

**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA AD 2015**

**CORAM: ADINYIRA (MRS), JSC (PRESIDING)  
DOTSE, JSC  
YEBOAH, JSC  
BONNIE, JSC  
BENIN, JSC**

**CRIMINAL APPEAL  
NO.J3/11/2015**

**2<sup>ND</sup> DECEMBER 2015**

**FRIMPONG BADU**

**... APPELLANT**

**VRS**

**THE REPUBLIC**

**... RESPONDENT**

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**JUDGMENT**

**ADINYIRA (MRS) JSC-**

**FACTS**

On 10<sup>th</sup> July 2006, Frimpong Badu (Appellant) arrived at the Kotoka International Airport to board a KLM flight to Amsterdam. While undergoing pre-boarding formalities, he was arrested by officials of the Narcotic Drugs Control Board on duty at the airport, on suspicion of possessing narcotic drugs on his body. He was taken to the 37 Military Hospital for an X-ray examination which proved negative. Appellant was

taken back to the Airport by the officials to conduct a search of his hand luggage. Four parcels of powdery substance suspected to be narcotic drug were found concealed in a small green bag that the Appellant was holding along with his Puma carry-on bag. A test conducted by the Ghana Standards Board proved that the substance was cocaine weighing 1, 656, 8215 grammes.

The Appellant claimed the green bag was given to him at the Airport by one Kenny to be given to a mutual friend Marvin in Holland saying it contained personal effects left by Marvin at home.

Appellant was subsequently charged and tried on two counts of:

- 1) Attempted exportation of Narcotic Drug and
- 2) Possession of Narcotic Drug

Contrary to sections 1(1) and 2(1), respectively, of the Narcotic Drug (Control, Enforcement and Sanctions) Law, 1990 (PNDCL. 236)

The Appellant was tried and convicted by the High Court on 25<sup>th</sup> September 2008, and was sentenced to a term of twelve (12) years IHL on each count to run concurrently. The Appellant was held in custody without bail from the day of his arrest on 10<sup>th</sup> July 2006 to his sentence on 25<sup>th</sup> September 2008.

On 4<sup>th</sup> March 2009, the Court of Appeal affirmed the decision of the High Court. The Appellant being dissatisfied appealed to the Supreme Court against the sentence of twelve (12) years IHL on the grounds that:

- a. The sentence of twelve (12) years IHL imprisonment imposed on the Appellant by the Trial Court was excessive under the facts and circumstances (evidence) of the Case and the Honorable Court of Appeal erred in affirming that excessive sentence.
- b. The Trial Court in imposing a sentence of imprisonment on Appellant on 25<sup>th</sup> September 2008 and the Court of Appeal in affirming the decision of the Trial Court on 4<sup>th</sup> March 2010, violated Article 14(6) of the 1992 Constitution by failing to take

into account the period of time appellant was held in custody before the sentence was imposed on him.

The main thrust of Counsel's submission was that the learned trial circuit Judge erred and violated Article 14(6) of the 1992 Constitution when he imposed the term of imprisonment on Appellant without taking into account the period of two (2) years and three (3) months Appellant spent in lawful custody for the offence before his sentence. He submits further that the Court of Appeal also failed to comply with the said constitutional provision when it affirmed the decision of the Trial Court.

Article 14(6) of the 1992 Constitution provides that:

“Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment.”

Counsel submitted that it is clear from the language of article 14(6) that it is mandatory for the trial court to take into account the period the Appellant spent in lawful custody in imposing the term of imprisonment; citing *Bosso v The Republic* [2009] SCGLR 420 and *Kweku Frimpong a.k.a. Iboman v The Republic*, unreported, Supreme Court Criminal Appeal No. J3/5/2010, 18 January 2012. He therefore urged for reduction of the sentence which he said was harsh and excessive having regard to the fact that the Appellant cooperated during investigations and the trial and testified truthfully and was a first time offender.

The principles of sentencing have changed. Article 14(6) of the 1992 Constitution requires that where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment.

So where in this case the trial judge was disposed to pass a sentence of 12 years imprisonment he was mandatorily required to take into account the period the Appellant has spent in custody, and accordingly declare that it considered and featured it into the consideration of the appropriateness of

the sentence that had been considered fit and proper for the offence committed by the Appellant.

In *Bosso*, ***supra***, this Court delivered a unanimous decision pronounced by Wood C.J. at p.420:

“This clear constitutional provision enjoins judges, when passing sentence, to take any period spent in lawful custody before the conclusion of the trial into account. A legitimate question which might arise any given case and which does, indeed arise for consideration in this instant appeal is how do we arrive at the conclusion that this constitutional mandate has been complied with? We believe this is discernible from the record of appeal. We would not attempt to lay down any hard and fast rules as to the form, manner or language in which the compliance should be stated, but the fact of compliance must either be explicitly or implicitly be clear on the face of the record of appeal.”

In *Kweku Frimpong a.k.a. Iboman v The Republic*, ***supra*** this Court settled on the mandatory nature of Article 14(6) and further made it clear that the court’s compliance with Article 14(6) of the 1992 Constitution must be explicitly stated in the Judgment. This Court went on to hold that it would be unconstitutional for a Court to fail to comply with Article 14(6) of the 1992 Constitution

The Appellant before us was held in custody without bail from the day of his arrest on 10<sup>th</sup> July 2006 through to the day of his sentence on 25<sup>th</sup> September 2008. It is apparent on the face of the record that the trial judge did not make any reference to the period the appellant spent in custody before the trial was concluded in passing sentence. The trial judge also made no reference to the constitutional provision. There are also no words express or implied to the effect that it weighted on the judge’s mind.

This is a clear breach of the Appellant’s fundamental human right to have the period spent in lawful custody featured and considered before sentence was passed on him. In the same manner the learned Justices of Appeal did not avert their minds to Article 14 (6). In effect, the Appellant is to spend 14

years and two and half months in prison custody for this lapse on the part of the trial and appellate courts. This failure amounts to a grave miscarriage of justice which this Supreme Court cannot countenance.

The Office of the Attorney General filed its statement of case on 31 November 2015, two days before judgment, on behalf of the Republic/Respondent, in response to these arguments which in our considered view are insurmountable; as the constitutional provision of Article 14(6) is mandatory

From the foregoing the appeal against sentence succeeds.

This Court will therefore consider the period spent by the appellant in lawful custody to vary the sentence. From the records, the Appellant was arrested on 10 July 2006 for possessing and attempting to export narcotic drug without authority and was remanded into lawful custody until the 26 September 2008 when he was convicted and sentenced. The fact that the Appellant is a first offender is also a mitigating factor as urged on us by Counsel.

Accordingly the period that the Appellant spent in lawful custody before conviction and sentence is taken into account by this Court by reducing the sentence of 12 years IHL on each count to 10 years IHL being the minimum sentence imposed by the Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 (PNDCL. 236).

The sentence of 12 years IHL is hereby set aside and substituted with a sentence of 10 years IHL on each count to run concurrently, with effect from the date of sentence by the trial court on 26 September 2008.

**(SGD) S. O. A. ADINYIRA(MRS)**

**JUSTICE OF THE SUPREME COURT**

**(SGD) V. J. M. DOTSE**

**JUSTICE OF THE SUPREME COURT**

**(SGD) ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) P. BAFFOE BONNIE**

**JUSTICE OF THE SUPREME COURT**

**(SGD) A. A. BENIN**

**JUSTICE OF THE SUPREME COURT**

**COUNSEL**

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**MATTHEW AMPONSAH ESQ.** (CHIEF STATE ATTORNEY) FOR THE  
REPUBLIC.