4-03-2024

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD AT NKAWKAW – EASTERN REGION ON MONDAY THE 4TH DAY OF MARCH, 2024: BEFORE HER LADYSHIP JUSTICE CYNTHIA MARTINSON [MRS], HIGH COURT JUDGE

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SUIT NO. D15/08/2023

AGYEKUM PRINCE

VERSUS

THE REPUBLIC

--

PARTIES

Appellant in lawful custody.

LEGAL REPRESENTATION

Cyril Boateng Keteku Esq. for the Respondent present.

James Asamoah Esq. for the Appellant absent.

JUDGEMENT

On 29th June 2023, the appellant through his counsel filed the instant appeal by extension of time under **Section 325 [2] of Act 30**. The petition is in respect of the conviction and sentence of the appellant by the Mpraeso Circuit Court in the Eastern Region. The judgment is dated 22nd day of October 2023. The court was presided over by His Honour Stephen Kumi Esq.

In the substantive case which gave birth to this appeal, the appellant and another were charged with two counts for the following offences.

(a) Conspiracy to commit crime to wit robbery, contrary to **sections 23 (1) and 149 of the Criminal Offences Act, 1960 (Act 29).**

(b) Robbery, contrary to **section 149 of Act 29.**

The Appellant pleaded guilty with Explanation on the 1st count, guilty on the 2nd count and was sentenced accordingly.

For the purposes of this appeal, A1 is [hereinafter referred to as the Appellant].

FACTS OF THE CASE AS NARRATED BY PROSECUTION

The facts of the case indicate that the Complainant one Isaac Amoako Boateng is a former student of Kristech Obo Kwahu. A1, the Appellant Agyekum Prince aged 20 years is a driver and his accomplice, A2 Ernest Kumi aka Survival, a Driver's mate aged 22 years are both natives of Kwahu Bepong. On the 3/10/21 at about 10.30 pm the complainant boarded a Taxi to Obo Kwahu and on their way, the Appellant stopped the car and his accomplice sitting close to the complainant at the back seat pulled a knife and robbed him of his Iphone XR. After the act His accomplice opened the car door pushed the Complainant down and told the Appellant to drive off. The complainant reported the incident to the Obo police. The Appellant and his accomplice were later arrested and handed over to the Obo Police.

According to the prosecution, in their cautioned statement the Appellant and his accomplice admitted the offence and asked for forgiveness. They were charged with the offences.

At the conclusion of the case, the Appellant and his accomplice were convicted on both counts and sentenced to 15 years IHL on each count to run concurrently. The appellant is aggrieved with his conviction and sentence by the Circuit Court and has mounted this appeal. The appellant's grounds of appeal are as follows:

PART OF THE JUDGEMENT COMPLAINED OF

The whole judgement and sentence imposed on the Appellant

GROUNDS OF APPEAL

(i) The conviction was wrong in law.

(ii) Further Grounds of Appeal shall be filed upon the Receipt of the record of Proceedings

RELIEFS SOUGHT

That the conviction and sentence of the trial judge be set aside.

SUBMISSION BY COUNSEL FOR THE APPELLANT

Counsel for the appellant submitted that the appeal should succeed on the following grounds:

(a) That Appellant being a first-time offender should have been treated leniently with regard to the sentencing.

(b) That the appellant could not have been charged with robbery since he did not take part in the crime or acted together with his accomplice

(c) The Appellant did not benefit from the crime

(d) The police influenced him to plead Guilty

(e) The learned trial court did not explain which of the two counts he sentenced the Appellant, the years involved in each of the counts and whether they were to run concurrently or otherwise.

As at the time of this delivery, the State had not presented any submission to the court.

It is the law that an appeal is by way of re-hearing. In that case, the Appellate court as in this case has the duty to review the evidence and the law in order to determine whether the conviction or the sentence or both are justified in law.

See:

- **Vinotor And Others V. The Republic [2015] 90 GMJ 43 CA**
- **Frimpong @ Iboman V. The Republic [2012] 1 SCGLR 297**
- **Apaloo And Others V. The Republic [1975] 1 GLR 156 CA**

- **Dexter Johnson V. The Republic [2011] 2 SCGLR 601**

I wish to discuss the offences which were preferred against the appellant and another before the trial court. It should be noted that no additional grounds were filed by counsel.

On count one, the Appellant and another were charged with conspiracy to rob, contrary to **sections 23 (1) and 149 of Act 29.**

The definition of conspiracy has been changed under **section 23 (1) in the Revised Act 29** in the compilation of the laws of Ghana. It provides as follows:

"Where *two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence"*

One can therefore realise that the new meaning of conspiracy under Act 29 is wider in scope than the old definition. Under the new definition, conspiracy is an intentional conduct.

Therefore, under the new definition, the accused persons must agree **to** act together to either abet or commit a crime. Under the new definition, a person cannot be guilty of conspiracy in the absence of any previous agreement. However, under the old definition, a person could be guilty of conspiracy in the absence of a previous agreement.

See:

- **Ayareba V. The Republic [2016] 97 GMJ 120 CA**
- **The Republic V. Peter Kwame Gyasi [2014] 72 GMJ 167 CA**
- **Agyapong V. The Republic [2015] 84 GMJ 142 CA**
- **Francis Yirenkyi V. The Republic [2017-2020] SCGLR 433**

The ingredients of conspiracy under the new definition are therefore as follows:

(a) That it involves two or more persons

(b) They agreed to act together.

(c) That the agreement to act together was for a common purpose.

(d) That common purpose was to commit or abet a crime.

It is however rare in conspiracy cases to have direct evidence of the previous agreement of the conspirators. However, their subsequent overt acts can be inferred from their prior agreement to act together.

From the charge sheet, it appears as if the Appellant and his accomplice were charged under the old definition of conspiracy.

However, from the combined reading of Section 31 [2] of the Courts Act, *Act 459 and Section 406 [1] of the Criminal Procedure Act, Act 30 is that;*

"An error, omission, or irregularity in a complaint, summons, warrant, charge sheet, proclamation order, judgement or any proceedings before or during the trial shall not cause a sentence or order passed by a court of competent jurisdiction to be reversed or altered on appeal unless the omission or error or irregularity has occasioned a substantial miscarriage of justice."

It is up to counsel for the Appellant to demonstrate how an omission in the charge sheet has occasioned a miscarriage of justice. From the argument of counsel for the Appellant, I do not see an omission in the charge sheet as the gravamen of this Appeal.

On count two, the Appellant and another were charged with robbery, contrary to section 149 of Act 29 as amended by the **Criminal Code (Amendment) Act, 2003 (Act 646).**

Under **Section 149, of Act 29 as amended by Act 646**, robbery is created as a first-degree felony. **Section 149 (1)** provides, *"Whoever commits robbery is guilty of an offence and shall be liable, upon conviction on trial summarily or on indictment, to imprisonment for a term of not less than ten years, and where the offence is committed by use of offensive weapon or offensive missiles, the offender shall upon conviction be liable to imprisonment for a term of not less than fifteen years".*

Section 150 of Act 29 provides that, a person who steals a thing commits robbery:

(a) if in, and for the purpose of stealing the thing, that person uses force or causes harm to any other person, or

(b) if that person uses a threat or criminal assault or harm to any other person, with intent to prevent or overcome the resistance of the other person to the stealing of the thing.

For the offence of robbery, it is important to establish the following ingredients by the prosecution.

1. That the accused stole something from the victim of the robbery of which he is not the owner.
2. That in stealing the thing, the accused used force, or harm or threat of any criminal assault on the victim.
3. That the intention of doing so was to prevent or overcome the resistance of the victim.
4. That this fear of violence must either be of personal violence to the person robbed or to any member of his household in a restrictive manner.
5. That the thing stolen must be in the presence of the person threatened.
6. That the identity of the accused regarding the commission of the offence should not be in doubt.

See: **Frimpong @Iboman V. The Republic (Supra),** and **Ntow V. The Republic [2007] 13 MLRG 130 CA**

Robbery is basically stealing, and the intention of the accused is primarily to dishonestly appropriate as under section 120 (1) of Act 29 something from another person. The accused must not be the owner of the thing appropriated as required under section 122 (2) of Act 29. He must not have any claim of right to the property stolen. There must also be the absence of consent from the owner as to its appropriation

by the accused person. This means, all the elements of stealing must be present in cases of robbery.

See: **Abaka V. The Republic [2010] 28 MLRG 111 CA**

It is the law that in criminal cases, the duty is on the prosecution to prove the allegation against the accused person beyond reasonable doubt. The prosecution has a duty to prove the essential ingredients of the offence with which the accused has been charged beyond reasonable doubt.

This burden of proof remains on the prosecution throughout the trial. It is only after a prima facie case has been established, that is a case strong enough to link the accused to the commission of the offence charged, that he will even be called upon to open his defence or give his side of the story.

See: **Amartey V. The State [1964] GLR 256 SC** and **Dexter Johnson V. The Republic (Supra)**

The 1992 Constitution as per article 19 (2) (c) presumes accused person innocent until he has pleaded guilty, or his guilt has been proven. This proof is defined under **Sections 11(2) and 13 (1) of the Evidence Act, 1975 (NRCD 323)** to be proof beyond reasonable doubt.

In this case, the Appellant pleaded Guilty with Explanation on count 1 and Guilty on count 2. For the purposes of this Appeal, I will reproduce what transpired at the court below on the 22nd of October 2021, including the contents of the charge sheet. However, the facts of the case on record as narrated by prosecution have already been stated earlier in this appeal.

THE CHARGE SHEET

IN THE CIRCUIT COURT, MPRAESO IN THE EASTERN REGION OF GHANA

COUNT ONE

STATEMENT OF OFFENCE

CONSPIRACY; CONTRARY TO SECTIONS 23 [1] OF ACT 29/60

1. AGYEKUM PRINCE; DRIVER, 2. ERNEST KUMI A.K.A. SURVIVAL; DRIVER'S MATE: You on the 3rd day of October 2021 at Obo Kwahu in the Eastern Circuit and within the jurisdiction of this court with intent to commit crime, did agree or acted together with a common purpose to commit crime to wit Robbery.

COUNT TWO

STATEMENT OF OFFENCE

ROBBERY; CONTRARY TO SECTION 149 OF ACT 29/60

2. AGYEKUM PRINCE; DRIVER, 2. ERNEST KUMI A.K.A. SURVIVAL; DRIVER'S MATE: You on the 3rd day of October 2021 at Obo Kwahu in the Eastern Circuit and within the jurisdiction of this court, then armed with a knife, did rob one Isaac Amoafo Boateng of his iPhone XR valued GH¢2,500.00.

COURT NOTE FOR FRIDAY 22ND OCTOBER 2021

Time: 09:56 am

Accused Persons: Both present.

Prosecutor: Inspr. Peprah Yakubu present.

Accused: We both understand the Twi language

Charge Read and explained in Twi to the accused persons.

COUNT 1

CONSPIRATION TO COMMIT CRIME: Contrary to Section 23 (1) of Act 29/1960.

PLEA: A1: GUILTY (with explanation).

A2: GUILTY (with explanation).

COUNT 2

ROBBERY: Contrary to Section 149 Act 29/1960.

PLEA: A1: GUILTY

A2: GUILTY

FACTS: Read and explained in the Twi language to the accused persons and a copy attached to the charge sheet.

EXPLANATION OF A1: I accept the charges against me. We committed the offences. But I am sorry. We have paid GH¢1,000.00 to the police to compensate the victim.

EXPLANATION OF A2: My Lord, I accept the charge. I am sorry. We made a mistake.

BY COURT: Based on the pleas of the accused persons and their explanations to the court, they are hereby convicted and found guilty on each of the two (2) counts against them.

PROSECUTION: My Lord, they are not known. They have also paid an amount of GH¢1,000.00 to the police in favour of the victim.

PLEA OF MITIGATION OF SENTENCE BY A1: My Lord, I pray for leniency. I am ready to refund the cost of the phone to the victim.

BY A2: I also pray for leniency. I promise to settle with the victim. I would not do that again.

SENTENCING: Although the court notices that the convicts are first offenders and showed remorse in court and they also paid GH¢1,000.00 to the victim, the court condemns the conduct of the convicts. Robbery is also prevalent in this area. The court therefore sentences each of the A1 and A2 to serve fifteen (15) years I.H.L. on each of the two (2) counts to run concurrently.

Prosecution to release the GH¢1,000.00 to the victim.

(SGD) STEPHEN KUMI ESQ

CIRCUIT JUDGE

In arguing the Appeal against the conviction, the Appellant's counsel submitted that, the Appellant could not have been charged with the offence of Robbery since he did not take part or act together with the alleged accomplice.

As has been stated earlier, the accused person is presumed innocent until he has pleaded or proven guilty, see **Article 19 (2) (c).**

In the case before me, the Appellant pleaded guilty with explanation in count 1 which is Conspiracy, and Guilty in count 2 which is Robbery. **Section 171 [3] of the Criminal Procedure Act** it is states:

[3] A plea of guilty shall be recorded as nearly as possible in the words used, or if there is an admission of guilt by a letter under ***section 70[1]*** *the letter shall be placed on the record and the court shall convict the accused person and pass sentence or make an order against the accused unless there appears to it sufficient cause to the contrary.*

However, there are instances where instead of an accused pleading guilty or not guilty, the accused may put in a plea of guilty with an explanation, as in the instant case. It should be noted that a plea of guilty with Explanation is not evidence and where the explanation given by the accused person if proven at the close of the prosecution's case will constitute a defence, the court shall enter a plea of not guilty for the accused see **State vrs. Sowah & Essel [1961] 2 GLR 743 SC**. The test for the trial court is whether or not the explanation given by the accused at the end of the trial will constitute a defence see the case of **Bediako vs. The Republic [1976] 1 GLR 39**, The court has no power to reject the explanation offered by the accused person on any ground apart from the fact that, it will not constitute a defence to the charge even where the accused can prove it at

the end of the trial irrespective of how stupid or funny the reason may be. See the case of **Forson v. The Republic [1976] 1 GLR 138.**

From the record of proceedings; A1 who is the Appellant pleaded guilty with explanation in count one after the 1st count (Conspiracy) charge had been read and explained to him in the Twi language and guilty in count two (Robbery).

The record has the explanation given by the Appellant as follows:

Explanation by A1: *I accept the charges against me. We committed the offences. But I am sorry. We have even paid 1000 to the police to compensate the victim.*

From the explanation offered by the Appellant above it can be gleaned from the content that same does not constitute a defence to the charge.

It can be garnered from the narration of the facts by counsel for the Appellant that his version of the facts is quite different from what is in the record. For instance, in the facts as narrated by the prosecution, it did not include a statement that his accomplice ordered the Appellant to stop and threatened him with a knife if he did not stop. In fact, in arguing the conviction, Counsel narrated what the appellant allegedly stated in his cautioned statement. Counsel however did not avert his mind that, due to the plea of guilty and guilty with explanation (which the said explanation in count one did not constitute a defence), the case did not go for trial for the prosecution to conduct disclosures. Therefore, those facts relied on by counsel which he allegedly said it is in the Appellant cautioned statement is not before this court. Counsel erroneously relied on the contents of the charged statement which is not before the court to reach a conclusion that the Appellant could not have been charged with the offence of conspiracy to commit robbery and robbery. This argument by counsel for the Appellant is untenable. This is because the Appellant did not plead " not guilty" to put the burden on the prosecution to prove his Guilt by disclosing all the arsenals under their sleeves.

Counsel for the Appellant in arguing against his conviction also alleged that the police influenced the Appellant to plead Guilty. With due deference to counsel for the

Appellant, this is not borne out of the record of Appeal before me. The Appellant's plea and his explanation as appear from the record exonerated the prosecution from any responsibility to prove the two offences that the Appellant was charged with.

I wonder how counsel will query the police investigations [which are not before the court] and conclude that there is no record which shows that the Appellant and one Survival acted together when the record before this court shows that the Appellant's own plea did not allow the case to proceed to trial.

It is also the contention of Counsel for the Appellant that the trial judge failed to clearly explain which of the two counts he sentenced the appellant and the years involved in each of the counts and whether they are to run concurrently or not. In fact, this assertion is misplaced and not borne out of the record.

The record before me has the sentencing as Follows:

SENTENCING: *"Although the court notices that the convicts are first offenders and showed remorse in court and they also paid GH¢1,000.00 to the victim, the court condemns the conduct of the convicts. Robbery is also prevalent in this area. The court therefore sentences each of the A1 and A2 to serve fifteen (15) years I.H.L. on each of the two (2) counts to run concurrently."*

Prosecution to release the GH¢1,000.00 to the victim.

There is no doubt from the above that the sentencing of the appellant who is A1 at the court below was made clear and certain. The verdict was that the Appellant was sentenced to 15 years on each count to run concurrently. The record has the pre-sentencing statement of both the Appellant and his Accomplice as well as the sentencing itself.

From the record above I do not see where the trial court erred in convicting the Appellants on both charges. I will therefore refuse the appeal against the Conviction.

Now, to the next ground of Appeal which was not stated by counsel as a ground of appeal but as part of the judgement complained of, 'is the sentence imposed by the Trial

Judge'. The appellant's counsel argued that the sentence was harsh and excessive and the court did not take relevant mitigation factors into consideration before the imposition of the sentence. He argued that the appellant is a young and a first-time offender.

Counsel for the Appellant is seeking a reduction in the sentence imposed on the appellant. By way of refreshing our minds, it is necessary to reproduce what the offence-creating Section says. **Section 149 of the Criminal Offences Act, 1960, Act 29 as amended by Act 646**, states as follows;

"Whoever commits robbery is guilty of an offence and shall be liable, upon conviction on trial summarily or on indictment, to imprisonment for a term of not less than ten years, and where the offence is committed by the use of an offensive weapon or offensive missile, the offender shall upon conviction be liable to imprisonment for a term of not less than fifteen years"

The appellant's counsel argued that the sentence was harsh and excessive.

It is trite that there is no maximum number of years of sentence which can be imposed on a person convicted of robbery. The law states only the minimum prison term and not the maximum. Where the law only states the minimum sentence but does not state the maximum, then it is sufficient indication that just as objects are viewed in a mirror, the society or the court intends to impose not only a deterrent sentence but also to show the revulsion of the society against such offence.

See: **Hodgson V. The Republic [2009] SCGLR 642**

Again, where the court finds an offence to be very grave, it must not only impose a punitive sentence but also a deterrent or exemplary one to indicate the disapproval of society in respect of that offence. Once the court decides to impose a deterrent sentence, the good record of the accused is even irrelevant.

See: **Howe V. The Republic [2013-2014] 2 SCGLR 1444.**

The determination of the length of sentence within the statutory period is a matter within the discretion of the trial court. And the courts always act upon the principle that the sentence imposed must bear some relation to the gravity of the offence.

In determining the length of sentence, the factors which a trial judge is entitled to consider are:

1. The intrinsic seriousness of the offence;
2. The degree of revulsion felt by the law-abiding citizens of the society for the particular crime;
3. The premeditation with which the criminal plan had been executed;
4. The prevalence of the crime within the locality where the offence took place, or in the country generally;
5. The sudden increase in the incidence of the particular crime; and
6. Mitigating or aggravating circumstances such as extreme youth, good character, and the violent manner in which the offence was committed.

See:

- **Sakyi V. The Republic [2010]34 MLRG 188 CA**
- **Robertson V. The Republic [2015] 80 GMJ 33 SC**
- **Kamil V. The Republic [2011] 1 SCGLR 300**
- **Razak And Yamoah V The Republic (SUPRA)**

As pointed out by Counsel for the Appellant in his written submissions, the apex court has postulated in a plethora of cases the factors that a court ought to consider when determining the length of sentence. See; **The Republic vrs. Adu Boahen [1972] GLR 70-78 and Kwashie vrs. The Republic [1971] 1 GLR.**

These factors which have already been mentioned earlier on in this delivery are to be considered by a trial Judge in passing a sentence. It also bears stating that, a punitive or

deterrent sentence, may be passed so as to indicate the disapproval of society of that offence and where the court finds an offence to be grave.

This was enunciated in the case of **Frimpong alias Iboman V. the Republic [J8A/2015] [2015] GHSC 106 [18 November 2015].**

Under **Section 30 (a) (ii) of the Courts Act 1998, Act 459**, an appellate court may in appropriate cases, alter the finding, maintain the sentence, or with or without altering the finding, reduce or increase a sentence on appeal. However, there are settled principles on which the appellate court can so act. One such basic principle is that an Appellate court will not interfere with a sentence of a lower court unless the sentence was found to be manifestly excessive having regard to the circumstances of the case or that the sentence was wrong in principle.

In this present appeal, the Appellant and his accomplice conducted the offence with a knife an offensive weapon to overcome the victim.

The Appellant is a first-time offender as opined by their Counsel but he did not commit this offence as a novice or "baby offender''.

It is trite knowledge that, a first offender may not deserve judicial clemency if there are certain aggravating circumstances to justify a harsher sentence where for instance a first offender in committing the offence uses cruel, or advanced methods of committing the crime. In such an instance such a first offender should be punished harshly. See the case of **Kwashie & Ano V. the Republic 1971 1 GLR 488-496** where it was held that;

"Where an offence is grave, the sentence must not only be punitive, but it must also be deterrent or exemplary in order to mark the disapproval of society of the particular offence".

The court noted on page 494 that upon these facts which reveal an offence of a very grave nature, the sentence must not only be punitive, but it must also be deterrent or exemplary. The sentence must mark the disapproval of our society of such conduct by the appellants (emphasis mine). Where the court decides to impose a deterrent sentence, the value of the subject matter of the charge and the good record of the accused become irrelevant. Finally, we would say that although the sentence appealed from may appear

severe, we do not think it is excessive in view of the gravity of the offence and the necessity for an exemplary sentence".

See also the case of **Adu Boahen V. The Republic [1972] 1 GLR 70.**

The Supreme Court speaking through Justice Akamba JSC, also said in the case of **Howe V the Republic [supra]** that***; "In determining appropriate sentences to impose on a conviction for robbery, a court of law is obliged to weigh all the aggravating factors as against whatever mitigating factors brought to the court's attention. The aggravating factors include the amount of force used by the accused or perpetrator, the amount of injury inflicted upon the victim(s), whether or not the victims fall within a category of vulnerable persons, such as old age or sickness, and gender (emphasis mine) whether this was a planned offence, time of the offence such as night, group or gang attack, dehumanizing actions. The possible mitigating factors include less use of force, less injury, young offender, low mental capacity, spur of the moment, daylight and single offender".***

I must say that after a careful perusal of the entire proceedings in this present appeal, I cannot but agree with the trial judge under whose jurisdiction the offence took place that Robbery is prevalent in the area and as such there is the need for a deterrent sentence. However, I must say that the trial judge considered some mitigating factors such as the Appellant being a first-time offender and gave the minimum sentence in cases where offensive weapons are used.

After considering the circumstances surrounding the case, all the evidence on record, and written submission by Counsel for the appellant and the authorities regarding sentencing as referred above, I find no favour with the submission by Counsel for the Appellant on his two grounds of Appeal.

I am satisfied that the sentence of 15 years imposed on the appellant for the two counts of conspiracy to commit Robbery and robbery to run concurrently is reasonable and commensurate with the offences charged considering the circumstances surrounding the commission of the crime on a mere student.

It can be gleaned from the proceedings that the appellant was remorseful, however, being remorseful alone in itself does not suffice to merit a reduction in sentence. The trial judge must take into consideration the canker of armed robbery in the community and our nation now, and the degree of revulsion felt by law-abiding citizens in the Country before sentencing the appellants.

Aligning my thoughts with the above-cited decided cases, and weighing the aggravating circumstances against the mitigating factors, I am of the respectful opinion that the court below dealt adequately in the sentence meted out to the appellant. This is because the offence of robbery with the use of offensive weapons attracts a minimum sentence of 15 years as per Act 646 of the Criminal Amendment Act,2003.

It bears mentioning that, I am not determining how I would have exercised my discretion in this given situation. I am considering whether given the wide spectrum of discretion at the disposal of the trial Judge he exercised it within the parameters of the law. This Court does not see where the trial judge erred.

The standard to sustain criminal appeal is that the conviction or the sentence or both has/have led to a substantial miscarriage of justice under **Section 31 of Act 459** or under **Section 406 of Act 30.**

See: **Kuchama alias Friday V. The Republic [2017-2018] 2 SCLRG 872.**

From the above analysis, I do not think the appellant's conviction and sentence have led to any substantial miscarriage of justice. The appeal therefore fails in its entirety and same is dismissed.

(SGD.)

JUSTICE CYNTHIA MARTINSON (MRS)

HIGH COURT JUDGE