

**IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE, HO (COURT '1') HELD ON MONDAY 17
APRIL 2023 BEFORE JUSTICE GEORGE BUADI, J.**

CASE NO. F17/01/2022

THE REPUBLIC

Versus

1	AKWESI OWUSU	}	
2	HARUNA TABOLOKA	}	
3	NORMESI FAMOUS (a.k.a Norgbe)	}	
4	AHADZI KORKU (a.k.a. Borbor)	}	
5	ERIC LUMOR (a.k.a. Zingaro)	}	
6	JOSEPH YAO AFAWUBO (a.k.a. Red)	}	ACCUSED PERSONS

JUDGMENT

1 Introduction

The six accused persons were on 22 February 2022 arraigned before this court summarily on eight criminal charges: conspiracy; robbery; causing harm; causing unlawful damage; threat of death, and of possession of arms and ammunition without authority against A5 and A1 respectively.¹ Represented by their respective two lawyers, all the accused persons pleaded not guilty to the charges - conspiracy (Count 1), two counts of robbery (Counts 2 and 3) the charge of causing unlawful damage (Count 4), and the two counts of causing harm (Counts 5 and 6). Concerning the two specific charges – Count 7 and Count 8 against A1 and A5, both denied the charges - possession of arms and ammunition without authority (Count 7) and the charge of a threat of death (Count 8).

¹ That is, the Criminal Offenses Act, 1960 (Act 29) ss. 23(1); 149; 69; 172; 75; and section 11 of Arms and Ammunitions Act, 1972 (NRCD 9).

2 Brief facts of the case as provided by the police

The accused persons - Akwesi Owusu (A1), unemployed, lives in Aflao; Haruna Taboloka (A2) is a farmer and a native of Agbozume-Klikor; Normesi Famous @ Norgbe (A3), is a porter and a native of Atiteti; Ahadzi Korku @ Borbor (A4) is a mechanic and a native of Aborbor-Kpogede in Togo; Eric Lumor @ Zingaro (A5) is a tailor and a native of Atiavi. Joseph Yao Afawubo @ Red (A6) is a farmer and a native of Denu. They are alleged to have on 2 October 2022 conspired to commit, indeed committed the offence of robbery; unlawful harm; unlawful damage; threat of death; and possession of arms and ammunition without authority.

The brief facts are that on 2 October 2021 at about 11:20 pm, the complainant² (PW6) received a distress call from Bernice, the wife of one of his brothers, Marshall who live in his Sadaco House that they were under robbery attack by men who were trying to gain access to their rooms after entry to the house. The accused persons, including others at large succeeded to enter the house, inflicted body injuries on the night security personnel at the duty post (PW5); damaged a couple of properties including metal security doors and windows. They are alleged to have subjected some of the residents to bodily harm amidst threats of death that enabled them to steal from the house some cash amount, a bag that contains lotto papers the accused persons thought contained money, and a pump action gun.

The arrival of a rescue team comprising PW6, the police, and neighbours compelled the accused persons to retreat into a nearby bush amidst sporadic shootings from their firearms. The rescue team pursued them into the adjoining

² Ganyo Azi, a lotto agent, businessman and Chief Executive Officer (CEO) of SADACO Brothers and Business Ventures located at Anlo-Afiadenyigba Junction.

bush, which resulted in the arrest of A1, who on interrogation mentioned A2 as the one who brought him to steal from the house. A3 was arrested when he stopped a motorbike to transport him to Atiteti. A search on A3, according to the police revealed two knives and different clothing in a carrier bag. PW1 identified A1 as one of the accused persons that exchanged gunfire shots with him. Furthermore, the clothing A3 was identified to be wearing during the commission of the crime was found in his carrier bag. A4 and A5, according to the police, were arrested in their attempt to escape on a motorbike; a search conducted on them revealed whistles in their bags; blood stains on A4's shirt who when interrogated was alleged to have admitted to having been among the men together with A5 and A6 that attacked residents in the house. A6 was arrested a couple of weeks later.

3 The applicable law, the ingredients of proof, and the standard of proof

The Criminal Offences Act, 1960 (Act 29) s. 23(1) defines the offence of conspiracy as 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. To secure a conviction for the offence, the prosecution is under statutory obligation to provide proof that there **were two or more persons** that **agreed to act** together; indeed acted together with the aim at or in furtherance of a common purpose of committing robbery in the house of the complainant that led to the commission of other crimes.

Robbery, per s.149 of Act 29 id. is a **first-degree felony**, which is defined per s.150 of Act 29 as follows:

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 [the] intent to prevent or overcome the resistance of the other person to the stealing of the things.

The prosecution is required to provide proof that the accused persons or some of them aided to appropriate or simply take away bags of lotto papers, a pump action gun as well cash sum of money from Azi Gameli (PW3) a resident of the house or the premises of A6 on the fateful night 2 October 2021 and that in doing so and with the intent to prevent and overcome the resistance of the residents to the commission of the offence used threats, assaults and caused harm and damage to some residents and properties in the house or premises respectively.

Concerning the charge of causing unlawful damage, s.172 of Act 29 provides:

172. Causing unlawful damage

- (1) A person who intentionally and unlawfully causes damage to property
 - (a) to a value not exceeding one million cedis or without a pecuniary value, commits a misdemeanour,
 - (b) to a value exceeding one million cedis commits a second degree felony.

- (2) A person who intentionally and unlawfully causes damage to property in a manner which causes, is likely to cause, danger to life commits a **first-degree felony**. (Emphasis added)

The prosecution is required to provide proof that the accused in committing or abetting the robbery caused damage to the security doors and burglar-proof in the victim's house, and that the damage was intentional and without any justification.

As regards the two counts of causing harm, the law – Act 29, s.69 - provides that “[a] person who intentionally and unlawfully causes harm to any person commits **a second-degree felony**. The prosecution is required therefore to provide proof that the accused persons caused or abetted in causing bodily harm to the night duty security personnel (PW5) and Abila Trekpah (PW4) on the night of 2 October 2021 with metal bars and cutlasses, and with the butt of a gun respectively, and that the harm was intentional and unlawful; that is, without any justification.

Concerning the charge of possession of arms and ammunition without authority, the Arms and Ammunition Act, 1972 (NRCD 9) s. 11 provides:

Where any firearms, arms of war, munitions of war, or ammunition are without the proper authority found in the possession of a person, kept in a place other than a public warehouse, or unlawfully kept in a private warehouse, that person or the occupier of that place, or the owner of the place or any person keeping them, commits an offence unless that person, occupier, or owner can prove that they were deposited there without the knowledge or consent of that person ...”

Ammunition is defined by the interpretation section of the law, i.e. s. 29 of NRCD 9 id as including explosives, munitions of war, and **materials for loading firearms**. The law requires the prosecution to provide proof that ammunition; that is, materials for loading firearms (AAA cartridges) were found in the possession of A1 who had no authority or justification for keeping them.

Concerning the charge of threat of death, Act 29, s. 75 provides that “[a] person who threatens any other person with death, with intent to put that person in fear of death, commits a **second-degree felony**.” The charge requires evidence of a threat to kill by A5 against Azi Gameli (PW3), and that A5 had the intention to put and did put PW3 in fear of imminent death. It is immaterial whether the threat would be capable of being carried out by A5. *See Act 29, s.17(3)*. What is required from the prosecution is proof that PW3 feared an imminent loss, danger or impairment of his life when A5 issued the threat.

4 Preliminary matters

On 13 April 2022, the court conducted the case management conference (CMC). It was settled at the CMC that the trial shall be conducted on witness statements. The prosecution filed its Disclosure Pack on 25 March 2022, which comprises a list of 56 items of handwritten statements, exhibits, and witness statements in a neatly ringed bound document. The prosecution on 17 May 2022 upon leave filed an additional document that comprises a supplementary witness statement by the investigating police officer D/Sgt Agbesi Nukporwoe Kwaku showing photographs of the accused persons and the clothes they were allegedly wearing on their arrests, marked or identified as Item/Exhibit 58, 59, 60, 61, 62, and 63.

5 The burden of producing evidence and the standard thereof

Having stated the substantive law and the mandatory ingredients of the requisite proof, I need to state here that the standard of evidential proof of the charges against the accused persons as enjoined by statute is one beyond a reasonable doubt. The prosecution assumes the duty “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.” Evidence Act, 1975 (NRCD 323) s.11(2). The

accused persons bear no duty under the law to establish proof of their innocence. The law requires them just to raise a reasonable doubt or improbability of the existence of the case of the prosecution. See s. 11(3) Evidence Act id.

I take notice that none of the accused persons raised a defence of *alibi* properly so-called in their statements to the police; neither at the trial. That is, at the time the crime allegedly took place, he was not at, near, or within the premises of Sadaco house, but rather at some other place, and therefore he cannot be identified as the culprit.

6 Evidence of the prosecution

The hearing of the case commenced on 13 May 2022. In all, the prosecution called eight witnesses. They are Albert Gakpey (PW1); Daniel Nani Azi (PW2); Azi Gameli (PW3); Abba Trekpa (PW4); Daniel Amewovi @Ayigbe (PW5); Azi Ganyo alias SADACO (PW6)³; Kwame Kalitsi (PW7); and lastly the investigating officer Agbesi Nukporwoe Kwaku (PW8) who in his evidence confirmed the evidence of the prosecuting witnesses by providing proof of their claims, particularly the evidence the CCTV in the house captured during the alleged operation in the house marked in the Disclosure Pack as Item/Exhibit 6.

I have chosen to avoid serializing the evidence of the prosecution witnesses. I shall concentrate on the evidence of PW8 who I find not only recounted but also confirmed the evidence of these prosecution witnesses. Nonetheless, as part of my core duty of finding the primary facts, I shall be making references to and finding

³ The owner of the house attacked and robbed; he is also the complainant in this case.

facts of pieces of evidence of the prosecution witnesses that I find crucial in my conclusion.

In his testimony, PW8 confirmed PW4 Abba Trekpah's evidence that she was attacked in one of the rooms closer to the main gate where PW5 Daniel Amewovi @Ayigbe was attacked. Both were treated for body injuries. *Item/Exh 7 and 8*. PW8 disclosed that PW3 Azi Gameli was also assaulted by some of the accused persons who threatened to shoot him if he raised alarm and that he got robbed of an amount of GH¢4,680. PW8 stated that when A1 Akwesi Owusu was arrested, three "AAA" live cartridges were found in his pocket which he claimed do not belong to him but he failed to mention who the cartridges belong to; neither did A1 lead the Police to whoever the cartridges belong to. PW8 stated that A1 mentioned A2 Haruna Taboloka as the person who brought him to steal from PW6's house.

According to PW8, A3 Normesi Famous was arrested carrying knives and different clothes in his bag. A3 could not explain why he was carrying the knives and different clothes. According to PW8, PW1 Albert Gakpey identified A3 Normesi as one of the armed robbers who exchanged gunshots with him. PW8 added that A4 Korku Ahadzi and A5 Eric Lumor were arrested while on a motorbike escaping from Anlo-Afiadenyigba after the robbery. A search conducted on them revealed that A4 was carrying a brown bag containing a cap, a whistle with a charm on it, a bangle, matches, a talisman, a chain with a cross, one cowry, and some pesewa coins in the bag. Blood stains and some sticky "metsimetsi" weeds were also found on A4's shirt and trousers. *See Items/Exhibits 22 and 23*.

PW8 added that A4 and A5 denied taking part in the robbery and told the Police that they were returning from Ave-Dakpa on a visit to A4's girlfriend. PW8 disclosed that in the course of the investigation, A4 mentioned A5 and A6 as well as others whose names he did not know as the people who attacked the house while he (A4) waited for them around, which led to his arrest. PW8 added that A4 while in police remand placed a call with his MTN No. 0556969551 to PW7's 0243216174 directing him (PW7) to confirm the story that he (A4) had told the Police that he was returning from Ave-Dakpa on a visit to his girlfriend whenever the Police contacted him (PW7), as he (A4) has given PW7's phone number to the Police.

PW8 testified that A5, while on police remand managed to exchange the trousers he was arrested wearing with that of a suspect in a different criminal case who was leaving police custody upon grant of police inquiry bail. According to PW8, A5 told the suspect that he did not want the Police to identify him wearing the trousers at the court if the Police choose to show the CCTV video in court. Police intelligence tracked the suspect and retrieved the trousers back to A5. See *Item/Exhibit 25*. I take notice that this allegation was not corroborated, as the prosecution failed to call this person (the suspect) to confirm the allegation.

PW8 added that his investigations revealed that A6 was the main architect of the robbery, as A4 and A5 mentioned A6 name as one of the persons who planned the robbery and led them to execute it. Itemized bills of phone call records that were obtained from the MTN upon an order of the court were adopted and marked *Item/Exhibit 46, 47, and 48*, which showed that A4, A5, and A6 were in constant touch among themselves before, during, and after the robbery attack within the Afiedenyigba catchment area of Ketu North Municipality. See *Items/Exhibits 46, 47,*

and 48. PW8 concluded his testimony by seeking to tender the investigation cautioned and charged statements the police obtained from the accused persons but the request attracted objection from the learned defence counsel.

Counsel objected to PW8's tendering into evidence the investigation and cautioned statements the accused persons allegedly gave to the police; that is, Exhibit/Item 26 - 44 (excluding Item 39). Learned counsel submitted that after the statements were read over to the accused persons by the independent witness, there was no proof that the independent witness explained the contents to the accused persons in their choice Ewe language. Counsel submitted that the authors of these statements are illiterates and the Evidence Act, s.120 frowns on the admissibility of the statements under such circumstances.

Based upon the test of admissibility of statements allegedly made by accused persons while under police custody per the Evidence Act, s.120, the court enquired from counsel as to where in their statements to the police the accused persons were found to have confessed to the crime. In response, counsel referred to the portion of A1's statement where he was alleged to have admitted to having three (3) AAA cartridges in his pockets and also in Items/Exhibits 35 and 36, where A4 was alleged to have confessed to the robbery. Counsel urged the court to reject the statements - Exhibits/Items 26 - 44 (excluding Item 39).

In her brief response, the learned state attorney reminded the court that none of the accused persons gave a confession statement, except A1 and A4 who appeared to have made some admissions of facts. Counsel agreed with her colleague that the statements do not appear on the statements to have been explained to the accused persons in Ewe after they were read over by the independent witness. All

the same, the accused persons, according to counsel appeared to have understood the contents as per the certification or attestation of the independent witness. Counsel reminded the court that defence counsel is not contesting or denying that the accused persons made those statements; nor that the statements were not voluntarily made, citing the case of *Asare (alias) Fanti v. State* [1964] GLR 70, SC.

I overruled the objection, adopted the statements, and marked them Items/Exhibits 26 to 45. I promised to incorporate reasons in the final judgment, which I hereby do. The test of admissibility of a statement by an accused person to the police whilst in detention is one primarily of its voluntariness as provided in the Evidence Act, s. 120(4). Once the evidence showed that there was an independent witness who certified that he was present when the statement was made and that it was made voluntarily, the statement cannot be rejected simply because the certificate or attestation omitted to state that the statements were read and explained to the accused person in their choice native language. In *Agogrobisah v The Rep.* [1995-96] 1 GLR 557 CA, a majority decision without any reference whatsoever to *Asare (alias) Fanti v. State* [1964] GLR 70 SC, the Court of Appeal referred to this position of the Supreme Court and held that when the statement was made and that it was made voluntarily, the statement could not be rejected simply because the certificate omitted to say "the contents were fully understood by the accused".

I need to reiterate here that the objection of learned defence counsel was not grounded on the question strictly that no statement was made; that they were confession statements, or that the statements were made under torture or violence, and thus were not made voluntarily. I overruled the objection, relying heavily on the decision of the Supreme Court in *Cubagee v Asare & 2 Ors* [2017-2020] SCGLR

305 where the Court laid detailed emphasis on the country's stand in the adoption of the discretionary exclusionary rule concerning the admissibility of evidence in alleged breaches of constitutional or statutory provisions.

I have had to read the judgment of the Court; the main issue the Court considered was whether a breach of a right conferred by the constitutional or a statute, perceptively as in this case a provision of the Illiterates Protection Act 1912 CAP 262 ought to be construed to exclude the entire statement of an accused to the police from being admitted in evidence on grounds that the accused was illiterate and that the statement was not explained in his choice language and also for the assurance that it was fully understood by the accused before he subscribed to it.

The Evidence Act, s.51 provides that "all relevant evidence is admissible except as otherwise provided by any enactment". The general law as to the admission or exclusion of relevant evidence by a trial court is provided in section 52 of the law, which provides that relevant evidence may be excluded at the discretion of the judge if the probative value of the evidence is substantially outweighed by the risk that it will create substantial danger of **unfair prejudice**.

The Supreme Court in *Cubagee* held that our Constitution does not contain a provision that specifically provides for circumstances in which a court is required mandatorily to exclude evidence obtained in alleged violation of a constitutional/human rights provision, or statute. This scenario, according to the Court had compelled the adoption by courts in Ghana of the jurisprudence of discretionary exclusionary rule in contrast to the automatic exclusionary rule where any evidence obtained involving alleged infraction of human rights, constitutional or statutory provision must be excluded by the court. The Court emphasized in

Cubagee the admissibility test as prescribed by Evidence Act, s.51, and encouraged trial courts to adopt the flexible discretionary exclusionary rule just as the English courts in respect of evidence perceived to have been obtained in breach of a constitutional or statutory right.

I am not certain in my mind whether there is any specific constitutional provision that endorses and glorifies the rights of illiterates as a constitutional/human right as generally provided in Article 12(2) of the Constitution. Whilst endorsing statutes that disallow evidence obtained in specific circumstances that also amount to a violation of certain rights guaranteed by the Constitution including confession statements procured through torture, which the Court held as inadmissible on account of section 120 of NRCD 323⁴ the Court held among others at page 323 para. 4 that:

In our understanding, the framework of our Constitution does not admit of an inflexible exclusionary rule in respect of evidence obtained in violation of human rights. With the rudimentary facilities available to our police to fight crime, it would be unrealistic to exclude damning evidence of a serious crime on the sole ground that it was obtained in circumstances involving a violation of the human rights of the perpetrator of the crime. The public interest, to which all constitutional rights are subject by the provisions of Article 12(2), in having persons who commit crimes apprehended and punished would require the court to balance that against the claim of rights of the perpetrator of the crime. (Emphasis added)

⁴ See also art. 15(2) a, 1992 Constitution.

It, therefore, seems to us that the framework of our Constitution anticipates that where evidence obtained in violation of human rights is sought to be tendered in proceedings, whether criminal or civil and an objection is taken, the court has to exercise discretion as to whether on the facts of the case, the evidence ought to be excluded or admitted. We, therefore, adopt for Ghana the discretionary rule ... evidence [allegedly] obtained in violation of human rights guaranteed under the 1992 Constitution. (Emphasis added)

The Court held further that Article 19 clauses 1 & 13 of the Constitution guarantee a right to fair hearing in criminal and civil proceedings and in any proceedings the court must ensure the achievement of the constitutional imperative balance of fair hearing. In determining whether the admission or the exclusion of a piece of impugned evidence could bring the administration of justice into disrepute or make proceedings unfair, the Court at page 324 para. 2 directed that:

Courts must consider all the circumstances of the case; paying attention to the nature of the right that has been violated and the manner and degree of the violation, either deliberate or innocuous; the gravity of the crime being tried and the manner the accused committed the offence as well as the severity of the sentence the offence attracts. The impact that exclusion of the evidence may have on the outcome of the case ... These factors to be considered in determining whether to exclude or admit evidence obtained in breach of human rights **are not exhaustive** but are only to serve as guides to courts.

As I said earlier, I reiterate here that the test of admissibility of a police investigation or cautioned statement that contains a confession or some traces

thereof by an accused person is whether or not the statement was ever made by the accused, and whether it was made freely and voluntarily without any pressure, undue influence, harm or threats of harm. Indeed, before the decision in *Cubagee*, the apex court had over half of a century held in *Asare (alias) Fanti v. State* (1964) GLR 70 SC, that:

Where an objection is raised against the tendering of a statement alleged to have been made by an accused person, [a minitrial shall] be heard **only where** the accused alleges that no statement was made at all, or that the statement was made under duress. **But when [an] objection is raised against such a statement on the ground of inaccuracy, its admissibility becomes a question of law for the judge.** (Emphasis added)

I have checked and read the said statements of the accused persons. They do not in my view, strictly amount to a confession to the crime. Besides, the objection was not grounded on the fact that the accused did not make those statements, or that they were made under an offer of inducements, or amidst torture, violence, or threats thereof, and therefore not freely or voluntarily made. My view, then and now, is that the accused persons gave their investigation and caution statements freely and voluntarily to the police as certified by the independent witness and that it shall amount to a breach of the superior overriding constitutional imperative of fair hearing to have rejected the investigation and caution statements of the accused persons on grounds barely that the independent witness after reading over the contents of the statements to the accused persons failed to explain the contents in Ewe language to the accused persons. I abide by the ruling. Beyond this, the Items or Exhibits in the prosecution disclosure document that PW8 made

references to in his witness statement and supplementary witness statement were all admitted in evidence without objection; indeed, none was rejected.

8 Finding of facts – assessment of prosecution evidence on record

Whether in a civil or criminal action, the core duty of a trial court is to resolve the primary facts and having done so to state its findings from the panoply of evidence on record. The correct application of the law depends on the processes of correct fact findings. *Quaye v Mariamu* [1961] GLR 93, SC at 95 para. 3. There is no dispute over the fact that there was a break-in into PW6's house on the night of 2 October 2021. PW5 (the night security man) testified that robbers entered the house on 2 October 2021 around 11 pm. The evidence of all other prosecution witnesses except PW3 suggests that the crime took place just after 11 pm. PW3 gave the time as around 10 pm. I find an obvious chronological inconsistency here but I deem it as insignificantly trivial to affect the critical mass of evidence that points to the fact that the commission of the crime took place around 11 pm and thereafter and certainly not any time before 11 pm.

As was held in *Adu Boahene v. The Republic* [1972] 1 GLR 70, CA, in criminal trials, it is not just a necessity for the prosecution to establish proof of the commission of the crime, but also, in fact, most importantly to lead evidence that establishes proof of the presence of the accused not only at the crime scene but also of his participation in the commission of the crime even if the accused failed to file a notice of *alibi* required under section 131 of Act 30. I find that strictly speaking, there was no defence of *alibi*. The only glimpse of *alibi* that A4 sought to lay in his investigation statement to the police was clearly in my view challenged and discredited as falsehood not only by the evidence of his friend PW7 by whom he

sought to establish it but also by the itemized call logs that traced the presence of A4 to Afiadenyigba where at all material times the crime was committed.⁵

Considering the evidence at the trial, particularly the outright denial by the accused persons of the crime, there appears in my view the probability of a presumed defence of mistaken identity though none of the accused persons put up that defense. The duty is therefore cast on the prosecution to provide and the court to ascertain proof of evidence of not only the presence of the accused persons at the crime scene but also proof of their identity as the ones who were involved and committed the crime. The Court in *Adu Boahene v. The Republic* id held at page 75 that the conundrum of the identity of an accused person in a criminal case may broadly be classified under two heads:

- (a) Where the person accused of the crime was seen, however briefly or casually, by another person.
- (b) Where the act in question was unobserved by anyone.

The court in the above suit stated that under the first head, there may be direct proof of identity by the oral evidence of another who recognized the accused as the perpetrator of the crime or noted his appearance who can say that the person who committed the offence and the accused share some common characteristics. The instant case can be put under the first head of identification evidence, as the prosecution has presented witnesses who claim to have seen some of the accused persons not only at the crime scene but also identified as committing the crime. My duty is to run through the evidence, particularly evidence from such witnesses, and to ascertain the claims of the prosecution witnesses.

⁵ See the location and phone calls of A4 in *Item/Exhibit 46*.

PW1 Albert Gakpey's evidence is that when he was approaching the crime scene, he exchanged gunfire with some men stationed at the crime scene and that four of the men run away from the crime scene on his approach. I find from his evidence that PW1 could not identify any of the accused persons during the commission of the crime. He added however that, whilst at the crime scene, A1 was arrested near the adjoining bush and brought to the crime scene. PW1 also testified, indeed maintained his evidence under cross-examination that he identified A5 by the dress A5 was wearing when he was arrested that same night near the vicinity and brought to the crime scene. According to PW1, A1 was interrogated by the police in his presence; A1 admitted being part of the men who came to rob the house because A2 asked him to. I did not find that the evidence of PW1 was successfully challenged and discredited under cross-examination by the defence counsel.

PW2 Daniel Nani Azi in his evidence stated that he identified all the accused persons except A6. PW2 said he saw A1 as the one "who held a gun towards my mother [PW4] and hit her jaw with [it, as] A1 did not cover his face", and further that, A1 was wearing a black sleeveless apparel with a hood. PW2 further identified A2 and A3 as part of the men he found in the house hitting and damaging Marshall's security door with iron bars; and that A4 was the man who was standing in the middle of the house holding a pot that contained bullets from which the other men took from to be firing in the house.

According to PW2, A4 was wearing a black shirt with white stripes in it, indeed wearing a charm with a whistle. The whistle, according to A2 was found in A4's bag upon his arrest and search. *Item/Exhibit 23*. I find that the CCTV coverage (*Item/Exhibit 6*) confirms the fact of entry of men into the house, and attempts

being made to break open the security door with an iron bar by some men. I also find Item/Exhibit 2 as proof of the severely damaged steel doors. Besides, I find Exhibit 62 - the photograph of A4 on his arrest - confirms PW2's description of his dress.

PW2 also identified A5 as part of the crime. In his cross-examination, learned defence counsel sought to deny the presence of the said accused persons at the crime scene and their involvement in the crime. I find the evidence of PW1 and PW2 as largely unassailed, particularly as to the identity of the accused persons, as PW2 in particular was a resident in the house and gave direct visual evidence. I have no doubt whatsoever in my mind of his direct eye evidence.

PW3 Azi Gameli was also resident in the house when the crime took place. His evidence is that he heard his mother PW4 crying for help following her molestation at the hands of A1 and A5 who he saw in his encounter with A1 and A5. Besides, PW3, I find, was a victim of the crime, as A1 and A5 robbed him of a cash amount of GH¢4,680 at gunpoint. He was able to identify A5 because, according to him A5's face was uncovered, coupled with the fact that A5 threatened to shoot him to death if he shouted. PW3 also identified A1 on his arrest and when brought to the house that very night of the incident. PW3 under cross-examination as to whether he was in the house and identified the accused persons, stated:

Yes, I was in the house. I was the one [the] two of them pointed the gun at; **I saw them with my very eyes. It was A5 who pointed the gun at me, threatening that if I shout, he would shoot at me.** I cannot identify the second person here.

I find that the pieces of evidence on the dresses of A1, A4, and A5 at the time of the arrest in the night are confirmed by their dresses in the photographs after the robbery as in Item/Exhibit 59, 62, and 58 in the prosecution's additional Disclosure.

PW4 was in the house during the alleged robbery, indeed, a victim of the crime - robbery and causing harm. She identified A1 and A5 as part of the men who robbed the house on the night of 2 October 2021. She added that "[A1 and A5] pulled me out from my room and I fell. They dragged me on the [floor] to where my son PW3 was". PW3 confirmed in his evidence his mother PW4's ordeal in the hands of A1 and A5. I find proof of PW4's bodily injury in Item/Exhibit 8.

PW5 Daniel Amewovi is the security man on duty at the main entry gate that fateful night 2 October 2021. His evidence is that at about 11 pm, about 15 men attacked him at his post in the house after their entry through the main gate. This is what ensued under cross-examination as to how his security was breached that night and the identity of persons he claims broke into the house:

Qn Can you tell the court why your security was breached that night?

Ans Yes, I can; I was there when all of a sudden they rushed on me and attacked me with metal bars and cutlass. Some of them spread themselves around and started shooting whilst some were using metal bars to gain access to the rooms in the house. By then, I was in a coma.

Qn You were in a coma, how did you then witness the shooting and breaking of door with metal bars?

An I was hearing the gunshots, and the noise of destruction of the doors with the metal bars they were holding.

PW5 added that before falling into a coma, he saw the accused persons and “asked what they wanted, but they attacked me. Indeed, I saw them walk away though I was in pain. They also attacked other people apart from me”. He added further under cross-examination that he had the opportunity later to watch the CCTV recording, which gave him the opportunity to identify the men who came to the premise and attacked him and robbed the house. Beyond PW5’s general recollection of events in the house on that fateful night, coupled with his claim to have watched the coverage of the CCTV, I am of the view that PW5 could not personally identify any of the men that attacked him as part of the crime. I find as a fact however that PW5 was brutally assaulted and as a result sustained bodily harm. See *Exhibits 7 and 6*.

In his evidence, PW6 stated that he received a distress call from one of the resident family members in the house. He arrived at the house after the robbery has taken place. PW6 did not witness therefore the commission of the crime; neither did he identify any of the accused persons committing the crime at the crime scene. All the same, PW6 testified of a search in the nearby bush where the accused persons allegedly retreated into, their pursuit, resulting in the arrest of A1 on whom three AAA cartridges were found. PW8 testified further that upon interrogation, A1 admitted that he was part of the alleged robbery in the house on 2 October 2021 upon the invitation of A2.

PW6 testified that A2 was found and arrested, whilst A3 was arrested whilst he was engaging a motor rider to get away from the vicinity of the crime to Atiteti. According to PW6 when A3 was brought to the crime scene on his arrest nearby that very night, A1 identified PW3 as part of the men that came to the house to rob

and cause damage. PW6 also testified that one Collins who was heading to the house met A4 and A5 on a motor looking suspicious and so with the help of other people arrested them and brought them to the crime scene. At the crime scene during a search, A4 and A5 were found with a bag; blood stains and sticky 'metsimetsi' weed were also found on A4's shirt and trousers. Under cross-examination as to how he identified A3, PW6 stated:

I was not present when [A3] was arrested but when he was brought to the house, and interrogated, he said all that I said in the said paragraph 16. Besides, at the house, when he was brought there, [PW1] identified him as the one he was exchanging gunshots with, and also, that was the dress he was wearing at the time he was exchanging the [gun] fire. Besides, PW3 also identified [A3] as one of the robbers. Upon further search in his bag, we found the dress and the knives.

Under cross-examination as to whether PW6 saw the accused persons cause the damage to the security doors and window burglar proofs, PW6 responded:

Personally, I did not [see]; but my brother Nani Azi (PW2) and my mother (PW4), and PW3 Azi Gameli saw them causing the damage. Besides, A5 happens to be my worker [and that] at the Police station, Ho Deme cells he knelt down before me pleading that he was lured into the robbery, and further that, that is his first time. A5 further told me that A4 deceived him by not telling him [object] of the operation.

PW6 maintained under cross-examination that he was present at the crime scene the very night after the act and was directly involved in the search on A1, A3, A4, and A5 at the crime scene in the house.

PW7 Kwame Kalitsi's evidence is that A4 who is his friend called him on 2 October 2021 from his (A4's) MTN cellular phone number 055 696 9551 on his (PW7's) contact number 024 321 6174 to arrange a defence of *alibi*. Pressed under cross-examination as to the content of the alleged phone conversation with A4, and the certainty of the identity of A4 at the other end, this is what PW7 said:

He told me to have lied about me to the Police at the time the Police arrested him at Afiadenyigba. A4 told me to call my wife Patience Bobonu for her to tell his (A4) girlfriend that he is coming to her at Ave-Dakpa. When A4 told me this, I told him that the issue would not be known to me alone. I told him that I will tell my brother by whom I go to know A4. - - -

The number appeared as strange/unknown [to me], but he responded that he was A4 when I queried the caller's identity. (Emphasis added)

PW8 brought to the fore what I deem as the required evidence of the agreement of minds and the working together of the accused persons, particularly A4, A5, and A6 to the commission of the crime per the itemized or catalogued phone calls involving the trio as in Exhibits 46, 47, and 48 respectively. There is no evidence on the face of Exhibits 46, 47, and 48 as to the content of the subject matter conversation of A4, A5, and A6, but PW8 stated under cross-examination that:

Yes, I cannot say, but during interrogation [at the police station] A5 informed the Police that A6 called A4 that they should meet at Afiadenyigba, and that whilst on their way from Keta to Afiadenyigba A5 kept on calling A6 whilst A6 kept calling A5 as to where they have met.

When they finally met at Afiadenyigba, A4 disclosed to A5 that the purpose of their meeting is to go and attack and rob [PW6's] house.

This piece of evidence that, obviously was culled from aspects of the statement of A4 and A5 is what I discern formed part of the crux of defense counsel's objection to its admission. Whilst I agree that they all together form a sort of admission of facts, the fact on record, all the same, is that none of the accused person or persons ever denied making such statement/s; neither was the objection grounded on the fact they were tortured to make the statements. PW8 further testified on the contents of the CCTV coverage of the robbery incident on the night of 2 October 2021 as in Item/Exhibit 6 that:

It contains some of the accused persons and others who are yet to be apprehended at the crime scene beating the security man at [the] post and others damaging the doors in the house and also moving around in the house indiscriminately shooting in the air. In one particular instance, the video showed them carrying a sack and moving out of the house. They later returned, [but] when an alarm was raised, they fled away.

PW8 identified A2, A4, and A5 in the CCTV coverage - *Item/Exhibit 6*. Besides, PW8 also identified A2 by Item/Exhibit 60. As to the identity of the dress A2 was wearing as captured in the CCTV and Exhibit 60, this was what ensued during the cross-examination of PW8 by defence counsel:

Qn A2 does not own the type of dress that person is wearing in the video.

Ans A2 was arrested not [near] the scene like others. So he might have changed his dress.

PW8 further identified A4 in the CCTV and also on Item/Exhibit 62 - the photograph of the accused after the alleged robbery incident. Defence counsel suggested to the witness that it was difficult identifying A4 due to the black-and-white nature of the CCTV coverage. PW8 agreed to the suggestion but added that besides the CCTV coverage, a photograph of A4 taken after the robbery incident showed properly the nature and colour of the attire/dress that A4 was wearing. Likewise, PW8 identified A5 in the CCTV coverage in Exhibit 6 as well as A5's photograph in Item/Exhibit 58.⁶ Though conceding to the suggestion of defence counsel that the person PW8 claims in the video to be A4 was wearing a face mask covering his nose, eyes, and ears, PW8 responded that:

... the top apparel appears to be ash with a hood which he had used to cover the head, with a striped rope [that] passes both sides of the hood that falls onto his upper chest. The down appears to be brown trousers.

PW8 stated further under cross-examination that A5 was arrested with the dress on him as they appear in the video. In response to defence counsel's suggestion that the CCTV coverage as in Exhibit 6 and the photographs of the accused persons as in Exhibits 58, 59, 60, 61, 62, and 63 do not connect the accused persons to the alleged crime, PW8 responded in reference to A5 that:

⁶ The photograph of A5, taken after the robbery incident.

A5 was seen [on] several occasions in the video appearing to be giving direction and instructions during the commission of the crime. Besides, he was seen carrying what appears to be a sack from the crime scene.

I find that there is a nearby bush close to the house, the crime scene; indeed, the fact that the bush adjoins the house, as none of the accused persons contested this fact. I find also that none of the accused persons ever succeeded in assailing the crux of the prosecution's case, nor the evidence of the prosecution witnesses. That is, first the presence of the accused persons in the house or the vicinity of the crime scene, and secondly, their identification as having been involved in the crime. As was held in *Adu Boahen v The Republic*, *id*, where the identity of an accused person in a crime is an issue, there can be no better proof of his identity than the evidence of a witness who mounts the witness box and swears on oath that the man in the dock is the one he saw committing the offence, the subject-matter of the charge before the court. See also *Nagode v The Republic* [2011] SCGLR 975 at 977 (holding 1).

The scenario, in this case, is not as of the second head that the court in *Adu Boahen Case* laid down where the act in question was unobserved by anyone; that is, where none of the accused persons was seen at the crime scene nor identified as committing the offence. The scenario, in this case, typifies what the *Adu Boahen Case* describes as the first head of identification evidence. This is where the person accused of the crime was seen, however briefly or casually by another person. Here in this case, multiple jigsawed interconnected pieces of evidence corroborate each other not only the presence of the accused persons at the crime scene but also evidence of their identity and direct involvement and participation in the crime as proven further by the CCTV coverage (Exhibit 6) and photographs that were taken

of the accused persons at the crime scene on their arrest as in Item/Exhibit 58, 59, 60, 61, 62, and 63. It was for these reasons that at the close of the prosecution's case, I concluded that a *prima facie* case had been made against the accused persons for which I directed each to open his defence; perhaps to enable them to provide some sort of explanatory evidence that could probably deflect and cast doubt on prosecution's case. The standard of proof here under this strand of the burden of proof on the accused is one of "preponderance of probabilities" of belief in the mind of the court as to the existence or non-existence of a fact in issue. *The State v Afenuvor* [1961] GLR 655 SC (holding 3); See also Evidence Act, s.12 *id.*

7 Findings of primary fact from the evidence of the accused persons

The accused persons filed their separate witness statements on 10 November 2022 as their evidence in chief. Curiously, each of them filed just a page witness statement. A5 and A6's witness statements are a page each, containing just six short paragraphs, whilst that of A1, A2, A3, and A4, invariably are also a page each that contains likewise eight short paragraphs. Besides the terse nature of the evidence in chief of the accused persons, I find that there is a curious symphonic thread in their defence that unanimously is as follows:

- I know nothing about the charges against me in the instant case.
- I deny all the allegations against me in the case.
- I deny the charges of conspiracy to commit robbery, robbery, causing unlawful damage, causing harm, ... against me and in further denial I say that I have never engaged in any such unlawful activities with any of the accused persons herein.
- I have never entered the Complainant's premises (crime scene) until I was arrested and taken there.

- I am innocent of all the allegations and charges made against me ...

Though a good and successful defence either in a criminal or civil trial does not hinge on copious pieces of evidence nor a multiplicity of witnesses, I am of the view that by the nature of evidence the accused persons produced at the trial, each botched the opportunity to cast a reasonable doubt in my mind as to the certainty of the prosecution's case. I deem it necessary to go through their evidence *in seriatim* including in particular evidence under cross-examination and to make findings of facts therefrom.

Per his responses under cross-examination, I find A1 untruthful. I find his claim that he was staying with his grandmother at Weta untruthful, indeed inconsistent with his investigation statement to the police. In fact, under cross-examination, A1 agreed to the suggestion of the learned state attorney that his uncle who was in the house at the time the police led him to the house told the Police that he does not live in the house but came there only around 2 am October 1, 2021. I find that his investigation statement dated 4 October 2021 was taken in the presence of an independent witness D/C/Insp Patience Nutakor at a police station here in Ho. Indeed, A1 "refused to give [a] statement to the police".

However, on 18 October 2021, in the presence of David Lemgo, an independent witness, A1 gave his investigation statement that he came to his grandmother's place at Weta at about 2 pm but left the house to Afiedenyigba Junction around 10 pm. It was whilst at the Junction that he heard gunfire shots and then later two guys arrested him on suspicion that he knew those shooting in the house and that he was part of the robbery; requiring A1 to send them to his house. It was on the way on a motorbike with the two guys to A1's house that A1's Bible and a

handkerchief fell from his pocket. According to him the guys stopped and searched him and found three AAA cartridges in his pocket and decided to send him to the crime scene. He denied being part of the crime.

In his charged statement on 6 December 2021 in the presence of Sgt Clement Glabu of Area 51 police station, A1 repeated his lack of knowledge of the crime but repeated that “the three live cartridges were retrieved from my jacket ... though they are not mine”. A1 assumes the duty to provide some explanatory evidence as to his track of movements since he left the house and also the owner of the cartridges and justification for their possession. A1 is required to provide further evidence of the purpose of his presence at the Afiadenyigba Junction at that hour, possibly, to deflect and cast some sort of doubt in the prosecution’s case, but he fatally failed. A1 failed to name or lead the police to the owner of the three live cartridges and the justification for his possession at that hour. A1 could also have produced his grandmother and/or uncle who the police met in the house to provide some sort of probable explanatory evidence of his movements that night. I have real doubts about the truthfulness of A1’s evidence. I find his evidence a single story, an uncorroborated story, which I am inclined not to believe.

A2 gave his investigation statement to the police on 4 October in the presence of D/C/Insp Patience Nutakor. He stated that “on 2/10/2021 at about 9 pm ... my friend Francis Yevu came to me in Klikor and [we] went to the wife at Akaglakofe” at about 9:30 pm and left there at about 11:30 pm. On reaching Afiadenyigba at the traffic light, A2 claims to have met one Owusu surrounded by some guys who upon his inquiries told him that there has been a robbery nearby at Sadaco House and that they were looking for passerby faces that are unfamiliar. A2 stated that he was not impressed with the responses Owusu was giving to queries from the

guys, particularly, the Weta home that Owusu claimed he was coming from. I infer from A2's statement that the said Owusu is referable clearly to A1. There seems to me therefore some sort of connection between A1 and A2 in the commission of the crime. Indeed, according to A1, it was A2 who invited him to join the robbery.

In his cautioned statement on 6 December 2021 in the presence of Sgt Clement Glabu of Area 51 Police, whilst reliant on his earlier statement, A2 denied knowledge and involvement of the crime and the accused persons. A2 stated under cross-examination to have led the Police to his house following his arrest in connection with this case. The Police met his wife Evelyn Agbever as well as his uncle in the house. By his investigating statement on 4 October 2021 that sought presumably to rely on an *alibi*, I find it incredulous that he did not produce that his friend Francis Yevu and/or the wife of his friend to lend credence to his defence of lack of knowledge in the crime. I am inclined not to believe this uncorroborated single story. Neither do I believe A3's evidence as to his track of movements back home at Atiteti after he closed work at Aflao. By his reckoning, he left Aflao after the close of work around 8:30 pm and got to Agbozume between 9-10 pm. He admitted under cross-examination that he ought to have been at home at Atitetti by 11 pm but he was not; but rather at Afiadenyigba, in fact evading to answer the time that he was arrested at Afiadenyigba. I fail to believe his uncorroborated story.

A4 hails from Dzita in Togo but stays at Woe in the Volta region. He admits under cross-examination to be staying at Aflao. He admits that he knows A5 and A6. He admitted under cross-examination that he was on a motorbike with A5 on Afiadenyigba Junction road when they were arrested in connection with the robbery. As to what both were doing at the Afiadenyigba junction, A4 responded

that “I went to fix my brother’s motorbike”. As to the legitimacy of his claim of fixing a motorbike around midnight, he responded that he did not “check the time, but it was not midnight” failing to tell what the time was. Though conceding to have called A6 on his phone earlier, he denied calling A6 on 2 October 2021. The claim is untruthful, as the itemized call log on Item/Exhibit 46 negates this claim. I find A4’s four statements he gave to the police all suggestive of admissions and also by his claimed association that implicate A5 and A6 in the crime.

A5 admitted under cross-examination that on the day of his arrest on 2 October 2021, he went somewhere after work with his friend A4 to repair A4’s motorbike at Afiadenyigba Junction, evading an answer to the time he and A4 got to Afiadenyigba for the repairs. A5 admitted that they were on the bike going home when they were arrested on the Azizadzi road. Once again, A5 failed to answer when they were arrested; neither did he respond to a suggestion from the state attorney that they were arrested around 12:10 midnight on 3 October 2021. As to the question of how they could be repairing a motorbike at 12:10 after midnight, A5 responded that “I am not the mechanic who worked on the motorbike”.

Learned state attorney showed A5 his photograph as in Exhibit 58 to which A5 agreed that was his photograph, indeed agreeing to counsel’s suggestion that the clothes he was wearing were as in the picture – Exhibit 58 that was allegedly taken after their arrest on suspicion of the commission of the crime. I take a serious view of A5’s failure to call as a witness the motor repairer he claims worked on the motorbike at that hour. I fail to believe his single uncorroborated story/evidence.

Without even splitting hairs to go through his statements to the police after his arrest a couple of weeks after the incident, A6’s defence was shattered and

discredited under cross-examination. A6 admits to a suggestion from the state attorney that he stays at Aflao Batome. He admits further under cross-examination that he gave a statement to the Police on the day of his arrest. A6 claims to have slept in the house on the day of the robbery (2 October 2021) with his wife Ami Afornorfe. A6 stated that he knows A4 at Aflao as his motor mechanic. He admitted having spoken to A4 on the phone the day of the robbery when A6 was at Afiadenyigba junction. A6 evaded the question as to the time he placed the call to A4, agreeing with learned state counsel that he met A5 at Afiadenyigba on 2 October 2021 after his call to A4.

A6 stated further under cross-examination that he went back to Aflao after meeting A4 and A5 after A4 repaired his motorbike for him. He could not tell the court the time he left Afiadenyigba to Aflao, adding that he left just after the repairs of the motorbike, unable to tell the court how long A4 took to repair the motorbike, admitting however that it could be an hour. Upon a suggestion of the learned state attorney that by the reckoning he could be at home at Aflao before midnight, A6 responded "Yes, I could be at home at Aflao before midnight. Then to the crucial question as to whether he was at home before midnight on 2 October, A6 responded, "Yes, I was". By his evidence at the trial, my view is that A6 cannot be true that he was at home in Aflao before midnight on 2 October 2021. Once again I fail to believe A6's uncorroborated single story.

10 Conclusion

From the totality of evidence produced at the trial, my view is that the prosecution has reasonably without any shred of doubt in my mind discharged the burden of proof required in the case. In any event, none of the accused persons in my view sought to raise nor succeeded to cast any doubt in my mind of the uncertainty or

improbability of the case of the prosecution. I have the equanimity of mind to find each of the accused persons guilty of the charge/s laid against each; I convict each accused person accordingly on their respective charges. I defer the sentencing to tomorrow. The suit is adjourned to tomorrow 18 April 2021 for the sentencing of the accused persons.

Ordered accordingly.⁷

(Sgd.) George Buadi, J.

High Court (1) Ho.

Lawyers

- 1 Ms Dina Dzifa Amefinu (Asst. State Attorney) for the Republic.
- 2 Raymond Akpatsa, Esq. for all the Accused persons

⁷ End of the judgment – *The Republic v. Akwasi Owusu & 5 Ors* (Suit No. F17/01/2022)