LAW OF EVIDENCE

MADE SIMPLE

Prepared by

DANIEL MARFO

JUDICIAL NOTICE

Required cases

- Commonwealth Shipping v. P&O Branch
- Republic v. Mensah & Ors
- R v. Igome
- Republic v. High Court, Denu; Ex parte Agbesi Awusu II
- Hilodgie v. George

Applicable Statute: Section 9, Evidence Act

Question

Mr. Dakura is a building contractor. He took a loan from City Group Bank to pre-finance a Government contract. When Mr. Dakura completed the job, the Government failed to pay him. As a result he defaulted on the repayment of the loan. City Group Bank took Mr. Dakura to court and obtained a judgment against him for the sum lent together with interest.

Mr. Dakura filed a motion to pay the judgment debt in installments, with the first installment to be paid in six months time. In his affidavit in support of the application to pay by installments, he deposed to the fact that he defaulted in the repayment schedule because the Government had failed to pay him a all to date. He also deposed to the fact that Government will pay him in six months, hence the plea to start the installment payments in six months.

The Bank opposed the application, stating that no evidence had been produced to show that Mr. Dakura had not been paid and also to prove the Government will start paying him in six months time. In allowing the application, the judge had this to say:

“I have taken Judicial Notice of the fact that the Government of Ghana is fond of defaulting in the payment of contractors. This has been the subject of commentary by the Word Bank in its annual report on Ghana. In addition to this, my wife is a contractor and through her I have been made aware that

payments to Local Contractors, which have been suspended for a while will commence in six months time. I will therefore exercise my discretion in favour of the applicant. Application allowed no order as to costs.

Discuss the merits of this ruling in the light of the principles regulating the instances when judicial notice may be taken of facts in issue.

MODEL ANSWER

Area of Law: Judicial Notice

Issues

1) Whether or not the trial judge erred by taking judicial notice of the World Bank annual report.

2) Whether or not the judge erred by taking judicial notice of his wife's experience.

Applicable law

1. In any trial, be it civil or criminal, a person who alleges is required to prove his allegation.

2. However, in such proceedings, it is not every fact, which has to be proved by adducing evidence during the hearing.

3. The law, in certain instances, allows or permits judges to do away with such requirement by acknowledging or taking notice of certain facts without requiring the party to prove it.

4. The effect is that the court is entitled to consider them as if they were admitted in evidence.

Definition:

1. In **Commonwealth Shipping v. P&O Branch, Lord Summer** defined Judicial notice as facts, which a judge is called upon to receive and act upon either from

his general knowledge of them or from enquiries to be made by him or from own his information, from sources to which it is proper to refer.

2. The concept of judicial notice has been codified in section 9 of the Evidence Act, 1975 (NRCD 323). Section 9(3) of NRCD 323 provides that judicial notice may be taken even when not requested. In fact section 9(4) of the same Act also provides that judicial notice may be taken at any stage during the proceedings and that it could be taken either on application by a part or on the courts own motion.

3. In this respect, Section 9(2) identifies two adjudicating facts, which may be properly taken judicial notice of. The first type of facts, which is capable of judicial notice is that which is generally known within the territorial jurisdiction of the count that is not subject to reasonable dispute. Indeed the first Part of section 9(2) is in relation to notoriety. The effect is that the fact must be within the jurisdiction of the court and therefore a judges personal knowledge alone is not enough. Thus, in **R v. Igombe**, where the judge took judicial notice of the herald newspaper room as a public place, that decision was criticized on appeal on the basis that the herald newspaper room was not generally known to the public as a public place. Another perspective of the first part of section 9(2) is that certain facts that are not be generally known in all parts of the country may be judicially noticed if they are generally known where the court has jurisdiction. Therefore, a court in Ashanti Region of Ghana may take judicial notice of those facts in Ashanti life, which are so well known in the region as to be beyond reasonable dispute.

4. The second type of fact, which may be judicially noticed under the second part of section 9(2) is that which may not be part of general knowledge but which may be readily and accurately determined or verified from unquestionably accurate (or credible) sources to the extent that the fact is not subject to reasonable dispute. The effect is that a judge can take judicial notice of any fact irrespective of his territorial jurisdiction, his personal knowledge or knowledge of the parties involved in the action, if the facts can be ascertained from a source, which is so reliable that no reasonable person can doubt the accuracy of the information it provides, and that such source is readily available.

Example:

Therefore, judicial notice can be taken of the fact that the earth goes round the sun, or that water is composed of two atoms of hydrogen and one atom of oxygen or that mosquitoes cause malaria even though this fact may not be generally known to the judge or the jury, for they can be ascertained readily from reputable and accessible data sources, which have these facts recorded in them.

5. Thus, this explained why judges in Ghana take judicial notice of the common law and statutes in Ghana. This is because statutes of Ghana and the application of common law on most facts can be readily ascertained from statutes books and law reports, which through the principle of stare decisis, indicate the prevailing law. In **Republic v. High Court, Denu; Ex parte Agbesi Awusu II (no.1**), the court held that judicial notice could be taken of the ruling of the trial judge in accordance with section 9(2)(b) of the Evidence Act since the facts contained in the said ruling are not subject to reasonable dispute. Also customary law as stated by reputable authors in learned writings and adopted by the courts can be judicially noticed for the same reason.

6. In **Republic v. Mensah**, where the court per Cecelia Koranteng-Addow noted that to take judicial notice of a fact, the judge has to be convinced that the matter was so notorious as not to be the subject of dispute among reasonable men, or that the matter was capable of immediate accurate demonstration by readily accessible sources of indisputable accuracy. The facts, which the trial judge took judicial notice of in the instant case could not be classified under this definition. She emphasized that even though the world inflation was a matter of public notoriety, the extent to which world inflation affected each country was not within the general knowledge of Ghanaians and for that reason was not a matter of which judicial notice could be taken. Again, one could also not make a sweeping statement about world inflation being due to the oil crisis and the extent to which this country had been affected without basing such observation on any evidence. The court concluded on this point by saying that a court was not the proper forum for the evaluation of economic factors, which contributed to inflation. Consequently to the extent that the judge did not

base his verdict on admissible evidence he was wrong.

7. Thus, judicial notice can only be taken of facts having been satisfied that that fact in issue comes under section 9 of the Evidence Act.

Analysis

a) In respect of the first issue, where the trial judge took judicial notice of World Bank annual report, on the basis section 9 and the ruling in **Republic v. Mensah**, the World Bank annual report is not a fact or something that is generally known by the public. In other words, not every Ghanaian knows of the report and the content thereof. In terms of the source of the report being accurate for verification, one can say that the fact being an organisation's report, it may be subject to criticisms in terms of how the report was generated. Also, considering the fact that similar organisations produce reports, whose contents may conflict with that of the World Bank's, the accuracy of the report cannot be vouched. It can therefore be concluded that the trial judge erred in taking judicial notice of the World Bank's report on Ghana.

b) On the issue of the judge taking judicial notice of his wife's information, one can say that being an information from his wife, it is not of general knowledge because it is information known to himself and the wife. Also, the source of that information cannot be verified considering the fact that the wife is just one of the many contractors. Therefore on this issue, the judge erred by taking judicial notice of the information by the wife.

CIRCUMSTANTIAL EVIDENCE & OPINION EVIDENCE

Required Cases

- R v. Exall
- State v. Ali Kasena
- State v. Brobbey & Nipa
- State v. Anani Fiadzo
- Osei v. Republic
- Conney v. Bentum-Williams

Applicable Statute:

- Section 67 - Expert Opinion
- Section 112 - Expert Opinion
- Section 113 - Expert Opinion

Question

Samansaman, a native of sirigu is charged with the murder of Dornipea. The prosecution admitted that there was no eye-witness to the murder but offered the following evidence in support of conviction:

Hint: Circumstantial Evidence

> "That the accused and the deceased lived close by; that the accused suspects the deceased of flirting with his wife; that the accused on several occasions have reported the deceased to the chief of Sirigu threatening of a dire consequence if the deceased persisted in his diabolic acts; that a day before the murder the accused threatened the deceased and told him if cutlass cannot kill him because of his juju then a gun could; that on the fateful day, the accused borrowed a gun from a local black-smith; that in the evening the accused went a drinking spree; that from the drinking spot the accused went to the house of the deceased through the front door; that soon after entering the deceased house there was a sound of a gun shot; that the accused was later found in a pensive mood some metres away from the deceased's house.

In his testimony, Dr. Odikro stated that the deceased died from gun shot wounds and that the nature of the wounds, which caused the death of the deceased was such that the shot must have been fired from the back door of the deceased's house rather than from the front door as adduced by the prosecutor.

As a judge in this case deliver your judgment. Will your decision be different in the absence of the evidence Dr. Odikro? If yes, why?

MODEL ANSWER

Area of Law: (1) Circumstantial Evidence
(2) Expert Opinion as an exception to Opinion Evidence.

Issues:

a) Whether or not the evidence adduced by the prosecutor can lead to the irresistible conclusion of the guilt of Samansaman.

b) Whether or not the presence or otherwise of Dr. Odikro's testimony is material in the determination of the guilt of Samansaman.

Applicable Law in respect of Issue 1:

1. In every trial, facts in issue may to be proved either by oral testimony, admissible hearsay, documents and things.

2. However, if the only evidence that could be given of facts in issue is only by means of the methods aforementioned, then many claims will fail for want of adequate proof.

3. This is because it is not always the case that every fact in issue is perceived, either by a witness, or admissible hearsay. At some stage during the trial, resort almost always has to be had to 'circumstantial evidence'.

4. Thus, circumstantial evidence is a means of proof, which is generally employed where there are no eye-witnesses to a crime but pieces of evidence are put together to determine the guilt of a person who committed the crime.

Example

Statement of a witness at a trial for murder that she saw the accused carrying a blood-stained knife at the door of the house in which the deceased was found mortally wounded. The jury is asked, first to assume that the witness is telling the truth; secondly, to infer that the accused inflicted the mortal wound with the knife. This process might be prolonged further, but as the number of steps which have to be taken from the first evidentiary fact to the ultimate inference of the fact in issue increases, the weaker does that evidentiary fact become as a means of proving the matter.

5. The difficulty in establishing the guilt of a person in the absence of an eye-witness and solely relying on circumstantial evidence was manifested in the cases of the **State v. Ali Kasena** and the **State v. Nipa & Brobbey**.

6. In the **State v. Ali Kasena**, where the accused had had a quarrel with the deceased, who was found that same night dead on the road along which the accused had passed to his house that night, the court held that where the evidence being relied on is purely circumstantial, the evidence must be more than a mere suspicion, rather the evidence must justify the accusation that point to the accused. It was also held in that case that the fact that the deceased was found at a place where the accused passed would not mean that the accused could be the only person who could have committed the crime. In this regard, the court stressed that multitude of suspicions when cannot be put together to prove the guilt of a person.

7. In the **State v. Nipa & Brobbey,** the court held that for circumstantial evidence to support a conviction, it must be inconsistent with the innocence of the accused and that it must lead to the irresistible conclusion that the accused committed the crime. The ordinary rule relating circumstantial evidence is therefore that you cannot be satisfied beyond

reasonable doubt on circumstantial evidence unless non other explanation than guilt is reasonably compatible with the circumstances. In fact in **State v. Nipa & Brobbey**, the court quashed the conviction of the accused on the basis that the prosecution failed to adduce evidence that could lead to one but only one conclusion to establish the guilt of the accused. This was because another person was arrested for the same offence, which raised reasonable doubt about the evidence of the prosecution.

8. A case where irresistible conclusion was deduced from circumstantial evidence was that of the **State v. Anani Fiadzo**. In this case the accused was convicted for the murder of his son and his activities during that fateful day were recounted, a statement made by the accused upon his arrest by the police was also adduced and finally the mode in which he was found with his throat slit coupled with the fact that the body of the deceased was found 25 meters away from the accused's farm were concluded by the court to lead to the guilt of the accused.

Applicable principle of Law in respect of Issue 2

As a general rule of evidence a witness is supposed to give testimony of facts, which he personally conceived but not inferences drawn from facts. As a result opinion evidence is generally inadmissible. The principle is that every witness is a witness of facts and not of opinion. Therefore, a person who appears before a court is required to tell the court of only facts of which he has personal knowledge and not his opinion about the facts (ie. the witness should speak of what he knows and not what he believes).

Exceptions to the rule on Opinion Evidence

There are two exceptions to the general rule on the admissibility of opinion evidence. These are expert opinion evidence and layman's (non-expert) opinion.

The position of the law as provided in section 67 of the Evidence Act is that for a person to qualify to testify as an expert he must satisfy the court that he is an expert on the matter to which his testimony relates by reason of his special skill, experience and training. Such an expert is by sections 112 and 113 of the Evidence Act, granted the power to testify his opinion and to base

his opinion on facts to which he does not have personal knowledge, contrary to section 60 of the Evidence Act.

WHEN IS EXPERT OPINION REQUIRED UNDER THE EVIDENCE ACT?

Section 112 provides that expert witnesses become necessary if the subject-matter is sufficiently above common experience, then that opinion or inference of the expert if it will assist the court in understanding the evidence or in determining the issue before the court then the witness will be allowed to give such testimony.

In **Osei v. Republic**, the court held that a handwriting expert was one who had adequate knowledge and skill as to handwriting whether acquired in the way of his business or not.

Expert opinion evidence therefore becomes admissible as an exception to the rule against opinion evidence in cases where it is necessary to provide a 'ready-made' inference, which the judge or jury, due to the technical nature of the facts, are unable to formulate. Section 112 of the Evidence Act sets out two requisites preliminary to the admission of expert opinion.

Firstly, the witness must qualify as an expert on the subject to which his opinion relates as per as section 67 of the Evidence Act. Secondly, the law requires that the subject of the expert opinion must be one where expert opinion will be helpful (To this end, expert opinion is only admissible on a matter that calls for expertise). It must be noted that expert opinion only provides a guide to the court and therefore operate as a persuasive effect and not binding on the court. In **Conney v. Bentum-Williams**, the court per Abban JA held that the judge is entitled to draw his own inferences from all the pieces of evidence before him and that the expert report is supposed merely to assist the court in deciding the vital issue before it.

The basis of the expert opinion or inferences is expressed in section 113 as on matters or information the expert himself perceives or known to him by virtue of his experience and expertise. As an expert, he may also arrive at his conclusions from matters he has assumed as being true for the purposes of giving his opinion or drawing inferences.

Analysis

In respect of Issue 1:

In respect of Issue 2

TRADITIONAL EVIDENCE

Area of Law

Traditional Evidence - The principles for the evaluation of rival or conflicting traditional evidence.

Things to cover:

- The effect of acts of ownership and possession.
- The effect of demeanor and coherence of the witnesses in narrative of their traditional history.
- The weight to be placed on publications or books containing traditional history in the assessment of traditional evidence.
- Whether a party whose traditional evidence is rejected can still have a declaration of title to land made in his favour.

Statement of the law

a. Traditional evidence is hearsay evidence but is admissible under section 128 and 129 of the Evidence Act, 1975 (NRCD 323), as an exception to the rule against hearsay. In Bruce v. Attorney-General, the court held that the trial judge had erred in rejecting as hearsay the evidence given by the plaintiff's uncle as to the birth place of the plaintiff because it is a definite principle of law that traditional evidence particularly in the class of cases relating to pedigree, inheritance, boundaries of land and the like is admissible as an exception to the hearsay rule. Similarly, in Ricketts v. Addo, the court said that traditional evidence relating to pedigree, inheritance, boundaries of land and family land transactions was admissible as an exception to the hearsay rule.

b. Statement of the principle for testing traditional evidence:

   The Privy Council in Adjeibi Kojo v. Bonsie laid down the rule to be applied when evaluating or testing traditional evidence as follows. The court held that the most satisfactory method of evaluating traditional

evidence is by examining it in the light of such more recent facts as can be established by evidence in order to establish, which of two conflicting statements of tradition is more probable. In other words, the applicable principle is that in evaluating, which of conflicting traditional evidence to accept as more probable, the courts should weigh the traditional evidence along side facts of recent ownership or possession concerning the contested subject matter – that is to say facts in recent memory.

Application of the principle in Adjeibi Kojo v. Bonsie

In Kwasi Yaw v. Kwaw Atta, the plaintiff sued for a declaration of title to land, which he claimed had been occupied b his family from time immemorial. The defendant also asserted that the plaintiff was the defendant's caretaker. The accounts given by the parties were clearly conflicting.

The court applied the principle in Adjeibi Kojo v. Bonsie and held that where there is a conflict of traditional history the best way to find out which side is probable is by making reference to recent acts in relation to the subject matter (in the instant case, land). The court further held that the fact that the plaintiff is in possession of the land, which has been acknowledged by the boundary owners to be the owner is enough to prove that his evidence of tradition is probably right.

In Achoro v. Akenfela, a chieftaincy dispute where the parties gave conflicting accounts of the proper person to be enskinned a chief of Kanjarga, the Supreme Court held that the best way of evaluating traditional evidence was to test the authenticity of the rival versions against the background of positive and recent facts. The principle in Adjeibi Kojo v. Bonsie was also applied in the case Adwubeng v. Domfeh.

However, in Adwubeng v. Domfeh, the court indicated further that a party could still succeed in an action for the declaration of title to land even if his traditional evidence is rejected. The essence of that ruling is that where a court is faced with conflicting evidence, traditional evidence does not have

to be used as the only basis for the court's decision. Other evidence before the court will be relevant in making a decision on the case. The result is that a party may win his case even if his traditional evidence fails. In fact this principle was enunciated in Adjei v. Acquah, where the Supreme Court held that facts established by matters and events within living memory especially evidence of acts of ownership and possession must take precedence over mere traditional evidence. The effect of this is that if in any litigation a party is able to establish that he and his family have been in long occupation of land in recent times, that evidence should be preferred by the trial court to evidence given by the opposing party to the effect that his ancestors were first to be in possession of that land. Similarly, the presumption of title raised under section 48 of NRCD 323 may assist a party to win his case even where his traditional evidence fails. The principle in section 48 was applied in Oppong v. Annin, where the court held that in view of the provision of section 48, a party could succeed in his claim even if his traditional evidence is rejected.

Impressions and Demeanors on Evaluating Traditional Evidence

In Oppong v. Anin, the Supreme Court noted that in assessing rival traditional evidence, the court must not allow itself to be carried away solely by the impressive manner in which one party narrated his version and how coherent that version is. Rather, the court must examine the events and acts within living memory established by the evidence and paying particular attention to the undisputed acts of ownership and possession on the record.

Thus, as held in the case of Adjeibi Kojo v. Bonsie, where the whole evidence is based on oral traditional not within living memory, it was unsafe to rely o the demeanor of witnesses to resolve conflicts in the case.

BURDEN OF PROOF

Statutory provisions:

Section 10 - Burden of persuasion or legal burden

(1) Burden of persuasion means:

- The obligation on a party;
- To establish to a requisite degree of belief;
- Concerning a fact in the mind of tribunal of fact or the court.

(2) The burden of persuasion require a party to:

- Raise a reasonable doubt concerning the existence or non-existence of a fact;

OR

The burden of persuasion may require a party to:

- Establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond reasonable doubt.

Section 11 - Burden of producing evidence or evidential burden

(1) Burden of producing evidence means:

- The obligation on a party;
- To produce sufficient evidence;
- To avoid a ruling against him on the issue.

(2) In a criminal trial, when the burden of producing evidence is:

- On the prosecution as to facts essential to guilt ⇒ P to produce sufficient evidence so that a reasonable mind will find the existence of the fact beyond reasonable doubt.

- On the accused as to any fact the converse of which is essential to guilt ⇒ A to produce sufficient evidence so that a reasonable mind could have a reasonable doubt as to guilt.

Section 12(1) & (2) - Standard of proof in civil cases

- Section 12(1) The burden of persuasion ⇒ proof by preponderance of probabilities.

- Section 12(2) Preponderance of probabilities ⇒ that degree of certainty of belief in the mind of the tribunal of fact or the court to convince it that the existence of a fact is more probable than its non-existence.

Section 13(1) - Standard of proof in criminal cases

- Civil or criminal actions: the burden of persuasion as to the commission of crime, which is directly in issue ⇒ proof beyond reasonable doubt.

Section 15(3) - Issue of insanity

- The party who claims that any party, including himself, is or was insane or of unsound mind has the burden of persuasion on that issue.

Section 17 (2) - Allocation of burden of producing evidence

- The burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.

Section 22 - Effect of presumption of guilt in criminal actions

Case Law

1. National Democratic Congress v. Electoral Commission of Ghana

Facts: The defendant published a notice, indicating its intention to hold elections to elect regional representatives to the Council of State. Following the publication of the notice, the plaintiff sued by invoking the original jurisdiction of the Supreme Court for a declaration that the notice issued by the defendant, was unconstitutional as it contravenes articles 89(2)(c) and 249 of the constitution and therefore a nullity. In support of the claim, the plaintiff also contended that the District Assemblies contemplated under article 242 were at the time of the notice not in existence. The plaintiff alleged that the Minister of Local Government had written letters to dismiss all the District Chief executives.

Holding: The Supreme Court dismissed the action and held as follows:

- To allege that a person has breached a constitutional provision requires the production of sufficient, cogent and clear evidence to support the allegation. The letters alleged to have been written were not produced, not even the dates of those letters.

- A plaintiff must seek the declaration or a claim and succeed on the strength of his own case and not on the weakness of the opponent or defendant.

Other key cases

2. COP v. Isaac Antwi
3. Sumaila Bielbiel v. Adamu Dramani & AG
4. Santa Singh v. State of Punjab
5. Fenuku v. John Teye
6. Sasu Bamfo v. Sintim

Introduction

In criminal and civil litigation, many facts are alleged by the parties, which need to be proved before the court can base its judgment on such facts. The burden of proof is an obligation to adduce evidence in a trial to prove an issue.

Illustration 1: If Kofi desires a court to give judgment that he is entitled to a certain parcel of land at East Legon, which is in the possession of Ama by reason of facts asserted by Kofi and which Ama denies, an obligation will be on Kofi to adduce evidence to prove the existence of those facts.

Illustration 2: In a murder case, the allegation may be that A has unlawfully killed B. The essentials of the allegations are that A killed B, a human being; that he did so with the intent to kill; and that the intentional killing was not justified by law. Since the prosecution asserts that these facts constitute the essential elements of the offence, it is incumbent on him to establish that belief of A's guilt in the mind of the court to the requisite degree prescribed by law.

Under the Evidence Act, burden of proof is divided in two parts, namely:

- The burden of persuasion (also referred to as legal burden and ultimate burden); and
- The burden of producing evidence (also referred to as evidential burden)

According to section 11 of the Evidence Act, the burden of producing evidence, which is also referred to as the evidential burden is the duty or obligation that lies on a party to adduce sufficient evidence to support his case regarding the issue at stake in order avoid a ruling of the court given against him or her. It is the obligation on a party to show that there is sufficient evidence to raise an issue for the consideration of the court. This evidence should be such as to induce the judge not to withdraw the case from the jury or dismiss it summarily. The burden to produce evidence is determined at the beginning of the trial. This burden is on the party that alleges. The principle on burden of producing evidence was applied in Faibi v. State Hotels Corporation.

In the Faibi case, the plaintiff was dismissed by his employers for buying contraband goods for the hotel, contrary to the policy of his employers. Following his acquittal by the district court, the plaintiff sued for damages for wrongful dismissal. The defendant contended that he had not been wrongfully dismissed. The court held that the onus in law lies upon the party who would lose if no evidence was led in the case; and where some evidence had been led, it lay on the party who will lose f no further evidence was led. The court explained that in the instant case since the plaintiff's contention was that his dismissal was wrongful whilst that of the defendant was that his dismissal was not wrongful, the party who would lose if no evidence was led would be the plaintiff. The onus was therefore on the plaintiff to prove that he was wrongly dismissed.

In Sumaila Bielbeil v. Adamu Dramani, the Supreme Court had to determine a preliminary issue as to which of the parties, that is the plaintiff or the defendant should open the case by adducing evidence. The court had earlier invited the defendant to begin the adduction of evidence as to whether he holds or has revoked his British citizenship prior to contesting the election as Parliamentary candidate. The counsel for the defendant rejected the invited by the court by insisting on the old norm that he who avers must prove and that in such a civil case it is the plaintiff and not the defendant who must begin in adducing evidence.

Exceptions

In Practice, there are certain circumstances, which demand that the accused has to prove his innocence or defence. These aply in two situations, namely:

- Where statute provides that the accused proves his defence such as insanity cases; or
- Where case law places the onus of proof on he accused

In criminal trials, as provided under section 11(2) of the Evidence Act is to the effect that the burden of producing evidence, when it is on the prosecution in respect of a fact, which is essential to guilt of the accused, requires that the prosecution must produce sufficient evidence so that a

reasonable mind could find the existence of the fact beyond reasonable doubt. Thus, the first burden is that of producing evidence, which must be satisfactory enough to induce the judge not to withdraw the charge against the accused from the consideration of the jury or to convince the judge, when he sits alone not to dismiss the charge summarily.

In litigation, it is not enough for the party desirous of winning his or her case to lead any evidence. Rather, the evidence he or she leads should be such as to convince the court or the trier of fact that the existence of the fact is more probable than its non-existence. In other words, he will have to lead evidence to convince the trier of fact or the court that his case has more merit than that of his opponent. It is only when he has so convinced the court that it will rule in his favour. This burden of convincing the court is referred to in NRCD 323 as the burden of persuasion of or legal burden. Section 10(1) of NRCD 323 has defined the burden of persuasion as the obligation of a party to establish a requisite degree of belief in the mind of the court concerning a fact. In criminal cases, except in very few instances, the measuring rod or standard for determining that the evidence adduced by the prosecution has attained the requisite degree is provided under section 10(2) and 22 of the Evidence Act; and this requite degree or standard of proof is “beyond reasonable doubt” and “preponderance of probabilities”. In such criminal proceedings, not all facts have to be proved need to be essential to he crime.

For example:
In a murder case evidence may be adduced to establish that A, the accused had a motive for killing B, in that A stands to gain financially if B died in A’s lifetime. Such a motive though admissible in forestalling a defence of incidental killing, is not an essential element in a charge of murder. But if the prosecutor wishes to introduce evidence to establish his motive, then he must assume the burden of persuading the court of the existence of the motive. However, because motive is not an essential element, he does not have to establish it to the standard of “beyond reasonable doubt”. He only has to establish by proof to the standard of ‘preponderance of probabilities’. A failure to establish a non-essential ingredient of the crime will not be fatal to the prosecution case as a whole.

When a prima facie case is established at the end of the prosecution's case, that is when the proof beyond reasonable doubt has been established, the accused is called upon to give hos version of the story. At this point, the burden is said to have shifted to the accused or the defendant, as the case may be. That is to say, it comes to the turn of the of the accused or the defendant to assume the burden of producing evidence to raise a reasonable doubt in the mind of the court that the prosecution has not succeeded in proving his guilt beyond reasonable doubt, having regard to the evidence before the court. In fact, when the court decides after the prosecution case that a prima facie case has been established, the prosecution does not put down the burden of persuading the court to believe, at the end of the whole case that the accused is guilty. What happens is that the accused carries a burden, which is different from that of the prosecution, while the prosecution carries its burden. Therefore, if the accused is able to successfully rebut the presumption of guilt, thus discharging his own burden of producing evidence, he will be entitled to an acquittal, because the prosecution would be left with its undischarged burden of proving at the end of the whole case that the accused is guilty beyond reasonable doubt.

Exception to proof in civil cases – In relation to allegation of crime in civil Trials

In Ghana, an exception made to the rule that a civil case must be proved by preponderance of probabilities is provided under section 13(1) of the Evidence Act, which is to the effect that where a in a civil case it is alleged that a crime has been committed, then the allegation of crime must be proved to the same standard or degree as the burden of proof in ordinary criminal cases. This means that notwithstanding that the case will be a civil one, the allegation of crime in the trial must be proved beyond reasonable doubt.

In Sasu Bamfo v. Sintim, where fraud and forgery were alleged in civil case, the Supreme Court held that the law regarding forgery or any allegation of a criminal act in civil trial was governed by section 13(1) of NRCD 323, which is that the burden of persuasion required was a proof beyond reasonable doubt.

Feneku v. John-Teye was another case involving the allegation of forgery of a document, which had to be established by proof beyond reasonable doubt.

RES GASTAE – AS EXCEPTION TO THE RULE AGAINST HEARSAY

Issues

1. Whether or not the statement Philip Mensah may be admitted as forming part of res gastae.

2. Whether or not Philip Mensah's statement may be admitted as a dying declaration.

Applicable Law

Hearsay evidence is defined by section 116 of the Evidence Act, 1975 (NRCD 323) as evidence of a statement other than a statement made by a witness while testifying in an action at a trial, offered to prove the truth of the matter stated. Thus, for a statement to de hearsay, three conditions should be fulfilled simultaneously, namely that the statement should have been made at the time when the trial court was not hearing the case (i.e. out-of-court); the statement made should be repeated by the witness, including the declarant as evidence before the court when it is actually hearing the case; and the statement should have been made by the witness for the purpose of establishing the truth of its contents.

By section 117 of NRCD 323, hearsay evidence is not admissible except there are contrary provisions in the Evidence Act or any other enactment or by agreement by the parties. There are however exception to this general rule against hearsay. Res gestae and dying declarations are part of the numerous exceptions of the hearsay rule.

In Wright v. Doe d Tatham, Parke B described res gestae as proof of the quality and intention of acts by declarations accompanying them. Similarly, in Howe v. Malkin, Grover J explained that although one cannot give in evidence a declaration per se, yet when there is an act accompanied by a statement, which is so mixed up with it so to become part of the res gestae, evidence of such

statement may be given. Therefore, res gaestae may refer to facts, which although not in issue, are so connected with the fact in issue as to form part of the same transaction, whether they occurred at the same time and place or at different times and places.

The conditions under which out-of-court statements are admitted under the res gestae rule as an exception to hearsay are provided under section 124 of NRCD 323. Under this provision, statements made by a person while an event, which under inquiry by the court was actually taking place or immediately after the event had taken place is considered as forming part of the res gestae. This means that the declarant's statement should have been made contemporaneously or spontaneously with the event or condition, which the statement describes or narrates. For example, if while being attacked, the declarant shouted, "Help! Help! Help! Kofi is killing me" and later Kofi is charged with the murder of the declarant, somebody who heard the declarant's shout for help without seeing Kofi attacking could give evidence of the shout he heard. In this regard, res gestae can be said to be a statement made by a person that is contemporaneous or spontaneous with the occurance with an event. In Ghana Ports & Harbours Authority v. Nova Complex, the Supreme Court held that a contemporaneous event was one, which took place at the same time as another event or immediately after the event, so that the two could be regarded as having occurred at the same time and that a contemporaneous statement (that is a statement which was made contemporaneously with the occurrence of a matter under inquiry in a court of law, was admissible in evidence. The requirement of contemporaneity is to prevent fabrication or concoction.

In R v. Bedingfield, the accused was charged with the murder of a woman. The deceased, her throat cut, came out of a room where she had been with the accused and immediately exclaimed "Oh dear, Aunt, see what Bedingfield has done to me!", and she expired in a very short time. The accused was found in that room with his throat cut and was charged with murder. The court held that that statement "Oh dear, Aunt, see what Bedingfield has done to me!" was not admissible as part of the res gestae. In this case, Cockburn C.J explained that the statement made by the woman was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard. The learned lord in

refusing to admit the statement also noted that "it was something stated by her after it was all over, whatever it was, and after the act was completed.

In Ratten v. R, a husband was convicted of the murder of his wife by shooting her. His defence was that a gun went off accidentally while he was cleaning it. The evidence established that the shooting of the wife, from which she died almost immediately, must have taken place between 1:12 and about 1:20pm. A telephonist from the local exchange gave evidence that at 1:15 she had received a telephone call from Ratten's house made by a sobbing woman who in a hysterical voice had said, "Get me the police please". The court held that the "Get me the police please" would be admissible as part of the res gestae because not only was there a close association in place and time between the statement and the shooting but also the way in which the statement came to be made, in a call for the police, and the tone of voice used, showed intrinsically that the statement was being forced from the wife by an overwhelming pressure of contemporary event. The court further held in the Ratten case that to ascertain whether a statement could form part of res gestae, one must have in mind the time limit between the act or event and the statement as well as the surrounding circumstances of the place and the manner the statement was made.

In Woledze v. Akuffo-Addo, the court said that for a statement to form part of the res gestae, it should be contemporaneous with the act and that the statement should have been made right after the act is committed not after a while. In effect, the act should some what mix up with the statement.

Thus, in R v. Duah, where a man killed a woman at dawn at Korle-bu and went over to his uncle's residence at Kuku Hills, Osu to tell him the " I have killed Agie", the court held that the statement "I have killed Aggie" could not form part of the res gestae. The court explained that for a statement to form part of the res gestae, the act complained of should be together or mixed up with the statement or must accompany the statement and also time, place and circumstances are also of the essence.

Dying declarations are also exception to the hearsay rule. Dying declarations are statements or utterances made by the declarant while on throes of death but relevant and closely connected to the event under inquiry by a court of

law. At common law, the rule is that for such statement to be admissible, the declarant should be at the point of death or should have given up hope of living when he made the statement. The admissibility of dying declaration as an exception to the hearsay evidence rule is not expressly provided under the Evidence Act. In R v. Perry, the court held that a dying declaration is not admissible unless at the time when it was made the declarant would have been a competent witness and should have no hope of living. In other words, death should be impending or imminent. In R v. Jenkins, a dying declarant changed her statement from "with no hope of recovery" to "with no hope at present of my recovery". The statement was held inadmissible on the grounds that at the time she made the statement, she had hopes of recovery. Similarly, in the case of R v. Bedingfield, the statement by the woman who emerged from her room with her throat cut that "oh dear, Aunt, see what Bedingfield has done to me" was held inadmissible as a dying declaration because there as nothing to show that the victim was under a sense of impending death.

In Ghana, dying declarations are made admissible under section 118(1)(b) of the Evidence Act for the simple reason that the declarant is unavailable witness.

Confession – As exception to hearsay evidence rule

Question

The only female teacher in the Teteman village was always the first to go to church every Sunday. On the Last Sunday of June 2006, she was found dead in her room. Esi lived alone. There was no eye-witness to the murder.

Suspecting foul play, the police arrested her boy friend, Chris. Initially, he refused to give any statement to the police. When detained in police custody, he wrote that he had nothing to say to the police. Before he was charged, the inspector in charge of the station told him that if he does not want his future blighted by the case, he should speak the truth, adding "the police have the power to help you, you know that, don't you? He thereafter wrote that he killed Esi for flirting with the village school head teacher.

Chris was finally charged with murder of Esi. He pleaded not guilty to the charge. Advise Chris on the evidential issues in this case.

MODEL ANSWER

Area of Law:
Confession statement as an exception to the hearsay evidence rule.

Issues
1. Whether or not the statement made by Chris is admissible in court.

Applicable Law
Hearsay evidence is defined by section 116 of the Evidence Act, 1975 (NRCD 323) as evidence of a statement other than a statement made by a witness while testifying in an action at a trial, offered to prove the truth of the matter stated. Thus, for a statement to de hearsay, three conditions should be fulfilled simultaneously, namely that the statement should have been made at the time when the trial court was not hearing the case (i.e. out-of-court); the statement made should be repeated by the witness, including the declarant as evidence before the court when it is actually hearing the case; and the statement should have been made by the witness for the purpose of establishing the truth of its contents.

By section 117 of NRCD 323, hearsay evidence is not admissible except there are contrary provisions in the Evidence Act or any other enactment or by agreement by the parties. There are however exception to this general rule against hearsay. Confession statement is part of the numerous exceptions of the hearsay evidence rule.

At common law, a confession is an informal admission, which is offered by an accused to another person in authority in respect of an offence alleged to have been committed by the accused person. Section 120 (1) of the Evidence Act describes a confession as a hearsay statement made by an accused admitting a

matter which constitutes or forms part of, or which taken together with other information already disclosed by him, is a basis for an inference of the commission of a crime for which he is being tried in an action. Section 120(1) of NRDC 323 further provides that a confession is not admissible unless the statement was made voluntarily. In determining a voluntary and admissible confession, Taylor J in Republic v. Konkomba said that a voluntary statement is a statement offered by a person on his own, freely, willingly, intentionally, knowingly and without any interference from any person or circumstance. In State v. Banful, the accused was tried for the murder of his school bursar. A confession statement he made was not admitted in evidence because it was not made voluntarily. It was induced by promise of favour and pressure brought upon the mind of the accused by the police, his father and the headmaster. The court held that where the prosecution intends to rely on a confession statement, it is their duty to prove affirmatively that the confession was voluntarily made and not induced by any promise of favour or advantage or by the use of fear and threats or pressure by a person in authority. In Republic v. Agiri alias Otabil, a confession statement was made inadmissible because the accused was forced to thumbprint an already prepared confession statement after he had been beaten up and handcuffed. Similarly, in COP v. Sen, a confession statement signed by the accused was not admitted into evidence because the accused signed the confession statement after he was told that after signing the case would be withdrawn. It was therefore held not to be voluntary.

A significant condition for the admissibility of confessions is the requirement in section 120(2) that the confession statement must be made in the presence of an independent witness in situations where the accused is arrested, restricted or detained. This condition is in fact a reinforcement of the voluntariness condition. Even though, the provisions relating to independent witnesses do not exempt ant categories of persons from acting as independent witnesses, in Frimpong alias Iboman v. Republic, the Supreme Court held that a policeman was not competent to be an independent witness, where the accused is arrested, restricted or detained. The Court of Appeal in the case Awutu Ellis Kaati v. Republic, refused to be bound by the Supreme Court's decision in Frimpang alias Iboman on the grounds that the Supreme Court's decision was contrary to the express statutory provision and therefore a fatal error.

Analysis/Conclusion

From the above authorities, it can be seen that the statement made by Chris to the police was involuntarily made. Like the cases of State v. Banful and Republic v. Agiri alias Otabil, Chris made the statement after the police had told him that they had the power to held him if he confessed. The confession by Chris is therefore inadmissible as evidence against him.

PRIVILEGE

Question

Charles was charged with the murder of a house help who lived in his house. His wife Kate knew of the concoction, which Charles prepared for the girl's consumption. She had given a statement to the police that she knew of the concoction. She however refused to testify against Charles, claiming that when she learned of the concoction, she was married to Charles and she did not want to incriminate her husband.

The prosecutor later discovered that the couple was married by the Bishop of Jesus Christ Apostolic Ministry International Church and was not a registered marriage minister.

Advise the prosecutor and Kate on the evidential issues arising from these facts.

Will your answer be different if you learned that six months after the incident the couple was divorced in the High Court.

MODEL ANSWER

1. Privilege with regards to marital communication
2. Competence and compellability regarding marital communication

Issues:

1. Whether or not Kate is competent to testify as a witness.
2. Whether or not Kate can claim marital privilege in order not to testify against Charles.

Applicable Law

S.A. Brobbey in his book "Essentials of Ghana Law of Evidence", has defined privilege as special right, immunity or exemption by which a person may refuse to give evidence or disclose a fact or prevent others from doing so in court proceedings or administrative enquiries. A privilege may permit a party to decline to answer interrogatories or disclose a document prior to trial. Privilege is thus an example of where on the ground of public policy or justice, relevant facts, which are ordinarily admissible may be inadmissible or immunity granted to persons competent to be witnesses, thereby exempting them from being compelled to give evidence.

Privilege only entitles witnesses to refuse to give evidence on particular matters. However, a witness who is competent but not compellable can choose whether to give evidence at all; but if he chooses to give evidence then he must answer all questions put to him, except those of which he is entitled to claim privilege.

Lawyer-Client Privileges

The main object of this privilege is to protect the communication between a client and the lawyer as well as the work done for the client as a result of that communication in the course of rendering professional service. The lawyer-client privilege is covered under section 100(2) of the Evidence Act and it is to the effect that a client has a privilege to refuse to disclose and to prevent any person to disclose a confidential communication, relating reasonably to professional service sought by the client and made between the client or its representative and the lawyer or a representative of the lawyer. As indicated a lawyer-client privilege also affects the work produced by the lawyer, and this is provided under section 102(1) of the Act. This privilege covers matters such as letters, indentures and other s=documents prepared by the lawyer or his representative.

Exceptions to Lawyer-Client Privilege

Section 101 of the evidence Act deals with limitations on the lawyer-client privileges to the extent that privilege cannot be claimed in the following instances:

- If there is evidence that the consultation with the lawyer was to facilitate the planning or commission of a crime.
- Where two or more persons claim interest in the property through the same deceased client of the lawyer
- Where there is allegation of breach of duty by a lawyer to his client or client to the lawyer.
- Where the lawyer is a witness to the execution of a document and an issue has arisen as to the formalities on the execution of the documents.
- Where there was communication relevant to a matter of common interest between two or more clients if the communication was alleged to have been made by any of the clients and there is a dispute in court between the two clients.

Privileges and Marital Communications.

Under normal circumstances, the spouse of the accused is not a compellable witness. In fact section 110 of the Evidence Act provides that a person has a privilege to refuse to disclose and to prevent another from disclosing confidential communication made between himself and his spouse during the pendency of their marriage. One major policy reason for this principle is that in law, a husband and wife are one and have identity of interest. It therefore follows that in law, the privilege against self-incrimination would apply to the husband and the wife. Thus, in Blunk v. Park, the court reaffirmed the rule that no one is obliged to give himself away and this is codified in section 97 of NRCD 323. In R v. Algar, the accused was charged with forging his wife's cheques during their marriage. The marriage was later dissolved as voidable on account of the husband's impotence. She testified for the prosecution and was convicted. On appeal, he conviction was quashed for the reasons inter alia that her evidence was inadmissible. In Ghana, there is no express statutory provision that the spouse can be compelled to testify for the prosecution. Refer tom page 423 of Brobbey's book for further arguments in relation to the legal effect of section 110 of the Evidence Act.

Analysis

Advise to Kate: In the present case, the marriage between Charles and Kate is void because they were not married by a competent marriage minister. Therefore Kate cannot claim privilege under section 110 because the marriage did not exist at all. She cannot rely on the decision in R v. Algar because in that case, the marriage was voidable, but in this case, the marriage is void ab initio.

Advise to Prosecutor: The prosecutor can rely on the case of RL to have the statement which Kate had previously made to the police, admitted into evidence. In that case a wife declined to testify against her husband on charges of rape of his daughter. A statement the wife had earlier made to the police undermining the defence of the husband was admitted in evidence.

The answer would not be different if six months after the incident the couple was divorced at the High Court. This is because the marriage was already void and so there was no marriage to dissolve. However, if it had been a real marriage, and the coupe had divorced six months after the incidence, Kate could still claim marital privilege because the wording of section 110 of NRCD 323 as well as the commentary to that section is to the effect that the privilege covers communication during the marriage and even after divorce the privilege still subsists.

DOCUMENTARY EVIDENCE - Illiterates

Applicable Law

The general principle of law is that where a party executes a document and attests by placing his mark on the document, the party is estopped from subsequently challenging or denying the facts contained in the document. Thus section 25 of the Evidence Act makes it clear that facts recited in a document is conclusively presumed to be true between the parties and their successors in interest as regards the content of the document except otherwise provided by law and equity.

However, the law seeks to protect the interest of illiterates executing a document. Under section 4 of the Illiterates Protection Ordinance, before an illiterate would be bound by a document purportedly signed by him, there must be proof of the fact that the document was read and interpreted to the illiterate and that he appeared to understand the content of the document before placing his mark on the document. The issue as to who qualifies to be an illiterate was considered in the case of Kwamin v. Kuffour where the court held that there is no presumption that a native of Ashanti who does not understand English language is bound by legal instrument made in English d=for the reason that that person had appended his signature to it or placed his mark thereto. In that case, the court held that where a person signs a document in his own language, then the signature raises a strong estoppel against him, which requires strict proof to subvert.

In Zabrama v. Segbedze, the court criticized the meaning of an illiterate given by the court in the case of Kwamin v. Kuffour and held that the test should not be whether or not the document must have been made in the language

of the person before it can bind him but that the document must have been made in the language he can read and write at the same time. That is to say, an illiterate is someone who cannot read and write the language in which the document was made.

The position of the law is that before a document can bind the illiterate, there must be proof that it had ben read and explained to him to his understanding before he signs. Thus, in Goodman Moshie v. Kwaku, the plaintiff, an illiterate Moshie man was injured in the course of his employment. He sued the defendant, his employer for damages for breach of statutory duty of care. The defendant denied breach and argued that since the plaintiff had been compensated under the Workman's Compensation Law, he was estopped from instituting the action. The plaintiff had signed a document showing that he had been compensated. The court found that the document was made in the English language and the plaintiff could not speak English but spoke in the Moshie language though an interpreter. The defendant argued that the document was explained to the plaintiff inn twi by one Quartey, a Ga man and held that there was no evidence that the plaintiff understood the content and that offended against section 4 of the Illiterates' Protection Ordinance.

In the Zabrama's case, the plaintiff sought to redeem land he alleged to have pledged with the defendant for some amount of money. The defendant denied the pledge and claimed that it was an outright sale. The defendant's evidence was corroborated by the writer of the document who gave evidence that he had read the over the document to the understanding of the plaintiff. The Odikro of the town also supported the defendant's assertion on ground that when the parties appeared before him for his consent to the transaction as custom required, he caused the document to be interpreted to the plaintiff before he signed the document. The Supreme Court upheld the decision of the trial judge that there was enough evidence on record that the plaintiff understood that it was an outright sale and that the fact that there was no interpretation clause did not make the document void. However in In re Kodie Stool; Adowaa v. Osei, the court held that a strict compliance of section 4 of Cap 262 entails the inclusion on the document a jurat at the end of the document prepared on behalf of the illiterate person.

LAW ON WITNESSES

General discussions on Witnesses

Meaning:

In any trial, be it civil or criminal, there is the need to adduce admissible evidence to the courts. One of the means of achieving this is through the instrumentality of witnesses. A witness in its strict sense is a person who gives evidence in a cause before the court to establish the facts upon which the parties rely upon to prove their cases. There are various modes of adducing evidence to established facts in issue in any trial. These include testimonial evidence, which is an oral statement given by a witness in court of facts of which he or she has personal knowledge and this may be made by any method by which the witness is capable of making it. For example, a witness who cannot speak may communicate his knowledge of the facts in issue to the court by signs or by writing. Thus, in **Chandrasekhera v. R**, a woman who was unable to speak because of her throat was cut suggested the name of her assailant by the sign of her hand. The court held the sign to be an oral statement relevant as a dying declaration. Another way a witness can adduce evidence in court is by hearsay, which is a statement of a person who is not available in court by made in court by a person who has no personal knowledge of the event. A witness may also come to court to offer evidence by tendering a document as evidence.

At common law the law on witnesses is that all persons are competent witnesses in any proceedings and that all such competent witnesses are compellable. There are however exceptions to this common law rule, such as competence and compellability of an accused, the spouse of a party, children and persons of unsound mind. Generally at common law, an accused person is incompetent to testify for the prosecution of for himself. In R v. Pipe, the court held that an accomplice who is not an accused in the proceedings but against who proceedings are pending should be called by the prosecution to testify if they have undertaken to discontinue the proceedings against him. In respect of the spouse to a party, the common law position was that a spouse of an accused was

competent to testify for the prosecution, but was not compellable for the prosecution.

In Ghana, section 58 of the Evidence Act, 1975 (NRCD 323) has abolished all pre-existing Common Law and statutory disqualification for witnesses, with the view to ensuring that only limitations imposed by the Act applies. Thus, in Ghana section 58 of the Evidence Act is to the effect that, except as provided under the Act, every person is a competent witness and all such competent witnesses are compellable. Therefore, under our jurisprudence, no person is disqualified from testifying on any matter. Notwithstanding the general rule on competence and compellability of witnesses under the Evidence Act, there are special circumstances where a person is disqualified to be a witness. This disqualification provision, as provided under section 59 of the Evidence Act is that the only instance where a person will be treated as not being a competent witness is where that person is incapable of expressing himself so as to be understood, either directly or through an interpreter as well as inability of the person to understand the duty to tell the truth. The combined effect of sections 58 and 59 of the Evidence Act is that in Ghana, a child or a person of unsound mind is competent to be a witness provided that person is capable of expressing himself so as to be understood and capable of understanding the duty of a witness to tell the truth. In **R** v. **Bellamy,** the court held that the proper test of the competence of a mentally handicapped person is whether that person has a sufficient appreciation of the seriousness of the occasion and realization that taking the oath involves something more than the duty to tell the truth in ordinary day-to-day life. Also, in **R** v. **Hill**, a patient of a lunatic asylum labored under a delusion that he had a number of spirits about him, which continually talk to him had a clear understanding of the obligation of oath. The court held that he was a competent witness to give evidence for the prosecution on a charge of manslaughter.

On condition that the witness is competent under section 59 of the Evidence Act, section 60 tends to limit the scope of the witness's testimony to only matters of which he has first-hand information (i.e personal knowledge). The purpose of limitation in section 60 is to assure the use in court of the most reliable evidence available. Thus, if the matter can be perceived by the senses, the witness must in fact have perceived it before he can testify to

it. Questions relating to the duration and quality of this perception and recollection are matters that affect the weight of the evidence and not its competence. For example, if the witness was out of the room while an event occurred, he may not testify to that event except as he might have heard or felt its shock waves or smelled its results. But he cannot testify to what he did not see. Therefore, if a witness does not meet the tests in Sections 59 and 60, it will be wasteful and efficient for the courts to hear him or her. Section 60(3) provides for the waiver of this rule of personal knowledge. If a witness testifies that he was born on a particular date at a particular place that evidence will be competent if not objected to even though the witness could not have had first-hand knowledge of the date and place of his birth. Section 60(4) makes clear that the requirement of personal knowledge does not extend to the opinion testimony of expert or lay witnesses who are, on particular subjects, allowed to give their evidence. Experts are by section 113 to base their opinions on facts of which they do not have personal experience.

Sovereign heads and other sovereign states are competent witnesses but are not compellable to give evidence in court. Per the Diplomatic Immunities Act, 1962 (Act 148), diplomatic agents are entitled to enjoy immunity from the criminal jurisdiction of Ghana. They also enjoy immunity from civil and administrative jurisdiction. Such immunity can be waived by the diplomatic agent. The waiver must be in writing. Refer to the case of **Tsatsu Tsikata v. AG**, where the Country Director official of the International Finance Corporation (IFC) was called to testify by producing documents at the trial. The Supreme court held that it was not in the power of the AG to say that the Country Director of IFC enjoys immunity and therefore cannot be subjected to the jurisdiction. The Supreme Court ordered that the Country Director must be served. There is a provision that the diplomat can waive the immunity.

A judge is a competent witness but cannot be compelled. Thus a judge sitting at a trial cannot testify as a witness at the trial. If he has to testify then he has to have nothing to do with the trial.

A member of a jury shall not give evidence as a witness in a trial in which he is sitting as a juror. However, when there is an issue regarding the validity

of a verdict, the juror will qualify like any other competent witness to testify on that point. He will be disqualified to give evidence on how any particular matter influenced a particular juror or the jury as a whole.

HEARSAY

General understanding of Hearsay

Hearsay is define under section 116(c) of the Evidence Decree, 1972 (NRCD 323) as evidence of a statement, other than a statement made by a witness whilst testifying in the action at a trial, which is offered to prove the truth of the matter stated. In other words, hearsay evidence is any evidence of any oral or written expression, which is made out-of-court and offered during trial to prove the truth of a matter stated. The effect of section 116(c) is that for a statement to be hearsay, three conditions must be present or fulfilled simultaneously. These are:

- The statement should have been made when the trial court was not hearing the case (i.e. out-of-court). Thus, if the statement was made outside the court or even in the court room, while the court was sitting, but at a time when the particular case was not being heard, this condition for hearsay would have been fulfilled.

- The statement should be repeated by any witness, including the declarant, as evidence before the court when it is actually hearing the case; and

- The statement should have bee made by the witness for the purposes of establishing the truth of its contents.

At common law to the common law rule against hearsay, a statement made other than one made by a person giving oral evidence in a legal proceeding was treated as inadmissible evidence of any fact stated. In **R v. Gibson**, where the defendant was charged with maliciously causing harm. The allegation was that he had thrown a stone at the victim. The victim gave evidence that immediately after he was hit by the stone he saw a woman who pointed to a door and saying: 'the person who threw the stone went in there'. The door in question was that of Gibson's home and he was found to be there. The woman who had told the victim where his assailant had gone did not give evidence. The

court overturned Gibson's conviction on appeal on the basis that what the woman did and said was hearsay and therefore inadmissible.

In Ghana, the general rule against hearsay is provided under Section 117 of NRCD 323, which states that hearsay evidence is not admissible except as otherwise provided by the Evidence Act or any enactment of by agreement of the parties. The exclusionary character of the rule in hearsay is due to the distrust of the abilities of the jury to evaluate hearsay evidence, or was due to the faith in the power of cross-examination, which is absent when hearsay evidence is given. The absence of cross-examination when hearsay is proffered in court pose a lot of danger due to the difficulty to be encountered by the trier of facts to satisfy itself that the witness believed the testimony and that he is justify so to do. See **R. Blastland** on this point.

Exceptions to the Rule Against Hearsay

Exception 1: First Hand Hearsay (Section 118)
According to section 118, evidence of hearsay is not made inadmissible by section 117 in the following instances:

a. If the statement, termed first-hand hearsay, made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence. Thus, for the first-hand hearsay to be admissible, two conditions that must be fulfilled, namely:

   - The out-of-court statement must be such that if the declarant had made it while testifying in it would not have been hearsay. This condition emphasizes the fact that the information given out-of-court should come directly from declarant's own knowledge and not acquired second-hand from anybody; and

   - The declarant who made the information out-of-court should be "unavailable as a witness". This means he should not be present in court to give evidence as provided under section 118(b)(i). The phrase 'unavailable as a witness' has been given a broad meaning under section 116(e) of the decree to include all situations in

which the witness cannot be made to testify in court. This includes unavailability due to legal disability such as disqualification as a witness as per section 59 of NRCD 323, privilege to refuse to testify or disclose or simply beyond the reach of the legal process. In **Appiah v. The Republic**, the Supreme Court held that the affidavit of the official of Barclays Bank International, London was admissible under the Evidence Decree, 1975 (N.R.C.D. 323) because as extracts of banker's books it was admissible under sections 125 and 176. It was also admissible as an exception to the hearsay rule under section 118, because it was the statement of a declarant who was unavailable and which since it had both the affidavit and seal of the Supreme Court of Judicature, England, satisfied the due authentication requirements of section 136. Besides, it should be a notorious fact that foreign banks could not be compelled to testify in our courts and were not amenable to the coercive directions of our courts. Furthermore, the enormous costs which would be involved in securing the attendance of such a witness, even if he were willing to testify, would breach section 178 (4) which provided for "the most just, expeditious and least costly administration of the law."

Exception 2: Admissions (Section 119)

The reception of admissions as an exception to the rule against hearsay is presumably based on the fact that no reasonable person will make out-of-court statements against or incriminate himself unless that statement is true. Refer to Ofori-Boateng @ page 109 – 116.

RES GASTAE CASES

R v. Andrews – This case laid down the test for admissibility of a statement as part of the Res Gastae, or Res Gastae statements. This is a s follows:

1. The primary question the judge must ask is whether the possibility of concoction or distortion can be disregarded.

2. To answer (1), the judge must first consider the circumstances in which the particular statement was made in order to satisfy himself that the event was *so unusual, startling or dramatic* as to dominate the thoughts of the speaker to the extent that his utterance was an instinctive reaction of the event, giving no time for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or pressure of the event excluded the possibility of concoction or distortion, provided the statement was made in conditions of approximate contemporaneity.

3. For the statement to be sufficiently spontaneous, it must be so closely associated with the event that excited it that the mind of the speaker was still dominated by that event. The fact that a statement was made in answer to a question is only a factor to be taken into consideration under res gastae statements.

Illustrative case: **R v. Newport**
Facts: The appellant's wife left their house after an argument. The case for the prosecution was that the appellant pursued her with a bread knife. At the time of the flight, the wife suffered a stab wound, which caused her death. The prosecution said that she was murdered, but the defence said that there had been an accident. The prosecution applied for evidence to be admitted that the wife had made a telephone call to a friend that evening. The friend said that she had sounded agitated and frightened, and asked if she could come to the friend's house if she had to leave her own in a hurry. This evidence was admitted on the basis that what the wife had said was part of the res

gastae, but the submission and the judge's ruling were made under a misconception that the call had been made immediately before the wife left the house, whereas in fact it had been made 20 minutes earlier.

Holding: In the light of the new evidence, the Court of Appeal held that the wife's utterance was plainly not part of the immediate incident and should have been excluded. In other words, it was in no sense a spontaneous and unconsidered reaction to an immediately impending emergency.

Note: The nature of the event itself and the lapse of time between the event and the utterance, are likely to feature in arguments on admissibility. Thus, the less dramatic the event and the greater the lapse of time, the less likely it is that the speaker's mind was still dominated by the event so as to rule out the possibility foe concoction or distortion. For example, in **Tobi v. Nicholas,** the res gastae exception was held not to apply where a statement was made 20 minutes after an undramatic traffic accident.

Duah v. The Republic

Principle: A statement at the time of performing a relevant act is admissible to explain the act, provided it is made contemporaneously by the person who performs that act, but the act has to be relevant to the facts in issue apart from the statement accompanying it.

Illustrative case: **R v. Bliss**

Facts: In this case evidence was tendered, to prove the nature of a certain road, that someone had planted a tree at a particular point, saying simultaneously that it marked the boundary between his land and the highway.

Holding: It was held that the mere planting of the tree was irrelevant apart from the declaration. Accordingly, neither evidence of the planting nor of the accompanying declaration could be given.

R v Dixon

Facts: In this case, a soldier had killed a corporal. The jury were directed that his statement immediately afterwards, "I know what I have done and I am not sorry for it", was admissible to prove the intent to kill. It was presumably thought that those words showed his state of mind shortly after the

event, and from his state of mind at the stage could be inferred his sate of mind at the earlier stage, just before the killing.

SUMMING UP

Area of Law: Summing Up

Issues:

1. Whether or not the judge misdirected himself by actual misdirection in usurping the duty of the jury
2. Whether or not the judge misdirected himself by non-direction by not drawing the attention of the jury to the defences raised by the unsworn statement

Applicable law

Summing up is one of the ways by which a judge controls the jury in a jury trial. In a jury trial, the judge determines questions of law while the jury determines questions of fact as provided under section 1 and 2 of NRCD 323 respectively. Thus, in R v. Ahenkorah, judges were warned to desist from encroaching on the province of the jury. Under section 277 of Act 30, where the case of both sides is finished the judge may if necessary sum up the law and the evidence for the jury. In the Practice Note in State v. Kwame Amoh, the court was of the opinion that though the section 277 of Act 30 seem to be obligatory, it was in actual fact mandatory. Therefore in a capital offence, it is a prerequisite that the judge sums up the law and evidence when the case on both sides is closed.

The authorities indicate that the summing up should raise the defences put up by the by the evidence even if expressly pleaded by the accused and also that the summing up should not be one-sided. The authorities also indicate that the judge in his summing up may express his views or opinion about the evidence but he is not to direct the jury that they accept his views and also that he should be fair.

In DPP v. Stonehouse, the court held that the judge should not pre-empt the jury by instructing them to render a guilty verdict. Thus, in summing up, except where the verdict is favourable to the accused, the judge shall not direct the n=jury on the verdict to enter. In State v. Afenuvor, the appellant appealed his conviction of murder on grounds that the judge failed in his summing up to the jury on the high of proof that the prosecution must satisfy

in a murder trial. In allowing the appeal, the court held that the judge in his direction to the jury must not only state the jury must be satisfied with the guilt of the accused but also the proper standard hat they must n=be satisfied beyond reasonable doubt or must be completely and entirely satisfied as to be quite sure of his guilt.

Although there is no exact formulation in summing up, in Barkah v. The State, the judge in his summing up stated that if the jury was not quite sure but felt that because of some reasonable and rare doubt that the guilt of the accused cannot be proved, then they must acquit him of murder. The appellant appealed on the grounds that by his summing up, the judge had shifted the burden of proof unto the accused.

Where a judge fails to adequately sums up or misdirect the jury in his summing up, this may prove fatal on appeal and lead to a quashing or reversal of the conviction on appeal.

Regina v. Ojojo was the consequence of a fatal summing up, where the judge in his summing up and in reference to the unsworn confession of murder directed the jury to enter verdict of guilty of murder. On appeal, the coiurt of appeal noted that even though the judge had directed the jury on the law of murder, he misdirected himself by actual misdirection and by non-direction. Misdirection because he, as a judge had usurped the domain of the jury by telling them to enter verdict of guilty and also by saying that the statement from the dock amounted to a confession. In the opinion of the court, the statement was an admission of the killing but not a confession of murder. Also the judge had misdirected himself by non-direction because the judge should have raised the defences of provocation and self-defence on behalf of the accused. This is because the judge in summing up must raise the defences available. This led to a substantial miscarriage of justice and so the conviction of the accused was quashed on appeal.

RELEVANCE AND ADMISSIBILITY OF EVIDENCE

Area of law: Relevance and admissibility of evidence obtained through illegal means

Issue

Whether or not the court can admit the evidence adduced through entrapment of the accused to confirm his guilt.

Applicable Law

In any trial, be it civil of criminal the court will have to rely on evidence adduced by the parties to the litigation in order to administer justice. However, it is only evidence that is relevant to the facts in issue that should be admitted.

The Evidence Act, 1975 (NRCD 323) has defined evidence in section 179 as any evidence, writing, material objects and other things that are presented to the senses to establish the existence or non-existence of facts in issue or facts relevant to the determination of the action that is before the court. What is relevant evidence has also been defined under section 51 of NRCD 323 as any evidence including evidence relevant to the credibility of witnesses or hearsay declarant, which establishes the existence or non-existence of facts in issue, which are of consequence to the determination of the action, more probable or less probable than when such evidence is not available or in the absence of such evidence. The effect of the above definition is that for evidence to be relevant, two elements must be present. The first element is that the evidence must have probative value. The second element is that evidence must be material to the extent that the connection between the evidence and the facts in issue must not be remote. If the connection is remote, then the evidence will be deemed as irrelevant. Another consideration is also that in general all relevant evidence, as provided under section 51(2) of the Evidence Act are admissible, except as otherwise provided under the Act or by an agreement between the parties to the action. In DPP v. Kilbourne, the court said that for evidence to be relevant, it must be logical and material. Notwithstanding the provisions in section 51(2), the courts have inherent exclusionary discretion to exclude relevant evidence if the admission

of such evidence will prejudice the action. The Evidence Act has made provision for instances where the court can exercise its exclusionary discretion to exclude relevant evidence. These are provided under section 52 (a)-(c) of NRCD 323, where it says that in cases of prejudice, undue delay, waste of time and surprises to the other party in civil cases, the court can exclude relevant evidence when the probative value is outweighed by the factors listed supra. Also in accordance with the provisions under section 53, the court can also exclude relevant evidence if the character traits of a person are adduced against him to establish his guilt in respect of the case before the court. However, such character evidence can be adduced when the accused himself relies on his character to establish his innocence; when the accused challenges the character of the prosecutor or the witness. In the case of Avegavi v. R, the court allowed character evidence to be adduced because the accused had challenged the character of the prosecutor by referring to him as a "liar".

Another instance where the admissibility of relevant evidence becomes an issue is when the evidence is obtained through an illegal means. In this area of the law of evidence, there are two schools of thought.

The first school of thought hold the proposition that it matters not how the evidence is obtained, it should be admissible. This common law position of the law was enunciated in the case of R v. Leatham, where Lord Crompton stated that "it matters not how the evidence is obtained and even if the evidence is stolen it should be admissible". In fact the position of this school of thought is premised on the principle that the primary aim of the court is to ensure that the ends of justice is met and that it is not the duty of the court to involve itself in administrative enquiry. In fact, the common law position on the admissibility of evidence obtained through illegal means has been used in a number of cases, including the case of R v. Apicella, where the court admitted evidence of a police report to establish the guilt of the accused when in fact the examination report was obtained without the consent of the accused.

The second school of thought hold that proposition that since no one should be allowed to benefit from his or her illegal act, evidence obtained through illegal means should not be admitted notwithstanding its relevance. A new

wave in this area of the law is that when deciding whether or not to admit evidence obtained through illegal means, the court should conduct "cost-benefit analysis" to ascertain the cost to the accused against the benefit to the society. If the benefit to the society is higher than the cost to the accused, then the evidence should be admitted otherwise it has to be rejected, although relevant. This is the position of the law in England following the passage of Police and Criminal Evidence Act (PACE) per its section 78. Even though PACE is not applicable in Ghana, it can be used as persuasive force. Therefore, if in Ghana it is the desire to fight corruption, then any evidence, which when adduced, albeit illegal, may be admitted by the court if the benefit to the nation as a whole is higher than the cost to the accused whose human rights may have been infringed. The court may also invoke its inherent exclusionary discretion and exclude such evidence if it will prejudice the other party as provided under section 52 (a)-(c) of NRCD 323.