IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA. A. D. 2022

CORAM:

WELBOURNE J. A. (PRESIDING)
B. MENSAH J.A.
BAFFOUR J.A

SUIT NO: H2/8/2021
5TH MAY, 2022

JAMES ADDEYFIO @ NII ARMAH, RASHID, TILAPIA, KWAMIVI — **APPELLANT**

VRS

THE REPUBLIC — **RESPONDENT**

JUDGMENT

Baffour J.A:

On the 12th of September, 2008, at about 1:30 am the house of one Dr. Robert Darko Osei, a Research Fellow and a Lecturer came under serious siege from a gang of robbers numbering about six. They welded offensive implements such as guns, knives and other deadly weapons adapted for use to cause bodily harm and death. Two of these men were in masks and they announced themselves to the household as "armed robbers" who had stormed the house looking for properties they had not laboured for. The house had seven rooms and with sheer bravado the robbers searched all the seven rooms of the house and held the occupants hostage. The father of the complainant, one Lt. Col Darko (rtd) was shot in the right thigh and severely assaulted. By the use of such force with intent to

overcome or subdue the resistance of the persons to the house, these men succeeded in taking away as booty an amount of Gh¢1,540.00, four mobile phones, a wallet, jewelry, two wedding rings, a wrist watch, a Compaq laptop computer, a pen drive among others.

Investigations led to the arrest of three of these men, namely, Solomon Duodo, Eric Cobbina and Kingsley Amankwah. It was the case of the Republic that these men mentioned the name of the Appellant as an accomplice. But appellant could not be arrested at the time by the Police. These men were tried and convicted by Asiedu J. (as he then was) and sentenced to sixty-five (65) years imprisonment each with hard labour. This Appellant having escaped by the skin of his teeth was not to be lucky for long. It is the case of the prosecution that the wife of the complainant received a love message that she had earlier received from her husband before her original phone was taken away from her by the robbers on the day of the robbery but this time the message was from an unfamiliar number. The wife of the complainant called the number that sent her the love message and during the conversation, the appellant, who it appeared sent the message proposed love to this woman. The wife of the complainant harbouring the notion that the exact love words received from the husband earlier in time and repeated by the appellant who sent the message to her was not coincidence but should be directly connected to the robbery as that phone was taken during the robbery and intending to lure appellant for his arrest, readily agreed to be the lover of this appellant and quickly arranged for a meeting by informing the police to lurk behind the scene. Upon sighting the appellant as the one who had intended to embark upon a love rendezvous, he was bounced upon and arrested by the Police.

In a subsequent identification parade organized by the Police, appellant was identified by the complainant. Based on these facts, the appellant was arraigned before the High Court and tried for two offences of conspiracy to commit robbery and robbery. The Appellant was convicted and sentenced to a term of sixty-five (65) years imprisonment with hard labour on the 15th of January, 2010 by the High Court, Accra, then Fast Track Division presided over by C. J. Honyenuga JA (as he then was) sitting as an additional Justice of the High Court. Having been in prison for over a decade into his three score and five years

imprisonment, time was graciously extended for him to appeal against his conviction and sentence. It was based on such leave granted him that he filed his notice of appeal on the 24th of February, 2020. He relies on two main grounds of appeal, being:

i. That the conviction was an error in law.
ii. That the sentence was too harsh.

RESOLUTION OF THE GROUNDS OF APPEAL

Counsel for the appellant has raised interesting legal arguments in his written submission for the consideration of the court. First, counsel contend that the charge sheet upon which the appellant was tried and convicted was defective and incurably bad as the charge sheet mentioned the appellant as having conspired with three other persons. And in that sense the charge sheet was not only irregular but fraudulent. Two, it is the plaint of counsel that there is no investigation cautioned statement and charged statement of the appellant in the record of appeal as well as the exhibits that were tendered at the trial. And in that sense the record of appeal was incomplete for which the court cannot find it reliable enough. Again, it is the claim of counsel that three convicted prisoners were called to testify at the trial on subpoena. That there is no evidence as to who these three persons testified for in the trial. That appellant was not afforded any opportunity to cross examine these subpoenaed witnesses. Regarding matters of substance as far as the appeal is concerned, it is the claim of counsel that the conviction was an error as it was only one man that testified for the Republic besides the investigator. Further that the evidence of the prosecution's own witness should have been corroborated. And finally the sentence of sixty-five (65) years has been observed to be harsh and excessive.

I find it necessary to deal with each of the legal grounds raised in the written submission before the need to tackle the claim that the conviction was an error. The charge sheet the appellant complains that it is defective is found at page 1 of the record of appeal. It is captioned:

The Republic

v

1. James Addeyfio @ Nii Armah, Rashid, Tilapia, Kwamivi
2. Solomon Duodu @ Aljaji (Convict)
3. Eric Cobbinah @ Adolf Hitler (Convict)
4. Kingsley Amankwah @ Spider (Convict).

The first charge is one of conspiracy of the appellant with the three others, who had earlier been convicted, to commit robbery whilst the second count is the substantive offence of robbery. Section 109 of the Criminal Procedure Act, 1960, Act 30, deals with joinder of charges. And it is to the effect that counts or charges may be joined together in the same complaint or charge sheet and tried at the same time if such charge or counts are founded on the same facts, or forms part of a series of offences. And section 110 states as follows:

"The following persons may be charged and tried together namely—

(a) persons accused of the same offence committed in course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of different offences provided that all the offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character;

(d) persons accused of different offences committed in the course of the same transaction".

(2) No trial shall be invalidated by reason only that two or more persons have wrongly been tried together on one complaint, charge sheet or indictment unless objection is made by any of the accused at the time or before he was called upon to plead".

It is true that the three other persons that were mentioned together with the appellant were not brought in the dock. However, two were brought from prison on subpoena to

testify. This is simply because they had already been tried and convicted by another High Court. By stating their names, all that the prosecution sought to do was to emphasize that in a charge of conspiracy one person cannot be charged with that offence and that appellant committed the offence, in the view of prosecution, with second to fourth accused persons who had already been convicted. With their conviction by Asiedu J. (as he then was) in an earlier trial it would have been a monstrous breach of the double jeopardy rule for which second to fourth accused persons would have pleaded autrefous convict, if prosecution had attempted to arraign them in the box with appellant. Therefore, the claim that the charge sheet was defective is completely unfounded. There is no error at all on the charge sheet and we dismiss this preliminary objection raised by the appellant.

The second preliminary objection raised by counsel for the appellant is to the effect that there is no investigation cautioned statement and charged statement of the appellant in the record of appeal as well as the exhibits that were tendered at the trial. And in that sense the record of appeal was incomplete for which the court cannot find it reliable enough. For that cause, counsel calls for the acquittal of the appellant. The issue of incomplete records in criminal appeals has confronted our appellate courts time and again. Our path as to the way forward is now lit with a floodlight of authorities as to what a court should do in the event that some records are missing. The Supreme Court gave the parameters for dealing with missing records in the case of **John Bonuah @alias Eric Annor Blay v The Republic (2020) CLRG 40 @49** the court speaking through Wood CJ stated that:

> "An appellant is not automatically entitled to an acquittal upon the mere proof of lost or destroyed trial proceedings. The quantum or the magnitude of the missing record – lost or destroyed and its centrality to the resolution of the appeal is the first criterion that merits attention. Thus, it is not every missing part of a trial record that would prejudice a merit based determination of an appeal but only that which is vital to its fair, just and conclusive determination… The cardinal principle is that the law does not demand a hundred percent record of proceedings, but such adequate record that can answer to the issues on appeal. Adequacy of the record test is

therefore a question determinable on the facts, by reference to the grounds of appeal …"

In this appeal what are the missing records? What is the quantum of such missing records? And what is its relevance or centrality to the resolution of the germane issues in this appeal? The records alleged to be missing are the investigative cautioned statements and charged statement of the appellant. The confession statements of the co-accused persons who were convicted but confessed their involvement in the robbery and implicated the appellant. Finally, other exhibits are also not on record. Guided by the criteria spelt out in the Bonuah case supra, what should engage the attention of this appellate court is whether this appeal can adequately be determined without the benefit of these documents? It is the claim of the prosecution that the appellant confessed to the crime when his statement was taken. And if this confession statement is not on record it does not work any manifest injustice at all to the appellant but rather to his benefit. So also is the statements of the Dw1 and Dw2 when they were arrested and it is claimed that in their respective statements they implicated the appellant as participis criminis. The absence of such statements all inure to the benefit of the appellant.

All the evidence involving the testimonies of the witnesses during trial are on record. This is an appeal that can easily be determined without any manifest and substantial injustice to both parties and the claim by the appellant that he ought to be acquitted because some statements are not record is not in accord with the law on missing records as spelt out in the Bonuah case. We need no hundred percent accurate record to settle the central issues in this appeal and accordingly dismiss the invitation by the appellant.

The third in the trilogy of the preliminary legal objections has to do with the claim that Eric Cobbinah, who testified as Dw1, Kinsgley Amankwah, who testified as Dw2 and Felix Ofori Attah who also testified as Dw3, were not allowed to be cross examined by the appellant. Is this claim borne out by the evidence on record? At page 24 of the record of appeal, when prosecution closed its case and the court ruled that there was a case for the appellant to answer, this is what the court said:

"[i]t is hereby ordered that Felix Ofori-Atta@Opeele who lives in house number B13/25 Kwasheiman Anglican school, convicts Eric Cobbinah @ Adolf Hitler and

Kingsley Amankwah @ Spider who are serving their sentences in Nsawam Prisons be subpoenaed to testify as witnesses for the accused person. The Registrar is to carry out these orders forthwith before the next adjourned date"

From the tenor of the order above the Dw1, Dw2 and Dw3 were made to appear in court as witnesses for the appellant. The court made the order as appellant was not represented and thought it needed to help appellant to sufficiently put his case across in court. And the subsequent record of their appearance bears testimony to that. For instance at page 34 of the record of appeal, when Dw1 appeared in court he was led to give his evidence by the court because the appellant was not represented and the court had a duty to help the appellant conduct his case. So it is when Dw2 also testified as well as Dw3. They were all led in evidence in chief by the court on behalf of the appellant. And it was after their evidence in chief that prosecution was allowed to cross examine those witnesses for the appellant. It is not the procedure that a witness who has testified for a party and has been cross examined is further examined in chief by the party that called him without leave of the court. From the record the claim that the three defence witnesses were not asked questions by the appellant is not correct as the court led those witnesses to testify on behalf of the appellant. That submission is also accordingly dismissed.

With the dismissal of all the preliminary legal points the court is left with the main ground of appeal as to whether the conviction of the appellant was an error by the trial court. By section 31 of the Courts Act, 1993, Act 459 the law allows this court as an appellate court on hearing any appeal before it in a criminal case to only allow the appeal if we are convinced 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 that the judgment in question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice. And the grounds of appeal that the conviction is an error can be deemed to be within the scope of the grounds upon which we are allowed to set aside a conviction or allow an appeal only if on the basis of the record before us we are satisfied that the conviction is not supported by the evidence on record. And is that the case in this appeal?

Arguing this ground of appeal, it was the submission of counsel of the appellant that it was only one witness that testified under oath against the appellant leading to his conviction. It must be firmly stated that it is not the multiplicity or the quantity of witnesses that are paraded to testify in court that matters but rather the quality and substance of the testimony proffered in court. For witnesses are weighed but not counted. The test is whether the evidence has a ring of truth, is cogent, credible and is trustworthy. It is only when there is doubt in the evidence that the court in appropriate circumstances, require corroboration of the evidence. This is the essence of section 7(2) to (5) of the Evidence Act, 1975, NRCD 323 which states as follows:

> "2) Evidence may in proper circumstances be corroborated by other independent evidence that requires corroboration.
>
> (3) **Unless otherwise provided by this or any other enactment, corroboration of admitted evidence is not necessary to sustain any finding of fact or any verdict.**
>
> (4) **No finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review on the sole ground that the court failed to caution itself or the jury as to the danger of acting on uncorroborated evidence unless the appellate court is satisfied that such failure resulted in a substantial miscarriage of justice**. [emphasis mine]
>
> (5) Nothing in this section shall preclude the court or any party from commenting on the danger of acting on uncorroborated evidence or commenting on the weight and credibility of admitted evidence or preclude the tribunal of fact from considering the weight and credibility of admitted evidence".

Clearly, evidence need not be corroborated for any conviction. And a judgment or decision would not be altered or reversed on appeal simply because a court acted on an uncorroborated evidence. What is necessary is that the reliance on the uncorroborated evidence to ground a conviction has resulted in a substantial miscarriage of justice. It is therefore necessary for an expedition to be taken into the evidence on record especially the evidence of the prosecution's star witness, Pw1, Robert Owusu Darko, to verify whether indeed this witness proved beyond reasonable doubt that appellant was one of the

witnesses that invaded the house of Dr. Robert Darko Osei on the night of 12th September, 2008. From the evidence what is stake is not about a doubt as to whether there was robbery but rather whether this appellant was one of the robbers that participated in the robbery. For in a criminal trial it is a duty cast on the prosecution to prove beyond reasonable doubt not only of the occurrence of robbery but that the accused in the dock was the one responsible for the robbery. Pw1 in his testimony claim after hearing a noise in the house his door was flung opened by two men in masks who pointed a gun at him by demanding properties. That he ran out of the room for help and was called by a young girl in the house that some of the robbers were in their room. Further that two of the robbers emerged by ordering him to get back. He emphatically stated that:

> "[O]ne of the guys who came up in the room is this young man sitting there. The next time I saw him was at a line up at Odorkor Police Station where I pointed him out as being one of those who came to the house".

Guided by the principles laid by the Supreme Court in the case of **Ibrahim Razak v the Republic J3/6/2011** a judgment delivered on th2 25th of April, 2012 that:

> "[W]here the ground of appeal bothers on mistaken identity, a trial or appellate court ought to carefully examine the evidence on it. A judge is to guide himself by considering factors such as the period of time over which the witness saw or observed the accused (appellants in this appeal), the conditions in which the observation was made, whether or not the area or vicinity was lit to make the observation possible, the distance between the witnesses and the appellants, or whether or not the description by the prosecution witnesses agreed with that of the appellant".

Could one say that the vivid testimony provided by Pw1 was not enough for the court to have relied upon? This evidence was not impeached at all in cross examination. This evidence together with the circumstantial evidence by Pw2 D/Sgt Musah Bawah as to how the appellant was arrested as well as that of Felix Ofori-Atta provides strong linkage of the appellant to the robbery and affirms the evidence of Pw1 as far as his identification of the appellant was concerned. For to Pw2, appellant was arrested because he sent a love message that had earlier been sent by the wife of the complainant. That the woman called

back and agreed to the love proposal of the appellant for which a love meeting was arranged between them. This is largely corroborated by Dw3, Felix Ofori-Atta, a driver's mate who was arrested together with appellant. Appellant had denied bearing the alias "Tilapia" as he paraded Dw1 and Dw2 in court to challenge that claim that he is not known by that name. However, his own witness, Dw3 who was arrested with him noted that appellant is also called "Tilapia". That upon their arrest, he heard people around saying that "Tilapia had been arrested by the Police". This name had earlier popped up as an accomplice to the robbery and appellant had tried to distance himself from that name.

The identification of Pw1 of appellant cannot be said to be a mistaken one. This same witness identified the appellant during the identification parade. There is nothing on record that confirms that Pw1 had been shown the picture of appellant before the identification parade. The reliance on the case of **Adu Boahene v The Republic [1972] 1 GLR 70 @74** CA to the effect that there cannot be better proof of the identity of an accused than the evidence of a witness who swore to have seen the accused commit the offence was in order by the trial court. The identity and description of the appellant and more especially his role in the robbery by Pw1 was vivid, graphic and unmistaken. I find that prosecution proved the identity of the accused beyond reasonable doubt and his conviction cannot be said to be an error. We affirm the conviction of the appellant and dismiss this ground of appeal that the conviction was an error as unmeritorious.

APPEAL THAT THE SENTENCE IS TOO HARSH

Appellant was sentenced to a term of sixty-five (65) years imprisonment with hard labour on both counts to run concurrently. It is not in dispute that a robbery of this nature which was committed with offensive weapons, the minimum sentence is fifteen (15) years imprisonment. The maximum was however not set by the Criminal Procedure (Amendment) Act, 2003, Act 646 which also repealed the Suppression of Robbery Decree that made robbery a crime for which one could be sentenced to life imprisonment or death. What swayed the mind of the court to sentence the appellant to such numbers of years in custody was that his accomplices were given sixty-five (65) years and was being given the same sentence as society disapprove of the offence of robbery because of its grave nature. Besides, that it also needed to serve as a deterrence to others. Whenever an Appellant

complains that a sentence imposed is harsh or excessive, the implication may be that even though the Judge might have acted within the confines of what the law provides in terms of not having exceeded the maximum sentence allowed by the law but that some mitigating factors that should have been considered in favour of the convict by the trial Judge in imposing the sentence were ignored or not adequately or thoroughly taken into account.

As it is a basic principle in sentencing that it is an exercise of the discretion of the court and as long as the necessary aggravating and mitigating factors have all been taken into consideration, an appellate court, even if it would have imposed a different sentence ought not to disturb the sentence. See **Kamil v The Republic (2011) 30 GMJ 1**; **Haruna v The Republic [1980] GLR 189.** An appellate court would disturb a sentence imposed only when there is evidence that the trial Judge acted on wrong or inadequate materials or that the court acted under a misapprehension of fact, in that it either gave weight to irrelevant or unproved matters or omitted to take into consideration relevant matters into account. See **Owusu v The Republic [2010] 28 MLRG 84, CA; Joseph Kofi Darko v The Republic, 28/02/14 H2/11/2013.**

Therefore, the starting point is the law under which the sentence was imposed. Second, the circumstances of the case and finally the factors that the trial Judge took into consideration. The law on robbery does not have a maximum ceiling. Not much or any analysis was done as to the circumstances of the case for which appellant was handed sixty-five (65) years imprisonment. The fact that the accomplices of the appellant received sixty-five (65) years in an earlier trial cannot be the sole reason for the appellant to have been also handed the same sentence. For the role played by each person must also reflect in the award of sentence. See **Dabla v The Republic [1980] GLR 501 @ 516-517**; **Regina v Sisala (1960) GLR 450**. What specific roles were played by the accomplices of appellants that attracted sixty-five (65) years sentence each by Asiedu J (as he then was) was not made bare for the court below to have copied it. No analysis at all was done as to the age of the appellant and whether the court needed to ensure that it did not impose a

sentence that was to be effectively sentencing him to a life in jail. See **Torto v The Republic [1977] 1 GLR 342 @ 347**. No consideration was paid to the fact as to whether appellant was a first time offender or was known to the law as established in cases such as **Haruna v The Republic [1980] GLR 189; Abu v The Republic [1980] GLR 294**.

The necessity to balance aggravating and mitigating factors and strike the right balance did not engage the attention of the trial court. If we are to do that we would be considering, among a gamut of others, the weapons used for the offence, which included guns, the harm caused – which included shooting at Lt. Col Darko (rtd) in the right thigh, the value of the items stolen – which included jewellery, phones, electronic gadgets, money worth Gh ¢1,540 as at 2008, appellant being a first time offender or known to the law, the age of the appellant, the level of remorse shown etc.

There is no obligation on a trial Judge to proffer reasons for sentence. However, if the court imposes severe sentence as it is in this case, that it provides cogent reasons. See **Gundaa v The Republic [1989-90] 2 GLR 50**. For if a court was not to impose the minimum fifteen years (15) but that of sixty-five (65) years, at least it must be clear on the record why the court went that far. It was for that reason that the sentencing guidelines was made to bridge the disparity in sentencing. However, the sentencing guidelines must be understood in its proper context. And as noted by Dotse JSC in his dissenting opinion in the case of **Isaac Amaniapong v The Republic j3/10/2013 dated 28th May, 2014** at page 26 of the unedited judgment that the guidelines are only to serve as direction for Judges and Magistrates but has no binding effect on any Judge as to be cast in mandatory terms. For no two cases are ever the same. Yet it could be resorted to as a form of assistance. It is conceded though that at the time of sentencing of the appellant in January, 2010, there was no sentencing guidelines in place.

I think the sentence of sixty-five (65) years is out of proportion to the crime committed when besides being identified as being part of the robbers his specific role was not shown to the court. Harsh, severe and long sentences have not had the effect of either deterring others or helped the criminals themselves to reform. I agree with the counsel for appellant that the sentence handed to the appellant was harsh as all the necessary factors were not taken into consideration. A reduction from sixty-five (65) to thirty (30) years would be

more apt in the circumstances. Accordingly, the appellant succeeds on this ground and the sentence is reduced accordingly reduced from sixty-five (65) to thirty (30) years.

(Sgd)
Eric K. Baffour, Esq.
(Justice of Appeal)

(Sgd)
Margaret Welbourne, JA
(Justice of Appeal)

(Sgd)
P. Bright Mensah, JA
(Justice of Appeal)

Representation
Charles Ameyaw for Appellant present
Dora Quarshie, SSA, for the Republic/Respondent present