admits of no complexities whatsoever.

2. From the Indo Guest House, the appellant drove on to the Ring Road, to Danquah Circle, through to Cantonments, to Ghana International School, back to Indo Guest House and through the same route to Danquah Circle and to the Kanda Highway where fuel was purchased at a cost of ¢250,000.00 now GH¢25.00 and paid for by the deceased.

Comments:- Apart from the many detours which the appellant was proven to have made before the purchase of the fuel at the cost of GH¢25.00 and paid for by the deceased and not GH¢30.00, the other pieces of evidence are consistent with what the appellant himself narrated.

It has to be noted however that, the evidence of PW7 and PW8 are so significant and material that, it tallies with what PW10 narrated as having found out during his investigations.

Secondly, if the deceased was not going to travel with the appellant outside Accra, what was the purpose in buying fuel for the appellant?

Thirdly, it has to be noted that the evidence led by PW10 is consistent with the evidence that has already been led and is on record and there is therefore no element of hearsay involved. Refer to PW7 and PW8.

3. PW10 also led evidence that the deceased bought mineral water from the Mobil Max store at the filling station where the petrol was bought. PW10 continued his evidence about the several detours that appellant made from the Mobil Filling station.

Comments:- This piece of evidence is also consistent with the evidence led by PW7 and PW8. As a matter of fact, PW7 even gave more details about the transactions the deceased made at the Filling Station i.e purchase of the mineral water, canned drinks, biscuits etc.

What must be noted is that, because of the false report made by the appellant to the BNI against the deceased about the printing and dealing in fake currency notes, the BNI had put the deceased under surveillance. This was how it came about that PW7 covered all the transactions of the deceased that day i.e. 27th May, 2004 which included his withdrawal of money from Barclays Bank, his enquiries at the Registrar-General's Department, his shopping at Koala etc.

From what I had narrated as the evidence that the PW10 had led before an attempt was made by learned Counsel for the appellant to object, the question might well be asked as to what portions of that evidence he was relating the objection to? Quite clearly, nothing that the witness PW10 had said up to that stage can in law be likened to hearsay

evidence. This is because, all the bits and pieces of evidence which together make the inference that none other than the appellant and the other person at large Telley Johnson were those who killed the deceased are on record.

As a matter of fact, assuming without admitting that the evidence of PW10 offends against the hearsay rule, which is denied, there is evidence on record from PW7 and PW8 in particular to fill in all the gaps if any that exist in the evidence on record.

Furthermore, PW10, as a Police Investigator is the person best placed to summarise the evidence collated during investigations and put them before the court.

What must be noted is that, the Prosecution in this case must be highly commended for the able manner in which they put together pieces of circumstantial evidence which directly connected the appellant to the commission of this heinous offence.

In my estimation, the test laid down years ago by Lord Sankey in the locus classicus case of ***Woolmington v DPP (1935) AC 262*** on proof in criminal cases has been satisfied.

As I have already stated, because the prosecution has been able to put up a very strong case of circumstantial evidence on record, which evidence has equally been corroborated by credible witnesses, and to which the learned trial Judge took pains to refer to, I am of the considered opinion that the failure by the learned trial Judge to refer to the word circumstantial specifically is insignificant and inconsequential. In the instant appeal, I am compelled to adopt the reasoning and conclusions reached by the Supreme Court in the case of ***The State vrs Anani Fiadzo [1961] GLR, 416*** in the above case, the Court, Coram: Korsah C. J, Sarkodee-Addo and Akimumi JJSC held per Sarkodee-Addo on the issue of circumstantial evidence as follows:-

> "***Presumptive or circumstantial evidence is quite usual, as it is rare to prove an offence by evidence of eye-witnesses, and inferences from the facts proved may prove the guilt of the appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption follows irresistibly from the circumstances proved in evidence, and in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the appellant, and incapable of explanation upon any other reasonable hypotheses than that of quilt. A***

conviction must not be based on probabilities or mere suspicion".

There is no doubt in my mind that there was sufficient evidence for the jury to believe that it was the appellant who killed the deceased even though there is no direct eye witness account of the incident. However, as I have quoted elsewhere in this judgment, bits and pieces of evidence from the various prosecution witnesses have combined to make a mass of very strong, convincing, powerful and incriminatory circumstantial evidence from which no one can be left in any doubt that it was the appellant who masterminded and killed the deceased because of his greed to reap from where he has not cultivated, planted and or sown.

William Shakespeare, the English Author of great repute, painted a similar picture of "Macbeth", in one of his Dramatic Tragedies entitled Macbeth when Macbeth was soliloquing in *Act 1, scene VII* on whether to kill or not to kill King Duncan in order to hurriedly succeed him at a time the King was visiting him to show appreciation for Macbeth's victory over the Thane of Cawdar and Norway in their revolt against King Duncan of Scotland.

This is what is recorded as having been said by Macbeth on the bloody deed that he was soon to embark upon in assassinating his host, the King.

"If it were done when 'tis done- then 'twere well.

It were done quickly,; if th'assassination

Could trammel up the consequence, and catch,

With this surcease, success; that but this blow

Might be the be all- and the end-all here;

But here, upon this bank and the shoal of time

We'ld jump the life to come. ***But in these cases,***

We still have judgment here, that we but teach

Bloody instructions, which being taught, return

To plague, th' inventor, this even handed justice.

Commends th ingredients of our poisione'd chalice

To our own lips He's here in double trust

First, as I am his kinsman and his subject,

Strong both against the deed then ***as his host,***

Who should against his murder shut the door

Not bear the knife myself. Beside, this Duncan

Harth borne his faculties so meek, hath been

So clear in his great office, that his virtues

Plead like angels, trumpet-tongued, against

The deep damnation of his taking off,

And pity, like a naked new born baby

Striding the blast, or heaven's cherubim horsed

Upon the sightless corners of the air,

Shall blow the horrid deed in every eye

That tears shall drown the wind, I have no spur,

To prick the sides of my intent, but only

Vaulting ambition, which o'erleaps itself

And falls on th'other".

From the proven facts of this case, the appellant like Macbeth was overly ambitious, greedy and callous, and was driven by an incessant motive to appropriate money which he knew the deceased had in his possession. The evidence is so clear that, it can only point to one and only one conclusion that it was the appellant who killed the deceased.

In this case, the body of the deceased was found not far from where PW7 and PW8 lost track of the appellant. Indeed, after picking the deceased from the Indo Guest House, the appellant never dropped off the deceased at any point. The presumption is that, the appellant was with the deceased throughout from the time he picked him, up to the time he killed him, burnt him and stealthily drove away in the darkness.

Herein lies the falsity in the defence case of alibi. It has not been proven and the jury were right in rejecting the alibi.

The prosecution having thoroughly investigated the case, afforded the appellant a fair trial as enshrined in our Constitution and indeed followed the due process of law.

Having followed the due process as by law established and having complied with all the practical requirements necessary and mandated in a trial on indictment such was done, the process which culminated in the conviction and sentence of the appellant for death cannot be faulted.

Under the circumstances, the quotation referred to in the commencing pages of this judgment that no man's life shall be taken unless after due process and in accordance with a general law have been properly complied with.

I will under the circumstances dismiss in its entirety, all the grounds of appeal against conviction and uphold the conviction of the trial court which was confirmed by the Court of Appeal decision of 16th July, 2009.

GROUNDS OF APPEAL AGAINST SENTENCE

By far, the grounds of appeal against sentence appear to be very radical and have the tendency to change the long standing principles and statutory provisions on the mandatory imposition of death penalty on persons convicted of murder.

I will adopt the approach learned Counsel for the appellant used in arguing the grounds of appeal on sentence and refer extensively to the statements of case filed by him on 17/5/2010, 1/10/2010 and 7/12/2010 respectively.

SUMMARISED GROUND ONE ON APPEAL AGAINST SENTENCE

1. The Court of Appeal erred in its conclusion that the Court was not the appropriate forum for considering the appeal against sentence.

   In respect of the above ground, it has to be decided what really were the appellants arguments in the Court of Appeal on sentence. In summary, learned counsel for the appellant would be deemed to have argued extensively that the mandatory imposition of the death penalty for all offences of murder violates the Constitution 1992 of the Republic of Ghana, for the following reasons:

i. It violates the prohibition of inhuman and degrading treatment or punishment under article 15 (2) of the Constitution.

ii. It violates the right to protection from arbitrary deprivation of life under article 13 (1) of the Constitution 1992 and

iii. It violates the right to a fair trial under article 19 (1) of the Constitution 1992.

Learned Counsel for the appellant referred this court not only to the many constitutional provisions on the subject, but also to a host of foreign decided cases, some of which are the following:

1. **Bowe and Davis vrs The Queen [2006] 1 WLR 1623 from 1628-1637 Privy Council**

2. **Reyes vrs The Queen [2002] 2 AC 235**

3. **Soering v United Kingdom (1989) II EHRR 439**

4. **Twoboy Jacob vrs The Republic** *(Criminal Appeal Case No. 18 of 2006 Court of Appeal of Malawi decided on 19th July, 2007)*

5. **Susan Kigula vrs Attorney-General** *(Constitutional Appeal No. 6/2003 Supreme Court of Uganda decided on 21st January 2009)*

6. See also the case of **Godfrey Mutiso vrs The Republic** *(Criminal Appeal No. 17 of 2008 judgment dated 30th July, 2010) Kenya Court of Appeal.*

The Respondent's response to the submissions of the appellant have been rather terse and really not consistent with the high professionalism exhibited by learned Counsel for the appellant.

Briefly stated, the Respondent's argument in response to the appellant's statement of case on this point is that, since the Court of Appeal was only sitting as an appellate court, it can only consider, vary or review a decision taken by a lower court whose decision is on appeal to the court based entirely on facts raised before the trial court.

Based on the above, learned Counsel for the Republic contended that the Court of Appeal decision was impeccable and should therefore not be disturbed.

Speaking for myself, even though I agree with the conclusion reached by the Court of Appeal in dismissing the said submissions on sentence, I think with due respect to learned Counsel for the Republic, the arguments canvassed for and on behalf of the appellant especially in this court, are so far reaching that a little bit more of an academic and high exhibition of professional standard would have sufficed.

In the first place, it must be noted that a constitutional issue can be raised for the first time on appeal at the Court of Appeal and even in this Supreme Court and when so raised must be duly considered.

The Supreme Court in the case of ***Attorney-General vrs Faroe Altantic Co. Limited [2005-2006] SCGLR 271 at 279 holding 8, particularly at 309*** per Georgina Wood JSC *(as she then was)* stated the principle that if an issue was not raised in the trial court and the intermediate Court of Appeal, it may not be raised in the Supreme Court unless it can be brought within any of the exceptions to this general rule. These are:

1. A jurisdictional issue could be taken or raised at any time, even for the first time on appeal.

2. Where an act or conduct has been made illegal by statute or where an action has been brought on a contract which was ex facie illegal it was the duty of the court to take the point even though it might not have been raised by the defendant.

3. And where the legal question sought to be raised for the first time was substantial and could be disposed of without the need for further evidence such as the constitutional issue raised by the defendant in the instant appeal, reference the ***Attorney-General vrs Faroe Altantic Co. Limited case.***

It is therefore clear and apparent that the appellant was entitled to raise the constitutional issue in the Court of Appeal. The Court Appeal was equally obliged to consider the said issue and if in their considered opinion it cannot be determined then a referral of the said issue ought to have been made pursuant to article 130 (2) of the Constitution and rule 67 of the Supreme Court Rules, 1996, C. I. 16

It is therefore quite clear that being a constitutional issue, there is nothing which forbids the Court of Appeal and therefore this court from considering it at the appellate level.

What must be understood is that, a constitutional issue just like a jurisdictional issue can be raised at any stage of the trial and on appeal and must be duly considered and determined. This is because these issues have the tendency to affect the very foundations of the case at its basis, and if sustained, will dispose of the appeal.

If for example, a constitutional issue is raised as regards the breach of any of the fundamental human rights and freedoms in articles 12 to 33 of the Constitution 1992, or of any other provision, then steps must be taken by the appellate court to decide the issue in line with the effect of that particular constitutional provision.

For example, if an appellant who has been convicted and sentenced to death for murder consequent upon a jury trial, subsequently contends on

appeal at the Court of Appeal that the verdict of the jury was not unanimous contrary and in clear breach of the provisions of article 19(2) (a) (1) of the Constitution 1992, the Court of Appeal must deal with and pronounce on that particular submission and come to a determination on the point. There is no need to contend that the issue was not raised in the trial court.

Secondly, the said constitutional issue being raised, is simple and straight forward and admits of no complexities whatsoever.

Thirdly, it must therefore be noted and clearly understood by all courts lower to the Supreme Court that it is not every reference to a constitutional provision that calls for a reference to this court under article 130 (2) of the Constitution 1992 and the Supreme Court Rules, 1996, C. I. 16, Rule 67.

I am of the opinion that, on a daily basis all the courts in this country apply the Constitution in their Rulings and Judgments without any reference to this Court for interpretation.

I am therefore of the considered view that the Court of Appeal should have considered and determined the constitutional issues raised before them. It is when due consideration is being given to the constitutional issue that a decision would be made whether a genuine issue of constitutional interpretation has arisen that calls for a reference to the Supreme Court What then are the issues raised?

Section 46 of the Criminal and other offences Act, 1960 Act 29 provides as follows:-

"A person who commits murder is liable to suffer death"

This law was promulgated in 1960. It therefore means that it was in existence before the Constitution 1992 came into force on 7th January, 1993. How then is this law to be determined such as will bring it into conformity with the Constitution 1992?

Article 11 (1) of the Constitution provides as follows:-

"The laws of Ghana shall comprise:-

a. this Constitution

b. enactments made by or under the authority of the Parliament established by this Constitution

c. any orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution

d. the existing law and

e. the common law"

Undoubtedly, the Criminal and other Offences Act 1960, Act 29, comes under the designation existing law, which has been defined under the Constitution as follows:

> *"The existing law shall, except as otherwise provided in clause (1) of this article, comprise the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution…"*

Sub-clauses 5 and 6 of article 11 of the Constitution provides thus:-

> *(5) "Subject to the provisions of this Constitution, the existing law shall not be affected by the coming into force of this Constitution."*

> *(6)"The existing law shall be construed with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of this Constitution, or otherwise to give effect to, or enable effect to be given to any changes effected by this Constitution."*

There is also no doubt that, the Criminal and other Offences Act, Act 29 as an existing law is a subordinate legislation to the Constitution 1992.

The above analysis will also apply to sections 294 (a) of the Criminal and other Offences (Procedure) Act, 1960 Act 30, which specify death as a prescribed and lawful mode of punishment in Ghana and section 304 (3) of Act 30 which lists the following as the authorised and approved methods of execution of the death sentence in Ghana, by hanging, lethal injection, electrocution, gas chamber or any other method determined by the Court.

The above analysis and those to be made thereafter are pertinent because of the issues raised in the supplementary statement of case filed by the appellant on 1st October, 2010 to wit:-

> "*The imposition of the mandatory death penalty for murder is unlawful because it violates the constitutional prohibition of inhuman and degrading treatment and the arbitrary deprivation of life and that it violates the right to a fair trial."*

Learned Counsel for the appellant has been very ingenious in crafting the above issue for determination in such a way that he does not as a matter of fact question the constitutional validity of the death penalty.

However, it is my humble view that in determining the issue as to whether the mandatory death sentence for murder violates the constitutional prohibition of inhuman and degrading treatment as well as the arbitrary deprivation of life etc, one will invariable embark upon an excursion as to whether mandatory death sentence for murder as we have it now in our Criminal and other Offences Act is in violation of various constitutional provisions in the Constitution 1992 vis-à-vis recent decisions of the Courts in South Africa, Zambia, Malawi, Uganda, and lately Kenya all of which have been referred to supra.

I have stated times without number that where our constitutional provisions on the subject matter are clear and there is no ambiguity, there should be no hesitation in interpreting the constitutional provisions without reference to decided cases from other jurisdictions.

In my opinion in the judgment delivered by the Supreme Court on 3rd February 2010 Suit No. CM/ JI/1/2009 intitutled, William Brown vrs Attorney-General and Two others, I stated as follows:-

> ***"I have always held the view that in interpreting a Constitution, one must resort to the Constitution itself to determine the spirit the framers of the Constitution intended to give it in its interpretation. Where the Constitution contains guidelines or principles which can be used to interpret the Constitution these must be applied. Where in the case of our Constitution 1992 there are no such express guidelines, the Supreme Court itself must fashion out its interpretative principles on a case by case basis taking into account the contextual nature of the provisions concerned. It is however my firm conviction that in fashioning out these guidelines and interpretative principles which underpin the Constitution 1992, one must first and foremost look at the Constitution itself, that failing then resort will be made to previous decisions of the Supreme Court in the 1st, 2nd and 3rd Republican Constitutions of 1960, 1969 and 1979 respectively.***
>
> ***I am also of the view that principles of constitutional interpretation and decided cases from foreign countries must be sparingly referred to and whenever these are used, the provisions of those Constitutions upon which the cases have been decided must be thoroughly digested and analysed to prevent the wholesale and corrupted adoption of foreign***

> ***constitutional interpretation which have no nexus to our home grown situation".***

In order to arrive at a considered, reasonable and fair minded interpretation of the constitutional provisions being relied upon by learned Counsel for the appellants to request a review and moderation in the application of the mandatory death sentence on those convicted of murder, I will adopt the same measure and yardstick stated in the unreported judgment of ***William Brown vrs Attorney General***, already referred to supra.

Admittedly, article 2 (1) (a) &(b) of the Constitution 1992 gives the right to any person who alleges that an enactment or anything contained or done pursuant to that enactment is inconsistent with or is in contravention of this Constitution to bring an action in the Supreme Court for a declaration to that effect.

The following are cases in which the Supreme Court has held that in interpreting article 2 (1) (a) & (b) of the Constitution 1992, the enforcement procedure under the said article should be assured to all classes of persons, both natural and or legal. Thus in ***New Patriotic Party vrs Attorney-General (The CIBA case) [1996-97] SCGLR 729***, the majority per Bamford Addo, Ampiah, Atuguba and Akuffo JJSC with Kpegah JSC dissenting explained the rationale in the following terms:-

> ***"It would be more beneficial and in accordance with the framers of the Constitution and in the pubic interest to open the door widely to permit both natural and legal persons like the plaintiff access to the Court."***

It must be noted that the plaintiff referred to therein is a registered political party. Other cases which reiterated the fact that all that an applicant or party need to establish in order to call in aid article 2 (1) (a) of the Constitution is an allegation and not a personal interest in the matter per se are the following cases:-

NPP vrs NDC [2000] SCGLR at 507 per Acquah JSC *(as he then was)* and ***Sam No. 2 vrs Attorney-General [2000] SCGLR 305.***

Thus, whereas the appellant has raised a constitutional issue in this appeal, there is no doubt that he not only has an interest in the matter but is permitted by the constitution to do so. Even though the raising of the constitutional matter has been indirectly introduced into the criminal appeal at the appellate court level, it is the duty of all courts at all times to strive to do justice by ensuring that substantial justice is done. This can only be done if the said constitutional issue is duly considered and determined in accordance with our judicial oath as Judges. It must be

noted that this court in the exercise of its appellate jurisdiction under article 129 (1) and 131 (1) & 2 of the Constitution 1992 as well as sections 4, 1(a) of the Courts Act, 1993 Act 459 has powers to deal with and determine any constitutional matters that arise therein.

In the instant appeal, the appellant has not invoked article 2 (1) a & b of the Constitution 1992 just referred to.

The appellant has however legitimately raised the constitutional issue on appeal which he is entitled to do.

PROHIBITION OF INHUMAN AND DEGRADING TREATMENT OF PUNISHMENT ARTICLE 15 (2) OF THE CONSTITUTION 1992

It is provided in article 15 (2) of the Constitution thus:-

> *"No person shall, whether or not he is **arrested**, **restricted** or **detained**, be subject to*
>
> > ***a. torture or other cruel, inhuman or degrading treatment or punishment***
> >
> > *b. any other condition that **detracts** or is likely to **detract from his dignity and worth as a human being."***

The above provision is in chapter 5 of the Constitution which deals with Fundamental Human Rights and Freedoms and the marginal note reads ***"Respect for Human Dignity".***

In respect of the above, the appellant argued very forcefully that the imposition of a mandatory death penalty for all offences, to wit murder without classification is inhuman. In support of this, learned Counsel for the appellant referred the court to the following cases which have been referred to supra.

1. Bowe and Davis vrs The Queen
2. Reyes vrs The Queen
3. Soering v United Kingdom
4. Twoboy Jacob vrs The Republic
5. Godfrey Mutiso vrs The Republic

In the ***Bowe and Davis case***, the Privy Council unanimously held that, judging by human rights standards, prevailing as long ago as 1973, the mandatory death penalty was an inhuman or degrading punishment.

In the ***Reyes vrs The Queen case***, drawing on the South African and other jurisprudence, the court gave an opinion which to me is only advisory but in view of the salient but pertinent issues raised therein, I have decided to quote in extenso the said judgment.

> *"Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation…As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charter party.* ***A generous and purposive interpretation is to be given to constitutional provisions protecting human rights.*** *The court has no license to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right in the light of the evolving standards of decency that mark the progress of a maturing society; See* ***Trop vrs Dulles 356 US 86, 101 1958****. In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion for reasons given by Chaskalson .P in* ***S vrs Makwanyame 1995 (3) SA 391, 431, para 88***
>
> > ***'Public opinion may have some relevance to the inquiry, but, in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society."***

These are very inspiring and powerful words which learned counsel for the appellant has invited this court to use as an important guide in interpreting the Constitution of the Republic of Ghana.

The ***Reyes vrs The Queen case*** was an appeal against sentence from the Court of Appeal of Belize to the Judicial Committee of the Privy Council which is the final appellate court.

It must be noted that, the Privy Council held that the imposition of a mandatory death sentence on all those convicted of murder by shooting was "disproportionate", "inappropriate" and "unconstitutional". In particular, the Committee held that such punishment was inhuman and offended against section 7 of the Belize Constitution which states:

> ***"No person shall be subjected to torture or to inhuman or degrading treatment of punishment. Lord Bingham summarized his reason on the issue in the following terms:***
>
> ***'The Board… is satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution, in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before the sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect".***

The undeniable fact is that there is no doubt that courts from various common law jurisdictions including Zambia, Malawi, Uganda, Kenya,

South Africa and others have come out strongly against the mandatory death sentence imposed on specific offences like murder without any classification of the gravity or otherwise of the particular offence. In the particular instance, it would mean that there must be various degrees of murder say 1st, 2nd, 3rd and possibly 4th degree murder. The problem then would be what criteria is to be used in determining the degree of murder. A court of law would then have to categorise and determine what factors must be taken into consideration; such as the following:

i. The gruesome nature of the way the murder was committed?

ii. The number of persons who died or were killed as a result of the act?

iii. The premeditated nature of the offence?

iv. The criminal antecedents of the accused/convicted person and others.

This list can be expanded to take into account, other factors.

In Ghana, the Criminal and other Offences Act, Act 29 specifically provides for the mandatory death sentence for anyone convicted of murder. It must also be noted that Act 29, as has already been noted is part of the existing laws of Ghana under article 11 of the Constitution 1992.

To what extent then, is section 46 of Act 29 inconsistent with article 15 (2) of the Constitution already referred to supra.

I do not intend to go into the polemics of what is torture, cruel and inhuman treatment of punishment because I believe judicial notice can be taken of the following conduct as constituting part thereof of inhuman, cruel and degrading punishment. For example,

i. corporal punishment, to wit incessant flogging on bare buttocks

ii. beheading,

iii. cutting of limbs and legs e.g. amputation

iv. Burning on the stake

v. Crucifixion

vi. Firing squad – which kills slowly by shooting from the limbs.

In my estimation all the above are punishment that can be described as torture, inhuman or degrading. Luckily, we do not have any of the above in Ghana.

Article 14 (1) (a) of the Constitution 1992 spells out clearly and in distinct terms the circumstances under which a person's liberty can be deprived under this Constitution. It provides thus:

> ***"Every person shall be entitled to his personal liberty and no person shall be deprived of his personal liberty except in the following cases and in accordance with procedure permitted by law.'***
>
> ***a. in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted".***

My understanding of the said article 14 (1) (a) is that, unless in execution of a sentence or order of a court of competent jurisdiction which imposes punishment on a convicted person after a trial in which the due process has been followed, a person's liberty cannot under any circumstances be deprived or curtailed.

It is also noteworthy that, article 3 (3) (a) and (b) of the Constitution 1992 specifically provides the death penalty as punishment for anyone convicted of the offence of high treason.

This is very significant because the Constitution 1992, despite the fact that it contains several provisions on the protection and enjoyment of fundamental human rights such as are provided for in article's 13, 15(2), 19 including all its sub-clauses, just to mention a few, nonetheless provides death as punishment for the offence of High Treason. Once the Constitution 1992 contains provisions mandatorily imposing the death sentence on any person who has been convicted of the offence of high treason as spelt out under the Constitution itself, it means that the Constitution 1992 does not directly or indirectly abhor or frown upon the imposition of the death sentence on the class of cases where the law provides for it.

Furthermore, article 13 (1) which is a provision in the same chapter five of the Constitution dealing with the Fundamental Human Rights and Freedoms enshrined in the Constitution 1992, states as follows:-

> ***"No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted."***

This means that any person who has been charged before a duly constituted court where due process has been followed and is convicted, if the sentence for the offence for which he has been convicted is one of death, then the intentional deprivation of the life of such a person is consistent not only with this Constitution but also the criminal jurisprudence of this country.

In view of the fact that the Constitution 1992 is in the scheme of Sources of law of Ghana, the Grundnorm, or the Basic law of the country, followed in that order by the laws passed by Parliament, which in this instance includes the Criminal and other offences Act, 1960 Act 29, which provides for the death penalty, I am of the considered view that the mandatory imposition of the death sentence by section 46 of Act 29 does not in any way violate article 15 (2) of the Constitution 1992 as has been forcefully contended by learned counsel for the appellant.

I have been really impressed by the sheer force and clarity of the arguments made by the learned Counsel for the appellant and his references to the foreign cases. Even though the arguments proffered in the cases appeared quite attractive, it is my respectful opinion that our constitutional regime on the provisions does not admit of the very liberal view that the courts in those jurisdictions had taken on the matter.

In view of the fact that the case of ***Godfrey Ngotho Mutiso vrs Republic***, the Kenya case decided by their Court of Appeal on 30th July 2010 is the most recent decision on the subject matter and indeed reviewed and considered all the other cases that had been referred to supra, I will confine my discussions on the merits and applicability of the principles of the Mutiso case under Ghana's Constitutional dispensation.

What then are the facts of the case?

In the Mutiso case, the appellant therein was convicted by the High Court in Mombasa, Kenya, presided over by Sergon J, sitting with three assessors for the offence of murder contrary to section 203 read alongside with section 204 of the Penal Code of Kenya.

The facts upon which the appellant was tried and convicted are that on the 4th day of November, 2004 at his village in the Mombasa District, with others not indicted before the court, murdered one Patrick Waweru Gachuki hereinafter referred to as the deceased.

The appellant detected he had lost his two mobile phones whilst having a bed rest in his Swahili Type house on the 4th November, 2004. He made a report to the Police and thereafter made his own enquires.

These enquires revealed to the appellant that the deceased was the thief who stole his mobile phones.

The appellant informed a certain Josephine who was reputed to be the girl friend of the deceased and who was a waitress at a Corner Pub that, it was the deceased who stole his mobile phones and he was therefore looking for the deceased to confront him.

Later in the night, at about 9.00 pm the deceased who had gone to the same Corner Pub was informed that the appellant was looking for him in his house. The deceased then left the Pub in the company of the brother of the appellant and others who also came to the Pub. Having being informed by a witness later that the deceased was being beaten up in the appellant's house, Josephine and her informant left to see for themselves what was really happening to the deceased.

The information was confirmed, as they saw the deceased being beaten up by the appellant, his brother ad brother-in-law in the corridor of the house of the appellant. As the corridor was fully lighted up with electricity, the following events were narrated by Josephine and confirmed by the witness as what they saw.

The deceased was half naked and his hands were tied behind his back. The appellant was holding a whip with which he was assaulting the deceased. Josephine and her informant were chased away and branded thieves upon being sighted, whilst the assault on the deceased continued.

Josephine returned to the scene with two other witnesses who also knew the appellant and testified at his trial. They also found the appellant holding a Somali Sword and a whip while another man was holding a wooden plank. Both were beating the deceased whilst calling him "thief", "thief". The matter was then reported to the Police and two officers were dispatched to the scene who rescued the deceased.

One of the Police officers testified as follows:-

That upon arrival at the scene he found a crowd of people who were standing and watching hopelessly as three men were beating the deceased next to the appellant's house. They found the appellant, holding a rubber whip with which he was beating the deceased. They saw deep cut on the deceased's chest. They also saw one of the assailants hold the deceased's head and bash it against the wall prompting bleeding through the mouth.

The Police were able to arrest the appellant whilst the other two men escaped. Even though the deceased was taken to hospital for treatment, he died six hours later while undergoing treatment.

An autopsy carried out on the body revealed multiple cuts and bruises all over the body, swellings on the lips and bruises on the face. There was also haemorrhage below the skin of the skull and the Pathologist was of the opinion that the deceased died as a result of intra-cranial haemorrhage due to head injury.

The appellant denied beating the deceased and claimed on the contrary that he rather saved the deceased from a mob attack and later called the Police, who arrested him as a suspect.

Despite his defence, the assessors returned a unanimous opinion that the appellant was guilty as charged. The appellant was therefore sentenced to

"suffer death in the <u>manner</u> authorised by law"

The manner authorised by law is that, the person *"shall suffer death by hanging on the neck until death is confirmed".*

The appellant being aggrieved by his conviction and sentence appealed on many grounds, but upon reception of arguments rested his case on the following grounds of appeal:

1. "The imposition of a mandatory death sentence upon the appellant was arbitrary and unconstitutional and the execution of the same in the instant case would amount to:

    a. An human and degrading punishment in breach of section 74 (1) of the Constitution of the Republic of Kenya.

    b. A denial of the appellant's right to a fair trial in breach of section 77 of the Constitution of the Republic of Kenya.

Whilst submissions had been made in Court for the appellant and the state, represented by the Attorney-General, there appeared to have been a major shift in Government Policy on the treatment of persons on the death row in Kenya and also the attitude of the Government on mandatory death penalty for murder convicts.

This change in policy was that, the Appeal Court was informed that the President of Kenya had issued a blanket commutation of all death sentences imposed against all death row convicts in Kenya including the appellant. The Counsel for the State informed the court that he had

instructions to withdraw all submissions made in respect of the appeal as it were opposing it. When pressed for his reasons, learned State Attorney only responded that the State was only conceding to the arguments covering this appeal and similar cases of murder, but not other offences which attract the death penalty, like Treason and aggravated robbery etc.

Despite the above concessions, the appellant still pressed forward his constitutional challenge as stated supra to the mandatory imposition of the death penalty in murder cases.

The Appeal Court in the Mutiso case prefixed its analysis of the law in issue with the following statement:-

> ***"As will be seen shortly, and indeed it is axiomatic, human society is constantly evolving and therefore the law, which all civilised societies must live under, must evolve in tandem. A law that is caught up in a time warp would soon find itself irrelevant and would be swept into dustbins of history."***

There is no doubt that the above statement is to a large extent correct. This is because law as a tool of social engineering is very dynamic, and to that extent is not static. Since laws are made for the good and orderly development of society, and society is everyday being improved upon, it is to be safely concluded that with civilization creeping everywhere around us laws that are absurd must give way to progressive and developmental oriented laws.

Sir William Blackstone, in his commentaries on the Laws of England 1765 – 1769 could not have been more apt when he wrote thus:-

> ***"The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as wholly without consideration".***

It is in the pursuit of the above ideals that almost all modern democracies including the over 200 years old democracy of the USA have written Constitutions which have spelt out their fundamental laws upon which all laws must be in tandem.

Laws must then not be measured in abstract terms or against non-existent or utopian principles which have no basis to a people's chosen way of life but to practical realities of human endeavour. What this means is that, in countries like Kenya, and Ghana which have written Constitutions, it is safe to conclude that these Constitutions represent

their aspirations as a people and unless and until it has been amended, it remains the body of laws against which all other laws must be measured. If the Constitution is warped and contains principles which appear to be uncivilized, so be it. Courts of law exist mainly to interpret constitutional and statutory provisions using various methods of interpretation e.g. purposive approach, mischief rule, golden rule etc.

The only instances where the courts intervene to as it were, appear to make laws is when there is an apparent lacuna or gap which appears in the Constitution or statutory law and needs to be filled in order to make the reading of the constitutional provision or statute law complete and reasonable.

In other cases, the maxim that "the judge should never be the legislator" must be scrupulously applied. This is because if this is not the case, then the will of the Judge would become the law and all would become subservient to Judges.

There is a well established principle of law that the laws, rules and orders of a state must be known to all the citizenry and its application to an extent be **certain** to ensure that people know how to behave, act or conduct their business in the State. However, if the law were uncertain and depended upon the opinion of a Judge, then arbitrary conduct becomes the order of the day. Modern day democratic Constitutions all over the world frown upon arbitrary conduct in all its forms.

I am therefore of the opinion that it is to the Constitution of Ghana that we must turn to for succour in times like this.

However, the Kenya Court of Appeal after reviewing a host of similar constitutional challenges to the mandatory death penalty in murder cases without any classification held in the Mutiso case as follows:-

> ***"On our own assessment of the issue at hand and the material placed before us, we are persuaded and now so hold that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter***

> ***and spirit of the Constitution, which as we have said, makes no such mandatory provision."***

After pronouncing that the judgment in the Mutiso case was in respect of only murder cases, the court went on to hold that it might well apply to other cases, such as treason, robbery with violence and attempted robbery. Concluding its opinion, the Kenya Court of Appeal stated thus:-

> "***The appellant may well be deserving of the death penalty or life imprisonment in view of the gravity of the offence committed and the circumstances of the deceased's death, or a lesser penalty, but then again, making such findings would be arbitrary. We must re-emphasise that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case."***

As a result, the case was remitted to the trial court for the submissions to be made before a decision is given as to the appropriate sentence to impose on the appellant.

I consider the reasons behind the above decision as very brilliant, bold and indeed captivating. It has been very attractive to me as a person trained in the law. But when I weigh it against the other options i.e. what does the Ghana 4th Republic Constitution 1992 say on this matter, then my spirit as a Judge is rekindled and I am reminded to defend the Constitution.

For example, the Kenya Court of Appeal was persuaded by the decision of the Supreme Court of Uganda in the Kigula case already referred to supra which held in part as follows:-

> ***"Furthermore, the administration of justice is a function of the judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty, Parliament removed the power to determine sentence from the courts and that, in our view is inconsistent with article 126 of the Constitution."***

Continuing further, the Uganda Supreme Court held that irrespective of the powers of Parliament to pass laws for the good governance of the country, it does not mean it can pass laws providing for a mandatory death sentence.

To the Uganda Supreme Court, the concept of separation of powers, finds expression in the fact that Parliament has not got the power to pass laws to tie the hands of the Judiciary in executing its function to administer justice.

In Ghana, article 125 (3) of the Constitution 1992 provides as follows on the repository of judicial power:

> ***"The judicial power of Ghana shall be vested in the Judiciary, accordingly, neither the President nor Parliament nor any organ or agency of the President or Parliament shall have or be given final judicial power".***

It must further be noted that articles 125 (1), 127 (1) & (2) reiterate and enforce the independence of the Judiciary in both its judicial and administrative functions.

It is also a fact that the Judiciary of Ghana under the 4th Republican Constitution 1992 has been largely and truly independent.

My candid understanding of the principle of judicial independence is that, in the exercise of both the judicial and administrative functions, the judiciary shall not be subject to the control of either the President, that includes the Executive and Parliament, the Legislative body.

For example, it means that in the core business of adjudication, from arraignment through the trial process up to the conclusion of the case where the Judge sums up to the jury if it is a trial on indictment, or delivers his judgment in a summary trial, no body outside the confines of the Judge's domain can interfere and in actual fact, not even the Chief Justice interferes with the daily adjudication of cases that come before the courts.

By parity of reasoning, it is the duty of Parliament to pass laws, and the Judiciary has no business to question the proprietary of laws passed by Parliament except those that are inconsistent with the Constitution which can be declared as such, or are obnoxious.

I certainly do not agree with the decision in the Kigula case by the Supreme Court of Uganda. The principle of the separation of powers has been carried too far. In otherwords, the concept as interpreted in the Kigula case meant that the Judiciary was interfering with the work of the Legislature.

The mere fact that a legislation has imposed a mandatory death sentence for an offence or imposed even a mandatory minimum sentence for an offence does not mean that the judicial discretion of the

courts have been taken away. In any case, it is Parliament that enacts legislation that the courts interprete and apply on a daily basis.

What must be noted is that, unlike Judges, Legislators are elected for fixed terms by the people directly. In essence therefore, Members of Parliament are directly accountable to the people they represent.

They are therefore to mirror the aspirations of the people they represent in Parliament. This they do in the type of laws they pass which in actual fact is a reflection of the policy objectives of the Ruling Government at any Particular time. It is the elected representatives of the people in Parliament who have the mandate of the people to pass laws for them and are held so accountable for four years. If they fail in their bid to govern properly by passing laws such as will bring peace, harmony, cohesion, development and progress to the citizenry, then they could be shown their exit.

Not so with Judges, who are appointed until they attain compulsory retiring age and therefore have security of tenure.

It will be a travesty of justice to maintain that Parliament cannot pass laws to mandate the courts as to the type of punishment to pass in certain offences which the Legislature considers to be serious.

To sum up on these issues, it can be ascertained that, the essential features of the doctrine of separation of powers is seen in the independence of the judiciary and this needed to be measured in terms of constant assessment in respect of selection, appointment and tenure of judges, as well as adequate provision of resources and the exercise of judicial authority in a free environment.

The freedom of Parliament, or parliamentary independence including those of individual members is very important and crucial and lies in the ability and competence of the Legislature to carry out their core mandate as enshrined in their Constitutions. There is this principle of parliamentary supremacy, under which Judges may not question the validity of legislation unless it was inconsistent with basic constitutional provisions.

In Ghana and in most of the Commonwealth where Judges have the constitutional power of review over legislation, Judges are sometimes called upon to make and render value judgments particularly where fundamental rights are in contention.

In giving a generous and purposive interpretation to fundamental human rights provisions thereby ensuring full protection for individual rights, Judges should avoid usurping the duties of Parliament.

I am well fortified in the view I have taken by the **Latimer House Guidelines** for the Commonwealth which were adopted in June 1998 as follows:-

Parliament and Judiciary

1. The legislative function is the primary responsibility of Parliament as the elected body representing the people. Judges may be constructive and purposive, in the interpretation of legislation, but must not usurp parliament's legislative function. **Courts should have power to declare legislation as unconstitutional. In other cases the appropriate remedy will be for the court to declare the incompatibility of a statute with the Constitution leaving it to the legislature to take remedial legislative measures.**

2. Commonwealth Parliaments should take speedy steps to implement their countries international human rights provisions.

3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights – Judges have a vital part to play in ensuring a vibrant human rights environment.

4. International law to be used to assist human rights jurisprudence in the countries of origin.

5. Dialogue between judiciary and government though desirable should not compromise judicial independence.
6. Access to the courts for the enforcement of fundamental rights must be guaranteed to all citizens.

7. Public awareness of other Human Rights bodies like CHRAJ, ADR Secretariats etc.

8. The public, especially Judges, lawyers, and Parliamentarians should have access to human rights education.

With the above as a guide, I am reluctant to hold and rule that the mandatory imposition of the death sentence for murder is unconstitutional in Ghana.

Before I conclude this judgment I think it worthwhile to consider how the US Supreme Court handled similar submissions in respect of mandatory imposition of death penalty vis-à-vis the eighth amendment of the US Constitution which states as follows:

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, <u>nor cruel and unusual punishments inflicted"</u>

There have been varying degrees of approach by the US Supreme Court in cases dealing with the 8th amendment of the US Constitution referred to supra. As can be seen, this constitutional provision is almost similar in content to article 15 (2) of the Constitution 1992.

In the case of ***Greg vrs Georgia, 428 U.S. 153 (1976)*** decided on 2nd July, 1976, the U.S. Supreme Court by a vote of 7-2 reaffirmed the constitutionality of the death penalty in the wake of an earlier decision of the same Supreme Court in the case of ***Furman vrs Georgia 408 U.S. 238*** (1972) argued on 17th January, and decided on 29th June 1972 where the U.S Supreme Court for the first time struck out the death penalty under the cruel and unusual punishment clause of the eighth amendment.

In the Greg vrs Georgia case referred to supra, the Supreme Court rejected claims that capital punishment was unconstitutional per se, but implied strongly that mandatory death penalty statutes would violate the Eighth Amendment's proscription of ***"cruel and unusual punishment".***

On the other hand, the majority of the Justices in Greg vrs Georgia **upheld statutes that guide Judge and jury when imposing the death penalty**.

The earlier decision of the U.S. Supreme Court in ***Furman vrs Georgia*** halted at the time all executions in the federal states that sanctioned the death penalty. The most important point to note however are the options the decision made on the application of the Eighth Amendment namely:

i. Mandatory death sentences for crimes carefully defined by statute

ii. Development of guidelines to standardize jury discretion

iii. Outright abolition of the death penalty

The later decision of the court in ***Greg vrs Georgia*** would seem to give the impression that the court departed from its very liberal views in ***Furman vrs Georgia***, and embraced a form of structured jury discretion based on the guidelines for sentencing.

The U.S. Supreme Court again took a hard line position on capital punishment and criminal justice in particular by denying a writ of certiorari to halt the execution of ***Bruce Edwin Callins,*** a murderer who was awaiting execution in Texas for the 1980 killing of a man during a

robbery. The case is *Callins vrs Collins, 510. US 1141 (1994).* It is interesting to note that Justice Harry Blackmun who was in the majority in the **Greg vrs Georgia case** was this time in dissent in the Callins vrs Collins. Shortly, after the decision of the Court, Callins was put to death by lethal injection.

See also the cases of ***Stanford vrs Kentucky, 492 US 361 (1989)*** argued on 27th March, 1989 and decided on 26th June, 1989 by a 5-4 majority wherein the court rejected the contention that the Eighth Amendment's prohibition of cruel and unusual punishment forbids the execution of those who were juveniles when they committed the crimes for which they were convicted. The court held that such a practice was not one of ***"those modes of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted and that it did not violate the "evolving standards of decency that mark the progress of a maturing society ".***

The court however by implication seemed to indicate that it would be unconstitutional for the state to impose the death penalty on a person who was under sixteen at the time of his or her offence.

See also ***Woodson vrs North Carolina 428 U.S 280*** where by a 5-4 majority, the Supreme Court reversed the lower courts approval of mandatory sentencing on Eighth Amendment grounds.

It must be noted that the reasoning behind the various decisions of the U.S Supreme Court seems to be firmly anchored on the principle that there must be put in place a mechanism whereby trial courts and juries will be guided in their sentencing regime.

In Ghana, this will mean that, after a guilty verdict has been returned by the jury in a murder case where the sentence of death has been mandatorily prescribed, the trial Judge as it were must exercise his or her discretion to sentence the convict to a term of imprisonment or death as he or she thinks fit.

This is my difficulty in accepting the plea that the mandatory death sentence as it operates now is discriminatory, takes away the discretion of the Judges and is unconstitutional vis-a vis the Constitution 1992.

For now, I think it is sufficient for this court to sound the alarm bells, for the legislative branch of government to take steps to put guidelines in place before a regime of legislative amendment can be enacted.

For example, clear guidelines would have to be established to indicate degrees of murder cases as already exists in the US.

In such a situation each degree of murder will evict different sanctions or punishment stated under the statute. Thus, not every murder case will be subject to the mandatory death sentence. Factors to be taken into consideration in such guidelines are the following:

i. The criteria for choosing aggravating and mitigating circumstances

ii. The nature of the discretion that sentencing bodies like the Judge or jury should retain once the circumstances have been established.

iii. How the sentencing body i.e. the court or jury will in practice determine whether a given circumstance exists or does not exist. This will enable the sentencing body to decide whether to apply it or not.

Indeed, it must be noted that, without settling the above issues or guidelines it is doubtful how an appellate court such as this court can exercise control over the requirements set out above.

I believe I will be speaking for many people in Ghana when I conclude that unless the Law makers, that is Parliament, come out with clear amendment of the law on the mandatory nature of the death sentence in murder cases and make provision for sentencing guidelines, it will be too much of an onerous responsibility for the trial court judges to carry out the task of deciding punishment for convicted murderers without any guidance.

In the U.S, as has been demonstrated above, the categorization of the crime of murder exists, hence it was easy for the guidelines to be put in place. I will therefore not accept the view point for now that evolving standards of decency have moved away from mandatory sentences and in particular, mandatory death sentence. Such a wholesale, application of the principle without a measuring mechanism to serve as a yardstick for the Judges and jury will certainly be a recipe for disaster, confusion and chaos in the criminal jurisprudence of this country.

In this respect therefore, it is quite clear that articles 13 (1) and 15 (2) (a) & (b) of the Constitution 1992 which states as follows:

13 (1) "No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted

15 (2) No person shall, whether or not he is arrested, restricted or detained, be subjected to-

a. torture or other cruel, inhuman or degrading treatment or punishment;
b. any other condition that detracts or is likely to detract from his dignity and worth as a human being."

does not render unconstitutional the death penalty for those convicted of murder.

This is because as in the instant case, the appellant has gone through the due process, has had the advantage of a two tier appeal system.

Besides it is the law that has provided for the deprivation of life intentionally after the due process has been complied with and in accordance with the laws of Ghana.

Thirdly, it is quite clear that the mandatory imposition of the death penalty is not unconstitutional articles 13, 15 and 19 of the Constitution 1992.

Finally, the appellant herein has been given more than adequate fair hearing as stipulated in article 19 (1) of the Constitution which states:-

"***a person charged with a criminal offence shall be given a fair hearing within a reasonable time."***

Nothing has been arbitrary in this trial and appellate process. The innocence of the appellant has been assumed throughout the trial process.

He had the benefit of Counsel right from the investigative stage up to the trial processes.

I must admit that I have been really impressed by the wisdom and the reasoning behind the cases referred to by learned Counsel for the appellant in support of his appeal against sentence.

For example, there appears to be good policy measures in the arguments that there ought to be categorization of murder cases to distinguish and or classify them into serious and minor cases.

What must however be noted is that Prosecutors must be cautious in preferring murder charges against people who fall foul of the law. The situation where prosecutors classify an event as murder whenever death results and therefore liable to be arraigned for murder must cease.

We cannot for purposes of convenience and lack of performance on the part of prosecutors in preferring appropriate charges in offences of this nature lead us to hasty and dangerous conclusions that the mandatory sentence of death in murder cases is unconstitutional.

What I believe in is that, a single life that is lost is as important as many lives that are lost in a terrorist attack or a food poisoning in which over hundred lives are lost. Each person's life is very important and crucial to the family who has lost the deceased irrespective of the status of the person concerned. That is why the admonition and decision of Roger Korsah J (as he then was) in the case of ***Seidu & Others vrs The Republic [1978] 1 GLR 65, holding 3, 4 and 6*** which states as follows is appropriate. He held thus:-

1. ***"The issue as to whether a case was one of murder or some other crime had to be determined objectively. Although the prosecution had to decide what charge it would prefer against a party, it was the duty of the court to decide whether the case was one of murder or some other crime by considering the evidence in support of the accusation."***
2. ***"Any person preferring a charge under a criminal statute must be quite sure that the offence charged was within the letter of the law."***
3. ***The power of preferring charges against persons suspected of crime must be exercised in good faith for which the power was conferred. A court was entitled to request the prosecution to advise the court on the basis for the prosecution…"***

The cumulative effect of the above decision no doubt imposes a great and onerous responsibility on prosecutors and to some extent on the courts. This is because the prosecutors must exercise the power to prefer charges in such serious cases as murder very responsibly and in good faith. Cases which do not qualify to be classified as murder cases should not be so described. If this principle is very well complied with, the mischief which the decisions in the kigula and Mutiso line of cases sought to solve would be avoided and possibly reduced to the barest minimum,.

The time is therefore ripe for the State Prosecution department to endeavour to objectively analyse the facts and the law applicable before preferring serious charges like murder against persons accused of such crimes.

CONCLUSION

In view of the reasons advanced supra, it is my considered opinion that this appeal must fail in its entirety against both conviction and sentence. I am however of the view that, in line with the guidelines established under the Latimer House principles the time has possibly come for the Parliament of Ghana to seriously consider whether to have a policy shift

in the mandatory death penalty regime imposed on those convicted of murder.

In view of my earlier decision that the existence of the mandatory death sentence for murder is consistent with the constitutional provisions referred to, it is only Parliament which can consider an amendment of the Criminal and other Offences Act, 1960 Act 29. In that respect, the submissions of learned Counsel for the appellant would be incorporated into the body of laws for our criminal jurisprudence.

It is only by such a positive method that the categorization of the various degrees of murder could be classified and incorporated to enable trial courts take evidence to determine what type of punishment to impose on a convicted murderer. That is the only way that in my view Ghana as a country can legitimately join the comity of nations which have removed the mandatory death sentence for murder offences from their statute books. Anything short of that in my opinion will amount to this court usurping the functions of Parliament which to me is not warranted under the circumstances, there being no conflict or lacuna in the law and the Constitution to be filled or purposively interpreted.

The appeal is accordingly dismissed.

[SGD] J. V. M DOTSE

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH JSC

I had the privilege of reading the draft opinions of my lords' professor Justice Date-Bah and Justice Dotse. I agree with their opinions that the appeal be dismissed on the grounds that the circumstantial evidence led by the prosecution at the trial court led conclusively to establish the fact that the appellant herein was the sole perpetrator of the crime which led to the murder of the deceased.

I am of the view that the jury was indeed adequately directed on the law and evidence in the summing –up that led the jury to return the verdict of murder.

However, I am compelled to state my personal opinion as regards the submission made by learned counsel for the appellant on the grounds that the death penalty imposed on persons convicted of murder as the sole punishment is unconstitutional. I have considered the cases from other jurisdictions cited in support of his submissions in which the learned counsel for the appellant put in a lot on industry. I am aware that the death penalty has been abolished in other jurisdictions, especially in the commonwealth countries. I will advocate for statutory intervention like other jurisdictions where they have degrees of murder instead of judicial intervention by way of interpretation. I therefore agree with my brother Dotse JSC.

[SGD] ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

ARYEETEY, JSC:

I am in complete agreement with the judgment read by my brother Dotse, JSC and I have nothing useful to add. The appeal should be dismissed.

[SGD] B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

COUNSEL;

KWABLA SENANU FOR APPELLANT.

MISS CYNTHIA LAMPTEY, CHIEF STATE ATTORNEY FOR THE RESPONDENT.