IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: DOTSE, JSC PRESIDING
YEBOAH, JSC
GBADEGBE, JSC
BENIN, JSC
PWAMANG, JSC

CRIMINAL APPEAL
NO. J3/1/2016

6TH APRIL, 2017

NO. 36781 GC/2 TETTEH SAMADZI - APPELLANT/APPELLANT

VRS

THE REPUBLIC - RESPONDENT/RESPONDENT

JUDGMENT

PWAMANG, JSC:-

The conviction complained about in this appeal was in respect of two robberies at Pokuase and Ayawaso, a suburb of Pokuase, at dawn of 6th March, 2009. After a lengthy trial in which the prosecution called five witnesses and all four accused persons testified and appellant herein called five witnesses, the trial High Court, Accra on 5th December, 2013 wrote a one and half-paged judgment convicting the appellant, A2 and A4 and sentencing them to 15 years with Hard Labour. A3 was acquitted and discharged for lack of evidence. The ground for the convictions was that the accused persons were identified by the victims of the robberies and that the identifications could not be controverted. In his brief judgment the trial judge did not review the evidence led at the trial but

only narrated the facts as presented by the prosecution when the accused persons were arraigned before him. Upon an appeal the Court of Appeal in its judgment dated 18th June, 2015 stated, and rightly so in our view, that though the trial court's judgement was terse it would review the evidence on record to determine if there was evidence which if believed could justify the findings. The Court of Appeal held that upon a review of the evidence led by the prosecution the findings of the trial judge on the identification of appellant were justified. In respect of the defence of alibi put up by the appellant, the court held that on the evidence on record the trial court was right in preferring the evidence of the prosecution's witnesses to that of the appellant's and dismissed the appeal in its entirety. The appellant is aggrieved by the decision of the Court of Appeal and has appelled to us as the final court mainly on the ground that the evidence led does not support his conviction. Learned Chief State Attorney, K. Asiama-Sampong, on behalf of the Respondent urged the court in his statement of case to uphold the concurrent findings of the two lower courts and dismiss the appeal unless there is evidence to establish that a blunder or error had been caused resulting in a miscarriage of justice. He cited the case of **Achoro v Akanfella [1996-97] SCGLR 209.**

As the Respondent has rightly argued, we are here dealing with an appeal against concurrent findings though the court of first instance did not articulate any reasons to justify its findings. In an appeal against concurrent findings the second appellate court ought to be slow in reversing the findings unless it can be shown that they are not supported by the evidence on record. See **Kamil V Republic [2011] 1 SCGLR 300**. In **Gregory V Tandoh [2010] SCGLR 971** this court stated other grounds on which a second appellate court would be justified in reversing conclusions by two lower courts as including; where the findings of fact by the trial court can be seen from the record to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the case, and where the first appellate court had wrongly applied a principle of law. In those instances the second appellate court must feel free to interfere with the

said findings of fact, in order to ensure that absolute justice is done in the case.

As an appeal is by way of rehearing and in order that the appellant would be given a fair trial and adequate consideration of his defence in this final appeal, we deem it helpful to set out in chronological order and side by side, the respective cases of the prosecution and the defence as proved by the evidence. This will facilitate a determination as to whether the findings and conclusions of the courts below were well founded. But that is where there is a serious problem with the manner of compilation of the Record of Appeal. The transcript of the testimonies of the witnesses is not in the usual order in which witnesses testify and that makes the whole record incoherent. A witness's testimony cannot be found at one particular part of the record but you have to jump over several pages forward and backwards in search of it. There was no PW5 but the record makes reference to PW6 and the transcription of the evidence is in bad English. The lawyer for the appellant too has been unhelpful in this regard since some of the confusion in the record could have been rectified by correction and re-arrangement. Furthermore, in his statement of case appellant's lawyer did not give sufficient guidance to the court as to where to find what testimony that may support the case he was making. The record itself is incomplete but that is a matter that will be addressed later in the judgment. Parties who impeach judgments either through appeals or other means have a duty to ensure that the record is orderly and easy to read since a confused record may adversely affect their chances of success. Nonetheless, in order to discharge our duty to do substantial justice in all cases, the court had to undertake a winding journey through the record in order to discover the true facts in the case.

PW1 and her husband PW2 testified in respect of the Pokuase robbery and stated that they were robbed roughly between 3.00am and 3.30am on 6/3/2009. Their account of the incident was that they were asleep when around that time the main door to their self-contained apartment house was broken open by use of concrete blocks and the noise woke them up. When they moved from their bedroom into the hall they saw appellant who fired a shot from a gun he was holding and the husband

fell down out of shock. He got up and they ran to their kitchen in order to escape through a door there that lead outside the house but the husband who was ahead on reaching that door saw A2 holding a knife standing there. He ran back into the house and entered a bath room, closed it and requested his wife who was following him to keep watch in front of its door. The appellant got to her, pointed the gun at her and held her hostage while one of the robbers searched their bedroom and took some mobile telephones and money belonging to the husband. PW1 and PW2 described the manner of dressing of appellant at the time of the attack as wearing long boots with a black trousers stuck into the boots and a black T-shirt which was also stuck in. PW2 who said he saw all three assailants through the window of his bathhouse when they were leaving after the robbery described the second robber as also dressed in black trousers and black top and the third was in blue jeans and a checked shirt. Under cross examination PW1 said the robbers were three in number but apart from appellant she would not be able to identify the other two. In the morning after the robbery the husband who is a news vendor went to work and the wife went to make a report at Pokuase police station about 6. 30am. Whilst there appellant and A2 were brought in by a mob that had arrested and assaulted them alleging they carried out the robberies that dawn. She identified the two as among the robbers that attacked them at their house.

It was the robbery at Ayawaso that resulted in the arrest of appellant and the other accused persons. Despite the fact that the record indicates the presence of a crowd at Ayawaso when appellant drove his car there, only one person testified. The key person in the events at Ayawaso was Justice Acquah and he gave evidence as PW3. Unfortunately, his evidence-in-chief is absent from the record. This situation pertained in the first appeal and lawyer for the appellant argued in the court below that the judgment of the High Court ought to be set aside since there was no complete record upon which appellant was convicted. The court rejected that contention and held that the record before it contained the cross examination of PW3 during which lawyer for the appellant led the witness to recount the matters he testified to in his evidence-in-chief. As the Court of Appeal rightly found,

the record before us contains that cross examination of PW3 with copious references to his evidence-in-chief and further details of what happened at Ayawaso that dawn. In addition to that, the police investigator gave evidence covering the facts of the case he obtained upon interviewing PW3 and through his investigations and together they provide a clear picture of the version of the prosecution as to what transpired at Ayawaso concerning the robbery there. The Respondent in his statement of case urged us to proceed as the court below did and determine the appeal on the record as it stands. Because it was appellant who complained about the state of the record in his statement of case, when the appeal came on for hearing before us we put him to his election whether he wanted the court to determine the appeal on the record as it stood or he wanted it remitted to the trial court for rectification. He opted for the determination of the appeal on the record as its stands. Besides, the appellant was convicted on three counts with only one count based on the Ayawaso robbery such that even if his conviction were to be set aside on the basis of the absence of PW3's evidence-in-chief, it would be in respect of only that one count leaving the convictions on the two other counts standing against him. In any event, the view of the court is that in the circumstances of this appeal, the absence of that part of PW3's testimony from the record does not obfuscate the evidence as a whole such as would cause a miscarriage of justice if the appeal is determined on it. This case is different from the Supreme Court case of **John Bounah @ Eric Annor V Republic, Criminal Appeal No. J3/1/2015, 9th July, 2015 unreported,** in which the court conditionally discharged an appellant against conviction on the ground that the entire testimonial evidence of the nine prosecution witnesses as well as that of the accused person was missing from the record. In that case the court had no record properly so called that could be relied upon in determining the appeal and miscarriage of justice would have been occasioned if the court proceeded but not in this case. In the circumstances we shall determine the appeal on the record as it stands**.**

From the evidence given by the prosecution's witnesses, the events at Ayawaso that culminated in the arrest and beating up of the appellant

and other accused persons are as follows; According to PW3, between 1.30am and 2.00am on 6/3/2009 he was attacked by a gang of armed robbers at his home. He said they broke down the door to his house with concrete blocks and entered. They demanded for money and when he did not give it they shot at him, overpowered him and stole his money, Motorola mobile phone and DVD player. He shouted for help but out of fear none of his neighbours came to his rescue. He said he did not know their exact number but some wore masks. However, he saw appellant and A4 among them. Before leaving his house, the robbers tried to lock him up in one of his rooms but he resisted resulting in them beating him up severely whereby he collapsed. He was resuscitated by some neighbours a few minutes after the robbers left his house and together they went to look for his attackers at a refuse dump near his house known to harbour criminals. When they got there, he saw a black VW saloon car with tinted glass windows and it sped off on seeing them. Whereas in the course of his testimony in court PW3 mentioned VW Gulf car, PW6 said during the investigation there was only mention of a black VW saloon car. PW3 said when the car sped off he immediately called his mother and narrated the incident to her and requested that a road block be mounted to trap the getaway car. Ayawaso lies opposite Pokuase junction and adjoins the Nsawam-Accra side of the dual carriage road. From the record PW3 mother's house is at the village centre while PW3's house is closer to the main Nsawam-Accra road. PW3's mother got a barrier mounted but after sometime no car passed so she called PW3 for them to mount another barrier near his house apparently in case the getaway car went in the direction of the main road. So PW3 and some neighbours mounted a barrier near his house and were guarding it. Under cross examination PW3 admitted that while guarding the barrier with his neighbours appellant drove his black VW Gulf car up to them in the direction of the village centre with two taxis following him and he came down from the car and requested them to open the barrier for them to pass. PW3 duly opened the barrier and they drove through. Appellant led the taxis to the village and then returned through the barrier near PW3's house and alighted A2 and A4 at A2's house just after the barrier and drove towards the main road. According to PW6 it appeared that it was after appellant passed through the

barrier mounted by PW3 and his neighbours the second time on his way out of Ayawaso that they noted that the car was a black VW car and that the getaway car they were looking for was also said to be a black VW saloon car. According to PW3 when it was learnt that A2 was in the black VW Gulf car the crowd rushed to attack A2 and A4, suspecting that they had something to do with the robbery. It was while the neighbours were holding A2 and A4 that the appellant appeared again in the same black VW Golf car and was arrested.

From the evidence of the investigator, when the police went to investigate the Ayawaso robbery PW3 initially refused to cooperate with them and would not tell them what really transpired. However, PW3 was clear in his evidence that A2, whom he knows very well as living in the same vicinity as himself, was not among the robbers who attacked him in his house. PW6 stated the basis for the mob arrest of the appellant in the following question and answer in cross-examination at p 78 of the record;

'**Q. The onlookers identified him as the one who committed the robbery somewhere? Is that what you are telling this court? The onlookers saw the 1st accused and identified him as the one who committed the robbery at 1am?**

A. All of them mentioned about the use of VW Saloon car. Eventually the VW Saloon car was returning from Pokuase driven(sic) by the 1st Accused person. And when they saw the first accused in the car he was driving into Pokuase, they remembered that this same man driving VW Saloon had earlier been (sic) spotted immediately after the robbery and as such he is one of those who robbed them.'

The impression one gets from the prosecution's own evidence is that A2 and A4 were attacked by the onlookers, not on account of on the spot identification by PW3, the victim of the robbery but on the basis of the type of car that dropped them off and it was on the same basis of the type of car being driven by appellant that the mob arrested him.

On the other hand, the case of the appellant was that he is a policeman living in a compound house at Abelenkpe in Accra and has a piece of land at Pokuase given to him by his father which he was developing. On the fateful, 6/3/2009 he woke up by 3.30am in order to pick up his worker, A3, at Pokuase to his building site to indicate some work to be done there and to return to his duty point at Flagstaff House before 6am. He did some press-ups in his room for exercise, came out and sat on the compound and polished his police boots. He placed a bucket of water by his side to bath in the common bath room of the house. While on the compound a *kenkey* seller and her workers who also live in the house came out of their room, greeted him and set about preparing their *kenkey*. After his bath he dressed up in his police uniform, drove his black VW Gulf car to Pokuase, picked up A3 and drove with him to his building site which is towards Accra. At the junction to Ayawaso appellant had noticed a motor accident and when he was returning to Pokuase to drop off A3, A3 expressed interest in viewing the accident scene. Appellant thus turned to the accident scene which was on the side of the dual carriage towards Accra. He got down there and even helped the police who were attending to the accident. It was then around 4. 40am and as he was about to depart to Accra the station master at the taxi rank at the junction pleaded with him as a policeman to help clear a road block the community at Ayawaso mounted because of a robbery that dawn and prevented the taxis from operating there. A3 told appellant that A2 who at times worked for him lives in that area so they should assist the taxi drivers. A3 sat in appellant's car and they led two taxis loaded with passengers and drove towards Ayawaso. On their way they stopped and picked up A2 and A4 to assist them. After picking them up they got to the road block around 5.00am and saw many people there so he got down and enquired the reason for the barrier from PW3 who appeared to be the main person. He explained that he had been robbed that dawn hence the blockage. PW3 then looked inside appellant's car and the taxis after which he opened the barrier for them to pass through but warned them that there was another barrier ahead. At the barrier ahead at the village appellant and A2 talked to the leaders of the crowd and they allowed the taxis free passage. They then returned through the first barrier, dropped off A2 and A4. He alighted

A3 at his home at Pokuase and drove off towards Accra around 5.30 am. On his way he received a telephone called from A2 and A4 who were talking amidst cries of '*ajei, ajei'* that the people in the area had jumped on them accusing them of being those who carried out the robbery that dawn since they came down from the black VW car he was driving. They said they needed him back if not they would be lynched so he drove back and met A2 at the junction. He picked him up and decided to drive with him back to the crowd to explain to them that A2 was with him. His explanation was accepted by some in the crowd but others rejected it and started shouting in Ga language; '*julou! Julou!'* (thief! Thief!). Thereupon he was arrested and together with A2 and A4 and they were assaulted terribly with all manner of implements. A4 was nearly killed but was saved by a good Samaritan and sent to Nsawam hospital where he was hospitalised. Appellant and A2 were sent to Pokuase police station.

The above stated account of appellant from the time he led the taxis from the taxi rank at Ayawaso junction up to his arrest is not much different from what PWs 3 and 6 said in their evidence at the trial. It is the same story that the other accused persons, including A3 who was acquitted and discharged for want of evidence, stated in their statements to the police and in their testimonies in court. The appellant's defence was simply that he was not at Ayawaso between 1.30am and 2.00am when PW3 was robbed nor at Pokuase at 3.30am when PW1 and PW2 were robbed so it was a case of mistaken identification. He indeed filed his alibi which the police were required to investigate. He was also required to lead evidence to prove the elements of his alibi. According to PW6, the police investigator, he was taken to appellant's building site at Pokuase and he saw that it lies in the direction of Accra as appellant said. PW6 under cross examination confirmed that records at Amasaman Police indicated that there was an accident at Ayawaso junction around 2.30am on 6/3/09. PW6 also confirmed that appellant drove to Ayawaso that morning, drove out and was re-entering when he was arrested. Furthermore, there was evidence of the road blocks at the time police visited the scene. Appellant on his part called the *kenkey* seller and her workers in his house as DWs1,2

and 3 who confirmed seeing him on the compound of their house around 4.00am that morning of 6/3/09. His wife testified that he slept by her from about 8.30pm the previous night till he woke up around 3.30am on 6/3/09. The court takes note that the evidence of appellant's wife was not controverted in the brief cross examination that was conducted by the prosecution. The bookman at the taxi rank at Ayawaso junction testified as DW5. He stated that he met appellant on Friday 6/3/09 at about 5.00am at the accident scene at the Ayawaso junction and sought his assistance to get the members of the Ayawaso community to open a road block for their taxis.

Since the conviction was based substantially on identification but the appellant contends that it was a case of mistaken identification, in the evaluation of the evidence to determine if the conviction was proper the court is required to note the caution about convicting on evidence of identification stated by the Court of Appeal in the case of **Hanson V Republic [1978] GLR 477**. In that case the Court of Appeal set aside a conviction based on identification of the appellant who pleaded alibi and in its judgment delivered by Archer JA (as he then was) at pages 486 to 487 he said as follows;

'In R. v. Turnbull [1976] 3 W.L.R. 445 Lord Widgery C.J. delivering the judgment of the Court of Appeal (composed of five judges) laid down these rules of guidance which I have no hesitation in adopting. At p. 447 he stated as follows:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."'

The evidence led by the prosecution in respect of the Ayawaso robbery leaves a reasonable doubt as to the involvement of the appellant. PW3 admitted that the appellant drove his car in front of two taxis into Ayawaso the morning of the robbery and came out of it and spoke to him at the barrier that was mounted to arrest the robbers and he allowed him free passage without causing his arrest. If he actually saw appellant among the robbers that dawn he would have immediately identified him and caused his arrest at the barrier. The facts presented by the prosecution talked of PW3's wife who was said to have escaped from the robbery but no such wife testified in court. There was also mention of arrest of one of the accused persons while he was running away from the scene of the crime holding a cutlass but no such evidence was proferred. PW3 said he was robbed around 2.00am but the evidence shows that the accused persons were arrested between 5.30am and 6.00am and none was arrested while running away from the scene of the robbery. Furthermore, the prosecution's case on the Ayawaso robbery appears to conflict with the evidence that the appellant and the other accused persons voluntarily offered to clear the road blocks mounted at Ayawaso to arrest the robbers. In our opinion, the finding that PW3 sufficiently identified the appellant as among the robbers who attacked him is inconsistent with the totality of the evidence on record in respect of the Ayawaso robbery and it ought to be set aside.

However, the identification of the appellant by PWs1 and 2 certainly amounted to a prima facie case of his involvement in the robbery at Pokuase but in such a situation the law demands that before deciding to convict the accused person the court is required to consider his defence with care to see if it creates a reasonable doubt as to his guilt. In **Lutterodt v Commissioner of Police [1963] 2 GLR 429** the Supreme Court through Ollennu JSC stated at page 440 as follows;

Where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages:

(1) Firstly it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the court should acquit the defendant;

(2) If the court should find itself unable to accept, or if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and

(3) Finally quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e., prosecution and defence together, and be satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if not, it should acquit.'

See also Darko v Republic [1968] 203.

The Court of Appeal at page 366 of the ROA stated as follows with regard to the defence of the appellant;

"DW2 said she saw the 1st appellant around 4.00am. She said she did not see him between 1.00 am and 3.30 am. DW3 said she saw the appellant at 4.00am on 6/3/2009. She too said she did not see him between 1.00 am and 2.30am. DW5 said he saw the appellant around 5.00am on the 6/3/2009 at the accident scene. It was only DW4 (the wife of 1st appellant) who said that she saw him at the material time, i.e between 1.00am and 3.30am. She said in her examination in chief that she went to bed with her husband around 8.00pm the previous night and that he was still in bed at 3.30am the following morning. It was therefore the word of DW4 (sic) against the word of PWs 1,2 and 3. Having regard to the totality of the evidence, the trial judge by inference, rejected the defence of alibi put up by the 1st appellant by preferring the evidence of the prosecution witnesses. I hold that he was right to have done so."

In our respectful view, the Court of Appeal erred in upholding and approving by inference the approach the trial court adopted in rejecting the defence of the appellant without more. The law as explained above required the court if it preferred the case of the prosecution witnesses against those of the appellant to go a step further and consider if the defence of the appellant was nevertheless reasonably probable. A reading of its judgment shows that the Court of Appeal itself did not take this second step in the consideration of the defence of the appellant. It therefore erred by failing to consider the defence of the appellant in accordance with the dictates of the law. If the court had undertaken that exercise it would have had to consider whether, taking the evidence of appellant and the corroborations by his witnesses whose evidence was not successfully impeached and his wife whose evidence was not controverted, and the consistency of the statements of all the accused persons right from the start in their caution statements and then in their testimonies, it is reasonably probable that appellant was not one of the perpetrators of the robbery at the house of PWs1 and 2 at 3.30am on 6/3/09 and that this probably is a case of mistaken identity. In the case of **Forkuo and Others v Republic [1997-98]1 GLR 1** at page 12 of the Report, Forster, JA noted as follows;

"The credibility of an alibi is greatly enhanced or strengthened if it is set up at the moment the accusation is first made and if it is consistently maintained throughout the subsequent proceedings. But if it is not resorted to at the very first opportunity and it is raised rather belatedly during the trial, then this is a potential circumstance to lessen the weight and force of the defence."

In this case the appellant set up his defence of alibi right from his arrest and maintained it through out so it ought to have been given more weight than the courts below accorded it. It may well be that having regard to the circumstances of the robbery as narrated by PWs1 and 2 they could have been mistaken in their identification as for instance PW1 purported to identify A2 at the police station when he was brought in as one of the robbers though she said she saw only appellant during the robbery.

In **R v Wunuah [1957] 3 WALR 303,** van Lare Ag. CJ cautioned trial judges in the following words at page 305 of the Report;

" On this issue the judge simply rejected the appellant's defence that he acted at a time when he was deprived of the power of self-control and did not appreciate, until after the event, what he had done. In this the judge again erred by failure to consider the alternative arising, following upon the appellant's explanation not being accepted, whether such explanation might reasonably be true. It would appear to this court that there is a tendency growing on the part of trial courts in this country to confine considerations in cases where the explanation of an accused person is in issue, to whether or not the explanation is true and not to consider the alternative narrower issue whether the explanation of the prisoner might reasonably be true. This tendency in our view is dangerous and we must seriously deprecate it." (He further said at page 306 that;)

"The position of the law in our opinon on the authorities is that if the explanation given by the prisoner is not accepted by the court, nevertheless if it might reasonably be true a doubts as to guilt arises, and in that event the prosecution has failed to discharge the onus on it, and the prisoner is entitled to the benefit of such doubt."

We associate ourselves with these remarks of van Lare Ag. C J. It appears to us that if the courts below had carefully considered the facts of the case as established by the evidence and applied the test of reasonable probability of the defence of the appellant, they would have come to a conclusion different from the one they arrived at. In the considered opinion of the court, the circumstances of this case and the evidence led makes the appellant's defence of alibi reasonably probable and ought to have entitled him to an acquittal. The error committed by the lower court has occasioned a miscarriage of justice so the concurrent findings ought to be reversed. The lower courts appear to have allowed themselves to be swayed by the tendentious presentation of the facts of the case by the prosecution upon the arraignment of the

accused persons which was not evidence but in this case gave a picture totally at variance with the proven facts. Trial courts must avoid falling for the version of the prosecution in criminal trials without subjecting its case strictly to the constitutional standard of proof beyond reasonable doubt. The proven facts and circumstances of this case leave a reasonable doubt as to the involvement of appellant in the robberies in question. A strong defence of alibi, it is said, weakens the prosecution's case and creates a reasonable doubt as to whether the accused is the perpetrator of the crime he is charged with. See **Bediako V The State [1963] 1 GLR 48 and R V Chadwick (1917) 12 Cr App R. 247.**

In conclusion, our opinion is that upon the application of the correct legal principles to the totality of the evidence led in this case the appellant's conviction cannot be supported and it ought to be set aside. The appeal is allowed and appellant is acquitted and discharged.

SGD G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I had the opportunity of reading the draft opinion of my brother Pwamang JSC which I entirely agree. However, I wish to express my opinion in support of this judgment on a serious matter which is gradually creeping into our criminal jurisprudence.

In this appeal, it appears the case was hotly contested as the prosecution called five witnesses to prove the case of robbery against the appellant. The appellant also gave evidence and in his defence of

alibi called witnesses in support. Earlier on the appellant had given a cautioned statement to the Police in line with his defence of alibi, in which he stoutly denied that he was no where near the scene of the crime and had nothing to do with the robbery.

In such a case, a trial court's basic duty is to make primary findings of facts through an evaluation of the evidence but surprising by this case, it abandoned its mandatory duties. The learned trial Judge after requesting the facts of the case presented by the prosecution on the first arraignment, proceeded to convict the appellant without any reference to the evidence led by the prosecution and the defence.

As a trial Judge he was enjoined to critically evaluate the evidence before him and offer reasons why the case of one of the parties ought to be believed. See *Quaye v Mariamu [1961] 1 GLR 93 SC*.

In the recent case of *Nagode v The Republic [2011] 2 SCGLR 975* this court condemned such practice whereby in contentious criminal trials reasoned judgments are not written even by the appellate courts.

Another serious error which the learned Judge committed was that he never considered the caution statement of the accused tendered by the prosecution. A caution statement of an accused person may go to his defence or incriminate him. In this case what was tendered by the prosecution as the caution statement of the accused person supported his defence of ablibi and the learned Judge in a summary trial was enjoined by law to have considered it as part of his defence. It is trite learning that a defence however weak ought to be considered by the court. If a caution statement is admitted in evidence and raises any defence known to the law, the trial court is enjoined by law to consider

it. See *Annoh v Commissioner of Police [1963] 2GLR 306 SC and Kumah v The Republic [1970] CC 113 CA.*

All these serious steps were blatantly ignored by the learned trial Judge. I hope that trial courts and appellate courts will in future perform this simple duty as criminal trials affect the fundamental human rights of accused persons who appear in our courts for Justice.

SGD ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

My lords, permit me to detain the precious time of the court to comment by way of future guidance only on the length of time that the matter herein took to be disposed of from the date that the accused persons were arraigned before the trial court to the conclusion of the case. In my view, the obligation placed on trial judges by virtue of article 19 of the 1992 Constitution appears to have been glossed over. Article 19(1) provides as follows:

> *"A person charged with a criminal offence shall be given a fair hearing within a reasonable time by the court*."

The language by which the above fundamental human right and freedom is expressed is free from any conflict as to its meaning and places an obligation on judges to ensure that cases involving accused persons that are brought before them are dealt with reasonable expedition. It is to be noted that failure to comply with article 19(1) may be a good ground for intervention by the High Court under article 33 of the Constitution if the breach were to have occurred in proceedings before a court other than the High Court for among others, a remedy that the court 'may consider appropriate for the purpose of enforcing or securing the enforcement' of the infringed provision. The authority conferred on the court under article 33 is quite extensive and enables it in appropriate instances to grant remedies other than those specifically mentioned in article 33(2) such as habeas corpus, mandamus, prohibition and quo warranto. The fact that the Constitution confers exclusive jurisdiction on the High Court in the enforcement of the fundamental rights and freedoms guaranteed under the Constitution is an acknowledgement of the court's power as guardians of the constitution and guarantor of the rights of citizens. The authority conferred on the High Court under article 33in relation to the fundamental human rights and in particular article 19(1) places an onerous responsibility on judges who preside over the trial of criminal matters to so manage the proceedings such that the right of accused persons to have trials held within a reasonable time may be given teeth and meaning in order that our citizens can reciprocally respect provisions of the Constitution. When courts of law violate rights and freedoms whose enforcement and or enjoyment they are constitutionally mandated to superintend trials conducted in breach of the constitution

lose the force of law rendering the judges acting not in accordance with their judicial oath. Such conduct also undermines confidence in the criminal justice system of which judges are active participants who are required to ensure that rights of citizens are respected and not violated with impunity. Indeed, if provisos of the Constitution should be violated at all, it is difficult to comprehend that acts of infringement would occur in our courts without any remedy to those affected thereby. Such acts are blots on the capacity of our courts to protect the rights guaranteed to us by the Constitution. Judges must bear in mind that it is not for nothing that the framers of the Constitution made provision in article 2(1) as follows

> *"A person who alleges that any act or mission of any person is inconsistent with, or in contravention of a provision of this Constitution, may bring an action to the Supreme Court for a declaration to that effect*."

It is important to observe that ensuring compliance with constitutional provisions engenders in the citizenry, a reciprocal respect for the constitution. On the other hand, when courts do not exercise the authority conferred on them to ensure observance with constitutional provisions, respect for the law, which is a pre-requisite for the rule of law and good governance is eroded.

Although the constitution has not provided what a reasonable time is, it seems to me that pending a clear pronouncement of time frames for criminal trials by the Supreme Court, this can for the time being be

determined on a case to case basis having regard to the nature of the offence, the evidence and availability of witnesses. In my view, as many criminal trials have tended to be unduly long with accused persons being prejudiced by the violation of article 19(1), the time has come for us to confront these delays by placing presumptive ceilings on types of cases to be followed by the prosecution and serve as a basis for trial judges to adopt more effective case management techniques that are designed to ensure compliance with the article under reference.

Reference in this regard is made to the Canadian case of **R v Jordan** [2016] 1 SCR 637 in which the Supreme Court came to the view that section 11(b) of the Canadian Charter of Rights and Freedoms which is expressed in words that are substantially the same as article 19(1) of the 1992 Constitution provides for criminal cases to be tried within a reasonable time had been infringed by a trial held more than the period provided in the framework earlier set out by the court in **R v Morin** [1992] 1 SCR 771. Based on the infringement of the constitutional provision set out by the court in R v Morin (supra), the Supreme Court set aside the conviction and ordered stay of proceedings. Speaking for myself, the recent decision of the Supreme Court in **Martin Kpebu v The Republic**, an unreported judgment dated May 05, 2016 by which the court declared unconstitutional certain provisions of the Criminal (Procedure and Offences Act), which denied bail in respect of specified crimes was to a large extent in my respectful opinion affected by the absence of any clear guidelines in regard to the requirement contained in article 19(1). In the R v Morin case (supra), the Supreme Court in

amajority decision by La Forest, Sopinka, and Gronthier. Mc Lachlin, Stevenson and Lacobucci JJ (Lamer CJ dissenting) held:

> *"The primary purpose of section 11.b is the protection of the individual rights of accused persons :(1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. The right to security of the person is protected by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh."*

In declaring the trial which had infringed section 11(b) of the Canadian Charter on Rights and Freedoms, the Supreme Court derived its authority from section 24(1) of the Canadian Charter of Rights and Freedoms which is expressed similarly like article 33 (2) of the 1992 constitution by which novel remedies that are responsive to the needs of particular cases may not only be warranted but also required to effectuate compliance with article 19(1) of the Constitution. I do not think for a moment that the purposes acknowledged by the Supreme Court in the R v Morin case (supra), is any different from that for which article 19(1) of the 1992 Constitution was intended to achieve and hope that in future we shall seeking guidance from countries such as Canada to lay down guidelines for compliance in terms of what is meant by "a fair hearing within a reasonable time" in criminal cases.

From the record of appeal before us, the parties were first arraigned before the trial judge on August 11, 2009. The trial of the case was commenced on the same date but unfortunately pended before the court until December 05, 2013 when judgment was delivered in the matter. The evidence contained in the record of appeal is not bulky and had the learned trial judge adverted his mind to the obligation imposed on him by article 19 (1), he would have directed a more expeditious course of trial in order to achieve the constitutional purpose intended to be given effect to in the trial of criminal cases.

In the course of the trial had in the trial High Court, there were adjournments granted in between the reception of evidence that endured in some cases beyond six months. It is to be observed that trial judges in criminal cases should endeavour to have some indication from prosecuting attorneys and or prosecutors and counsel for the accused in terms of the probable length of the trial and where possible get their collaboration and assistance in making the witnesses available for the matter to be dealt with expeditiously. There can be no justification for the reception of evidence in a criminal matter in which witnesses are all within the jurisdiction to span the period August 11, 2009, to January 24, 2012. Then there is the period between the submissions of addresses which ended on April 24, 2013 and the delivery of judgment almost eight months thereafter notwithstanding the statutory period of six months allowed for High Courts. These defaults have been pointed out of several others to demonstrate that the learned trial judge lost control of the proceedings contrary to the obligation which he assumed by virtue of article 19 (1). Although no issue has

been raised in the matter herein concerning these defaults, attention is drawn to them for the purpose of future guidance in order to ensure that as the guardians of the constitution, our courts will rise up to the expectation of society by ensuring their observance of the provisions whose enjoyment they are required to superintend.

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

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

SGD **A. A. BENIN**
(JUSTICE OF THE SUPREME COURT)

COUNSEL

ALBERT ADAARE FOR THE APPELLANT/APPELLANT
ASIAMA SAMPONG (CHIEF STATE ATTORNEY) FOR THE RESPONDENT/RESPONDENT