IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA. A. D. 2024

CORAM:

OPPONG, J.A. (PRESIDING)

ACKAAH-BOAFO, J.A.

TANDOH, J.A.

SUIT NO: H2/35/2024

30TH JANUARY, 2025

THE REPUBLIC ------- APPELLANT

VERSUS

KWESI NYANTAKYI------- 1ST ACCUSED/RESPONDENT

ABDULAI ALHASSAN ------- 2ND ACCUSED/RESPONDENT

J U D G M E N T

Ackaah-Boafo, JA

i. Overview:

[1] My Lords, the central issue in this interlocutory appeal for our determination arises from an apparent conflict between the constitutional rights of a witness in a criminal proceeding pending before the High Court and the constitutional rights of the accused persons in that same proceeding. The Republic, as the Appellant, contends that the witness, Anas Aremeyaw Anas, an investigative journalist, must be allowed to testify in camera to protect his identity, given the nature of his work. The 1st accused, Mr. Kwesi Nyantakyi, a former president of the Ghana Football Association (GFA), who is facing criminal charges, contends that his right to make full answer and defence requires that the witness, he himself, his counsel, and the judge be able to see the accuser's face when he testifies, particularly in conformity with the principle of public trials in criminal cases in our country.

[2] The 1st Accused/Respondent is standing trial in the suit titled *"The Republic vs. Kwesi Nyantakyi and Abdulai Alhassan - CR/0316/2021"* pending before the High Court, Criminal Court – 2, Accra. It is alleged that the 1st Accused/Respondent engaged in illicit activities while serving as the Chairman of the Ghana Football Association (GFA), the Vice President of the Confederation of African Football (CAF), and a Council Member of the Federation of International Football Associations (FIFA). These alleged activities were captured in a media documentary titled *"Number 12: When Misconduct and Greed Become the Norm."* Specifically, the 1st and 2nd Accused/Respondents are charged with one count of conspiracy to commit a crime, namely fraud by an agent, contrary to Sections 23(1) and 145(1)(a) of the Criminal Offences Act, 1960 (Act 29), as well as corruption by a public officer, contrary to Section 239(1) of Act 29.

ii. The Background:

[3] The case concerns allegations of corruption and fraud involving the 1st and 2nd Respondents, both former executives of the GFA. The 1st Respondent held several high-ranking positions in football administration, including President of the GFA and Vice-President of the Confederation of African Football. The 2nd Respondent served as Northern Regional Chairman and a GFA Executive Committee member.

[4] Anas Aremeyaw Anas, an undercover investigative journalist, leading Tiger Eye PI, conducted a covert investigation into alleged corruption within the GFA between 2016 and 2018. His findings, presented in a documentary titled *"Number 12: When Misconduct and Greed Become the Norm"*, included video and audio evidence implicating the Respondents in illicit activities. As a result, they were charged with conspiracy to commit fraud by agent and other offences under Ghana's Criminal Offences Act, 1960 (Act 29).

[5] On March 9, 2021, the prosecution submitted witness statements, including one from Anas. In March 2022, during a Case Management Conference (CMC), the prosecution, by oral application, requested that Anas's testimony be taken in-camera due to the sensitive nature of his undercover work. Despite opposition from the 1st Respondent, the trial court, presided over by Justice Mrs. Elfreda Dankyi, J, ruled in

favour of the prosecution, allowing the testimony of Anas to be taken in-camera based on Articles 19(14) and 19(15) of the Constitution.

[6] The 1st Respondent challenged the court's decision in the Supreme Court in a case titled *The Republic v. High Court (Criminal Division 2), Accra Ex Parte: Kwesi Nyantakyi*, seeking to quash the trial court's decision. On November 8, 2022, the Supreme Court ruled in favour of the 1st Respondent, quashing the trial court's ruling. The record shows that the Appellant (Republic) opposed the application at the Supreme Court, as reflected in its affidavit in opposition, found on pages 65 to 74 of Volume 2 of the ROA. Despite this opposition, the Supreme Court quashed the High Court ruling.

[7] Subsequently, on December 8, 2022, the Appellant filed a motion requesting that the Republic's witness, Anas Aremeyaw Anas, testify in-camera. A copy of the application, along with the supporting affidavit, can be found on pages 3 to 38 of the Record of Appeal (ROA), Volume 2. The High Court, differently constituted by Justice Mrs. Marie-Louise Simmons, J, partly granted the application by a ruling dated May 17, 2023. The ruling can be found on pages 192 to 203 of Volume 2 of the ROA.

iii. Grounds of Appeal:

[8] Both the Appellant and the 1st Respondent, being dissatisfied with the ruling and the orders made, have appealed against the same. The Appellant contends that the trial court erred in the exercise of its discretionary powers, while the 1st Respondent alleges that the trial judge erred in law. The following are the grounds of appeal raised by the Appellant.

i. *That the trial judge exercised her discretion wrongly when she ordered that the witness, undercover journalist Anas Aremeyaw Anas, should unmask in the presence of the accused persons and their lawyers in chambers as a condition for his testimony to be heard by the court; and*

ii. *That the decision of the court has occasioned a substantial miscarriage of justice.*

[9] The grounds of appeal of the 1st Respondent are also as follows:

i. *The Court below erred in law when it ordered that the witness "Anas Aremeyaw Anas..." testify in open court in his mask or disguise..." after his identification in the chambers of the trial court [the court below] by the accused persons and their lawyers.*

Particulars of error:

a. The order disables the trial court [the court below] from properly evaluating the credibility of the witness within the context of section 80(2)(a) of the Evidence Act, 1975 (NRCD 323) which is quintessential in all trials for purposes of ensuring a fair trial within the meaning of article 19(2)(e) and (g) of the 1992 Constitution.

b. The order undermines the fundamental human right of the first accused/appellant to a fair trial as the trial court [the court below] is disabled from using an essential tool for the evaluating the credibility of the witness which is the witness' demeanour provided for in section 80(2)(a) of the Courts Act.

c. The order completely discounts the fundamental human right to a fair trial guaranteed and protected by the provisions of article 19(2)(e) and (g) of the 1992 Constitution as the right of the first accused/appellant and his lawyer to assess the demeanour of the prosecution's witness during the examination of the said witness is lost which is a breach of the accused/appellant's fundamental human rights.

ii. *The court erred in law when it held that the second application filed by the prosecution praying the court below to call their witness Anas Aremeyaw Anas to testify in camera was not a repeat application.*

Particulars of error:

a. *The conclusion reached by the court below completely overlooked the*

fact that the Supreme Court quashed the decision of the court below on the ground also that the court below's decision that the prosecution's witness testify in camera did not fall within the exceptions stated in the 1992 Constitution and the Courts Act 1993 (Act 459) for court proceedings in camera.

b. *The effect of the Supreme Court decision therefore was that the court below was wrong not only on grounds of procedure but also merits regarding the prosecution's application for the witness to testify in camera because the prosecution's said application did not meet the guidelines set out in the 1992 Constitution and the Courts Act 1993 (Act 459).*

c. *The Supreme Court having determined that it was wrong for the court below to grant the prosecution's application for their witness to testify in camera, the prosecution's second application for their witness to testify in camera on the very grounds the Supreme Court held did not justify the grant of the prosecution's first application rendered the prosecution's second application a repeat application.*

iii. *The court below erred in law when it held that granted that the second application filed by the prosecution praying the court below to call their witness Anas Aremeyaw Anas to testify in camera was a repeat application the quashing of the earlier decision of the court below by the Supreme Court qualified the second application as fresh application.*

Particulars of error:

a. *Although the decision of the Supreme Court was made in the exercise of the Supreme Court's supervisory jurisdiction, the Supreme Court clearly determined the merits of the prosecution's first application for their witness to testify in camera because the Supreme Court granted the application for certiorari on the grounds among others that the prosecution's first application did not satisfy the grounds for the*

prosecution's witness to testify in camera.

b. *The decision of the Supreme Court therefore did not rest on the grounds of procedure only but also on the merits of the prosecution's application for their witness to testify in camera which the very grounds on which the prosecution founded their second application.*

c. *As the court below acknowledged that the prosecution's second application was a repeat application, the said second application could not regenerate into a fresh one only because the Supreme Court quashed the decision of the court below on the prosecution's first application.*

[10] My Lords, from the nature of the grounds of appeal filed by the parties, it is evident that both the Appellant and the 1st Respondent are challenging the ruling of the court below regarding the orders made. According to the parties, the judge at the court below erred in her decision because she failed to properly exercise her discretion and correctly apply the law. I wish to first deal with the case of the grounds of appeal of the 1st Respondent because, in my view, the grounds question both the legal basis for the application filed by the Appellant and the decision made by the court below, which, to my mind, goes to jurisdiction. The disposition of the same may make the Appellant's grounds of appeal moot.

[11] My Lords, I understand Counsel for the 1st Respondent to argue, under ground (ii) above, that the lower court erred in law by failing to recognize that the prosecution's second application— which gave rise to the instant appeal to allow their witness, Anas Aremeyaw Anas, to testify in camera—was a repeat application. The key points raised are that the court below overlooked and disregarded the Supreme Court's ruling of November 8, 2022, which quashed its earlier decision to permit the witness to testify in camera. In Counsel's view, the Supreme Court determined that such testimony did not fall within the exceptions for in-camera proceedings under the 1992 Constitution and the Courts Act, 1993 (Act 459).

[12] I also understand the 1st Respondent to state that the Supreme Court's decision in quashing the original order highlighted both procedural and substantive flaws in the prosecution's initial application—albeit an oral one—because the application did not meet constitutional or statutory guidelines for in-camera testimony. To that extent, the second application, though formal, relied on the same grounds previously rejected by the Supreme Court and was, therefore, a repeat application. Consequently, the failure of the court below to recognize this constituted a legal error.

[13] Further, by ground (iii) above, I understand the 1st Respondent to assert that the court below made an error in law by considering the second application by the prosecution (the Appellant herein), despite the Supreme Court having already addressed the merits of the first application when it quashed the earlier order. The ground of appeal and the particulars provided rest on the fact that the Supreme Court granted the certiorari application on the basis that the lower court lacked jurisdiction to make the order, stating that it failed to meet the requirements for the witness to testify in camera. According to the 1st Respondent, the Supreme Court's decision extended beyond procedural grounds and addressed the substantive merits of the case.

[14] The 1st Respondent further contends that the second application, filed after the Supreme Court's order, was based on the same grounds as the first. Since the Supreme Court had already determined that these grounds were inadequate, the second application could not logically be treated as fresh but rather as a repeat application. In the view of the 1st Respondent, the court erred by not acknowledging that the second application was a repeat application but rather a fresh application due to the Supreme Court's supervisory intervention. By doing so, the lower court failed to correctly apply the law, as it overlooked the effect of the Supreme Court's decision to quash the first order. Having stated my understanding of the grounds of appeal, I hereby set out the submissions of counsel.

iv. Counsel Submission:

[15] In his written submission supporting the above grounds of appeal, learned Counsel for the 1st Respondent submitted that the court below, in granting the second

application, violated Article 129(3) of the 1992 Constitution. According to Counsel, this provision mandatorily requires all courts in the country to follow the decisions of the apex court on questions of law. Counsel further submitted that, in the application granted by the Supreme Court, the court "laid it down that permitting the testimony of the witness in camera would violate the provisions of Articles 126(3) and 19(14) of the 1992 Constitution". He argued that the court below—the High Court—was bound to follow the decision of the Supreme Court, which had quashed the earlier decision of the High Court that permitted Anas Aremeyaw Anas, the Republic's witness, to testify in camera.

[16] Counsel further argued that the court below, in granting the second application, violated Articles 126(3) and 19(14) because the Republic (Applicant) did not satisfy the grounds required for a repeat application. Counsel contended that the law permits a repeat application only when it is brought on new and different grounds, not on the same grounds and arguments. He referred to the order made by the High Court, differently constituted, on March 9, 2021, which the Supreme Court quashed on November 8, 2022. Drawing from the earlier oral application granted by the High Court, Counsel stated, "The second application by the Republic had previously come before the Court, even if it was a viva voce one. The Court entertained it, granted it, and it was quashed." Counsel further argued that, although the second application was in writing, the affidavit in support of the application was identical to the one previously granted.

[17] Counsel next argued that, in the Republic's affidavit in opposition to the 1st Respondent's certiorari application in the Supreme Court, the Republic canvassed the same matters on which the application was based. However, the Supreme Court found the application untenable. Counsel further stated that the three main factors that must be met for the grant of a repeat application were lacking in this instance, and, therefore, the application ought not to have been granted. To support this contention, Counsel cited the case of *Republic v. High Court, Kumasi; Ex Parte Sefa (Bank of Ghana – Interested Party (No. 2); Republic v. High Court, Kumasi; Ex Parte Gyamfi (Bank of Ghana – Interested Party (No. 2) (Consolidated) 2013-2014)* 1 SCGLR 512 and referenced the dictum of Atuguba JSC.

[18] Counsel for the 1st Respondent further criticized the High Court's decision to grant the application, arguing that the 2nd application violated his client's fundamental human rights under Article 19(14) of the Constitution. This provision guarantees the right to a fair trial, including the requirement that court hearings be held in public. According to Counsel, the failure to hold the trial in public undermines this right. Counsel also submitted that the Supreme Court's decision of November 8, 2022, unequivocally established that the High Court lacked jurisdiction to make the said order.

v. The Republic's Response:

[19] The main argument presented by the learned State Attorney for the Republic (Appellant) in response to the 1st Respondent's grounds of appeal under discussion is that the Appellant disputes the 1st Respondent's claim that the Supreme Court had already decided the merits of the Republic's second application. According to the learned State Attorney, the trial judge, whose findings the Appellant supports, observed that an earlier oral application for a witness to testify in camera had been granted by the court but was subsequently quashed by the Supreme Court through judicial review.

[20] In the view of Counsel, the trial judge emphasized that when a court decision is quashed by a higher court, it is rendered null and void, leaving no decision in existence. Consequently, there can be no repetition of a non-existent decision. Counsel further argued that the order issued by the apex court through judicial review did not address or determine the application on its merits.

vi. Applying the Law and Analysis:

[21] My Lords, I begin my analysis of the grounds of appeal under discussion by posing the question: "*Did the judge at the court below have jurisdiction to decide the second application*?" To my mind, this question is necessary because it is not disputed that, following the grant of the first application, which was orally made, the 1st Respondent filed an application for Certiorari by way of Judicial Review. The Supreme Court acceded to the application by granting it. A copy of the order of the Supreme

Court was attached as Exhibit AG2 to the second application filed by the Appellant (Republic). This copy is found at pages 32–33 of the Record of Appeal (ROA), Volume 2.

[22] To avoid any confusion, I hereby set out part of the record of proceedings at the Supreme Court on November 8, 2022. The *Coram* was as follows: P. Baffoe-Bonnie (Presiding), Prof. N.A. Kotey, M. Owusu (Ms), A. Lovelace-Johnson (Ms), and I.O. Tanko Amadu, JJSC. The order states as follows:

> "Ashia:
>
> We pray for an order of certiorari to quash the orders of the High Court made on 9th March, 2022 as having been made without jurisdiction.
>
> BY COURT
>
> The application is granted. The order of the High Court made on the 9th March, 2022 granting the witness of the Interested Party the right to give evidence in camera is hereby ordered to be brought before us for the purpose of being quashed and same is quashed accordingly.
>
> There will be no order as to costs".[Emphasis Mine].

[23] My Lords, the judge at the court below was aware of the order referenced above. At page 196 of the Record of Appeal (ROA), Volume 2, the judge considered the law and principles governing repeat applications, which formed the crux of the 1st Respondent's Counsel's submissions. However, the counsel's arguments were dismissed. The core of the court's holding is found at paragraphs 2-4 where the judge stated as follows:

> "*In the instant case, it is my opinion, the principles does not arise at all.*
>
> *There is indeed nothing existing to repeat. There is no denial that, an earlier application with the same prayer was made to this court, albeit orally and the same granted by the Court. There is also no denial that, the said decision or ruling of the Court granting the said oral application for the witness in issue to testify in camera was quashed by the Supreme Court pursuant to a judicial review application initiated at the instance of the Respondent herein. Though the decision of the Supreme Court as can be found on the record is not detailed enough and does not state in detail the reasons for the Court's decision, there*

is certainty on the face of it that, the decision of this Court differently constituted granting the oral application for the witness to testify in camera was quashed by certiorari.

With the quashing of the earlier decision of this Court by the Supreme Court, the earlier application of the Applicant together with its decision, becomes non-existing. There can therefore be nothing existing to be repeated. It has been determined in several decisions of the Apex Court that a Judicial review does not determine the merits of a case" [Emphasis Mine].

[24] With the above as the foundation, the judge reasoned and relied on the case of *The Republic v. High Court, Commercial Division, Accra, Ex Parte: Electoral Commission; Papa Kwesi Nduom – Interested Party* (Civil Motion No. JS/7/2017, dated November 7, 2016) to state that the Supreme Court did not determine the application on its merits. Therefore, it was impossible for her to accept the Respondent's submission that the application was a repeat application "which has been determined on its merits and ought not to be entertained by this court".

[25] My Lords, I understand the court's ruling to mean that the Supreme Court did not determine the application on the merits because the decision was rendered within the context of a judicial review application, and the reasoning was terse and brief. As noted above, the learned State Attorney supports the trial judge's position on the grounds that the application was not determined on the merits, and therefore the court was correct to hear and determine the application afresh. However, having reviewed the Record of Appeal (ROA), I respectfully disagree. The difficulty with this proposition lies in assuming that, because the Supreme Court did not provide detailed reasons for granting the application, it was not determined on the merits. In my view, the principle of *stare decisis* precludes this court from acceding to the arguments advanced by the Appellant. The Appellant's position, which supports the court's decision, runs contrary to the purpose and principles underlying the doctrine of *stare decisis*.

[26] My Lords, with due deference to the judge in the court below, it is evident that she misinformed herself regarding the facts and the processes filed before her. This

is because at page 193 of the ROA, the judge stated: "The Respondents filed a motion at the Supreme Court invoking the supervisory jurisdiction of the Court by way of certiorari to quash the decision of this Court, claiming that it violated **Articles 126(3) and 19(14) and (15) of the 1992 Constitution**, and on the ground that no formal application was made by the Prosecution before the grant of the order by this Court." (See page 193 of the ROA.)

[27] To my mind, the above confirms that the application filed by the 1st Respondent at the apex court challenged the earlier decision on the basis that it was contrary to "**Articles 126(3) and 19(14)** and **(15)** of the 1992 Constitution." As noted in paragraph 22 above, Counsel for the 1st Respondent, Mr. Ashia, prayed the Supreme Court to grant the application on the ground that the High Court acted "without jurisdiction." The Supreme Court unequivocally granted the application, holding and by implication stating that the High Court lacked jurisdiction to make the impugned order.

[28] Now, the application filed on December 8, 2022, by the Republic was anchored in **Articles 19(14), 19(15)**, and **126(3)** of the 1992 Constitution (see page 3 of the ROA, Volume 2) — the same constitutional provisions at the centre of the certiorari application. In other words, the trial judge ought to have recognized that the basis for the application had already been determined by the Supreme Court, which held that the order permitting the witness to testify in camera was contrary to the aforementioned constitutional provisions and that the court lacked jurisdiction to issue such an order. The assertion that the decision was made in a judicial review rather than on appeal, and therefore did not address the merits, is unfounded.

[29] I find no compelling reason to justify the lower court judge's position, based on the Record of Appeal (ROA), that the second application was not a repeat application. The judicial review decision had resolved the very issue that was brought before the court in the second application—namely, that the High Court lacked jurisdiction to order the witness to testify in camera or any other order as made, as this was contrary to **Articles 19(14), 19(15),** and **126(3)** as granted by the Supreme Court.

[30] It must be accepted that the principle of *stare decisis* applies to decisions made in both judicial reviews and appeals. The doctrine of *stare decisis* compels courts under the supervisory authority of higher courts to adhere to the legal principles pronounced by those higher courts. This obligation exists to promote order, certainty, and efficiency in the administration of justice.

[30] My Lords, the controlling jurisprudence under Article 129(3) mandates that all other courts in the country are bound to follow the decisions of the Supreme Court on questions of law. A lower court cannot disregard binding precedent. The principle that lower courts must follow the decisions of higher courts is fundamental to our legal system. It ensures certainty while allowing the law to develop in an orderly and incremental manner. Consequently, the decision of the lower court on May 17, 2023, was made *per incuriam*, as the court lacked jurisdiction to issue the said order. The Supreme Court's ruling of November 8, 2022, constituted binding judicial authority that could neither be ignored nor circumvented in any way.

vii – The Appellant's Case on Appeal:

[32] My Lords, in my respectful opinion, the above analysis is sufficient to dispose of the appeal before us. However, I believe it would not be appropriate or fair to the Appellant if I did not address the grounds of appeal filed by the Republic and the arguments presented. Additionally, the issue at stake requires that, as the first appellate court, we provide our opinion, which will serve as guidance for courts faced with similar questions both now and in the future.

[33] In my opinion, the Appellant's grounds of appeal, outlined in paragraph 8 of this opinion, highlight two main points of contention regarding the decision of the judge at the court below, which forms the subject matter of the instant appeal. The learned State Attorney contends, firstly, that the judge improperly exercised her discretion by requiring the Republic's witness, Anas Aremeyaw Anas, an investigative journalist operating covertly under certain circumstances, to remove his mask in the presence of the accused and their lawyers in chambers as a condition for his testimony to be accepted by the court.

[34] Secondly, Counsel contends that the court's ruling has resulted in significant injustice or unfairness to the Republic. Specifically, it is argued that the trial judge erred in judgment by imposing conditions that compromised the witness's anonymity, which is crucial to his role as an undercover investigator. The Learned State Attorney further asserts that this error has caused a serious miscarriage of justice, potentially affecting the fairness and integrity of the trial.

viii: Arguments of Appellant's Counsel:

[35] Counsel submits that the instant appeal concerns the rules governing in-camera proceedings and witness protection within the context of ensuring a fair trial. According to Counsel, the 1992 Constitution generally mandates public court proceedings, allowing public access to observe trials. Notwithstanding this general rule, Counsel submits that there are exceptions where public or private interests necessitate confidentiality, as outlined in Articles 19(14), 19(15), and 126(3). These provisions, according to Counsel, grant adjudicating authorities and courts the discretion to conduct proceedings in-camera under specific circumstances, such as considerations of public safety, public morality, public order, or the protection of private lives. In Counsel's view, this discretion is exercised while safeguarding the accused's right to be present at their trial.

[36] Counsel further submits that the significance of in-camera hearings was interpreted by the Supreme Court in the case of *Justice Paul Uuter Dery v. Tiger Eye P.I. & Others* (J1/29/2015) (4th February 2016) [2016] GHASC 2. In delivering the judgment, Benin JSC explained that the Latin phrase "in camera" literally means "in chamber," signifying privacy. Counsel also referred to *Black's Law Dictionary* (9th edition, p. 832), which defines the term as judicial actions taken either in the judge's private chambers, in a courtroom with spectators excluded, or when the court is not in session.

[37] In the view of the learned State Attorney, the importance of in-camera hearings under Article 146(8) of the 1992 Constitution mandates confidentiality in certain cases. According to learned Counsel, while the current case does not involve an explicit constitutional requirement for in-camera proceedings, the Appellant's argument is that

the rationale for such hearings applies here. Counsel's submission emphasizes that in delicate cases, privacy is crucial to the fair and effective administration of justice.

[38] Applying the case of the Appellant to the law, Counsel submits that it is not the Appellant's position that the trial court lacked jurisdiction to make orders regarding the testimony of the Republic's witness, Anas Aremeyaw Anas. However, Counsel argues that the judge's exercise of discretion was neither fair nor candid given the circumstances and facts of the case. The Appellant disagrees with two key aspects of the orders: (1) requiring the witness to testify in open court rather than in-camera, and (2) mandating that the witness remove his mask and reveal his identity to the accused and their lawyers in chambers before testifying.

[39] The Appellant further submits that Anas Aremeyaw Anas' covert investigative work forms the foundation of the Respondents' prosecution, as reflected in the charge sheet and the witness statement filed by him. In Counsel's view, while the appeal does not primarily focus on the covert nature of the investigation, the Appellant notes that criminal jurisprudence permits the admission of all relevant evidence. Counsel argues that Anas' statement outlines his investigative methods, mentions threats from the 1st Respondent, and highlights the murder of a colleague involved in the investigation.

[40] Counsel further submits and urges the court to take judicial notice of the widely reported murder of Mr. Anas' colleague Ahmed Suale, emphasizing that requiring Anas to reveal his face and testify openly would compromise public and witness safety. She argues that witness identification can be based on voice recognition and not solely on facial features. Furthermore, she asserts that the trial judge acted unfairly by failing to adequately consider the unique circumstances of the case.

[41] Counsel for the Appellant further argues that allowing the prosecution witness to conceal his face would not violate the Respondents' right to a fair trial. According to Counsel, Article 12(2) of the 1992 Constitution permits the curtailment of individual rights in the interest of public safety and justice. In Counsel's opinion, the Respondents' rights to attend the trial, cross-examine witnesses, and present their defence remain intact, even if the witness testifies in-camera or with their face

concealed for protection. Counsel submits that a fair balance must be struck between the prosecution's right to call its witnesses and the accused's right to defend their case. If the witness cannot testify due to the court's refusal to grant anonymity, it undermines the prosecution's right to a fair trial. Therefore, the trial judge failed to adequately balance the rights of both parties.

ix. Response Submission of 1st Respondent:

[42] The 1st Respondent's Counsel submits that the public safety argument presented by the Republic is untenable for several reasons. Counsel first submits that the witness is supposedly well-known for his anti-corruption crusade, and his investigation led to the reform of the GFA due to the Ghanaian public's interest in Tiger Eye's investigation. In Counsel's view the witness, Anas Aremeyaw Anas, cannot rely on the supposed public interest while simultaneously seeking to avoid it.

[43] Counsel further submits that there is no evidence on record linking the death of Ahmed Suale to the investigations, which are the subject of the application that has led to this appeal, despite the voluminous documents filed by the Republic. Counsel further submits that there is no evidence on record showing that the witness, Anas Aremeyaw Anas, has been threatened, either directly or indirectly, as a result of his alleged investigative work, which he has persuaded unsuspecting members of the public to regard as credible.

[44] According to Counsel, based on an affidavit filed by the 1st Respondent, at pages 40 to 104 of the ROA, Volume 2, there is evidence that the witness, Anas Aremeyaw Anas unlawfully encroached upon lands belonging to individuals who confronted him in an area known as Tsado, near the Trade Fair site in Accra. In the view of Counsel, Anas is not a credible witness. Based on the foregoing, Counsel prays the Court to dismiss the Appellant's case.

x. The Court's opinion and Analysis:

[45] My Lords, as stated earlier in this opinion, the Supreme Court has already determined that the court below had no jurisdiction to grant the Republic's witness the right to testify in camera pursuant to Articles 19(14), 19(15), and 126(3), which

were relied upon by the Republic, Appellant. Consequently, based on my analysis above, I do not wish to rehash the discussion.

[46] I will, therefore, focus on the trial fairness argument and the allegation that the judge did not exercise her discretion equitably. My Lords, the public appearance of Anas Aremeyaw Anas is controversial, as many Ghanaians hold differing opinions about his work and methods of operation. The controversy surrounding Anas' methods raises important public policy concerns that have generated heated debate among many Ghanaians. In my view, those difficult and important questions are not the focus of this proceeding and cannot, and should not, be resolved in this forum. To my mind, the issue at hand is the arguments advanced by the learned State Attorney and whether the judge's decisions—(1) requiring the witness to testify in open court while wearing his mask rather than in camera, and (2) mandating that the witness removes his mask and reveal his identity to the accused and their lawyers in chambers before testifying—are justifiable or whether they undermine the fair trial process.

[47] The learned State Attorney's criticism of the trial judge includes the fact that she failed to strike a fair balance between the prosecution's right to call witnesses and the accused's right to defence and answer to the charges. She further criticizes the judge for failing to exercise her discretion fairly, arguing that asking the witness, to remove his mask in chambers to enable the accused persons and their lawyers to see his face endangers his life. She urges the Court to take judicial notice of the fact that the death of Ahmed Suale, a working colleague of Anas, which was widely reported, remains unresolved. The Appellant argues that the law permits the curtailment of individual rights for the greater public good. The Republic (Appellant) further contends that even if the witness testifies in camera while concealing his face, the Respondents' rights to present their case would remain intact. The question then arises: is the Appellant's argument anchored in any law, whether international or Ghanaian?

[48] My Lords, from the record before us, it is evident that, apart from the constitutional provisions cited by the Republic (Appellant), no decisional law—whether from this jurisdiction or persuasive foreign jurisprudence—was presented for our consideration. As previously stated, this judgment has the potential to serve as a

significant jurisprudential guide within our legal framework. With this in mind, I find it prudent to first examine international jurisprudence addressing key factors influencing the adoption of witness protective measures, as sought by the Appellant.

[49] A landmark decision in this area is ***Prosecutor v. Tadić*** (Decision on Prosecution Motion for Protective Measures for Witnesses, *IT-94-1-T, 10 August 1995*), which remains pivotal, albeit occasionally viewed as radical. The factors identified in *Tadić* decision for implementing witness protective measures include:

i. Circumstances necessitating the shielding of aspects of a witness's identity from the public and, in extreme cases, from the accused.
ii. Under the framework of the Rome Statute, the use of measures such as facial and voice distortions.
iii. Application of protective measures on a case-by-case basis.
iv. Necessity arising from risks to the witness or their family.
v. Risks exacerbated by weak or absent domestic protection systems, particularly in regions governed by instability or lawlessness, for example, where there is a rule of warlords rather than the rule of law.
vi. The inevitable encroachment upon the accused's right to a fair trial, particularly their right to confront their accusers.
vii. The principle of proportionality to ensure measures are commensurate with the identified risk.

[50] My Lords, in my respectful opinion, if the judge at the High Court had jurisdiction to issue the orders she made, her orders might, based on the above principles, have been reasonable and balanced, or could be described as a common-sense approach. By requiring the unmasking of the witness in chambers, with only the accused and court officers present, the judge sought to achieve a proportionate compromise. This approach aligns with another international court decision, ***The Prosecutor v. Bosco Ntaganda*** (*ICC-01/04-02/06*), where the court observed:

> "To this end, the Chamber notes that the accused and the Defence will be able to see the Witness give evidence at trial and hear the Witness's voice without distortion. Therefore, the Chamber finds, pursuant to Rule 87 of the Rules, that the protective measures sought, specifically the allocation of a pseudonym for

use during the trial and face and voice distortion during testimony, should be granted in this case" (p. 9). [Emphasis Mine].

[51] Furthermore, it is important to note that a synthesis of international jurisprudence on witness protection underscores the following principle by an academic:

> *"This leading jurisprudence requires full disclosure to the defence, but not necessarily to the public, prior to trial. This allows adequate defence preparation and witness cross-examination. In circumstances of significant threat, pre-trial physical protection—particularly surrounding disclosure and testimony—is critical to ensuring the accused's right to a fair trial, as well as the physical and psychological well-being of witnesses"* (Mahony, C., 2010).[1]

[52] My Lords, it is evident from the foregoing that shielding a witness's identity from the accused is an extreme measure, to be employed sparingly and only in accordance with the principles outlined in *Tadić*, even at the level of international human rights courts. In my view, the facts of this case do not meet the established standards.

[53] I next turn to the trial fairness argument advanced by both Counsel. My Lords, it is important to emphasize that the right of an accused person to confront and cross-examine their accuser in a criminal trial is a constitutional right. This right should be modified only in exceptional circumstances, based on verifiable facts rather than speculation or emotional appeals. At the same time, this court must also equally acknowledge the constitutional right of a witness to protection during court proceedings.

[54] In considering the above competing rights, I believe it is important to remind oneself of what is at stake in human terms, insofar as the subject matter of the appeal is concerned. Mr. Nyantakyi and the 2nd Respondent are facing serious criminal

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[1] The Justice Sector Afterthought: Witness Protection in Africa. Pretoria: Institute for Security Studies. Retrieved from http://hdl.handle.net/2292/14893).

charges. Although he is cloaked in the presumption of innocence at this stage, if convicted, he potentially faces incarceration and reputational harm beyond what he would have faced as a result of his prosecution. His fate will depend on whether the witness, Anas, is believed. Mr. Nyantakyi's outcome in the trial in part hinges on whether his counsel can demonstrate that the witness is neither credible nor reliable. Therefore, no one can begrudge him for insisting that based on the law his counsel should have unfettered access to the witness in the courtroom and all other available means that could reasonably assist in uncovering the truth of the allegations made against him.

[55] On the other hand, Anas Aremeyaw Anas, whose work lies at the heart of the prosecution, must substantiate its accuracy in a public forum where his credibility and reliability will be rigorously scrutinized. This investigation is just one of many Anas has undertaken as an undercover journalist, employing his chosen methods of concealment. It is, therefore, unsurprising that, when confronted with the formidable challenge of facing his accuser, he seeks the confidentiality, security and assurance that come with preserving his anonymity.

[56] My Lords, considering the case of the Appellant, the facts, and the human rights terms I have outlined above, the following is my assessment of the grounds of appeal under discussion. In my opinion, the Respondents' statutory right to cross-examine witnesses called by the prosecution at trial, pursuant to Article 19(2)(e) and (g), is a component of their right to make full answer and defence at trial. That right is constitutional. Cross-examination has been repeatedly described as a matter of fundamental importance, integral to the conduct of a fair trial and the meaningful application of the presumption of innocence. In my view, cross-examination is the mainstay of our adversarial system and the device we use to uncover the truth.

[57] In the Canadian case of ***R. v. Lyttle***, [2004] 1 S.C.R. 193. at para. 41, Justice Fish stated:

> "The right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make full answer and defence". [Emphasis added.]

Also, in the case of ***R. v. Trieu*** (2005), 2005 CanLII 7884 (ON CA), 74 O.R. (3d) 481 (Ont. C.A.), at para. 94, the Court of Appeal for Ontario, Canada stated that cross-examination is "the ultimate means of demonstrating truth and of testing veracity". Although the above statements of the law are not binding on this court, I am persuaded by them.

[58] Having stated so, let me quickly add that cross-examination is not an end in itself. Rather, it is one of the means by which the accused makes a full answer and defence. To my mind, full answer and defence is, in turn, a crucial component of a fair trial—a constitutionally protected right and the ultimate goal of the criminal process. While it is true that not every limit on the right to cross-examination compromises trial fairness, it is a right that must be safeguarded in a criminal proceeding, as trial fairness is ultimately measured by reference to the entirety of the process.

[59] Cross-examination involves the testing and challenging of evidence presented in a trial. It ensures the credibility of witnesses and allows the accused to confront their accusers, a principle central to the fairness of judicial proceedings. The right to face one's accuser is not only foundational to justice but also reinforces public confidence in the legal process. In our criminal justice system, value is placed on the ability of lawyers and the trier of fact to see the full face of the witness as he/she testifies. In my view, any limitations on this right, such as restrictions on face-to-face confrontation or the inability to fully question a witness, could affect the trial's fairness. As already stated, fairness in this context must balance the interests of the accused, the rights and well-being of the witness, and the broader societal need to maintain faith in the judicial system.

[60] A witness with a covered face, in my view, may hinder cross-examination in two significant ways. First, a covered face restricts the trier of fact's ability to observe the witness's demeanour, which is a key factor in evaluating their credibility and the reliability of their testimony. Second, witnesses communicate not only through words but also through non-verbal cues. These cues can provide the cross-examiner with valuable insights into the witness's thoughts, as the same words, when accompanied

by different facial expressions, can lead to varied interpretations and prompt different lines of questioning. Effective cross-examination relies on continuously assessing the witness's responses and identifying sensitive aspects of their testimony.

[61] My Lords, the physical presence of an unmasked witness during testimony is of great importance. Beyond aiding the cross-examiner and the court in evaluating the witness's credibility and interpreting non-verbal cues, it can also facilitate cross-examination in other specific ways. For example, in cases where the identity of the witness is contested, the ability to observe the witness's face may be critical for confirming their identity. This, in turn, could be pivotal to the effective cross-examination of the witness or to other elements of the defence.

[62] In my respectful opinion, the criminal justice system operates on the principle that truth is most likely to emerge through a public adversarial process. Face-to-face confrontation, particularly between an accused person and their accuser, is a fundamental aspect of this process. The significance of confrontation to the cross-examiner cannot be understated, even though credibility assessments based on demeanour, like those based on other factors, may sometimes be flawed. Denying an accused the opportunity to observe the full face of a State witness—especially the accuser—during cross-examination diminishes a potentially valuable element of the defence.

[63] My Lords, it is also significant to bear in mind that in our adversarial system, a witness' demeanour encompasses their behavior, tone of voice, facial expressions, and overall conduct while giving testimony. Judges often rely on these non-verbal cues as supplementary tools to evaluate the reliability and truthfulness of the testimony. In many common law systems, including ours, the judge, as the fact-finder, observes the demeanour of witnesses to gain a holistic understanding of the evidence presented, particularly in cases where factual disputes hinge on the parties' credibility. When a trial judge makes a credibility finding based on telltale signs discerned from a witness's demeanour, appellate courts are generally reluctant to interfere or disturb such findings. *See* the case of **Ntri & Anor v. Essien & Anor** [2001-2002] SCGLR 451. This underscores the importance of observing a witness's facial expressions to form

impressions of their credibility or lack thereof. In my respectful opinion, denying a trial judge the opportunity to observe a witness's face would undermine the fairness of the hearing process.

[64] My Lords, as previously noted, the fairness of a trial must encompass not only the rights of the accused but also the welfare of the witness. Trial fairness cannot be viewed solely from the perspective of the defendant; it must also account for broader societal interests. These interests prioritize a process that ensures accurate and reliable verdicts, while respecting the rights and dignity of all participants, including the accused. This principle forms the foundation of the Appellant's argument. As I understand it, the Appellant asserts that the order for witness Anas Aremeyaw Anas to reveal his face in chambers to the accused, their lawyers, and the judge before testifying places his life in danger. The issue, however, is that the learned State Attorney has failed to demonstrate how and why this endangers the witness. For instance, is there a risk that individuals in the chambers might take photographs of the witness? It is a well-established rule that photography is prohibited on court premises, including the courtroom or the judge's chambers. In practical terms, the judge has the authority to order the exclusion of all electronic devices from the courtroom. I am not persuaded and therefore I do not accept the argument.

[64] The Court is also urged to take judicial notice of the fact that the individuals responsible for the murder of Ahmed Suale, a former colleague of Anas, have not been apprehended, which suggests that revealing Anas' identity could jeopardize his safety. In my respectful view, this argument appears to be more of an emotive appeal than one grounded in verifiable facts. There is no concrete evidence linking the Respondents in this case to Ahmed Suale's death. While it is true that the Court must consider the safety and protection of a witness, any decision to override a constitutional right must be based on evidence and verifiable facts. Unlike an accused's right to a fair trial and the ability to make a full defence, a witness' decision to cover their face, based solely on their work, does not automatically arise from their participation in the criminal justice process. In my respectful opinion, a witness who seeks to cover their face while testifying must demonstrate that this right is constitutionally protected and that it outweighs the accused's rights and serves the

public interest. As previously mentioned, the Supreme Court has annulled the order made by the lower court based on the constitutional provisions cited by the Appellant.

[65] Finally, it is clear that the Appellant in this appeal has relied on Article 19(15) of the Constitution. The pertinent portion of this provision, in my view, concerns the "protection of the private lives of persons involved in the proceedings." My understanding is that courts, tribunals, or other judicial bodies possess the legal discretion to safeguard the confidentiality and personal dignity of individuals engaged in the proceedings, particularly in matters involving sensitive personal issues. In my view, the exercise of such discretion must be firmly rooted in the applicable legal framework and must serve the specific purposes for which it is granted. In my opinion, this provision does not imply that our judicial system should adopt varying standards for different individuals participating in court proceedings as witnesses. To interpret it otherwise risks opening a proverbial Pandora's box, potentially leading to a flood of claims justifying differential treatment for individuals testifying or participating in our justice system.

xi. Conclusion and Disposition:

[66] My Lords, before concluding, I wish to address an observation arising from the arguments advanced by the Appellant regarding the witness, Anas Aremeyaw Anas. The Appellant appears to suggest that no one knows the witness, such that even a brief sighting of his face in court would endanger his life. Upon reviewing the case record, I find no basis for this assertion. For example, on page 13 of the Record of Appeal, Volume 2, the witness's statement explicitly identifies him as both an "Investigative Journalist" and a "Lawyer". This implies that he has undergone formal education, culminating in his being called to the Bar, which suggests that he has peers and classmates who are familiar with him. Consequently, he is known to various individuals in this country with whom he has interacted. Therefore, to argue that the mere visibility of Mr. Anas in chambers of a judge to the accused or a tight selection of people such as the judge and counsel who are officers of the court, seems, in my respectful view, to be in the realm of hyperbole or exaggeration. It risks insulating the witness from accountability on hypothetical grounds, even while he holds others up for scrutiny.

[67] Based on the above analysis, I am of the respectful opinion that the Appellant's appeal should fail in its entirety and same is dismissed. Based on the Supreme Court's ruling of November 8, 2022, the court below had no jurisdiction to make the orders issued on May 17, 2023. The 1st Respondent's appeal succeeds on grounds (ii) and (iii) of the grounds of appeal filed. The 1st Respondent's ground (i) of the grounds of appeal is not discussed, as no useful purpose would be served in doing so. My analysis of the Appellant's grounds of appeal addresses that ground.

[68] Consequently, in my opinion, the Respondents' right to a fair trial can only be upheld in the specific circumstances of this case by requiring the witness to remove his mask before testifying. Therefore, I hold that the ruling dated May 17, 2023, by the High Court, Criminal Division, Accra along with all consequential orders, should be set aside. Accordingly, it is hereby set aside.

SGD

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KWEKU T. ACKAAH-BOAFO
(JUSTICE OF APPEAL)

I AGREE

SGD

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ABOAGYE TANDOH
(JUSTICE OF APPEAL)

CONCURRING OPINION

Anthony Oppong, JA:

I have had the privilege of reading the speech of my learned and most respected brother Kweku T. Ackaah- Boafo, JA and I am in total agreement with his impressive analysis and conclusion.

I, however, consider that I should express myself in few words in amplification of the issue relating to the principle of *stare decisis* or the doctrine of precedent which essentially enjoins a court to follow earlier judicial decisions of a higher court when

the same point arises again in litigation.

Since my brother in the lead judgment has stated the facts of this case, I do not consider it necessary to repeat them, save those that may be imperative in making my point.

It is on record that on the 9th of March 2022, when the case was called at the trial High Court for case management conference, the prosecution/appellant herein made an application, albeit, *vive voce* wherein a request/prayer was made of the trial high court to hear the testimony of Anas Aremeyaw Anas (the witness to testify) in camera. This application was, as would be expected, opposed by counsel for the first accused person/appellant herein. Nonetheless, the trial high court granted the request of the prosecution/appellant.

The record indicates further that the first accused/appellant expressed his dissatisfaction of the said ruling of the trial high court dated 9th March, 2022, as he considered it an aberration, by filing an application invoking the supervisory jurisdiction of the Supreme Court for an order of certiorari to quash the 9th March 2022 order of the trial high court which would have allowed the prosecution witness (Anas Aremeyaw Anas) to testify in camera.

It is instructive to observe that the grounds upon which the application for an order for certiorari was filed before the Supreme Court are found at page 56 of Volume 2 the Record of Appeal (ROA) and they are in the following words:

1. *The order of the High Court (Criminal Division 2) that the Prosecution's witness testify in camera is a clear error apparent on the face of the record, as it patently violates the provisions of articles 126(3) and 19(14) of the 1992 Constitution of the Republic of Ghana*

2. *The High Court (Criminal Division 2) committed an error of law apparent on the face of the record when it assumed jurisdiction and granted the Prosecution's prayer for its witness to testify in camera without any*

a. *Formal application to the court for that purpose; and*

b. *Evidence whatsoever put before the Court to enable the Court decide whether or not the Court's constitutional obligation to conduct proceedings in public is substantially outweighed by considerations of public morality, public safety or public order*

3. *The order of the High Court (Criminal Division 2) that the Prosecution|s witness testify in camera, is a clear error apparent on the face of the record, as it undermines the said court's constitutional obligation in article 12(1) of the 1992 Constitution of the Republic of Ghana to respect and uphold the fundamental human rights and freedoms enshrined in Chapter five of the 1992 Constitution of the Republic of Ghana,* ***especially Applicant's right to a fair trial and the rule of natural justice, audi alteram partem."***

On the 8th November 2022, for its relevance, I may be permitted to quote the ruling of the Supreme Court after it had undoubtedly considered all arguments for and against the certiorari application as well as reading all papers filed.

"BY COURT

The application is granted. The order of the High Court made on the 9th March, 2022 granting the witness of the interested party (The Attorney General) the right to give evidence in camera is hereby ordered to be brought before us for the purpose of being quashed and same is quashed accordingly"

One would have thought that that decision of the Supreme Court quashing the order of the trial high court should have brought to an end the issue of excusing Anas Aremeyaw Anas, the star witness of the prosecution, from testifying in public. But that was not the case

On 8th December, 2022, the prosecution/appellant filed yet another application at the

trial high court and repeated the same prayer of making an order for Anas Aremeyaw Anas to testify in camera. It is the ruling of the trial high court on this application that has become the subject matter of the instant appeal. Both the prosecution and the first accused appealed against the said ruling.

In my respectful view, that application filed on 8th December 2022 should not have been entertained at all by the trial high court as it defied the principle of *stare decisis*. It is my view that the ruling of the trial high court which has become the subject matter of the instant appeal was given per incuriam; without due regard to the Supreme court decision dated 8th November, 2022.

The Supreme Court, having quashed the order or the ruling of the trial high court on grounds referencing Articles 126(3), 19(14) and 12(1), inter alia, as stated supra, the application seeking the same order which had been quashed by the Supreme Court made the trial high court appear not bound by the Supreme Court on the decision on a question of law as to whether or not a witness for his personal safety is entitled by law to override constitutional provisions and be given preferential treatment by the law by allowing him to testify in camera.

Article 129(3) of the Constitution, 1992 provides that: "*The Supreme Court may, while treating its own previous decision as normally binding, depart from a previous decision when it appears right to do so;* ***and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law"***

It bears emphasis, therefore, that where the Supreme Court pronounces a decision on a question of law, that decision binds on all other courts even including this court. In this case, it is my considered view that among the grounds by which the ruling of the trial high court dated 9th March 2022 was quashed was that the said ruling was erroneous on the face of the record having regard to the clear provisions of the Constitution 1992, namely Articles 126(3), 19(14) and 12(1). That decision of the Supreme Court was a decision on a question of law on merits and so it was binding on the High Court and by the principle of judicial precedent, the trial high court should have followed it and dismiss the application in *limine*, especially so when the trial high

court was made aware of the Supreme Court decision on the matter.

The point made herein is particularly related to the first accused/appellant's challenge of the finding by the trial high court that the application filed by the prosecution praying the court to call their witness Anas Aremeyaw Anas to testify in camera was not a repeat application. That challenge was well placed, since it is the same constitutional provisions that were deployed by the prosecution to persuade the trial court to allow the witness to testify in camera.

I am not oblivious of the principle of law governing repeat applications as stated by the Supreme Court in the case of **Ex Parte Hesse & Scancom Ltd (2007-2008) 2 SCGLR 1230** where Georgina Wood CJ postulated that it is only when there is a new matter or a fresh point which alters the position of the parties or the dynamics of the particular cause or matter that the court that dealt with an earlier application might entertain another application or repeat application so as to consider the new facts or circumstances in determining the requisite interim relief the applicant is seeking.

This postulation of the learned then Chief Justice reiterates the point made in **Vanderpuye v. Nartey (1977) 1 GLR 124** that:

"if there was a new matter which changed the positions of the parties, a court should look at it to determine whether the prayer in a motion for interlocutory relief ought to be granted despite the fact that a similar motion had already been disposed of in relation to the same question"

It may be observed in this case that there is no new fact or circumstance or flesh point which necessitated reconsideration of the earlier application, the grant of which was quashed by the Supreme Court. In effect, the purported repeat application was untenable and should not have been allowed to see the light of the day.

As indicated at the beginning, I concur that the appeal by the first accused/appellant is allowed and the appeal by the prosecution is dismissed. Accordingly, I subscribe to setting aside of the ruling of the court below dated 17th May 2023.

SGD

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ANTHONY OPPONG
(JUSTICE OF APPEAL)

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