IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: AKUFFO (MS), CJ (PRESIDING)
ATUGUBA, JSC
ADINYIRA (MRS), JSC
DOTSE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC
PWAMANG, JSC

REFERENCE
NO. J6/04/2017

28TH FEBRUARY, 2018

RAPHAEL CUBAGEE ……. PLAINTIFF

VRS

1. MICHAEL YEBOAH ASARE
2. K. GYASI COMPANY LIMITED
3. ASSEMBLY OF GOD CHURCH ……. DEFENDANTS

JUDGMENT

PWAMANG, JSC:-

This case is a reference to the court of a question relating to interpretation and enforcement of Article 18(2) of the 1992 Constitution by the Magistrate of the

District Court "A" Sunyani pursuant to Article 130(2) of the Constitution. It is provided by Article 130(1) & (2) of the Constitution 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; and

(b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under 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.

The background to the reference is that in the course of testifying in a land case before the Magistrate, the plaintiff sought to tender in evidence audio recording of a telephone conversation he had with one John Felix Yeboah, a Superintendent Minister who was representing his church, the 3rd defendant, in the case. Plaintiff claimed the recorded conversation covered matters that were in contention in the case before the court and he wanted to use it to prove that the Superintendent Minister in that conversation admitted plaintiff's side of the case. The lawyer for the defendant objected to the tendering of the recording on, among other grounds, that it was made surreptitiously by the plaintiff without the consent of the said John Felix Yeboah and therefore in violation of his rights to privacy guaranteed by Article 18(2) of the Constitution.

Before ruling on the objection the trial Magistrate had the recording played in open court. In his ruling he held that though the recording was authentic and contained material related to the matters in contention in the case, it was made without the consent of John Felix Yeboah. As to whether the secret recording amounted to a breach of Article 18(2) and if so whether the recoding was to be excluded from the evidence, the Magistrate took the view, and rightly in our opinion, that he required guidance from this court. We say the Magistrate was right in seeking guidance of the Supreme Court because the issues that arise call for an interpretation of Article 18(2) of the Constitution to determine its scope and whether secret recording of telephone conversation by a party to the conversation amounts to a breach of the Article and inadmissible in evidence. The Constitution is not clear on these issues and this area of the law has not been definitively pronounced upon by the Supreme Court so the restraint exercised in this case by the Magistrate was in accord with the judicial posturing required by Article 130(2) of the Constitution. The Supreme Court has been given exclusive jurisdiction to interpret the Constitution and interpretation involves determining the scope of provisions and discovering the intent of the framers of the Constitution. See **Republic v High Court (Commercial Division), Accra: Ex Parte Attorney-General (Balkan Energy Ghana Ltd & Ors Interested Parties) [2011] 2 SCGLR 1183 at pp 1190-1191.**

The question referred to us is; "Whether the secret recording of the conversation between the plaintiff and the Superintendent Minister and representative of the third defendant was made in violation of clause (2) of Article 18 of the 1992 Constitution and therefore unconstitutional and inadmissible? (sic)". We shall begin with the first part of the question which is whether it amounts to a violation of the rights of privacy guaranteed by Article 18(2) of the Constitution for an a person to secretly record a telephone conversation to which he is a party. Article 18(2) of the Constitution provides as follows;

> **"(2) No person shall be subjected to interference with the privacy of his home, property, correspondence or communication except in accordance with law and as may be necessary in a free and democratic society for public safety or**

the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

Privacy is so broad a constitutional right that it defies a concise and simple definition. It comprises a large bundle of rights some of which have been listed in the article as privacy of the home, property, and correspondence or communication. This list is not exhaustive and the full scope of the right of privacy cannot possibly be set out in the text of the Constitution. However, under the right to privacy is covered an individual's right to be left alone to live his life free from unwanted intrusion, scrutiny and publicity. It is the right of a person to be secluded, secretive and anonymous in society and to have control of intrusions into the sphere of his private life. See the **Unreported Judgment of Supreme Court dated 20th December, 2017 in Suit No CA/J4/31/2015; Madam Abena Pokua v Agricultural Development Bank.**

Privacy is a very important human right that inheres in the individual and ensures that she can be her own person, have self identity and realise her self worth. It guarantees personal autonomy for the individual and without it public authorities would easily control and manipulate the lives of citizens and undermine their liberty. It is one of the most widely demanded human rights in today's world for the simple reason that advancements in information and communication technology have made it extremely easy to interfere with privacy rights. As a result almost all states have passed laws and detailed regulations to protect privacy rights and prescribe circumstances under which public authorities, private organisations and, in some countries, individuals may be permitted to interfere with privacy rights. In respect of interference with privacy of communication, the latest Ghanaian regulations are contained in the **National Communication Regulations, 2003, LI 1719**. Section 10 of it makes it an offence for a third party to intercept communication transmitted form one party to another without the consent of the parties to the communication. The regulations however have no provision covering secret recording of telephone conversation by a party to the conversation, which is the situation in the instant case.

An overview of the laws in other countries on the legality of an individual secretly recording a telephone conversation to which he is a party shows differences in the legal regimes. There are countries such as Canada and Italy where it is legal to record a telephone conversation without permission provided you are a party to the conversation. On the other hand we have jurisdictions, notably Germany and the State of Florida in the United States, where even if you are a party to a telephone conversation it is prohibited for you to record the conversation without the consent of all parties to it.

In construing Article 18(2) of our Constitution to determine its scope in relation to the question referred to us, we wish to underscore the elements of the right of privacy we stated above. The right protects the individual against unwanted intrusion, scrutiny and publicity and guarantees his control over intrusions into his private sphere. This means that it is up to the individual, subject of course to statutory laws made for the public good as stated in Article 18(2) itself, to decide if there should be any intrusion into, scrutiny or publicity of his private life including his communication. It is further up to the individual to determine the extent and manner of such permitted intrusion, scrutiny or publicity. When a person talks on telephone to another the conversation is meant to be oral communication since if the speaker wanted the speech in a permanent form he could elect to write it down or record and send to the other person. It would be wrong for the person at the other end to assume that the speaker has waived his rights of privacy and consented to him recording the conversation and rendering it in a permanent state. Therefore, to record someone with whom you are having a telephone conversation is to interfere with his privacy beyond what he has consented to. In similar vein, it would amount to breach of privacy to put your phone on loudspeaker for the listening of third parties when you have a telephone conversation with another person because to so would be causing an intrusion into the caller's private sphere beyond what she consented to. Before recording someone or allowing third parties to listen to what he says on telephone, his consent must be sought or he must be informed such that he can decide to end the call if he does not want to be recorded or heard by third parties. We are in an environment where people take the rights of their neighbours

very lightly. We are therefore not persuaded to join those jurisdictions that permit secret telephone recording by a party to the conversation.

Clearly therefore, on the facts of this case the secret recording of the Superintendent Minister amounted to a violation of his right to privacy which has been guaranteed by Article 18(2) of the Constitution.

The second leg of the question referred to us is whether the recording which we have held to have been obtained in violation of the constitutional rights of the Superintendent Minister ought to be excluded from the evidence being led in the case despite the fact that its contents are relevant to the matters in contention. In the ruling of the Magistrate in which he made the reference he offered his own opinion on the approach to be adopted by Ghanaian courts when confronted with a challenge to the admissibility of evidence obtained in violation of human rights and we wish to commend him for the industry he demonstrated therein. The referring Magistrate, H/W Jojo Amoah Hagan, reviewed, with admirable clarity, statutory provisions and jurisprudence of Canada, the United Kingdom and the United States of America with regard to exclusion of evidence obtained in breach of constitutional rights. He cited relevant decided cases such as **Mapp v Ohio 367 U.S. 643 (1961), Miranda v Arizona 384 U.S. 439 (1966), R v Herbert [1990] 2 S.C.R 151 and INS v Lopez-Mendoza, 468 U.S. 1032 (1984).** He also considered the general position of Ghana law of evidence and the provisions of the **Evidence Act, 1975 (NRCD 323)** in relation to the exclusion of relevant evidence. Unfortunately, lawyer for the defendant who raised the objection at the District Court did not file a statement of case when we granted leave to the parties to do so. The plaintiff acted in person and filed a statement of case but, not being a lawyer, he could not assist the court on the matters of law that arise for determination.

As the referring Magistrate rightly pointed out, the general law in Ghana on the exclusion of relevant evidence by a trial court is stated in Section 52 of the **Evidence Act (supra).** It is therein provided that relevant evidence may be excluded at the discretion of the judge if the probative value of the evidence is substantially outweighed by the risk that it will create substantial danger of unfair prejudice. There is also Section 51 (1) of the **Evidence Act** which is relevant in this

case. It provides; "All relevant evidence is admissible except as otherwise provided by any enactment."

The question whether courts ought to exclude evidence obtained in violation of the rights of the person against whom the evidence is offered is a fertile litigation field, particularly in criminal cases. In Ghana and many other countries there are statutes that disallow evidence obtained in specific circumstances that also amount to violation of certain rights guaranteed by the Constitution. An example is confession statements procured through the use of torture which are not admissible on account of Section 120 of **the Evidence Act** but torture is equally forbidden by Article 15(2)(a) of the Constitution. There is also privileged communications between lawyer and client and doctor and patient which are not admissible in evidence by virtue of Sections 100 and 103 of **the Evidence Act** respectively and which really are intended to protect the privacy rights of the party claiming the privilege. However, beside these specific instances which are covered by Section 51(1) of **the Evidence Act,** the wider question of should evidence obtained in violation of any human right guaranteed in the Constitution be excluded from evidence is different and calls for close scrutiny.

Our Constitution, unlike some foreign enactments, does not contain a provision that specifically provides for the circumstances in which a court is required to exclude evidence obtained in violation of any of the human rights provisions. Article 35(5) of the **South African Constitution, 1996,** Section 24(2) of the **Canadian Charter of Rights and Freedoms, 1982** (which is a schedule of the **Canada Constitution Act, 1982)**, to be referred to as "the Canadian Charter" and Article 69(7) of the **Rome Statute of the International Criminal Court, 1998** all provide for the exclusion of evidence obtained in violation of human rights only upon stated grounds. That implies that where those grounds are not established in a trial, evidence obtained in violation of a guaranteed human right is to be admitted. That practice that gives discretion to the court to determine whether or not to exclude evidence obtained in breach of rights is referred to as the discretionary exclusionary rule.

There is the other practice whereby any evidence obtained involving any infraction of human rights must be excluded by the court. That is called the automatic exclusionary rule. It evolved from decisions of the United States Supreme Court that involved interpretation and enforcement of the human rights provisions of their Constitution which, like the case of Ghana, did not have a specific provision on exclusion of evidence obtained in violation of the constitutional rights. Therefore, in order to answer the second part of the question presented by this reference we need to critically examine the relevant provisions of our Constitution and chart a path consistent with the Constitution. But it appears that Azu Crabbe, C.J. blazed the trail on the subject in the case of **Okorie @ Ozuzu v The Republic [1974] 2 GLR 272 C.A.** Although that decision is not binding on us it is of considerable weight so we intend to commence our analysis of the subject with a review of that case.

Okorie @ Ozuzu v The Republic involved Article 15 (2) of the Constitution, 1969 which provided that:

"(2) Any person who is arrested, restricted or detained shall be informed immediately, in a language that he understands, of the reasons for his arrest, restriction or detention and of his right to consult Counsel of his own choice."

In the course of police investigations of a crime of murder shortly after the promulgation of the 1969 Constitution, the investigating officer took two cautioned confession statements from the second appellant. The officer did not inform him of his right to consult counsel of his own choice as required by article 15 (2) of the Constitution, and he too did not ask for the presence of counsel. After the investigations he together with the first appellant were charged with the murder, tried, convicted and sentenced to death. During the trial when the prosecution sought to tender the confession statements in evidence, defence counsel objected on the ground that they were not made voluntarily but that objection was dismissed as unsubstantiated. On appeal, counsel for the first time raised, inter alia, the issue that the two confession statements were made in breach of article 15 (2) of the Constitution, 1969, and consequently that the statements ought to have been excluded at the trial. Azu Crabbe, C.J, who delivered the opinion of the Court of

Appeal, said in the judgment that there was on bill of rights in the 1957 and 1960 Constitutions of Ghana and Article 15(2) was novel so no Ghanaian precedent was available to be followed. He therefore had recourse to foreign jurisprudence and based the decision of the court largely on cases decided by the Supreme Court of the United States of America. At pages 282/283 of the report he delivered himself as follows;

" It seems to this court that the guarantee of the right to consult counsel is based on the Sixth Amendment to the Constitution of the United States of America, and in our opinion the interpretation of the second limb of article 15 (2) should, therefore, be made consistent with the decisions of the Supreme Court of the United States on the Sixth Amendment, which, though not binding upon this court, are no doubt of persuasive authority in this country. So interpreted, it will mean that a departure from the procedures required by article 15 (2) would render inadmissible at the resulting trial any confessional statement obtained from a suspect."

The court relied heavily on the U.S Supreme Court case of **Miranda v Arizona (supra)** which in any case was a split decision. He concluded with this rather general statement at page 283 of the report;

"In the opinion of this court, it is irrelevant that an infringement of a constitutional right has not occasioned a miscarriage of justice. Any breach of the provisions of the Constitution carries with it "not only illegality, but also impropriety, arbitrariness, dictatorship, that is to say, the breaking of the fundamental law of the land": see The Proposals of the Constitutional Commission For a Constitution For Ghana, 1968. p. 22, para. 88. The statement in exhibits A and K, were obtained in violation of the second appellant's constitutional rights, and consequently, we hold that they were inadmissible in evidence at the trial of the second appellant. There is, however, sufficient evidence aliunde to support the conviction of the second appellant, and his appeal must, therefore, fail."

Okorie @ Ozuzu v The Republic was a criminal case and the foreign cases relied upon by Azu Crabbe, C.J. in his interpretation of Article 15(2) of the Constitution, 1969 involved the liberty of the individual and violations of rights committed by government agents in the course of criminal investigations. Yet the very broad statement of the court that evidence obtained in violation of any human right, whether a miscarriage of justice was occasioned or not, ought automatically to be excluded appears to propose an absolute and inflexible rule, admitting no discretion in all cases both criminal and civil. But the reasoning of U.S Supreme Court that influenced the court in **Okorie@Ozuzu v The Republic** has not been applied by that court to extend the exclusionary rule to cover civil proceedings. See **United States v Leon 52 L.W. 5155 (1984) and INS v Lopez-Mendoza, 468 U.S. 1032 (1984).** Nonetheless, it is useful to take note of the policy rationale that informed the U.S Supreme Court's position of almost automatic exclusion of obtained evidence in violation of constitutional rights. (In the case of **Payton v. New York, 445 U.S. 573, 602 (1980)** the Supreme Court by a majority decision talked of 'exigent circumstances' that may be a basis for relaxing the rule). Mr Justice Potter Stewart said in **Elkins v. United States 364 U.S. 206 (1960) 217** that the American Exclusionary Rule was ***"calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."*** See also **Mapp v Ohio (supra).** So the case for the almost automatic exclusion is that it is in the long term interest of enforcement of human rights to deny the use of evidence obtained in violation of a right.

However, enforcement of human rights is not a one way street since no human right is absolute. There are other policy considerations that have to be taken into account when a court in the course of proceedings is called upon to enforce human rights by excluding evidence and that explains why more jurisdictions have now adopted the discretionary rule approach so it would be important to consider what pertains in those jurisdictions for comparative analysis. But as we seek to benefit from comparative learning, it bears noting that in Canada the exclusionary rule even in civil proceedings is restricted to cases where the violation of Charter rights is by a

state actor. See **R v Harvey (1995) 101 C.C.C (3d) 193.** This position of the Canadian courts is based on the fact that Section 32(1) of the Canadian Charter makes the Charter applicable only to the legislatures and governments of Canada and its provinces. Our Constitution on the other hand in Article 12(1) enjoins all natural and legal persons in Ghana as well as state actors to respect and uphold the fundamental human rights and freedoms enshrined in the Constitution. It is therefore competent for us to consider the application of an exclusionary rule in this case though the breach of the right was by a private person.

The English courts have adopted the discretionary exclusionary rule in respect of evidence obtained in breach of constitutional rights. The case which authoritatively stated the position of their Lordships is **Mohammed v The State (Trinidad & Tobago) [1998] UKPC 49.** In that case the appellant unsuccessfully challenged the admissibility of a statement made to the police on the ground that he had been denied his constitutional right to consult with a solicitor in the police station. Upon a final appeal to the Privy Council the appellant argued that his conviction should be quashed on the ground that since his right to consult a solicitor was guaranteed in the Constitution of Trinidad & Tobago any evidence in violation of that right ought to be excluded. His counsel urged on their Lordships the decision of the U.S Supreme Court in **Miranda v Arizona (supra)** which was based on the automatic exclusionary rule. In rejecting the policy of automatic exclusion Lord Steyn, who delivered the unanimous opinion of Board, said as follows at paragraph 25 of the judgment;

"Fundamental as the rights of a suspect to communicate with his lawyer are it does not follow that such rights can only be given due recognition by an absolute exclusionary rule such as was enunciated in Miranda. The rigidity of the Miranda rule is underlined by counsel's concession that, if applicable, it would not permit the judge to read the statement. Whatever the statement contained it would have to be excluded, and that would be so even in the case of a trivial breach. Such an absolute rule does not easily fit into a system based on English criminal procedure. At the time of

the enactment of the constitutional guarantees the settled practice in England and Trinidad and Tobago was that the judge had a discretion to admit or exclude a voluntary confession obtained in breach of the Judges' Rules. In these circumstances their Lordships are satisfied that it would not be right now to hold the judge's discretion to admit or exclude a confession was entirely abolished by the relevant constitutional provision. Their Lordships therefore reject the argument based on the Miranda decision."

He then stated what their Lordships considered to be the right approach to be adopted by a judge when objection is taken to the admission of unconstitutional evidence. At paragraph 29 of the judgment he said;

> ***"It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right. The narrow view expressed in King is no longer good law. On the other hand, it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded. But their Lordships make clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high***

value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case. Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the courts. The qualification is that it would generally not be right to admit a confession where the police have deliberately frustrated a suspect's constitutional rights."

Mohammed v The State was a criminal case and there the balancing exercise entailed balancing the rights of the accused against the public interest but a similar approach has been applied with regard to civil cases involving competing rights of privates persons guaranteed in the European Convention on Human Rights which is applicable in the United Kingdom. The leading case is **Jones v. University of Warwick [2003] 1 WLR 954.** In that case, the claimant argued that she had a continuing disability in her right hand as a result of an accident at work. The defendant employed an inquiry agent who secretly filmed the claimant in her home. The videos showed that the claimant had entirely satisfactory function in her hand. The claimant sought to have the videos secretly recorded excluded from evidence in court arguing they were made in violation of her human rights guaranteed in Article 8 of the European Convention (the right to respect for one's private and family life, home and correspondence). The insurance company insisted that the evidence ought to be admitted in the interest of justice. The trial judge held that the evidence was admissible in order to do justice in the case. Lord Woolf, C.J. who delivered the unanimous judgment of the Court of Appeal at paragraphs 22 and 23 of the judgment commented on the approach of the trial judge as follows;

"While this approach will help to achieve justice in a particular case, it will do nothing to promote the observance of the law by those engaged or about to be engaged in legal proceedings. This is also a matter of real public concern. If the conduct of the insurers in this case goes uncensured there would be a significant risk that practices of this type would be encouraged."

Lord Woolf, C.J. then set out the question that was faced by the lower courts and answered it in this manner at paragraph 28;

> ***"That leaves the issue as to how the court should exercise its discretion in the difficult situation confronting the district judge and Judge Harris. The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of article 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out."***

The European Convention on Human Rights, like the Ghanaian Constitution, 1992 does not provide for circumstances in which courts are required to exclude evidence obtained in violation of Convention rights. However, the Convention provides in Article 6 a right to fair hearing, in both civil and criminal proceedings and the jurisprudence of the European Court of Human Rights, Strasbourg is to the effect that the admission of evidence obtained in violation of Convention rights would not automatically render a trial unfair. All the circumstances of the case would have to be taken into account to determine whether the failure of a domestic court to exclude such evidence resulted in an unfair trial. See **Schenk v Switzerland (1991) 13 E.H.R.R. 242.** In **Khan v United Kingdom [2000] E.C.H.R 195,** secretly recorded evidence was relied upon in convicting the applicant on a narcotic charge in the United Kingdom. The court after examining all the circumstances in that case held that no violation of the applicant's right to a fair trial had occurred. So the European Court also applies the discretionary exclusion rule.

The exercise of discretion in the determination of whether to exclude evidence obtained in breach of human rights appears inevitable under our Constitution because even Article 18(2) which is the subject of interpretation in this case states

several exceptions to the individual's right to privacy and a court confronted with an objection to evidence on the ground that it was obtained in breach of privacy would need to consider if any of the exceptions are applicable in the circumstances of the case.

Furthermore, it is provided by Article 12(2) of the Constitution as follows;

> **"(2) Every person in Ghana, whatever his race, place of origin, political opinion, colour, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest."**

This provision in our opinion is an explicit direction to the court to undertake a balancing exercise in the enforcement of the human rights provisions of the Constitution. See S.Y. Bimpong-Buta; **"The Role of the Supreme Court in Development of Constitutional Law in Ghana" (2007) at page 471**. In our understanding, the framework of our Constitution does not admit of an inflexible exclusionary rule in respect of evidence obtained in violation of human rights. With the rudimentary facilities available to our police to fight crime it would be unrealistic to exclude damning evidence of a serious crime on the sole ground that it was obtained in circumstances involving a violation of the human rights of the perpetrator of the crime. The public interest, to which all constitutional rights are subject by the provisions of Article 12(2), in having persons who commit crimes apprehended and punished would require the court to balance that against the claim of rights of the perpetrator of the crime. Similarly, civil proceedings always involve competing rights of the parties such that relevant evidence that was obtained in violation of the constitutional rights of one party is usually offered in a bid to protect the rights of the other party or parties in the action. It therefore seems to us that the frame work of our Constitution anticipates that where evidence obtained in violation of human rights is sought to be tendered in proceedings, whether criminal or civil, and objection is taken, the court has to exercise a

discretion as to whether on the facts of the case the evidence ought to be excluded or admitted. We therefore adopt for Ghana the discretionary rule for the exclusion of evidence obtained in violation of human rights guaranteed under the 1992 Constitution.

As to the grounds upon which evidence obtained in violation of human rights guaranteed in the 1992 constitution may be excluded, our opinion is that where on the facts of a case a court comes to the conclusion that the admission of such evidence could bring the administration of justice into disrepute or affect the fairness of the proceedings, then it ought to exclude it. The reasons are simple. The preservation of the integrity and repute of the administration of justice is a matter of vital public interest so courts in whatever they do must strive to achieve that ultimate objective. Then Article 19 clauses (1) & (13) of the 1992 Constitution, guarantee a right to fair hearing in criminal and civil proceedings respectively so in any proceedings the court has a duty to ensure the achievement of that constitutional imperative.

In determining whether impugned evidence could bring the administration of justice into disrepute or make proceedings unfair, the court must consider all the circumstances of the case; paying attention to the nature of the right that has been violated and the manner and degree of the violation, either deliberate or innocuous; the gravity of the crime being tried and the manner the accused committed the offence as well as the severity of the sentence the offence attracts. The impact that exclusion of the evidence may have on the outcome of the case, particularly in civil cases where establishment of the actual facts is of high premium. These factors to be considered in determining whether to exclude or admit evidence obtained in breach of human rights are not exhaustive but are only to serve as guides to courts.

For instance, where the offence the evidence is offered to prove is a grievous crime committed in a gruesome manner and the infraction of the accused person's right by the police was unavoidable, in the absence of countervailing factors, public interest would require that a court leans towards allowing the evidence since it would bring the administration of justice into disrepute in the thinking of the public to exclude such evidence. But where in a civil case, while the case is pending or at the time the

dispute was raging, one of the parties with a view to procuring evidence in support of his case in court obtains evidence in violation of the human rights of his opponent, that is conduct that could also bring the administration of justice into disrepute.

Applying the above principles to the facts of the case at hand, it appears from the record that the plaintiff secretly recorded the Superintendent Minister with a view to using the evidence in court against him. To allow such deliberate violation of rights would encourage litigants to side step the rules of evidence and thereby undermine the integrity of court proceedings and bring the administration of justice into disrepute. The plaintiff certainly would have alternative means of adducing evidence in proof of his case and he should not be allowed to benefit from this intentional violation of the human rights of his opponent in the case. Our conclusion could have been otherwise if there were countervailing factors but on the facts of this case the secret recording ought not to be allowed. In his statement of case before us the plaintiff offered no justification whatsoever for his interference with the privacy of the Superintendent Minister.

The decision in the Canadian case of **Masccoushe (Ville) v Houle (1999) CanLii 13256 (QC CA)** lends persuasive support to the conclusion we have come to in this case. In that case a city council connived with a neighbour to surreptitiously record the telephone calls an employee made at her home. The recordings revealed that the employee divulged certain confidential information about the city council to some real estate developers. On the basis of that information the employee's appointment was terminated. She sued the city council and it sought to justify the termination on the grounds of insubordination and offered to tender the secret recordings into evidence in proof of her insubordination. She argued that those recordings were made in violation of her privacy rights guaranteed by the Canadian Charter and ought, by Section 24(2) of the Charter to be excluded from the evidence. The court of first instance admitted the recordings but upon an appeal it was reversed. There was a further appeal by the city council to the Court of Appeal of Quebec and the main issue for determination was whether the secret recordings ought to be excluded.

Under Section 24(2) of the Canadian Charter the court shall exclude evidence obtained in a manner that infringed or denied rights guaranteed by the Charter if it is established that having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute. The Quebec Court of Appeal took the view that there was no question of good faith or accidental violation of the rights of the employee. Rather, it was a situation where evidence was gathered in an unconstitutional manner for the express purpose of terminating her employment. Paul-Arthur Gendreau, JCA, concurring in the unanimous judgment of the court said as follows:

"In short, the City appropriates the justice system here because, under the burden of proof, it wants the court to accept illegally acquired evidence, in the most serious violation of privacy and without justification. All the elements argue in favor of excluding the evidence. The balance is broken and I believe that a reasonably informed person such as the one described by Lamer J. in Collins would consider that this civil justice system should not be used for purposes such as those that appear to preside over business under study. I therefore conclude, like my colleague Justice Robert, that it would be unacceptable for a tribunal, whether administrative or judicial, to lend itself to a manoeuvre like this."

In conclusion therefore, we answer the question referred to us as follows; the secret recording of John Felix Yeboah, the Superintendent Minister and representative of the 3rd defendant by the plaintiff amounted to a violation of the privacy rights of the said John Felix Yeboah. In all the circumstances of this case the secret recording ought to be excluded from the evidence in the case.

However, since the Magistrate of the District Court "A" Sunyani has already listened to the recording we direct that the case be transferred to the nearest District Court for determination.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

AKUFFO (MS), CJ:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ATUGUBA, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

AKOTO-BAMFO (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

RAPHAEL CUBAGEE APPEARS IN PERSON FOR THE PLAINTIFF.

NO REPRESANTATION FOR THE DEFENDANTS.