IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA AD - 2020

CORAM: - HONYENUGA, JSC. (PRESIDING)

MERLEY WOOD (MRS.), J.A.

OBENG-MANU, J.A.

CRIMINAL APPEAL NO: H2/17/2019

DATE: THURSDAY 9TH JULY, 2020

ABDUL RAMAN WATARA BENJAMIN == APPELLANT

VRS.

THE REPUBLIC == RESPONDENT

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JUDGMENT

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MERLEY WOOD, JA

This is an appeal against the judgment of the High Court, Accra dated 31st July 2018 confirming the judgment of the Circuit Court, Tema convicting the Appellant on the offence of conspiracy to commit crime to wit robbery contrary to sections 23(1) and 149 of the Criminal Offences Act, 1960 (Act 29) and sentenced to 30 years imprisonment.

The Appellant who was the 3rd Accused in the trial court was charged jointly with seven other persons two of whom were at large. Whereas he was charged with only the offence of conspiracy to commit crime to wit robbery, the other accused persons were also charged with the offence of robbery contrary to section 149 of the same enactment.

The facts culminating in this appeal are as follows:

The complainant was the owner and manager of the Goil and Agapet Gas Filling Stations located at Valco Flats and Zenu respectively. The Appellant was the Assistant Manager and Accountant respectively of the Complainant's two Filling Stations. On 21st January 2013, whilst the workers of the Agapet filling station were rendering accounts to the Appellant in readiness for the bankers of the complainant to collect the money at the said filling station, seven armed men who were wielding guns, held them hostage in the accounts office. They made away with the sum of Twenty Four Thousand Ghana Cedis (GH¢24,000.00) being three days sales. One of the workers identified the 1st Accused person and police investigations led to his arrest on 6th February 2013. He admitted the offences and mentioned the name of the 2nd Accused person Mohammed Ali, as the leader of the gang. He also mentioned the name of the 3rd Accused person and one Ernest as those who masterminded the robbery as well as the 4th, 5th and 6th Accused persons and one Mamud Shantut Ali as members of their robbery gang. The 1st Accused person on 9th February 2013 led the police to the arrest of the 2nd Accused person who upon interrogation admitted the offences and revealed that he planned the robbery with the Appellant and one Ernest. He further stated that he was given an amount of Two Thousand Five Hundred Cedis (GH¢2,500) by the Appellant as his share of the booty. Upon the arrest of the 4th Accused person on 16th February 2013, he admitted having received an amount of One Thousand Ghana Cedis (GH¢1,000) from the Appellant as his share while upon the arrest of the 5th Accused person on 20th

February 2013 he also admitted receiving his share of Three Hundred Ghana Cedis (GH¢300) from the Appellant. The 6th Accused person was arrested on 31st July 2013 when he was about to be lynched for a similar offence.

Upon these facts they were arraigned before the Circuit Court, Tema and after a full trial all the accused persons were found guilty of the offences as charged and sentenced to 30 years imprisonment with hard labour.

Dissatisfied and aggrieved with his conviction and sentence, the Appellant appealed to the High Court on the following grounds:

a. The learned trial judge erred when she failed to take note of the reasonable doubt raised in the prosecution's case.
b. The conviction is against the weight of evidence.
c. The sentence of 30 years imprisonment with hard labour handed to the Appellant is harsh and excessive.
d. Additional grounds of appeal may be filed upon receipt of the record of proceedings.

The High Court however dismissed the appeal. The Appellant has therefore appealed to this court on the following three grounds pursuant to leave granted:

a. The trial Circuit Court Judge and the High Court Judge failed to adequately consider the case of the Appellant.
b. The judgment is unreasonable and not supported by the evidence on record.
c. Both the Circuit Court and the High Court wrongly relied on the caution statements of the co-Accused persons to convict the Appellant.

It must be noted that the Republic/Respondent failed to file their written submission.

Counsel for the Appellant in arguing Ground A of his written submission submitted that the prosecution relied on the caution statements of the co-accused to implicate the Appellant without leading any direct or circumstantial evidence to link the Appellant with the charge of conspiracy levelled against him by failing to prove that there was a prior agreement between the parties.

Counsel submitted that the learned judges of the Circuit and High Courts wrongly relied on the evidence of the co-accused persons to convict the Appellant.

He further argued that even though the trial judge relied on circumstantial evidence to convict the Appellant, the law on circumstantial evidence is that it must point irresistibly to the guilt of an accused person before it can be relied upon. He cites the case of ***Logan vrs The Republic [2008] 13 MLRG 81*** at ***103***. He submits that it is not certain that the 1st and 4th accused persons were referring to the Appellant because whereas the 4th Accused person stated in his investigation caution statement that the accountant was a certain man on top of a motorbike, the 1st Accused person said he was the Gas Filling station accountant. The evidence is that the Appellant was at the station at the material time that the robbery took place.

He further argues that the unsworn statement of an accused person cannot be used as evidence against a co-accused. Counsel further submits that even though the caution statements of 1st, 2nd and 4th Accused persons were taken prior to the Appellant being charged and which incriminated the Appellant, in their defence at the trial, they denied knowing the Appellant. He relies on the cases of Lawson ***vrs The Republic [1977] 1 GLR 63, Bonsu alias Benjillo vrs The Republic [1999-2000] 1 GLR 199; G/L/Cpl Ekow Russel vrs The Republic, [2016] 102 GMJ 124 SC; Yirenkyi vrs The Republic [2016] 99 GMJ 1 SC.***

I will subsume all the other grounds under Ground C which states that " ***Both the Circuit Court and the High Court wrongly relied on the caution statements of the co-Accused persons to convict the Appellant.***"

It is trite that in criminal trials it is the duty of the prosecution to prove the case against the accused person beyond reasonable doubt. This has been codified in sections 11(2), 13(1) and 22 of the Evidence Act, 1975 (NRCD 323). At the end of the trial the prosecution must prove every element of the offence and show that the defence is not reasonable. The prosecution assumes the burden of persuasion or the legal burden as well as the evidential burden or the burden to produce evidence. The legal burden or the burden of persuasion is to prove every element of the charge. The evidential burden is to adduce evidence that will suffice to establish every element of the offence. This burden remains on the prosecution throughout the case. Proof beyond reasonable doubt also implies that it is beyond dispute that the accused person was the one who committed the offence.

In the case of ***Woolmington vrs DPP [1934] AC 462*** or ***25 CR. App. R 72***, Lord Sankey stated thus on the standard of proof in criminal prosecutions:

> "*Throughout the web of the English Criminal Law, the golden thread is always seen, that it is the duty of the prosecution to prove the prisoner's guilt – if at the end of , and on the whole of the case, there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner…..the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle is that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*"

In ***Miller vrs Minister of Pensions [1947] 2 All ER 372*** at ***373***, Lord Denning (as he then was) explained proof beyond reasonable doubt as follows:

"*It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable" the case is proved beyond reasonable doubt, but nothing short of that shall suffice*."

In the case of ***Darko vrs The Republic [1968] GLR 203*** Amissah J.A succinctly stated the duty of the prosecution in proving the guilt of an accused person thus:

> "*The principle that an accused person should be acquitted if his defence was believed or if it was reasonably probable did not call for uniformity of expression by judges or the use of any particular form of words. The crucial question relevant to the point in any ordinary criminal trial would turn upon whether the judge or tribunal of fact upon consideration of the whole evidence found that the case of the prosecution had been proved beyond reasonable doubt. Where a Court convicted only because it took the view that the accused person's defence was not to be believed this would be equivalent to shifting the burden on to the defence. For it would in effect amount to saying that he was entitled to be acquitted only if he proved his defence to the satisfaction of the Court. By implication the Court would then have relieved the prosecution of its duty to prove its case beyond reasonable doubt which it was not entitled to do. A Court could not therefore stop short at saying that it was convicting the accused because it did not believe its story. It must go further and show whether his story did not create a reasonable doubt either."*

The burden of proof on the accused person as per ***section 11(3) of NRCD 323*** is that:

"*In a criminal action, the burden of producing evidence when it is on the accused as to a fact the converse of which is essential to guilt required the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt*."

Therefore, it means that if there is any burden of proof on the accused during a criminal trial, that proof will be discharged if he is able to raise only a reasonable doubt.

Section 13(2) of NRCD 323 provides that

"*Except as provided in section 15(3), in a criminal action, the burden of persuasion when it is on the accused as to a fact essential to guilt requires only that the accused raise a reasonable doubt as to guilt*."

In ***COP vrs Antwi [1961] GLR 408*** on the onus of raising reasonable doubt on the accused person, the Court held that:

> "The *fundamental principles underlying the rule of law are that the burden of proof remains throughout on the prosecution and the evidential burden shifts to the accused only if at the end of the case for the prosecution an explanation of circumstances peculiarly within the knowledge of the accused is called for. The accused is not required to prove anything. If he can merely raise a reasonable doubt as to his guilt he must be acquitted."*

By reason of the statutory mandate of this Court, as stipulated in section 31(1) of the Courts Act, 1993, Act 459 thus:

Subject to subsection (2), an appellate court on hearing an appeal in a criminal case shall allow the appeal if the appellate court considers

(a) That the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or

(b) That the judgment in question ought to be set aside as a wrong decision on a question of law or fact, or

(c) That there was a miscarriage of justice,

And in any other case shall dismiss the appeal.

(2) The appellate court shall dismiss the appeal if it considers that a substantial miscarriage of justice has not actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted on that charge or indictment.

Thus, the verdict or conviction or acquittal subject to subsection (2) will be set aside by the appellate court for being unreasonable or not supported by the evidence or on a wrong decision which has led to a miscarriage of justice. The appeal will be dismissed where there is no substantial miscarriage of justice or the point raised is a technicality or a procedural error or a defect in the charge but there is evidence in support of the offence committed.

This position is buttressed by section 406(1) of the ***Criminal and Other Offences (Procedure) Act 1960, Act 30*** which states that

"Subject to the provisions hereinafter contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or review on account

(a) Of any error, omission, or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or other proceedings before or during the trial or in any enquiry or other proceedings under the Code; or (b) of the omission to revise any list of jurors in accordance with the provisions of Part V;

C of any misdirection in any charge to a jury unless such error, omission, irregularity or misdirection has in fact occasioned a substantial miscarriage of justice."

It is also trite law that it is the trial court that has the right to make primary findings of fact and where they are supported by the record, the appellate court is not permitted to interfere with same. The findings will however be interfered with upon certain conditions.

In the case of ***Agyenim-Boateng vrs Ofori & Yeboah [2010] SCGLR 861*** holding 1 the court speaking through Aryeetey JSC stated thus regarding the findings of the trial court: "It *is the trial court that has the exclusive right to make primary findings of fact which would constitute building blocks for the construction of the judgment of the court where such findings of fact are supported by evidence on the record and are based on the credibility of witnesses. It is only the trial tribunal which must have had the opportunity and advantage of seeing and observing the demeanour of the witnesses and become satisfied with the truthfulness of their testimonies touching on any particular matter in issue. The appellate court can only interfere with the findings of the trial court where the trial court: (a) has taken into account matters which were irrelevant in law; (b) has excluded matters which were critically necessary for consideration; (c) has come to conclusion which no court properly instructing itself could have reached; and (d) the court's findings were not proper inferences drawn from the facts. However, just as the trial court is competent to make inferences from its specific findings of fact and arrive at its conclusion, the appellate court is also entitled to draw inferences from findings of fact by the trial court and to come to its own conclusions."*

The Appellant's charge sheet read thus:

STATEMENT OF OFFENCE

Conspiracy to commit crime; to wit Robbery contrary to sections 23(1) and 149 of the Criminal Offences Act, 1960 (Act 29).

PARTICULARS OF OFFENCE

1. Sumaila Alhassan A. Sumangaliwa; 2. Mohammed Ali; 3. AbdulRaman Watara Benjamin; 4. Abass Fudu Adamu @ Kwaku Manu; 5. Yusif Johnson Lamptey A. Johnny Nash; 6. Mamud Shantut Ali & Zoobi; 7. Ernest (At Large); 8. Diamond (At large).

Section 23(1) of the Criminal Offences Act, `1960 Act 29 which defines conspiracy provides thus:

> *"If two or more persons agree to act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime as the case may be."*

In a charge of robbery after the definition had been amended by the Statute Law Review Commissioner, to secure a conviction, the prosecution has to prove that two or more persons agreed to act together and that the agreement was to act for a common purpose which in this case is robbery.

Section 24 of the same enactment provides thus;

"Where two or more persons are convicted of conspiracy for the commission or abetment of a criminal offence, each of them shall where the criminal offence is committed, be punished for that criminal offence, or shall, where the criminal offence is not committed by punished as if each had abetted that criminal offence."

Section 150 defines robbery as:

A person who steals a thing commits robbery

(a) If in, and for the purpose of stealing the thing, that person uses force or causes harm to any other person, or

(b) If that person uses a threat or criminal assault or harm to any other person, with intent to prevent or overcome the resistance of the other person to the stealing of the thing.

The prosecution called three witnesses in proof of its case. PW1, Rockson Kumaza, a pump attendant at the filling station who had finished rendering accounts to the Appellant was an eye witness to the robbery. He testified that he could identify two of the robbers. He recounted how the 1st and 6th Accused persons pointed a gun at him and they asked him to go back to the accounts office where the money was taken away at gun point.

The second prosecution witness, Samuel Tengey, a pump attendant at the filling station testified that while serving a customer he saw two people whom he thought were customers. While engaged in a conversation with one of the customers he was serving, he saw one person who was wearing a mask holding a gun at the gate. He therefore fled the scene and reported what he had seen to the owner of the filling station.

According to the third prosecution witness (PW3), the investigator No. 39804 Detective L Corporal Godwin Agbolegbe, his investigations revealed at page 41 of the Record of Appeal (ROA) that "*the armed robbers went to the filling station with three motor bikes, whiles two of them wore facial mask (sic), the rest were not masked. Investigations further revealed that the robbers took away 3 days sales including an amount of GH₵1,996 which was left unpaid by 3rd Accused that is Benjamin Abdul Raman Watara despite the arrival of the Company's bankers who came on 18th January 2013 for the money. I then moved to the Valco flats area where I mounted surveillance in the area and on 6th February 2013, 1st Accused Sumaila Alhassan a.k.a*

Sumaila was identified to me with the help of an informant as the said Akia. During interrogation, he admitted as being part of the seven men who robbed the gas filling station on 21/1/13 at about 9:30am. He went further and mentioned Mohammed Ali, 2nd Accused as the leader of the gang. He then mentioned 3rd Accused and one Ernest, now at large as those who masterminded the robbery operation together with 2nd Accused. He then mentioned Abass Fudu Adamu, that is 4th Accused and 5th Accused Yusif Johnson Lamptey and 6th Accused Mamoud Shantut Ali as his accomplices. On 9/2/13, 1st Accused led police to the house of 2nd Accused and identified him as the leader of the gang. 2nd Accused was also arrested and during investigation, he confessed to the crime and indicated that the robbery was planned between himself, 3rd Accused, the accountant and Ernest at large. He indicated further that after the robbery operation he was given GH₵5,000.00 by 1st Accused and that he equally handed over the GH₵5,000.00 to 3rd Accused of which he was given GH₵2,500.00 by 3rd Accused. The remaining GHc2,500.00 was shared between himself and Ernest. 3rd Accused was also arrested the same day. 2nd Accused then led police to the house of Ernest but he was not met in the house. Investigation disclosed that Ernest got information of the arrest of 3rd Accused and escaped. On 16th February 2013, Abass Fudu Adamu that is 4th Accused and 5th Accused Yusif Johnson Lamptey and 6th Accused Mamoud Shantut Ali as his accomplices. On 9/2/13 1st Accused led police to the house of 2nd Accused and identified him as the leader of the gang. 2nd Accused was also arrested and during interrogation, he confessed to the crime and indicated that the robbery was planned between himself, 3rd Accused, the accountant, and Ernest, at large. He indicated further that after the robbery operation, he was given GH₵5,000.00 by 1st Accused and that he equally handed over GH₵5,000.00 to 3rd Accused of which he was given GH₵2,500.00 by 3rd Accused. The remaining GH₵2,500.00 was shared between himself and Ernest. 3rd Accused was also arrested that day… On interrogation of 4th Accused he admitted having received GH₵1,000.00 from 3rd Accused as his share of the booty. 5th Accused was also arrested on

26/2/26/02/13. …. On interrogation he also admitted having received GH₵3,000.00 as his share of the booty from 1st Accused."

The following transpired during cross examination of PW3 at page 75 of ROA

Q; *3rd Accused in his statement told you that he has nothing whatsoever to do with his statement.*

A: That is so but surprisingly when I checked from his books, I saw that on 18th January 2013 despite the bankers of the company came for the money and left some which I detected it was not the norm. He ought to have paid every money rendered to him.

Q: Would I be right to say that at best if he had kept the money, he would be held for stealing?

A: That is not stealing. It was a deliberate attempt to increase the amount for his accomplices to come and take.

Q: I am putting it to you that the 3rd accused keeping those money does not amount to robbery or getting more booty for the robbers.

A: Consistently 3rd accused was mentioned by 1st accused, 2nd accused and 4th accused as the architect or engineer for the robbery.

Q: I am putting it to you that the mention by 1st, 2nd and 4th accused of the name of 3rd accused is not true. He was not the architect.

A: He was mentioned by 1st, 2nd and 4th accused and my check of the books shows that leaving part of the sales was meant for the robbers.

Page 76 of the Record of Appeal.

Q: In your evidence in chief you said 3rd accused was given some of the booty.

A: He was given GH₵5,000.00 by 2nd accused after which he returned GHc2,500 to 2nd accused.

Q: I am putting it to you that 3rd accused was not part of the robbery and too he was not given any booty by anybody.

A: That is exactly what happened. He was given GHc5,000 after which he gave 2nd accused GH₵2,500.

Q: I also put it to you that 3rd accused did not participate in the robbery.

A: He was actually the planner which took place on 21st January 2013.

Q; These assertions of participation of 3rd accused is based on what some others accused persons told you.

A: It is not only the mere fact that he was mentioned by the accused persons but I have investigated this matter and I say he intentionally left the monies unpaid. I realized that no matter how small or the big the money is when the bankers (Prudential Bank) come so far as they are there, you need to give them any amount. He was easily identified by 2nd accused as the one he planned the robbery with.

Page 77 of the Record of Appeal.

Q: You are not in a position to tell this court as to whether or not things said established 3rd (sic) by 1st accused, 2nd accused and 4th accused are true.

A: Yes that is why after he was mentioned by 1st accused, 2nd accused and 4th accused I still did not only rely on their statement but went further to investigate.

The Appellant denied in his investigation caution statement Exhibit C and testimony that he knew anything about the robbery. His testimony was that while going about his duties on the 21st January 2013, three robbers entered their office and pointed a gun at him and removed money from the safe. After the robbery, he called the complaint and

thereafter went and lodged a complaint at the Ashiaman Divisional Police Command. He further testified that he had worked with the company for a long time.

The learned Circuit trial judge in her judgment stated thus "*the statements of all the Accused persons are fascinating and they seem to run through a common thread that so strongly links A3 to all of them even though each gave his statement at a different day depending on the day of arrest. A1 statement was written on 6/2/13, A2 statement was collected on 9/02/13, A3 statement was on 7/02/13, A4 on 16/02/13, A5 on 20/02/13 and A6 on 2/08/13. Can it be said that it was a mere coincidence that each of them mentioned A3 in his statement? I am unable to accede to Counsel's submission that all those who claim to have had encounter with A3 sworn never to have seen him before when they gave their evidence and therefore, they cannot be credible. Naturally whenever Accused person confessed to his/her involvement in a crime in a statement to the police, hardly would he stick to such statement when he mounts the witness box on oath. That is the reason why the Courts over the years have said a later contradictory statement in the absence of cogent explanation must not be taken serious… Again, the manner in which the incident happened and the account given by A3, visa vie (sic) the confession by A1 and evidence of PW3, A3 under normal circumstance should have been able to identify A1 if he was not a co-conspirator in the entire episode.*"

Learned Counsel for the Appellant in his written submission to the High Court abandoned the first two grounds of appeal by stating thus: "*upon a careful review of the record of proceedings and deep reflections, we humbly wish to abandon the first ground of appeal and rely on the second ground of appeal which is a reduction of the 30 years sentence imposed on the appellant.*" Counsel therefore appealed only against sentence.

The learned High Court judge on 31st July 2018 in delivering the judgment stated thus:

"At page 203 of the record of appeal, A2 admitted the offence and confessed that he planned the robbery with the Appellant. In the words of A2, ***"… after the introduction, the manager of the filling station (Appellant) indicated to me that he needed people to go to the gas filling station to take some money for him and that he will be at the work site….(Emphasis mine).*** *Again, from the facts A2 indicated that, the Appellant gave him an amount of GH₵2,500.00 as his share of the booty after the robbery. Also from the facts, A1 mentioned the Appellant as the master minder of the robbery. Also at page 210 of the records, A4 confessed as follows: "…..****A1 then called a certain man called Accountant (Appellant) to give me the money. The accountant (Appellant) immediately gave me GH₵1,000.00" (Emphasis added)****. Furthermore, A5 also confessed that the Appellant gave him GH₵300 as his share of the booty, after the robbery.*

It is not a mere coincidence that each of the Accused persons identified and mentioned the Appellant as the master-minder and a key player of the crime. I am therefore convinced that the Appellant agreed to act together with his accomplices for the common purpose of committing the offence. In establishing this offence, it may be that the alleged conspirators have never seen each other, and have never corresponded; or may have never heard the name of the other and yet by law, they may be parties to the same common criminal agreement. I agree with my brother at the lower Court that the Appellant should not be allowed to escape from his handiwork."

It is clear from the judgment of the High Court that the learned judge relied on the statements of the 1st and 2nd Accused persons who incriminated the Appellant in their statements to affirm the conviction of the Appellant.

Even though the 1st Accused person in his caution statement stated that *"it was Mohammed and the accountant of the said Gas Filling Station who masterminded the whole*

operation", in his testimony in court, he denied mentioning the name of the Appellant. He testified that "if the CID told me I was the one who mentioned the others, I do not know anything about it…."

In cross examination of the 1st Accused person by the prosecution this is what transpired:

"Q: *How many were you.*

A: We were four.

Q: I further put it to you that you mentioned 2nd and 3rd as those who masterminded the robbery.

A: Not correct.

Cross examination by Counsel for the 3rd Accused (Appellant)

Q: *Prior to your arrest by the police did you know 3rd Accused.*

A: No I have never seen him anywhere.

The 2nd Accused during his evidence in chief and cross examination denied knowing the Appellant even though he mentioned his name in his caution statement Exhibit B. In the said Exhibit B, he stated that "*I got to the park my friend Ernest was with a certain man who he introduced to me as Manager of a Gas Filling station at Zenu a suburb of Ashiaman. After the introduction the manager indicated to me that he needs people to go to the Gas filling station to take some money for him and that he will be at the work side when the people come. …..the manager called me on phone at about 7:30pm and asked me to meet them again at Jericho park….*"

The 2nd Accused person during his evidence in chief had this to say: "…*When the crime officer finished he gave the statement to the CID to go and copy it. I was sitting there when they*

brought 3rd Accused to show me and asked if I know him. I told them I did not know him. Then after that he asked me to thumbprint the statement. I then thumb printed and I was taken back to Community 22 Police Station." Page 98 of ROA.

He denied knowing the Appellant during cross examination by the prosecution. Below is an excerpt of the cross examination to be found at page 101 of the ROA:

Q: *I put it to you that when you got there 1st accused gave you GHC5,000.00 and asked you to share the money with Ernest (7th Accused) and 3rd accused to share.*

A: Not correct.

Q: I put it to you that about 2 pm the same day 3rd accused called you and asked you to meet him at Jericho park.

A: Not correct

Q: I put it to you that when you met 3rd accused at Jericho Park you gave him the GH¢5,000.

A: Not correct.

Q: I put it to you that 3rd accused gave you GHc2,5000.00 and asked you to share with Ernest.

A: Not correct.

Q: *I put it to you that you called Ernest to the Jericho park where you handed over the GH¢2,5000 to him.*

A: Not correct

In the instant case, the 1st, 2nd and 4th Accused persons incriminated the Appellant at the time they were arrested and confirmed same in their caution statements being exhibits A, B and D respectively and their charge statements being exhibits G, H and K. However, during the trial they retracted what was in the said exhibits. As held in the

case of ***Odupong vrs Republic [1992-93] GBR 1038*** at page ***1042*** "*The law is now well settled that a person whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn, is not worthy of credit and his evidence cannot be regarded as being of any probative value in the light of his previous contradictory statement unless he is able to give a reasonable explanation for the contradiction. This was the view taken by this court in Gyabaah vrs Republic [1984-86] 2 GLR 461 in which a witness admitted that his prior statement to the police was inconsistent with his evidence in court without offering any explanation for the contradiction*.

Since the evidence on oath of the 1st, 2nd and 4th Accused persons is contradictory to their previous statement, their evidence would be regarded as not being worthy of belief.

Moreover, it is trite law that where two or more persons are tried jointly, unsworn statements made by each is generally only evidence against the one who made it. It was held in the case of *Lawson* ***vrs The Republic [1977] 1 GLR 63*** that "*If two persons were jointly tried together, unsworn statements made by each were generally only evidence against him who made them. And such an unsworn statement would be inadmissible evidence where (as in the instant case) it was made in the absence of the appellant who denied it at the trial and the co-accused repudiated it when cross-examined by the appellant. Even if the unsworn statement had been made in the presence of the appellant, its admissibility would depend on what part of it he expressly or implicitly accepted."*

Again, in the case of ***Bonsu alias Benjillo vrs The Repulic [1999-2000] 1 GLR 199 SC*** holding **2** it was held that "*An unsworn statement by an accused person unless repeated by him on oath at the trial and he had been cross-examined on it, would be admissible evidence against only the maker and not a co-accused. Since in the instant case, the first accused had been unavailable for trial, his prejudicial unsworn caution statement incriminating the appellant and*

which he had made in the absence of the appellant, had been wrongly admitted in evidence by the trial tribunal. Accordingly, it should not have been used against the appellant."

As already stated, the Appellant was charged with the offence of conspiracy to rob. The prosecution therefore had to establish that there were two or more persons, that they agreed to act together and that the agreement to act was for a common purpose.

As earlier noted, in proof thereof, the prosecution called three witnesses. The testimony of PW3 indicates that he relied on the incriminating statements made by the other accused persons to establish the case against the Appellant. We agree with Counsel for the Appellant when he submits that on this Ground C that both the Circuit Court and the High Court wrongly relied on the caution statements of the co-accused persons to convict the appellant. In the case of ***Yirenkyi vrs The Republic [2016] 99 GMJ 1 SC,*** the Court speaking through Akamba JSC stated thus:

> "*It is trite criminal law that a confession made by an accused person which is admitted in evidence is evidence against him. It is however not evidence against any other person implicated in it (See Rhodes (1954) 44 CR. App. R. 23) unless it is made in the presence of that person and he acknowledges the incriminating parts so as to make them, in effect, his own.*
>
> *This position is in contrast with the evidence on oath of a co-accused in a joint trial, which is evidence for all purposes, including the purpose of being evidence against the accused. (See Rudd 1948 32 Cr. App. R. 138)*
>
> *At common law the plea of guilty of a co-accused was not evidence against the accused (Moore (1959) 40 Cr. App. R. 50).*

In the instant case the incriminating evidence relied upon was made prior to the arraignment. It was not evidence given while they were jointly charged when the co-accused in his defence made the incriminating statement. In such instance, the co-accused against whom the incriminating statement is made has the opportunity to discount the incriminating statement in cross-examination." See also the case of ***G/L/Cpl Ekow Russel vrs The Republic, [2016] 102 GMJ 124 SC***."

As already noted in the instant case, the 1st, 2nd and 4th Accused persons incriminated the Appellant at the time they were arrested and confirmed same in their caution statements being exhibits A, B and D respectively and their charge statements being exhibits G, H and K. The contents of these statements incriminated the makers and not the Appellant unless the said statements were made in the presence of the Appellant and he acknowledged them thus making them his own.

However, the 1st, 2nd and 4th Accused persons retracted what they had said in the said exhibits during the trial. From the foregoing, it is amply clear that the trial Circuit Court and the appellate High Court did not apply the correct principle of law in convicting and sentencing the Appellant. We will therefore interfere with the findings of the trial court and the appellate High Court. Accordingly, the conviction cannot stand and we hereby set aside the conviction and sentence.

Having arrived at the above conclusion, we are of the opinion that that it will be superfluous to deal with Grounds A and B.

The appeal succeeds.

(Sgd)

Merley A. Wood (Mrs.)

(Justice of Appeal)

(Sgd)

Honyenuga **I agree** **C.J. Honyenuga**

(Justice of Supreme Court)

(Sgd)

Obeng-Manu **I also agree** **Obeng-Manu Jnr.**

(Justice of Appeal)

COUNSEL

Colonel Mahama Iddrisu (Rtd) for the Appellant

No legal representation for the Republic Respondent