IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX (CRIMINAL COURT '2') HELD IN ACCRA ON 6TH DAY OF NOVEMBER 2023

CORAM: HER LADYSHIP JUSTICE MARIE-LOUISE SIMMONS (MRS)

JUSTICE OF THE HIGH COURT

CASE NO: CR/732/2017

THE REPUBLIC - RESPONDENT

VS

1. YAW ASAMOAH
2. KOFI YEBOAH - APPELLANT
3. OSEI PREMPEH

JUDGMENT

This is a judgment based on a Petition of Appeal filed on the 13th October 2017, on behalf of the above named Appellant. The appeal was initially filed against both the conviction and sentence of the trial Circuit Court, Accra presided over by Her Honour Mrs. Patience Mills-Tetteh whose judgment was delivered on the 20th December 2012.

OFFENCE AND SENTENCE

The Appellant and his co-accused were charged with the offences of **Conspiracy to Commit crime, Robbery and Robbery** contrary to **Sections 23 (1) and 149 of Act 29** and the Appellant was sentenced to 22years imprisonment in IHL after a full trial.

The facts of the case as provided at the trial Circuit Court was that, the complainant was a 36year old store superintendent with the Electricity Company of Ghana. The Appellant, Kofi Yeboah, then A2, was said to be 30years at the time of the incident. The A1 and A3, were also said to have been 30years each whilst the A4 was 23years at the time of the incident. The complainant lived at his home at Dokuna new Bortianor with his siblings. On the 29th November 2009, they retired to bed after locking their main door. That at about 1am on the 30th November 2009, the Appellant and his co-accused armed with a pistol, pump action guns and clubs conspired and attacked the house and robbed the complainant and his family of an amount of GHC1,700.00, five (5) mobile phones and some personal effects . The Appellant and his co-accused also shot one of the residents in the leg and the bolted away. On the 6th January 2010, the Appellant and his co-accused were arrested when they were preparing to commit another robbery. According to the facts, the Appellant and his co-accused admitted their involvement in the robbery to the police.

THE ORIGINAL PETITION OF APPEAL

The Petition of Appeal filed earlier stated the grounds of appeal as follows:

1. That the conviction and sentence were unreasonable and unsupported having regard to the evidence

2. The Court erred in holding that the Appellant and the 3rd Accused had a common purpose because they were together and they had a common purpose, indicated by the way the question were supplied to them even in Court

3.The Court erred in finding the Appellant guilty on the grounds that once he had admitted his involvement in an earlier offence alleged to have been committed with the 3rd Accused, Appellant could now say he did not commit this second offence with A3 who has pleaded guilty to the same offence".

The Court erred in failing to find that the issue of identification was not resolved and neither made a finding on the issue.

Other grounds to be filed upon receipt of the record of proceedings.

RELIEF SOUGHT

That the conviction be overturned and sentence quashed

AMENDED NOTICE OF APPEAL

The Appellant later filed an amended Notice of Appeal on the 16th June 2022. He sought to abandon the appeal against conviction and appealed only against sentence as follows:

That the sentence is harsh and unreasonable in making the long terms of imprisonment consecutive and not concurrent, especially in view of the sentence of the other Accused person of the same offences who pleaded guilty immediately and was sentenced on his own plea.

RELIEF SOUGHT

a) *That the sentence be reduced to terms of 20years each to run concurrently and not consecutively.*
b) *That the sentence was harsh and excessive*

Additional grounds may be filed upon receipt of the Record of Appeal

THE INCOMPLETE /LOST / MISISING RECORDS

It is important to note that the Appellant did face difficulty in procuring the Record of Appeal. The records indicate that back in 18th June 2019, the Court noted that the Registrar had failed to provide the appeal records and an order had been issued in that regard. Due to this, further orders were made on the 8th December 2020 against the Registrar of the Circuit Court, Accra to produce the Records of Appeal. On the 19th May 2021, a similar further order was again made by this Court differently constituted on the 19th May 2021. The Court takes note that it later became obvious that the registry could not trace all the record and therefore it became an issue of incomplete records, and the issue persisted and has still been in issue up till the time of the filing of the submissions for this appeal. The counsel for the Respondent had the cause to state in her submission the unsettled issue of the incomplete Records of Appeal in this appeal. She stated as *inter alia:*

> *"My Lord, this Honourable Court has knowledge of the fact that the Record of Appeal in this matter is incomplete as same had been brought to the notice of the Court. The Respondent is cognizance of the order of this Honourable Court on the 5th June 2023, where the Court adopted the Record of Appeal as it is, for the purpose of determining this Appeal…"*

This Court indeed took that decision especially because the appeal is only against sentence and not conviction. The available record in my opinion is sufficient though not perfect to be utilized for this appeal.

LOST OR DESTROYED RECORDS

The Supreme Court has decided on the issue of loss, incomplete or destruction of records. In the case of **KWAME NKRUMAH @ TASTY VS. THE REPUBLIC, NO. 33/6/2106 DATED 26TH JULY 2017**, the Apex Court decided that an Appellant is not entitled to be acquitted on the mere fact or on the basis of the loss or destruction of judicial records. The Court laid out some factors to guide an Appellate Courts to determine whether or when to acquit an Appellant or not under such circumstances as follows:

1. *An Appellant shall not be at fault or be responsible or blameable for the loss or destruction*
2. *An Appellant is not automatically entitled to an acquittal upon mere proof of loss or destruction of trial proceedings*
3. *The quantum or magnitude of missing records or its relevance to the appeal*
4. *Where its proven that the record is material to the appeal, the Court should determine the reconstruction of the lost record*
5. *Where reconstruction is impossible then a retrial may be ordered depending on the circumstances, length of time, nature of case, time spent in custody etc.*
6. *If retrial is impossible, an Appellant must be conditionally or unconditionally discharged.*
7. *But this extreme order must be exercised sparingly in exceptional cases.*

The Court further stated that the conditional or unconditional discharge must be used when the evidence points to the innocence of the Appellant in relation to the missing records and the nature of the offence he was charged with and the length of time spent in custody.

Prior to this decision, the Supreme Court had taken a similar decision in that case of **JOHN BONUAH @ ERIC ANNOR BLAY VS. THE REPUBLIC, DATED 9TH JULY 2015,**

WOOD CJ. The Appellant had been sentenced to life in 2002 from robbery when the offence carried a life sentence when committed with arms. He appealed to the C.A unsuccessfully and later to the Supreme Court when the punishment to robbery had subsequently had been amended. At the time of this second appeal the only record of appeal were the Bill of Indictment, the summing up, the cautioned statements of the Appellant. There was no records on the alibi investigations, no mini records and nothing on the entire evidence taken.

The Apex Court allowed the Appellant the 13years he had already spent in custody as a conditional discharge with the prosecution given a five (5) year period with which to find the records and prosecute the Appellant or have the conditional discharge turned into an unconditional discharge.

Based on these decisions of the Apex Court, this Court proceeded to adopt the proceedings of this case as it is, for the purpose of this appeal. On this basis, I will proceed to consider this appeal.

WRITTEN SUBMISSIONS

In the Written Submission filed on the 23rd June 2023 on behalf of the Appellant, counsel abandoned the appeal against conviction and maintained the appeal against sentence.

The records indicate that the Republic/Respondent also filed its submission through a State Attorney, Dorm Esi Fiadzoe on the 20th July 2023.

ARGUMENTS IN SUPPORT OF THE APPEAL

The main and relevant arguments in support of his submission was that:

1. *The trial judge failed to consider the mitigating factors available to the Appellant.*
2. *A co-accused of the Appellant, A3 who pleaded guilty simplicita at the start of the trial was sentenced to 20years even when per the available evidence he held and used two guns in the course of the robbery whilst the Appellant was given 22years when he did not.*
3. *The trial judge was prejudicial when she throughout the trial, sought to make references to the fact the Appellant had allegedly been involved in another crime, and did consider that fact in her judgment.*
4. *The trial judge failed to provide any reasons or explanation for the sentence she meted out, nothing on record to indicate what weighed on the judge's mind to impose the sentence she imposed.*
5. *That the Appellant had been incarcerated for 13years already and had regretted his misdeeds and prays for an opportunity to amend his ways.*

   Proposes a sentence of 20 years.

RESPONDENTS ARGUMENTS

In summary, the counsel for the Respondent argues rather that:

1. *The sentence of 22years IHL was not harsh considering the nature of the offence, the circumstances of the incarceration of the Appellant and the relevant punishment*
2. *That it is evident that there were several aggravating factors that existed considering the facts of the case including the use of offensive weapons and actual harm caused of a weapon on a victim.*
3. *That the Court must consider the purpose of sentencing under such circumstances*
4. *That the sentence was well within the law and within the discretion of the trial Court and the Appellate Court must not disturb the sentence.*
5. *Concedes that the sentence meted out consecutively was erroneous and should rather have been concurrent.*

APPEAL BY WAY OF RE-HEARING

One of the clearly settled principles of law which cannot be controverted is that an appeal is by way of re-hearing. This means that the Appellate Court or body is to examine the entire proceedings or decision that is the subject of the appeal to determine whether the decision can be supported in law or in fact or both. Numerous case law support this principle which is relevant to both civil and criminal appeals. The cases include **TUAKWA VS. BOSOM (2001-2002) SCGLR, 61, OPPONG VS. ANERFI (2011) 1 SCGLR, 556, KWA KAKRABA VS. KWESI BO (2012) 2 SCGLR, 834, DEXTER JOHNSON VS. THE REPUBLIC (2011) SCGLR 601, NAGODE VS. THE REPUBLIC (2011) SCGLR 975**

In the case of **AMANKWAH VS. THE REPUBLIC (J3/04/2019) (2021) GHASC, 27 DATED 21ST JULY 2021**. The Supreme Court through Dotse JSC, explained the concept as pertains to criminal trials as follows:

> *"… applying the above principle in a criminal appeal might result in the Court embarking upon the following, to analyze the entire Record of Appeal and this must include the charge sheet, the Bill of Indictment (where applicable), the witness statements of all witnesses, all documents and exhibits tendered and relied on during the trial, as well as the evidence during testimony and cross examination. To satisfy itself that the Prosecution has succeeded in establishing the key ingredients of the offence charged against the Appellant beyond reasonable doubt and that the entire trial conformed to settled procedures under the Criminal and Other Offences Procedure Act, Act 30 and that the acceptable rules of evidence under the Evidence Act, NRCD 323 have been complied with including the Practice Directions issued following the decision in **THE REPUBLIC VS. BAFFFOE-BONNIE AND 4 OTHERS (2017-2020) 1 SCGLR 327** case.*

In the case of **DEXTER JOHNSON VS. THE REPUBLIC (2011) SCGLR 601**, the Supreme Court explained re-hearing in this context to mean that the principle empowers the Appellate Court to consider in its entirety the appeal record before it and substitute itself as the trial Court and the Court of Appeal. The Court went further and stated that in such a circumstance, the Court had the power to maintain the conviction, set it aside and acquit and discharge or increase the sentence.

TRIAL COURT BOUND BY THE RECORD OF APPEAL

In this case before me, the Appellant was charged and prosecuted with three (3) others for the offences of **Conspiracy to Commit Crime, namely Robbery and Robbery** as stated above. The records indicate that after a full trial, the Appellant was convicted and sentences to 22years imprisonment. The Appellant's counsel as pointed out by the Respondent's counsel, surprisingly stated at page 1 of her submission that the sentence meted out was 80years. However at subsequent pages such pages 2, 3 and 5 of her submissions, she correctly stated the sentence of 22 years. Indeed the Record of Appeal at page 32 recorded a sentence of 22years.

It has been the principle that in an appeal, the parties and indeed the Appellate Court are bound by the Record of Appeal and nothing else, and counsel for a party cannot refer to any fact that cannot be supported by reference to the record.

See the case of **ABDUALI IBRAHIM @ YARO VS. THE REPUBLIC C.A, CRIM APP. NO. H2/0/ 2019 DATED 25TH JUNE 2020**.

It must also be reiterated that cases such as **ISMAILA NUNOO LARTEY VS. THE REPUBLIC (UNREPORTED CASE NO. H2/26/ 2017) DATED 30TH JANUARY 2019,**

CA, *confirm that an Appellate Court is limited to any errors committed by the trial Court and not matters which allegedly happened after sentence and do not form part of the Record of Appeal.*

This Court being bound by the Record of Appeal herein, proceeds on the basis that the sentences meted out to the Appellant, the subject matter of this appeal was 22years.

Every Appellate Court in a Criminal Appeal must consider the relevant statutory principle of **Section 31 of the Courts Act, NRCD 323 that** Appeals in criminal matters is only allowed on **substantial miscarriage of justice**.

Section 31 (1) spells out:

> *"subject to subsection (2) of this section an Appellate Court on hearing an appeal before it in a criminal case shall only allow the appeal if it is considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of a wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in other case, shall dismiss the appeal.*
>
> Section (2), *the Court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or the point raised in the appeal consists of a technicality or procedural error or a defect in the charge sheet or indictment but there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the caused could have been convicted upon that charge or indictment."*

I seek to rely on these principles and case law on criminal appeals and analyze the present appeal.

CONSIDERATION OF MITIGATING AND AGGRAVATING FACTORS

It is obvious at page 32 of the records that the learned trial judge did not consider any factors whether mitigatory or aggravating before sentencing the Appellant**. Section 177 of Act 30** requires that in summary trials, the Court having heard the parties and the evidence and having considered, the entire matter **MAY** convict the Accused and pass sentence to acquit as there case may be. The Court shall then give its judgment orally and also record the decision briefly together with the reasons for the decision **(if any)**

Sub section (2) of 177 states that:

> *"the Court may, if it thinks fit receive evidence to inform itself as to the sentence proper to be passed."*

There is no doubt that it is a permissive requirement of a trial judge to take evidence of the circumstances of the case and that of the Accused before passing sentence. However, the Supreme Court over the years have laid down a criteria for trial Courts to consider before sentencing.

Earlier cases such as **KWASHIE VS. THE REPUBLIC (1971) 1 GLR 488, KAMIL VS. THE REPUBLIC (2011) 1 SCGLR 300** and **HARUNA VS. THE REPUBLIC (1980) GLR 190** as quoted by both counsel and subsequent ones such as **BANAHENE VS. THE REPUBLIC (2017-2018) 1 SCGLR 600** and **AMANKWAH VS. THE REPUBLIC, GHASC 27, DATED 21ST JULY 2021**, per DOTSE JSC, all lay down the criteria for sentencing.

The Supreme Court in recent times in cases such as **AMANKWAH VS. THE REPUBLIC** (supra) have frowned on the practice where no independent investigations is conducted or no evidence is taken by a trial court before sentencing.

The Court held that at least such basic information on an Accused which may include, the youthfulness of the Accused, the show of remorse, reparation made, evidence of good character must be obtained before sentence.

In any case, it is a Constitutional requirement under **Article 14 (6)** that a trial Court shall consider any time spent by an Accused in lawful custody before sentence. This provision has been interpreted to be a mandatory one by the Apex Court in cases such as **FRIMPONG BADU VS. THE REPUBLIC, CRIM APP, NO J3/11/ 2015**, Supreme Court per ADINYIRA JSC and **BOSSO VS. THE REPUBLIC (2009) SCGLR 420, KWAKU FRIMPONG aka IBOMAN VS. THE REPUBLIC, CRIM. APP. NO J3/5/ 2010, SC.**

In FRIMPONG BADU (supra), ADINYIRA JSC stated *inter alia*:

> *"The principle of sentencing have changed, Article 14 (6) of the 1992 constitution requires that where a person is convicted and sentenced to a term of imprisonment from an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial, **shall** be taken into consideration in imposing the term of imprisonment."*

In addition, the **Ghana sentencing guidelines** for judges in criminal trials prescribes that any aggravating and mitigating factors available to an Accused are considered before sentencing. The guidelines goes ahead to provide the needed guide for some specific offences such as robbery with suggested sentences to consider. Robbery is considered at **page 14** of the guidelines and the preferred sentences are fixed depending on the use of weapons or not.

The Appellant in this appeal, did spend some time in lawful custody before the completion of his trial. The Record of Appeal confirms that he was arraigned before the Court on the 13th January 2010 and remanded into custody. He remained in custody until the date of conviction and sentence on the 20th December 2012. There is no evidence on

record that he was granted bail. It is therefore clear that the trial Court should have considered this.

I have also considered that the age of the Appellant which was stated in the facts of the case as 30years, however the charge sheet does not state it, but the Cautioned Statement of the Appellant at page 43 of the Record of Appeal clearly confirms the age at the time of the crime to be 30yeras. Since all parties are bound by the Record of Appeal, there can be a determination made that the Appellant was 30years and not a young offender at the time of the incident, thus youthfulness, in the context of criminal law, cannot afford the Appellant any benefit as a mitigating factor.

I must state that the fact that the Appellant himself made admissions especially in his defence and under cross-examination as evident at pages 19-23 of the Record of Appeal that he did commit a previous robbery at a bank manager's house with one Kwabena Ebo made it difficult for the trial Court to have ignored that fact. The learned trial Court therefore went ahead and though the Prosecution failed to produce documentary evidence to prove a previous conviction, as required **under Section 300 of Act 30,** considered this fact in the analysis in her judgment. At page 31 of the Record of Appeal among others, the trial judge stated:

> *"A2 admitted that he robbed a bank manager with the other Accused persons but he denied robing this specific complainant. This contradicted his earlier admission of guilt when he was first arrested and brought to this Court."*

It is natural that every judge siting as a Court of Justice, cannot easily gloss its eyes over an admission made by an Accused himself of his involvement in a previous robbery incident. However, it is my opinion that the trial Court erred in considering such information in her judgement when ***the law requires evidence of a previous conviction for an offence but not a previous criminal conduct.*** It is to be emphasised that it was the

Appellant himself who introduced evidence about his previous bad character and that enabled the Prosecution to cross examine him on it. On that score, the Prosecution committed no wrong in cross examining him on his previous bad character. However, may I emphasize that there was still no proof by the Prosecution that a Court of competent jurisdiction had convicted the Appellant for that offence which the Appellant stated. The requirement for a previous conviction is pursuant to **Section 300 of Act 30** which states:

> *"300 (1) where a person, having been convicted of a criminal offence is again convicted of a criminal offence, that person is liable to increased punishment provided in the table or annexed to this section…"*

Under cross examination of the Appellant, it became obvious at page 23 of the Record of Appeal when the Appellant was asked whether it was the bank manager's case that took A2, A1, A3 and A4 to Nsawam, which he responded to in the affirmative. No question of the involvement of the Appellant himself was asked, perhaps for the fear that, the Prosecution would have been blamed for prejudicing the mind of the Court against the Appellant. **With no evidence of such previous conviction, I would deem it that the Appellant was a first-time offender and count it as a mitigating factor.**

On the aggravating factors, as aptly laid out by the Respondent's counsel, the circumstances of the case prove that the incident of the robbery was serious and violent. No doubt offensive weapons were not just carried along to put fear, but were actually used to cause harm in order to overcome the resistance of the victims to the stealing.

The evidence of the Prosecution Witnesses on the extent of the robbery and nature of offence was of such as a serious nature. The physical and emotional trauma that this incident may have caused to the victims, the community and to any law abiding citizen must be an aggravating factor to be considered. Finally, the fact that the Appellant went

through a full trial as opposed to a guilty plea at the start of the trial will not serve as a mitigating factor for him.

THE CONCURRENT SENTENCE

This Court have also considered the submissions made by both counsel that the learned trail judge erred in issuing out a consecutive sentence to the Appellant and his co-accused when the facts of the case and the nature of the evidence confirms that the acts of the Appellant and his co-accused all emanated from *"**one grand design or criminal conduct which occurred on a particular day and venue**"*, the sentences should not have been consecutive. **(See Sections 302 (a) and 303 of Act 30.**

Relying on the provisions of Section 30 (a) (iii) of the Courts Act, 1993, Act 459, I will set aside the consecutive sentence of 22years meted out to the Appellant and alter the nature of the sentence by substituting the consecutive sentence for a concurrent one.

In altering the nature of the sentence, I have taken note of the submissions made by both counsel and have considered the legal principle that the exercise of the power of sentencing lays entirely within the discretion of the trial Court and provided the sentenced falls within the maximum permitted by law, an Appellate Court should not disturb it. I have in addition, I have further considered that an Appellate Court can however disturb the sentence only when it was of the opinion that the sentence was excessive or that the sentence was wrong in law or in principle.

See cases such as **SAMUEL AGOE VS. MILS ROBERTSON SCGLR 1505, BANDA VS. THE REPUBLIC (1975) 1 GLR 152.**

With both mitigating and aggravating factors not having been considered by the trial judge before sentencing, it is the opinion of this Court that it was both wrong in law and in principle that the trial Court failed to consider same.

This Court after due consideration of both mitigating and aggravating factors, will exercise its powers under **Section 30 of the Courts Act, Act 459** and accordingly maintain the conviction and **reduce the sentence of 22years** meted out to the Appellant **to 20years IHL** for both counts. The sentences are to run concurrently. The appeal against sentence therefore succeeds.

(SGD)

JUSTICE MARIE-LOUISE SIMMONS (MRS)
(JUSTICE OF THE HIGH COURT)

COUNSEL:

PHILLIPA DENNIS FOR THE 2ND ACCUSED/APPELLANT.

NO LEGAL REPRESENTATION FOR THE REPUBLIC/RESPONDENT.