IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)

DORDZIE (MRS.), JSC

AMADU, JSC

PROF. MENSA-BONSU (MRS.), JSC

KULENDI, JSC

CRIMINAL APPEAL

NO. J3/02/2021

26TH MAY, 2021

OBENG GYEBI ……. APPELLANT

VRS

THE REPUBLIC …….. RESPONDENT

JUDGMENT

KULENDI JSC:-

INTRODUCTION

Upon a cursory glance, this Appeal appears to be a normal appeal against a sentence by a convict. However, upon closer inspection and a lot of introspection, this matter transforms

into one of immense jurisprudential importance with the very essence and nature of justice at the heart of the main issue that this set of facts raises.

This is an appeal against the judgment of the Court of Appeal upholding the life sentence handed to the Appellant by the Kumasi High Court on the 18th day of August, 2000 for having committed the offences of Conspiracy and Robbery. At the time of the sentencing of the Appellant, the law governing the sentencing of people convicted of Armed Robbery was the **Suppression of Robbery Decree, 1972 (N.R.C.D. 11).** The relevance of this point will become increasingly obvious in the course of this opinion.

The Appellant, who represents himself, argues that the life sentence imposed on him is harsh and excessive given the circumstances surrounding the case as well as the proceedings in Court.

The Appellant, then aged 32, was arraigned before the High Court, Kumasi, coram: His Lordship Mr. Justice S.E. Kanyoke, and charged with Conspiracy to Commit Robbery and Robbery contrary to **Sections 23 and 149 of The Criminal and Other Offences Act, 1960 (Act 29)** respectively. He pleaded not guilty to both counts but after trial was convicted and sentenced to life imprisonment in accordance with the terms of **Section 2 of the Suppression of Robbery Decree, 1972 (N.R.C.D. 11)**. He appealed against the conviction and the sentence, but his appeal was dismissed by the Court of Appeal on 24th February, 2012 leading to this current Appeal. He filed the notice of appeal on 28th April, 2020 pursuant to leave granted on 24th March, 2020.

BACKGROUND

The background as can be ascertained from the record is as follows;

The Appellant and five (5) others are said to have entered the house of one Kofi Tawiah at Boate near Obuasi on 1st January, 1999 around 1:30am. On reaching the said house, they

did not meet Mr. Kofi Tawiah. Instead, they met Kwabena Obeng, a co-worker of Mr. Tawiah's who was taking care of the house in Mr. Tawiah's absence. Mr. Obeng told the robbers that Mr. Tawiah had gone to Kumasi for the holidays when the robbers mentioned that they were looking for him. The robbers, who thought Mr. Obeng was Mr. Tawiah, ordered him at gunpoint to lead them into the bedroom. Mr. Obeng and others were subjected to beatings by the robbers who subsequently made away with cash and gold worth Fifty-Four and a half Million old Cedis (¢54,500,000.00), five thousand four hundred and fifty new Ghana Cedis (GH¢ 5,450.00 in today's currency).

A complaint was made to the police and the Appellant and others were arrested and arraigned before Court.

Following a trial, the Appellant, together with others, was convicted and sentenced to life in prison.

GROUNDS OF APPEAL

The grounds of this appeal are reproduced verbatim below:

1. That the sentence is excessively harsh with regards to the evidence on record and the circumstances surrounding the case;

2. That Appellant is a first time offender who has served twenty (20) years in prison already through the hard way;

3. That the trial High Court failed to consider any mitigating factors available then such as first time offender, circumstantial evidence, and whether he has dependents, and also the gravity or severity of the case, and;

4. That, Appellant has long ago reformed and demonstrated remorse out of regret of the past occurrences."

The Appellant is therefore asking this Honourable Court to tamper justice with mercy and set aside the life imprisonment handed down on him and replace it with a more bearable sentence.

ARGUMENT BY THE APPELLANT

The Appellant cites the dictum of Ansah JSC (as he then was) in the case of **Kamil v. The Republic (Unreported) Appeal NO. J3/3/2009 delivered on 8TH DECEMBER, 2010**, where the Learned Justice stated, "*Where an appellant complains about the harshness of a sentence he ought to appreciate that every sentence is supposed to serve a five-fold purpose, namely, to be punitive, calculated to deter others, to reform the offender, to appease the society and to be a safeguard to this country*." He goes on to state that the principle governing appeals against sentences was stated in the case of **Apaloo v. The Republic [1975] 1 GLR 156,** as follows:

> "*The Court would interfere [with the sentence] only when it was of the opinion that the sentence was manifestly excessive having regards to the circumstances of the case, or that the sentence was wrong in principle*."

The Appellant also references the case of **Kwashie vs. The Republic [1971] 1 GLR 488** where this Honourable Court held that in considering the length of the sentence, the trial Judge is required to consider factors including; (a) the intrinsic seriousness of the offence, (b) the degree of revulsion felt by the law-abiding citizens of the society for the particular crime, (c) The premeditation with which the criminal plan was executed (d) the prevalence of the crime, within the particular locality where the offence took place, or in the country generally, (e) The sudden increase in the incidence of the particular crime and (f) mitigating or aggravating circumstances such as extreme

youth, good character, first time offender and the violent manner in which the crime was committed.

The Appellant also acknowledges the difference the involvement of a weapon makes in considering the sentencing of someone convicted of the offence he was convicted of. He cites the case of **Frimpong alias Iboman vs. The Republic [2012] 1 SCGLR 297** where this Honourable Court held "*What is to be noted here is that whilst the minimum sentence for robbery has been fixed at 10 years simpliciter, in cases where offensive weapons have been used, the legislature has deemed it fit and proper to enhance the minimum to 15 years imprisonment.*"

The Appellant notes that in the summing up done by the Honourable Trial Court Judge, he directed the jury to return a verdict of not guilty when it came to the Appellant for the substantive charge of Robbery due to lack of evidence. This is found on page 223 of the Record of Appeal.

The Appellant also argues that no mitigating factors were considered in coming to a life sentence. He cites the fact that although some of the occupants of the house were beaten during the robbery, none of the occupants were seriously injured or shot, and the fact that a sum of ¢2 million (GH¢ 200) out of the total sum of ¢54.5 million (GH¢ 5,400) was recovered from him as mitigating circumstances which the Trial Court and the Appellate Court ought to have considered in his favour.

Additionally, he cites the case of **Apaloo v. The Republic** (supra) which states "A sentence of imprisonment, even though intended as a general deterrence must not be excessive in relation to the facts of the offence."

Finally, he states that his fellow accused persons, the Third Accused and the Fourth Accused, were released on appeal at Accra and Kumasi around 2015 and 2017 and maintains that it is clear that the Court of Appeal "failed in analysing the

circumstances of the case critically, and erroneously dismissed his Appeal from the High Court".

The Appellant then concludes by saying that he has served 20 years in prison "in the hard way" and that he has a good record of behaviour before all inmates and officers. He states that while he was young at the time of his arrest and conviction, he is now grown and has spent the productive years of his life behind bars. He thus asks the Court to tamper justice with mercy and set aside the life sentence and reduce the sentence to the minimum.

ARGUMENT BY THE REPUBLIC

The Republic in their written submission to this Court, makes a rebuttal to the Appellant's grounds for this Appeal by considering them as essentially one ground of appeal. Under this unified ground of appeal, the Republic contends that the life sentence awarded to the Appellant is appropriate, all circumstances considered. In support of this point, the Republic asserts that while it was not captured in the record of proceedings, the trial judge relied on the **Suppression of Robbery Decree, 1972 (N.R.C.D. 11**) which was the then extant law governing the sentencing of people convicted of the offence of Robbery.

After reproducing the provision contained in **Section 2 of NRCD 11,** the Republic submitted that the trial judge had only two options in sentencing the Appellant under the law, the death penalty, or a life sentence. The Republic asserts that by giving the Appellant a life sentence, the trial court considered all possible factors and gave the Appellant the most appropriate sentence. The Republic argues that, as a matter of fact, the trial judge could not have imposed a lesser sentence than the life sentence which was handed down to the Appellant.

LAW AND ANALYSIS

This case brings up a fairly unexplored and specific question, yet one not without guidance that can be obtained from or found in existing law. The question here being, "what happens when a person is convicted and sentenced under a provision that is repealed and/or replaced with a reduced sentence while the person appeals the sentence?". To be clear, this question is not the main contention which was addressed by the parties herein, which was whether the sentence imposed on the Appellant was harsh, considering all the circumstances at the time of the trial.

In considering whether or not a sentence passed by a lower Court is harsh, the main factor to be considered is not necessarily whether or not the lower Court exceeded its limits when it comes to the power to sentence. It is, as Taylor J (as he then was) stated in the case of **Impraim v. The Republic [1991] 2 GLR**, that "there were mitigating factors which were ignored or were not comprehended by the trial court."

In case of **Kwashie & Another v. The Republic [1971] 1 GLR 488-496**, the Court of Appeal held as follows;

"*In determining the length of sentence, the factors which the trial judge is entitled to consider are: (1) the intrinsic seriousness of the offence; (2) the degree of revulsion felt by law-abiding citizens of the society for the particular crime; (3) the premeditation with which the criminal plan was executed; (4) the prevalence of the crime within the particular 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*."

Again, for clarity's sake, this is **NOT** the main question at play in this present Appeal. The issue that this Court has to primarily address in this Appeal is specifically the effect of the repeal of the life sentence and death penalty as the only possible punishments that could be handed down for the crime that the Appellant was

convicted of, *after* his conviction by the trial court, but *during* the appellate process, especially against the sentence, but more generally, the situation where a penalty, a forfeiture or a punishment is reduced, mitigated or eliminated by a provision of the enactment so substituted *after* the conviction of a person for a crime, but while an appeal against the penalty, forfeiture or punishment has not been exhausted.

As stated earlier, this specific situation, while fairly unexplored in our jurisprudence, is not one without guidance in existing law. First, let us commence from the trite and over-repeated principle that an appeal is by way of a rehearing. Us lawyers and judges often state this principle. But what does it mean, exactly, to say that an appeal is by way of a rehearing?

For an answer to this, we can look to the dictum of Windeyer J. which elucidated with efficient precision, what it means to say that an appeal is by way of rehearing in the case of **Da Costa v. Cockburn Salvage & Trading Pty. Ltd. [1970] HCA 43; (1970) 124 CLR 192, at pp 208-209.** There, he stated as follows:

> *"This does not mean that the appeal is a complete re-hearing as a new trial is. It means that the case is to be determined by the Full Court, its members considering for themselves the issues the trial judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him,* ***but applying the law as it*** *is when the appeal is heard* ***not as it was when the trial occurred.*** *"* **(emphasis added)**

Already, this has implications for the sentencing of the Appellant. It becomes apparent, as stated earlier, that the most relevant question for consideration in this appeal, and in the appeal before the Court of Appeal, is not whether the sentence imposed on the Appellant was harsh, nor whether there were mitigating factors that should have reduced the sentence that was awarded by the Trial Judge, nor indeed whether or not the sentencing regime governing the offence that the Appellant was

convicted of at the time of the sentencing at the trial court, restricted the trial judge to the sentence that was imposed at the time of the sentencing. The relevant question evolves past those questions to become, "In an Appeal, which is by way of rehearing, what was the law (governing the sentencing of a person convicted of an offence of which the Appellant was convicted) **at the time when the *appeal* is heard**?" In most cases, the legal sentencing regime — that is, the law governing the sentencing of the offence in question, would not have changed by the time of the appeal and therefore in an appeal against a sentence, the considerations which an Appellate Court has to contemplate in making a decision about the sentencing are the same as the considerations which the Trial Court had to evaluate. In this case however, since the law governing sentencing at the time when the appeal was heard by the Court of Appeal and now by this Court was different from the law at the time of the original sentencing, it is the law at the time that the appeal is heard which ought to be applied since the appeal is by way of a rehearing, therefore the considerations which the Trial Court and the Appellate Courts have to evaluate are different.

This inevitably begs the question, "what should happen in the situation where the sentence that the newer law imposes is harsher, or imposes a higher minimum sentence than the law being repealed?" First of all, if this is the case, yet after sentencing, no one appeals against the sentence, there is no problem. Secondly, once again, we are guided by the law, starting from the Constitution.

The **1992 Constitution in Article 19(11)** says "*(11) No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.*"

In terms as simple as they can be put, an enhanced sentence under a new law by definition was not prescribed in a written law at the time of the commission of the criminal conduct, whereas a newly mitigated sentencing regime was already contemplated by the previously harsher statutory prescribed sentence.

This then begs the question, "what happens in a case (such as this one) where the newer mitigating sentencing regime is less harsh than the previous sentencing regime's **minimum** sentencing guideline? — Surely, it cannot be said that the older sentencing regime contemplated the less harsh sentence since it explicitly excluded the less harsh sentence."

To those who pose that question, we would first say that that is a very valid question. However, we would be quick to add that refuge can still be sought from and be found in already existing law. For this, we turn to **Section 35(2)(e) of the Interpretation Act, 2009 (Act 792).** There it is provided as follows:

> *"(e) where a penalty, a forfeiture or a punishment is reduced or mitigated by a provision of the enactment so substituted, the penalty, forfeiture or punishment, if imposed or awarded after the repeal or revocation, shall be. reduced or mitigated accordingly."*

While it is conceded that this provision specifically outlines a situation where the repeal occurs before the sentence is awarded or imposed, we are of the view that this provision can and ought to be applied *mutatis mutandis* to cases where the accused has been convicted, but has not exhausted their constitutionally guaranteed right of appeal. More so because an appeal is by way of rehearing.

From the record of Appeal, the notice of this appeal was filed on the 28th of April, 2020. As of this date, the applicable sentencing regime for the offence of Robbery is provided for under **section 32 of the Criminal Offences (amendment) Act 2003, Act 646** which amends **section 149 of the Criminal Offences Act, 1960 Act 29,** and provides as follows;

Robbery

(1) *Whoever commits robbery is guilty of an offence and is liable, on conviction upon summary trial or indictment to imprisonment of a term of not less than ten years, and where the offence is committed with 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.*

By reason of our preceding reasoning, we are of the considered opinion that this is the sentencing regime under which we may proceed to exercise our jurisdiction to rehear this appeal with regards to the Appellant's plaint against the life sentence rightly imposed on him by the trial judge at the time. From this section, a court, including this Court may impose or sanction a sentence of not less than ten years, and where the offence is committed with 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.

In the article entitled *"Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation"* published in the November 1972 edition of the University of Pennsylvania Law Review by the editors of that law review, a few examples are cited to support this view. The authors of this article write as follows,

> *"In American cases in which penalties were lessened, the abatement doctrine operated as it did in England. In Commonwealth v. Kimball [38 Mass. (21 Pick.) 373 (1838).], for example, the defendant was convicted of selling liquor without a license. While his appeal was pending the statute was repealed by implication due to the passage of another statute prohibiting the same conduct. The latter statute provided for a fine of between ten and twenty dollars while the former provided for a twenty-dollar fine. The court held that the defendant was entitled to arrest of judgment since the former penalty had been repealed by the latter statute in the absence of a saving clause. Similar results were also found in cases of express repeal and prospective re-enactment with lower penalties. Judgment was arrested on appeal and a convicted defendant was discharged*

in State v. Daley [29 Conn. 272 (1860).] because, before the defendant's trial, the legislature had expressly repealed the manslaughter statute and replaced it with a prospective statute with lesser penalties. In this situation the legislature could have used a saving clause in the repealing statute or provided that the new statute apply to outstanding violations of the repealed statute. Had the latter device been used, it would not have violated the ex post facto clauses because punishment would have been mitigated."

Therefore, if, during the appeal against the sentence of a convict, the sentencing regime for the conduct for which they are in court is amended by Parliament, and this amendment is one that mitigates the prescribed sentence, the convict, in an appeal against their sentence, may argue that *their* sentence ought to be mitigated in the light of Parliament's new thinking on the punishment for their conduct and an appellate Court ought to consider the new law in coming to a conclusion on the appeal against the sentence. This is especially the case where the new sentencing regime has sentencing options less harsh than the minimum sentencing option under the old regime.

Once, and after the determination has been made by the Appellate Court that a new, less harsh sentencing regime has been passed into law by Parliament, the Appellate Court then has to take into account the considerations set out in **Kwashie & Another v. The Republic** in order to determine *by how much* it would reduce the sentence of the Appellant. This judgment will now do that, a task which the Court of Appeal was not automatically enjoined to do since the Applicant's appeal to the Court of Appeal, the grounds of which may be found at page 227 of the Record, was essentially against conviction and not against sentence.

What then, are some of the mitigating factors that ought to have been included in coming up with the sentence in this case? While the trial court had no option but to impose the statutory sentence, on the Appellant, the remit of the first appellate court,

the Court of Appeal, was different. The Court of Appeal had the power, under its jurisdiction of rehearing, coupled with the combined effect of the repeal of the **NRCD 11** and the provisions contained in **Section 35 of Act 792** to take into account all factors that go to mitigation in favour of the Appellant. These would be the same factors that the High Court would have had recourse to, but for the statutory imposition of the minimum of a life sentence by **NRCD 11**. That said, it must however be noted that from the notice of appeal, at page 226-228 of the Record of Appeal, the nine elaborate grounds of appeal to the Court of Appeal, did not include an appeal against sentence. Consequently, it is understandable that the Court of Appeal as the first appellate court did not exercise its jurisdiction to consider a mitigation of sentencing, since the relief was not sought by the Appellant on that occasion. Having already said that we have the jurisdiction to evaluate the harshness or otherwise of the sentence for the reasons aforesaid, the first mitigating factor that we would consider is the fact that the Appellant is a first-time offender.

Of course, as Brobbey JSC noted in the case of **Frimpong v. The Republic (J3/5/2010) [2012],** the youth of an offender or the fact that he is a first time offender do not mandate a Court to give a convict any particular sentence. Indeed, if there is a minimum sentence for the offence, that minimum ought to be the lowest sentence granted even if the offender is a young first time offender.

Secondly, the fact that even the Trial Judge did not believe that there was enough evidence to convict the Appellant of the charge of robbery should be a mitigating factor. Even though, the Appellant made a statement admitting his guilt, the record shows that he subsequently reneged on that confession, insisting that the admission was induced by threats, beatings and harassment by the police and thereby compelling him to abandon his very initial denial of any role in the Robbery. In considering this, and the rest of the evidence on the record, the Trial Judge came to the conclusion that there was not enough evidence on the record to convict the Appellant for Robbery, and directed the jury not to convict him of Robbery.

However, the Jury returned a verdict of guilty for both Robbery of Conspiracy, the Trial Judge thus sentenced him to the minimum punishment of life in prison. One can safely infer that the mitigating factors were operating on the mind of the Trial Judge. This is because he awarded the minimum sentence that he could under the law.

The evidence did not show that anyone was seriously injured during the robbery. This is a factor that, as the first appellate court whose jurisdiction has been invoked to mitigate sentencing, we ought to consider. Even though a gun was involved, nobody was shot and/or seriously injured. That notwithstanding, the possession and/or use of an offensive weapon in Robbery, aggravates the sentence from a minimum ten years to a minimum of fifteen years by virtue of **section 149 (1) of Act 29** as amended by **Section 32 of Act 646.** Consequently, in this Appeal, we cannot lawfully substitute the sentence of the Appellant with a sentence that is less than fifteen years.

From the record, the Appellant was in custody from the time of his arrest sometime in 1999 up to the date of his conviction, on 18th August, 2000 and has since been in prison under a life imprisonment with hard labour. During this time, the Appellant alleges that he has been of good behaviour, towards inmates and prison authorities, and this has not been challenged by the Respondent. This therefore ought to be a mitigating factor which should inure to the benefit of the Appellant in our evaluation of any mitigating circumstances in this rehearing in relation to sentence.

The Appellant also states that his children are young adults, who were raised by and now have to be supervised by their ageing grandparents. He states that his protracted absence, and lack of any parenting role in the lives of his children makes them vulnerable to becoming delinquent and thereby run a risk of being on the wrong side of the law. Even though his children are already young adults, he could make a modest and minimum contribution to shaping their direction in life, if he had the benefit of a mitigation of his sentence. Family and social circumstances such as these

may in the appropriate circumstances, be considered one way or the other in sentencing.

That said, a court in sentencing must equally consider aggravating factors in each case. In this case, the offence of Armed Robbery was and is still a serious offence. The seriousness society attaches to Robbery is demonstrated by the sentencing rules surrounding the offence.

Additionally, at the time this offence was committed, armed robbery was prevalent and even today its occurence cannot be said to be any less. In fact some have argued, and may be right that it is on the ascendancy and is becoming increasingly brazen and violent. That said, having regard to social dynamics and the competing contentions in the jurisprudence of custodial punishment as the most effective tool for the suppression of crime, it is understandable and desirable that the Criminal Offences (Amendment) Act imposes a more flexible punishment regime that enables the Courts to impose appropriate sanction having regard to the peculiar circumstances of each case.

Given the age of the appellant at the time the crime was committed in 1999, by parity of reasoning he would be in his 50s as at date of this judgment.

Granting a commutation of the sentence of the Appellant has a societal benefit because he will be in society where he will serve as a reminder to others around him what happens when they decide not to pursue a straight and narrow path.

Considering the five-fold factors affecting the discretion of a Court raised by Ansah JSC (as he then was) in the case of **Kamil (supra)** we are of the view that the time served by the appellant already is nearly punitive enough.

Consequently, having regard to the totality of the circumstances of the Appellant's conviction and sentence, and the statutory changes which mitigate the punishment for robbery, after the Appellant's conviction, we are of the opinion that the sentence of life imprisonment imposed by the trial court on the Appellant ought to be reduced. The Appeal against the sentence therefore succeeds. Consequently, his life sentences for each of the offences of which he was found guilty and made to run concurrently, are hereby set aside. We substitute a sentence of thirty (30) years from the date of conviction, to run concurrently for each of the offences of which he was found guilty. In computing time to be served by the Appellant, we took into consideration the time served on remand during the trial of the case at the Trial Court.

We are inclined to recommend that, for the avoidance of doubt, that whenever Parliament embarks on legislation that reduces or mitigates, a penalty, forfeiture or punishment by way of an amendment, to existing statutes, the administration of justice would be enhanced if express saving provisions are included to provide for the fate of persons already sentenced and still serving a punishment, penalty or forfeiture under the statute that has been amended or repealed.

This is necessary to address the fate of those who may well have exhausted the appellate process and so cannot avail themselves of the rehearing jurisdiction of any Appellate Court in a bid to achieve a review of the sentence, penalty or punishment they may still be serving in spite of the introduction of new legislation that takes a less harsh view of the conduct for which they were punished or sentenced.

E. Y. KULENDI

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

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