IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA

AD - 2022

CORAM: *OFOE, J.A. (PRESIDING)*

MERLEY WOOD, J.A.

BERNASKO ESSAH, J.A.

CRIMINAL APPEAL: ***H2/27/2021***

23RD MARCH, 2022

APOR AMOAKWAH FREDERICK ……… APPELLANT

VRS

THE REPUBLIC ……… RESPONDENT

JUDGMENT

V. D. OFOE, J.A.

The appellant who was the 4th accused person before the trial Circuit Court was sentenced to 25yrs for the offences of conspiracy to commit the offence of robbery and

robbery. He was convicted on the 2nd of December 2013. His appeal to the High Court was dismissed on the 20th July 2017. He is aggrieved at the High Court's dismissal of his appeal and is before us challenging the dismissal on three grounds. He has formulated the grounds of appeal as follows:

"1. The judgment cannot be supported having regard to the evidence on record

2. The court caused substantial miscarriage of justice by failing to address 4th accused's defence adequately

3. That the sentence is harsh and excessive"

The brief facts of the prosecution's case is that the 4th accused/appellant and 4 others were alleged to have conspired and snatch a Kia Rio vehicle from the complainant holding cutlasses and a pistol. It was the 1st accused who hired the vehicle and directed the complainant driver to Odorkor Terrazo and when he got the driver to stop for him to alight at his destination the others pounced on the complainant, seized his car key, threw him out of the car and drove his vehicle away. This was on the 13th February 2011. On the 23rd of March 2011 the 1st accused was arrested in an investigation involving another car robbery. On the 28th of March 2011 he was mixed up in an identification parade and the complainant who was invited for the procedure identified the 1st accused as one of those who robbed him of his car. 1st accused volunteered a caution statement in which he admitted the offence and mentioned that the vehicle was sent to the 5th accused by the 2nd, 3rd and 4th accused persons. On the 28th May 2011 the 2nd accused was arrested in Breman Asikuma and he admitted the offence in his caution statement. On the 8th of June 2011 the 4th accused was also arrested in Ajumako Besease. He also admitted the offence in his caution statement. Based on intelligence report the 5th accused was also arrested and he admitted the offence in his caution statement.

The prosecution called in all three witnesses: The complainant, the investigator of the case, D/Sgt Frimpong and D/Inspector Felix Asamoah Gyamfi. Because the accused persons disowned their caution statement a mini trial was conducted compelling D/Sgt Asamoah Gyamfi to testify since he acted as an independent witness to all the accused persons.

After the trial court had accepted the caution statements as voluntarily given by the accused persons and admitted same, the case went through full trial and the result was the conviction of the accused persons.

The trial judge alluded to the principle that a court could convict on the confession statement of an accused person provided the trial judge was satisfied that the confession was made genuinely and voluntarily by the accused person. He concluded that he had no reason to question the findings of the trial circuit judge that the confession statements were voluntarily made and therefore admissible. He found the conviction proper and upheld same. He also found the denial of all the accused persons' confession statements as an afterthought and inconsistent with their earlier written statement and, like the circuit judge, denied them any credibility. He said at page 7 of his judgment, found at page 112 of the Record of Appeal as follows:

"In the instant case, a careful examination of the evidence on record showed that the findings of fact made by the trial court were amply supported by the evidence on record. Therefore, there is no basis for interfering with the conclusions of the trial court made thereof.

I am therefore satisfied with the findings by the trial judge that the appellants were accomplices in the robbery and fully participated in same. The appellants confessed to the offence in their investigation caution statement and gave an account of their

respective roles in the robbery. If indeed, the appellants were not involved in the robbery, they could have put in a plea of alibi right at the outset of the trial. This they failed to do"

Reading the trial circuit judgment and that of the High Court, it is clear to us that the conviction of the appellant was based mainly on his confession statement. We have alluded to this conclusion of the trial judge earlier in this judgment. We will quote that of the trial circuit judge also.

"The statements of exhibits A, B1, C and E are contradictory to the evidence on oath. It is therefore my opinion that, the evidence in the box is an afterthought. The statements were given voluntarily. There is nothing whatsoever to indicate that the statements were forced confessions. It is assumed that they told the truth when the matter was still fresh in their minds. They had no time to manipulate things. They confessed to the commission of the offence in their caution statements

In the case of Bilah Moshie vrs The Republic (1977) 2 GLR 418 the Court of Appeal said in holding (2) that a conviction could quite properly be based entirely on the evidence of a confession by a prisoner and such evidence was sufficient as long as the trial judge enquired most carefully into the circumstances in which the alleged confession was made and was satisfied of its genuiness.

In the latter case of Ayobi vrs The Republic(1992-93) pt 2 GBR 679 the Court of Appeal apparently re-affirmed this legal position by holding that once a confession was direct, positive and satisfactorily proved, it sufficed to warrant conviction without corroborative evidence.

The caution statements of the accused persons were direct, positive and satisfactorily proved. The explanation by the accused persons carries no weight. Accordingly I hold

that, the confession statement alone can ground the conviction of the offences which the accused have been charged. I find A1, A2 and A4 guilty on counts 1 and 2. I convict them accordingly. A5 is found guilty on count one since the evidence shows that he only conspired with A1,A2,A3 and A4 who is at large……."

Having based the conviction of the appellant on the confession statement it is not therefore surprising that counsel for the appellant was critical of the trial court's acceptance of the caution statements of the accused persons. He was indeed eloquent in his submission seeking our endorsement of his request to reject the confession statements relied on by the trial courts, both at the circuit level and the trial High Court.

It is common legal knowledge that by Section 120 of the Evidence Act for the admission of a confession statement there should be an independent witness testifying to the fact that the statement was made voluntarily without fear, intimidation coercion, promises of favours. It is counsel's submission that in the first place Inspector Felix Asamoah Gyamfi, who acted as an independent witness for the appellant was not an independent witness in terms of this section, as explained in the Supreme Court case of ***Ekow Russel vrs The Republic (2017-2020) 1 SCGLR 469.*** According to counsel, the evidence of this witness clearly identified him as part of the investigation team he cannot therefore be considered an independent witness. He was part of the investigating team in that he shared the same office with the investigator of the case and was his superior who superintended over his work. That the witness was the superior and supervisor of the investigator and therefore cannot be an independent witness, counsel referred us to the cross examination of the witness recorded at page 23 of the record of appeal

"Q. What age did the A1 give?

A. I cannot remember the exact age. He gave his age as 17 years

Q. He was a minor

A. His real age was checked and found out that he was over 18 years

Q. You did more than just being a witness

A. Not correct. Because I was the administrator at the station, I am always informed of what each investigator is doing

Q. You are interested in this case

A. Not correct

…………………….."

From this cross examination the witness admits he is the administrator of the office from where the investigator operates and he is informed of what each investigator is doing.

Counsel's next submission questioned the credibility of this independent witness, Inspector Asamoah Gyamfi. He argued that this witness gave false testimony about the age of the first accused as above 18 in an earlier trial. But a subsequent appeal before the Court of Appeal by the first accused, this age testified to by the witness was found to be false. The concern raised by counsel is to the effect that for what reason would this witness testify falsely as to the age of first accused if he was an independent witness and had no interest in the outcome of the trial of the accused persons? To counsel not only did this false evidence dent the credibility of this witness but also exposed him as having an interest in the end result of the case his evidence seeking to authenticate the alleged confession statement of the appellant should have been rejected by the trial High Court.

Alluding to all the guidelines provided by Section 80 of the Evidence Act, NRCD 323, it is counsel's contention that there is a credibility barrier that this so called independent

witness was not able to cross. His acceptance by the trial Circuit Court and the High Court as an independent witness to the confession statements of the accused persons and the appellant and convicting them, has occasioned a miscarriage of justice and the conviction of the appellant should be set aside.

The evidence on record indicates that Inspector Asamoah Gyamfi, the independent witness, acted as independent witness for all the accused persons even though the arrest of these persons were on different days and spanned over a period of 3 months. To counsel this should also have aroused the suspicion of the trial courts in accepting the Inspector as a genuine independent witness for the appellant.

Concluding this ground of appeal that the judgment cannot be supported having regard to the evidence on record, counsel raised the issue of identification. He submitted that there was no evidence the appellant was identified in any identification parade before his arraignment before the court.

He rounded off his submissions that since the confession statement of the first accused cannot be accepted as binding the appellant there was no evidence on which to anchor the conviction by the trial courts.

On its part the prosecution i.e. the respondent, maintained that there was no evidence the independent witness was not disinterested. Counsel contended that in this case, unlike the **Ekow Russel** case, there was no evidence this independent witness was directly involved or was a member of the investigations team and that his admission that he was the administrator of the station where the appellant and his accomplices were processed by the investigator cannot be interpreted to include him as a member of the investigation team. The case of **Ekow Russel** relied on by counsel for the appellant to question the

admissibility of the caution statements of the accused persons, including the appellant, was therefore vacuous, contended counsel.

Responding to the submission that the trial judge wrongly relied on the confession statement of the 1st accused to convict the appellant it is the contention of counsel that the trial judge did no such thing. Rather, he considered the evidence of the appellant and that of the other accused persons separately, including their caution statements, and noting the role each person played, convicted them accordingly. Concluding his submission, counsel submitted that the appellant's evidence, just like the other accused persons, was not considered credible by the trial judge since they testified contrary to their earlier written statements, their conviction cannot be questioned.

The submission of both counsel when reviewed within the record of appeal, a finding whether Inspector Gyamfi should be accepted as an independent witness or not to the confession statement of the appellant is very crucial to this appeal. For a finding that he was not an independent witness terminates this appeal in favour of the appellant since appellant's conviction was based on his confession statement.

Was he an independent witness as required under section 120 of the Evidence Act, NRCD 323? In answering this question we rely on the case of ***Ekow Russel vrs The Republic (2017-2020) 1 SCGLR 469*** where the Supreme Court through Akamba JSC expatiated on who can be such an independent witness as mentioned within the said Section 120. At page 492 of the report his Lordship stated:

"In order to attain the objective of providing adequate safeguards for a suspect under investigation, an independent witness as used in section 120 of NRCD 323 may include any person who qualifies to be a competent witness and has no direct personal interest in the case in issue. Such an independent person must be a person who is disinterested in the

matter under investigation. At the official level, the independent witness person should not be directly under the control and influence of the person investigating the crime nor himself be part of the investigating team. In summary any person-be it a policeman, a soldier, a prison officer, of any other security investigating apparatus or a civilian who qualifies in terms of being disinterested in the matter under investigations, and is not under the direct control or influence of the person investigating the crime, or is not himself part of the investigating team and qualifies to be a competent witness may serve as an independent witness…"

The evidence of D/Sgt Gyamfi's involvement in the case as identified by counsel for the appellant from the record of appeal is that he acted as the independent witness to all the accused persons. He worked with the investigator in the same office even though not close to him, he was the administrator of the C.I.D office and that because he is the administrator at the station he was informed of what each investigator was doing. What we are to determine is should these pieces of evidence make the inspector someone directly involved in the investigations of the appellant as to deny him the quality of an independent witness?

We cannot deny knowledge of the environment within which the police investigators work, particularly in relation to getting independent witnesses where suspects are under investigations. We can take judicial notice of the fact that suspects more often than not, give their statements at the police stations in the cause of investigations and where a suspect confesses to the offence charged the investigator has the duty to look for an independent witness to the confession statement. This is particularly so if the suspect is not in a position to provide one of his choice acceptable to the investigator. Even though nothing prevents the suspect or the investigator going out of the police station to fetch for an independent witness, it is worth noting that the choice should not only be reliable but

available when sought for. For in the process of prosecution there may be the possibility of the accused person denying his confession statement. When that happens it becomes crucial for the investigator to locate the independent witness to testify to the voluntariness of the confession statement given by the accused person. **Ekow Russel** case provides a typical instance where the independent witness could not be traced to testify and what its effect on the case of the prosecution could be. Where the investigator fails to locate the independent witness or locates him but for whatever reason he testifies adverse to the prosecution, the chances of the prosecution failing to establish the voluntariness of the confession statement is extremely high. When these difficulties and the caution needed in getting independent witnesses for confession statements are noted, it becomes easier to understand why the investigators will prefer to choose independent witnesses from their mist for the sake of reliability and availability. In applying the exposition by the Supreme Court in the **Ekow Russel** case therefore it is crucial to get a convergence of evidence, very cogent one that will clearly disqualify a police officer serving at the police station where the suspect is investigated as an independent witness. What evidence will we accept as a police officer having "direct personal interest" in the case? When will such a police officer be "a disinterested person"? Investigating a case involves the investigator and his superior officers who may have the duty of directing the investigations and fairing the docket for prosecution. Should all involved in building a docket on a case be persons having direct personal interest in the case and therefore disqualified? Care should be taken in deciding which police officers should be disqualified applying the Ekow Russel's case else it becomes an albatross on the neck of criminal prosecution and end up frustrating investigations. In the **Ekow Russel** case the independent witness was directly involved in the investigations in that he was a member of the search party that went to search the rooms of the accused person. That is not what we have in the case

before us. The witness in this instant case said he was the administrator of the station and all the investigators report to him. It is worth the emphasis that he did not say the investigator of this case was the only one who reports to him but he said all the investigators. In this administrative position of D/Sgt Gyamfi we do not find him such a police officer who has direct interest in the case as to disqualify him as an independent witness. Bearing in mind our concern expressed herein on the difficulties the investigator may encounter and the caution he has to exercise in getting independent witnesses, we emphasize that we do not find D/Sgt Gyamfi being the administrator and the person who all investigators report to disqualified as an independent witness. The position he occupies we find a pure administrative position we do not find him directly interested in the conviction of the appellant and his colleagues. We are not surprised that in the position of the administrator in the office who it was believed will be available to testify in case the accused persons deny their confession statement, as indeed it happened in this case, he found himself the choice as an independent witness for the investigator for all the accused persons even though they were arrested on different days.

At page 23 of the Record of Appeal counsel refers us to these answers in cross examination of the independent witness which to him should have discredited the witness. We will re-quote for the sake of emphasis

"Q. What age did the 1A give?

A. I cannot remember the exact age. He gave his age as 17 years

Q. He was a minor

A. His real age was checked and found out that he was over 18 years

It is the submission of counsel that the evidence of the age of the 1st accused person which the D/Sgt Gyamfi testified to as above 18 was found to be untrue when the 1st accused person went on appeal to the Appeal Court. Such a person cannot be a credible witness, is the contention of counsel. Section 80 of the Evidence Act, NRCD 323, appropriately referred to by counsel, provides guidelines and some situations for the determination of the credibility of a witness and each will have to be considered within the facts and circumstances of each case. To contend that the witness has testified to a fact which was once found to be untrue in an earlier case and therefore the witness should be denied any credibility anywhere he testifies will appear too mechanical an approach to performing this assessment duty. In that earlier Court of Appeal case that counsel refers to, it is not the evidence of the D/Sgt Gyamfi supporting the prosecution's case of a contested confession statement that was found untrue, but a piece about the age of an accused person. Our duty here therefore is to consider the evidence D/Sgt Gyamfi gave in that earlier case within the facts and circumstances of the current case in making that decision on his credibility. In this case before us what evidence has the witness given which counsel for the appellant contends should not be given any credit? All we get from the records is his evidence maintaining that the confession statement was given by appellant voluntarily. Do we believe and accept this evidence? In the hearing of an appeal it is worth noting that the finding of fact to be made from the evidence adduced before the court is the preserve of the trial court to be interfered with only when the finding has no support on the records. Mention of two of the several authorities on this principle should suffice for our purpose. The case of ***Amoah vrs Lokko (2011) 1 SCGLR 505 and Oxyair vrs Wood (2005-2006) SCGLR 1057*** come to mind. The trial courts, both the circuit and the High Court, have found that the confession statement of the appellant was voluntarily made. By that finding they accepted D/Sgt Gyamfi as an independent witness whose

evidence is credible and supportive of the prosecution's case that the appellant authored a confession statement worth the conviction of the appellant. Do we have any evidence to depart from this finding of the trial courts? We found none on the record. Counsel's submission under this head questioning the credibility of D/Sgt Gyamfi is in consequence rejected.

In any case we had opportunity of reading the Court of Appeal judgment counsel referred to and on close reading it was not as if the court of appeal made any findings against D/Sgt as untruthful witness in stating the age of the 1st accused. All the court of appeal did was to mention and accept the age of the 1st accused which was stated as 17, as stated in exhibits B and C of the record of appeal before it. The court did not make any categorical statement on the credibility of this witness. To our mind what the records disclose is a misstatement of the age of the 1st accused in the trial. Will a misstatement of the age by the witness necessarily mean he intentionally lied to the court and therefore an unreliable witness? Now let's go back to his cross examination results on this issue again

"Q. What age did A1 give?

A. I cannot remember the exact age. He gave his age as 17 years

Q. He was a minor

A. His real age was checked and found out that he was over 18 years

Q. You did more than just a witness"

We find in this cross examination results the witness not sure what the age of the A1 was but appeared to be recollecting that he was 18 years. We do find in these answers a clear intention of the witness to deceive or being untruthful to the court as to conclude that he

is someone without any credit whose evidence should not be accepted in support of the prosecution's case.

Another leg of the submission of the appellant for which he wants his conviction to be reversed was the determination of his identity. Was he one of the persons who attacked the first prosecution witness, the driver of the vehicle who was robbed by the accused persons? We do not see the relevance of this submission. The appellant was convicted on his own confession statement his identification as one of the complainant's attackers becomes irrelevant.

Counsel argues another ground which on a cursory reading of the record of appeal, to be precise the judgment of both trial courts, we can respond to immediately. There is nothing on record that the trial judges used the confession statement of the 1st accused against the appellant, as counsel contends. As rightly submitted by the respondent, the trial judge considered each and every accused person on his confession statement and convicted them accordingly.

There is one fact that may be escaping counsel for the appellant in all his submissions directed at questioning the acceptance of the confession statements of the appellant. The question that should engage counsel's attention is how did the police get to know the other accused persons? From the record of appeal it started with the caution statement of the 1st accused Percy Aboagye alias Nana Kwame made on the 2nd of April 2011. This can be found at page 145,146 and 147 of the record of appeal, specifically page 146. He gave this statement at the time none of the other accused persons had been arrested by the police. It was in this statement that the names of the other accused persons were mentioned for the first time. Was it the police that got these names from somewhere else and got them into the caution statement of the 1st accused who was forced to sign? From

the records it was also after the 1st accused had given out the names that the police went looking for them, some of whom were arrested at midnight.

A very interesting submission has been made by counsel for the appellant. At the end of the mini trial the trial circuit judge mentioned exhibits A, A1, B, B1, CC1, and DD1 as exhibits admitted for 1st 2nd 4th and 5th accused persons. No mention was made of exhibit E. But in the trial judgment he mentioned and quoted part of exhibit E as that of the caution statement of the 4th accused person. Surprisingly this exhibit E is also not part of the records. It is counsel's submission that there being no exhibit E in the records the appellant who was the 4th accused in the case could not have been convicted on a confession statement exhibit E that does not exist. What we understood counsel to be contending is that there appears to be a mix up of the exhibit naming for which the appellant cannot be blamed and convicted when clearly there is no exhibit E, the alleged confession statement, to support his conviction. Such mix up should be considered in favour of the case of the appellant on the principle that it is better for ninety nine criminals to go scot free than for one innocent person to be wrongly incarcerated or jailed. We appreciate the reasoning of counsel but we find it over technicality at best. The judgment that convicted the appellant was clear exhibit E was for the appellant. Indeed at page 68 of the record of appeal the trial judge quoted exhibit E which he described as the caution statement of the appellant and relied on this exhibit E to convict the appellant. Yes, there had been a recording mix up and an administrative lapse that had excluded the said exhibit from the record of appeal, but what was contained in exhibit E was mentioned by the trial judgment in his judgment and considered appropriately.The best response we have is to reject the contention of counsel praying for the acquittal of the appellant on this technical ground. We do so in line with section 31(2) of the Courts Act, Act 459 which directs dismissal of an appeal if the point raised consists of a technical or

procedural error where there is evidence to support the charge. One would have expected counsel to have sought rectification of the records when this omission of exhibit E from the records came to his attention rather than seek an acquittal on that basis.

From the foregoing delivery in total we are clear in our minds that the appellant has not made a case for which we can question the conviction on the ground that the evidence led by the prosecution failed to meet the bench mark, prove beyond reasonable doubt, as required by law in criminal proceedings.

The appellant was convicted and sentenced to 25 years for the offence of robbery which by law carries a minimum sentence of 15years. Appellant counsel's submission which we find uncontestable is the failure of the trial judge to apply Article 14(6) of the 1992 Constitution which demands that any period spent in lawful custody in respect of that offence before completion of trial shall be taken into account in imposing the term of imprisonment. The record of appeal, specifically the records that relate to sentencing of the appellant, did not mention the period of a little above 2 years spent in custody before his sentencing. The cases of ***Kweku Frimpong (alias Iboman) vrs The Republic (2012) 1 SCGLR 297, Bosso vrs The Republic (2009) SCGLR 420*** are categorical that such omission is a constitutional aberration that cannot be countenanced. We are bound to rectify such omission which we do by substituting a sentence of 20 years having regard to the period he was in custody.

From the foregoing the appeal is dismissed save for that which complains of the sentence.

(SGD.)

V. D. OFOE

[JUSTICE OF APPEAL]

MERLEY A. WOOD (MRS.), (JA), I agree *(SGD.)*

MERLEY A. WOOD [JUSTICE OF APPEAL]

S. R. BERNASKO ESSAH (MRS.), I also agree *(SGD.)*

S. R. BERNASKO ESSAH (MRS.)

[JUSTICE OF APPEAL]

<u>COUNSEL</u>*<u>:</u>*

VIVIAN OSEI-TUTU FOR RESPONDENT

MARTIN KPEBU WITH ALPHONSE QUAINOO FOR APPELLANT