CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT THE CIRUIT COURT 'B' OF GHANA HELD AT TEMA
ON TUESDAY, 1ST NOVEMBER, 2022

SUIT NO.

THE REPUBLIC

VRS

ABDUL ALI MASAWUDU @ DOGO

RULING

The accused person is before this Court on a charge of robbery contrary to section 149 of the Criminal Offences Act, 1960 (Act 29)

The particulars of offence are that on or before the 8th of May, 2018, at Community one Tema, in the Tema Metropolis and within the jurisdiction of this court, with force and to overcome the resistance of one Samuel Ahiadeke with a gun, robbed him of an amount of twelve thousand Ghana cedis (Ghs 12,000), iPhone 8 valued seven thousand Ghana cedis (Ghs 7,000), CCTV deck recorder valued at one thousand five hundred Ghana cedis (Ghs 1,500) wedding ring valued eight thousand Ghana cedis (Ghs 8,000) and wrist watch valued three hundred Ghana cedis (Ghs 300) all to a total value of twenty eight thousand, eight hundred Ghana cedis (Ghs 28,800)

The accused person pleaded not guilty. By that plea, he was shielded by the constitutional provision that he was innocent until proven guilty. In ***Gligah & Atiso v. The Republic [2010] SCGLR 870 @ 879*** the court held that *"Under article 19(2)(c) of the 1992 Constitution, everyone charged with a criminal offence was presumed innocent until the contrary is proved. In other words, whenever an accused person is arraigned before any court in*

any criminal trial, it is the duty of prosecution to prove the essential ingredients of the offence charged against the accused person beyond any reasonable doubt. The burden of proof is therefore on the prosecution and it is only after a prima facie case has been established by the prosecution that the accused person would be called upon to give his side of the story."

The prosecution in order to discharge its burden of establishing a prima facie case against the accused person, called two witnesses and closed its case thereafter.

According to PW1, on the 7th day of May, 2018, at about 10:30am, he was in the office together with his boss and other workers when some fair young men including the accused persons and three others entered with guns.

The four persons asked all of them to lay down and they obliged. They then searched their drawers for money and valuables. That the accused person came to him and took his Nokia and infinix phones, his wedding ring and an amount of Ghs 600. That he was able to identify the accused person because he stared at him when he (the accused) removed his phones and money from his pocket.

One of the robbers also searched and beat his boss whilst another was with other workers and the wife of the boss. That the last person was moving around the office. The one moving around the office cut the wire connection to the CCTV and took same away.

PW2 testified as the investigator. According to him, the police trailed the robbers to their hideout at a guest house and one of the robbers by name Malik, who is now deceased, exchanged gunfire with the police and was killed. That the rest managed to escape. He continued that police intelligence disclosed the accused person as one of the

robbers who robbed complainant and a police wireless message was sent out to all stations. That on the 17th day of January, 2020, the complainant with the assistance of the Ashaiman police arrested the accused person at his hideout.

He tendered in evidence the investigation caution and charge statement of the accused person as EXHIBIT A and B.

CONSIDERATION BY COURT

Section 173 of the Criminal and other Offences Procedure Code, 1960 (Act 30) provides that; "If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him."

In deciding whether or not a case is made out against the accused sufficiently to require him to make a defence, the Court must make certain considerations. According to the Supreme Court in the case ***of Asamoah &Anor. Vrs. The Republic [2017-2018] 1 SCGLR, 486, Adinyira JSC*** speaking for the apex court, stated that ''the underlying factor behind the principle of submission of no case to answer is that, an accused person should be relieved of the responsibility of defending himself when there is no evidence upon which he may be convicted. The grounds under which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trial or trial by indictment may be restated as follows;

a) There had been no evidence to prove an essential element in the crime
b) The evidence adduced by the prosecution had been so discredited as a result of cross examination; or

c) The evidence was so manifestly unreliable that no reasonable tribunal could safely convict upon it
d) The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt, one with innocence.

See the cases of ***The State v. Ali Kassena [1962] 1 GLR 144*** in which the ***Practice Direction issued by the Queens Bench Division in England [1962] 1 E.R 448 (Lord Parker CJ)*** was approved of, ***Moshie Alias Adama v The Republic [1977] 1 GLR 186, Kofi alias Buffalo v. The Republic [1987-88] –Tsatsu Tsikata v. The Republic [2003-2004] SCGLR 1068***).

Prior to analyzing the evidence to establish whether the necessary elements of the offence have been proved or not, I first of all have to determine whether the prosecution succeeded or not in establishing the identity of the accused as the alleged perpetrator of the offence.

In ***Ibrahim Razak v. The Republic [2012] 50 GMJ 139 SC @ 154-155*** the court regarding proof of identity of an accused held that "*It may also be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics; e.g. age, height, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties or peculiarities including blood group, as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places, or facts and other details of personal history. Thus it is fair and reasonable to say that the modes of identifying the perpetrators of a crime vary and holding an identification parade may be one of the acceptable modes. Another may be by proof of personal characteristics or peculiarities like the height of the person given by the oral evidence by prosecution witnesses on oath in court.*"

In the case if ***Dogbe v. The Republic, Atta Bedu J***, stated thus 'in criminal trials, the identity of the accused person as the person who committed the crime might be proved either by direct testimony or circumstantial evidence of other relevant facts from which it might be inferred by the Court''

The evidence of prosecution, is that by direct testimony of PW1, accused person was among a group of four men who attacked and robbed PW1 and other persons in his office on the 8th day of May, 2018. According to PW1, he is able to identify the accused person because he stared at the accused in the course of the robbery. However, under cross examination, this evidence of direct identity was called into question.

In cross examining PW1, learned counsel for the accused person had asked him at pages 40-41 of the record of proceedings;

Q: So, did you take the order to lay down.

A: Yes, My Lord no rightful person at the moment where you can see your life is in danger and you are being asked to lay down and say no. It would be a danger to me if I refuse to comply with what I am been asked to do.

Q: So were you laying prostrate, upside or sideways.

A: My Lord, prostrate.

Q: That is to say that your face was to the floor.

A: Yes, My Lord.

Q: I believe everything was moving very fast not so.

A: Yes, My Lord.

Q: You know with you that you have to convince this honorable court that you know and can unmistakably identify the accused person don't you.

A: My Lord No, at the time when we were asked to lay down at our office we have these two tables, so my mind was running faster as I did not know whether we will be killed or not,

so I tried to hide from my head to my waist under the table so that in case of any shooting. So, whilst under the table I was able to be turning my neck around because they could not see my head that was when I was able to identify the accused person.

Q: Per paragraph 10 of your evidence in chief you said that the accused person "came to you and you identified him". How were you staring at him?

A: My Lord, whilst I was under the table, he was searching me and so at the time my wallet was at my back pocket and he was turning me around removing everything he found in my pocket.

At page 43 of the record of proceedings, still under cross examination by learned counsel for the accused, PW1 answered;

Q: you were not able to state to this honourable court the meaning of the phrase as read to you in your paragraph ten (10) earlier, what is the meaning of that phrase. "I was staring at him".

A: My Lord, as I stated in my earlier statement saying that whilst he was searching me, he was the one who was turning me to make sure that whatever he wanted from me, he took it so that was when I got the opportunity to look at him.

Q: By saying staring at him, are you saying you took a long look at him. Is that correct?

A: Yes, My Lord. I was looking at him.

Up to this point, PW1's claim was that upon the orders of the accused and his accomplices, he was laying prostrate on the floor. That his head and upper part of his body was under a table whilst his buttocks and lower part of his body was outside. That the accused person came to him, took his wallet from his back pocket and then ordered him to turn around. Accused then took his phone. That it was at this time that he managed to get a good glimpse of the accused person. Learned counsel for the accused person had again challenged this evidence on the

basis that naturally, it is impossible for one to get a glimpse at a person standing over the lower part of their body whilst they lay prostrate. At page 48 of the record of proceedings, he had answered;

Q: Did you after this alleged robbery incident ever try again to lay with your face down and look at a person bending over your buttocks particularly with the upper half of your body under the table.

A: Yes, My Lord.

Q: Were you able to see the face of the person bending over your buttocks that way.

A: Yes, My Lord.

PW1's credibility began to wane at this point. It is easy for any human being to lay in the position that PW1 claimed he was in and put to test PW1's claim. I find that it would be next to impossible, unless one already knows the person or has had a glimpse of the person, to look at a person who is bending over their buttocks when they are laying prostrate with their head laying under a table.

To further dent the credibility of PW1 as to his claim of identifying the accused person, learned counsel for the accused person had at pages 49 and 50 of the record of proceedings asked;

Q: You told this court on the last adjourned date that the accused person was bare faced. Is that correct?

A: No, My Lord, I did not say that.

Q: Did the accused have a head gear of any kind.

A: Yes, My Lord.

Q: What head gear.

A: The one we normally call face mask.

Q: What is the other name?

A: My Lord, long before this nose mask or face mask we are wearing, the name we normally know is face mask so I don't know any other name.

Q: Can you describe the face mask.

A: My Lord, there is this ernh, it is like a hat that they wear and then they cut their eyes, nose and then the lips side.

Q: I put it to you that it is impossible for you and indeed for anybody else to identify a person interacting with him then just by looking at the person when the person was wearing a balaclava with only eye holes.

A: My Lord, he is the one I saw.

Q: I put it to you that you saw a balaclava with eyes.

A: I saw the face mask and he is the one I saw.

Also, at pages 50 and 51 of the record of proceedings, PW1 answered:

Q: And the last of the robbers was moving around the office.

A: No, My Lord, as I said earlier on, they were not standing at one particular place at a moment one person goes and the other will come and the other moves. Not that one person was standing on a particular person at all times.

I found PW1 generally to be an untruthful witness because under cross examination, he sought to deny the obvious. He wants the court to believe that the accused person was wearing a balaclava which covered all of his face and exposed only his eyes, nose and mouth, dressed in a long dress popularly referred to as ''jalabia'' with jeans trousers, (see page 40 of the record of proceedings), further that the accused and the others kept moving around the office in a situation that he agrees was a fast moving scene, that he PW1 had the upper part of his body under a table and yet, he had positively identified the accused person, whom he had

no prior knowledge of simply because the accused bent over him to remove his wallet and also turned him over to remove his phones. I did not believe him.

From his own description, the only visible part of the accused that anyone could see would be his hands and possibly his feet i.e., if he was not wearing shoes and a part of his neck. A jalabia is a long dress that covers a person's neck straight to his feet. It has long sleeves as well. PW1 says the accused was also wearing jeans trousers and had covered his face with a balaclava. The combined effect of the jalabia and jeans trousers is that accused was completely covered from neck to toe.

The effect of the balaclava as PW1 himself indicated is that it was only accused person's eyes, nose and mouth that were exposed. If I am to believe PW1's evidence, then the only visible part of accused that was uncovered would be his hands and depending on how far the balaclava extended over the neck, a part of his neck. Yet, PW1 wants this court to believe that he had stared at accused very well such that he could be able to identify him without the balaclava.

What finally nailed the coffin in the head as to PW1's lack of credibility, was his insistence that the accused person is fair in complexion. At page 38 of the record of proceedings, PW1 under cross examination by learned counsel for the accused person had answered;

Q: So now I put it to you that the accused person in the dock is not fair in colour.

A: My Lord, it is untrue.

The record of proceedings would indicate that the court immediately made a note '' the accused person is visibly dark in colour and even darker than PW1 who cannot be described as fair''. Indeed, in terms of complexion, the only description that any person

can give to the accused person is that he is dark. Accused is a very dark person who cannot by any stretch of the imagination be regarded as fair.

PW2, confirmed this when at page 87 of the record of proceedings, under cross examination by the Court, he answered;

Q: Could you please assist the court to describe the skin color of the accused person.

A: My Lord, dark.

Q: Again, could you assist me to describe your own skin type.

A: Chocolate color.

As was held in ***Howe v. The Republic [2013-2014] 2 SCGLR 1444***, in a criminal trial, the prosecution is obliged to lead evidence to identify the accused as the person who had committed the crime. By way of identity, I find that prosecution has failed to positively identify the accused person as part of the four men who robbed PW1 and others.

From the evidence of prosecution, accused person has been linked to this crime because of these occurrences:

a) One of the phones that was stolen during the robbery was an iPhone and same was traced to one Malik at a hotel at Gulf City, Tema
b) The police engaged in a shootout with the said Malik and killed him
c) Afterwards, the police whilst in the guest room with the girlfriend of the deceased, saw that a certain number was calling the deceased's phone incessantly
d) The girlfriend of the deceased identified the caller as the accused person and informed police that he was a friend to the said Malik
e) The police arrested the accused person more than eighteen months after the commission of the crime and accused person denied knowing either Malik or his girlfriend or that he had called the said Malik on the day of the shoot out

f) Police later found out that the accused person was not being truthful as he indeed knew the said Malik and his girlfriend.

PW1, at page 53 of the record of proceedings, had answered under cross examination by learned counsel for the accused person;

Q: I put it to you that the accused person has absolutely nothing to do with the alleged incident we are talking about.

A: My Lord that is not true and My Lord the day of the incident as we stated in our statement, they took iPhones and so we happen to track the phone and we were able to locate one of them at Bethlehem Gulf City in a hotel with the Swat Unit and when he sensed the danger that it was police, he turned to shoot at them and so he was shot and the accused person over there was calling the guys number so we took the number because he kept calling. At the time the guy was with the girlfriend so the police asked the lady to answer the call and he was asking of his other colleague but the police asked the lady to tell him that he is in the washroom still, he kept on calling so we have to check the number through the WhatsApp and that was where we were able to track him also but we were not successful to track him that day.

At page 72 of the record of proceedings, PW2 answered;

Q: *Without admitting that Aisha Mohammed has anything to do with the accused person or Malik Suleman, Edward Malik or whatever name you call him, I put it to you that Aisha Mohammed told you was to the effect that accused person was Malik's friend and no more.*

A: My Lord, accused person initially when he was arrested denied knowing Aisha Mohammed and the Malik and even denied the number but after the information was

given by MTN, he then claimed that yes, he knows the Aisha Mohammed and the Malik and that he even calls the Malik boss.

Also, at page 83 of the record of proceedings, PW2 had answered under cross examination;

Q: Assuming without admitting that Aisha described the accused person as a friend of Maliks' as in paragraph 12 of your alibi report, does that make accused person an accomplice in the crime on trial.

A: My Lord, investigations would have proven that his friendship is tantamount to accompliceship.

PW2's claim that the accused person knew the said Malik and denied ever knowing him was put under vigorous cross examination by learned counsel for the accused person. At page 79 of the record of proceedings, this is what transpired:

A: My Lord, I did mention the complete name.

Q: You had an opportunity to show a picture of Malik to the accused person. Did you not?

A: No, My Lord.

Q: You shot Malik dead is that correct.

A: I did not My Lord. I am only the investigator.

Q: Did your investigations take you to the house of the said Malik.

A: No, My Lord.

Q: So, I put it to you that you denied yourself the opportunity to get a picture of Malik and by that reason, you are unable to show Malik's picture to the accused person for identification.

A: Yes, My Lord, I was not the substantive investigator by then. I took over the investigation after the accused person had been arrested.

Q: After the person had been arrested, you still had the opportunity. I put that to you to go for that picture if it was important to your case.

A: My Lord, I did not go for the deceased picture.

From the evidence, prosecution roped in the accused person on the basis of the proverb "show me your friend and I would show you your character''. Prosecution's logic was that since Malik was an armed robber, then by necessary implication, anyone who is his friend and who was calling him incessantly on the day the said Malik engaged in a shoot out with the police and who after twenty months now denies knowing the said Malik is an armed robber as well.

That supposition is not sufficient in law. Indeed, as counsel for the accused person rightly indicated, even if the said Malik were alive, the police would have to prosecute him in order to prove his guilt and establish that he is an armed robber. It can thus not be said on authority that the said Malik was an armed robber on the basis of the phone that was found with him.

Accused person's friendship with him may have been suspicious but it is trite that a multitude of suspicions does not constitute proof in law, much more so in criminal law. Prosecution was under an obligation to lead cogent and relevant evidence consisting of either direct or circumstantial evidence to prove that the accused person was part of a group of four young men who robbed the said shop and its workers on the said day.

Robbery is a serious offence and the people of Ghana have through their representatives in Parliament acknowledged this fact by creating a minimum term of imprisonment of at least ten years without the use of a weapon and fifteen years with the use of a weapon. It is imperative that prosecution in seeking to prosecute such persons and make society safe for all of us, prosecute based on relevant evidence rather than suspicions and logic.

On that basis, at the close of prosecution's case, I find that they have failed to establish the identity of the accused person as being one of the four men who engaged in the robbery on the 8th of May, 2018, I hereby acquit and discharge the accused person.

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

D.S.P J. ASAMANI FOR THE REPUBLIC

CHARLES WALKER DAFEAMEKPOR FOR THE ACCUSED PERSON