IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2014

CRIMINAL APPEAL
No J3/3/2013

22ND MAY 2014

CORAM: R.C. OWUSU JSC (MS) (PRESIDING)
J.DOTSE JSC
ANIN-YEBOAH JSC
N.S GBADEGBE JSC
J.B. AKAMBA JSC

IGNATIUS HOWE - APPELLANT

V

THE REPUBLIC - RESPONDENT

JUDGMENT

AKAMBA, JSC

The Appellant was charged before the High Court, Cape Coast with the offence of Robbery. He was convicted on 21st May 2007 and sentenced to a term of forty-five (45) years imprisonment with hard labour. He appealed to the Court of Appeal against his conviction and sentence. The appellate court on 2nd December 2007 dismissed the appeal. He has appealed to this court on as many as eight grounds. These are:

(I) Their Lordships of the Court of Appeal erred in law in refusing to apply the principle on identification in the case of **Karim v The Republic (2003-2004) 2 SCGLR 812** to the facts of the case.

(II) Their Lordships of the Court of Appeal erred in holding that the identification parade was not flawed.

(III) The judgment and conviction cannot be supported having regard to the evidence on record.

(IV) The Court of Appeal misdirected itself when it speculated that the witnesses were able to identify the accused person 'maybe the mask fell off his face' and so occasioned a miscarriage of justice.

(V) The sentence of 45 years affirmed by the Court of Appeal was excessive.

(VI) The learned judges of the Court of Appeal erred when they held that the prosecution met the standard of proof in this case.

(VII) The learned judges of the Court of Appeal erred in not upholding the submission of no case, which had been dismissed by the trial judge.

(VIII) The Court of Appeal erred in finding that the appellant was among the robbers

In this court the appellant argued grounds (i), (iii), (vi) and (viii) together. We would include ground (ii) to this list because it impugns the Court of Appeal's determination on the identification parade as flawed. These grounds together raise for consideration whether the prosecution by their evidence sufficiently and adequately identified the appellant as one of the robbers and also met the evidential burden of proof beyond reasonable doubt on the issue of identity. We would equally determine these grounds together. The appellant placed a great deal of premium on the case of **Karim v The Repulic 2003-2004 SCGLR 812**. In that case the issue that came up for determination pertained to in-dock identification which the court deprecated as generally undesirable. However evidence of in-dock identification is not inadmissible but raises issues of what weight to be attached or accorded such evidence. We think in all fairness that the appellant counsel's reliance on the **Karim** case is unhelpful since we are not called upon to decide on in-dock identification.

The issue of identification is one of fact to be determined by the court. Hence in a criminal trial the prosecution is obliged to lead evidence to identify the accused as the person who committed the crime for which he/she is charged. Identification may take several forms. It may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics such as age, height, size, hair, complexion, voice, handwriting, 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 including identities of mental qualities, habits and disposition. (See Phipson on Evidence 10th edition, p. 170, para 1381). We approve the Court of Appeal decision in the case of **Adu Boahene v The Republic (1972) GLR 70** relying on Phipson (summarized supra) when they stated that the holding of an identification parade and proof of the personal characteristics of the accused are not the only modes by which the identity of a person accused of a crime can be established. The court pointed out that where the identifying witness had known the accused for some time prior to the commission of the crime and had led the police to the house then it would be pointless to hold an identification parade. But where the identifying witness saw the accused only for the first time for a brief period at the commission of the offence then the failure to hold an identification parade or to prove his personal characteristics would detract from the weight to be attached to the evidence of identification.

In the instant appeal the prosecution complied with regulation 195 of the Ghana Police Service which guides the conduct of identification parades. Exhibit D was tendered by the prosecution on 26/4/2006 to prove that the identification parade was carried out during investigations into this case. The exhibit (D) clearly shows that thirteen persons including the appellant participated in the exercise. The Ghana Police regulation 195 recommends a minimum of eight persons in an identification parade. This regulation for the conduct of identification parades accords with the guidelines in the **English case of R v Turnbull (1977) Q.B.224** in which the Court of Appeal first laid down the requirement to guide the conduct of

identification parades. The import of the requirement is succinctly captured by Eric Cowsill and John Clegg in their book entitled Evidence: Law and Practice, 2nd edition as follows:

"Whenever a case depends wholly or substantially on the correctness of identification evidence which is disputed, the judge should himself assess the quality of the evidence of identification and decide whether the evidence is good enough to be left to the jury….. In any case where disputed identification evidence is to be left to the jury, the judge should direct the jury very carefully as to special need for caution before convicting in reliance upon it and should refer to the possibility of a witness or even a number of witnesses making an honest mistake. Provided that such a warning is given, the trial judge is entitled to direct the jury that an identification by one witness could provide support for the identification by another (R v Breslin (1985) 80 Cr App R 226).

The judge should then direct the jury to examine closely the circumstances in which the original observation was made:

(1) Over what period?
(2) In what conditions?
(3) In what light?
(4) At what distance?
(5) Was the witness recognizing someone he already knew?
(6) Was he identifying a stranger?
(7) Does the description given to the police match the appearance of the accused?"

In the instant appeal the evidence of identification comes from the testimonies of PWs 1, 2 and 4. Counsel for the appellant makes capital of the number of persons who participated in the identification parade. According to him the figure thirteen that participated in the exercise is a derogation from the rules. That argument is puerile because the regulation simply prescribes a minimum figure of eight hence any figure above eight is acceptable. The regulation further recommends that as far as possible the participants should be of similar age, height, general appearance and class of life as the suspect. We find nothing irregular about the

manner in which the identification parade was conducted. The prosecution witnesses were kept in a room away from where the parade took place and called one after the other to undertake the exercise. Upon completion of the exercise the witness did not return to the room reserved for witnesses awaiting their turn. It is evident from the record before us that the identification parade accorded with the prescribed regulation. (See page 306 of Criminal Procedure in Ghana by A.N.E.Amissah, 1982)

The next crucial determination is what premium to place on the outcome of the identification made by the two prosecution witnesses. This must be determined by scrutinizing the evidence of both PWs 1 and 2 under the questions posed above i.e. over what period did the witness observe the person identified, under what conditions, in what light and at what distance etc. It is instructive to recount the testimony of PW1 first: "*As soon as I got to the kitchen I saw accused who was wearing a mask but the face was quite visible. And I also took note of his structure. He held me by the neck and I heard one of them saying they have sent them to come and kill me. And another asked where was the money? And I answered by saying that the money is in the wardrobe. So I tried to raise my head, one of them hit me with a stick and the mark is on my head*."

The perpetrators engagement with the PW1 was close and long enough for him to identify key features of the accused person in particular such as the face, complexion and physique. This certainly was possible because the witness (PW1) said the accused held him by his neck. No wonder that despite suffering so much trauma and ordeal from the perpetrators the PW1 identified the accused as he did at the parade organized by the Police.

The PW2 also witnessed the events of 22nd June 2005 at about 1 to 2 am. The significant account by this witness runs thus: *"So we all run to our daddy's bedroom where the toilet is. So my father went to face the robbers. We were there when we heard my father calling my mother. And my father said 'I am dying, I am dying'. He said they should open the door and they came to my father's room and opened the toilet door. When he opened the door, a stone fell on my back and so I looked up at him and he said I should put my face down. He slapped my mother*

three times and ordered us to kneel down but my mother could not as she has stroke." Here again the witness PW2 had more than enough encounter with the accused while in his father PW1's room to be able to identify him as he did at the parade, having earlier spotted him the next day following the event. As we stated in **Nagode vs The Republic (2011) 2 SCGLR 975 at 977 holding 1**, "the issue of the appellant's identification was one of fact for a judge sitting without a jury in every summary trial. The learned trial judge after evaluation of the rival testimonies gave adequate reasons for believing the evidence of the first prosecution witness who swore to have seen the appellant as one of the robbers." Unfortunately the appellant has not demonstrated to us that the trial judge and the first appellate court have failed to adequately consider any evidence that would have enured to his benefit in this appeal. The appellant's attempt to rely on alibi at the trial court equally failed miserably. We find no merit in these combined grounds of appeal and accordingly dismiss same.

The grounds of appeal remaining are grounds (iv), (v) and (vii).

The Court of Appeal misdirected itself when it speculated that the witnesses were able to identify the accused person 'maybe the mask fell off his face' and so occasioned a miscarriage of justice.

The learned judges of the Court of Appeal erred when they held that the prosecution met the standard of proof in this case.

The learned judges of the Court of Appeal erred in not upholding the submission of no case, which had been dismissed by the trial judge.

The Court of Appeal erred in finding that the appellant was among the robbers

We would consider the above grounds together. While it is correct to state that the Court of Appeal did speculate that the mask must have fallen during the hurried and brisk activity, this speculation about what must have happened to the mask was not the reason for identifying the accused as one of the robbers. Both the trial court and the Court of Appeal adequately dwelt on the substantial testimonies of the two witnesses (PWs 1 and 2's) who had close encounters with the perpetrators as to be able to identify the accused as they did at the

identification parade which was conducted in accordance with proper procedure. There were sufficient reasons for arriving at the conclusion that the PWs 1 and 2 were truthful witnesses and correctly identified the accused as one of the robbers. The appellant has not given any ground for disbelieving these witnesses. This ground of appeal fails and is dismissed.

In the light of our determination on the crucial issue of the identity of the accused having been proved beyond reasonable doubt it goes to no issue to determine a failure by the Court of Appeal to uphold a submission of no case. In other words, we are satisfied that the prosecution had proved each ingredient of the charge of robbery beyond reasonable doubt at the close of their case that no submission of no case could be sustained under the circumstance. There cannot be any error on the part of the Court of Appeal in the finding that the accused was part of the robbers following the acceptance that the identity of the accused in these events had been proved beyond reasonable doubt. This ground also fails.

The last ground for our consideration is the ground that the sentence of forty five (45) years affirmed by the Court of Appeal is excessive. In the written submission by counsel for the appellant the failure by the trial judge to give reasons for his harsh decision is the reason for appealing against same. Counsel is also unhappy that no record was made that the trial judge considered any mitigating factors. An appeal is by way of rehearing. We have the whole record of proceeding before us and will consider every bit to arrive at a conclusion on sentence. In determining appropriate sentence to impose, a court of law is obliged to weigh all the aggravating factors as against whatever mitigating factors brought to the court's attention. The aggravating factors include: the amount of force used by the accused or perpetrator, the amount of injury inflicted upon the victim/s, whether or not the victim falls within a category of vulnerable persons such as old age or sickness, whether this was a planned offence, time of the offence such as night, group or gang attack, dehumanizing actions. The possible mitigating factors include: less use of force, less injury, young offender, low mental capacity, spur of the moment, daylight, and single offender. The prosecution tendered exhibits A1 to A9 which clearly attest to the level of vandalism deployed by the accused and his co- perpetrators. Exhibit A10 to A12 attests to the injuries inflicted on PW1 to

warrant his admission to hospital. The medical report on PW1 was in evidence as exhibit G. It confirmed that he was admitted for almost a forth night i.e. from 22nd June 2005 and was discharged on 5th July 2005. The exhibit G catalogues bullet wounds and abrasions as well as a left thigh with pellets shown by X-ray. Also in evidence is the account of the three slaps administered to PW2's mother (See page 12 of ROA), a woman who was suffering from stroke. Last but not least, the threats and fear put into PW2 and the siblings to kneel down or be killed. Thus weighing the aggravating factors against the mitigating factors, the courts below dealt adequately in the sentence meted out to the accused. This is the more so because the offence of robbery attracts a minimum sentence of fifteen years when the offence is committed by the use of an offensive weapon as per Act 646 the Criminal Code Amendment Act, 2003. In this context we are not determining how we would have exercised our discretion in the given situation. We are considering whether given the wide spectrum of the discretion at the trial judge's disposal he exercised it within the parameters of the law. We are satisfied that the exercise was properly conducted and would in the circumstance affirm the sentence of forty-five (45) years IHL. In the event the appeal is dismissed in its entirety for lack of merit.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

DISSENTING OPINION ON SENTENCE

DOTSE JSC;-

I have been privileged to have read the erudite judgment of my respected brother, Akamba JSC. Even though I am in complete agreement that the appeal against conviction must fail, I disagree that the sentence of 45 years should be affirmed.

I am not unaware of the fact that the appellant herein was tried and convicted for an offence of robbery with violence which is one of the very serious crimes that has plagued this country for quite sometime now.

There have been varied views that imposition of harsh, long and excessive prison sentences on convicted persons accused of robbery will not only keep away these dangerous persons from society for a long time, but also serve as a deterrence to others.

This it is hoped, will prevent like minded persons from committing similar offences in future. The question I want to pose here is, does this phenomenon always achieve this desired result? I do not think so. This is because of the alacrity with which these crimes, especially robbery with violence continue to be committed in all parts of the country makes me feel that, perhaps the time has come for the administrators of the Criminal justice in Ghana to re-think their policies and re- strategise.

I am of the candid view that, if we do not quickly reform our criminal justice system, then in the not too distant future, as a country we may be faced with the option of using all our very scarce resources to build more prison facilities as

well as cater for the inmates of the prisons. This is because of the apparent breakdown of the criminal justice system.

This is because, the number of convicts who are sentenced on a daily basis to prison terms such as 40 years and above will create no more space in the prison leading to overcrowding and hence the need to find additional space and resources.

What should be done under these circumstances?

I am of the view that, we need to revise and reform our criminal justice system such that section 294 of the Criminal and Other Offences (Procedure) Act, 1960 should be amended to include more effective ways of punishment that will reduce the number of years inmates spend under custodial sentence.

It is generally understood and accepted that, the following are the main aims for the imposition of punishment:

1. Retribution
2. Deterrence
3. Prevention
4. Reformative
5. Rehabilitation and
6. Justice

By the conviction and imposition of punishment, the aim of retribution would be deemed to have been met anytime punishment is imposed on convicts. However, it is not certain what level of retribution would be satisfactory to the victim of the crime. So this alone is not a useful guide.

As I have already stated, these harsh sentences are not achieving the desired deterrent effect. This is possibly due to the manner in which these sentences are executed. It may be useful for accused persons to serve their prison sentences in their own communities so that their peers will realise that it does not pay to engage in crime.

See the case of **Frimpong alias Iboman v The Republic [2012] 1 SCGLR 297** *holdings 7 and 8* thereof where I espoused similar views.

By far, prevention of crime is what any serious criminal justice system must seek to promote in exacting punishments. It does appear that as a nation we have not succeeded in preventing crime by the nature of punishment imposed by the courts.

Reformation and rehabilitation are twin principles and are very critical to the sustainability of any criminal justice system

Unfortunately, this is where the system has broken down because of the collapse of the Social Welfare and Community Development Departments. To succeed as a country, we need to re-introduce the social welfare concepts such that there will be constant monitoring of discharged prisoners, and if the laws are amended, then with the introduction of parole and or suspended sentences, benefits will be enjoyed by inmates and there will then be shorter custodial sentences that are actually served, the rest will be suspended and monitored.

Finally, with all the above in place, justice will be the fulcrum of any punishment since all the imbalances in the system will be removed.

Bringing the above scenario to the instant appeal, I am of the considered view that the sentence of 45 years is too harsh, excessive and will be counter productive to the aims and or purposes of punishment outlined above.

In this respect, considering all the aggravating and mitigating factors so expertly analyzed and dealt with by my respected brother Akamba JSC, I am still of the view that a sentence of 30 years imprisonment with hard labour be substituted for the 45 years.

Even though am aware that this opinion is a dissenting one and will not affect the fortunes of the appellant in anyway, I hope the opportunity will soon be created for me to deal with this issue of long prison sentences that have become the rule rather than the exception.

The above are the reasons why I departed from my brothers and sister on the 45 years prison sentence and in turn impose 30 years instead.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

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