IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE (COURT '1') HO THIS MONDAY 3 APRIL 2023 BEFORE JUSTICE GEORGE BUADI, J.

CASE NO. F22/15/2023

REPUBLIC	}	……..	RESPONDENT
Versus			
YAO YEBOAH	}	……..	CONVICT/APPELLANT

JUDGMENT ON CRIMINAL APPEAL

The appellant herein was on 22 November 2018 convicted and sentenced to a cumulative 17-years imprisonment by the Circuit Court, Kpando presided over by His Honour Nana Brew on two criminal counts of stealing and possessing stolen property contrary to the Criminal Offences Act, 1960 (Act 29) s.124(1), and s. 148.

On 14 February 2023, the appellant filed this appeal upon leave the court granted on 13 February 2023 under the Criminal & Offences (Procedure) Act, 1960 (Act 30) s. 326. The appeal is against the cumulative sentence of 17 years IHL the trial circuit court imposed on the appellant. The appeal, therefore, is not against his conviction of the offences, but rather against the sentences of 9 years and 8 years, including the order of the trial court for the sentences to run, "conservatively" 17 years, which I understand to be rather 'consecutively'.

The grounds of the appeal, per the notice filed, simply, is for mitigation of the 17-year sentence on grounds that the appellant is:

1 … a first-time offender

2 The sentence should have run concurrent instead of consecutive since all the counts emanated from one grand design

3 That all the stolen item[s] were retrieved and handed over to the [victim] complainant

4 That the 17-year sentence is excessively harsh with regard to the value of the stolen items

Having not appealed against his conviction, the appellant does not strictly appear to be contesting the charge and the facts, including evidence that was adduced before the trial court leading to his conviction. My duty, therefore, is to look at the legitimacy and soundness of the sentences on each count of the two counts as well as the cumulative 17-year sentence that the learned trial judge imposed on the appellant upon his conviction. I need to state here that both at the trial court and in this appeal, the appellant was unrepresented by a lawyer. The prosecution failed to file any written address as their case in the appeal.[1]

The charge of stealing is a second-degree felony, which upon conviction carries a maximum 25 years sentence, whilst the offence of possessing stolen property, invariably is equivalent to the offence of dishonestly receiving that carries a similar sentence upon conviction in the absence of evidence to the contrary. See Act 29, s. 148. Indeed, the sentence on conviction of the offence of dishonestly receiving as defined by sections 146 and 147 of Act 29 carries the punishment as conviction of

[1] Mr Joseph Opusumah who was present in court, representing his colleague Ms Nana Konadu Frimpong drew my attention to a copy of Ms Frimpong's written submission that was filed as far back as on 3 March 2023.

the charge of stealing in the absence of reasonable evidence to the contrary, i.e. a maximum sentence, also of 25 years.

Considering the definition of the offence of stealing that involves the appropriation of the thing, coupled with the maximum sentence upon conviction of the offence, one wonders the need, in fact, the prudence and appropriateness of a further or additional charge of possessing stolen property. This is because the act involved the same accused person in a single act against the same victim of the crime. I take notice from the charge sheet and reiterate that the appellant was convicted on two counts: stealing, and possessing stolen property. Particulars of the stolen items as stated on the additional count of possessing stolen property states - "two fridge motors, one machine engine, one decoder and one brand new ceiling fan value not yet known …", which I find is also stated as particulars on the count of stealing. That is, the particulars of the first count (stealing) had been repeated in the second count concerning the date, time, place, and items, and as I have just stated above, the same ownership and victim of the stolen items. The crime, I repeat was committed in the execution of a single criminal transaction.

In his terse sentencing, this is what the learned trial judge wrote after convicting the appellant for the two counts - stealing, and possessing stolen property:

> Accused is sentence[d] to 9 years imprisonment [for the offence of stealing], 8 years imprisonment [for the offence of possessing stolen property] … The sentence runs **conservatively**. Hence accused is sentenced to 17 years imprisonment in hard labour. (Emphasis added

Courts do pass sentences upon conviction of accused persons. The sentences are often accompanied by orders or further orders as to how the sentences are to be served; either, to run concurrently or consecutively. With much respect to the learned trial judge, the sentence he passed to run '**conservatively**' is new to me. It is unclear the meaning the trial judge ascribed to the word, as by practice there is no such word like that in the sentencing lexicon of courts. Unable to have direct access to the trial court's record book, I shall accord the benefit of the doubt to the judge and say that the word might be a misspelling or a typing mistake and that the judge meant possibly to write 'consecutively' rather than 'conservatively'.

The Ghana Sentencing Guidelines Manual (the Manual) was out-doored with a clear intention at page 2 of its 'Introduction', to "assist [j]udges, [m]agistrates and lawyers in their work so that **everyone** knows how sentences are fixed".[2] The purpose of the Manual is aimed to promote a standard and consistent sentencing pattern by the courts. Though a court is not obliged by law to give a reason for its sentences, the court must state the sentencing principle that directs the sentence; for example, whether the sentence is meant to be a punitive, deterrent, reformative etc. The term of the sentence must fit the purpose or principle of the sentence and must not be out of proportion to the offence committed.

The value of an item or thing allegedly stolen does not affect whatsoever the charging of the offence of stealing. In fact, per <u>Act 29, s.123(1)d</u>, stealing is committed in respect of a thing whether the value of the thing does not amount to the value of the lowest coin denomination. However, after the conviction of an

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[2] That is, the victim, the accused, the witnesses, their families and friends, the police, the lawyers, the community, the press and the public at large.

offence of stealing, the Manual imposes a duty on the court to consider the value or fix the value thereof of the stolen property in dishing out a standard, fairer and more appropriate sentence.

Per the Sentencing Guidelines, at page 16, factors worth considering as mitigating factors in sentencing upon conviction of the offence of stealing include the "low value [of the good stolen]; necessity; spur of the moment/opportunistic; recovery [of the good] in good condition; refund; only one [instant] offence; [role of the accused if the crime involves other persons]". On the other hand, factors the Manual enjoins the courts to consider as aggravating circumstances in imposing a standard appropriate sentence for the offence, include, "high value; sentimental value; premeditation; state of [the] goods on recovery; public property; two or more offences; [role of the accused where the commission of the crime involves more than one person]".

Indeed, at page 16, paragraph 3 at 'Step 3', the Manual provides "sentence ranges" of 'Level A' to 'Level E'. 'Level A' and 'Level B' provide for the passing of non-custodial (one day) sentences to cover instances where the value of property loss is not above 500 penalty units and where strong mitigating factors exist, extending from non-custodial (1 day) to 2 years in 'Level B' where there are few aggravating factors, but good and or some mitigating factors. Level C range covers non-custodial (I day) to 5 years sentence as regards instances of loss of property of value ranging from 500 to 5,000 penalty units. Levels C and D range of sentences of 5 - 10 years and the maximum of 10 - 25 years respectively covers where the value of property loss is of unlimited penalty units, where there are considerable aggravating and little or no mitigating factors, and also where there are gross

aggravating factors including professional offender, several/serious offences, previous convictions, among others.

It does not appear in the judgment of the learned trial judge what 'Level' or range the judge fixed or placed the appellant's case; neither does it appear in the judgment that the trial court took into consideration provisions in the Manual as provided at page 16 for guidance and assistance. I reiterate that the charge sheet discloses that the value of the loss or stolen items was unknown. Indeed, the stolen items, as stated in the charge sheet, I reiterate, are "two fridge motors, one machine engine, one decoder and one brand new ceiling fan value not yet known …". I have my doubts if the value was more than 1000 penalty units, as the nature, model, brand and age of the 'machine engine' was also unknown'.

I find no record in the judgment of the learned trial judge of any aggravating factor that directed the trial judge's sentence of the appellant to the term of sentences on the individual counts and also the cumulative 17 years that the court ordered to run "conservatively". The learned trial judge stated in the judgment to have taken into consideration the "accused's plea of mitigation" but failed to state the nature of the mitigation plea. By its appellate duty of rehearing, an appellate court requires the record or idea of the thinking processes of the judge, particularly what accounts for his assessment, and conclusions on the application of the relevant law.

The appellant states that he is a first-time offender and that all the stolen items were retrieved and handed over to the victim complainant. These claims were not contested by the State; indeed, filed no written submission.[3] The presumption, in

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[3] See as n1.

effect, is that the appellant did not derive or gain any benefit from the crime. By the circumstances of facts, I find the appellant's case as securely situated in 'Level A', or 'Level B' in the Sentencing Guidelines Manual, which provides for the passing of a non-custodial (one day) sentence extending at most to two years sentence that does not foreclose the option of the order for payment of a fine.

I reiterate that the offence of stealing alone carries the maximum sentence of 25 years and that depending on the circumstances of the commission of the offence, the trial judge was at liberty to fix any sentence including a day sentence and a fine within the prescribed 25 years as suggested in the Guidelines. Sentencing is a discretionary exercise; certainly, a judicial discretion that imposes a duty on the trial judge to be reasonably fair and just within the circumstances of the case. The trial judge owes a duty to himself and to the parties to put on record the principle involved in his sentencing; accounting therefore his choice of the term or range of the sentence for "everyone [to see how] sentences are fixed". See the Sentencing Guidelines Manual, page 3, para. 1. (Emphasis added)

Indeed, as regards the imposition of sentences, section 302 of Act 30 id provides as follows:

> **Several crimes, or several acts done in execution of one criminal purpose**
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> 302 With respect to cases where one act constitutes several criminal offences or where several acts are done in execution of one criminal purpose, the following provisions shall have effect:
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> (a) where a person does several acts against or in respect of one person or thing, each of which is a criminal offence but the whole of which acts are done in execution of the same design, and in the opinion of the Court before

> which that person is tried, form one continuous transaction, that person may be punished for the whole of the acts as one criminal offence, or for anyone or several of those acts as one criminal offence, and all the acts may be taken into consideration in awarding punishment, but that person is not liable to separate punishments as for several criminal offences …

The courts have had the opportunity to interpret and apply the above provision in a plethora of cases including *Tetteh Asamadey alias Osagyefo v. Commissioner of Police* [1963] 2 GLR 400, where the court held at headnote 2:

> Where a person does several acts, each of which is an offence and the several acts were done in the execution of **one grand design**, the prosecution may elect either (i) to charge the person with only one offence, in which case, on conviction, the court is entitled to take into consideration the rest of the acts in passing sentence, or (ii) to charge the person with the several acts, in such case if the person is convicted **the sentence for each act must run concurrently with the others emanating from the one grand design**. (Emphasis added)

In this appeal, as held in the case cited just above, though the appellant was charged with two counts of offences, they were all committed out of one design against the same victim complainant, which the sentences to have been ordered to run concurrently. A prerequisite for the award of concurrent sentences under Act 30, s. 302 (a) was that those several acts each of which constituted a crime should be directed against one person or thing. *Banda v The Republic* [1977] 2 GLR 253, and that consecutive sentences should not have the effect of crushing an accused person.

From all angles worth considering, including what is provided at page 16 of the Sentencing Guidelines, my view is that the facts and circumstances that I find on record cannot provide solid and safe support for the 8 years and 9 years on each count of the offence. Neither is there any valid legal platform to support the trial judge's choice to order the sentences "to run conservatively" for 17 years. I agree therefore, with the appellant's position that the 8 years and 9 years sentences for the respective offences of stealing and possessing stolen property as well as the order for the sentence to run cumulatively or consecutively for 17 years as excessively harsh, particularly upon the consideration of the mitigating factors in the case which include the appellant's uncontested claims that: firstly, he is a first-time offender; secondly, that all the stolen items were retrieved and handed over to the complainant (possibly in good condition); and thirdly, that all the counts emanated from a single act, which in effect required the sentence to be made to run concurrently. See Act 30, s.302 id.

I have the calmness of mind to hold that the learned trial judge was respectfully wrong on all legal fronts as contested by the appellant in his grounds of appeal. I reiterate what I stated earlier about the Sentencing Guidelines at page 16 Level A' and 'Level B' that provides for the passing of non-custodial (one day) sentence to cover instances where the value of property loss is not above 500 penalty units and where strong mitigating factors exist, extending from non-custodial (1 day) to 2 years in 'Level B' where there are few aggravating factors, but good mitigating factors as I find in this case, particularly the youthful age of the appellant coupled with the fact of his first encounter with the law. Respectfully, this is what the learned trial judge failed to consider, which if had would have inured to the

appellant's advantage. The failure, in my view, amounted to a gross miscarriage of justice.

The law – the Courts Act, 1993 (Act 459) s.30 and s.31 - provide for the general powers of the appellate court hearing an appeal in a criminal case. Within the powers, as stated above, I shall allow the appeal on grounds that the judgment of the learned trial judge was wrong on all questions of law or fact that occasioned a substantial miscarriage of justice. I uphold each ground of the appeal. The appeal succeeds. **I set aside** the nine (9) years and the eight (8) years sentence the trial court imposed on the two counts of stealing and possessing stolen property respectively. In their respective places, I substitute two (2) years on each count, to run concurrently taking effect obviously from the date of the sentence of the trial court on 22 November 2018.

Having been sentenced to two years in 2018; we are in 2023 and that suggests to me that the appellant has by now effectively served in full the two-year sentence that had been imposed. I, therefore, make an order for his immediate release /discharge from the host prison facility.

Ordered accordingly.[4]

Justice George Buadi J

High Court (1)

[4] The end of the judgment in this criminal appeal – *Yao Yeboah v. The Republic* (Case No. F22/15/2023) decided on 3 April 2023

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Lawyers:

Ms. Nana Konadu Frimpong (Assistant State Attorney) for the Republic.

No legal representation for the appellant.