IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE SITTING AT NSAWAM MEDIUM SECURITY PRISONS ON TUESDAY, 13TH JUNE 2023

CORAM: HIS LORDSHIP JUSTICE KOFI NYANTEH AKUFFO – JUSTICE OF THE HIGH COURT

CASE NO. D15/32/2018

YAW GARI

V.

THE REPUBLIC

JUDGEMENT

INTRODUCTION

Yaw Gari (hereinafter called "Appellant") appeared before the Circuit Court, sitting at Techiman facing one (1) count for the offence of Robbery: Contrary to Section 149 of Act 29/1960.
The Appellant pleaded not guilty.
The brief facts as presented to the trial court is that, the Appellant and three (3) others armed with Guns, blocked a road and proceeded to Rob and beat passengers in a vehicle.
After a full trial, the trial Judge found the Appellant guilty as charged and convicted him accordingly.
The trial Judge sentenced the Appellant to thirty (30) years in prison.
Aggrieved by and dissatisfied with the conviction and sentence, the Appellant has appealed against both.
In support of their respective positions, both the Counsel for the Appellant and the State Attorney filed written addresses.
In relation to the grounds of appeal, the following is contained in the written address filed on behalf of the Appellant.

"… It's the case of the Appellant that his conviction and sentence was not borne by law…"

For the sake of clarity, I shall proceed to deal with the following.

(a) Applicable burden and standard of proof.
(b) Elements/ingredients of the offence.
(c) The applicable principles governing appeals against conviction.
(d) The applicable principles governing appeals against sentence.
(e) Decision of the court.
(f) Conclusion.

APPLICABLE BURDEN AND STANDARD OF PROOF

It is trite learning that in criminal proceedings, the onus rests squarely on the prosecution to prove the guilt of the accused person to the degree of 'beyond reasonable doubt'.

Pursuant to the above, in **Oteng v. The State (1966) GLR 352 at 354,** SC, Ollenu JSC said:

" …The citizen too is entitled to protection against the State and that our law is that a person accused of a crime is presumed innocent until his guilt is proved beyond reasonable doubt …".

- **See also Sections 11(2) and 13(1) of the Evidence Act (1975) NRCD 323).**

With regards to the defence, it is instructive to note that there exists no onus on an accused person to prove his innocence. He only needs to raise reasonable doubt to merit an acquittal.

The case of **Commissioner of Police v. Isaac Antwi (1961) GLR 408, SC** is directly in point. Korsah CJ stated:

" … The Law is well settled that there is no burden on the accused. If there is any burden at all on the accused, it is not to prove anything, but to raise reasonable doubt. If the accused can raise only such a reasonable doubt, he must be acquitted …".

- **See also Sections 11(3) and 13(2) of the Evidence Act (supra).**

ELEMENTS/INGREDIENTS OF OFFENCE

The current offence under consideration is the offence of Robbery.
It is defined in Section 150 of Act 29, 1960 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 intent to prevent or overcome the resistance of other person to the stealing of the thing…".**

In the case of **Kofi Asiedu v. The Republic- Criminal Appeal No. H2/16/2010, Dennis Dominc Adjei, JA**; elaborated on the ingredients of Robbery as follows:

> **"…From the above definitions, a charge of robbery could be proved where one uses force or causes harm to any other person in his effort to steal something or the person who is stealing must have used threat or criminal assault or harm to any person with intent to prevent or overcome the resistance of the other person to the stealing…"**

APPLICABLE PRINCIPLES ON APPEALS AGAINST CONVICTION

The instant Appeal is alleging that the conviction is not borne by the law.
In effect, the Appellant is claiming that the conviction cannot be supported by the evidence placed before the trial court.
Section 31(1) of the Courts Act-Act 459/1993 provides as follows:

> **"… Subject to subsection (2) of this Section, an Appellate Court on hearing any Appeal before it in a criminal case shall allow the Appeal if it considers that the verdict or conviction or cannot be supported having regard to the evidence or that the judgement in question ought to be set aside on the ground of a wrong decision on any question of law or fact or that on any ground there was a miscarriage of justice and in any other case shall dismiss the Appeal…".**

Pursuant to the above, it is a truism that there is one substantive ground upon which an Appeal can be successful.

The ground is that there has been the occurrence of a substantial miscarriage of justice.
Same can be proved in three (3) different ways.
The three grounds were neatly enunciated by the esteemed Jurist and Author, Dennis Dominic Adjei JA, in his authoritative book- Criminal Procedure and Practice in Ghana, Volume 1 at page 469:
He wrote as follows:

> **"…There is one main ground under which an appeal may succeed, that is where the Appellant proves that there is a substantial miscarriage of justice. There are three separate grounds of Appeal which constitute substantial miscarriage of justice and a successful proof of any one of them may allow the appeal. The first ground is where the appellate court considers that the verdict or conviction or acquittal ought to be set aside on grounds that it is unreasonable or cannot be supported having regard to the evidence. The second ground is where the court considers that the judgement was decided on wrong question of law or fact. The last ground is where the court finds that there was a miscarriage of justice. Any other ground of appeal outside the three grounds discussed above shall fail. The Court shall dismiss any appeal on procedural error or defect or technically unless it has occasioned substantial miscarriage of justice…".**

APPLICABLE PRINCIPLES ON APPEALS AGAINST SENTENCING

At the outset, it is apt to establish the proposition that any Appeal, be it against sentence, conviction or both is by way of rehearing.
To this effect, it is totally incumbent upon the Appellate Court to consider the evidence on record and consider whether the trial Judge came to the right conclusions.
The case of **Bosso v. The Republic (2009) SCGLR, 420** is directly in point.
The Esteemed Jurist, Georgina Wood CJ, stated as follows:

> **" … The Rule that Appeals are by way of rehearing is not limited to substantive Appeals only, but the sentences passed, provided an Appeal lies therefrom …"**

It must be noted that when an Appellant seeks to get the sentence meted out reduced, he must be aware that there exists some general sentencing principles.
It is for the above reason that Ansah JSC stated as follows in **Mohammed Kamil v. the Republic (2011) 1 SCGLR at 300:**

> **" … Where an Appellant complains about the harshness of a sentence, he ought to appreciate that every sentence is supposed to serve a five-fold purpose, namely, to be punitive, calculated to deter others, to reform the offender, to appease the society and to be a safeguard to this country …".**

Indeed, with regards to general sentencing principles, same was given a detailed elaboration in the oft-quoted case of **Kwashie v. The Republic (1971) 1 GLR 488, CA.**
Azu-Crabbe JA (as he then was) stated as follows:

> **" … In determining the length of sentence, the factors which the trial Judge is entitled to consider are (1) the intrinsic seriousness of the offence; (2) the degree of revulsion felt by law-abiding citizens of the society for the particular crime; (3) the premeditation with which the criminal plan was executed; (4) the prevalence of the crime within the particular locality where the offence took place, or in the country generally; (5) the sudden increase in the incidence of the particular crime; and (6) mitigating and aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed. Thus, a Judge in passing sentence may consider the offence and the offender as well as the interest of society …".**

It must be noted that the need for a trial Judge to take into account the offence, offender and society is of paramount importance. It is precisely for the above reason that Baidoo JA (as he then was) remarked as follows in **Republic v. Selormey (2001-2002) 2 GLR,424:**

> **" … On the authorities, in passing sentence, a Judge had to consider the offence, the offender and the interest of society. Thus, although there was no scientific scale by which punishment was measured, a sentence had to be imposed to fit both the offender and the crime …".**

With regards to sentencing, it is trite learning that same is a matter of discretion for the trial Judge.
However, it is of utmost importance that the discretionary powers of the court is exercised within the confines of established principles.
Specifically, it is incumbent upon the sentencing authority to take into account the relevant mitigating and aggravating factors.
Additionally, should the trial Judge decide to impose a lenient or a deterrent sentence, it is of paramount importance that cogent reasons are given for the sentence imposed.
Once a trial Judge has duly adhered to the above requirements, it does not lie with the Appellate Court to disturb the sentence imposed by the trial court.

However, the contrary hypothesis is also true.

If the trial Judge fails, refuse or neglect to take into account the applicable mitigating and aggravating factor or give reasons for the sentence imposed, the Appellate Court would be fully entitled to interfere with the sentence imposed by the trial Judge.

The above propositions have been duly established in a myriad of authorities in this jurisdiction.
The ratio Descendendi of three (3) Eminent Jurists are directly in point.
In Banda v. The Republic (1975) 1 GLR at 52, Osei-Hwere J (as he then was) stated as follows:

> **" … The exercise of the power of sentencing lay entirely within the discretion of the trial Court, and provided the sentence fell within the maximum permitted by the statute creating the offence and the trial Judge duly considered those matters that should go in mitigating of sentence, an Appellate Court should not disturb the sentence only because it would have felt disposed to impose a lighter sentence if it had tried the case at first instance …".**

On a similar note, Apatu-Plange J (as he then was) had the following to say in **Assah alias Asi v. The Republic (1978) GLR at p2**:

" … Now in dealing with an Appeal of this nature, the court has to find out whether there were any mitigating factors which the trial Magistrate took or failed to take into consideration.
If the record reveals that he took all the said mitigating factors into consideration before imposing the sentence, then discretion can be said to have been properly exercised, and in the absence of any special circumstances, an Appellate Court will be slow to interfere with such a sentence. If, however, the record does not reveal that the trial Magistrate took any such mitigating circumstances into consideration, then the Appellate Court will find out whether the said mitigating factors were such that if the trial Magistrate had adverted his mind to them, he would have probably not have imposed the said severe sentence …".

Taylor J (as he then was) on his part, stated as follows in **Haruna v. the Republic (1980) GLR, 189:**

" … The question of sentence was a matter of discretion with all courts of justice. However, the discretion was exercisable on well-known principles. In awarding sentence, particularly when the court set out to award a deterrent sentence, all the circumstances must be considered. If there were circumstances tending to mitigate the application of the deterrent principle, then reasons must be given why those circumstances must be ignored if a deterrent sentence was imposed. If that was not done, then the discretion has not been properly exercised and the Appellate Court could interfere with the said exercise of discretion. If, however, all the circumstances relevant to the question of the appropriate sentence have been adequately considered, the exercise of the discretion by a lower court ought not be impugned by an Appellate Court …".

The factors, guidelines and principles stated ut supra, would be taken into due consideration in determining whether the instant Appeal ought to succeed or fail.

As stated above, the instant Appeal is against both conviction and sentence.

Both the Appellant and the Republic duly complied with the directions of the Court by filing written addresses.

The written address of the Appellant contain, inter alia, the following;

1. The evidence of the Prosecution witnesses contradicted one another.
2. The Prosecution could not furnish the court with the number of victims robbed by the Appellant.
3. The time that the Robbery occurred was not established because different witnesses provided different timelines.
4. The Appellant was wrongly identified as someone who took part in the Robbery.
5. No property belonging to any of the complainants were found on the Appellant.
6. There were no medical Reports tendered in evidence to prove that the complainants suffered injuries.
7. Only two (2) victims of the Robbery were supposed to have identified the Appellant.
8. There is no evidence that the police did visited the crime scene.
9. The trial Judge failed to take mitigating factors into consideration before sentencing.

The following authorities were included in the Appellant's written address;

a) Yamoah v. The Republic (2012) 2 SCGLR, 750.
b) Elijah and Atiso v The Republic (2010) SCGLR, 870.
c) Torto v The Republic (1991) 1 GLR, 347, CA.
d) **Republic v Anane Kwesi (Unreported) - 28th September 2016 (Ghanaian Times**).

Surprisingly, the written address of the Republic dealt exclusively with the Appeal against sentence.

No arguments were canvassed in respect of the Appeal against conviction.

The crux of the submissions was that, a trial Court ought to consider both mitigating and aggravating factors in order to be balanced and fair.

The Republic also associated itself with the prayer for a reduction of the sentence but stated that this Appellate Court cannot impose a sentence less than the minimum statutory sentence for Robbery with weapon (15 years imprisonment). The following cases were relied on by the Republic;

1) **Anang v The Republic (1984-1986) 1 GLR, 458.**
2) Kamir v The Republic (2011) 1 SCGLR, 300.
3) Kwashie v The Republic (1971) 1 GLR, 488.
4) Atuahene v COP (1963) 1 GLR, 448.
5) Addae v The Republic (1970) CC, 75.

It must be noted that all Appeals (conviction and /or sentence) are by way of rehearing.

To this end, I will proceed to subject the evidence on record to close serving and determine whether or not to grant the instant Appeal against conviction and sentence.

Having undertaken the above task, could it be said that the instant Appeal out to succeed? My answer is in the negative.

Six (6) key reasons inform the conclusion I have reached.

I will hereby proceed to expand on the reason ut Infra.

To start with, upon evaluation of the evidence produced at the trial court, one is left in no doubt that the prosecution proved the elements of the offence under consideration.
Two (2) of the victims testified on oath that the Appellant and others forcibly took monies and mobile phones from passengers travelling from Kumasi.
Crucially, the testimonies of the prosecution witnesses remained unshaken by way of cross-examination.

As a result, I have no hesitation in holding that the prosecution discharged the burden placed on them by law by proving the elements of Robbery to the degree of beyond reasonable doubt.
In the famous case of **Miller v. Minister of Pensions (1947)2 ALL ER 372 at 373**, the celebrated Jurist Dening J (as he then was) stated the following about what is the meaning of beyond reasonable doubt:

> **"…It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice…"**

Taking into due cognisance the ratio of the above dictum, I am satisfied that the evidence adduced and provided by the prosecution was adequate to prove the elements of Robbery beyond reasonable doubt.

The second reason is that the Appellant did not produce sufficient evidence to raise reasonable doubt as to his guilt.
The Appellant elected to give an unsworn statement which consisted of an unequivocal denial of the commission of the offence.
The Appellant did not call any witnesses to corroborate his evidence.
It is trite learning that an accused person is under no obligation to lead evidence to prove his innocence.
However, it is equally trite learning that it is incumbent upon an accused person to lead evidence to raise reasonable doubt as to guilt.
Failure to do so, to all intents and purposes, can prove fatal to the case for the defence.
The case of **Ali Yussif Issa (No.2) v. The Republic (2003-2004) 2 SCGLR, 181** is in point.
The esteemed Sophia Akuffo JSC (as she then was) stated as follows:

> **"… Taken together, the burden of persuasion and the burden of producing evidence…. are the component of the burden of proof. Thus, although an accused person is not required to prove his innocence, during the course of his trial, he may run a risk of non-production of evidence and/or non-persuasion to the required degree of belief, particularly when he is called upon to mount a defence…"**

Taking the above dictum into account, I am satisfied that the Appellant failed to raise reasonable as to his guilt.

Next, I note that identification is of paramount importance when it comes to offences such as Robbery.
In the instant matter, two (2) prosecution witnesses testified that they saw the face of the Appellant as amongst the persons who committed Robbery.
Apart from the testimonies on oath, the Appellant was also clearly identified in an identification parade.
In **Republic v. Adu Boahene (1972), 1 GLR, 70, Azu Crabbe JSC** (as he then was) stated as follows:

> **"… Where the identity of an accused person is in issue, there can be no better proof of his identity than the evidence of a witness who mounts the witness-box and swears that the man in the dock is the one he saw committing the offence, which is the subject matter of the change before the Court…"**

The net effect of the aforestated is that the clear identification of the Appellant was crucial as it went a long way in proving the case of the prosecution beyond reasonable doubt.

Another reason is that, there exist circumstantial evidence which was not rebutted by the Appellant.
Upon his arrest, the bag held by the Appellant was duly searched. Items found therein included five (5) mobile phones, 3 hard gloves and other items.
Even though, the above items does not automatically suggest that the Appellant committed the instant offence, it cannot be discounted, particularly when it is juxtaposed with other factors.
The items recovered, to my mind, constitute circumstantial evidence.
Crucially, no plausible explanation was offered by the Appellant with regards to the recovered items.

Lord Hewart CJ, stated the following about circumstantial evidence in the case of **R v. Taylor (1928) Crim.App Rep 21at p29:**

> **"*…It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics…"***

In the instant matter, the above evidence does not inure to the case put up by the Appellant.

The Penultimate reason is that, the trial Judge did not commit any errors in relation to the sentence imposed.
Even though it is not apparent that mitigating factors were taken into consideration, the trial court manifestly decided to give a deterrent sentence as a result of the prevalence of Robbery.
Was the trial Judge entitled to give an enhanced sentence in the circumstances?
I sincerely believe he was entitled to do so.
I take Judicial notice of the fact that Robbery is increasingly becoming a dangerous canker that must be nipped in the bud.
It must also be noted that Robbery is a first degree felony offence that can attract a maximum of life imprisonment.
The thirty (30) years in prison in hard labour which was imposed on the Appellant is clearly within the confines of the range of sentence that could be imposed by the trial court.
The conclusion reached with regards to the sentence is fortified when I consider the case of **Adu Boahene v. The Republic (1971) 1 GLR, 488.** The esteemed Azu-Crabbe JSC (as he then was) stated as follows:

> **"… Where an offence is of a grave nature, the sentence must not only be punitive but it must also be deterrent and 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…"**

Lastly but perhaps more importantly, I fail to see any substantial miscarriage of justice occasioned.
In the case of **Adu v. Ahamah (2007-2008 SCGLR,43**, the Supreme Court commented as follows:

> **"…That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be neglect of some principle of law or procedure, whose application will have the same effect.."**

Relating the above dictum, I fail to see any departure from the rules of judicial procedures.
I also fail to see any victations of principles of law.
In effect, the trial judge did not commit errors of law which resulted in substantial miscarriage of justice.

CONCLUSION

Taking into cognisance all the analysis ut Supra, this Appellate Court cannot impeach the conviction and sentence of the Appellant by the trial Court.
As a direct consequence, the Appeal against both conviction and sentence fails.
The Appeal is hereby dismissed.

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* **Mohadeen Osuman Esq.,for the Appellant.**
*** State Attorney absent.**

SGD.
HIS LORDSHIP JUSTICE KOFI AKUFFO
(JUSTICE OF THE HIGH COURT)