IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

CORAM: AKUFFO[MS.],(JSC),(PRESIDING),
ADINYIRA [MRS.], JSC
OWUSU [MS], JSC
YEBOAH, JSC
GBADEGBE, JSC

CRIMINAL APPEAL
NO: J3/2/2011
30TH MAY, 2012

1. BEN OKEKE
2. PRINCE UMEH a.k.a SAKORA
3. JOSHUA CHUKU --- APPELLANTS
4. EMEKA OSENDO

VERSUS;

THE REPUBLIC --- RESPONDENT.

J U D G M E N T

SOPHIA A. B. AKUFFO (MS), JSC.

The appellants were charged with the offences of conspiracy to commit robbery contrary to sections 23(1) and 149 of Act 29, and robbery contrary to section 149 of Act 29. At the Sekondi High Court, they were tried on indictment and convicted of the offences. They were each sentenced to twenty-five (25) years IHL on each count to run concurrently. On appeal to the Court of Appeal, their conviction and sentences were affirmed. The appellants therefore brought a further appeal to the Supreme Court.

Brief Background

According to the Prosecution, the appellants are Nigerian citizens now resident in Ghana. On 21st December 2000 they arrived in Takoradi from Accra and continued to Tarkwa. They arrived in Tarkwa at about 10:00pm where they were led by a man by name C.K. to Akoon Small Mining Company. Armed with a single barrel shot gun, an axe, a jack knife and a quantity of ammunition, the appellants together with certain other persons attacked the security officers on duty. The appellants beat up these officers and afterwards made away with a gold weighing machine valued at ¢12 million (old Cedis) and a quantity of gold concentrate. The appellants then continued to Wasa-Manso where they attacked the home of a prosecution witness and his family. The appellants hit the witness on the head and he fell down unconscious. They subjected his wife to severe beatings after which they stole two travelling bags, a mobile phone and its charger, one kente cloth and a sum of ¢1.1 million. The appellants packed the items into the man's vehicle and fled but abandoned the vehicle at a point after radio announcements had been made about the robbery. Fortunately the appellants were spotted by some town folks and were chased and apprehended and handed over to the police.

The grounds of appeal to the Supreme Court may be summed up as follows:-

1. There was non-compliance with Section 187 and 188 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) were not complied with therefore the committal proceedings were a nullity

2. The amendment to the Bill of Indictment after the close of the case for the prosecution has occasioned a substantial miscarriage of justice to the appellant
3. There was misdirection by non direction of the jury as regards alibi since the appellants claimed they had not been at the crime scenes

4. Failure to take the pleas of the Appellants in respect of count 3 was fatal to the Respondent's case

5. The Court of Appeal erred when it failed to consider the time factor in the two robberies at Tarkwa Kwaabedu and Wasa Manso.

6. The Court of Appeal erred when it held that the summing up is faultless when the trial high court judge misdirected himself by non-direction of the jury as to what constitutes a 'reasonable doubt' in criminal trial.

Beginning with the first ground of appeal, Section 187 of Act 30 explains the process for taking the statement of the accused person in court during committal proceedings, whereas section 188 discusses the subject of witnesses for the defence. Though the appellants' first ground of appeal is couched broadly under sections 187 and 188, in his written submission before the Court, their counsel only discussed section 187 of Act 30.

Section 187 provides as follows:-

(1) 'The Court shall, before deciding whether to commit the accused for trial, address to the accused the following words or words to the like effect:-

> "Before deciding whether to commit you for trial, I wish to know if you have anything to say in answer to the charge. You are not obliged to say anything but if you have an explanation it may be in your interest to give it now. What you wish to say will be taken down in writing and if you are committed for trial it may be given in evidence. If you do not give an explanation your failure to do so may be the subject of comment by the judge, the prosecution or the defence."

(2) 'The Court shall comply with the rules set out in the Sixth Schedule as to the taking of a statement.'

It is notable that the Section makes it clear that '*words to the like effect*' may be used in addressing the accused person on the matter.'

The said Sixth Schedule of Act 30 sets out the rules for taking the Statement of the Accused and provides that:-

1. "The Court shall refer the accused to the requirements of section 131, in relation to alibis, and if necessary explain to the accused in simple terms the meaning of an alibi. The court should then tell the accused that if the accused's answer to the charge is an alibi the accused may give a personal explanation now, although the accused may not yet be able to name the witnesses by whom the accused proposes to prove it, giving notice of the witnesses later, within the time specified in the section.

2. Where a statement already made by the accused and intended, according to the summary of evidence, to be put in evidence at the trial of the accused appears to the Court to be inconsistent with the statement now being made, the Court should draw the accused's attention to the inconsistency and invite the accused to make the correction desired in the accused's present statement."

According to Counsel for the appellants, the appellants denied the offence and explained to the trial court how it was that they found themselves in Manso and were arrested by the youth. Consequently, he contends that the Sixth Schedule should have been complied with and the meaning of an alibi should have been explained to them at the committal. Counsel, therefore, submits that there was a failure to do so which has occasioned a substantial miscarriage of justice being meted out to the appellants at that stage.

Counsel for the appellants also contends that the conclusion by the magistrate that 'there is sufficient evidence to successfully prosecute the accused persons' leaves much to be desired of an impartial judge.

As was observed by both counsels in this matter, there were no statutory statements of the appellants attached to the record of appeal. However, as was

also noted by counsel for the respondent, at page 98 of the record of appeal, it is on record that, before the Prosecution closed its case, the statutory statements of the appellants were tendered in evidence as exhibits V, W, X and Y. This clearly indicates that statutory statements of the appellants were indeed taken at the committal proceedings. However since they were not attached, it is hard to tell if sections 187 and 188 were complied with. (This includes whether or not the provisions on alibi and on inconsistent statements made by the accused were followed). The record is quite clear that on 8th July, 2003, the day the statements were added to the record of proceedings in the High Court, the appellants were represented by Counsel, who was present in court. However, counsel herein has not given any indications to the court what efforts, if any, he made to ensure that the statutory statements were included in the record of appeal.

Now, the judge's duty in committal proceedings is amply spelt out in section 184(4) of Act 30 i.e. the duty of the court to determine whether there is a case for the accused to answer. The case of **State v Bisa [1965] GLR 389** affords further clarification of the scope of this duty and explains that the duty of the Magistrate is to find out whether a prima facie case has been made against the accused; or to determine the credibility of the accused or his witnesses since no one testifies on oath before the committal court. In that case it was held by the court that:-

> "... if after due examination of the summary of evidence the magistrate comes to the conclusion that there is evidence, even a scintilla, to support the offence of which the accused stands charged, he must commit."

It is not imperative for a magistrate to hear the evidence of witnesses on oath before he may commit, as has been held in **Kwakye v The State [1965] GLR 647** and **the State v Director of Prisons; Ex Parte Schumann [1966] GLR 703**. In this regard it is noteworthy that, in this case, the Chairman of the Community Tribunal noted, after perusing the Bill of Indictment and summary of evidence and all relevant documents and preliminary evidence, that there was sufficient evidence to successfully prosecute the accused persons.

Additionally, Section 406(1) of Act 30 states as follows:

(1) Subject to this Part a finding, sentence or order passed by a court of competent jurisdiction shall not be reversed or altered on appeal or review on account

(a) of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or any other proceedings before or during the trial or in an enquiry or any other proceedings under this Act, or

(b) of the omission to revise a list of jurors in accordance with Part Five, or

(c) of a misdirection in a charge to a jury,

unless the error, omission, irregularity, or misdirection has in fact occasioned a substantial miscarriage of justice.

Thus, even assuming that sections 187 and 188 of Act 30 were not complied with, from the record of this case, such an omission cannot be said to have occasioned such a miscarriage of justice as is contemplated by section 406(1) of Act 30. This is because, as already noted above, the Community Tribunal, after it had considered the Bill of Indictment and summary of evidence and other relevant documents found that there was sufficient evidence to prosecute the appellants in the High Court. 0

Regarding the second ground of appeal, Section 232(1) of Act 30 allows for the amendment of an indictment at any stage during the trial of an accused person. The Section reads as follows:-

> "Where before a trial on an indictment *or at any stage* of the trial, it appears to the Court that the indictment is defective or that an order should be made for a separate trial, the Court shall make an order for the amendment of the indictment that the Court thinks necessary to meet the circumstances of the case, and on the terms that the Court considers just unless, having regard to the merits of the case, the amendment cannot be made without injustice." (emphasis mine)

Hence, the law is quite explicit that an amendment to a Bill of Indictment may be made at any stage of the trial unless, having regard to the merits of the case,

the amendment cannot be made without injustice. In this case, it is noteworthy that, as the record shows, counsel for the appellant did not object to the amendment being made. In any event, nowhere in his Statement of Case herein has counsel for the appellants been able to demonstrate to the court the manner in which the amendment occasioned an injustice to the appellants. It is not sufficient for counsel for the appellant to simply make a sweeping statement that a substantial miscarriage of justice to the appellants has occurred, without showing how it was caused. This ground of appeal, therefore, fails.

Interestingly enough, though counsel for the appellants formulated his third ground of appeal as 'misdirection by non direction of the jury as regards alibi', in his arguments in support of this ground of appeal, he merely harps back to the first ground of appeal that certain salient procedures under section 187 of Act 30 were not followed.

Though the first ground of appeal has, hereinbefore, been sufficiently dealt with, certain other elements are worth mentioning in our consideration of ground three.

Section 131 of Act 30 provides as follows:-

> "(1) Where an accused intends to put forward as a defence a plea of alibi, the accused shall give notice of the alibi, 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
> b. Prior, in the case of a trial on indictment, to the sitting of the trial Court on the date to which the case of trial has been committed for trial.
>
> "(2) Where the notice is given the Court may, on the application of the prosecution, grant a reasonable adjournment

"(3) Where the accused puts forward a defence of alibi without having given notice, the Court shall call on the accused to give notice to the prosecution of the particulars mentioned in subsection (1) forthwith or within the time allowed by the Court and after the notice has been given shall, if the prosecution so desires, adjourn the case.

"(4) Where the accused refuses to furnish the particulars as required the case shall proceed but evidence in support of a plea of alibi is not admissible in evidence."

The procedural requirements, where the defence of alibi is intended to be or is raised, are thus quite clear and specific. In the case of **Afwireng v The Republic [1972] 1 GLR 270**, the appellant, in his defence, set up alibi, and contended that, contrary to what the prosecution alleged, he was elsewhere and not at the scene of the crime. He, however, failed to give notice of his defence of alibi and so the evidence was excluded. Upon his conviction, he appealed, contending that the failure to give notice was not fatal to the defence. The appeal came before His Lordship Edmund Bannerman C.J., sitting as an additional High Court judge. The Court allowed the appeal and held that assuming that the defence of the appellant was one of alibi (as the learned magistrate found) the above section requires in such a case the trial magistrate to call upon an accused person to file a notice of alibi when such a defence is raised without notice of the particulars of such alibi having been previously given to the prosecution to adjourn the case for such purposes, if necessary. It is only when the court has complied with this requirement and the accused has failed to furnish the details of his alibi as directed that any evidence of the alibi is shut out and excluded. Thus, where the court has failed to comply with subsection (3) of Section 131 by calling on the accused to give particulars of his alibi, no issue of a refusal to furnish particulars would arise and subsection (4) of Section 131 will not apply. In such circumstances, unless the prosecution calls the attention of the Court to the non-compliance, or applies for particulars of the defence of alibi raised to be given, the trial will simply proceed normally.

In the matter before us, though the trial judge failed to comply with the requirements of subsection (3) of section 131, in that he failed to call on the

accused persons to give notice to the prosecution of the particulars of the alibi they were raising, he did not exclude the evidence. Rather, he considered the evidence in his summing up to the jury. He asked the jury to consider the statements of the accused persons and their testimony before the court and to convict or acquit based on all these (see pages 161 and 162 of the Record of appeal). The third ground of appeal is, therefore, quite untenable as there was no misdirection of the jury, concerning the appellants' defence of alibi.

Concerning Ground 4 of the appeal, it is very clear at Page 21 of the Record of Appeal that the pleas of the appellants were taken as regards counts one and two. Though there is no record of their pleas having been taken on count three, which is in respect of the robbery incident at Adum Benso, the Bill of Indictment clearly shows that the appellants were charged with one count of conspiracy to commit robbery, and two counts of robbery. In addition the record of proceedings shows that the appellants were tried in respect of count three as evidence was led on this count. The prosecution at the trial led evidence through PW1 and PW2 to prove the guilt of the appellants as regards the robbery incident at Adum Benso.

As shown at page 144 of the Record of Appeal, the jury returned a verdict of guilty on each of the charges against the accused appellants. Also at page 145 of the Record the trial judge sentenced each appellant "on each charge to twenty-five years IHL to run concurrently." The learned judge did not specify whether the appellants were sentenced on all three counts on the Bill of Indictment or on the two counts they pleaded to as appears on the record. However His Lordship in his summing up to the jury considered the testimonies of all the prosecution witnesses including PW1 and PW2 and directed the jury to do same.

During the trial counsel for the appellant did not raise any objection when evidence was led on count three. Section 406(2) of Act 30 stipulates that:-

> "(2) In determining whether any error, omission, or irregularity has occasioned a substantial miscarriage of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

In **Dochie v The State [1965] GLR 208** the appellant was charged with, inter alia, attempt to commit crime contrary to section 18(1) instead of section 18(2) of Act 29. He was convicted by a circuit court and appealed to the High Court alleging that he was convicted under the wrong provision. The Court held that the objection to section 18(1) could have been taken in the court below by counsel. Since no miscarriage of justice had been occasioned by the mistake, the appellant could not rely on it as provided under section 406(2).
Further in the case of **Adabele and Others v. The Republic [1984-86] 1 GLR 478-481** the pleas of the accused persons were not taken during the trial. However the prosecution witnesses were cross examined by the counsel for the appellant. Subsequently counsel for the appellants made a submission of no case and lost and also had the opportunity to address the court at the close of their case. He never at any of these stages raised any issue against the fact that the pleas of the accused persons were not taken. The High Court sitting at Bolgatanga held that the fact that the counsel participated in the trial from its inception to the end shows that the appellants were being tried on a plea of not guilty. The court was of the view that the appellants' case was not prejudiced in any way and as such, on appeal, the conviction of the appellants could not be interfered with solely on the ground that their plea was not taken. This stance is entirely reasonable since, essentially, a plea serves the purpose of enabling the accused person to declare his/her intention to place in contention a particular charge made against him/her.

In this appeal, it is clear from the record that the appellants were afforded ample opportunity to contend with the Republic concerning count three. Counsel for the accused indeed cross-examined PW1 and PW2 who had testified for the prosecution in connection with the said count. Consequently, there is no basis for us to interfere with the conviction of the appellants, merely because their pleas were not taken at the trial with regards to count three. Ground four is, therefore, baseless.

Our only reaction to Ground 5 of the appeal herein is that there is nothing on record to show that the prosecution's case indicated that the crimes occurred at the same time. The appellants had also raised this ground before the Court of Appeal, and it was, in our view, sufficiently considered and dealt with. Reading

the judgment of the Court of Appeal, the learned Iris May-Brown, JA, noted that:-

> "The prosecutor has led evidence to show that the two robberies took place at different times. There was evidence of the car stolen from the second robbery and abandoned not too far away from where the accused persons were apprehended by the town folk. The kente and the gold weighing machine, retrieved from the accused persons were proved to have been stolen from the two places where the robbery occurred.
>
> "The suggestion as to the long distance between the two towns and the incapability of the accused persons to have been present in the two areas was made by counsel for the defence during cross examination of a prosecution witness. No evidence was offered to support the suggestion and to cast doubt on the case of the prosecution. A suggestion made during cross examination does not constitute evidence and the judge is not obliged to direct the matter to the jury for their consideration. **Kugblenu v. The Republic [1969] CC 160, CA**."

In any event, since the appellants were pleading alibi, it would not in any significant manner help their case either way if the robberies were committed at different times or at the same time. Thus this ground also fails.

With regard to the sixth ground of appeal, the record shows that, in his summing up to the Jury, the learned trial judge gave the following directions:-

> "The generally accepted principle of criminal trials in Ghana is that the prosecution must discharge the burden of proving the accused guilty of the offence charged to your satisfaction and must do so beyond all reasonable doubt. That means the prosecution must not leave you in any doubt at all about the guilt of the accused . . . so that even before you come to the end of your deliberations, you must feel completely satisfied with the case for the prosecution that unanswered by the accused, you could convict him of the charges otherwise your verdict for each accused or any of them should be not guilty . . . *Therefore before you even consider the defence of the accused persons, you must first be satisfied*

that the prosecution has succeeded in taking their case outside the ambit of speculation and conjecture." (emphasis mine)

The Evidence Act, 1975 (NRCD 323), in sections 10 to 17, stipulates the law on the burden and standard of proof in civil and criminal cases. For the purposes of the sixth ground of appeal, one only needs to focus on sections 13(1) and 16 which provide as follows:-

"13(1) In any civil or criminal action the burden of persuasion as to the commission by a crime which is directly in issue requires proof beyond a reasonable doubt.

"14. The Court on all proper occasions shall instruct the jury as to which party bears the burden of persuasion on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."

The rationale for the strictures codified by these provisions is well known and was expressed by Olennu JSC in **Oteng v. The State [1966] GLR 355** in the following terms:-

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

We are in no doubt, whatsoever, that the direction given by the learned trial judge to the jury was clear enough to show the jury that the onus was on the Prosecution to establish its case against the accused persons. He also directed them clearly enough concerning the standard of proof required of the Prosecution. He gave them clear enough direction to prevent them from shifting the burden of proof from the Prosecution to the defence unless the Prosecution had met the standard of proof required of it. Thus, the judge adequately placed

the jury in a strong position to understand the duty cast on them and as such the judge rightly directed the jury. There was no misdirection or non-direction whatsoever. The direction was indeed impeccable and fully served the purposes of the law; it cannot be faulted in any way.

For the foregoing reasons, the appeal fails in its entirety and the judgment of the Court of Appeal is hereby affirmed.

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COUR

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)

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