IN THE HIGH COURT HELD IN CAPE COAST ON THURSDAY, THE 25TH DAY OF NOVEMBER, 2021, BEFORE HER LADYSHIP MALIKE AWO WOANYAH DEY (HIGH COURT JUDGE)

CC83/2021

THE REPUBLIC

VRS

1. **ABDULAI GARIBA**
2. **WISDOM ADUKPO**
3. **CHRISTOPHER YAW AFREH**

ACCUSED PERSONS PRESENT

LUCY BOISON WITH KAFUI MOORE FOR THE REPUBLIC

MICHAEL NANA FYNN FOR A1

ERNISTINA OBBOH FOR A2

FRANCESCA SEFENU FOR A3

JUDGMENT

The three accused persons were arraigned before this court on the 18th day of October 2021 and charged with the following offences;

Conspiracy to commit a crime, namely robbery, contrary to sections 23(1) and 149(1) of the Criminal Offences Act 1960 Act 29 and robbery Contrary to section 149(1) of the same count.

The brief facts of the case, as presented by the prosecution, are as follows;

Seth Kwaku Akyea, now deceased, was the Operations Manager of ECOBANK GHANA LIMITED, Labone Branch and a resident of Adom City Kasoa. The 1st

accused, Abdulai Gariba alias Rebel Leader is a scrap dealer at Accra, whilst the 2nd accused person Wisdom Adukpo alias Moro is a motor mechanic at Agona Konyako, and the 3rd accused person, Christopher Afreh alias Indomie alias Shadow is a construction labourer at Kasoa.

On 21st August 2015, at about 11:00 pm, the deceased was returning to his house from town in his private vehicle Hyundai Elantra with registration No—GS 7072-13. Accused persons, together with one Kwadwo Hitler alias Hitler at large, armed themselves with a locally manufactured pistol and a jackknife. They laid ambush near the gate of the deceased to rob him. As soon as the deceased entered the compound with his vehicle, the accused persons rushed on to him and ordered him to surrender all his money. The deceased's wife, Faustina Nkrumah, was seated at the vehicle's front seat when the robbery continued. The deceased refused to surrender all monies on him as instructed by the accused persons, and a struggle ensued between him and the accused persons. The accused persons forcibly took two mobile phones belonging to him and a cash amount of four hundred Ghana cedis which was in the locker of the deceased's dashboard. During the struggle, the 1st accused, armed with a locally manufactured gun, shot the deceased in the neck and Kwadwo Joe alias Hitler, armed with a jack knife, stabbed the deceased in the abdomen. The deceased fell to the ground, and the accused persons entered his car and drove it away. In the process of running away with the vehicle. The accused persons were involved in an accident and crashed the vehicle into a motor rider at Roman Junction Kasoa. Accused persons then abandoned the deceased's vehicle.

Police investigations led to the arrest of the 1st accused person on 1st June 2016. The 1st accused person admitted the offence and named the 2nd and 3rd accused persons as his accomplices. Police intelligence also led to the arrest of the 3rd accused person. Investigations also revealed that the 2nd accused person had been convicted for another crime and was serving a sentence at the Senior Correctional Centre at

Mamobi. Both 2nd and 3rd accused persons admitted the offence and mentioned the 1st accused person as their accomplice. Their accomplice Kwadwo Hitler is, however, still on the run. After closing their investigations, they were arraigned before the court on those charges.

Before I proceed to delve into the case, it is pertinent to state what is required of the prosecution and the accused persons in a criminal case such as the one brought before the court, and I must also state that I have perused the addresses filed by both counsel for the Republic and the one filed on behalf of the 2nd accused person and it has assisted the court in arriving at its decision in this judgment.

The settled principle of law is that the burden of proof is on the prosecution to establish the accused person's guilt in a criminal trial. That is because Clause 2c of Article 19 of the Constitution 1992 states as follows;

"An accused person is presumed innocent until proven guilty or he has pleaded guilty."

That important principle also finds expression in the case of **Woolmington vs DPP (1935) AC 462**, which principle has been relied on in various cases in our criminal jurisprudence, not forgetting that it has become canonised in our Evidence Act, 1975 NRCD 323. When the prosecution assumes this burden, the standard of proof required is proof beyond a reasonable doubt. Thus section 11(2) of the Evidence Act, NRCD states that;

> ***"In a criminal action the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt."***

The term beyond a reasonable doubt means evidence being led satisfactorily to prove the commission of the offence by the accused.

In conceptualising proof beyond a reasonable doubt, Lord Denning in **Miller vs Minister of Pensions [1947] 2 All ER 372** had this to say

> ***"…proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not the least probable," the case is proved beyond a reasonable doubt, but nothing short of that will suffice…"***

It is also entrenched in our criminal jurisprudence that an accused person, when called upon to enter his defence, is only to raise a reasonable doubt in the case of the prosecution—section 11(3) of the Evidence Act, 1975.

The Supreme Court explained this principle in the case of ***Commissioner of Police vs Isaac Antwi [1961] GLR 408,*** where it was stated that:

"The fundamental principles underlying the rule of law are that the burden of proof remains throughout on the prosecution and the evidential burden shifts to the accused only if at the end of the case for the prosecution an explanation of circumstances peculiarly within the knowledge of the accused is called for. The accused is not required to prove anything; if he can merely raise a reasonable doubt as to his guilt, he must be acquitted."

Further, in the case of **Osafo vs The Republic [1993-94] 2 GLR 402,** the Court of Appeal held that:

> ***"Although the appellant had no burden to prove his innocence, once he admitted that the drugs were found in his room but proceeded to exonerate his possession, he was obliged under the provision of section 11(3) 1975 (NRCD 323) to lead evidence to create doubt in the case for the prosecution."***

As stated in the case of **Oteng vs The State (1965), CC 183** reasonable doubt does not include fanciful doubt. In this court's opinion, reasonable doubt that will justify an acquittal is a doubt based on reason arising from evidence or lack of it. It is a doubt which a reasonable man or woman might entertain. It is not an imaginary doubt. It is a doubt that would cause prudent men to hesitate before acting in matters of importance to themselves.

In satisfying the burden imposed on them by law, the prosecution called four witnesses, namely PW1, NO. 7696 D/L/CPL Christiana Mawusi, PW2 D/INSPECTOR Kennedy Ndego, PW3 Inspector Michael Adu Adjei and PW4 Faustina Nkrumah, wife of the deceased, who testified that she was with the deceased on the night of the attack.

At the close of the prosecution's case, the court called upon all three accused persons to enter into their defence since, in the court's opinion, a prima facie case had been established against them.

The accused persons opted to testify from the witness box and were cross-examined. None of them called any witness in support of their case. It ought to be noted that none of them filed any Notice of Alibi in this case. They all denied the offences charged.

SUMMARY OF EVIDENCE

PW1 testified that on 27th December 2018, the case was assigned to her for continuation of investigations from the substantive investigator Dominic Sakzabre who has proceeded on retirement. She told the court that she knew the investigator's handwriting. She told the court that upon taking over, she established that on 21st August 2015 at about 11.25 pm, the National Police Information Room Headquarters in Accra called Kasoa station with information that there was an ongoing robbery at the Akweley Estate. When the police rushed to the scene, they found the deceased

Seth Kwaku Akyea in a pool of blood with a gunshot wound and a stab wound lying in front of his house. The police retrieved a jackknife, a spent cartridge and a hat from the crime scene. The police also took photographs of the scene and the deceased's body, after which his body was conveyed to the Police Hospital for autopsy. The pathologist gave the cause of death as Exsanguination and shotgun injuries.

She further testified that the deceased and his wife were attacked by three men on the day in question, and during the attack, the deceased put up resistance and so was shot by the robbers. After the robbers shot him, they took control of the deceased's vehicle and ran away. She also testified that on the 22nd day of August 2015, the police received information that the deceased's vehicle had been involved in an accident and abandoned at CP junction, a suburb of Kasoa. The police visited the scene and also took photographs of the scene and the vehicle with registration number GS 7072-13, after which they moved it to the police station. Later the police received information from some witnesses who were on a motorcycle that the robbers, who were four in number, ran into them and fled into the bush.

Significantly, she testified that on 1st June 2016, the police received intelligence that the 3rd accused, Christopher Yaw Afreh was part of the robbery and was hiding at Kasoa. The police traced the 3rd accused and arrested him at his hideout. Upon interrogation, he admitted the offence and mentioned the first accused, Abdulai Gariba, 2nd Accused person, Wisdom Adukpo alias Moro as his accomplices and another person he could not remember but could identify when seen. The third accused person and the police visited the deceased's house, and he identified it as where the robbery took place and demonstrated how the robbery took place. He also showed the police where they sat and waited for the deceased to return home and where the deceased's car was parked before they attacked him. He further told the police that the jackknife belonged to one of his accomplices, but the 1st accused person shot the deceased.

The police received information that the 2nd accused person had been convicted of another offence and was serving a sentence at the senior correctional Centre at

Mamobi. The police and the 3rd accused visited the said facility, where the 3rd accused identified the 2nd accused person as his accomplice. An investigation caution statement was taken from the 2nd accused person, who admitted the offence. Upon a tip-off on 2nd June 2016, the police arrested the 1st accused person from his hideout. Upon interrogation, he mentioned one Kwadwo Joe alias Hitler at large as part of their gang. The accused persons narrated how the entire robbery took place. When they entered the house, they ordered the deceased to surrender his money and vehicle, but he resisted; thus, a struggle ensued, and the first accused shot the deceased whilst Kwadwo Joe alias Hitler stabbed him in the abdomen with a knife. They pulled the deceased out of the vehicle and fled the scene with it. While running away, they ran into a motorcycle, and thus they got down and ran away on foot.

She also told the court that the previous investigator took the investigation caution statements of all three accused persons. Later when she took over and read the statements to the accused persons, they denied it.

She tendered the following exhibits in evidence;

- Statement of Dominic Sakzabre dated 18th November 2016 marked as Exhibit A.
- Photographs of the crime scene, vehicle implements, and body of the deceased tendered and marked as Exhibit B, B1, B2 B3 and B4
- Further Investigation Caution statement of A1 dated 27th December 2018 marked Exhibit C.
- Further investigation Caution statement of A3 dated 27th December 2018 marked Exhibit D.
- Charge caution statement of A1 dated 29th May 2019 marked as Exhibit E
- Charge statement of A3 dated 29th May marked as Exhibit F
- Charge statement of A2 dated 2nd September 2019 marked as Exhibit G

Based on the objection raised by counsel for the accused persons that the investigation caution statements of the accused person were not taken voluntarily, the court held a voir dire regarding the investigation caution statements of all three accused persons. However, after the voir dire, the 2nd and 3rd accused persons' investigation caution statements dated 10th June 2016 and 1st June 2016 were admitted into evidence and marked as Exhibits H and J, respectively. The investigation caution statement of the 1st accused person dated 23rd and 24th June 2016 was rejected and marked as R and R1 in view of the fact that the prosecution did not lead any evidence on its voluntariness. In a nutshell, the prosecution could not produce the independent witness that took the statements.

PW2 D/INSPECTOR Kennedy Ndego also testified that in 2015 he was attached to the Gomoa Ojobi District Police Headquarters. On 18th September 2015, one Stephen Matsi of Gomoa Kwame Kwaa came to the station and reported that the 2nd accused had attacked him at gunpoint in an attempt to rob him; thus, at the time that this offence took place, the 2nd accused person was not in custody.

PW3 No. 35733 D/Sgt Michael Adu Adjei testified that on 25th August 2015, a case of Robbery and Murder was reported to the police and referred to the Dominic Sazkabre to investigate. No arrests were made until 1st June 2016, when police gathered intelligence about the involvement of the third accused person. He and some officers proceeded to Kasoa Walantu and arrested the 3rd accused person. Upon interrogation, he admitted the offence and mentioned the 1st accused person as his accomplice and another person whose name he did not know. On 23rd June, the police received intelligence about the hideout of the first accused person who was planning another robbery. The police went to his hideout at Obom Road near Kasoa, where he was arrested. The police retrieved a bunch of motor keys from the 1st accused person's hideout after a search was conducted. He handed over the accused to the Kasoa police for investigations.

PW4 Faustina Nkrumah testified that the deceased was her husband, and she lived with him at Akweley Estate Kasoa. On 21st August 2015, the deceased picked her up from her house so they could go to his house. When they got to the house, he got down to and opened the gate and drove into the house and parked the vehicle. He got down again to close the gate when some unknown men attacked him. The men brought him towards the car, and the deceased told me to run inside the house, and she did. She began to scream, which drew a tenant's attention, but when she told her, she did not believe it. She collected a phone from another tenant to call her sister, who lives close to the police station but suddenly heard a gunshot before she could get through.

THE EVIDENCE OF THE ACCUSED PERSONS

The 1st accused testified that he was a scrap dealer and resided at Darkuman junction before his arrest. However, his mother lived in Kasoa, and he was going to visit her on the day of his arrest. At Kasoa Obom Junction, he saw one Mohammed, an Okada rider at Obom Junction who was also a friend of one of his brothers. In the same year, he borrowed Mohammed's phone to make a call, but the phone slipped, and the screen got damaged. Mohammed wanted him to buy a new phone, but he did not have money to buy it. His brother told him Mohammed had reported the matter to the police, so he should be careful. Mohammed could not see him for some time because he had returned to Darkuman. Thus on the day in question, whilst visiting his mother, he stopped at Obom Junction to buy fried rice at Obom Junction. When he saw Mohammed, he called and told him he should forget about the phone. After the said interaction with Mohammed, Mohammed suddenly hooked his belt from behind and noticed that he was with some men whom he later found to be policemen. The police officers arrested him and beat him up mercilessly at the scene. At the police station, the police beat him again, and he sustained injuries to his body. The scars he sustained are still visible on his right wrist, in his left palm at the back of his eyes and on his scalp.

He denied knowledge of the offence and told the court that he did not know the 2nd and 3rd accused persons until his arrest. He denied committing any crime with the other accused persons.

The second accused person Wisdom Adukpo alias Moro also testified that he was a motor mechanic and was living in Kasoa American Town. He was at the Correctional Centre for three years until he was released on 9th March 2019. Less than a month after his release from the Correctional Centre, one of his friends, Martin, was arrested and sent to the Kasoa Police station after accidentally knocking someone with his motorbike. Martin used to work with him before he went to the correctional centre. Thus he visited him at the Kasoa police station on about five occasions. He knew the police officers; they also knew him because he was in custody at the Kasoa police station before he was convicted and sentenced to the Correctional Centre, and he used to see all the police officers that testified in this case at the station. One day when he visited the said Martin, the police informed him that he was under arrest regarding this case. He was surprised because the investigator Mawusi PW1 had seen her several times at the police station but never asked him about it. He denied the charges and informed the police that he was at Agona Konyako on the day of the incident, but the police did not take him there. PW1 read over his investigation caution statement to him, but he was surprised because that was not the statement he gave to the police who visited him at the correctional centre. He was kept in police custody for months after his arrest without medical care, even upon request, until he was transferred to the Ankaful Prisons.

He testified further that when he was at the Correctional Centre, the 3rd accused and a police officer with Isaac Mensah, the independent witness, visited. They lined up 6 of them, and the 3rd accused said he did not know them. Later that day, he was recalled by the officer, and he told him that the 3rd accused said he knew him and that he had committed a crime with him. He denied it because the 3rd accused did not even make the statement in his presence. The CID asked him where he lives and the work he does.

Though he insisted that he knew nothing about the crime, he saw him scribbling something, after which he asked him to thumbprint. He said the first time he met the 1st accused was when he met him at the Ofaakor Circuit court.

The third accused person also testified that before his arrest, he was living at Domeabra Kasoa. On 3rd June 2016, he was arrested by the police at Electricity Kasoa on the road to buy food. When he questioned the police about the reason for his arrest, they told him he should be quiet until they got to the station. A Sony Ericsson phone with the name Christopher written on it was shown to him, and he asked whether he knew the owner, but he denied ownership of same. He mentioned his name to the police as Christopher Yaw Afreh alias Indomie alias Shadow. He was handcuffed at his back and was severely beaten by the police to speak the truth. The crime officer asked about one Rebel Leader with whom he committed the offence, but he denied knowing him. He also asked about A2 and one Kojo Joe, and he denied same as well. The crime officer then took a different sheet and enquired from him what he went to do at Electricity, and he told him he went to buy food. He offered to call his master to confirm that he was a mason, but the police refused. They also refused to take him to his place of abode to make enquiries.

EVALUATION AND THE APPLICABLE PRINCIPLES OF LAW

As stated early on, the first count against the accused persons can be found under sections 23(1) and 149(1) of the Criminal Offences Act 1960, Act 29.

Section 23 (1) of the Criminal Offences Act 1960 Act 29 states 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."***

Thus as its duty, the prosecution must prove the following ingredients;

1. The offence involved two or more persons.
2. These persons agreed to act together.
3. They acted together for a common purpose, i.e., to commit a crime or do an unlawful act or a lawful act by an unlawful means.

In the case of ***Republic vs Eugene Baffoe-Bonnie and Others [2020] DLHC8774,*** Kyei Baffour J as (he then was) was of the opinion that the new rendition of the offence of Conspiracy by the Statute Law Review Commissioner had narrowed the scope of the charge. Nevertheless, according to him, it was no defence for an accused to claim when found acting together with others to contend that it cannot be used as evidence of a prior concert or deliberation. According to the learned Justice, who is now a Court of Appeal Judge, any interpretation that appears to ignore the latter part of section 23(1) of Act 29 to the effect that "… whether with or without previous concert or deliberation" would have missed the import of the offence of Conspiracy as envisaged under the law. He went on to cite the case of **Faisal Mohammed Akilu v the Republic [2017-2018] SCGLR 444 dated 5th July 2017,** where the Supreme Court, through Apau J.S.C., threw more light on the new rendition as follows;

"From the definition of conspiracy as provided under section 23(1) of Act 29/60, a person could be charged with the offence even if he did not partake in the accomplishment of the said crime, where it is found that before the actual committal of the crime, he agreed with another or others with a common purpose for or in committing or abetting that crime…However, where there is evidence that the person did, in fact, take part in committing the crime, the particulars of the conspiracy charge would read that he acted together with another or others with a common purpose for or in abetting the crime" This double-edged definition of Conspiracy arises from the undeniable fact that it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. Therefore, Conspiracy could be inferred from the mere act of having taken part in the crime where the crime was actually committed. Where the conspiracy charge is hinged on an alleged acting together or in concert, the prosecution is tasked with the duty to

prove or establish the role each of the alleged conspirators played in accomplishing the crime."

In view of the fact that the conspiracy charge must be discussed in the light of the offence of robbery, it is pertinent to state the law on Robbery, which can be found under sections 149 (1) and 150 of Act 29 as follows;

149(1). Robbery

"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 not less than fifteen years."

150. Definition of robbery

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.

Thus, under these two offences, the prosecution must prove the ingredients of the offence beyond reasonable doubt as stated under sections 11(2) and 13(1) of the Evidence Act, 1975 NRCD 323. The ingredients to be proved under these two offences are embedded in the sections stated above and include proof that;

1. The offence involved two or more persons.
2. These persons had a prior agreement to act together, or they acted together.

3. They agreed or acted together for a common purpose, i.e., to commit a crime or do an unlawful act or a lawful act by an unlawful means.
4. That the accused persons stole from their victims.
5. That the accused persons used force or caused harm to their victims or threatened, assaulted or used harm on their victims to overcome their resistance to stealing the thing.

See also the cases Frimpong a.k.a. Iboman v The Republic [2012] 1 SCGLR 297, and Behome vs The Republic [1979] GLR

A discussion of both charges together would, at the end of the day, resolve the issue as to whether the prosecution has led sufficient evidence to sustain both charges against the accused. These two offences shall therefore be discussed together.

In this case, the 4th prosecution witness testified that she lived together with her husband, Seth Kwaku, at Akweley Estate, Kasoa. On the day in question, she was with the deceased in his car, and when they got home, the deceased got down, opened the gate, drove in, and parked the vehicle. After parking the vehicle, he got down again to lock the gate but was attacked by some unknown men. The men brought him towards the car, and whilst attacking him, the deceased asked her to run inside, and she did and locked the door. Whilst inside, she began shouting for help. She heard a gunshot as she tried to get help by using a tenant's phone to call her sister. When she came out later, she saw the deceased lying in a pool of blood on the ground with gunshot wounds. She realised that the robbers had taken the deceased's vehicle away. PW1 also told the court about the investigations conducted by the police in respect of the said attack. She told the court about how the investigations conducted by the police led to the arrest of the three accused persons and how all three of them had confessed to the crime in their investigation caution statements. Quite apart from the oral testimonies of the prosecution witnesses, the 2nd and 3rd accused persons in their investigation caution statements Exhibits H and J mentioned that on the day in question, they were four in number. Thus the evidence produced by the prosecution

revealed that more than one person attacked the deceased, and they had taken his mobile phone, an amount of 400 cedis and his vehicle away from the scene.

Counsel for the 2nd and 3rd accused persons cross-examined the prosecution witnesses at the mini-trial, and the court was convinced first that the accused persons had made the said statements and they made them voluntarily without any duress or threats whatsoever. It was established that the independent witness was present at the making of their statements. There is ample evidence on the record that the deceased had been attacked by robbers who acted together for a common purpose on the day in question.

Indeed from the evidence given by the prosecution witnesses, the deceased was attacked in unison by the three unknown men, whilst the 2nd and 3rd accused mentioned that they were four in number. There is ample evidence on the record that whilst the men attacked the deceased, one shot him, and another stabbed him. The evidence produced by the prosecution shows the picture of the deceased lying in a pool of blood. It also showed the knife retrieved from the crime scene and is consistent with the evidence with PW1 that apart from being shot, the deceased also received stab wounds. There is also evidence from PW4 that when she escaped and went inside the house, she heard a gunshot while trying to make calls. When she came out, she found that the deceased had been shot and his vehicle taken away by the armed men, including their mobile phones and money. In fact, per their own investigation caution statements, the 1st and 2nd accused persons stated that they searched the car and took away two mobile phones and a cash amount of GHC400. Aside from that, there is also evidence from the prosecution witnesses confirming the statement of the accused persons that they drove the vehicle away from the scene.

Quite apart from that evidence, it is established that the attack on the deceased was made in unison with a common purpose which was to steal from him, and indeed the robbers succeeded in taking the vehicle away, including the mobile phones which

were in the vehicle. Thus the common purpose for which the accused persons attacked the deceased is evident on the record.

The prosecution's evidence on the harm that was caused to the deceased to overcome his resistance to the stealing of the two mobile phones, the vehicle and the amount of 400 Ghana Cedis was attested to by PW4 and PW1 and corroborated by the investigation caution statements of the 2nd and 3rd accused persons. There is ample evidence that the deceased is dead and that he died at the scene of the crime because, per Exhibit A, which is the statement of the original investigator, when they got to the scene, the deceased was lying in a pool of blood dead and they transported his body to the Police Hospital for autopsy. This clearly shows that the robbers caused personal harm to him, and PW4 also felt threatened when the attack occurred and had to run for her life after the deceased told her to do so. This harm caused to the deceased and threat that PW4 faced was meant to overcome the resistance of the deceased and PW4 to the stealing of the items. There is ample evidence on the record that the deceased struggled with the robbers, but they succeeded in taking the items away from him.

Having established the ingredients of conspiracy and robbery, has the prosecution led sufficient evidence on the identity of the accused persons? I shall therefore proceed to discuss the evidence led by the prosecution in relation to the identity of the robbers though the court has touched on it briefly supra.

Under cross-examination, it was suggested to PW4, especially that she did not see the men who attacked the deceased, and she agreed with that suggestion due to the manner in which the attack was carried out. It must be stated that the entire cross-examination of counsel for the accused persons, especially that of A2, was to dwell on the inability of the witnesses to identify the accused persons as the robbers and the possibility that other persons connected with the deceased could have committed the offence. However, it must be stated that the evidence led shows that the witness PW4, though he was with the deceased, could not have identified the accused persons

because of the manner in which the offence was carried out. The question to be answered is whether that inability to produce direct evidence of identification is fatal to the prosecution's case.

On this point, counsel for the Prosecution submitted that an identification parade and proof of personal characteristics of an accused are not the only means by which the identity of a person accused of a crime can be established. The court agrees with this submission because the call for an identification parade or proof of identity by someone who perceived the situation may directly not be possible due to the manner in which the robbery took place, as already stated above. There is no direct evidence presented by the prosecution to prove the identity of the accused persons, but their own confession statements gave them up.

In fact, in respect of A1, his statement was rejected by this court in all fairness to him, as the prosecution could not produce the independent witness. However, in his further statement before this court which was admitted without objection, he told the court that he was confused when he gave that statement, and A2 and A3, who were the first to be arrested, had mentioned him as the brain behind the entire robbery. This court had the opportunity to comment on that evidence in its ruling, which directed A1 to also open his defence because of the following reason;

Having established that the deceased died as a result of the attack by more than one person, including the accused persons, the statements given by A1 and A2 concerning the plan hatched to rob and the steps taken by each accused person and the role each accused person played in the robbery, the statements of A1 and A2 are binding on A1 since their declarations and acts were made in furtherance of the conspiracy and the robbery.

See the case of **George Ayittey v The Republic Suit No H2 /1/2018** dated 21st January 2021, where the learned Justice Dennis Adjei stated;

The law of the evidence of a conspirator against a co-conspirator becomes binding where it is established that conspiracy existed and all were members of the conspiracy, and their acts and declarations were made in furtherance of the crime. The ratio established in the ancient case of R v Blake 1844 6 QB 126 was that acts and declarations of a co-conspirator made in furtherance of an existing conspiracy between them shall be binding on the other co-conspirator. The above position was articulated in the case of **RV BOSSMAN AND OTHERS [1968] GLR 595 at page 600** as follows;

"It is true that acts and declarations of one conspirator in furtherance of the common design may be given in evidence against any other conspirator see R v Blake 1884 6 QB 126. And therefore should the second accused be proved to be in a conspiracy with the first accused the declaration which binds must be in furtherance of their common design. And before it is received in evidence against the other accused, the existence of the conspiracy and the fact that the parties were members of the same conspiracy must be proved."

In a conspiracy trial, evidence of what one accused says in the absence of other conspirators is rendered admissible against such others on the basis that if they are all conspirators, what one of them says in furtherance of the conspiracy would be admissible evidence against them, even though it was said in the absence of the other conspirators. This is said to be an exception to the hearsay rule.

It must also be stated that the law is clear that a confession statement sole can be relied on by a court to convict an accused person where it is clearly established that the accused gave the statement voluntarily.

See the cases of **Billa Moshie v The Republic [1977] 2GLR 418** and State vs Otchere

At page 170 of his book Practice and Procedure in the trial courts and Tribunals in Ghana 2nd Edition, the author Justice Brobbey notes… In **Ofori vs The State, [1963] 2GLR 452SC,** the Supreme Court held that a free and voluntary confession of guilt by

an accused person, if it is direct and positive and is duly made satisfactorily proved is sufficient to warrant a conviction without any corroborative evidence. In this case, the corroborative evidence though not linked to the identity of the accused persons, PW4's evidence as narrated to the court fits the manner described by the 2nd and 3rd accused persons.

Therefore, this court holds that the inability of PW4 to identify the attackers on that night cannot be relied on by the court to absolve the accused persons in the face of the confessions they gave to the police. In fact, A3 was the first to be arrested, and in his statement to the police dated 1st June 2016, he gave a vivid narration of how the entire plan was taken, the steps they took before reaching the deceased's house, which statement could not have been fabricated by the police. He even told the court about how they waited for the deceased to come home. This court believes that the narration of the accused persons was what actually happened on the day in question. There is evidence on the record that not only did 2nd and 3rd accused persons confess and mention the role A1 played, but they also mentioned another person who is now on the run as their accomplice, and he stabbed the deceased whilst A1 shot the deceased to overcome his resistance in stealing the items. PW3, as stated above, was one of the arresting officers and also confirmed that A1 was arrested based on police intelligence gathered from an informant.

There is also evidence that not only did A3 mention A2, but he identified him at the Senior Correctional Centre, and it was after that identification that the police took A2's investigation caution statement in the presence of an independent witness.

In **Howe vs the Republic [2013 2014] 2 SCGLR 1444** cited by counsel for the prosecution on the issue of identity, the Supreme Court, through Justice Akamba JSC, noted that identification was one of fact to be determined by the court. Thus the prosecution must lead evidence to identify the culprits of a crime. In this particular case, though PW4 did not see the men who attacked them, her narration of how they

were attacked fits into the confessions of the accused persons themselves as to how they waited and entered the house when the deceased had parked the vehicle after entering the house. They had placed themselves at the crime scene, revealed by the vivid narration by A2 and A3 and the participation of A1.

Regarding A1's defence, in his statement dated 27th December 2018, A1 claimed that he was confused when he gave the rejected Statements Exhibit R and R1. It must be noted that he also stated that he did not know A2 and A3 or Kwadwo Joe alias Hitler. This court notes that Exhibit E was taken five months after A1 gave Exhibit C and narrated how he destroyed Mohammed's phone he swore to show him because he could not replace the said phone for him. This statement resonates with his evidence on oath. As counsel for the republic submitted, when AI was arrested initially, he did not mention the said Mohammed as someone who had a bone to pick with him, but that only came up after the initial statements he gave. I agree with counsel that that story is an ex post facto realisation that A1 has sought to give to extricate himself from the grips of the law. His denial of his alias as Rebel leader and that he is known as Zongo leader is neither here nor there. After all, he did not deny that his name is abdulai Gariba. In any case, both A2 and A3 mentioned his alias as Rebel leader, not Zongo leader, as he would have this court believe. He even sought to raise an alibi which was fully substantiated.

His story is, in the opinion of the court, not reasonably probable because he was arrested per police intelligence as his movements were being monitored in respect of the robbery, which the police had information that he had participated in and confirmed by A1 and A2 in their statements to the police.

A2's testimony on oath is entirely different from his evidence in his confession statement, and this court cannot accept his evidence on oath as the truth regarding his denial of the offence. A2 sought to create the impression that on the day, the offence

was not in Kasoa and sought to say that he did not give the statement that the prosecution has sought to attribute to him.

This is because in the case of **State vs Otchere [1963] 2GLR 463**, the court held that *"a witness whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn is not worthy of credit. Such evidence cannot be of any importance in the light of the previous contradictory statement unless the witness can give a reasonable explanation for the contradiction.*

See also ***MORIARTY VRS LONDON CHATHAM AND DOVAN RLY 1870 LR 5 QB 314,*** where Cockburn CJ said inter alia:

"…It is evidence against a prisoner that he said one thing at one time and another at another, showing that the recourse to falsehood leads fairly to an inference of guilt. Anything from which such inference can be drawn is cogent and important to the issue. So if you can show that a plaintiff has been suborning false testimony and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one…."

See also the cases of Gyabaah vs The Republic [1984-86] 2 GLR 461

Richmond Kwabla Dzangbatey v The Republic CA Suit No H2/12/2015

Egbetorworkpor vs. The Republic [1975] 1GLR 485

There are material inconsistencies between his evidence on oath and those statements he gave to the police when everything concerning the incident was fresh in his mind. Thus, no weight would be attached to what he told the court.

A3 also gave a completely different story on oath, which is inconsistent with his statements in Exhibit H dated 1st June 2016, Exhibit D dated 27th December 2018, and his charge cautioned statement dated 29th May 2019. When everything was fresh in his memory, he gave a vivid description of how all three of them carried out the entire

operation. This court can, therefore, not believe his story on oath over his statement, and the same authorities apply in his case. This court regards his testimony on oath as an ex post facto realisation considering that even in Exhibit D, he completely changed his story and departed substantially from his statement.

In the light of the confessions of the 2nd and 3rd accused persons, I hold that their testimonies on oath are not reasonably probable, and the court rejects them as false and an attempt to escape the grip of the law.

On the totality of the evidence before the court, this court is of the opinion that the evidence against the accused person links them to the offence, and they have failed to raise any reasonable doubt in the case of the prosecution. All the accused persons had sought to do was to shift blame to others despite their vivid and graphic details given when everything was fresh in their memory. This court rejects their defence as fanciful possibilities to deflect the course of justice. As earlier stated supra, the law will fail to protect the community if it admits fanciful possibilities to deflect the course of justice.

In the case of Frimpong alias Iboman vs The Republic already mentioned Supra and reminded the court of the words of Dotse JSC in the following words;

"For our part, we cannot but agree with the learned trial judge that the defence of the appellant was but an attempt to extricate himself from the crime at that last stage. As a matter of fact, the defence of the appellant not only lacked substance but was infantile and lacked merit."

Consequently, this court holds that the prosecution has proved the case against the accused persons beyond reasonable doubt, and I find all three accused persons guilty of the offences charged and convict them accordingly.

Plea in mitigation of Sentence

SENTENCE:

It is trite that sentencing is at the discretion of the court as long as it falls within the statutory limit imposed by law. Under Article 296 of the Constitution 1992, when discretionary power is conferred on a person, he is enjoined to exercise it fairly and candidly in accordance with due process and devoid of any arbitrariness or personal dislike.

See the case of **VICTOR OCLOO VS THE REPUBLIC [2014] 69 G.M.J. 173**

In the cases of **Kwashie vs The Republic [1971] I GLR CA 488, Kamil vs The Republic [2011] 1 SCGLR 300, and Gorman vs The Republic,** the principles to be considered by the court in sentencing are as follows;

- The seriousness of the offence.
- The degree of revulsion felt by law-abiding citizens for a particular crime.
- The premeditation with which the criminal plan was executed.
- The prevalence of the crime within the particular society or the country where the offence took place.
- The sudden increase in the incidence of the particular crime.

In the case of **Adu Boahen vs The Republic** already cited supra, the Supreme Court stated as follows;

"In Kwashie v. The Republic [1971] 1 G. L. R. 488, C.A. it was held by this court that where an offence is very 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. When the court decides to impose a deterrent sentence the good record of the accused is irrelevant. There can be no doubt that the crime of robbery is prevalent in this country, and that recently there has been a sudden increase in its incidence. We are satisfied that the learned trial judge must have taken into consideration the prevailing wave of robbery in the country when he imposed what is obviously a deterrent sentence."

In sentencing the accused persons, I have considered the plea of mitigation. I have also considered the time spent in custody, that A1 and A3 are first-time offenders, and that they are young men in our society who should have put their energy into doing something productive for the benefit of themselves, their families and the nation as well. I also note that A2 is not a first-time offender but had been convicted of robbery and had served some years at Nsawam Prison before he was moved to the correctional centre at Mamobi. I consider the fact that the deceased was killed in the robbery, leaving behind his wife and child, that his vehicle, though retrieved, was damaged, and that his phones and money had also been stolen violently without mercy.

The court also takes into consideration the prevalence of the offence and the increase in such offences in the country. I also take the revulsion of right thinking and law-abiding citizens towards such a heinous crime into consideration and the fact that per their own showing, they laid wait for the deceased and pounced on him when he least suspected such an attack and the emotional and psychological effect that may have had on the deceased wife who has been denied the presence of her somebody because of the actions of the accused person and sentence them all to 20 years each on counts one and 30 years IHL on count 2 to run concurrently for A2 and A3 and 40 years IHL on count 2 for A1to run concurrently with the sentence on the 1st count.

MALIKE AWO WOANYAH DEY
JUSTICE OF THE HIGH COURT
CAPE COAST