IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2015

CORAM: WOOD CJ (MRS) PRESIDING
ADINYIRA (MRS) JSC
DOTSE JSC
YEBOAH JSC
GBADEGBE JSC
BENIN JSC
AKAMBA JSC

WRIT
NO.J1/7/2015

1ST DECEMBER 2015

MARTIN KPEBU

VRS

ATTORNEY-GENERAL

JUDGMENT

DOTSE JSC:

This writ, is at the instance of the Plaintiff, a private Legal Practitioner and filed pursuant to article 2 (1) and 130 of the Constitution 1992 seeking the following relief:-

> *"On a true and proper interpretation of article 19 (11) and article 14 of the Constitution of Ghana 1992, section 104 (4) of the Criminal and other Offences (Procedure) Act, 1960 (Act 30), is inconsistent with the said articles and therefore unconstitutional."*

CONSTITUTIONAL PROVISIONS RELIED UPON

At this stage, I think it is pertinent to consider the constitutional and statutory provisions that are germane to this action.

Article 19 (11) of the Constitution 1992 provides as follows:-

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

Article 14 (1) of the Constitution 1992 also provides thus:

(1) "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; or

(b) in execution of an order of a court punishing him for contempt of court; or

(c) for the purpose of bringing him before a court in execution of an order of a court; or

(d) in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community; or

(e) for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or

(f) for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or

(g) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana."

STATUTORY PROVISIONS IN ACT 30

Section 104 of the Criminal and Other offences (Procedure) Act, 1960 Act 30 also provides as follows:

Forfeiture of recognisance

(1) When it is proved to the satisfaction of a Court by which a recognizance under this Act has been taken, or when the recognizance is for appearance before a Court, to the satisfaction of that Court, that the recognizance has been forfeited, the Court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty thereof, or to show cause why it should not be paid.

(2) Where sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover it by forfeiting any sum deposited in pursuance of section 99 or by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) The warrant may be executed within the local area of the jurisdiction of the Court which issued it; and it shall authorise the attachment and sale of any movable property belonging to that person, when endorsed by a Magistrate within whose area of jurisdiction such property is found.

(4) When the penalty is not paid and cannot be recovered by attachment and sale, the person so bound is liable, by order of the

Court which issued the warrant, to imprisonment without hard labour for a term not exceeding six months.

(5) Repealed by the Criminal Procedure Code (Amendment) Act, 2002 (Act 633), s. (8)].

(6) Where a surety to a recognizance dies before the recognizance is forfeited, the estate of the surety shall be discharged from the liability in respect of the recognizance.

(7) Where any person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognizance, a certified copy of the judgment of the Court by which that person was convicted may be used as evidence in proceedings under this section against the surety of that person and, if the certified copy is so used, the Court shall presume that offence was committed by that person unless the contrary is proved."

The constitutional provisions referred to supra give the clearest indications that the framers of the Constitution 1992 resolved to do away with arbitrariness, totalitarianism and abuse of basic democratic principles. Is it any coincidence that, articles 14 and 19 (11) of the Constitution 1992 all form part of chapter 5, of the Constitution 1992, which deals with the Fundamental Human Rights and Freedoms?

The Plaintiff's relief, which he seeks before this court therefore has to be evaluated against the background of the constitutional guarantees of basic fundamental human rights and freedoms as enshrined in chapter 5 of the

Constitution. It is because of this premium which was placed on the enjoyment of these basic freedoms that the whole of this chapter 5 of the Constitution 1992 is one of the few entrenched provisions, meaning its amendment process is rigorous and involves the exercise of people's power. It is this underlying philosophy that should guide this court in evaluating whether any of the provisions of section 104 of Act 30 referred to supra is in breach or inconsistent with the said articles 14 (1) and 19 (11) of the Constitution 1992.

WHAT THEN IS RECOGNIZANCE

In this respect, it is necessary to understand what a recognizance is. Black's Law Dictionary, 9th edition, by Bryan A. Garner defines or describes recognizance in the context in which it has been used in section 104 of Act 30 on page 1386 as follows:-

> *"Most commonly, a recognizance takes the form of a bail bond that guarantees an unjailed criminal defendant's return for a court date.* ***Recognizances are aptly described as contracts made with the crown in its judicial capacity."*** *A recognizance is a writing acknowledge by the party to it before a Judge or officer having authority for the purpose, and enrolled in a court of record. It usually takes the form of a promise with penalties for the breach of it, to keep the peace, to be of good behaviour,* ***or to appear at the assizes****. William R. Anson, Principles of the Law of Contract 80 -81. "*

In other words, Bail is with cash or it's equivalent such as the bail bond that a court will accept in exchange for allowing the accused person or suspect to remain at liberty until the conclusion of the trial or investigations. The Bail so given creates an obligation for the accused person to make all required court appearances. What is contained in section 104 of Act 30 are the circumstances under which the court will forfeit the bail, i.e. recognizance that has been given for the appearance of the accused person in the court.

Thus, whenever the accused fails to turn up in court when required to do so, the court either keeps the cash if it was a cash bail, (this is not popular or common in Ghana because of our dire economic conditions) and the court issues a bench warrant for the arrest of the accused person and or may proceed against the person who entered into the recognizance, i.e. the undertaking that he will produce the accused on demand in court or pay a cash penalty.

WHAT THEN ARE THE ESSENTIAL INGREDIENTS OF THIS SECTION 104 OF ACT 30

It should be generally noted that, section 104 of Act 30 outlines the procedure for recovery of a bail sum upon forfeiture of recognizance. Upon proof of recognizance, section 104 (1) states that the courts shall record the grounds of proof and may call on a person bound by the recognizance to pay the penalty or the forfeiture or show cause why it should not be paid. **Section 104 (4) further establishes that where the penalty is not paid and cannot be recovered by attachment and sale, the**

person so bound is liable to imprisonment without hard labour for a term not exceeding six months. This is the crux of the Plaintiff's complaint in this case.

Writing in his pioneering work on the "Criminal Procedure in Ghana" A. N. E. Amissah states as follows on page 188:

> *"Whenever it is proved to the satisfaction of a court by which a recognizance under the code has been taken, or when the recognizance is for appearance before a court, to the satisfaction of that court, that the recognizance has been forfeited, the court shall record the grounds of proof, and may call upon any person bound by the recognizance to pay the penalty attached, or to show cause why it should not be paid… if the penalty is not paid and cannot be recovered by attachment or sale, the person so bound is liable, by order of the court which issued the warrant, to imprisonment without hard labour for a term which may extend to six months."*

The learned Author has thus provided solid basis for the Plaintiff's complaint about the constitutional breaches of this section 104 provisions vis-à-vis the Constitution 1992.

PLAINTIFFS' ARGUMENTS IN SUPPORT OF HIS CASE

According to the plaintiff, estreating a bail bond is a civil cause of action as stated in ***R v Southhampton Justices, Ex parte Green [1975] 2 A.E.R 1073.*** Failure to fulfill recognisance gave rise to a civil debt and the

nature of that debt was not altered though it was enforceable like a fine, by warrant of distress or committal to prison.

The plaintiff further contended that in applying the test of a crime outlined in *Amand v Secretary of State for Home Affairs [1942] 2 A.E.R 381 or [1943] A.C 147* to an application to estreat a recognizance in Ghana, the outcome was not a trial of the surety for an offence. According to the plaintiff, this is because article 19 (11) of the Constitution 1992, specially states that the cause or matter is only criminal if the law criminalizes it and sets out a punishment. The recognizance is thus merely in the nature of a bond which is essentially a contract. Failure to fulfill it gives rise to a civil debt, and though enforceable like a fine it is still simply a civil debt and as such it is not a criminal cause or matter. The definition in Blacks Law Dictionary lends support to this argument.

The Plaintiff relied on several cases including **R v Durham Justices Ex parte Laurent [1994] 2 A.E.R, 530 Div Court,** where it was contended by the applicant therein that, the forfeiture of the recognizance was a conviction for an offence within the meaning of the Criminal Justice Administration Act, 1914, Section 37 (1) thereof whilst the respondent contended otherwise, the court after considering the arguments, held as follows**:-**

> **"that a conviction should be in respect of an offence in the sense that it could be made the subject of a criminal charge,**

and a breach of a formal undertaking was, therefore, not within the terms of the section."

In *Ex parte PPE Limited & Paul Juric (Unique Trust Financial Services Limited – Interested Party [2007-2008] SCGLR 188* Date-Bah JSC expressed doubt as to whether the restriction on personal liberty in the form of imprisonment for failure to pay a debt was justifiable in a civilized democratic society.

He further added that although article 14 (1) (b) of the 1992 Constitution permits the imprisonment of a person where there is contempt of court, it would be troubling if the contempt concerned were solely a failure to pay a judgment debt.

In **Republic v High Court, Ex parte Laryea Mensah [1998-99] SCGLR 360** at 368 it was stated that a person commits contempt and may be committed to prison for willfully disobeying a court order requiring him to do an act **other than payment of money or to abstain from doing an act. According to the plaintiff, this formulation contains a clear exclusion of liability for contempt of court in respect of a court order for the payment of money.**

DEFENDANT'S ARGUMENTS IN RESPONSE

According to the defendant, the pivot of article 19 (11) is to prevent retrospective penal legislation. In effect no one can be convicted for an act or omission which is not declared as an offence in a written law with the penalty for such offence provided in the written law.

Counsel for the defendant further contended that Section 104 (4) prescribes the forbidden conduct and provides specific sanction for its violation.

The defendant contended that, it was not unconstitutional to commit a person to imprisonment for willful default, want of due diligence and deliberate disobedience of a court order. The case relied on by the Plaintiff i.e. *Southampton Justices, Ex parte Green* did not say that a person cannot be sentenced to imprisonment just because failure to fulfill the recognisance gave rise to a civil debt.

The defendant further argued and relied on the dicta of Atuguba JSC in Ex Parte PPE Limited already referred to supra.

The defendant therefore submitted forcefully that, both decisions create the impression that the court can commit to prison any person whose conduct demonstrates a willful default, want of due diligence and deliberate disobedience of the orders of the court.

Section 104 also dwells on this willful default or lack of due diligence. This can be seen in section 104 (2) which provides that where sufficient cause is not shown and the penalty not paid the court would proceed to recover the penalty.

The defendant also submitted that, the procedure by which a bail bond is forfeited is a trial to determine the failure of the surety to produce the person bailed, and this is a result of willful default, in view of the basic

elements of a trial as set out by Taylor JSC in *Kwakye v Attorney-General [1981] GLR 9.*

According to the defendant, the plaintiff restricted his interpretation of article 14 to 14 (1) (a). Article 14 (1) establishes that no person shall be deprived of his personal liberty except in the following cases:

(a) In execution of a court order or sentence in respect of a crime he has committed and

(b) in execution of an order of a court punishing him for contempt of court.

The defendant therefore submitted that, Article 14 (1) (b) thus allows a person to be imprisoned for contempt of court and willful default, want of due diligence and deliberate disobedience of the court are all conducts amounting to contempt of court. Section 104 takes its power to imprison from article 14 (1) (b) and not article 14 (1) (a).

The defendant submitted that reading section 104 as a whole reveals that commitment to prison is not premised on a failure to pay money but rather failure of the surety to produce the principal party. This failure must be the result of willful default, lack of due diligence or deliberate disobedience of the court.

The resulting penalty for this contemptuous conduct is paying the penalty, forfeiting the sum deposited, issuing a warrant for the attachment and sale of the surety's movable property and imprisonment. In effect,

imprisonment is not caused by failure to pay money but failure to pay penalty for willfully disobeying the order of the court to produce the principal party.

The defendant further contended that the plaintiff's statement of case was misleading since he sought to create the impression that the outcome of an application to estreat a recognisance was not a trial. Learned Counsel for Defendant further contended that, such an application is served on the surety with an affidavit and on the return date the prosecution would have to lead affidavit evidence or call witnesses to testify orally and be subject to cross examination in satisfaction of section 104 (1). It states that where it is proved to the satisfaction of the court that a recognizance had been forfeited, the court shall record the grounds of proof and may call on the person bound to pay the forfeiture or show cause why it should not be paid. The surety may testify on oath and may call a witness.

Both parties may address the court and the court then makes a ruling, either for or against the surety. Section 104 therefore makes provision for a trial contrary to the plaintiff's assertions.

The Defendant therefore concluded that section 104 is not inconsistent with article 14 and 19 (11) of the constitution. Section 104 is in consonance with article 14 (1) (b) since willful default to produce a bailed person amounts to contempt of the court, Mr. William Kpobi learned Chief State Attorney therefor urged this court to dismiss the plaintiff's case.

MEMORANDUM OF ISSUES

Counsel duly filed a joint memorandum of issue in compliance with the Rules of the Supreme Court, C. I. 16. The only issue filed is as follows:-

1. "Whether or not section 104 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30) is contrary to article 19 (11), 14 (1) and 15 (1) (2) and (3) of the Constitution (1992),

LEGAL ISSUES

In order to determine whether section 104 (4) of the Criminal and other offences (Procedure) Act, 1960 (Act 30) is contrary to article 19 (11) and 14 (1) and 15 (1), (2) and (3) of the Constitution 1992, it is imperative to consider the type of legal relationships that are created when a person stands as a surety for someone who enters into a recognizance.

From the Plaintiff's arguments it is certain that his case is that the recognizance is in the nature of a bond which is actually a contract and failure to fulfill gives rise to a civil debt. Even though the said debt is enforceable like a fine, it is still simply a civil debt and therefore not a criminal cause or matter.

The Plaintiff's arguments seem to have been given a major boost by the case of **Daswani v Commissioner of Police (No. 2) [1964] GLR, 54** where Sowah J (as he then was) made determinations when he was called upon to consider the obligations of a surety under a bail bond and the circumstances under which the obligations under a bail bond may be discharged. It was held by the eminent jurist, Sowah J, (as he then was) as follows:-

"a bail bond like a civil bond is a contract under seal, and for the bond to be enforceable against the obligees or the principal party any conditions precedent must be shown to have been fulfilled. In the present case, failure on the part of the Police to state another date for the appearance of the principal party, discharged the surety from his obligations under the bond, and such failure was a defence to any action which might be brought to enforce the obligations under the bond."

Even though the statute under which the above decision was given are somewhat different from section 104 of Act 30, the facts and effect of the decision are spot on and thus applicable to this case. Sowah J, (as he then was explained the above decision further thus:-

"In my view a bail bond like a civil bond is a contract under seal in which the contracting parties undertake certain exclusive obligations but which obligations are taken for the benefit of the one or the other contracting party or some third party. For the bond to be enforceable against the obligees or principal party and sureties the party seeking to enforce it must show that if there were any conditions precedent to the enforcement of the obligations undertaken by the obligees, that condition precedent has been fulfilled."

It is to be noted that section 104 of Act 30 deals generally with the procedure upon forfeiture of recognizance that is to say, default in the case

of the surety to produce the principal party before a court of competent jurisdiction, wherein the surety is bound to be called upon to pay the penalty or show cause why it should not be paid.

However, sub-section (4) of Section 104 of Act 30 specifically provides that when the penalty is not paid and cannot be recovered by attachment and sale of property earmarked, the surety, i.e. the obligee is liable by order of the court which issued the warrant, (and that is the court which makes orders upon forfeiture of the recognizance to enable the sum specified therein to be realized) to suffer imprisonment without hard labour for a term not exceeding six (6) months. This is what the Plaintiff is complaining about.

What is the definition of the offence for which a surety is to be imprisoned for six months without hard labour? Quite clearly, it does appear that, article 19 (11) of the Constitution 1992 which provides that no person shall be convicted of a criminal offence unless the offence is defined and the penalty for the offence also prescribed in a written law has been breached. What offence does a person commit when as the one who offered recognizance for the accused or principal party to appear in court to answer the charge or charges preferred against him fails to appear in court to answer commit, to make him liable to imprisonment for six months?

My understanding of the case law and the statutes referred to by the parties is that the forfeiture of recognizance is a civil debt, albeit it may be enforceable like a fine, by warrant or committal to prison.

However, recent pronouncements by the Supreme Court in cases like, ***Republic v High Court, Accra: ex-parte Laryea Mensah [1998-99] SCGLR 360*** and ***Ex-parte PPE Ltd v Paul Juric (Unique Trust Financial Services Ltd- Interested Party)***, already referred to supra signalled the death knell of the punishment or committal for non payment of judgment debt in transactions which are primarily civil in nature.

In the ***Ex-parte PPE*** case for example, Date-Bah JSC, explained the reasons for the unanimous decision of the Court which was generally to the effect that article 14(1) (b) provisions of the Constitution cannot be extended to punishment for contempt of court for non payment of judgment debt vis-à-vis order 43 rr 1 (1), 50 (i) (c) and 12 (1) of C.I. 47 in the following terms:

> *"Although article 14 (1) (b) of the 1992 Constitution permits the imprisonment of a person where this is done in execution of an order of a court punishing him for contempt of court, I would be exceedingly troubled if the contempt concerned were solely a failure to pay a judgment debt… Construing the relevant rules of civil procedure namely, order 43, rr 1(1), 5 (1) (cc) and 12 (1) of C.I. 47) according to the normal canons of construction yields a result that is not incompatible with the spirit of civil liberty with which our Constitution is infused."*

In coming to the said decision, Date-Bah JSC referred to the earlier decision of Bamford-Addo JSC in the **Ex-parte Laryea Mensah** at 368

wherein the court speaking through her in a unanimous decision stated thus:-

> *"By definition, a person commits contempt and may be committed to prison for willfully disobeying an order of court requiring him to do any act* ***other than the payment of money or to abstain from doing some act."***

The matter was put in beyond doubt when the court, again speaking through Date-Bah JSC delivered himself in the Ex-parte PPE case as follows:-

> *"The issue of civil liberty raised is whether in this day and age imprisonment should be an option available for failure to pay a debt. I very much doubt whether this is a restriction on personal liberty that is justifiable in a civilized democratic society."*

Atuguba JSC, in his concurring opinion in the Ex parte PPE case also had this to say on pages 196-197 as follows:-

> *"The exclusion of the remedy of committal to prison as a means of enforcing a decision for the payment of any money (as shown by the provision in rule 12 (1) from the new High Court (Civil Procedure) Rules, 2004 C. I. 47, is in line with the fundamentality of the liberty of the individual in chapter 5 of the Fundamental Human Rights and Freedoms Provisions of the 1992 Constitution. It is notorious that these rights are subject to such limitations as are necessary in the public interest on the protection of the rights of others."*

It is interesting to observe that, all the provisions of the Constitution which the plaintiff referred to as being contrary to section 104 of Act 30 are all contained in this chapter 5 of the Constitution 1992 which Atuguba and Date-Bah JJSC both referred to.

I have looked critically at article 14 of the Constitution 1992 in its entirety and in relation to the peculiar facts of this case.

I have also considered the various submissions of the Parties in respect of the said provision.

Considering all the above scenario, I am of the view that section 104 (4) of Act 30, is in reality inconsistent with article 14, and that committing a person to prison for default in paying a civil debt arising from a default to produce a bailed person does not amount to contempt of court.

I am also unable to accept the defendant's contention that the processes normally embarked upon wherein affidavits are served as a prelude to estreating a bail bond satisfy the provisions in article 19 (11) of the Constitution 1992. It is untenable. What must be noted is that, article 19 (11) is a safeguard against abuse of a person's fundamental human rights and prevents arbitrariness and frowns upon convictions for undefined criminal offences which do not have punishment prescribed in written laws.

Even though section 104 (4) prescribes the punishment, the offence is however undefined and to that extent, it is contrary to article 19 (11) of the Constitution as well and to that extent must be struck down as being inconsistent with the constitution.

Section 104 (4) is therefore in my opinion inconsistent with article 14 and 19 (11) of the Constitution 1992 and to the extent of the inconsistency, is struck down.

CONCLUSIONS

Having considered the constitutional and statutory provisions referred to supra, as well as the decided cases and also some guidance from Blacks Law Dictionary, I am of the considered view that section 104 (4) of the Criminal and other Offences (Procedure) Act, 1960 (Act 30) is indeed and infact inconsistent with the provisions of article 14 (1) and 19 (11) of the Constitution 1992.

In the light of the analysis supra, and basing myself on the provisions of article 2 (1) of the Constitution 1992 section 104 (4) of Act 30 is accordingly struck down as being contrary to and inconsistent with Articles 14 (1) and 19 (11) of the Constitution 1992.

The Plaintiff thus succeeds on the relief claimed before this court.

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

ADINYIRA JSC:-

The issue for consideration by this august Court is whether upon the proper interpretation of Articles 14 (1) and 19 (11) of the 1992 Constitution of the Republic of Ghana, section 104(4) of the Criminal and Other Offences (Procedure) Act, 1960, (ACT 30) is inconsistent with the said articles 19(11) and therefore unconstitutional.

I have had the privilege of reading beforehand the draft by my respected brother Dotse, JSC and I am in agreement with his reasoning but I wish to add a few words in concurrence.

The issues of civil liberty raised by the Plaintiff in his writ and statement of claim is not novel, as this Court had on occasions expressed its abhorrence in committing a person to prison for failure to pay a judgment debt. For example Date –Bah JSC in *Republic v. High Court (Fast Track Division) Ex Parte PPE Ltd and Paul Jurik (Unique Trust Financial Services Ltd Interested Parties) [2007-2008] SCGLR 188 at 191* opined:

> "This case, for me raises an issue of civil liberty...The issue of civil liberty raised is whether in this day and age imprisonment should be an option available for failure to pay a debt. I very much doubt whether this is a restriction on personal liberty that is justifiable in a civilized democratic society. Accordingly only clear and compelling statutory language would persuade me to reach the conclusion that a person should go to jail for the inability of his company to pay a debt, which is the essence of the facts of this case."

My brother Dotse has extensively set out section 104 (4) of Act 30 in his written opinion and so it is sufficient for my purpose to summarize Section 104 of Act 30 as setting out the procedure for forfeiture of recognizance and sub-section (4) provides that where the penalty is not paid and cannot be recovered by attachment and sale, the person so bound is liable to imprisonment without hard labour for a term not exceeding six months.

The Plaintiff submits that standing surety is not a criminal offence and a surety should not be punished where the principal party jumps bail. The stipulation of imprisonment as a punishment under Act 30 contravenes Article 19 because the offence has not been defined.

The Defendant's response that the purpose of Article 19 (11) is to provide against retroactive legislation is incorrect as the relevant provision is Article 11 (5) which is inapplicable here.

Article 19(11) states:

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

Black's Law Dictionary 8th Edition defines the word "define" as, to state or explain explicitly, to fix or establish (boundaries or limits), to set forth the meaning of(a word or phrase)

I am not impressed by the defendant submission that "section 104 (4) of Act 30 prescribes the forbidden conduct and provides a specific sanction for its violation and thus is consistent with the Constitution." as the Defendant by this argument is inferring a criminal offence from the existence of a penalty for the forfeiture of a bond. In my opinion, Article 19 (11) requires the offence to be stated explicitly or defined as well as the penalty.

From the jurisprudence cited by the Plaintiff and my esteemed brother Dotse JSC, such as *R v Southampton Justices, Ex parte Green* [1975] 2 AER 107 and *R v Durham Justices, Ex parte Laurent* [1994] 2 A.E.R. 530 Div Court; estreating a bail bond is like a civil bond or civil debt; and although the debt is enforceable like a fine, by warrant of distress or committal to prison it is not a criminal cause or matter.

We may recall that since 2004, the remedy of committal to prison as a means of enforcing a decree for the payment of money in civil proceedings has been deleted with the enactment of the High Court (Civil Procedure) Rules, 2004 (C.I. 47). Atuguba JSC in *The Republic v. High Court (Fast Track Division) Ex Parte PPE Ltd and Paul Jurik (Unique Trust Financial Services Ltd Interested Parties,* ***supra,*** remarked that this deletion was in line with the fundamental liberty of the individual enshrined in Chapter 5 of our Constitution.

In his book, *Practice & Procedure in the Trial Courts& Tribunals,* S.A. Brobbey JSC wrote at page 555 para. 2 that:

> "In the light of the current view that a person cannot be sent to prison for debts, it is questionable whether the surety can properly be sent to prison for owing on the bail bond, if the bond is considered as a debt arising from a contract. This is a moot point which should await a court decision"

Following the above, it is obvious that that Section 104 (4) of Act 30 is no longer a good and valid procedure to estreat a bond. The most important and overriding factor is that that Section 104 (4) of Act 30, does not define any criminal offence for which a punishment has been prescribed and therefore infringes Article 19(11). Consequently the said section has failed to measure up to the provisions of the 1992 Constitution in respect of the protection of personal liberty and is therefore unconstitutional. Furthermore I consider the said section cannot in any way be construed as a procedure permitted by law as envisaged under Article 14(1) for a person to be deprived of his personal liberty. Article 14 (1) states:

"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

It is about time for this Supreme Court in the exercise its jurisdiction under Article 2(1) to enforce the Constitution to strike down Section 104 (4) of Act 30 as inconsistent with Articles 14(1) and 19(11) of the Constitution.

I concur with the unanimous decision that the Plaintiff's action succeeds.

Accordingly, section 104(4) of the Criminal and Other Offences (Procedure) Act, 1960, (ACT 30) is struck down as it is inconsistent with the provisions of Articles 14(1) and 19(11) of the Constitution.

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

JUSTICE OF THE SUPREME COURT

GBADEGBE JSC:

I have had the advantage of reading the draft of the judgment about to be delivered by my respected brother, Dotse JSC and I agree with the reasons and conclusion that the claim herein be allowed. I do however, wish to add a few words of my own by way of concurring in the said judgment limited to a consideration of the nature of a recognizance as follows. The question for our determination in these proceedings is a relatively simple one, which turns on section 104(4) of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) in terms of its conformity with the provisions of the 1992 Constitution. Section 104(4) of Act 30 provides in the following words:

"*Where the penalty is not paid and cannot be recovered by attachment and sale, the person so bound is liable, by order of the*

Court which issued the warrant, to imprisonment without hard labour for a term not exceeding six months."

The above provision forms part of provisions on forfeiture of recognizance in our criminal justice system. As my brother Dotse JSC has made extensive reference to the entire provisions contained in section 104 of the Criminal and Other Offenses (Procedure) Act, I desire to limit my consideration to the section quoted in the preceding paragraph on which the plaintiff's action is based. The question that one must first consider is what is a recognizance? Reference is made to Barron's *Law Dictionary, (Fifth Edition***)** at page 426 wherein the word "recognizance" is defined as follows:

"*an obligation of record, entered into before a court or other officer duly authorized for that purpose, with a condition to do some act required by law, upon failure of which the recognizor is oblige pay a specific sum to the court or a party 46 NW 988, 989. For instance in criminal law, a recognizance is an undertaking entered into before a court of record by the defendant and his sureties by which they bind themselves to pay a sum of money to the court unless the defendant appears for trial. 3 S. W. 436."*

As the section with which we are concerned deals with recognizances, it is quite clear from the above definition that upon the failure of the person at whose instance the recognizance is entered into, the liability of the surety is in its nature civil and cannot under any circumstance operate to create criminal responsibility. I venture to say that the constitution aside, speaking from basic principles of law the mode of redress in a crime as opposed to a civil action is its distinguishing feature on which there is no conflict of opinion. For example, in Halsbury's Laws of England (4thEdition) Volume 11 at page 11, the learned authors writing on the

subject “Principles of Criminal Liability” state on the sub-heading “Criminal and Civil Liability distinguished” as follows:

> “*Civil proceedings have for their object the recovery of money or other property, or the enforcement of a right or advantage on behalf of the plaintiff; criminal proceedings have for their object the punishment of a person who has committed a crime. Criminal proceedings are not to be used as a means of enforcing a civil right”*

I have deliberately commenced the consideration of the task with which we are faced from basic principles of law for the purpose of demonstrating that the formulation of section104 (4) of the Criminal and Other Offences (Procedure) Act, (Act30), contains its own seeds of destruction when it creates without any justifiable statutory authority the imposition of criminal punishment for an obligation which is in its nature purely civil. So said, it appears that the section has been an invasion on the rights of our citizens for quite some time now and indeed, long before the coming into force of the 1992 Constitution. Indeed, the use of the word “penalty” by the lawmaker in the impugned section itself provides us with some concern when it purports to impose a term of imprisonment on a surety who is unable to produce an accused to appear before a court of law in accordance with the obligation entered into. In the case of *Brown v All weather Mechanical Grouting Co ltd* [1954] 2 QB 443 at 446; [1953]1 All ER 474 at 475, Lord Goddard CJ observed of the word “penalty” in relation to the word “fine” as follows:

> “*Counsel for the respondents has taken a point of great importance, and the court is indebted to him for doing so as this point appears not to have occurred to anybody before because there have been plenty of proceedings under the section in question in circumstances*

I will mention in a moment……. Concisely stated, the argument of counsel for the respondents was that the sanction provided by the Act for using a vehicle which has one class of license attached to it for a purpose which would require a different class of license is a monetary penalty which can be recovered in various forms of proceedings, but the Act does not create an offence in the sense that it is punishable as a criminal offence, although a penalty may be recovered in what would generally be called penal proceedings. If it is true, if the word "penalty" as distinct from the word "fine", is used in a section, the general rule is that the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and a fine always goes to the Crown."

My Lords, it appears to me that even without going into a consideration of the provisions of the constitution in particular articles 14(1) and 19(11), section 104 (4) of the Criminal and Other Offences and Procedure Act (Act 30) seems to be a deviation from the established principles of criminal jurisprudence which have informed the underlying distinction between a crime and a civil wrong and I cannot but associate myself with the above statements that fell from Goddard CJ several years ago in a situation that is similar to that with which we are concerned in these proceedings. There is no doubt in my mind that since the passing of the Criminal And Other Offences (Procedure) Act in 1960 several persons who provided surety to accused persons must have been victims of the section and it gives me some pleasure that today, we have the opportunity of righting the wrongs which have been part of our criminal procedural laws for quite a considerable time. I think I must express my commendation for the plaintiff for the historic opportunity that this case offers us in our quest to do justice to the good people of this country.

Turning to the action before us, the plaintiff complaints that the impugned section violates articles 14(1) and 19(11) as it seeks to undermine the protection afforded under the constitution. In order to appreciate the gravamen of the issues turning on the constitutionality of section 104(4) of the Criminal and Other Offences (procedure) Act, (Act 30) of 1960, I shall quote in extenso the relevant provisions of the 1992 Constitution on which the plaintiff relies to sustain his action. I commence with article 14 (1) by which it is provided 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; or***
>
> *(b)* ***in execution of an order of a court punishing him for contempt of court; or***
>
> *(c)* ***for the purpose of bringing him before a court in execution of an order of a court; or***
>
> *(d)* ***in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for***

the purpose of his care or treatment or the protection of the community; or

(e) ***for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or***

(f) ***for the purpose of preventing the unlawful entry into Ghana, or of effecting the expulsion, extradition, or other lawful removal of that person from Ghana while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or***

(g) ***upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana"***

Article 19 (11) also provides in the words that follow:

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

Examining section 104(4) of the Criminal and Other Offences (Procedure)Act, it is quite plain that the liability to suffer a term of imprisonment which as earlier on said in this delivery constitutes a criminal punishment cannot be justified under any of the constitutional provisions cited above. Notwithstanding this, learned counsel for the defendant has contended before us that the term of imprisonment provided

for in the section is justified on grounds of willful default to provide an accused person before a court of law. I have tried in vain to examine the relevant articles of the constitution which are alleged by the plaintiff to have been violated by the continuing in force of the Criminal and Other Offences (Procedure Act) against those cited by the defendant in support of the imposition of imprisonment, and I must confess that the more I tried to make sense of the defendant's submissions, the more I felt that the complaints which have formed the basis of the action herein are clearly unanswerable. I cannot understand how there can be a term of imprisonment imposed upon a person who by the nature of his undertaking to the court though in a related criminal matter can without a charge sheet on which proceedings are taken in accordance with the procedure provided by law be exposed to sanctions that are criminal in nature. Besides, it is clear that there is no known offence in our criminal code for which a person might be charged.

In my view, if the section on which the matter herein turns were expressed such that we could reach a different interpretation of it to render it in conformity with the constitution as provided for in article 11(4) of the constitution, I would have pursued that course of action but as it is, section 104 (4) of the Criminal and Other offences (Procedure) Act, is one which fails to measure up to the provisions of the 1992 Constitution and accordingly comes within the scope of cases in respect of which we are enabled under article 2 (1) and (2) in the exercise of our original jurisdiction to declare as null and void and of no effect. Accordingly, the plaintiff's action succeeds and I proceed to have the said section struck down as unconstitutional.

N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

AKAMBA, JSC:-

I have had the privilege of reading beforehand in draft the decision by my respected brother Dotse, JSC and I am in agreement for the reasons therein stated that the plaintiff's actions succeeds. I wish however to add a few concurring words of my own.

The decision to strike out section 104 (4) of Act 30 as being contrary to and inconsistent with article 14 (1) and 19 (11) and also 15 (1), (2) and (3) all of the Constitution 1992, has been taken with deep thought and consideration for its implications in the present state of affairs in our part of the globe. In the advent of the rise in drug and narcotic offences as well as fraud and forgery offences to name but a few, offences which often require the provision of recognizance for the appearance of persons suspected or accused of such offenses, either before the police or the courts, respectively, as the case may be, the present writ could not have been issued at a more onerous time. I note this against the background of suspects and/or accused persons who upon release on bail simply disappear sometimes with the connivance of their sureties. Section 104 (4) appears handy to restrain negligent or careless sureties. In the present arrangements of things, this option seems open to the appropriate state agencies "where the penalty is not paid and cannot be recovered by attachment and sale" for them to seek an order of the court which issued the warrant, to imprison the person so bound.

This provision has over the years been considered rather literally by these agencies without due consideration of the fact that there are Constitutional limitations for restraining the liberty of the individual. Expressing doubt as to the availability of the option of imprisonment in respect of a decree for money,

Atuguba, JSC stated obiter, in Ex Parte PPE Ltd (2007-2008) SCGLR 188 at 197, that "even if committal would lie in respect of a decree for money, the judgment-debtor could not be committed to prison unless the applicant establishes willful default on his part."

Recognizance being essentially a civil undertaking, the option of imprisonment, is not an available option under the Constitution. The whole arrangement under s 104 of Act 30 by which a recognizance is taken or entered for the appearance of a suspect, is a civil undertaking which cannot give rise to a criminal penalty of imprisonment. The remedy appropriately remains the civil recovery by attachment and sale. Gone are the days immediately following the Industrial Revolution when it was common place in England for persons and indeed families to be thrown into jail for debts arising out of contracts. Since then the distinction between civil arrangement and criminal offence has been maintained and not least in this country. No doubt, this must have compelled Date Bah, JSC to lament in the Ex Parte PPE Ltd case (supra) that "I very much doubt whether this is a restriction on personal liberty that is justifiable in a civilized democratic society. Accordingly, only very clear and compelling statutory language would persuade me to reach the conclusion that a person should go to jail for the inability to of his company to pay a debt, which is the essence of the facts of this case." Given the civil nature of the undertaking under s 104 (4) of Act 30, one cannot simply read criminal elements into the arrangement as a justification for the penalty of imprisonment. To that extent not even the establishment of willful default or absence of due diligence can transform this purely civil arrangement into a criminal offence.

This conclusion does not prevent the legislature from subsequently enacting well defined criminal legislations to counter the fraudulent activities of persons who for example enter into recognizance or acknowledge recognizance in the name of others before any court, judge, or other persons lawfully authorized in that behalf just as was done in England under s.34 of the English Forgery Act 1861.

It is also important to stress that this decision to strike out s.104 (4) does not do away with requirements and obligations under s. 104 (1), (2), (3) and (6) which remain valid.

For the above reasons and those ably stated by my respected brothers Dotse and Gbadegbe, JJSC I concur in striking out s 104 (4) of Act 30 as being unconstitutional.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS)

CHIEF JUSTICE

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

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