IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: AKUFFO, (MS) JSC (PRESIDING)
DATE-BAH, JSC
ANSAH, JSC
BONNIE, JSC
BAMFO,(MRS) JSC

CRIMINAL APPEAL.
No. J3/6/2011

25TH APRIL,2012

1. IBRAHIM RAZAK
2. KENNEDY YEMOAH **APPELLANTS**

VRS.

THE REPUBLIC **RESPONDENT**

J U D G M E N T

ANSAH JSC:

At their trial at the High Court, Sekondi, each of the two accused persons, was charged with a count of the offence of

Count one

Statement of offence

ROBBERY: Contrary to section 149 (1) of Act 29 of 1960 as amended by Act 646;

Particulars of offence.

1 Ibrahim Razak: 2 Kennedy Yamoah: for that on the 27th day of July 2005, at West Anaji, a suburb of Takoradi in the Western Region of Ghana and within the jurisdiction of this court did use force and threat with intent to overcome any resistance in order to steal properties belonging to Mr. and Mrs. Cudjoe valued at ¢8 million.

Count Two.

Statement of offence.

ROBBERY: contrary to section 149 (1) of Act 29 of 1960, as amended by Act 646;

Particulars of offence

1, Ibrahim Razak; 2 Kennedy Yamoah: for that on the 27th July 2005, at West Anaji, suburb of Takoradi in the Western Region of the Republic of Ghana and within the jurisdiction of this court did use force and threat with intent to overcome any resistance in order to steal properties valued at about ¢13 million belonging to Mr. and Mrs. Ward of House Number 6/790 Street, West Anaji.

Count Three.

Statement of offence

ROBBERY: Contrary to Section 149 (1) of ACT 29 of 1960 as amended by Act 646:

Particulars of offence

1 IBRAHIM RAZAK 2 KENNEDY YAMOAH: for that on the 27th of July, 2005 at West Anaji a suburb of Takoradi in the Western Region of the Republic of Ghana and within the jurisdiction of this court did with intent to overcome any resistance in order to steal properties valued at ¢5 million belonging to Mr. and Mrs. Aboagye of House Number PLT 48, West Anaji."

The facts upon which the charges were laid against the accused were that, in the small hours of 27th July 2005, five men with one of them wearing a mask, attacked the complainants in three houses within a 100 meters radius at West Anaji, a suburb of Takoradi, and succeeded in making away with properties valued at ¢8 million the properties of Mr. and Mrs. Cudjoe, properties valued at ¢13 million belonging to Mr. and Mrs. Ward of House number 7/90, West Anaji, Takoradi. That same day the two accused robbed Mr. and Mrs. Aboagye of House Number PLT 48, West Anaji, of properties valued at ¢5million.

On 17th August 2005 the 1st accused was arrested upon a tip-off to the police; the second was to suffer the same fate on 24th August 2005.
At an identification parade carried out by the police, the two accused persons were identified by the Prosecution Witnesses to have been some of the culprits of the dastardly armed robbery of 27th July 2005 on the complainants.
When arraigned before the court on the charges above mentioned, each accused pleaded not guilty to them.

However, His Lordship Mr. Justice D. K. Ofosu Quartey, sitting at the High Court, Sekondi, tried the two accused persons, found the guilt of each proved beyond reasonable doubts on each count and convicted them accordingly; he proceeded to mete out a sentence of life imprisonment on each of them.

The accused were aggrieved by the conviction and sentence, and appealed them to the Court of Appeal.

The Court of Appeal affirmed the conviction of each appellant, but considered that, much as the sentence imposed by the trial judge was justified by the seriousness of the offence, the degree of revulsion felt by law abiding citizens and the impunity with which the offences were committed called for severe punishment to the appellants to serve as a deterrent to those who intended to engage in this heinous crime, nonetheless, the infliction of the maximum sentence for armed robbery was obviously on the high side. The court for this reason, interfered with the sentence of life imprisonment by setting it aside and substituting it with one of 30 years imprisonment for each accused.
The accused were once again aggrieved by the judgment and went on a further appeal to this court for the purpose of quashing their conviction and sentence.
The grounds of this further appeal were that:
"1. The conviction of the Appellants (sic) were based on doubtful identification and the benefit of the doubt should have enured to the appellants.
2. That the innocent discrepancies in the police statements of the girl friend and the New Achimota Hotel attendant about the departure

dates were not testimonies before the Court and they should have had no bearing on the case but it did.
3 It is not likely that tall persons like the Appellants, who would stand out clearly easily, would undertake an armed robbery operation in their neighbor hood.
Additional grounds to be filed when the record is available."
None has been filed so far at least to our knowledge.

The accused at the trial are referred to as the appellants in this opinion.

This being a criminal trial, the onus was heavily on the prosecution to prove beyond reasonable doubts that on the day stated in the charge sheet, the appellants used force or threat of harm to any person or the complainants for the purpose of stealing their properties, that there was the intention to prevent or overcome the resistance of the complainant and lastly, and more importantly, that it was the accused who committed the offence of robbery on the prosecution witnesses, the complainants at the trial.

From the grounds of appeal quoted above the pith of the grounds of appeal (in grounds one, two and three), deal with the issue of the identity of the persons who were alleged to have committed the acts complained of. The crux of the grounds of appeal were the procedure for carrying out the identification parade by the police and the defence of the plea of alibi put up by the second appellant; by this appeal, these ought to be considered to see how far the prosecution succeeded in discharging the onus on them namely, to prove beyond reasonable doubts that it was the appellants who committed the offence in question.

Evidence on identity of appellants:

In the present appeal, there could be no doubt the prosecution proved beyond reasonable doubts that the offence charged, to wit robbery, was committed on the date and place in question; what was in dispute was the identity of who the perpetrators were. The prosecution alleged and the appellants categorically denied that they committed the offence. The multi billion cedi question is, therefore, was there sufficient evidence to convict the appellants on the charges

they faced at their trial or the first appeal in the courts below? That would tend to put the identity of the perpetrators in dispute. The law was that:
In every criminal trial it is not only necessary for the prosecution to prove the commission of the crime, but also to lead evidence to identify the accused as the person(s) who committed it. That was of a very crucial importance for a proven case of mistaken identity is a good ground for reversing a conviction for a crime on appeal. Thus where the ground of appeal bothers on mistaken identity, a trial or appellate court ought to carefully examine the evidence on it. A judge is to guide himself by considering factors such as the period of time over which the witness saw or observed the accused (appellants in this appeal), the conditions in which the observation was made, whether or not the area or vicinity was lit to make the observation possible, the distance between the witnesses and the appellants, or whether or not the description by the prosecution witnesses agreed with that of the appellant(s). On this see the guidelines by Lord Widgery CJ in *R v Turnbull [1977] QB 224*.

The identification may take various forms. In *'Phipson on Evidence' (10th ed.) p 170 paragraph 1381,* it is stated:
'When a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics: e.g. age, height, size, hair, complexion, voice, hand-writing, manner, dress, distinctive marks, faculties, or peculiarities including blood group, as well as of residence, occupation, family relationship, education, travel, religion, knowledge of particular people, places, or facts, and other details of personal history.' see *Adu Boahene v The Republic [1972] 1 GLR 70 at 74*
Thus, it is fair and reasonable to say that the modes of identifying the perpetrators of a crime vary and holding an identification parade may be one of the acceptable modes. Another may be by proof of personal characteristics or peculiarities like the height of the person given by the oral evidence by prosecution witnesses on oath in court.

In this appeal, the evidence on the identity of the appellants was given by the PW1, George Peter Ward. He gave a graphic account of how five men armed with guns used five inch blocks and a pick axe to break into his house amidst gunshots all over the place.

The PW1 was positive one of the five men wore a mask. Inferentially the others were not so masked so he saw the faces of those unmasked men.
A week after the horrendous episode, the PW1 and others were called to the police station headquarters for an identification parade. There he was able to identify the first appellant as one of the people who went to rob them – he walked to the first appellant and touched him. The PW1 said he was able to identify him because of his low hair cut and fair complexion.
Under cross-examination, the PW1 said even though the nightmarish attack in the house took place at about 2:00 am, there was light from a four feet florescent bulb in front of the house. The attackers came to the house and were there for an hour and he the PW1 did not have any visual problem, so he could see them clearly.

The evidence of the PW2, Mrs. Christiana Lee Ward, on the identity of the robbers did not differ from that of the PW1. She also identified the first appellant at the parade. In the house, she saw him through the holes in the blocks of the verandah. The identification marks or features about him were that his hair had been cut low and he was tall; he was the one who instructed the other robbers to stop hitting the door with the cement blocks because there was an iron bar behind it. When the robbers gained ingress into the house, she saw them as she entered her room which had its lights on. They slapped her and asked her for money and ordered her to bring her bag. She obliged them the request or order. The bag contained 7 million cedis, made up of 500 dollars, and 1.5 million cedis. This evidence showed that the PW2 had a close encounter with the robbers, and an opportunity to see them - she could see them in the light before they entered the house. The first appellant was one of them.

The PW3, Edmund Aboagye told yet another gruesome encounter with the robbers-how they entered his house to rob him, fully armed to the teeth with doubled barreled gun, a cutlass and a pistol. They succeeded in robbing him of cash the sum of ¢300,000.00 and ¢200,000.00 (thus making a total of ¢500,000.00), some jewellery and mobile phones.
At the parade, he was able to identify the first appellant as one who took part in the robbery in the house that night. To quote his exact

description he said he saw the first appellant *'fiilifiili'* – a local parlance meaning 'very clearly'.

These three prosecution witnesses who were participants at the parade identified the first appellant as one of the robbers. [The PW3 said he was able to identify the first appellant because when he was in his daughter's room, he could see clearly what was going on and the 1st appellant was the one who was taking the jewellery. He saw him clearly for his hair had been cut low.]

It was noteworthy that the 2nd appellant was not identified as one of the robbers by the Prosecution Witnesses at the first parade. He was identified at a second parade by the PW2. This was confirmed by the 2nd appellant in his testimony before the trial court where he said the witness identified tall and fair colored men.

Counsel for the appellants wondered why five men were identified at the parade but only the two appellants were charged with the offence, thus casting doubts about the reliability of the parade. The answer was provided by the prosecution through the evidence by the PW4, Detective Inspector Ben Gakpe, who investigated the case. He said the second appellant was identified by the PW2 at a second parade. There were five persons who were identified but only two were charged with the offences because the others were not picked out as suspects – in other words five were identified but only two were picked out as suspects. The reason was that someone told him a story about them; that was to say, there was evidence against those two persons. As there was nothing against the rest they were not charged with any offence. That was the reasonable thing to do. Those other persons had only been brought to form part of the group of persons for the parade, that was to only form the 'row' but not because they were suspected to have taken part in the robbery.

A close study of the entire record of proceedings reveals that there was ample evidence to support the conclusion of the Court of Appeal that the two appellants were properly identified as having taken part actively in the robbery in the houses at West Anaji, Takoradi, on 27th July 2005. This was via the oral evidence by the prosecution witnesses on oath supported by identification evidence at the parade at the police station.

It ought to be stated that issues about the identity of the appellants as being members of the gang that committed the offence in question, were of fact the resolution of which lay squarely within the province of the trial judge. When he discharged that burden with a finding of fact, an appellate court would be slow to interfere with it unless it could be shown that there was no evidence to support that finding of fact. That was not the case here where the evidence was rather overwhelming in support of the offence charged against the appellants.
The critical question is whether such identification evidence as was led by the prosecution was sufficient to support the conviction of the appellants? It ought to be noted that this was not like an in-dock identification in *Karim v The Republic [2003-2004] SCGLR 812*.
In this appeal there was evidence from prosecution witnesses who had the opportunity to see the robbers 'fiilifiili' because of light from a four feet fluorescent bulb. They also were close to each other in the houses and rooms where the robbers ordered them to surrender items like jewels and cash to them. There was also evidence that the appellants were identified at a parade at the police station before they were charged with the offence. At least this is enough to distinguish this appeal from *Karim* (supra) on the facts.

The plea of alibi:
The second appellant pleaded alibi in his defence. Simply put, it means the fact or state of the appellant having been elsewhere when the offence was alleged to have been committed.
In criminal law and procedure, "if an accused puts forward an alibi as an answer to a criminal charge, he is simply saying that whoever might have committed the offence, if it was committed at all, it was not he; and to support this he leads evidence that he was elsewhere at the material time." see *Bediako v The State [1963] 1 GLR 48, SC*, at 50.

The onus of making good the plea of alibi was on the person asserting it, in this case the second appellant. This he may discharge on the balance of probabilities.

In his effort to prove his plea of alibi, the second appellant said in his evidence in chief that on the 27th, July, 2005, he was not in Takoradi, having traveled to Accra with a brother, Albert Koomson, on a

business transaction, on 24th July. In Accra, he slept at a hotel called 'Chavez' in Achimota, until the 26th July 2005. Due to lack of sufficient money, that day, they moved from the hotel to the house of a girl friend where they stayed till 28th July 2005. It was when they got back to Takoradi that he heard that Albert Koomson had been arrested for robbery. When he went to visit him at the police station, he was arrested for the offence and later identified by the PW2 as having been one of the robbers.
Earlier he said in his cautioned statement to the police tendered in evidence as Exhibit 'G', that, he had traveled to Accra on business to collect his goods on the 27th August 2005 so the police could contact one Osei Nyarko of Dansoman. In court he did not mention the name of this Osei Nyarko at all.
He rather gave evidence that he was with a girl-friend called Eartha Lartey, whose name had not been mentioned in exhibit G at all and who made a poor show of herself under cross-examination, as she refused to answer questions but only retorted 'I don't know' to them for her answers. She did not lend any support to the cause of her principal the second appellant. It thus created the presumption that the introduction of Eartha was an afterthought.
The credibility of a witness and weight to be given to his evidence was the duty of a trial court.
The trial court disbelieved the story of alibi and rejected it. The Court of Appeal affirmed the trial court in considering and rejecting the defence of alibi put up by the 2nd appellant. There was evidence to support the conclusion of the Court of Appeal and I have no reason to disturb their decision.

An appeal to this court is by way of a rehearing of the facts in evidence.
I also affirm the two lower courts in their treatment of the plea of alibi by the second appellant.

Section 131 of Act 30, of the Criminal and other offences (Procedure) Act, 1960, (Act 30), governs the practice and procedure in alibi, and provided that:

"131 Alibi
(1) Where an accused intends to put forward as a defence a plea of alibi, the accused shall give notice to the prosecutor or counsel with

particulars as to the time and place and of the witnesses by whom it is proposed to prove,
(a) prior, in the case of a summary trial, to the examination of the first witness for the prosecution, and ..".
There is no prescribed form for the notice to the prosecutor for an alibi and an accused person may give the required notice and particulars in his investigative cautioned statement to the police. That was Exhibit 'G' at the trial dated (sic) 9-9-200. That was long before the PW1 gave evidence on 18th November 2005.
The issue is did the failure by the second appellant to file the required notice of alibi have any effect in law? *Bediako v The Republic [1976] GLR 39,* deserves consideration. In that case, there was no notice of alibi filed by the third appellant therein and Sarkodee J did not think the mere mention by the accused in his statement that he was not at the scene amounted to notice; the learned judge considered that the sum total of the defence was a complete denial of the charge which was considered and rejected by the trial court. He had earlier held that where the accused failed to give such notice as was required of him under section 131 (1) of Act 30, it must appear to the trial court that there was the defence of alibi properly before court: see page 42. The learned judge went on to hold that nothing stopped the accused from calling as witnesses the people he said he was with to confirm his defence if it was true.

In this appeal, the defence of the second appellant was investigated by the PW4, the police investigator. The trial judge considered the defence by the second appellant but rejected the alibi because of the contradictions in his evidence and his alibi witnesses.

Counsel for the appellants submitted that the reasons for disbelieving the story of the 2nd appellant were not weighty for they were trivial. I was tempted to agree with the submission for, for conflicts in testimony to be exculpatory, they must be weighty and substantial on material issues. However, where a particular defence is put up, its inherent veracity is determined by the presence or absence of conflicts and even the minutest conflict may provide a chink in the story which may prove sufficient ground for disbelieving the story. Thus, the trial judge examined the evidence of Eartha Lartey the alibi witness, and noted that she contradicted the evidence of her principal the 2nd appellant on the period of their relationship, the

number of times he slept in her house, the food they ate on the 26th of July 2005 as well as her demeanor in the court room during her evidence under cross-examination. Besides that the second appellant did not mention or call Osei Nyarko's name in his statement in exhibit 'G' The trial judge had the duty to decide which witness he should believe or not on an issue. He determined whether or not the second appellant proved his alibi on the balance of probabilies.
In this appeal, the trial judge scored very low marks for the 2nd appellant and his witness on the alibi and rejected that defence. I have no reason to interfere with what he did.
Appeals to the superior courts are governed by Sup-part V of the Courts Act, 1993, Act 459, and
Section 31 (1) thereof provided that in criminal matters an appellate court shall allow the appeal if it considers that the verdict for conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of a wrong decision of 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.
Section 31 (2) provided that:
"The court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred …"

I have given consideration to the submission by counsel for the appellants that it was not likely that tall persons like the appellants who would stand out clearly would ever undertake an armed robbery in their neighborhoods, and I must make myself clear such a submission defies all logic as it is preposterous and extravagant, to put it mildly. I reject it. Where was the proof that it was only short people who would commit offences of this nature in the neighbor hood or elsewhere for they would escape detection because of their diminutive height? None was provided by counsel.
Equally unimpressive was the submission that people who were known in a particular vicinity are unlikely to commit offences there for they could be easily identified and arrested. Counsel did not provide any scientific clues or facts by way of evidence to support this submission. He did not provide any basis for judicial notice to be taken of that by the courts too. He did not lead a scintilla of evidence

that the appellants were known in the vicinity. It was not surprising the Court of Appeal rejected it. I agree with the Court of Appeal.

I have considered the entire record of appeal and concluded that there was more than ample evidence to support the finding of guilt of the appellants on the charges; that the offences were proved beyond reasonable doubts and the appellants were properly convicted on all the counts.

It must be observed that in this appeal, the trial and the first lower appellate court concurred in their findings of facts and the law on this is that:
"in an appeal against findings of facts to a second appellate court like this court, where the lower appellate court had concurred in the findings of the trial court, …. This court will not interfere with the concurrent findings of the lower courts *unless,* it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower courts dealt with the facts. It must be established, eg, that the lower courts had clearly erred in the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied: see *Thakur Harihar Buksh v Thakur Umon Parshad (1886) LR 141A7*; or as pointed out in *Robins v National Trust* Co. [1927] AC 515, that the finding is so based on erroneous proposition be corrected, the finding disappears. In short, it must be demonstrated that the judgments of the courts below are clearly wrong: see *Allen v Quebec Warehouse Co. (1886) 12 App Cas 101." see: Achoro v Akanfela [1996-97] SCGLR 209; Obrasiwa II v Out. [SCGLR] 618; Koglex (No 2) v Field [] SCGLR; Adu v Ahamah [2007-2008] SCGLR 143; GPHA & Captain Zeim v Nova Complex Ltd. [2007-2008]; SSB LTD. v CBAM Services Inc. [2007-2008] SCGLR [2007-2008] 894.*
This line of respectable authorities shows that the law on concurrent findings of facts are well settled. The law applies, where such as in this case, the findings are supported by evidence on record.
I make bold to say I have examined the judgment under appeal, including of course, the evidence marshaled by both sides, but found no such error or blunder. Try as the appellants did, they did not succeed in showing any.

Consideration of appeal against sentence

The sentence a court may inflict on an accused person either at a trial or on appeal is entirely within its discretion.

In *Mohammed Kamil v The Republic*, unreported judgment of this court delivered on …, this court said:

"The factors a court would consider in determining the length of sentence are stated in *Kwashie v The Republic [1971] 1 GLR 488, CA*, to be:

'(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 or 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."

Besides this, this court in *Mohammed Kamil (supra*), reminded itself that:

"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, see also what this court said in a similar situation in *Hodgson v The Republic ; Gligah & Atiso v The Republic [2010] SCGLR 870.*

I am not satisfied that the Court of Appeal failed to consider all these factors or that, they considered irrelevant factors or that for any sufficient reason they did not exercise their discretion judicially, or that their sentence was inordinately harsh.

In the result, the appeal against sentence did not deserve any favorable response by this court.

The only mitigating factor might be that even though they were armed, no life was lost or any injuries were inflicted on the hapless victims. That alone was not enough to persuade us to interfere with the quantum of sentence. In my view considering all the circumstances of this case, the Court of Appeal was lenient, right and fair, in substituting the 30 years imprisonment for each appellant for

the life imprisonment dished out by the trial court and this court will not interfere with the exercise of its discretion.

In the result, I proceed to affirm the conviction and sentence and dismiss the appeal entirely.

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) S. A.B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

(SGD) DR. DATE-BAH
JUSTICE OF THE SUPREME COURT

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