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

CORAM: ADINYIRA(MRS) JSC (PRESIDING)
OWUSU (MS) JSC
DOTSE JSC
ANIN-YEBOAH JSC
AKAMBA JSC

CRIMINAL APPEAL

No: J3/4/2014

28TH MAY 2014

SAMUEL AGOE MILLS ROBERTSON **APPELLANT**

VRS.

THE REPUBLIC **RESPONDENT**

JUDGMENT

OWUSU (MS) JSC;-

This is an appeal against the Judgment of the Court of Appeal reducing a sentence of 15 years I. H. L imposed on the Appellant to 12 years I. H. L.

The Appellant was charged with five (5) others on two counts of conspiracy to commit crime contrary to section 23 (1) of the criminal offences Act of 1960 and possessing Narcotic Drug without lawful authority contrary to section 2 (1) of the Narcotic Drugs (control, enforcement and sanctions) Act of 1990.

The Appellant who initially pleaded not guilty to both counts, changed his plea to guilty on count one (1) and guilty with explanation on count two (2).

He was represented by counsel who informed the court that the "guilty with explanation" plea was not to offset a plea of not guilty but only a mitigating plea.

The court accordingly convicted him on his plea and adjourned the case for sentencing of the Appellant after his counsel has put in a plea for mitigation.

When the court came to sentence the Appellant, this is what His Lordship said:

> "I have taken the plea of mitigation ably canvassed on behalf of the 1st accused by his counsel, (sic). I have also considered that the 1st accused is a first offender. However, the question

of possession of narcotic drugs has assumed a dimension which needed to be eradicated from the society as society disapproves of it. This menace of narcotic drugs has tarnished the good image of the West African sub-region including Ghana and for that the law required a deterrent sentence as required in KWASHIE VRS THE REPUBLIC.

In passing sentence I would also have regard to the fact that the 1st accused has been on remand since the 29th day of June, 2008, the day of his arrest. Consequently, the 1st accused is sentenced to fifteen (15) years imprisonment with hard labour (I. H. L.) on each count of conspiracy and unlawful possession of narcotic drugs. Sentences to run concurrently."

Dissatisfied with the sentence of fifteen (15) years I. H. L., the Appellant appealed to the Court of Appeal.

On appeal to the Court of Appeal, the Court of Appeal allowed the appeal, reduced the sentence and set aside the sentence of fifteen (15) years I. H. L. In its place the Court of Appeal, substituted a sentence of 12 years I. H. L.

The appeal to the Court of Appeal was based on the following grounds:

"a. in sentencing, the court below did not take the disability of applicant into account in accordance with Article 29 (5) of the 1992 constitution of Ghana.

b. The court below failed to properly apply the period applicant had been on remand before conviction on the sentence imposed on applicant."

Still dissatisfied with the sentence of 12 years I. H. L., the Appellant is before this court once again asking for reduction of sentence on the grounds that:

"i. The 12 years sentence is harsh."

Under this ground, counsel sought to explain why he considers the sentence to be harsh as follows:

"1. First of all the Appellant pleaded GUILTY which means he did not cost the state any LONG protracted trial. It is prayerfully submitted that in such a scenario the minimum sentence which in this case is 10 years would be appropriate.

2. Secondly the appellant spent almost two clear years in custody BEFORE sentencing without the option of bail. So given this situation even if the court would not make the sentence effective date of arrest at least it would further the ends of justice if the sentence was made the minimum under the law.

3. (i) Finally it is respectfully submitted that the law on effective date of the sentence is now so well muddled. It is respectfully prayed that this court fundamentally declare that in a situation where the accused is arrested and detained without option of bail for a long trial it is only fair that out of respect for basic human rights whatever

sentence that is imposed upon him more so in cases such as this where minimum sentences are prescribed under the law, the penalty must be made effective date of arrest.

(ii) The court did not adequately consider the medical condition of the Appellant."

The Court of Appeal reduced the 15 years imprisonment to 12 years because according to their Lordships, the trial Judge should have taken the Appellants disability into consideration. This is what their Lordships said:

> "We think that considering the disability of the Appellant the trial judge should have taken that into consideration in sentencing the Appellant but the record of Appeal does not indicate that he did so - - - - - - - - - "

It is for this reason that their Lordships allowed the appeal and set aside the sentence imposed by the trial court.

Before the Court of Appeal, counsel had relied on Article 29 (5) of the 1992 constitution which states that:

> "In any judicial proceedings in which a disabled person is a party the legal procedure applied shall take his physical and mental condition into account."

The Court of Appeal therefore on this basis reduced the sentence.

With due deference to their Lordships, I do not think the Appellant's disability should have been a consideration for reducing the sentence. The sentence passed by the trial court is not a procedure. In L. B. Curzon's Dictionary of Law, procedure is defined as *"formal manner of conducting judicial proceedings."*

The trial Judge assigned good reasons for the sentence passed by him. Sentencing is discretionary and where the discretion has been judicially exercised, an appellate court has no just cause to interfere with the exercise of discretion.

The principles upon which the court would act on an appeal, against sentence were that it would not interfere with a sentence on the mere ground that if members of the court had been trying the appellant they might have passed a somewhat different sentence. The court would interfere only when it was of opinion that the sentence was manifestly excessive having regard to the circumstances of the case, or that the sentence was wrong in principle.

"Grave offences (such as in the instant case) usually called for deterrent sentences. But the general principle was that a sentence of imprisonment, even though intended specifically as a general deterrence must not be excessive in relation to the facts of the offences - - - - - - - - - " See the case of APALOO VRS THE REPUBLIC[1975]1 GLR 156 at 159.

If the Court of Appeal had reduced the sentence on the misapplication of Article 29 (5) of the constitution urged upon it by counsel for the Appellant, should this court endorse the sentence based on the error? I do not think so.

This court, sitting on the appeal, has to examine the record, the gravity of the offence and arrive at a conclusion whether the sentence passed by the trial court should be interfered with.

The trial Judge in passing sentence, gave reasons why he imposed the 15 years I. H. L. even though there is no obligation on him to do so.

> "The offence was of a very grave nature for which reason the sentence must not only have been punitive but must have been a deterrent or exemplary in order to mark the disproval of society of such conduct. When a court decides to impose a deterrent sentence, *the value of the subject matter of the charge and the good record of the accused become irrelevant"* (emphasis mine).

I associate myself with these holdings in the case of KWASHIE VRS THE REPUBLIC [1971]1 GLR 488 at 493 already referred to and come to the same conclusion in the instant case.

The Appellant, an amputee engaged himself in drug trafficking and was transporting 380 slabs of cocaine from the Western Region to Accra. One may ask, for what purpose? Among his accomplices was one JAVI, a Columbian who is at large.

The trial Judge was concerned about the drug menace which according to him has assumed a dimension which needed to be eradicated from the society as society disapproves of same. The menace of narcotic drugs has tarnished the good image of the West African sub-region including Ghana and for that the law required deterrent sentence.

I totally agree with His Lordship and see no justifiable reason why the 15 years I. H. L. imposed by him should be interfered with.

The court must help to stamp out this drug trade especially the use of our dear country as a transit quarter.

I take judicial notice of the inhuman treatment and harassment Ghanaians are needlessly subjected to when we travel outside Ghana on regular checks at International Airports and the courts should discourage this conduct.

I am not being heartless in this matter but sincerely feel that the exercise of discretion by a trial court in passing sentence after conviction should not be interfered with just because the appellate court would not have passed the same sentence if the Appellant had been tried by it.

Having regard to the magnitude of the offence which carries 10 years minimum sentence, I would not say that the 15 years I. H. L. imposed by the trial court is manifestly excessive and for that reason this court must interfere with same.

The Appellant did not suffer his disability while in prison and if with the disability, he decided to employ same to engaging in such crime, that disability should not influence the court in passing sentence on him.

On the evidence as a whole, I find no merit in the appeal. The sentence of 12 years I. H. L. which was imposed by the Court of Appeal is hereby set aside and the sentence of 15 years I. H. L. passed by the trial court is hereby substituted.

(SGD) R. C. OWUSU(MS)

JUSTICE OF THE SUPREME COURT

ADINYIRA (MRS.) J.S.C;

I had the privilege to read before hand the opinion of my eminent sister, Owusu JSC and I agree with her conclusion that the appeal against sentence be dismissed. I however have a few words to say about the sentence.

The appellant who is a person with a disability submitted before the Court of Appeal that the trial court failed to take his disability into consideration before passing sentence. He submitted this failure was an infringement of Article 29 (5) of the Constitution, 1992. The Court of Appeal upheld his submission and reduced the sentence of 15 years IHL imposed by the High Court to 12 years IHL. The appellant still dissatisfied appealed to this Supreme Court against the sentence.

Article 29 (5) provides:

> "In any judicial proceedings, in which a disabled person is a party the legal procedure applied shall take his physical and mental conditions into account"

As my sister has ably demonstrated in her opinion, the appellate court wrongly applied the said article.

The majority of this Court is of the view that upon rejecting the appeal, this Court would exercise its discretion under section 30 (a) (ii) of the Court Act, 1993, (Act 459) to vary the sentence of 12 years IHL to 15 years IHL and thereby restore the sentence imposed by the High Court. We come to this conclusion as the High Court adequately considered all the mitigation factors in the case and the sentence of 15 years IHL for the offence of that magnitude: possessing 380 slabs of cocaine, a narcotic drug, was not excessive and wrong in principle.

I therefore agree to sentencing the appellant to 15 years IHL.

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

ANIN YEBOAH J.S.C;

I also agree that the appeal against sentence be dismissed and the sentence enhanced to 15years I.H.L.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

DISSENTING OPINIONS ON SENTENCE

DOTSE JSC:

I have been privileged to have read the brief but erudite judgment of my very well respected sister Rose Owusu JSC on why the appeal against sentence must fail.

I am however unable to agree with her that the sentence of 15 years imposed on the appellant by the trial High Court must be substituted for the 12 years that the Court of Appeal allowed when it reduced the sentence of 15 years.

Even though the principles guiding punishment have been very well discussed in the said judgment, I think there is something that has always been missing in the attitude of the courts towards sentencing and punishment for that matter.

Section 294 of the Criminal and other offences (Procedure) Act, 1960 states on different kinds of punishment as follows:-

"The following punishment may be inflicted for offences

a. death

b. imprisonment

c. detention

d. fine

e. payment of compensation

f. liability to police supervision"

In this instant, am concerned with only imprisonment. It has to be noted that, the above law was enacted in 1960 with little or no substantial amendments. It can therefore be said without any contradiction that there is a lot to be done about the punishment regime in our criminal justice system.

For example, there are other forms of punishment which are being practiced elsewhere, to wit, community service, parole, suspended sentences just to mention a few.

Considering the disability which the appellant herein has, and his medical condition, it is my opinion that despite the gravity of the offence which he has committed, it will be more humane to sentence him to the barest minimum that the offence stipulates and this to me is 10 years.

Why do I say so? There is evidence on record that the appellant is an amputee and is a known diabetic mellitus patient. Out of abundance of caution, let me quote in full the medical report on the appellant which is in the record of appeal. It states in reference to the appellant thus"

"The above named amputee is a known Diabetes Mellitus patient reported here on 04/11/2009 at the O.P.D with complaints of severe pains in right knee, waist pains and in left leg due to a fall. He has since been visiting this hospital for regular routine follow up and medication."

I think it is sufficient for me to state that judicial notice has been taken of the fact that the appellant is an amputee and is also a Diabetes Mellitus patient and this is a debilitating disease which if not treated properly can incapacitate a person. In this respect, it is very useful at this stage to go into medical journals to find out a little bit more on Diabetes Mellitus.

What is Diabetes Mellitus?

"This is a serious metabolic disorder characterized by defects in the body's use of carbohydrates. It may be caused by a deficiency in insulin production by the pancreas or else by an inability of the body cells to use the insulin available.

Diabetes mellitus, once established, persists throughout the life of the individual and often produces serious, life-threatening complications, and thus reduces life expectancy.

*Among diabetes, blindness occurs twenty five times as frequently as among non-diabetes, kidney disease occurs seventeen times more frequently;**gangrene of the tissue is fifty times more prevalent among diabetics; a**nd heart disease occurs twice as often among diabetics as among non-diabetics.*

111Although diabetics, as such is not curable, the modern treatment programs, when faithfully followed can relieve the patient of the symptoms of the disease and can reduce the prospect of this developing tragic complications."

Source "You and Your Health- Volume Three page 225 by Harold Shryock and Mervyn G. Hardinge

With the above write up on what Diabetes Mellitus is, coupled with the fact that the appellant is an amputee, the question that begs for an answer is whether the prison has adequate facilities to cater for the appellant in the condition in which he finds himself?

I do not think so. I have a fair idea of what a prison in Ghana looks like and the conditions operating therein.

The minimum sentence for the offence committed by the appellant is 10 years. Taking the quantity of narcotics involved in this case into consideration, it can justifiably be said that even the 15 years imposed by the learned trial Judge is not enough.

However, if I take into account, the following serious conditions, the amputee condition of the appellant, and the debilitating disease Diabetes Mellitus which he is suffering from, which is a disease which requires proper attention and treatment at all times then it is prudent to ensure the early release of the appellant from prison. Any relapse in the treatment can lead to threatening consequences, extending in some cases to life threatening situations.

Whilst I am aware that a Diabetic or indeed an amputee can be sentenced to life imprisonment, that is however not the situation here. My understanding is that, once there is an opening for the appellant to come out of prison at the earliest opportunity, that chance must be given him.

Our criminal justice system must be such that opportunities are given to all to continue their life after imprisonment in much the same condition that they entered prison.

Secondly, it will be too expensive for the prisons to maintain the appellant in his present condition within the duration of his entire sentence

I am really fortified in my opinion because as an institution, I believe the time has come for the judiciary, to wit the Courts to make recommendations for the amendment of our Criminal and other Offences (Procedure) Act, 1960, Act 30.

Times are changing very fast, and it is my view that the old view that punishment must be deterrent in nature has to be repackaged and refined to include reforms and rehabilitation.

In her invaluable book of the ***"Criminal Law Series, The General Part of Criminal Law- A Ghanaian Casebook, Volume I***, " Prof. Henrietta J. A. N. Mensa-Bonsu writes on page 138 on specific deterrence as follows:-

"An individual may be punished severely to discourage him or her from ever committing a like offence. Such punishment thus ensures that the particular individual would learn lessons from the severity of the punishment and never repeat the conduct.

The effectiveness of deterrence as a purpose of punishment depends upon three important factors, namely (1) the certainty of punishment, (2) the fact that the unpleasantness of the penalty would out weigh any advantage obtained by the Commission of the offence and (3) ***publicity****.*

Without publicity, the public would not know about the fate of offenders and therefore the information which would encourage law abiding behavior would be unavailable."

I am convinced that, the lack of publicity about the prosecution, conviction and sentence of persons accused of some offences such as robbery, rape, defilement, narcotics, stealing etc, has resulted into the failure of the deterrent nature of the sentences being imposed having any effect on the public.

In times, past, the Narcotics Control Board was publishing the pictures of Ghanaians convicted of drug offences and sentenced accordingly in the national dailies. This definitely served as sufficient notice that crime does not pay and that one stood the chance of losing all of the reputation and wealth because of a criminal conduct.

The shame attributed to criminal conduct by such exposures for me is more than the length of years that convicts are being handed these days.

In my judgment in the case of **Frimpong alias Iboman v Republic [2012] 1 SCGLR, 297** I made references to such a phenomenon at page 334 of report as follows:-

We however, doubt really, if such a sentence, or long sentences by their nature reform offenders. There is absolutely no doubt that such a long sentence of 65 years will appease society and safeguard them from criminal conduct. It is however our view that for such sentences to be really deterrent to others, then a different approach must be adopted to the imposition of sentences. This is because as in this appeal, if the appellant successfully completes the term of 65 years, we doubt even if his peers in Domeabra, near Konongo will be alive for them to be deterred upon his release, that is, if he survives the hard prison conditions in this country. We similarly doubt if those around Kantamanto, in Accra where appellant had a store will also be available upon his release after serving the 65 years to be deterred from engaging in criminal conduct. The greatest deterrence to our mind is the swift but unlawful mob action that society unleashes upon those suspected of committing crimes especially, stealing, robbery and ritual murders. If what happens to suspects in robbery cases is anything to go by, there would have been no robbery or stealing cases by now. "

If I take the above quotation and match it against the severe sentences that the courts have in recent years been imposing in offences like defilement, robbery, stealing and narcotics, then it will mean that there is indeed a long journey for us in Ghana before success can be attained.

This is because, despite the fact of these severe sentences, it does appear that the deterrent effect of the sentences are not being felt, possibly because of lack of publicity.

I will advocate a regime where those convicted and sentenced for offences like rape, defilement, robbery and narcotics related cases will have their pictures published in local papers denoting the offences they have committed and the sentences imposed.

Thirdly, some of these people should be made to do community service in the very communities they come from, i.e. the recent conviction and

sentence of the former Italian Prime Minster Silvio Berlusconi to do community service for tax related offences.

In this respect, it will be a welcome relief if our procedure rules on criminal justice will be amended to include suspended sentences, parole and also some form of community service.

These proposals if taken up seriously will have an effect on persons who are criminally minded and perhaps might lead to reduction in the crime rate.

Secondly, if new forms of custodial sentence are introduced which will lead to the spending of less time in prison by convicts with the rest being spent within the community by the convict doing service with a monitoring mechanism.

This will invariable lead to the strengthening of the capacity of the Department of Social Welfare such that the Probation officers of that department will monitor prisoners on say parole if it is introduced or those required to do community service and or suspended custodial sentences. Similarly, convicts who are made to serve reduced prison terms on account of poor health can also be monitored and measured during their release to ensure that they do not embark upon a career in crime again.

It is for the above reasons that I am unable to agree to the lead judgment's re-imposition of the 15 years prison term. I will therefore allow the appeal and impose a sentence of 10 years.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

AKAMBA, JSC

This appeal is against the sentence of twelve (12) years substituted by the Court of Appeal for the fifteen (15) years originally imposed by the trial High Court. I am unable to appreciate the necessity for reverting to the original sentence of fifteen years as decided by the majority. By reverting to the original sentence imposed by the High Court this court is enhancing the sentence of the appellant in the circumstance. The reason given by this court for enhancing rather than endorsing the reduction by the Court of Appeal was that the latter had assigned wrong reasons for the exercise. The Court of Appeal said that, "considering the disability of the Appellant the trial judge should have taken that into consideration in sentencing the Appellant but the record of Appeal does not indicate that he did so…" Let me state clearly that I do not subscribe to the view by the majority that: "The trial judge in passing sentence, gave reasons why he imposed the 15 years IHL even though there is no obligation on him to do so." (Underlined for emphasis). That certainly is an unfortunate position to come from the highest court of the land which itself is guided in the exercise of its overwhelming power by the Constitution. A judge is obliged to give reasons for whatever discretion he/she exercises under the Constitution or any other law. To contend otherwise is to yield to arbitrariness. Article 296 (b) of the 1992 Constitution stipulates that where in the Constitution or any other law discretionary power is vested in any person or authority the exercise of it shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law. Given this Constitutional stipulation I see no reason why the exercise of a discretion touching on what sentence to apply after a trial should escape the rule that a court must furnish reasons for the choice of sentence. This to my mind will assist, among others in determining whether the sentence arrived was based on proper assessment when the same comes on appeal for further consideration. Except for the few offences with fixed penalties, the majority of offences warrant the exercise of discretion as to what sentence/s is/are appropriate to the charges/offences. It is therefore not sufficient for the trial court to simply pronounce a sentence without giving reasons which relate to the facts before the court. It is also important to bear in mind that sentencing if

properly carried out is by far the most difficult part of the trial process. If carried out simply mechanically will lead to a lot of injustice, counterproductive and not serve the purpose of society. If it is well and thoughtfully carried out and in accordance with law it will be beneficial to society. In this appeal the appellant did not waste the time of the court when he pleaded guilty to the offence. Even though the respondent in her written submission decries this early submission to justice as a strategy to assist the appellant's colleagues I fail to see how this comes about. The burden still remains on the prosecution to prove the charges against each accused beyond reasonable doubt.

The trial court did consider that the appellant was a first offender. The court however considered that the question of possession of narcotic drugs had assumed such dimension that it needed to be eradicated from society hence the sentence of fifteen years. The court also had regard to the fact that the appellant had been on remand from 29th June 2008 when he was arrested and sentenced as it did. The Court of Appeal accepted the plea in mitigation as warranting its further consideration hence the sentence of twelve years in place of the original fifteen. Considering the evidence in the record of appeal the only reason given by the trial judge for his choice of sentence was the fact that the offence warranted a deterrent sentence. That is a reason enough for the trial judge to deploy but considered along side the other mitigating factors, the Court of Appeal's grant of the reduction to twelve years was appropriate and properly exercised. It is in this regard that I would dismiss the appeal. I therefore affirm the sentence of twelve years entered by the Court of Appeal.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

COUNSEL

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