

IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE (GENERAL JURISDICTION), ACCRA
HELD ON THURSDAY, THE 12TH DAY OF OCTOBER, 2023 BEFORE HIS
LORDSHIP,
JUSTICE ERIC KYEI BAFFOUR (JUSTICE OF THE COURT OF APPEAL)
SITTING AS ADDITIONAL HIGH COURT JUDGE

CASE NO. CR 0014/2020 TIME:

1:14 p.m.

THE REPUBLIC
VERSUS

WILLIAM ATO ESSIEN



Convict/Respondent present

Prosecution/Applicant represented by Joshua Sackey (SSA) being led by Richard Gyambiby (PSA) present

Counsel for Convict/Respondent — Baffour Gyawu Bonsu Ashia for Thaddeus Sory present

By Court: At the last adjourned date, which is the 27th of July 2023, the Court could not sit. Subsequently, there was two months' vacation. May I enquire from learned Counsel for the Convict, whether the Convict has taken advantage of the long period of time fortuitously afforded him to pay the monies.

Counsel for Convict/Respondent: My Lord, we have not been able to pay the agreed sums to the State. At the last two sittings, a letter has been written from the offices of Robert Kpatsa informing the Court that they had gotten a judgment against Essien Swiss International for which reason they had an interest in the properties which Essien Swiss had assigned to Panaerico Company Limited. We took steps and realized that it was true that they had taken judgment against Essien Swiss. This piece of information cause Panaerico to cease payments as agreed under the sale of asset agreement between Essien Swiss and Panaerico Company Limited. My instructions are that, steps were taken to engage Keymeb Travel & Tours Limited, the Judgment

Creditor to resolve the issue. As I speak, there is an appeal pending against the judgment of the High Court. It is our humble prayer that because of the steps which the Convict has taken to pay more than one third of the agreed sum, it is our humble prayer that this Court indulges us and grant us more time in order to retire the outstanding amounts. We are not taking advantage of the leniency that the Court has shown us. I pray that My Lord should temper justice and give us more time.

By Court: I have heard learned Counsel praying for further time for the Convict to pay the outstanding GH¢53,000,000.00. The basis of the prayer is that, there is an appeal pending in respect of the case of Keymeb Travel & Tours Limited v Essien Swiss over the levying of the execution of some properties at Prampram. In the view of the Court, I do not think it proper for this Court to hold in abeyance the determination of the application filed by the Republic to abide by uncertain date in future for the completion of a completely independent case which may not even have any impact on this suit. I accordingly invite the Republic to move the application filed on 2nd of May, 2023.

Prosecution/Applicant: My Lord, before you is an application for the imposition of custodial sentence on the Respondent pursuant to Section 35 (7) of the Court Act 1993, Act 459. I move in terms of the motion paper and the supporting affidavit. Per the agreement that the Republic had with the Respondent herein under Section 35 of the Court's Act, our 3H¢90,000,000.00 was to be paid to the State. This agreement was adopted by this Court. However, the Respondent herein has failed to abide by the terms of the agreement and this Court has granted him several opportunities to make payments as they fell due to no avail. Per the clear provisions of Section 35(7) of the Courts Act, the entire outstanding balance of (311<53,000,000.00 has fallen due. Per their showing, the Respondent will not be able to raise this amount in fulfillment of his obligation to the State. As a result of this, we are praying that the Court will pass a custodial sentence on the Respondent since his conduct is in clear violation of Section 35 (7) of the Courts Act. We pray that the amount paid so far should be taken into consideration by the Court in mitigation of sentence. We pray accordingly.

Counsel for Convict/Respondent: My Lord, we are opposed to the application filed by the State praying this Court for the requisition of custodial sentence on the Convict/Respondent pursuant to Section 35(7) of the Courts Act. Our affidavit in opposition which opposes the current application is on two grounds.

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The first is that the application is premature and fails to properly invoke the jurisdiction of the court.

The second ground of opposing the application is that, the Convict has demonstrated in this Court that if this Court should lean towards him and afford him the opportunity, he will be able to pay the outstanding sum.

This application is brought under Section 35 (7) of the Courts Act - read out.

Our interpretation of this Section is that there is every obligation placed on the State. For that reason, we are saying that the application by' the State praying the Court for the imposition of custodial sentence is premature. The second leg of our argument is that the Convict has demonstrated in this Court that given the opportunity, he will be able to pay the outstanding amount which has fallen due and payable. Just when the agreement between us and the State was executed, even though the Convict has not been working ever since the licence of the bank was revoked, the Accused then, Convict now, was able to pay the first installment of (31-1<30,000,000.00. My Lord, this is someone not working. Apart from the fact that he is not working, his passport has been seized. My Lord, these are exceptional circumstances under which the Convict had had to raise these sums. The spirit and purpose of Section 35 (7) of the Courts Act will be completely undermined if the Court were to proceed to pass custodial sentence on the Accused person, especially when the Convict has made payments amounting to GH¢37,000,000.00, more than one third of the settlement sum. A custodial sentence at this time will undermine the spirit and purpose of Section 35 (7) of the Courts Act. It will also undermine the efforts being made by the Convict. Having regard to the new facts that have arisen after the execution of the agreement, and in the interest of justice, it is our humble prayer that My Lord tampers justice with mercy and afford the Convict some time to pay the total amount that has fallen due and payable. A period of six (6) months

given to the Convict will be enough time for the Convict to retire the amount pending, especially when he is still a Convict and his passport has been seized.

RULING OF THE COURT ON THE MOTION FOR THE IMPOSITION OF CUSTODIAL

SENTENCE ON WILLIAM ATO ESSIEN PURSUANT TO SECTION 35(7) OF THE COURTS ACT, 1993, ACT 459

1. The Republic by this motion seeks an order for the imposition of custodial sentence on the Convict/Respondent pursuant to section 35(7) of the Courts Act, 1993, Act 459. The application is supported by a twelve-paragraph affidavit to the effect that the Convict had failed to make a payment of Twenty Million Ghana Cedis on or before the 28th of April, 2023 thereby failing to meet the conditions imposed on him and in the view of the Republic this effectively terminates the terms of settlement. Prosecution accordingly seeks for the passage of custodial sentence on the Convict according to law. A background to what has necessitated this process would be helpful.
2. It may be recalled that on the 13th of December, 2022 the Convict changed his plea from "Not Guilty" to "Guilty" on all the counts that he was facing before this court. He was accordingly convicted on his plea. The Convict took advantage of section 35 of the Courts Act, 1993, Act 459 for which the Republic and the Convict agreed to terms of settlement that was filed before the court on the 30th of November, 2022.
3. By the terms of the Agreement relevant for our purpose today, the Convict was required to refund a total amount of Ninety Million Ghana Cedis to the Republic as reparation and restitution. He paid an amount of Thirty Million Ghana Cedis on the 1st December, 2022. The Convict was required by the terms of the Agreement to make a payment of Twenty Million Ghana Cedis on or before Friday the 28th of April, 2023. With the subsequent payments to be on the 31st of August, 2023 and the final payment to be on the 15th of December, 2023.
4. The court accepted the terms of settlement and noted in the judgment delivered on the 13th December, 2022 as follows:

"The passage of custodial sentence is hereby suspended. However, the guilty plea and the conviction would always hang around the head of William Ato Essien as a sword of Damocles until all the monies have been paid in accordance with the terms and timeliness agreed and accepted by the court. I order that if the convict default in the first payment of the amount of Twenty Million Ghana Cedis or makes some payment short of that Twenty Million Cedis by the

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28th of April, 2023, the whole of the amount of Sixty Million Ghana Cedis shall become due and payable by the convict. Upon failure to pay the terms of the agreement entered into and adopted by the court with its further conditions imposed by this court would be deemed to have come to an end. In that event, the prosecution shall immediately after the expiration of the whole of the day of 28th of April, 2023 shall cause the immediate apprehension of the convict and produce him before the court as soon as practicable for custodial sentence to be passed on him according to law. '

5. As at today the record reflect that only Thirty Seven Million Ghana Cedis out of the Ninety Million Ghana Cedis has been paid. The Convict opposes this application on two main grounds. First that this application filed by the Republic is premature on the basis that the Republic should have taken steps to recover the monies first. And second that the Convict has demonstrated good faith by paying part of the sums even though he is not working.
6. I do not see the claim being made that the application is premature. The Agreement emanated out of criminal proceedings but not civil one. There is nothing either under section 35 of Act 459 or under the Agreement into between the Republic and the Convict that demanded that if the Convict was to default in his payments to the Republic was to undertake the civil process of levying execution. And in response to the second claim that the Convict has demonstrated good faith by paying part of the monies; I think good intentions even though commendable is not enough answer to the weightier matters deposited to in the affidavit in support of the application.
7. Finding the averments of the prosecution not to have been denied that the convict has not paid the outstanding Millions of Ghana Cedis that he agreed to pay on or before the 28th of April, 2023 and finding that by this conduct the invocation of section 35(7) of Act 459 is apt the application is well ground in law.

8. Months after the filing of this application by the prosecution it cannot also be denied that the payment that was also due by the 31st of August, 2023 has also long elapsed and same has not been paid to the Republic. Out of a total amount of Forty Million Ghana Cedis that ought to have been paid by the Convict/Respondent as at 31st August, 2023, only an amount of Thirteen Million Ghana Cedis has been paid so far despite countless adjournment and indulgence that this court afforded the Convict/Respondent to abide by the Terms of Settlement that this court reluctantly accepted.

9. As a matter of fact a very material allegation made by the Convict/Respondent in his Affidavit in Opposition to the application for imposition of custodial sentence was a claim that an agreement had been reached between Essien Swiss Ltd and a company known as Panarico Ltd for which Essien Swiss was entitled to periodic payments for the sale of its assets or which same was to be relied upon to make payment to the Republic. See paragraph 15 of the affidavit in opposition filed by Convict on the 10th of May, 2023.

10. That property from the record subsequently made available to this court shows that the property has been the subject of execution by a company called Keymeb Travel and Tour Ltd. That this fact was known to the Convict/Respondent at the time he made the deposition to use same to pay for the monies owed the Republic. And yet he did not deem it fit to have made full disclosures to the court that the property was encumbered.

11. Again, the property situate at Prampram has also been the subject of Notice of Claim filed by a company called Bill Capital Ltd, Gifty Essien and Brollen Ltd in Civil Suit No: COM/0061/15 in a suit entitled Keymeb Travel & Tour Ltd v Essien Swiss International, Capital Holding Ltd & Others. Clearly therefore, the likelihood of any monies emanating from any sale of the Prampram property to liquidate the monies Convict agreed to pay before this court was only unlikely to materialize even if the court were to afford the Convict the further six months being demanded.

12. The ample time afforded the Convict/Respondent has only showed that the Convict/Respondent is not in any position to pay the monies. In fact, the court in its unusual overindulgence of the Convict/Respondent failed to sit on the 27th of July, 2023 hoping that the two months' vacation that followed being August and September, the Convict/Respondent, if he had the means to pay the monies, would have received monies to pay the Republic. The present application which the court has incubated for so long is

highly meritorious and same is granted for the imposition of custodial sentence on the convict. For the avoidance of any doubt the section 35(7) of Act 459 states as follows:

" Where a person convicted under this section defaults in the payment of any money required of the person under this section or fails to fulfil any condition imposed by the Court under subsection (6), any amount outstanding shall become due and payable and upon failure to make the payment, the Court shall proceed to pass a custodial sentence on the Accused."

^counsel for Convict: My Lord, by way of mitigation, we wish to state that the convict is a first time offender. Before coming to this court, the convict had had no brush with the law. Again, we wish to state that, after the agreement which was executed between ourselves and the State, the convict has shown good faith by paying 37 Million Ghana Cedis out of the agreed sum. The convict is a married man with children. and indeed he is the breadwinner of the house. My Lord, he did not go to sleep when we executed the agreement. He indeed made an offer of giving the water treatment plant located at Prampram which is valued at 10 Million Dollars, enough to off-set the outstanding amount of 53 Million Ghana Cedis together with the judgment that has been procured by Kaymeb Ghana Ltd. It is our humble prayer that this court tampers justice with mercy, considering the positive steps taken by the convict.

Lawyer Godwin Tameklo (as a friend of the Court): My Lord, I wish to add, as a friend of the court that in passing sentence, this court should factor the conduct of the convict, Mr. William Ato Essien in making good, at least part payment and not one who has acted indolently by going to sleep, in the course of the generous offer that this court gave him. Balancing the interest of the court, my Lord should consider the fact that a custodial sentence on the Accused, the longer it is, the more difficult it becomes for the Republic to get what is due it. It is my humble prayer that my Lord if possible, should maintain the sword of damocles that is still hanging on him.

SENTENCE

1. In all the convict pleaded guilty to all the sixteen (16) counts charged and was convicted. The offences range from conspiracy to steal various sums of money, stealing and money laundering. The maximum sentence for the offence of stealing even though a second-degree felony is Twenty-Five years imprisonment as stated under section 296(5) of the Criminal and Other Offences (Procedure) Act, 1960, Act 30. For money laundering the maximum sentence under section 3 of the Anti-Money Laundering Act, 2008, Act 749 is a maximum often (10) years imprisonment with hard labour. It may be with or without the option of a fine. To aid a court in imposing appropriate sentence a number of factors may have to be considered by the court. Among some of the factors that may be considered or for which the court may take into consideration, include, inter Cilia, the nature of the crime, the circumstances of the

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criminal, the effect of the crime on the society and its victims. The nature of the crimes committed were not just ordinary criminal offences of stealing. The huge sums of monies involved were taken out of Capital Bank Ltd in a manner that eventually led to its collapse. Some of these monies were packed in jute bags and delivered to the convict. The nature of the crime cannot be seen as one of the many stealing cases. The offences are not light but grave in nature. They were executed with calculated and deliberate thoughts but not an opportunistic theft.

2. I also consider the standing of the Convict/Respondent as a majority shareholder of the Bank which he exploited to his own advantage by being overbearing in his quest to take as much money that he wanted from Capital Bank Ltd. He demonstrated sheer greed in his desire to own another Bank besides Capital Bank Ltd and left no stone unturned through subterfuge and deceit with pure criminal intent to set up Sovereign Bank Ltd. Being in a position of trust he was expected to have demonstrated a sense of responsibility and true fidelity. He had no cause whatsoever to steal such gargantuan sums of money. The punishment must reflect that.
3. The court is not unaware that the Convict/Respondent pleaded guilty and an amount of ThirtySeven Million Ghana cedis has been refunded to the Republic. I place on record that I cannot gloss over the fact that he pleaded guilty after he had wasted the time of the court for over three years and had caused the Republic to parade seventeen witnesses before the

court. Nevertheless, having refunded an amount of Thirty-Seven Million Ghana Cedis out of Ninety Million Cedis to the Republic, the punishment must reflect that.

4. Above all I cannot fail to take into account the trail of pain and tears that had been occasioned by the criminal conduct of the Convict/Respondent. Countless number of innocent citizens lost their jobs and are still job hunting. The nation had to spend huge sums of money to bail the creditors and depositors. From the above factors enumerated, they can all be said to be encapsulated in the five-fold purpose for which sentence and punishment by a court is supposed to serve, namely, first to be punitive, second, calculated to deter others, third, to reform the offender, fourth, to appease the society and finally, to be a safeguard to Ghana. see the case of Kamil v The Republic [2011 1 SCGLR 300.
5. In doing a balancing act of all the factors and ensuring a further balancing act of the need for the sentence to aptly serve the five-fold purpose stated supra, I proceed in the exercise of my discretion to impose custodial sentence in the following manner:

6. On count one, which is conspiracy to steal GH¢ 100,000,000, I sentence the convict to ten (10) years imprisonment with hard labour. On count three, being the substantive offence of stealing of GH¢100,000,000, I was minded to impose a sentence close to the maximum of twenty-five (25) years, however taking into consideration that an amount of Thirty Seven Million Cedis has so far been paid or recovered, I impose a sentence of fifteen (15) years on the convict. On count four, being money laundering of an amount of an amount of GH¢100,000,000; I impose a custodial sentence of four (4) years on the convict. On count five, which is conspiracy to steal GH¢30,000,000, I impose a sentence of ten (10) years imprisonment with hard labour. On count seven being the substantive offence of stealing of an amount of GH¢30,000,000, I impose a sentence of ten (10) years imprisonment with hard labour. On count eight (8) on the money laundering charge, I sentence the convict to two (2) years imprisonment with hard labour.

7. Count ten (10) is a charge of stealing of an amount of (31-1<35,000,000 by the convict, I sentence him to a term of eleven (11) years imprisonment with hard labour. On count eleven on money laundering I sentence the convict to two (2) years imprisonment with hard labour. On count thirteen (13) on the charge of stealing an amount of GH¢2,000,000, I

sentence the convict to four (4) years imprisonment with hard labour. And on count fourteen (14) on money laundering I sentence the convict to one year's imprisonment with hard labour. On count sixteen (16) on the charge of stealing an amount of GH¢5,000,000, I sentence the convict to six (6) years imprisonment with hard labour. And on count Seventeen (17) on money laundering of the said amount, I sentence the convict to two (2) years imprisonment with hard labour. On count Nineteen (19) on the charge of stealing of an amount of GH¢12,000,000, I sentence the convict to eight (8) years imprisonment with hard labour. On count Twenty (20) on money laundering of the amount to two (2) years imprisonment with hard labour. On count Twenty-two on the charge of stealing GH¢8,500,000, I sentence the convict to seven (7) years imprisonment with hard labour. Finally, on count Twenty-Three, I sentence the convict to two (2) years imprisonment with hard labour. All the sentences are to run concurrently.

8. For the avoidance of doubt, for the custodial sentences imposed, the court has fully taken into consideration the monies recovered by the Republic before the arraignment before the court or paid by the convict consequent upon his plea of guilty.

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ERIC KYEI BAFFOUR (JA)

(JUSTICE OF THE COURT OF APPEAL)

M.A. SITTING AS ADDITIONAL HIGH COURT JUDGE

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