IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ACCRA – GHANA

CORAM: MARGARET WELBOURNE JA PRESIDING

P. BRIGHT MENSAH JA

ERIC KYEI BAFFOUR JA

SUIT NO. H2/17/2021

5TH MAY 2022

FELIX OKINE ARYEETEY … APPELLANT

vs

THE REPUBLIC … RESPONDENT

JUDGMENT

BRIGHT MENSAH JA:

The accused/appellant herein, Felix Okine Aryeetey was on the 02/07/2013, arraigned before the Criminal Assizes at the High Court, Accra charged with the offence of **Murder contrary to S. 46 of the Criminal Offences Act, 1960 (Act 29)** in Count 1 appearing on the Bill of Indictment (Charge Sheet). In the particulars of the offence supporting the charge, it was alleged that the appellant had on or about the 07/08/2003 and at Berekuso in the Akuapem South District of the Eastern Region, intentionally caused the death of a Samuel Bosomtwe otherwise known as Kakra, by unlawful harm. See: ***p.1 of the record of appeal [roa].***

The appellant in addition with Daniel Nana Affum, Nicholas Tawia Asante and Joseph Kwadjo Fianko, were jointly charged with **Conspiracy to commit Murder contrary to Ss 23(1) and 46 of the Criminal Offences Act, 1960 (Act 29)** in Count 2**.** See: ***p. 1 [roa].***

On the same Bill of Indictment, Daniel Affum alias K.K was singularly charged with **Abetment of Murder contrary to Ss 20(1) and 46 of the Criminal Offences Act, 1960 (Act 29),** the particulars of offence being that Daniel Affum on that said 07/08/2003 allegedly instigated the appellant, Felix Okine Aryeetey to intentionally cause the death of Samuel Atta Bosomtwe by unlawful harm. See: ***pp 1-2 [roa].***

In that same case, Daniel Affum was charged with three (3) counts of **Use of Offensive Weapon contrary to S. 70 of Act 29**. It was alleged that on or about 07/08/2003 and at Berekuso, Daniel Affum intentionally and unlawfully caused harm to Richard Boateng by shooting him with a gun; shot Sampson Asare with a gun and also shot Akosua Eku with a gun. See: ***p. 2 [roa].***

In count 7 on the same B.I, Joseph Kwadjo Fianko was charged with the **Use of Offensive Weapon contrary to S. 70 of Act 29**. He was alleged to have intentionally and unlawfully caused harm to Akosua Eku by shooting her with a gun on 07/08/2003 at the same place, Berekuso in the Akuapem South District of the Eastern Region. See: ***pp 2-3 [roa].***

At the end of the trial, the jury returned a verdict of guilty for murder against the appellant, Felix Okine Aryeetey in respect of Count 1 on the B.I. and was also found guilty on the charge of Conspiracy to Murder in respect of Count 2. In consequence, the appellant was convicted and sentenced to death by hanging for Murder in Count 1 and sentenced to 25 years IHL for

Conspiracy to Murder in respect of Count 2. The other accused persons jointly charged with the appellant were also found guilty on the charge of Conspiracy to Murder and equally sentenced to 25 year IHL each.

The appellant, Felix Okine Aryeetey alias Adjetey aggrieved by, and dissatisfied with the conviction and sentence on both counts has, with the leave of this court granted 22/10/2019, appealed against the decision of the lower court to this court. His grounds of appeal are as follows:

1. The conviction ought to be set aside on the grounds that

   it cannot be supported having regard to the evidence.

2. The conviction and sentence of the appellant has occasioned

   miscarriage of justice.

See: ***pp 374-375 [roa].***

Facts of case:

Before proceeding to analyze the facts and the evidence led in the case and to consider the merits or otherwise of the instant appeal, it is appropriate to chronicle the facts/events leading to the trial of the case.

The facts as presented by the prosecution are that the 1st Accused person in the case, Daniel Nana Affum alias K.K is a trader and the chief of Akrode clan at Berekuso in the Eastern Region of Ghana. The 2nd and 3rd Accused persons, namely Nicolas Tawia Asante and Joseph Kwadjo Fianko are farmers. The 4th accused person, Felix Okine Aryeetey alias Adjetey [the appellant herein] is a taxi driver whilst the deceased, Samuel Atta Kakra

Bosomtwi was resident at Ashiaman but was occasionally paying his grandmother visits at Berekuso.

It was further narrated that there was the late Akosua Esseku, the then queen mother of the Achiase clan who together with one Kwaku Armah, nominated and installed one Kwame Tetteh and Afia Ahentowa as the chief and queen mother respectively from the same Akrode clan. However, a day after the installation, one Nana Oteng Korankye and Nana Acquah also nominated and installed the 1st Accused as the chief of Akorade clan. That brought serious rift between the supporters of both factions. Consequently, on the 7th day of August 2003 it is claimed that at about 6.30pm there arose some exchange of abusive words between one Juliana Esi aka Ayeboafo and Adjoa Faustina, a sister of Kwasi Tetteh who was earlier installed as the chief. It is alleged that Adjoa Faustina insulted Juliana. Juliana then rushed to report it to Nana Acquah. The matter was also relayed to Nana Oteng Korankye and the said Nana Korankye asked his son, James Amaning to go the house of Nana Acquah and invite him to a ceremony then being performed in Nana Korankye's house.

It is further alleged that James Amaning drove his father's bus with his friends on board who were all wielding offensive weapons, to the house of Kwasi Tetteh who was then sitting in front of his house. Kwasi Tetteh was confronted as regards the where-about of Adjoa Faustin but Tetteh rather went inside his room and brought out a cutlass and slashed James Amaning's on the neck killing him instantly. The 1st Accused person upon hearing the death of his son, Amaning allegedly went to town with 2nd, 3rd and the appellant, all carrying offensive weapons. It is alleged they went to the house of Kwasi Tetteh but did not get him. Considerable damage was

caused to Tetteh's house after firing guns shots in the house. Thereafter, it is alleged, they went to the central part of the community where they met Samuel Atta Bosomtwi together with his twin brother, Isaac Atta Bosomtwi. As soon as they met them it is A1 ordered the appellant to 'finish' them. The appellant then allegedly removed a knife and stabbed the deceased on the left chest. Samuel Atta Bosomtwi bled profusely and died later.

Analysis of the case and opinion of this court:

To begin with, it is trite learning that in indictable trials, as in the instant case, the trial judge decides on all questions of law as stipulated in **S. 1(1) of the Evidence Act, 1975 [NRCD 323]** whilst the jurors are the judges of facts in terms of **S. 2(1) of NRCD 323**. At the close of the trial, the judge sums up the evidence led on record, both oral and documentary to the jury whilst directing them on the law. He is entitled to express an opinion on the facts. However, the jurors are not bound by the opinion the trial judge expresses on the facts. See: ***Bodua alias Kwata v R [1966] GLR 51 SC.***

In the instant appeal, Counsel for the appellant has criticized the trial judge for misdirection and or non-direction to the jury. The criticisms as appearing on **p. 12 of his written submissions** are reproduced here below:

> *"I must however state that, whereas I notice from the record that although the learned trial judge referred to the said material contradictions which were left unexplained, I do not see any sufficient direction to the jury that such inconsistencies are matters which by law must be resolved in favour of the appellant."*

I need to state that there is no particular format, form or formula for making a summing-up. What is important to me, is not the form in which the direction is given, but the substance of the direction. See: ***Oduro v The State [1967] GLR 36.***

On substance of a summing-up and the trial judge's duty in directing the jury, the Supreme Court gave the following directions in ***The Practice Note, (State v Amuah) [1961] GLR 195***, that it is to say:

> *"It is the duty of the trial judge to place the prisoner's case adequately before the jury, that is to say, he should remind the jury of the general nature of the defence, but not that he may present a different case no matter how favourable that may be to the prisoner. It is of the greatest importance that the jury should be directed in an impartial way on the facts, and not in such a way as to indicate what they should find; it is also imperative that a judge should point out the considerations for the jury to bear in mind in deciding whether or not they should find the prisoner guilty. Although a judge debarred from expressing his own opinion on the facts, it is his duty at the same time to warn the jury that they are not obliged to accept the opinion expressed by him on the facts."*

Is it really the case that the trial judge in our present case misdirected or non-directed the jury on material facts that the jurors ought to have taken into account in their deliberation and their verdict?

I need to put it on record that the 1st, 2nd and 3rd Accused persons ie Daniel Nana Affum alias K.K, Nicholas Tawiah Asante and Joseph Kwadwo Fianko respectively who were found guilty and convicted for various offences as stated in the B.I and sentenced to 25 years IHL each, successfully appealed against their convictions and sentences. The Court of Appeal speaking through Tanko Amadu JA [as he then was] in a unanimous decision concluded in its judgment as follows:

> *"…… In concluding this judgment therefore, I must say that there are too many loose ends in the evidence adduced on which the appellants were convicted and sentenced, such that it is unsafe to sustain the convictions and sentences imposed on them. That is why I will allow this appeal and set the said convictions and sentences while I return a verdict of discharge and acquittal in favour of all the appellants."*

See: **Daniel Nana Affum @ K.K & 2 ors v The Republic, Case No. Crim. App. No. H2/2/2016, 12/017 [unreported].**

I made reference to this court's previous judgment supra on purpose. First, it is relevant and has a bearing on the instant appeal because all the accused persons as well as the appellant, **Felix Okine Aryeetey** were tried together in that case on the same facts. It cannot be put to any serious doubt that the evidence led in the case and on which A1, A2 and A3 were found guilty, convicted and sentenced accordingly but were acquitted and discharged on appeal, are the same as that used in convicting and finding appellant guilty for conspiracy to murder and murder. Therefore, although

the said judgment hereinbefore referred to was not part of the record before us, it is nevertheless a judicial decision emanating from this court that is all on fours with the present appeal and to which this court can take judicial notice of in terms of **S. 9(2) of the Evidence Act, 1975 (NRCD 323)**.

Next, the previous judgment is binding on us in terms of **Article 136(5) of the 1992 Constitution.**

Now, it is the argument of the appellant that the conviction ought to be set aside on the grounds that it cannot be supported having regard to the evidence.

From the available evidence, it was the case of the Prosecution that on that fateful day, ie 07/08/2003 the people of Berekuso in the Eastern Region celebrated their Yam Festival. It was alleged that during the celebration and at about 7.30pm the accused persons named in the case and the appellant were armed with offensive weapons including guns and cutlasses. They met the deceased, Samuel Adu Bosomtwe in whose company was his twin brother, Isaac Adu Atta Bosomtwe, the star witness who gave evidence in the case as the first Prosecution witness (PW1).

Proof beyond reasonable doubt:

The golden thread that runs throughout the web of our criminal jurisprudence is that the guilt of a person suspected of having committed a crime is that of proof beyond reasonable doubt. This principle has been encapsulated in our **Evidence Act, 1975 [NRCD 323], S. 13(1)** that provides:

> *"(1) In a civil or criminal action the burden of persuasion as to*
>
> *the commission by a party of a crime which is directly in issue*

requires proof beyond a reasonable doubt."

As regards how the burden shall be discharged, **S. 11(2) of NRCD 323** states:

> *"In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of a fact beyond a reasonable doubt."* **[emphasis added]**

The standard of proof beyond reasonable doubt was explained by the eminent jurist, Lord Denning in the case of ***Miller v Pensions (1972)2 All ER 372*** as follows:

> *"Proof beyond reasonable doubt does not mean proof beyond a 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 strong against a man as to leave a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."*

Indeed, our law reports are also replete with cases that have essentially explained the principle, proof beyond reasonable doubt. In illustration, see the following cases: ***Tetteh v R [2001-2002] SCGLR 854***; ***Dexter Johnson v R [2011] 2 SCGLR 601*** and ***Frimpong a.k.a Iboman v Republic [2012] 1 SCGLR 297***.

In other commonwealth jurisdictions, some courts have defined "beyond a reasonable doubt" this way:

"It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based on reason and common sense – the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. The jury will remember that a defendant is never to be convicted on mere suspicion and conjecture." **[emphasis supplied]**

It bears stressing, therefore, that proof of the essential ingredients of the offence charged is no means a mathematical proof. It suffices if the Prosecution led evidence such that any reasonable man would be persuaded that the person in the dock indeed committed the offence. In the words of Lord Denning:

"…….*if the evidence is strong …… as to leave a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not the least probable' the guilt of the accused would be have been established."*

Did the Prosecution in our present appeal pass the litmus test of proving the guilt of the appellant, Felix Okine Aryeetey beyond reasonable?

It is worthwhile stating that in proof of the charge of murder as in the instant case, the prosecution carried the burden to establish the following:

1. That Samuel Atta Bosomtwe alias Kakra is dead;
2. That he died from harm;

3. That the harm was unlawful;
4. That the harm was caused intentionally; and
5. That it was Felix Okine Aryeetey that caused the unlawful harm.

From the available evidence, it is not in doubt whatsoever that Samuel Atta Bosomtwe is dead. The pathologist's report that was tendered in evidence by the Police Investigator in the case attested to that fact. It was also established that the deceased died through harm and the harm was unlawful. Undoubtedly, Samuel Atta Bosomtwe did not die by natural cause but through an unlawful harm, that is to say, by stabbing. **S. 1 of the Criminal Offences Act, 1960 [Act 29]** defines "harm" to mean a bodily hurt, disease, or disorder whether permanent or temporary.

Unlawful harm is statutorily defined in **S. 76 of Act 29** as: *"Harm is unlawful which is intentionally or negligently caused without any of the justifications mentioned in Chapter One of this part."*

S. 31 of Act 29 outlines justifications in law. These include: an express authority given by a statute; or of authority to execute the lawful sentence or order of a court; or of the authority of an officer to keep the peace or of a court to preserve order; or of an authority to arrest and detain for felony; or of a necessity for the prevention of or defence against a criminal offence etc. etc. None of the justifications listed above applies in this case as the evidence did not show, for eg., that the deceased was the aggressor or that his assailant was provoked in any way resulting to attacking the deceased. The harm caused to the deceased was intended to kill him because was that he was stabbed in the chest.

By operation of law as housed in **S. 11(1) of Act 29,** where a person does an act for the purpose of causing or contributing to cause an event, that person intends to cause that event within the meaning of this Act although in fact or in the belief of that person or both in fact and also in that belief, the act is unlikely to cause or to contribute to cause the event. And the crux of the matter is whether it was the appellant who intentionally caused the death of Samuel Atta Bosomtwe.

I have critically and carefully evaluated the evidence and hold the respectful view that the evidence the Prosecution led in the case is so porous and fraught with inconsistencies that it was dangerous for the jury to return a verdict of guilty of murder thereby occasioning a gross miscarriage of justice to the appellant. To put it bluntly, the evidence is not reliable and insufficient to sustain the conviction of murder in this case. And I shall demonstrate it in a moment.

First, there so much inconsistencies in the evidence of the eye witness account of PW1. Admittedly, by **S. 58 of NRCD 323** a person qualified to be a competent witness if he has personal knowledge of the issue he is testifying about**.** PW1 being a twin brother to the deceased presumably, he had had interest in the outcome of the case. So, the law required the trial court to decide on what weight and credibility to attach to his testimony. In the past, the law was that the courts ought to be cautious with evidence of witnesses interested in the outcome of a case. See: ***Addai v Anane [1973] 1 GLR 144 @ 149-150; Basare v Sakyi [1987-88] GLR 313 @ 323.***

Now, there is a break with the past, however. The current position of the law as enshrined in **Ss 58, 59 & 60 of the Evidence Act, NRCD 323,** is that every person is a competent witness to give a testimony in a case

unless he was disqualified. So long as a person is competent and is speaking from personal knowledge the court is not entitled to reject, disbelieve or ignore his testimony simply on account of his blood or other close relationship to the party in whose behalf he testified. The caveat, however, is the rule required that the court has to decide on what weight and credibility to attach to such testimony. See: ***Comfort Abla Agbosu v Captain Boafo, C/A Suit No. 90/92 [unreported judgment] dated 29/04/199.*** [Coram: Foster, Benin & Afreh JJA.] See also: ***Atadi v Ladzekpo [1981] 218 @ 226-217***.

From the available evidence, it cannot be over-emphasized that the only direct evidence of the Prosecution was that of the twin brother of the deceased. Isaac Adu Attah Bosomtwi (PW1), the twin brother who claimed he was in the company of his deceased brother at the time of the incident testified that the accused persons including the appellant herein attacked them in front of their house at Berekuso in the presence of their grandmother. He stated that he knew the appellant and the other accused persons as all hailing from Berekuso. According to him, he was sleeping that night when around 8.45pm he heard his deceased brother calling him and inviting him to come down to see that Amaning has been killed. So he quickly ran down and met his brother by the road side in front their house. He was in boxer short at the time, according to PW1. He continued:

> *"So when I met my brother I saw people coming from left and right side of the road, whilst some were also standing. So there and then K.K, the 1st accused said that, yes, this is Atta and O.B., they have been following the queen mother, they should finish*

them. So after the 1st accused has said that, then 2nd accused just held my brother's shirt, and my brother was removing it, when he removed 4th accused **[appellant herein]** *removed a dagger and then stabbed my brother on the chest. Just after this incident, I turned to K.K, the 1st accused and said, 'have you seen, you said they should kill us,' by then he was also holding a single barrel gun, so when I decided to run through a way, he fired but I ran away."*

He continued that he ran to their house to his grandmother and whilst there he saw people holding his twin brother with blood oozing from his body and they asked that they prayed for him.

It is important to observe that the statements PW1 volunteered to the Police in connection with the case were received in evidence on behalf of the defence as **Exhibits 1, 2 & 3.** These statements are the subject of attack and criticisms by Counsel for the appellant. Counsel in his written submissions has argued at **p.12** as follows:

"There were also inconsistencies arising as to whether there was one or two stabs and another as whether it was the right or left chest of the deceased which was stabbed. I must however state that whereas I notice from the record that although the learned trial judge referred to the said material contradictions which were left unexplained, I do not see any sufficient direction to the jury that such inconsistencies are matters which by law

resolved in favour of the appellant."

What are the inconsistencies in the evidence of PW1 and was Counsel for the appellant justified in the criticisms? It cannot be overemphasized that when matters were very fresh on PW1's mind he volunteered a statement to the Police on 8th August, 2003 a day after the incident. The statement is contained in **Exhibit 1** in which he said, *inter alia,* as follows:

> *"…… as we turn ourselves to go home, one Affum alias KK in the company of Adjetey, Aggo, Tawiah and Affum Dada came to surround us. Subsequently Affum Dada among them gave me a heavy blow on my chest and I fell down. Subsequently Adjetey also removed a knife from his body and stabbed the rib region of my twin brother Samuel Adu Kakra. Again Tawiah also removed the same knife from my brother's wound and stabbed the same region the second time and he died.* **[emphasis mine]**

See: ***p 359 [roa].***

Shortly after giving the statement, **Exhibit 1** PW1 gave another statement on 11th August 2003. That was received in evidence as **Exhibit 2,** part of which I reproduce here below:

> *"…….. OB then held my hand to follow him to the house. On our way KK came from behind and said he OB was stupid boy and that he refused to follow him and rather on the side of Obaa-panyin and Abusuapanyin in the town. There KK ordered one*

Tawiah and Adjetey to kill OB. Suddenly Adjetey who was in a black dress removed a short knife and stabbed the right chest of OB. There Tawiah also removed a knife and stabbed the same place where Adjetey had stabbed. I then shouted and said 'KK have you seen that you have caused the death of my brother OB?"

[emphasis added].

See: ***p 359 [roa].***

PW1 giving statements to the Police did not end the 11th August, 2003. On 7th September 2004, he yet gave another statement which was received in evidence as **Exhibit 3.** For purpose of clarity I reproduce here below part of **Exhibit 3** on point:

"…….. At a junction, I spotted Daniel Affum @ KK, Adjetey, Tawiah, Dada …… and Ago heading towards us. Tawiah suddenly held the deceased tightly and Daniel Affum intoned to my hearing that 'stupid boy finish him'. He went on to say that myself and my late brother were supporting Obaapanyin Akosua Eseku and Kwadwo Armah. Adjetey removed a knife from its scabbard and stabbed the left chest of my brother. The scabbard fell down. My brother run home but was followed by Tawiah, Adjetey and Daniel Affum. I also run after them……..."

See: ***pp 359 – 360 [roa].***

PW1 gave this statement, **Exhibit 3** a year later after the incident and it was at that stage that he started changing his story as regards who actually drew the knife into the body of his deceased brother and caused his death. Isn't it ironic, therefore, that the learned trial judge in addressing the jury in his summing-up and commenting on the inconsistencies in the evidence of PW1, which the trial judge was entitled to do any way, made the following observations?

> *"Ladies and gentlemen of the jury, it is evident on the four occasions that the PW1 had the opportunity to tell how his deceased brother died, he appeared to be telling markedly different stories. In his evidence in chief PW1 said his brother was stabbed by A4 alone upon having been so ordered by A1. In his statement to the Police 8th August 2003, that is a day after the incident, PW1 said his brother was stabbed by A4 and then A2 followed with the same knife that A4 had used. This time he did not say the stabbing was at the instance of the A1. Then on 11th August 2003, PW1 again gave Exhibit 2 to the Police. He said in Exhibit 2 that A1 ordered A2 and A4 to kill his brother whereupon A4 removed a short knife and stabbed the brother on the right of his chest. Thereafter A2 also removed a knife and stabbed the brother at the same place. Finally, in Exhibit 3*

PW1 asked that OB be finished and A4 removed a knife from its scabbard and stabbed the deceased at the left side of the chest. So, the question remains who killed Samuel Atta Bosomtwe @ Kakra @ OB? Was it A4 alone or A4 and A2? Indeed, if A4 and A2 stabbed from the evidence adduced by the Prosecution whose blow effectively killed the deceased? From the narrations of PW1 who happens to be the only eye witness as to how the deceased died, it is not clear as to who killed the deceased……

……."

Undoubtedly, there are clear inconsistencies in the accounts PW1 gave to the Police as how his deceased twin brother, Samuel Atta Bosomtwi was killed. Although, when PW1 mounted the witness box he insisted that it was the appellant that stabbed his brother, he offered no satisfactory explanation to clear those inconsistencies contained in his prior statements to the Police, particularly **Exhibits 1 & 2**. In his prior statements to the Police he claimed that both A2 and A4 drew knives into the mortal body of the deceased. With these inconsistencies hanging, the evidence of PW1 is not worthy of credit. This court speaking through Osei-Hwere JA [as he then was] in ***Asia v Ayeduvor [1987-88] 1 GLR 175*** stated the rule on prior self-contradiction thus:

"*Under the principle of prior contradiction, a prior inconsistent statement, if not satisfactorily explained as to the circumstance under which it was made eg., either under duress or mistake,*

will go to impeach the credibility on the particular fact."

Indeed, it is the settled position of the law that a witness 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 therefore be regarded as being of any importance in the light of his previous contradictory statement unless he is able to give a reasonable explanation for the contradictions. The principle applies whether or not the previous contradictory statement was made by the witness at his own trial or otherwise. See: ***The State v Otchere [1963] 2 GLR 463***. See also: ***Gyabaa v R [1984-86] 2 GLR 461***.

It is peculiarly important to observe that when PW1 was given the opportunity to clear the doubts or inconsistencies in his prior statements he rather said he did not tell the Police the contents of those statements he made. Put differently, he did not make those statements or perhaps bordering on who killed his brother. To further buttress the point, I refer to some answers he gave under cross-examination as follows:

"Q. How many times was your brother stabbed

A. My Lord once

Q. Meaning apart from A4 who you allegedly stabbed your brother none of the accused persons did stab your brother

A. My Lord it was A4 who stabbed him and A2 was the one who held my brother and as he pulled his shirt A4 brought out a knife and stabbed him.

……

Q. Which part of your brother's body was stabbed

A. My Lord he was stabbed under his left breast.

……..”

*See: **pp 31-32 [roa]***

Now, under further cross-examination, PW1 offered this evidence in reaction to some questions asked him:

“Q. In Exhibit 1, the statement you gave to the Police you said A1 stabbed your brother in the ribs.

A. My Lord I did not say anything like that to the Police

Q. Again in that same Exhibit 1, you said Tawia, A2 also removed the same knife from the wound of your brother and stabbed him at the same place for the second time and he died.

A. My Lord I did not say so. I said it was A4 who stabbed my brother and A2 held him and it was during that process that my brother pulled his shirt and A4 stabbed him.

……....

See: ***p. 36 [roa].***

Then at ***p. 38 [roa]*** answering questions on **Exhibits 2 & 3,** PW1 reacted:

“*Q. Mr Bosomtwi, you told the Police in Exhibit 2 that your brother was stabbed in the right chest*

A. My Lord I did not say that to the Police and I did not agree with him.

Q. Whilst in Exhibit 3 you told the Police that your brother was stabbed in the left chest but in Exhibit 2 you said it was the right.

A. My Lord I told the Investigator that it was on his left and the Investigator himself went there to snap some pictures and saw it by himself. What I said was once."

As observed elsewhere in this judgment, when in the witness box the witness instead offering an explanation to clear any doubts of inconsistencies in the statements he had earlier given to the Police, PW1 rather denied making those statements to the Police. But these statements, **Exhibits 1, 2 & 3** were tendered through him by the defence without any objection from the Prosecution. PW1 could not avoid the effect of a prior inconsistent statement by the simple expedient of denial. As a general rule, a previous statement a person makes to the Police that is in distinct conflict with his evidence on oath was always admissible to discredit or contradict him and it would be presumed that the evidence on oath was false unless he gave a satisfactory explanation of the prior inconsistent statement. That witness could not avoid the effect of a prior inconsistent statement by the simple expedient of denial. See: ***Yaro v R [1979] GLR 10***.

In view of the inconsistencies in the statements of PW1, particularly in Exhibits 1 and 2 as regards how many stabs were inflicted on the deceased and which stab rather killed him; whether the stab was on ribs or the knife penetrated the left or the right chest of the deceased under his breast, exposed PW1 as an incredible witness. To that extent, I do agree with the submissions of learned Counsel for the appellant that there was a non-direction by the learned trial judge to the jury as to the legal effect of those material inconsistencies. Admittedly, the learned trial judge drew the attention of the jury to the inconsistencies but I hold the respectful view that he should have gone further to explain that by law, those material inconsistencies in the evidence of the eye witness account raised serious doubts in the case of the Prosecution as to who actually killed the deceased. Being serious doubt, it ought to have inured in favour of the appellant and in consequence, for the jury to have returned a verdict of not guilty.

In view of the inconsistencies in the evidence of PW1 it is my respectful opinion that it was necessary for his evidence to have been corroborated. As a general rule, corroboration is not necessary in law. Thus, a court can convict on the evidence of one witness provided he is found credible. See: ***Commissioner of Police v Ameyaw [1962] 2 GLR 162***. See also: R ***v Asafu-Adjaye (No.2) [1968] 567 C/A***.

However, I think it would have been better served if the Prosecution in the instant case called some other person[s] as witnesses to strengthen their case. This is because PW1 in his evidence said there were many people at the scene of the time of the incident. I conclude, therefore, there is a

serious doubt as to whether it was the appellant or A2, Nicholas Tawia Asante that killed the deceased on that fateful day.

That leads me to addressing the evidence of the Police Investigator and the medical autopsy report he tendered in evidence.

It is noted on record that Counsel for the appellant rightly objected to the tendering of the report on grounds that it was not the Police Investigator that issued it and therefore cannot speak to it. However, the objection was not upheld thus, the report was received in evidence as **Exhibit A.** Having received it in evidence the learned trial judge had the duty to address the jury on the effect in law of the failure of the pathologist that saw and examined the body of the deceased and issued the autopsy report to have mounted the witness box to defend it and be subjected to cross-examination on the report. In ***Agyeman v R [1968] GLR 1004*** after PW1 had completed his evidence the trial circuit judge referred to a medical certificate and recorded that the accused had been certified by a medical officer as fit to plead to the charge he was facing at the trial without the Prosecution called upon to produce the medical officer to be cross-examined on his report. Upon appeal, the court held that it was insufficient for the court to rely on a medical certificate issued by the medical officer or the oral evidence of the prosecution to convict the accused.

Emphasizing that the medical officer ought to have mounted the witness box to defend his report, the court held further:

> "*The medical officer who issued the certificate must give oral evidence on oath from the witness-box and be subjected to cross-examination. A mere reference to a medical certificate*

without taking the oral evidence of the medical officer given on oath rendered the whole trial null and void."

Failure to call the medical officer, Dr Lawrence Adusei who issued the report, **Exhibit A** in our present case was fatal to the Prosecution's case as it was plainly obvious from the evidence that the Police Investigator was unable to satisfactorily answer questions on it. **Exhibit A** only stated **"stab".** Whether it was a dagger/knife which was used was never disclosed in the report. According to the report, in the medical officer's opinion was that:

"*the death was due to left pneumo haemothorax from stab chest injury an unnatural cause".*

The report fell short of saying it was the knife in contention that was used in drawing the blood of the deceased.

It has not been explained with any degree of certainty why the prosecution never tendered the knife in evidence although the Police Investigator in his evidence told the coiurt and jury that he visited the crime scene. If he did retrieve a blood cutlass at the crime scene why not the knife/dagger. The blood stained cutlass was listed it on the B.I to be tendered in evidence. For unexplained reasons, that blood stained cutlass was also never tendered in evidence. Cumulatively, the absence of these material evidence rendered the prosecution's case so unworthy of credit that reliance on it by the jury to find the appellant herein guilty for murder and convicted accordingly has occasioned a grave miscarriage of justice to the appellant.

Overall, I am satisfied upon the review of the evidence led on record that the case of Prosecution was riddled with inconsistencies, contradictions and the learned trial judge, to a very large extent misdirected or non-directed the jury on the consistencies and fatality of the Prosecution's case. The end result was the return of the verdict of guilty of murder and conspiracy to murder which to all intents and purpose, were error in fact and in law. The evidence by the prosecution was so weak that any reasonable trier of fact or tribunal minded to do justice in the matter could not safely convict on it.

The Court of Appeal differently constituted had earlier seriously and exhaustively considered the evidence led on record and I do agree with the conclusion that there were too many loose ends in the prosecution's case and therefore, unsafe to sustain the convictions and guilt of the accused on the charges of conspiracy to murder. In the final analysis, the appeal was allowed and the convictions set aside. It will be superfluous to recite the same facts and consider the evidence only to come to same conclusion that based on the weak evidence of the prosecution and the inconsistencies in the evidence of the witnesses, particularly the star witness, PW1 the evidence cannot sustain the appellant's conviction of conspiracy to murder and murder. I will also add my voice that the Police Investigator never did a good job. This being a murder trial, he ought to have a proper and thorough investigation and meticulous job. He abdicated his duty and assumed that the autopsy report would do the saving trick for him.

Finally, I need to remark that it was possible that the appellant might have been spotted at the scene and during the time of the incident.

Nevertheless, having regard to the unreliable nature of the evidence of the prosecution "*it is better to let the crime of a guilty person go unpunished than to condemn the innocent person"*.

The doctrine which is claimed dates back to Roman law and ascribed in 1769 to William Blackstone but re-echoed by the United States Supreme Court in 1895 has been incessantly applied by the common law courts that "it is better to let the crime of a guilty person go unpunished than to condemn the innocent."

The appeal therefore succeeds and is hereby allowed. The verdict of the jury finding the appellant guilty of conspiracy to murder and murder is hereby set aside. Consequently, the appellant is acquitted and discharged on both counts of conspiracy to murder and murder.

sgd

P. BRIGHT MENSAH

(JUSTICE OF APPEAL)

sgd

I agree **MARGARET WELBOURNE**

(JUSTICE OF APPEAL)

sgd

I also agree **ERIC KYEI BAFFOUR**

(JUSTICE OF APPEAL)

Counsel

SETH AWERE-OPANYINYENA FOR RESPONDENT

K. ADJEI –LARTEY FOR APPELLANT