IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA. A. D. 2023

CORAM:

JUSTICE CECILIA SOWAH (MRS.) J. A. (PRESIDING)

JUSTICE ANTHONY OPPONG (MR.) J.A.

JUSTICE KWEKU ACKAAH-BOAFO (MR.) J.A

SUIT NO: H2/12/2022

20TH APRIL, 2023

EDWARD KOTEY ALIAS NIIQUAYE ------- ACCUSED/APPELLANT

VERSUS

THE REPUBLIC ------- RESPONDENT

J U D G M E N T

Ackaah-Boafo, JA

i. Overview:

[1] My Lords, the matter before us involves the Appellant, who was the second Accused Person in the case heard by the High Court, Accra. The Appellant was charged

with abetment of crime, to wit: defrauding by false pretences contrary to *Sections 20(1) and 131 of the Criminal and Other Offences Act, 1960, Act 29.* The particulars of the offence stated that the Appellant on or about 6 November, 2015 at North Kaneshie, Accra in the Greater Accra Region, with intent to defraud, aided Kofi Owusu Hayford with Toyota Rav 4, 2010 model and obtained the consent of Prince Owusu Amankwah to part with GH₵50,000.00 being part payment of the Toyota Rav 4, 2010 model representing that he will sell the said vehicle to him, which statement he knew at the time of making it to be false. Kofi Owusu Hayford was the 1st accused at trial. Though he started the trial, he failed to attend court in the course of the trial

[2] In her reasons for judgment, the trial High Court judge preferred the version of the events given by the prosecution witnesses including the police investigation officer, dismissed the Appellant's evidence and arguments based on the evidence proffered, and convicted the Appellant of the offence of abetment of crime and sentenced him to 6 years IHL. The Appellant appeals against his conviction and sentence.

ii. Background:

[3] The salient facts of the case were that the Appellant was a dealer in used cars at North Kaneshie and sometime in 2015 he received a 2010 model of Toyota Rav 4 from the United States to sell. The complainant, one Prince Owusu Amankwah's uncle who lives at Obuasi expressed a desire to purchase a Toyota Rav 4, a 2010 model. According to the complainant, he saw a Rav 4, 2010 model advertised on a website called Tonaton.com and spoke with someone he believes is one of the accused persons on telephone on November 3, 2015 and was informed the vehicle is selling at a price of GH₵60,000.00. According to the complainant, the person he spoke with agreed to send the car through his errand boys to Capital Court Hotel, North Kaneshie for him to verify and same was done. He said he took photographs of the vehicle and sent same to his uncle who agreed to buy the vehicle.

[4] According to the Complainant, the following day he went to inspect the vehicle with his mechanic at the same venue and met an errand boy called Raymond. The complainant said on November 6, 2015 his uncle sent to him an amount of GH₵50,000.00 as part payment for the vehicle. The same day, according to the complainant one of the accused persons asked him to meet him at the premises of the National Investment Bank (NIB), North Kaneshie branch, the next day and he did. According to the evidence at the NIB, the 1st accused, Kofi Owusu Hayford came out of the banking hall and the complainant handed over the money to him and the documents (in the name of Edward Kotey) covering the Toyota Rav 4 2010 model vehicle, white colour was then handed over to the complainant. The Appellant was in the vehicle in the area at the time the payment was made.

[5] After the payment of the money, the complainant and the said errand boy, Raymond, went to a house said to be for the 1st accused to ostensibly collect two passport size photographs of the 1st accused in a taxi cab. According to the complainant, the taxi cab was asked to park in front of a house and Raymond went inside the house but never returned to the taxi and the complainant did not find him in the house when he followed up and so he returned to the Capital Court Hotel, North Kaneshie but did not find the vehicle which was present when the money was paid. The complainant said he called the 1st accused's telephone number and that of Raymond several times but their telephones were switched off.

[6] A complaint was made to the police at the Kaneshie police station. On 14 November, 2015 the Appellant herein was arrested by the police with the vehicle, the Toyota Rav 4 2010 model with chassis number 2T3BF4DVXAW077766 bearing the name of Edward Kotey alias Niiquaye. The 1st accused, Kofi Owusu Hayford, was later arrested by the Kaneshie police because he was involved in another fraud matter and was in custody at the Mile 7 Police station. Upon his arrest, cautioned statements were taken from both the 1st accused and the Appellant. In his cautioned statement, the 1st

accused admitted collecting the GH₵50,000.00 from the complainant.

[7] Upon arrest, the Appellant, in his cautioned statement which is at pages 47 to 51 of the Record of Appeal (ROA), said he is a dealer in used cars and received a 2010 model Rav 4 to sell from the United States. He said he put "For Sale" notice with a telephone number on the vehicle. He said sometime in October 2015, he received a telephone call from a gentleman who informed him that he had seen the vehicle and wanted to meet up with him. The Appellant said he went to where the vehicle was and met two people who introduced themselves as Mr. Nice and Yeboah who said they are car dealers themselves. He said they informed him that they had a customer who wanted a Toyota Rav 4 to buy and they will act as his agents for purposes of the sale. According to him, they enquired about the purchase price and he informed them that it was GH₵85,000.00. He said they bargained and he agreed on GH₵78,000.00. He said the individuals informed him they will sell to the prospective purchaser at GH₵85,000.00 and give him GH₵80,000.00 and keep the GH₵5,000.00 as their commission.

[8] The Appellant said he was subsequently called by the Mr. Nice who asked him to send the vehicle to the Capital Court Hotel to enable the prospective purchaser to inspect the vehicle. The Appellant said he took the vehicle and met Mr. Yeboah, one of the individuals who met him earlier and the complainant in this case. He said he did not talk to the complainant who took photographs of the vehicle. He said Yeboah did all the talking and the complainant promised to bring a mechanic the next day to inspect the vehicle and he did the next day as promised.

[9] The Appellant further said the next day, the Mr. Nice called him to inform him that the complainant was interested in buying the vehicle but wanted to find out whether the appropriate duty had been paid and therefore requested for copies of the custom clearance documents. The Appellant says the original of the documents were with a friend called Bismark from whom he borrowed money to pay the duty. He therefore asked Bismark to send a copy of the documents to Mr. Nice and same was

done. The Appellant further said, the next day he received another call from Mr. Nice that the prospective purchaser was ready to pay for the vehicle and therefore he should drive same to the Capital Court Hotel for the payment by the buyer.

[10] The Appellant said he drove the vehicle to the Capital Court Hotel and met Yeboah and the said buyer. The Appellant said Yeboah had discussions with the buyer but they did not speak to him and they walked away. He said he called Mr. Nice to find out if the buyer was no longer interested in the vehicle but was asked to drive the vehicle home and he will be contacted. The Appellant said after waiting for a while he made a telephone call to Yeboah but there was no response. Further calls to Mr. Nice and Yeboah did not go through. According to the Appellant, the following week he continued to park the vehicle at the location (hotel) where he had previously parked because he realized that the buyer, Mr. Nice and Yeboah were not coming. He was arrested at the same location where he parked the vehicle by the police. He was later charged for the offences referred to supra.

[11] As indicated above, after trial, the High Court on June 2, 2021 convicted the Appellant on the charge of abetment and sentenced him to six years imprisonment with hard labour (IHL). The Appellant, dissatisfied with the conviction and sentence, has filed the instant appeal before us. The original Notice of Appeal is at pages 213-214 of the ROA. Further to leave granted by this Court on June 27, 2022, an Amended Notice of Appeal was filed on June 29, 2022 setting out two main grounds.

iii. Grounds of Appeal:

[12] The two grounds of appeal set out in the amended Notice of Appeal are as follows:

> ***"1. The learned trial judge erred in law and on the facts in convicting the Accused person on the charge of aiding and abetting; and***
>
> ***2. The judgment of the court is unreasonable and cannot be supported***

by the evidence on record.

Particulars of Error of Law

i. That in the Honourable Court's evaluation of the evidence, she completely mis-stated the facts of the case as testified to in court, ignored all the evidence in rebuttal of the prosecution's allegations even though some of the evidence were corroborated by the prosecution's own witness and stated her conclusion as if no evidence was led by the defence on crucial elements in allegations made against the Accused.

ii. That the Prosecution did not prove the intention of the accused to defraud the Complainant and neither did they prove his consent for the Complainant to part with GH₵50,000.00 to A1.

iii. That the learned trial judge convicted the Accused person on her personal opinion of what she thinks happened when there was no evidence to lead her to that conclusion and ignored the evidence to the contrary on the record".

[13] From the nature of the grounds of appeal, it is clear that the Appellant is challenging the holding of the trial court in regards to the conviction and the sentence imposed. To the Appellant, the trial judge was wrong with her analysis of the facts and application of the law. He contends that the trial judge ignored the evidence proffered by the Prosecution witness and the Appellant and rather applied her personal opinion of the facts.

[14] It is trite that where the Appellant in a criminal case alleges in his notice of appeal that the judgment is unreasonable or cannot be supported having regard to the evidence, it is incumbent on an appellate court to analyse the entire record of appeal so

as to satisfy itself that taking into account the testimonies and the documentary evidence the prosecution proved its case beyond reasonable doubt and the conclusions of the judge are reasonable and supported by the evidence. In effect the criminal appeal, like a civil appeal with similar ground of appeal is by way of rehearing. See **Dexter Johnson. v. The Republic [2011] SCGLR 601.** It is also noted that having set out the ground of appeal under discussion, the onus is on the Appellant to satisfy the appellate court that the judgment is indeed unreasonable having regard to the evidence.

Ground 1 of the Notice of Appeal:

Appellant's Counsel's Submission:

[15] Counsel for the Appellant began his submission on this ground by stating the well-known principle that in every criminal trial, the burden of proof is on the prosecution to prove the guilt of the accused beyond reasonable doubt. He referred to Sections 11(2) and 13(1) of the Evidence Act, NRCD 323, 1975 and such decisions as **Brempong II v. The Republic (1995-96) 1 GLR 350** to support the submission. Counsel also referred to the case of **Asare v. The Republic [1978] GLR 193** to argue that there was no burden on the accused to establish his innocence but rather, it is the prosecution which has the onus to prove the guilt of the accused beyond reasonable doubt. Learned Counsel argued that the effect of the cases referred to is that the prosecution bears the burden to prove the guilt of the accused at all times and so "it will not matter the manner in which the case of the accused person is conducted, the evidence that is led by the prosecution must prove to one conclusion that, the person accused of the crime is the one who committed it and no one else".

[16] Counsel for the Appellant next referred to Sections 20(1) and 131 of the Criminal Offences Act, 1960 (Act 29), which deal with the charges of Abetment and Defrauding by False Pretences. Proceeding further, Counsel basing himself on the old case of **In R v. Grey (1917) Cr. App. R 244 at 246,** submitted that "a person could only be convicted –

apart from special exceptions – as an aider and abettor if he knew all the circumstances which constituted the offence. Whether he realized that those circumstances contained an offence was immaterial. If he knew all the circumstances and they constituted an offence and he helped in the actions which constitutes the offence that was enough to convict him of being an aider and abettor". Counsel also referred to the writings of *P.K. Twumasi's book, Criminal Law in Ghana at pages 98 – 100* to support his submission.

[17] Learned Counsel also referred to the case of **Commissioner of Police v. Sarpey & Nyamekye [1961] GLR (PT 11) 756 SC @758** and the statement of Sarkodee-Addo, JSC that;

> "In order to convict a person of aiding and abetting it is incumbent on the prosecution to prove that the accused did any one of the acts mentioned in subsection (1) of Section 20 of (Act 29). Under subsection (2) a person who abets a crime shall be guilty if the crime is actually committed
>
> (a) In pursuance of abetment, that is to say, before the commission and in the presence or absence of the abettor and
>
> (b) During the continuance of the abetment, that is to say, the abetment must be contemporaneous in place, time and circumstances with the commission of the offence, in our view, an act constituting an abetment in law must precede or it must be done at the very time when the offence is committed".

[18] Applying the law to the facts and disagreeing with the holding of the court below, Counsel submitted that it was incumbent on the prosecution to prove that the Appellant in fact acted in a positive manner to have aided, encouraged, facilitated or assisted the 1st Accused, Kofi Owusu Hayford in the commission of the crime. In this case, Counsel referred to page 109 of the ROA, where PW1 (the complainant) said he did not meet the Appellant until November 6, 2015 when he went to make the payment. Counsel further submitted that in this case, it was never proven that the Appellant was

aware of any discussion between the 1st Accused and the complainant. Counsel next submitted that PW1 admitted (at page 104 of the ROA) that he did not call the telephone number displayed on the vehicle with the sign "For Sale". Counsel submitted that the evidence showed that the complainant, PW1 was all along speaking with another person rather than the Appellant.

[19] Counsel next submitted that the Appellant was never proven to have been aware of any discussion that may have taken place between the 1st Accused and the complainant. Counsel contended further that the "Appellant's presence by the car is not conclusive evidence of knowledge of the conduct of 1st Accused person as he is, by the evidence, the owner of the car" and had every right to be present whenever anyone came around. Learned Counsel also stated that the Appellant did not act in anyway "overtly or covertly" with regards to the dealings of the complainant and the 1st Accused person. The further submission of Counsel was that at all material times the Appellant remained in his car and did not speak with PW1 on any occasion. He also referred to the evidence of the investigator (PW3) at page 103 of the ROA where he testified that the 1st Accused denied knowledge of the Appellant when he was arrested and admitted receiving the money from the complainant.

[20] Counsel referred to other aspects of the ROA to submit that the Prosecution failed to establish any connection whatsoever between the Appellant and the 1st Accused person. Substantiating what constitutes the error of law, Counsel submitted that on the offence of abetment, the prosecution had to prove the *mens rea* i.e., the intention of the Appellant but failed. Counsel submitted that the prosecution's case was that the Appellant's car was the medium to lure PW1 into believing a certain state of fact because he was present when PW1 on two occasions transacted business with the 1st Accused person. Counsel submitted that the presence of the Appellant by itself was inconclusive of an intention to abet the 1st Accused person because there is no evidence that he had knowledge of the dealings which took place. It was submitted that his mere

presence did not make him abettor of the 1st Accused because there was no evidence that he communicated with him. Based on the above and other arguments captured in the written submission, Counsel prayed the Court to overturn the judgment.

Respondent's Counsel's Submission:

[21] The mainstay of the argument of the learned State Attorney for the Republic is that the learned judge did not err because the Appellant aided the 1st Accused because "had A2 not aided or abetted 1st Accused with the white Toyota Rav 4, 2010 model vehicle, accused could not have succeeded in collecting the GH₵50,000.00 from the complainant (PW1)". He reiterated that "an act constituting abetment of a crime must precede it or must be done at the very time when the offence is committed". In this case it was further submitted that "the testimonies of PW1, PW2 and PW3 established the fact that A2's act of exhibiting the White Toyota Rav 4, 2010 model on several occasions to PW1 that the said vehicle was for sale and this was indeed false representation" convinced the complainant to part with GH₵50,000.00 to A1 at the National Investment Bank on November 6, 2015. According to counsel, the Appellant's conduct before and during the commission of the crime enabled the 1st Accused person to defraud the complainant.

[22] Counsel next referred to the evidence of the prosecution witnesses (from pages 9 to 19) of the written submission filed to say the prosecution witnesses were credible and therefore the trial judge did not err. At page 19 of the submission, counsel referred to pages 135 – 139 of the ROA, where the Appellant's cross-examination evidence at trial is recorded to submit that looking at the evidence, the Appellant "cannot say he does not know Mr. Nice. In fact, he spoke to the so-called Mr. Nice all throughout the transaction from the beginning to its execution. He was complicit and seriously involved". Counsel further submitted that the Appellant knew the 1st Accused person and aided him to defraud the complainant but trying hard to disassociate himself from him. Counsel

further submitted "we do not expect to see the sharing of the money before we can say A2 partook in it. It is inferred. The society cannot be safe if we accepted this kind of fanciful probabilities canvassed by the 2nd accused person. His defence cannot be reasonably probable in the least considering his role in the entire controversy".

[23] Learned Counsel further argued that "it is trite learning that the guilt of the accused could be established either by a direct evidence, where the same is available, or by an indirect which is sometimes called circumstantial evidence". In this case, counsel implored the court to conclude that based on all of the circumstances, the Appellant's intention should be inferred. Arguing further, Counsel submitted that *"Respectfully my Lords, the following authorities will further buttress the judgment of the trial judge in the* ***FRIMPONG ALIAS IBOMAN VRS THE REPUBLIC [2010] SCGLR 870 @314 (sic)*** *said "…crime is always investigated after the crime has been committed. However, during investigations, the police are able to put strings of activities and draw the necessary inferences and conclusions. Some of the evidence might be direct and therefore quite conclusive. But others might be indirect and referred to as circumstantial evidence as apart from the accused there might not be any living eye witness of the crime. But courts of law will not throw their hands in despair only because there is no other eye witness account of the crime. This is the relevance and importance of circumstantial evidence which can be used to put together very strong credible case capable of securing conviction for the prosecution".* Based on the above, Counsel submitted that the evidence showed that the Appellant is the owner of the Toyota Rav 4, 2010 model and it is the presentation of same that enabled the complainant to part with the money to the 1st Accused.

[24] Proceeding further on this ground of appeal, learned counsel submitted that the Appellant presented himself to the complainant as the "errand boy" of the 1st Accused and "told the complainant and his uncle that the price negotiation should be done with the person who has been speaking to them about the sale of the car because he was the owner and they are only his errand boys". Again, according to Counsel, by that act the

Appellant aided the complainant to part with the money to the 1st Accused. Counsel further submitted that if indeed the Appellant was not part of the crime, then as the owner of the vehicle, knowing that someone wanted to purchase, he would have been happy to receive the money personally and not to rely on a "stranger". The behaviour of the Appellant, according to Counsel shows his intent to defraud the complainant and therefore his position is not true and same should be rejected by the court. In support of his argument, Counsel referred the court to such cases as **Nagode v. The Republic (2011) 2 SCGLR 975, Afful v. Okyere, and Karim v. Republic [2003-2004] SCGLR 812 AND Bonsu Alias Benjilo v. The Republic [1997-1998] GLR.** Counsel submitted that the "trial judge delivered a reasoned judgment well-grounded in law and facts and did not err in law and facts as claimed by the Appellant".

iv. Applying the Law and Analysis:

[25] As stated from the outset, the Appellant was charged with "Abetment of Crime, namely defrauding by false pretences contrary to sections 20(1) and 131 of the Criminal Code and Other Offences Act of 1960 (Act 29)". See pages 185 - 212 of the ROA being the judgment. At page 211 of the ROA, the Court stated "I do find as a fact that the 2nd accused person did aid and abet with A1 to defraud the complainant of the sum of GH₵50,000.00. I have also said the offence of defrauding by false pretences has been established by the prosecution. Therefore, the 2nd accused is found guilty of the offence of abetment of crime. He is convicted accordingly. He is sentenced to 6 years IHL on count 1".

[26] Now, what is the applicable law in respect of the charges the Appellant was convicted for and sentenced? As stated by the trial judge, the applicable sections of the law are Sections 20(1) and 131 of the Criminal Offences Act, 1960 (Act 29). The Prosecution provided the particulars of the offences in Count 1 and 2 of the Charge Sheet. See pages 94 and 95 of the ROA. For purposes of clarity, I hereby set out the law.

Section 20(1) of Act 29 provides that:

> *"A person who directly or indirectly, instigates, commands, counsel, procures, solicits, or in any other manner purposely aids, facilitate encourages or promotes, whether by a personal act or presence or otherwise and a person who does an act for the purposes of aiding, facilitating encouraging or promoting the commission of a criminal offence by any other person whether known or unknown certain or uncertain, commits the criminal offence of abetting that criminal offence and of abetting the other person in respect of that criminal offence"*

[27] The learned author, and now a jurist, Prof H.J.A.N Mensah-Bonsu in her book the General Part of Criminal Law – A Ghanaian Handbook Vol 2 at page 489 speaking on Inchoate Offences (II) Accessorial Liability in relation to abetment explains the crime of abetment as follow:

> *"The crime of abetment is committed when a person renders assistance to another for the purpose of committing a crime, and thereby makes a contribution to the doing of a criminal act. At the inception of the commission of an offence, various actors may be involved although only one person i.e. the principal may be found to have actually performed the actus reus of the offence. Such a person, i.e., the principal actor would be punished for that activity. Such punishment would however, not affect those who actually may have made the commission of the offence possible. Therefore, without the rules on the liability of accessories, all such important personalities in the criminal enterprise would escape punishment. For instance, in a scheme to rob a bank, there would be several participants, i.e. the master-brain who devised the whole scheme; the insider who provided information vital to the robbery; the person who provided the plans of the premises to be robbed; the carpenter who manufactured the special ladder to be used, the driver of the get-away car;*

the watchman who agreed to be absent on that day to facilitate the operation; the look-out whose job it was to ensure that the principals would be warned if the police approached the scene; and those who purported to provide the spiritual strength to the scheme such as the pastor or jujuman or mallam who blessed the scheme or provided potions to guarantee the success of the scheme; all of whom would be linked by common design to commit one crime. Rules on accessorial liability thus ensure that each of these people would be liable for the assistance rendered, for perhaps, without their individual contributions, the principals may never have attempted the crime".

[28] The learned author at pages 490-491 further states that;

"This is a long list of acts that could render one an accessory to a crime. As long as one shares the mens rea of the offence, no act is harmless if done to further the objects of the criminal enterprise."

What the above means is that, to be successful, the prosecution had to prove that the 2nd Accused person, the Appellant herein, directly or indirectly did by way of instigation, commanding, counselling, procuring, soliciting or in any manner rendered assistance by way of purposely aiding, or facilitating, encouraging or promoting whether by personal act or presence facilitated promoted or aided the commission of the crime of defrauding by false pretence by the A1, that is Kofi Owusu Hayford.

[29] In my opinion, for the prosecution to have proved its case against the Appellant, it had to establish that the Appellant shared the *mens rea* of the offence with the 1st Accused. The prosecution had to prove that the Appellant as an aider or abettor, intended to assist or encourage the 1st Accused to defraud the complainant. This is because an accused can only intend to assist or encourage in the commission of a crime if he knows which crime the perpetrator intends to commit. Therefore, the prosecution

must prove that the Appellant knew that the A1 intended to commit the crime of defrauding by false pretences.

[30] The learned author Dennis Dominic Adjei in his book1 states at page 63 that "intent, in all cases, is the yardstick for which criminal offences are measured". He continues that "The intention of the person who is alleged to have committed crime shall be proved, else the charge should fail. Proof of the intention of an accused person is material in all criminal cases except where the enactment creating the criminal offence provides otherwise". [Emphasis Mine]. See **R v Gyamfi [1960] GLR 45, CA.**

[31] It is noted that Section 11 of Act 29 contains elaborate definitions of "intention" which a court is expected to apply to cases before it. The Section 11 defines intention in five different ways. For instance Section 11(1) gives intention its ordinary or basic meaning that an accused did the act for the purpose of thereby causing or contributing to cause the event proscribed or prohibited by the law: that is, that the accused desired the consequence caused by his act. Section 11(2) of Act 29 also defines intention as a foresight of consequence:

> *"If, a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this Code, although he does not do the act for the purpose of causing or of contributing to cause the event."*

In other words, although he did not desire the consequence, he will be deemed to have intended to cause it if he believed or foresaw that his act would probably cause or contribute to cause the event. Under this subsection, a person cannot be held to have intended to aid the commission of a crime unless he was conscious that his act was likely to lead to the commission of the alleged crime.

1 Contemporary Criminal Law in Ghana, April 2017 – Printed by G-Pak Limited

[32] The above position of the law was applied in the case of **Akorful v The State [1963] 2 GLR 371**, SC, where the Supreme Court emphasised the subjective element in the definition of intention in murder. Azu Crabbe JSC said at 375:

> *"Before a prisoner can be convicted of murder he must be found to have had a real or wicked intention to kill or it must be found that the circumstances were such that he was aware that the result of his act would be death.*

While the charge in *the Akorful case* was murder, in my view the principle about the need to prove intention before an accused could be convicted of an offence is the same.

[33] One common strand from the above discussion is that the prosecution had the onus to prove that the Appellant had the intention to assist and encourage A1, Kofi Owusu Hayford to defraud the complainant. From the ROA, the trial judge's reasons with respect to the intention of the Appellant were confined to two main paragraphs at page 206 of the record of appeal (ROA). At pages 206 – 207. At paragraph 2 (page 206), she wrote:

> "A2 aided the 1st accused person, Kofi Owusu Hayford by giving him his White Toyota Rav4 and representing same as something ready to be sold by any prospective purchaser. Not only did A2 offer his Toyota Rav4, he also gave the car documents of his White Toyota Rav4 to A1 in order to convince the complainant that the representation made to him to sell the Toyota Rav.4 was true".

[34] At the last paragraph of pages 206 - 207 of the ROA, the court after discussing how the vehicle was sent to the Capital Court Hotel at Kaneshie on the day the complainant made the payment and why the Appellant did not collect the money himself, as the owner of the vehicle further stated:

> "It therefore sounds right that the money for payment of the car should be received by that owner i.e. A2, and not A1. Of what interest does 1st accused

have to collect the proceeds of the car? This shows their **intent to defraud** the complainant. After all the initial encounter with the complainant, A2 ought to have followed and dealt with the complainant directly and not through so-called Mr. Nice. Clearly the two were on a mission to dupe the complainant big time". [Emphasis Mine].

[35] Having reviewed the ROA, in my view, the trial judge's finding of intent of the Appellant is flawed and unreasonable. I agree with Counsel for the Appellant's submission that the mere presence of the Appellant with the Toyota Rav. 4, 2010 model at the Capital Court Hotel alone is not enough to establish his intention to aid the 1st Accused to defraud the complainant. Further, in my respectful opinion, that the money was received by A1 or the so-called Mr. Nice (this could actually be two personalities as discussed further below) does not unequivocally lead to a conclusion that there was a meeting of minds between A1 and the Appellant to defraud the complainant. Nor does the failure of the Appellant "to have followed and dealt with the complainant directly and not through so-called Mr. Nice" lead inexorably to a conclusion of an intent on his part to defraud the Complainant. Also, in my respectful opinion the statement of the trial judge that the Appellant "gave the car documents of his White Toyota Rav4 to A1" is simplistic and does not represent the true evidence presented by the Appellant. What this provokes is the question of an intent to defraud between A1 and Mr. Yeboah but to my mind, the Appellant like the complainant is a victim of fraud by the 1st Accused person and not his aider or abettor. In my view that the Appellant's evidence which was consistent from his cautioned statement, same of which was adopted when he was charged and repeated at trial is plausible, reasonable and believable. There is an air of reality to it and therefore the court's dismissal of same in my opinion is not justified.

[36] The Court at page 200 of the ROA states the Appellant's evidence. He told the Court as to how he was approached by two individuals, Mr. Yeboah and Nice who introduced themselves as car dealers who had been approached by someone to

purchase a Toyota Rav 4, 2010 model. He explained how he negotiated the price with them and how he was asked to drive the car to the Capital Court Hotel for the prospective buyer to see the vehicle, initially by taking photographs and later inspected by a mechanic. Contrary to the conclusion of the court, the evidence does not support the conclusion that the Appellant gave the documents of the vehicle to A1. The evidence of the Appellant at page 132 of the ROA was that;

> "On Thursday, around 2:00pm, I received a call from Mr. Nice and he told me they were interested in buying the car so I should send them a copy of the custom clearance levy and also a receipt indicating I had paid all the necessary duties. I made him understand that I borrowed money from someone to be able to clear the car so the documents covering the car were in the possession of that man; I therefore needed to speak to that man first. Mr. Nice then gave me a number and said if the man agreed, we should send photos of the documents to that number on WhatsApp….So, I gave the number to the man I borrowed money from (Mr. Bismark) and he sent the photos to Mr. Nice on WhatsApp".

[37] The above narrative describes how the documents of the vehicle, got to A1 as can be inferred. To therefore conclude that the Appellant gave the documents to A1 to enable him defraud the complainant is not accurate based on the evidence. In any case, the documents received by A1 were doctored as the evidence established, even though the Court held otherwise. I shall later touch on that.

[38] The evidence further established that upon arrest, A1 informed the police, when he was questioned that he did not know the Appellant. And so how can one aid and abet someone he did not know? At **page 123** of the ROA, the following is a snippet of the evidence when Counsel for the Appellant cross-examined Detective Inspector Robert Mensah Tenge on July 40, 2020:

> "**Q**: When you arrested A1 and sent him to the police station, <u>did you have the opportunity to interrogate A1 and A2 at the station at the same time</u>?

A: Yes I did.

Q: In the course of the interrogation did A1 disclose to you knowledge of A2?

A: In the course of the interrogation at the Police station A1 mentioned to me and the officers present that he does not know A2 anywhere. However, according to A1, at the Capital Court Hotel where A2 met with PW1, he A1 was present but never showed his identity to A2 so the two did not speak to each other".

[39] The evidence also established that the complainant did not at any time speak with the Appellant despite describing him as an errand boy of the 1st accused. For instance, on the day the complainant made the payment, he conceded that he did not speak with the Appellant. On March 18, 2020 when the complainant was further cross-examined, the followed evidence was elicited as recorded at **page 108** of the ROA:

"Q: On the day you went to pay for the car, did you go near the car or speak to A2?

A: I went near the car and I saw A2 and the other errand boy in the car. I never spoke with A2.

Q: Do you realize that if you had called the number on display with the "for sale" sign or asked A2 his name, you could have asked yourself from being defrauded?

A: As I said, as I was already in contact with A1 and he was telling me the car belonged to him and that A2 and the other errand boy do those errands for him".

Again, I am of the view that the court's conclusion that the Appellant's defence "cannot be reasonably probable in the least considering his role in the entire controversy" is rather unreasonable. The bases for the trial court's conclusion of the Appellant's intention to abet the 1st Accused, is undermined by the above evidence.

[40] The Learned state Attorney, representing the state, in his written submission referred to the fact that the Appellant is the owner of the Toyota Rav.4, 2010 model and stated that his decision to drive the vehicle to the Capital Court Hotel and not collecting the purchase price personally from the complainant aided A1 to defraud the complainant. He therefore implored the court to draw an inference that the Appellant intended to aid and abet A1 based on all of the circumstances of the case.

[41] Having reviewed the ROA, I am of the respectful view that Counsel's invitation to the court to draw an inference of the Appellant's intention to aid and abet the A1 to defraud the complaint is not based on the law2. A conviction for a criminal offence should not be based on such an inference, conjecture and speculation. The facts relied on by learned Counsel, with due deference to him and accepted by the court, are based on conjecture and speculation. In my respectful opinion, the process of drawing inferences from evidence is not the same as speculating even where the circumstances permit an educated guess. To my mind, it is also important to point out that supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference in this case. The assumed facts for the inference must be taken from the primary facts for a proper and a reasonably drawn inference. A reasonably drawn inference requires an evidentiary foundation which in this case is lacking. In this case, the evidence does not establish that the Appellant had any intention to assist and encourage A1 to defraud the complainant. I accordingly agree with the position of the Appellant that the trial Judge erred in establishing an intention on the part of the Appellant to aid and abet A1 to defraud the complainant. I will therefore grant the first ground of appeal.

[2] **See** Section 18(2) of the Evidence Act, NRCD 323, 1975 – which provides that "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action".

v. GROUND 2 OF THE NOTICE OF APPEAL

[42] The second ground of appeal indicts the trial Judge for not properly evaluating the evidence. It is the omnibus ground. The Appellant is praying the court to set aside the judgment on the ground that it is unreasonable or cannot be supported having regard to the evidence. By this ground, it is the case of the Appellant that the judge's evaluation of the evidence is manifestly inconsistent with the drift of the evidence heard. This ground of appeal provokes a re-evaluation of the entire evidence on record.

[43] Since it is the Appellant who contends that the judgment is unreasonable or cannot be supported by the evidence, he is implying that there are pieces of evidence on record which if applied to his benefit could change the decision in his favour or, that certain pieces of evidence have been wrongly applied against him. The onus is therefore on the Appellant to demonstrate that.

[44] Counsel for the Appellant cited the case of **Kamil v. The Republic [2011] 1 SCGLR 300,** *Holding 2* and **Logan v. The Republic [2007-2008] SCGLR 76** to submit that the trial court was wrong when it relied on circumstantial evidence to establish that the Appellant abetted the 1st Accused person beyond the fact that the car belonged to him and was selling it. Learned Counsel further submitted that "at page 206 of the record of appeal, the learned trial judge stated without facts supported by the evidence that the car displayed by the Appellant for sale was done in bad faith. She went further to state that the Appellant offered his car as well as his car documents to the 1st Accused person to convince PW1 of the 1st Accused person's false representation".

[45] Counsel next argued that the trial judge stated at page 209 of the record of appeal that "the presence of A2 with the car was part of the grand scheme to defraud the complainant to make the complainant to believe the representation as true" was a conclusion drawn but not supported by the evidence on record. Proceeding further, learned Counsel submitted that the findings of the learned Judge referenced above are not supported by the evidence on record because there is no evidence provided by any

of the prosecution witnesses that the Appellant offered his car to the 1st Accused person for sale to the complainant or to any other person as bait to defraud. According to Counsel, what the evidence established "without any doubt by the prosecution is that the vehicle belonged to the Appellant and it was indeed for sale".

[46] Counsel further submitted that, the fact that the vehicle was indeed for sale was supported by the evidence of the investigator, PW2, whose evidence on the issue is captured at page 124 of the ROA, when he stated:

> "…we were the (sic) on board a vehicle and having spotted an unregistered Rav 4 white coloured car being mentioned in respect of a crime under investigation, we approached the vehicle and detected that it was being offered for sale with the inscription "for sale" and a mobile contact number written on it.

This finding of fact by the investigator is irrefutable and never contradicted during trial".

According to Counsel, the above are the true facts and not the conclusion of the trial judge.

[47] Learned Counsel also referred to the trial judge's position that the Appellant presented himself as an errand boy to the complainant and therefore worked for the 1st Accused. Counsel submitted that the trial judge was wrong because the PW1 admitted that until the arrest of the 1st Accused person, he had known him as Edward Kotey. This, according learned Counsel is a clear proof of the Appellant's "innocence or lack of knowledge and of PW1's lack of exercise of due diligence or negligence". Proceeding further on the submission, Counsel argued that even though PW1 claimed to have met the Appellant on three different occasions, he did not know his name.

[48] After referring to parts of the judgment Counsel submitted that it is clear that the case of the prosecution is based on suspicion and bare allegations and nothing more substantial. Counsel referred to the case of **R. v. Atter [1956] Crim. L.R. 289** and the statement of Devlin J at page 290 that:

"You cannot put a multitude of suspicions together and make proof out of it".

Counsel submitted "that seems to have been the case, where a person is made culpable merely by his own attempt to legitimately sell his own car and same is used by others for nefarious purposes. Prosecution does not deny that the Appellant is the actual owner and seller of the car". Based on all the above submission and other arguments stated by Counsel in the written submission, Counsel prayed the Court to set aside the conviction of the accused and discharge him because the judgment of the court is unreasonable and not supported by the evidence.

vi. Respondent's Counsel's submission:

[49] Counsel for the Republic made much of his arguments on the ground 1 of the Notice of Appeal and therefore submitted briefly on this ground of appeal. Counsel submitted that the judgment of the trial court is reasonable and supported by the evidence adduced by the prosecution against the Appellant. According to learned Counsel, the prosecution "has sufficiently adduced overwhelming evidence" based on the record of appeal. Counsel maintained that the trial judge "reasonably delivered a substantial verdict leading to the conviction and sentence of the 2nd accused person (appellant). Edward Kotey alias Niiquaye". To that extent, Counsel submitted that the Respondent is dissatisfied with the submission of Appellant's counsel that the judgment is unreasonable and not supported by the evidence.

[50] Learned Counsel for the Republic further stated that the "position of the law reinforced by section 406(1) of the Criminal and Other Offences (Procedure) Act 1960, Act 30 …is that no finding, sentence by a court of competent jurisdiction shall be reversed or altered on appeal on account of any error, omission or irregularity unless the error has in fact occasioned a substantial miscarriage of justice as **in Kwasi Kuma v. The Republic [1972] 1 GLR 179, CA".** Counsel submitted that in the instant matter, the evidence was amply sufficient to justify the conviction of the Appellant and therefore

the trial judge did not err. In this case, it is the submission of Counsel that no substantial miscarriage of justice has been occasioned and therefore the appeal should be dismissed.

vii. The Court's Opinion on Ground 2:

[51] Based on the law earlier stated in this judgment, as the appellate court on this ground of appeal, we are required to comb through the whole record of appeal and to determine for ourselves, in regard to the relevant law in the case and the evidence to determine whether the findings made and the conclusion are justified. To my mind we must re-examine and to some extent reweigh and consider the effect of the evidence. The law is that an appellate court has a duty to set aside a verdict "that is unreasonable or cannot be supported by the evidence." A conviction is reasonable if the verdict is one that a properly instructed jury or judge could reasonably have rendered. See the Canadian Supreme Court case of ***Corbett v. The Queen***, **[1975] 2 S.C.R. 275**, at p. 282.

[52] Looking at the record, I agree with the Appellant's Counsel that there are some findings made by the trial judge which are contrary to the evidence and/or not supported by the evidence. Firstly, on the issue of whether the documents of the Rav 4, 2010 model presented by the 1st Accused was fake and the one tendered by the Appellant was genuine, the trial judge at page 203 of the ROA, stated:

> "**The documents on the car given by PW1 and the one the 2nd accused had, turned out to be the same; <u>none was established to be fake".</u>** [Emphasis Mine].

[53] A review of the ROA, respectfully does not support the finding of the Court. The following is what transpired when the investigator, the police Officer was cross-examined by the Appellant's Counsel. It is recorded at **page 120** of the ROA.

> "Q: The two documents you just tendered in, Exhibit E and E1, have you taken time to examine both carefully?
>
> A: Yes.

Q: Are **they the same in every particular detail**?

A: **No my lady.**

Q: Have **you investigated to establish which of the two documents you have is the genuine one**?

A: **Yes my lady. I did.**

Q: Can you tell the Honourable Court **which of the two is genuine?**

A: **The one from A2.**

Q: Will you agree with me therefore that **the document given to you by the complainant <u>is a forged document</u>**?

A: **Yes, my lady."**

[54] The above evidence is clearly contrary to the conclusion of the trial judge that none of the document was found to be fake. I wish to state that it is clear that the Court was misled by Counsel for the Republic in coming to its conclusion. This is because despite the evidence of PW2 referenced above, Counsel for the Republic in my view, unreasonably refused to accept the evidence of his own witness and insisted that none of the document was fake. It is recorded at pages 137, 138 and 141 of the ROA. At page 137-138 of the ROA, the following exchange between Counsel and the Appellant was recorded.

"Q: <u>Prove to the court that the vehicle documents A1 was holding was fake</u>?

A: If we are to compare the two documents, I can prove which is fake and which is original.

Q: By what mechanism can you prove it?

A: If we are to assess the document with regards to the company that cleared and the name of the agent, official stamps and dates on the document and the numbers of cars in the container that contained the car. I have copies that I can present for comparison.

Q: I am putting it to you that you have not been truthful to the court.

A: I am speaking the truth. And if the court would agree, we will present the copy of the document for comparison page by page.…

Q: I am putting it to you that Detective Inspector Tenge did a thorough investigation and that the document of the vehicle bearing your name that A1 was holding was the original one.

A: The other day we were in court, my counsel asked Detective Inspector Tenge which of the document was the original and the Inspector said mine was the original. If the court would permit us to make comparison of the two documents, I am sure we would arrive at the genuine documents".

In my view, from the above, it is clear that Counsel either did not appreciate the evidence of his own witness or was confused, and that was unfortunate because the court relied on the position of the Respondent in the judgment.

[55] Secondly, at page 206 of the ROA, the trial judge stated that "in fact, apart from the direct identification of the 2nd accused person by the victim (PW1), the other evidence on record do not simply show A2 had displayed his said Toyota Rav. 4 for sale in **good faith**". Upon a review of the record, I am of the opinion that there was no evidence to support the conclusion that the Appellant displayed his vehicle for sale not in good faith. In fact, the evidence of PW2, the investigator rather confirms that even after the Appellant had allegedly abetted the 1st Accused, to defraud the complainant, he confirmed to the police that the vehicle, which was parked in the open, was for sale.

[56] At page 124 of the ROA, the following evidence was elicited from PW2 on the sale of the vehicle.

"Q: When you called the number on the vehicle and A2 responded and came to where the vehicle was parked, did you initially introduce yourself to

him as a police officer?

A: Yes I did, likewise my other colleagues.

Q: And did you ask him whether the car was for sale?

A: Yes we did.

Q: And what was his response?

A: He affirmed it was for sale"

In my view, if after allegedly aiding and abetting A1 to defraud the complainant, the Appellant still informed police officers who had introduced themselves to him as officers that the vehicle was for sale, then it is difficult to comprehend how and why the trial judge concluded that he did not display the vehicle for sale in good faith. I agree with Appellant's counsel that the court's finding is not supported by the evidence. In any event, in my thinking, it will not make sense for the Appellant to go back to the same Capital Court Hotel days after he allegedly aided and abetted the 1st accused to defraud the complainant to display the same vehicle in open place with his telephone number placed on it, knowing that he can easily be arrested.

[57] Also, at page 210 of the record, the trial judge stated as follows:

"If A2 was doing genuine business of the sale of his car, all the evidence points to the facts that 1st accused person Kofi Owusu Hayford, is one and the same person as Mr. Nice who went in person to 2nd accused to introduce himself to him as a car dealer. Why is he saying that he has never met him? The inference is guilt. He is trying hard to avoid any form of association with A1 knowing he has aided with him to defraud the complainant".

With due deference to the trial judge, it is my opinion that the statement is speculative and not supportable by the evidence. There is no evidence on the record to support the above statement that the 1st accused person is the so-called Mr. Nice, who went to meet

the Appellant.

[58] The only evidence in regard to whether or not the 1st accused and the Appellant knew each other was the one proffered by PW2, the investigator. He was asked a direct question, whether or not the 1st accused and the Appellant knew each other, and he answered that his investigation showed that they did not know each other. The exchange is at page 123 of the ROA.

> "Q**:** In the course of the interrogation did A1 disclose to you knowledge of A2?
>
> A**:** In the course of the interrogation at the Police station A1 mentioned to me and the officers present that he does not know A2 anywhere. However, according to A1, at the Capital Court Hotel where A2 met with PW1, he A1 was present but never showed his identity to A2 so the two did not speak to each other". [Emphasis Mind].

The trial judge stated that the Appellant is denying knowledge of A1 because it is an inference of guilt. The drawing of inference in this case based on the facts is unreasonable because there is no evidential basis to do so. As earlier stated in this judgment, a reasonably drawn inference requires an evidentiary foundation which in this case is lacking.

[59] Now, based on all of the above, the question to be asked is did the trial judge misapprehend the evidence? I am of the respectful opinion that she did. To my mind, a misapprehension of evidence encompasses at least three errors: **(1**) the failure to consider evidence relevant to an issue; **(2)** a mistake about the substance of an item or items of evidence; and (**3**) a failure to give proper effect to evidence. In this case it is clear that the trial judge failed to consider the evidence of PW2, the police investigator that the 1st accused confirmed that he did not know the Appellant and there is no contrary evidence to rebut that. The trial judge also failed to give proper effect to the fact that the document which A1 gave to the complainant was fake. From the evidence,

after receiving a photograph of the document on WhatsApp through Bismark, the man the Appellant said had the document, A1 altered same. Also, in this case the evidence shows that the trial judge was mistaken about the Appellant's evidence that he genuinely presented the vehicle for sale. The trial judge's conclusion that the vehicle was presented as a "bait" to help A1 defraud the complainant is not supported by the evidence at all.

viii. Conclusion and Disposition:

[60] My Lords, based on all of the above I am of the respectful opinion that the misapprehension of the evidence has occasioned a miscarriage of justice. The judgment delivered by the trial court is unreasonable, based on the evidence. Mistaken appreciation of the substance of material parts of the evidence and the error of law, specifically the lack of intent of the Appellant to aid and abet A1 to defraud the complainant clearly played an essential part in the reasoning process of the trial judge, which resulted in the conviction of the Appellant.

[61] Ultimately, I agree with the Appellant's Counsel that the judgment is unreasonable because it is not supported by the evidence based on the standard of proof beyond reasonable doubt. It is therefore my opinion that the conviction should be overturned based on the above analysis. Consequently, the appeal of the Appellant succeeds. The conviction and sentence of the Appellant is set aside together with all the consequential orders made by the Court. The Appellant is Acquitted and Discharged.

SGD

……

KWEKU T. ACKAAH-BOAFO, JA.

(JUSTICE OF THE COURT OF APPEAL)

I AGREE **SGD**

……

CECILIA H. SOWAH, J.A

(JUSTICE OF THE COURT OF APPEAL)

I ALSO AGREE **SGD**

……

ANTHONY OPPONG, J. A

(JUSTICE OF THE COURT OF APPEAL)

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