IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

CORAM: DOTSE JSC PRESIDING
GBADEGBE JSC
AKOTO-BAMFO (MRS)
AKAMBA JSC
PWAMANG JSC

CRIMINAL APPEAL
No. J3/7/2015

17TH FEBRUARY 2016

FRANCIS YIRENKYI - APPELLANT

VRS.

THE REPUBLIC - RESPONDENT

JUDGMENT

DOTSE JSC:

In his book, entitled *"The Supremes Greatest Hits – The 34 Supreme Court Cases That Most Directly Affect Your Life"* Michael G. Trachtman, commenced chapter 4 of the book on page 58 with the following quotation which we think is very relevant to the circumstances of this case that we would want to adapt and use. It states as follows:-

> ***"The one place where a man ought to get a square deal is in a courtroom, be he any colour of the rainbow…" Atticus Finch,***

This is an appeal by the Appellant against the unanimous decision of the Court of Appeal, dated 10th April 2014 which dismissed an earlier appeal lodged by the appellant against his conviction by the trial Circuit Court, Tema on 2 counts of conspiracy to commit crime, to wit, stealing and stealing, to the High Court. In otherwords, the appellant, who was tried alongside 5 other persons by the Circuit Court Tema on the 2 counts referred to supra was convicted and sentenced to a term of 10 years on each count to run concurrent, appealed against the conviction and sentence to the High Court which dismissed the said appeal with a further appeal to the Court of Appeal also being dismissed. In the scheme of things, the appeal to this court, is the third leg of the appeal which the appellant has embarked upon. It must be noted that, since the trial and conviction was in a court lower than the High Court, the appellant had to comply with article 131 (2) of the Constitution 1992 by obtaining special leave of the Supreme Court to file this appeal which was granted by the

court on 5th May 2015 coram, Adinyira (Mrs), JSC presiding, Dotse, Baffoe-Bonnie, Gbadegbe and Akamba JJSC's.

We are of the view that, considering the persistence and perseverance of the appellant in pursuing this appeal to the third level, we have decided to examine and re-examine the entire appeal record. This is because it is our belief that, it is by such a process, that the facts from the trial circuit court, and the two lower appellate courts would be analysed with a view to drawing useful lessons for the guidance of prosecutors, lawyers and judges. In this vein, we would embark upon an elaborate evaluation of the facts of this case.

FACTS OF THE CASE

The appellant herein, therein named as 5th accused and five others were arraigned before the Circuit Court Tema on the following charge sheet.

In the Municipal Circuit Court "A" Tema

The Republic

Vrs

1. No. 39353 E/C/GPL. Kingsford Nyabenyi
2. No. 39356 E/L/GPL. Joseph Okoso
3. No. 39362 E/L/GPL. Anthony Kwadwo Owusu
4. No. 39332 GC/2. Edem Kulewosi
5. **No. 40209 GG/2. Francis Yirenkyi**

6. Ex-C/Inspector Michael Amematspor

Count one

Statement of Offence

Conspiracy to Commit Crime; To wit; Stealing: Section 23 (1) of Act 29/60

Particulars of offences

1. No. 39353 E/C/GPL. Kingsford Nyabenyi, Policeman,2. No. 39356 E/L/GPL. Joseph Okoso, Policeman 3. No. 39362 E/L/GPL Anthony Kwadwo Owusu, Policeman 4. No.39332GC/2. Edem Kulewosi 5. No. 40209 GG/2. Francis Yirenkyi, Policeman 6. Ex-C/Inspector Michael Amematspor Security man: For that you together with others now at large on the 18th day of January, 2010 at Ashiaman in the Tema Municipal Circuit and within the jurisdiction of this Court, did agree and act together with a common purpose to commit crime to wit; stealing.

Count two

Statement of Offence

Stealing – Section 124 (1) of Act 29/60 (As amended By NLCD. 398 Para 4)

Particulars of Offence

1. No. 39353 E/C/GPL. Kingsford Nyabenyi, Policeman,2. No. 39356 E/L/GPL. Joseph Okoso, Policeman 3. No. 39362 E/L/GPL Anthony Kwadwo Owusu, Policeman 4. No.39332GC/2. Edem Kulewosi 5.

No. 40209 GG/2. Francis Yirenkyi, Policeman 6. Ex-C/Inspector Michael Amematspor Security man:-For that you and others now at large on the same day at about 9.00pm at the Ashiaman over-pass near Tema in the Tema Municipal Circuit and within the jurisdiction of this court did steal 800 bags of granulated sugar value GH¢60,000.00 from articulated man Diesel truck No. BA. 1394Q then being driven by Stephen Buadu the property of Madam Emelia Kufour

Upon their arraignment, the following constitute the facts that were presented to the court as a result of the Police investigations and the basis of the prosecution of the appellant and the others.

FACTS AS PRESENTED IN COURT

"The 1st and 2nd accused persons are Policemen Stationed at Ashiaman, the 3rd, 4th and 5th are also Policemen stationed at Teshie in Accra. The 6th accused is a retired Chief Inspector formerly at the Kpeshie Divisional Headquarters, Nungua in Accra and now Chief Security Officer working with a Building Construction Company at Nungua. On ***18/1/2010*** *at about 10.20pm, the driver in charge of articulated man diesel truck No. BA.1394Q loaded with 800 bags of granulated sugar reported to the Ashiaman Police that, he was stopped at the Ashiaman over-pass on the Tema Motorway at about 9.00pm on his way to Kumasi by some Policemen. That the Policemen were on board a black Cherokee Jeep No. GT. 1321 Z driven by a man in a civil dress. They told him the sugar was stolen and therefore he was being wanted at the Police Headquarters in*

Accra. Consequently, they abandoned the Man Diesel truck No. BA. 1394 Q together with the 800 bags of sugar and put him on board their black Cherokee Jeep No. G.T.1321 Z.

They drove him on the motorway to the Tetteh Quarshie Intercharge in Accra and returned with him to a section of the Motorway near the Adjeikojo junction and abandoned him. But when he finally got to where his truck was abandoned, he realized that the truck together with the sugar was nowhere to be found. On ***25/1/10,*** *the Man Diesel truck No. BA. 1394 Q without the whole 800 bags of sugar was found abandoned at Madina in Accra. Preliminary investigation led to the arrest of the 1st accused Kingsford Nyabenyi who owned a blue-black Cherokee Jeep No. GT. 3221 Z and the other accused persons for their complicity in the theft of the 800 bags of sugar.*

The case is still under investigations and the accused persons are found to be in a syndicate with others including some civilians yet to be arrested. Strenuous investigations are therefore in progress to bring all to book. The stolen 800 bags of sugar still not traced."

From the above facts as presented to the Court, it is certain that apart from the 1st accused therein, Kingsford Nyabenyi, who was mentioned as being the owner of a blue-black Cherokee Jeep No. GT 3221 Z no specific mention has been made of the other accused persons. Indeed, it should have dawned on the learned trial Judge straight away that the Prosecution in the case were embarking on a fishing expedition and she should have

given them time to link the other accused persons to the crime failing which she should have discharged the other accused persons.

In our mind, the Police actually failed and or refused to conduct thorough investigations into this case. In order to cover up their shortcomings they decided to lump together all persons whose names popped up during the investigations without any due diligence.

Why do we say so? For example, on page 38 of the appeal record is the evidence of PW4 Detective Chief Inspector Nicholas Amegatcher, who commenced investigations into the case and he testified in part as follows when he was giving evidence in chief.

> *"At the Police Headquarters, the mobile phone of 1st accused was connected to enable them send it to MTN authorities to get the itemized bills on it to assist in investigations as to who called or calls made at the time of the crime."*

We do appreciate the fact that, the investigations in this case were later taken over and completed by Detective Inspector Joseph Tettey Kormitey who testified in the trial court as PW5. We have perused the entire appeal record, but there is no indication whatsoever that PW5 pursued the line of investigations that would have led to the call records of the 1st and 2nd accused persons therein being called up for scrutiny to reveal those persons whom they called during the material time of this crime.

This is because from the evidence on record, 1st and 2nd accused persons therein, were the only persons that PW1, the driver of the articulator

vehicle from whom the 800 bags of sugar were stolen had identified. Furthermore, we observe, from the circumstances of this case that, indeed if the Police had pursued the mobile phone records of both 1st and 2nd accused persons, and indeed all the other accused persons, all those connected with this case either directly or indirectly would have been apprehended.

Secondly, from the facts as presented to the trial Circuit Court, it was stated that the case was still under investigations, and that there were some civilian collaborations who were yet to be arrested.

This meant that, from their investigations the Police might have been close on the heels of those civilians implicated in the case. We do know from the evidence on record that one Frank and an Immigration Officer whose names popped up (as having been interested in an earlier deal which although did not materialise), were not even called for testimony at all.

Thirdly, it is surprising that, no evidence was led to establish that, the Ashaiman Police, to whom the initial report was made at about 10.30pm on the 18/1/2010, took any steps to locate the man Diesel Articulator Truck No. BA 1394 Q loaded with 800 bags of sugar.

No entries from the Police Station Diary of action indicating that messages had been dispatched that night to all the highway Police Patrol to search, locate and arrest the said vehicle with the goods had been given or made available to the court.

What has to be noted is that, an Articulator vehicle is not like a motor bike or bicycle which could have been driven on lanes, alleys or in between houses to avoid early detection.

Instead, the facts on record disclose that, it was not until the 25/1/2010 that the said Articulator Truck was found abandoned at Madina without the 800 bags of sugar. The motorway is a security highway, in the sense that, there are toll booths at both ends of the road. Either way, there could have been no escape route if the number of the Articulator vehicle had been given out to the highway patrol team on the motorway, or at least to the Police on duty at the toll booth on the night of the 18/1/2010 when the crime took place. Instead, PW1, the driver of the Articulator vehicle was put on counter back that night, for what purpose, only the Ashaiman Police know.

From the circumstances of the case, it is only PW1, Stephen Boadu, the driver of the articulator truck, who was the only eye witness to the case. It is therefore appropriate at this stage to relate the material particulars of his testimony in the trial court. This is what PWI said:

> *"I am Boadu Stephen, I live at Sunyani. I am a driver. I drive an articulator truck.* ***I know the accused persons. I know the 1st and 2nd accused persons.*** *On 18th January 2010 I was in Tema. On that day, a Monday, I came to convey sugar in Kumasi. I came to collect the bags of sugar from Heepo Warehouse. Heepo warehouse is opposite Maersk Line. On that day I went to convey 800 bags of sugar from Heepo truck. The number of the articulator is BA1394Q.*

The truck does not belong to me. The owner of the truck is Emmanuel Kusi. The 800 bags of sugar belong to Mr. Kuffour's wife. I cannot say the value or cost of the bags of sugar.

About 8.30pm, when I was on my way to Kumasi, the accused persons, using a Jeep Cherekee with registration number GT 3221 Z stopped me. I was stopped at the Ashiaman overpass. When they stopped me, they asked me to come down from the car. I asked them why. ***Apart from the 1st and 2nd accused persons that I know, there were two others in the Jeep. I cannot recognize the other two persons when I see them****.*

As stated earlier, I asked them why I should come down. They opened the door of the articulator truck themselves and pulled me out and said I have diverted somebody's goods. That the owner of the goods I have diverted has brought my car number to the Police Headquarters and as such they were searching for me that since they had seen me, they were sending me to the headquarters. I told them what they were saying is not true. That I have never given my car to a spare driver for about a year. So if they believe what they are saying is true they should sit in my car for all of us to go to the headquarters. ***1st accused and 2nd accused told me I cannot teach them their job and started beating me. They then handcuffed me and said they were sending me to the Police Headquarters. They put me in their jeep. On our way, when we got to Tetteh-Quarshie, one of the two other men said they forgot to let me lock the articulator doors and so they***

decided to return to where my vehicle was parked to enable me lock my door*. They turned at Tetteh-Quarshie heading for Tema. On our way, when we passed the toll booth, they asked me for money. I told them I did not have enough money on me to give to them. As we were approaching the Ashiaman over pass, I offered to give them GH¢10.00. They refused to accept it with the explanation that the amount was small and decided to send me back to Accra to lock me up. They again turned and headed towards Accra. When we got to the Ashaiman bridge they alighted me and asked me to pick a car. In respect of the GH¢10.00 I offered, they took it from me when they alighted me.* ***The one who took the GH¢10.00 is 1st accused. I crossed the road and picked a taxi to where I left my articulator but when I got there my truck was not there.***

When I realized that my truck was nowhere to be found, I told the driver of the taxi that took me to send me to the nearest Police Station. I narrated the story to the taxi driver.

The driver took me to Ashaiman Police Station. At the Police Station, I narrated my story to the Policemen on duty ***who took my statement and put me behind the counter.*** *The following day, I was behind the counter when I saw a jeep like the type that picked him. When they went and had a look at the jeep, they all came back and sat down at the counter. None of them said anything."*

From the evidence of PW1, it is clear that he identified Kingsford Nyabenyi and Joseph Okoso, 1st and 2nd accused persons therein respectively

Secondly, PW1 identified the vehicle which belonged to 1st accused as the operational vehicle.

Thirdly, PWI also stated categorically that, apart from 1st and 2nd accused persons, there were 2 other persons in the vehicle but he cannot identify them.

The fact of the matter herein is that, altogether, there were six persons who had been charged and arraigned before the trial Circuit Court. This meant that, only two of the remaining four persons on trial could have been on board the vehicle.

Finally, PWI was quite categorical throughout his testimony that it was only 1st and 2nd accused who played lead roles in the arrest and stealing of the 800 bags of sugar.

Thus, unless clear investigations that have been conducted disclose through direct or circumstantial evidence, the culpability of the remaining four accused persons who were tried and convicted, was in serious doubt. This is because there was no evidence linking them to the facts of the case. It remains a conjecture.

This then brings into focus, the relevance of the Police in putting PW1 behind bars after he made the complaint to them. What was the relevance of this? Was is to prevent PWI from making necessary contacts that during the night the incident happened?

EVIDENCE OF PW5 ON APPELLANT

The only evidence on record which suggests any indictment of the appellant in this case is from PW5. This is what he said:

> *"I had a call from an unknown person who told me that in respect of the case I was investigating if I wanted the truth in the case and other accomplices, he will help. That I should arrest one Owusu who is at Teshie. That if I have him arrested he is going to tell me the whole truth."*

Based upon the said information, PW5 testified that he was then authorised to arrest 3rd accused therein, Anthony Kwadwo Owusu. The crux of what 3rd accused told PW5 during the investigations is as follows:-

1. That 3rd accused mentioned 6th accused Micheal Amematspor who intend led him to one Frank, at whose spot they met.
2. That this Frank connected them i.e. 3rd and 6th accused to an Immigration officer who worked at the Tema Port.
3. That, on the advice of the Immigration Officer, they planned to intercept some Ghanaian drivers who transport cooking oil from Tema Port to Niger to help the drivers defray their expenses which had not been paid on previous occasions.
4. That 3rd accused discussed the deal with his District Commander who advised against it, but it appeared they nevertheless persisted in their contacts and plans.
5. That later, Frank alerted them that the goods were ready, and he invited him to a Bank where he was on duty.

6. That Frank gave him 3rd accused an amount of GH¢180.00 to hire a car for the exercise. Thereafter, he the 3rd accused, called 4th and 5th accused persons to the Bank and gave 4th accused an amount of GH100.00 to hire a car for the deal and he pocketed the rest. However, 4th accused failed to hire the vehicle.
7. Later, 1st accused was contacted and he agreed to use his car for the exercise.
8. Thereafter, on the appointed date, the 3rd accused alleged that the 4th and 5th accused took a car from Teshie to the Ashaiman overpass on the motorway to link up the 1st and 2nd accused. **However after waiting in vain for a while for the description of the type of vehicle described by the Immigration Officer as having loaded the cooking oil, they dispersed and called off the exercise.**

It is interesting to observe the following statement as the concluding remarks from PW5 as to why the appellant and the others were arrested, charged and prosecuted.

"After this revelation, the accused persons were interrogated. Apart from 4th accused who admitted he received GH¢100.00 all of them denied their involvement in the case cited by 3rd accused. After having put these two scenarios, the revelation given by 3rd accused and the complaint given by PW1, ***it was observed that the complaint by PW1 fitted into the story given by 3rd accused with the exception of the car, the registration number. It has been observed that the period that the cited case happened,***

the location and the time fitted the complaint made by PW1…Based on these observations I was asked to charge them and put them before court".

INCONSISTENCIES IN THE EVIDENCE OF PW5

1. The instant case is about 800 bags of sugar whilst the case mentioned by PW5 involving the appellant is about cooking oil.
2. The cooking oil deal according to PW5 never materialized, whilst that in the instant 800 bags of sugar actually happened.
3. According to PW1, the complainant in the instant case, he identified both 1st and 2nd accused persons as those who took part in the sugar deal. However, PW5 mentioned 1st, 3rd, 4th and 5th accused persons as those who took part.
4. What should be made clear is that from the narration of PW1, whilst 1st and 2nd accused occupied the front seat of the Cherokee jeep, he was sandwiched between the other two occupants of the jeep. From all indications, the PW1 could easily have identified the 3rd, 4th , 5th 6th accused persons, if any of them were those who sat at the back of the car with him.
5. It is therefore clear that the evidence of PW5, connecting the appellant to the instant case of stolen 800 bags of sugar on board PWI's articulator vehicle is not only remote, but has no nexus to the facts of this case but appear to us to be an exaggeration.

This is because, the said Frank who was reputed to own a drinking spot was never identified and brought into the case to lend credence to the allegations.

Secondly, the said Immigration officer was also not identified. From the evidence his telephone number was known to 3rd accused and if PW5 had been any diligent, he could have tied all these loose ends of the case to establish a proper nexus between the appellant and the others to the instant case.

DECISION OF THE TRIAL CIRCUIT COURT

Despite all these shortcomings, the learned trial Judge on the 29th day of March 2011, convicted the appellant and his co-accused on both counts of conspiracy and stealing and sentenced them to 10 years imprisonment with hard labour on each count to run concurrent.

APPEALS

An appeal by the appellant against his conviction and sentence by the trial court to the High Court was on the 1st day of November, 2012 dismissed.

A further appeal by the appellant against the High Court judgment was also similarly dismissed by the Court of Appeal in a unanimous decision on the 10th April 2014.

APPEAL TO SUPREME COURT AND GROUNDS OF APPEAL

Feeling aggrieved by the decision of the Court of Appeal, the appellant yet again filed an appeal to this court against the said judgment with the following as the grounds of appeal:

a. "The conviction is not supported by the evidence adduced.

b. The Court of Appeal and the High Court presided over by Her Ladyship Justice Cecilia H. Sowah (JJA) erred in refusing to reduce the Appellant's sentence in the circumstances when all his co-accused persons tried together with him on conspiracy charged and convicted and sentenced with him have their sentences reduced from ten years to two years on the same self evidence **in view of the law that when two or more persons are charged with conspiracy, tried together, convicted and sentenced on same self evidence to a term of imprisonment and one person appeals and was acquitted or has his sentence reduced all are entitled to be acquitted or have their sentences reduced in the same matter for same self evidence cannot be used to convict one or more persons and acquit the others or reduce the sentences of others on the same criminal role of conspiracy unless there is evidence that those whose sentences are affirmed have taken steps beyond what the others acquitted or have their sentences reduced have done.**

c. The sentence of ten years is harsh and unreasonable and in view of the reduction of the sentences of A1, A2, A3, A4 and A6 to two years on the same criminal role of conspiracy charge tried together

convicted and sentenced to ten years on the same self evidence A5 appellant is entitled to benefit from the same reduction in the absence of evidence that he has gone beyond what his co-accused did. Failure of the Court of Appeal to reduce his sentence is an error for that ten years cannot stand in view of the reduction of the other accused persons sentences to two years."

SUBMISSIONS BY COUNSEL FOR APPELLANT ON GROUNDS OF APPEAL

GROUND (A)

Learned counsel for the appellant in his arguments in his statement of case in support of grounds of appeal number (a) argued thus:

1. That the Revised Edition Act, 1998 Act 562 has redefined the definition of conspiracy in section 23 (1) of Act 29 as follows:-

   "Where two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous consent or deliberation, each of them commits a conspiracy to commit or abet the criminal offence."

2. Learned counsel dealt at length on the fact that the operative words in the section 23 (1) are "agreement to act" and that without the agreement there cannot be an offence of conspiracy to commit the offence. Learned counsel then referred copiously to the evidence of PWI who was the only eye witness and drew the necessary

inferences which have already been stated supra that the appellant was not at the crime scene and also did not have any prior knowledge or agreement with the other accused persons.

3. The evidence of PW5, the final investigator as well as the confession statement of 3rd accused including the testimony of the appellant herein and his statement to the Police have all been referred to and commented upon by counsel.
4. Learned counsel for the appellant also submitted that the somewhat incriminating evidence of 3rd accused is not admissible against the appellant without corroboration.
5. Learned counsel also dwelt at length on the **confession statement** of the appellant in exhibit H in which he was alleged by 3rd accused to have agreed to participate in the deal contrary to his evidence on oath in court. Learned counsel then referred to the case of **Odupong v Republic [1992-93] GBA 1038** where the Court of Appeal, coram Amuah, Brobbey JJA's as they were then, and Forster JA held on this principle as follows:-

"The law was well settled that a person whose evidence on oath was contradictory of a previous statement made by him, whether sworn or unsworn, was not worthy of credit and his evidence would be of no probative value unless he gave a reasonable explanation for the contradiction."

The appellant in the case referred to supra, offered no explanation for the conflicts apparent in his defence, and the jurors were perfectly justified in rejecting the defence of accident put forward. **Gyabaah v Republic**

[1984-86] 2 GLR 416 and Kuo-den alias Sobti v Republic [1989-90] 2 GLR 203 SC were referred to.

However, in the instant case the appellant offered sufficient explanation on record to explain the contradictions in his Police statement and testimony on oath.

Learned counsel therefore stated that since the appellant offered cogent and reasonable explanation for the contradictions in his alleged prior statement to the Police and his testimony in court, the trial court and the lower appellate courts ought to have considered the principle of law stated in the cases referred to supra.

Learned counsel also submitted forcefully that the alleged confession statement of the appellant was not a voluntary statement in terms of the provisions contained in **section 120 (1) and (2) of the Evidence Decree NRCD 323, 1975 as amended by SMCD 237.**

Learned counsel referred to the cases of **Asare alias Fante v State [1964]** and **Republic v Agyiri alias, Otabil [1982-83] I GLR 251** in support.

Learned counsel also referred extensively to portions of the evidence of PW5, 3rd accused and the statements of the 3rd accused on the appellant in exhibits “F” , “F1” and “H” respectively and concluded that the Court of Appeal was in error when it upheld the judgment of the High Court. Learned Counsel therefore urged this court to set aside the conviction and

sentence of the appellant and instead return a verdict which will acquit and discharge him.

GROUNDS B AND C

These grounds were argued together by learned counsel for the appellant. They dealt with the sentence of 10 years imposed on the appellant despite the overwhelming evidence that the appeal by the other co-accused against their sentence had been successful in the sense that, the sentences had been reduced from 10 years to 2 years.

Basing himself on several authorities such as **Rex v Plumber [1927] 2 KB 339**, **R v Anthony [1965] 2 QB 189 Criminal Appeal 104, Kannangara Aratchiege Dher Masena v Re (1951) AC Privy Council, and Gyedu v Republic [1980] GLR 480,** learned counsel concluded that the Court of Appeal was in error when they failed to reduce the sentence of the appellant from 10 to 2 years as his co-accused had in the High Court.

SUBMISSIONS BY LEARNED COUNSEL FOR THE RESPONDENTS

In the best traditions of the Bar, learned Principal State Attorney, Evelyn Keelson submitted as follows:-

> "*My Lords, the Republic is not opposed to the Applicants appeal. This is because after studying the record of appeal, we believe that the conviction cannot be supported having regard to the evidence on record. However, we do not entirely agree with the submissions*

made by counsel for the appellant in his statement of case and we shall therefore proceed with our submissions giving reasons why the conviction is not supported by the evidence on record."

STANDARD OF PROOF

Learned Principal State Attorney rightly in our view referred to the standard of proof that is required in criminal cases. She then referred to the dictum of Lord Denning in the case of **Miller v Minister of Pensions [1947] 2 A.E.R 372 at 374.**

Learned counsel for the respondent stated forcefully as follows:-

"*To secure a conviction for the offence of conspiracy to steal, the prosecution is required to establish that there were two or more persons, that they agreed to act together and that the agreement to act together was for a common purpose, which in this case was to steal the 800 bags of sugar loaded on the complainant's articulator truck. For the offence of stealing, the prosecution was required to establish that the appellant dishonestly appropriated the bags of sugar belonging to another person."*

Counsel then referred to the case of **State v Boahene [1963] 2 GLR 554** in support. Learned Principal State Attorney also referred to the principles involved in proving conspiracy charges which in most cases is based or founded on circumstantial evidence. In this respect, learned counsel referred to the cases of **Commissioner of Police v Afari and Addo [1962] 1 GLR 483** and **Duah v Republic [1982-88] 1 GLR 343**

and concluded after an elaborate and exhaustive analysis of the evidence that **the appellant was convicted on insufficient evidence and that the inferences drawn from which the guilt of the appellant was established in both counts of conspiracy and stealing were wrong in law and must be reversed.**

It is considered worthwhile to quote the closing statements of learned counsel for the respondent in the statement of case as follows:-

> *"In conclusion my Lords, it is the submission of the Respondent that the evidence on record is not enough to sustain the Appellant's conviction on both counts of conspiracy to steal and stealing. Since the Respondent has a duty to assist the court to administer justice, we wish to submit that in the interest of justice the conviction and sentence of the Appellant cannot be supported and same must be set aside."*

From the submissions of learned counsel for the parties, especially that of the learned Principal State Attorney for the Republic/Respondent, an issue which we consider relevant but preliminary is this.

WHAT WEIGHT IS A COURT TO PUT ON SUBMISSIONS OF A PARTY THAT SUPPORTS THE CASE OF THE OTHER?

What must be noted is that, it has been generally stated by the courts in a long line of several respected decisions of this court that an appeal is by way a re-hearing of a case. See **Tuakwa v Bosom [2001-2002] SC GLR 61, Oppong v Anarfi [2011] 1 SCGLR 556, Dexter Johnson v The Republic, Opare Yeboah and others v Barclays Bank Ghana Ltd. [2011] 1 SCGLR 330 at 345 and Agyeiwaa v P & T Corporation [2007-2008] 2 SCGLR 985** where Georgina Wood C.J stated at page 989 as follows:-

> *"The well established rule of law is that an appeal is by way of rehearing, and an appellate court is therefore entitled to look at the entire evidence and come to the conclusions on both the facts and the law."*

That being the case, we find the statement by the Court of Appeal when a similar observation was made by the then learned counsel for the Respondent in support of the appellants case as erroneous and not supported by the evidence on record.

Since an appeal has been held to be a re-hearing, the Court of Appeal should rather have resorted to the appeal record rather than picking bits and pieces from the decisions of both the learned trial Judge and the High Court.

We concede that, at every stage of a trial process, be it at the trial or appellate level, it is the responsibility of the court to evaluate the evidence led in court and analyse it with the laws applicable before coming to a

decision. A court of law should not be misled by the submissions of any party in a case before it.

In otherwords whenever a party supports the case of another party as happened in this case, the court must consider the facts of the case as a whole before considering whether to accept the submissions of counsel supporting the case of the other or not.

In the instant appeal, when a similar submission was made in the Court of Appeal, the court was very uncharitable and made the following observations:-

> *"The learned counsel for the State Mrs. Marina Appiah Opare (Principal State Attorney) gave a rather stunning reply to the above argument in her written submission. She concludes the opening paragraph of her written submission which narrates the facts of the case thus "The case is still under investigations and the accused persons are found to be in a syndicate with others including civilians yet to be arrested, strenuous investigations are therefore in progress to bring all to book." This is obviously a pretrial presentation of facts of the case and cannot be acceptable as facts of this case at its second appellate stage. The learned Principal State Attorney went on to argue the appeal in favour of the appellant, attacking the evidence of the prosecution witnesses and said the prosecution has failed to prove its case beyond reasonable doubt and she concluded that there is no evidence on record to support the conviction and sentence of the appellant.*

Counsel for the state has obviously compromised her position, she is not representing the interest of the Republic in this appeal, and she should have in the vein of her position announced herself as co-counsel for the appellant. We would deem it that the Republic is not represented in the hearing of this appeal and consider the appeal on its merit. In our view there is ample evidence on record that links the appellant to the charges. These are the evidence of PW5 one of the investigating officers which can be found on page 50 of the record, the evidence of the 3rd accused and the statements of the appellant and the 3rd accused exhibits H and F."

We are however of the considered view that, if the learned justices of the Court of Appeal had considered in totality the evidence of the witnesses in the trial court, as well as those of the accused persons and the exhibits tendered, and also taking into consideration the burden of proof required in criminal cases such as the instant case, they would definitely not have made the comments referred to supra against the learned Principal State Attorney.

Indeed, from the facts as recounted in the trial court and to which copious references had already been made, it is clear that the case was still under investigations and no new evidence had been discovered since. For example, the call records of the principal parties in the case, 1st and 2nd accused persons had not been made available to the court to determine whether they made calls to some of the other persons on trial. Again, the said Frank, who linked 6th accused to the Immigration Officer and then to the 3rd accused persons had all not been contacted.

The district commander of the 4th accused and the appellant who advised against the cooking oil deal was also not brought into the picture. This explains the frustrations of the learned State Attorney. In our opinion, her conclusions therein, were right.

It is not uncommon for parties in a case to sometimes support the case of their opponents or adversaries. This is because, it is even considered unethical to defend the indefensible when it is apparent that the position being defended is either not supported by law or evidence on record.

In ***Amidu (No.3) v Attorney-General, Waterville Holdings (BVI) Ltd. & Woyome (No. 2) [2013-2014] I SCGLR 606*****,** where the Honourable Attorney-General supported in part the review application being sought by the Applicant therein, Martin Amidu, the Supreme Court stated at page 634 of the report as follows:-

RESPONSE OF THE FIRST DEFENDANT-RESPONDENT ATTORNEY-GENERAL TO THE REVIEW APPLICATION

> **"***Before us in this court, and during this review application, the current Attorney-General, Hon. Mrs. Marietta Brew Appiah Oppong, has taken a stance which we consider as very principled and worthy of commendation. The position taken by the first defendant-respondent is that of acceptance and avoidance."*

Concluding her remarks on the state of the review application by Martin Amidu, the Hon. Attorney-General again on page 634 stated thus:-

"It is our humble submission, my Lords, that the Plaintiff-applicant's quest for review is within the ambit of the law, i.e. rule 54 of C. I. 16."

In the unreported Civil Appeal No. J4/50/2014 dated 30/7/2015, intitutled Kwasi Owusu & Another v Joshua Nii Nmai Addo & Another, the Supreme Court coram, Wood, CJ, (Presiding) Ansah, Dotse, Yeboah and Benin JJSC whilst giving reasons for the dismissal of the appeal in which learned counsel for the appellants therein conceded the point in the court on the 28/7/2015 by stating thus:-

"On second thoughts, we concede the point that we are not coming under any of the provisions specified under S. 4 of the Act 459."

Wood C.J, speaking on behalf of the court in a unanimous decision commented on the concession made by learned counsel for the appellant therein in the following terms:-

"It therefore comes as no surprise that counsel conceded that their appeal is not properly laid before the court. Consequently, this appeal is incompetent, it having been filed without the special leave of this court, and therefore without following due process."

It therefore follows that, the practice of lawyers making concessions in court when circumstances demand, should rather be encouraged when made in good faith, but not otherwise. Under the circumstances we consider the attack on learned Senior State Attorney by the Court of Appeal as unwarranted.

ANALYSIS OF THE GROUNDS OF APPEAL

Before we begin an analysis of ground (a) of the appeal which is that, **the conviction is not supported by the evidence adduced**, we have to critically examine the evidence that has been led by the prosecution and to which we have copiously referred to, and juxtapose same with the submissions of learned counsel in their statements of case.

As with all criminal cases, the duty of the prosecution is to prove the charge or charges against the accused person, in this case appellant beyond all reasonable doubt.

It has already been stated that the definition of conspiracy under the criminal and other Offences Act, Act 29 of 1960 has been amended by the work of the Statute Law Review Commissioner.

Under the old definition, the following ingredients of the offence of conspiracy had to be established to obtain a conviction. These were

(1) Prior agreement to the commission of a substantive crime, to commit or abet that crime,
(2) Must be found acting together in the commissioning of a crime in circumstances which show that there was a common criminal purpose.
(3) That there had been a previous concert even if there was evidence that there was no previous meeting to carry out the criminal conduct.

Out of abundance of caution, let us refer to the old formulation under section 23 of Act 29 which states as follows:-

> *"If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime as the case may be."*

Even though we have already quoted the new section 23 of the Criminal Offences Act for purposes of emphasis, let us refer to it again, and it states as follows:-

> **"***If two or more persons agree to act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime as the case may be."*

In this new formulation, the only ingredient that has been preserved is

(1) The agreement to act to commit a substantive crime, to commit or abet that crime.

The new formulation no doubt reinforces the view that conspiracy is an intentional conduct. Marful-Sau J.A, sitting as an additional High Court Judge in the case of **Republic v Augustina Abu and others, (Unreported) Criminal Case No. ACC/15/2013** discussed the new

formulation of conspiracy and held that the new formulation had changed the scope and nature of the law on conspiracy in our criminal law."

Marful-Sau JA continued his analysis by stating thus:-

> *"The difference in the definition of conspiracy in the two statutes is in the opening sentence. While the new Criminal Offences Act, uses the words agree to act, the old criminal code uses the words agree or act. "*

The effect of conspiracy as defined by the Court of Appeal, is that the persons must not only agree or act, but must agree to act together for common purposes.

The essence of the changes brought about by the work of the Statute Law Review Commissioner **is that, under the new formulation, a person could no longer be guilty of conspiracy in the absence of any prior agreement, whereas under the old formulation a person could be guilty of conspiracy in the absence of any prior agreement.**

There is some uncertainty over the work of the Statute Law Review Commissioner and how the courts have applied the new formulation. The preponderant and correct statement of the law was stated by the Court of Appeal per Korbieh JA in the case of **Sgt. John Agyapong v The Republic**, unreported Criminal Appeal No. H2/1/2009, dated 12th February 2015 with Mariama Owusu (Ms) presiding and Dzamefe JJA making up the rest of the panel. This panel of the Court of Appeal stated as follows:-

"*Whatever counsel for the respondent meant to say, she was dead wrong to say that the new formulation of the law by the Statute Law Revision Commissioner was wrong and should be ignored".*

Continuing further, the Court of Appeal held thus:-

"It is trite law that it is only the Supreme Court that has the power to strike down a law as unconstitutional. Hence, counsel's statement that the new formulation on the law of conspiracy as contained in section 23 (1) should be ignored as invalid cannot be tolerated. Until the Supreme Court declares otherwise, the law on conspiracy shall be the formulation as contained in section 23 (1) of the Criminal Offences Act, 1960, Act 29 and any court or lawyer worth its or his/her name must consider that to be good law."

We endorse this view of the Court of Appeal for it is only a proper challenge in the Supreme Court to the work by the Statute Law Revision Commissioner that can result in the striking down of the new formulation in section 23 (1) of Act 29. In this regard, contrary views held by a different panel of the Court of Appeal in the case of ***Ekene Anozie v The Republic unreported Criminal Appeal No. H2/44/12 dated 27th/6/2013*** *coram Apaloo, Gyaesayor and Sowah JJA, where they held that, "The Commissioner by Act 562 had no powers to change any law. He accordingly usurped the powers of Parliament. The court went on further to hold and rule that, in their view"* ***the old formulation and the case law based on that***

formulation continues to be good law notwithstanding the editorial work of the Law Review Commissioner".

It would appear that the Court of Appeal itself erred by usurping the powers of the Supreme Court to render as unconstitutional a law that had been passed by Parliament. In our view therefore, the new formulation in section 23 (1) of Act 29 is the law on conspiracy in Ghana and until that formulation has been changed by constitutional amendment or recourse to the Supreme Court, the changes brought about by the work of the Statute Law Revision Commissioner are valid and remain the laws of Ghana. The decision by Marful-Sau JA in the ***Augustina Abu*** case and by the Korbieh JA panel in the ***Sgt. Agyapong case*** are therefore correct and should be applied.

Applying the new formulation in section 23 (1) of Act 29 to the circumstances of this case shows that the prosecution in the said case have not been able to establish a prima facie case against the appellant to merit his being called upon to even open his defence. We must observe that the burden of proof that vests in the prosecution to establish and prove the ingredients of an offence against the appellant remains throughout on the prosecution.

See cases **like Amartey v Republic [1964] GLR 256 at 295 SC, Gligah v Republic [2010] SCGLR 870, Dexter Johnson v Republic [2011]SCGLR 601 and Frimpong alias Iboman v Republic [2012] 1 SCGLR 297 at 313,** just to mention a few.

Learned counsel for the Respondent, was really spot on when she stated in her written statement of case thus:-

> *"To secure a conviction for the offence of conspiracy to steal, the prosecution is required to establish that there were two or more persons, that they agreed to act together and that the agreement to act was for a common purpose which in this case was to steal the 800 bags of sugar loaded on the complainants articulator truck. For the offence of stealing the prosecution was required to establish that the appellant dishonestly appropriated the bags of sugar belonging to another person."*

It is significant to observe that, the learned Principal State Attorney actually analysed the facts of the case critically in her statement of case and stated that there are a number of inconsistencies in the evidence of the 3rd accused.

The 3rd accused is the person who briefed PW5 the investigator on the involvement of the appellant and upon whose evidence the appellant was convicted. But if we examine his evidence in exhibits F, FI and his evidence in court, the impression we get is that, this 3rd accused was referring to a different operation involving cooking oil and not 800 bags of sugar. In any case, it is also clear from the record that the said operation on the cooking oil did not even take place. Wherein again lies the conviction of the appellant.

In evaluating the evidence on record against the appellant, the Court of Appeal concurred with the learned trial Judge and the first appellate court, the High Court in the following terms:-

> *"The trial Judge carefully analyzed the evidence pointing out the inconsistencies and came to the conclusion that the accused persons including the 5th accused the appellant herein agreed to commit a crime. The appellate High Court similarly carefully analysed the evidence adduced by the prosecution in proof of the charge of conspiracy at pages 4 and 5 of her judgment and came to the conclusion that the prosecution succeeded in proving that the accused persons agreed to act together with a common purpose and they acted together with a common purpose."*

We have already referred copiously to the evidence of PWI and PW5 who led material evidence in the case. Indeed, if the learned trial Circuit Court Judge had adverted her mind to the new formulation in section 23 (1) of Act 29, she would not have concluded that the appellant and the others agreed to commit a crime. This is because it is very clear that PWI did not see the Appellant at the crime scene at all. Secondly, the evidence of PW5 and to some extent that of the 3rd accused are so remote that no nexus had been established between the appellant and the others in the stealing of the 800 bags of sugar.

For example, the evidence of PW5 and 3rd accused concern deals involving the diversion of cooking oil. In any case there was no evidence on record to have established that, the said deal involving the cooking oil truck interception and diversion ever took place.

We are of the considered view that, in criminal cases such as the instant one, only one standard of the burden of proof that exists under our laws are applicable to all, irrespective of their status, vocation or profession. It must therefore be noted that, so far as proof of the ingredients of a crime are concerned, whether you are a Judge, a lawyer, Policeman, Politician or a Minister of Religion etc. the yardstick is the same.

The rules and principles on the burden of proof as has been laid down in several cases such **as Woolmington v DPP [1935] AC 262, 25 CR. APP. R 72, HL per Lord Sankey, COP v Antwi [1961] I GLR 408 SC and Lutterodt v COP [1963] 2 GLR 429** holding 3, cannot be whittled away or shifted. It is only after there has been a conviction, that your station in life, i.e status, profession, vocation etc. come into play when punishment is to be effected or imposed. We will deal with these when we consider grounds (b) and (c) later.

It is therefore our considered opinion that, the lower courts considered the positions of the appellant and lowered the scales of justice on the burden of proof in the analysis of the evidence against him in particular and the others in general.

In our mind, it is certain that the Court of Appeal took extraneous circumstances into consideration in evaluating the case. This led to gross and substantial miscarriage of justice against the appellant.

The Court of Appeal appreciated the lack of evidence linking the appellant to the offence, but failed to give him the benefit of the doubt as they were entitled to do under the authorities.

This is how the Court of Appeal itself assessed the appellant's involvement.

> *"Though the 5th accused was not identified by PW1 the victim, there is sufficient evidence on record showing he agreed to partake in "the deal" and the deal was actually executed on the 18th of January 2010 using the 1st accused's Cherokee Jeep. The deal involved stealing of 800 bags of sugar from the articulated truck driven by PW1.*
>
> *Section 24 (1) of the Criminal Offences Act reads: (1) "Where two or more persons are convicted of conspiracy for the commission or abetment of a criminal offence, each of them shall, where the criminal offence is committed, be punished for that criminal offence, or shall, where the criminal offence is not committed, be punished as if each had abetted that criminal offence."*
>
> *It is therefore not a valid argument to say that a case of stealing was not made out against the appellant. I find the trial Circuit Court and the High Court's analysis of the primary facts of this case the inferences drawn on those facts and the application of the law in respect of the charge against the accused persons including the appellant herein very sound."*

With the greatest respect, the above conclusion of the Court of Appeal is not supported at all by the evidence on record.

We have already drawn the necessary linkages that show the vacuum or lacuna in the prosecution's case against the appellant.

Indeed, if the learned lower Court Judges, had considered the caution and direction of the Supreme Court in the case of **Amartey v State** already

referred to supra, perhaps they would not have come to the conclusions they have reached in this matter.

The Supreme Court laid down the following test for general application in all criminal cases as follows:-

> *"Where a question boils down to oath against oath, especially in a criminal case, the trial Judge should first consider the version of the prosecution, applying to it all the tests and principles governing credibility of witnesses, when satisfied that the prosecution's witnesses are worthy of belief, consideration should then be given to the credibility of the accused's story, and if the accused's case is disbelieved", the Judge should consider whether short of believing it, the accused's story is reasonably probable*."

In the instant case, it is clear that the prosecution did not lead any substantial evidence to connect the appellant to the offence. For example, if indeed the Prosecution were serious in the investigations, nothing prevented them from accessing the phone call records of all the suspects and accused in the case. The Police have the power to access these phone records from the various Telecommunications Companies through the courts.

Initially, hints were given by the Police as if this was going to be done. Eventually nothing of the sort was done. Valuable evidence which could have been gathered if that had been embarked upon was lost. Secondly, the appellant indicated quite clearly in his evidence that he discussed the oil deal with his District Commander who advised against it. The

Prosecution failed to call this Commander, just as they failed and or refused to call the Immigration Officer and Frank who was the link man.

What is surprising to us is that, the fact of the duty that the burden of proof lies on the Prosecution in a criminal case was not lost on the learned justices of the Court of Appeal.

They correctly stated the law in our opinion in the following passage, but made a detour in the application of the facts of the case to the law.

This is what the Court of Appeal stated on the burden of proof.

> *"It is trite learning that the burden of proof in a criminal charge is proof beyond reasonable doubt. Section 11 (2) of the Evidence Act 1975 provides "In a criminal action the burden of producing evidence when it is on the prosecution as to a fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond reasonable doubt." Lord Denning in the case of Miller v Minister of Pensions [1947] 2 ALL ER 372 at 374 defines proof beyond reasonable doubt as follows: - "Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave a remote possibility in his favour which can be dismissed with a sentence "of course it is possible but not*

the least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice." This position of the law on the standard of proof expected in a criminal trial was confirmed by the Court of Appeal in the case of Juliana Osei v Republic [2009] 24 MLRG 203.

The inconsistencies in the evidence of the accused persons including, the appellant herein, his evidence at the trial and denial of facts he had admitted in his statement point to the fact that he had not been a truthful witness; in fact the other co-accused persons also tried to throw dust in the eyes of the court. What this points to is that they have guilty minds."

From the above rendition, it is certain that the Court of Appeal had a prejudicial mind against the appellant and the other co-accused persons. In our view, the Court of Appeal had shifted the goal posts for the appellant in this particular case. It is as if he was being called upon to establish his innocence. On the contrary, it is a cardinal constitutional principle, embedded in article 19 (2) (c) of the Constitution 1992, that a person is presumed innocent until the contrary is proved in court or he himself has pleaded guilty.

It is therefore a denial of the appellant's constitutional rights in the way the Court of Appeal proceeded with the issue of burden of proof.

Even though some doubts might have been raised by the story of the appellant, the steps set in the **Amartey v State** case, referred to supra,

are such that it is only after the prosecution had made out a case that the appellant's weak case if at all will be considered.

What is clear is that, mere suspicions, or a string of suspicions alone are not enough in drawing conclusions and inferences to support a conviction.

A Court of law must be mindful of the dangers in acting on a string of suspicions without any real and genuine basis to sustain a conviction. This warning was given by the court in the case of **State v Otchere [1963] GLR 463**, where it was held that the offence of conspiracy may be proved by direct or circumstantial evidence.

The court stated further as follows:-

> "*Where it is sought to prove a conspiracy solely by circumstantial evidence, the evidence must be such that, not only may an inference of conspiracy be drawn from it, but also that no other inference can be drawn from it."*

Since what the 3rd accused said in exhibits F and F1 and on oath in court did not connect the appellant herein to the offences charged, it was manifestly wrong in law to have convicted him on the two counts of conspiracy and stealing.

In this particular appeal, the Supreme Court is the third appellate court that the appellant has turned to. The ground of appeal that we are considering, demands that we look entirely at the record of appeal. We concede that it is within the remit of the trial court to consider and evaluate the evidence led at the trial court. It is also the duty of an

appellate court, especially a final appellate court like the Supreme Court to analyse the entire record of appeal, take into account the documentary evidence as well as oral testimony on record.

This is the only way that an appellate court will satisfy itself that, the burden of proof that lies on the prosecution in a criminal case has been discharged and that the decision arrived at by the lower courts are amply supported by the evidence on record.

Applying the above test to the instant case reveals a gaping hole which cannot be filled. The conviction of the appellant on the charges of conspiracy and stealing were therefore wrong in law and are set aside.

GROUNDS B AND C

This will then lead to the resolution of grounds (b) and (c) of the Appeal. Even though the appellant is entitled to an acquittal in view of our decision on ground (a) there are some issues raised in grounds (b) and (c) which we feel should be dealt with.

Whilst we agree with the exposition of the law by learned counsel for the appellant that since all the accused persons including the appellant herein had been tried, convicted and sentenced to 10 years imprisonment with hard labour, the reduction in the sentence of the 1st, 2nd, 3rd and 4th from 10 years to 2 years on the same evidence, maintaining the sentence of 10 years on the appellant would be bad in law and should not be allowed to stand.

See case of **Gyedu v Republic [1980] GLRD 480** where the accused persons therein had been indicted for conspiracy and tried together, it was held that it will be inconsistent for the jury to rely on the same evidence to acquit some of the accused persons and convict the other in a conspiracy charge. The same principles of law were upheld in the cases of **Kannangara Aratchiege Dher Masena v R (1951) AC Privy Council, R v Anthony (1965) 2 QB 189 Criminal Appeal 104 and others.**

The crux of the ratio in all the said cases is that, when persons are charged and tried together on an offence of conspiracy, it would be inconsistent and bad in law for some of the accused persons to be acquitted and others convicted provided the evidence is the same.

In the instant case, the evidence against the appellant is even the weakest. Assuming that the ground of appeal urged on the court in ground (a) had not been successful, the appellant would have been entitled to a reduction in the sentence alongside his other colleagues who benefited from the sentence reduction in the High Court.

However, as was stated by this court in the case of **Gligah and Another v The Republic**, already referred to supra, *"The courts must consider the status or the type of profession and or work the accused person did before sentence was imposed."*

Thus where the appellant and the others were Policemen, the court was mandated to take that into consideration and impose very harsh, severe and deterrent sentences.

However, in view of our conclusions that the conviction of the appellant is not supported by the evidence adduced during the trial, there would be no need to pursue this discussion on principles for the imposition of punishment.

CONCLUSION

In the premises, the appeal by the appellant against his conviction and sentence succeeds.

Accordingly, the judgment of the Court of Appeal dated 10th April 2014 is hereby set aside.

By necessary implication, the conviction and sentence of 10 years I.H.L which was imposed on the appellant by the learned trial Circuit Judge, dated 29th March 2011 is set aside and the confirmatory judgment of the High Court dated 1st November 2012 is also reversed and set aside.

In its place, the appellant is acquitted and discharged on all the two counts of conspiracy and stealing of 800 bags of sugar.

Appeal succeeds in the terms of the judgment stated supra.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREM COURT

CONCURRING OPINION

AKAMBA, JSC

My Lords, I agree with the opinion ably delivered by my respected brother Dotse, JSC allowing the appeal. I however, wish to add the following by way of emphasis.

It is apparent from the record of appeal before us that the 3rd accused played an important role leading to the charge of conspiracy proferred against him and others. But what were the exact circumstances?

The 3rd accused's statement linked the appellant herein and the 6th accused person, Michael Amematsror, the retired Police Chief Inspector to one Frank who mooted the deal. The trial Circuit Court as well as the first appellate court, the High Court, placed heavy premium upon the 3rd accused's incriminatory statement against the appellant. This key role of the 3rd accused was put in context by my brother Dotse, JSC in the following words:

"The 3rd accused is the person who briefed PW5 the investigator on the involvement of the appellant and upon whose evidence the appellant was convicted. But if we examine his evidence in exhibits F, F1 and his evidence in court, the impression we get is that, this 3rd accused was referring to a different operation involving cooking oil and not 800 bags of sugar."

It is trite criminal law that a confession made by an accused person which is admitted in evidence is evidence against him. It is however not evidence against any other person implicated in it. (See Rhodes (1954) 44 CR. App.

R. 23) unless it is made in the presence of that person and he acknowledges the incriminating parts so as to make them, in effect, his own.

This position is in contrast with the evidence on oath of a co-accused in a joint trial, which is evidence for all purposes, including the purpose of being evidence against the accused. (See Rudd 1948 32 Cr. App. R. 138)

At common law the plea of guilty of a co-accused was not evidence against the accused (Moore (1959) 40 Cr. App. R. 50).

In the instant case the incriminating evidence relied upon was made prior to the arraignment. It was not evidence given while they were jointly charged when the co-accused in his defence made the incriminating statement. In such instance, the co-accused against whom the incriminating statement is made has the opportunity to discount the incriminating statement in cross-examination.

To my mind the reliance on the incriminating confession by the 3rd accused to rope in the appellant in the circumstances of this case and in the absence of its acceptance by the Appellant is wrong in law and the conviction based thereon ought to be set aside.

It is therefore for the above reasons and those ably articulated in the lead judgment by Dotse, JSC that I concur that the appeal be and is hereby allowed.

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO – BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

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