IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CRIMINAL APPEAL

NO. J3/02/2018

8TH MARCH, 2018

KINGSLEY KUCHAMA a.k.a FRIDAY …….. APPELLANT

VRS

THE REPUBLIC …….. RESPONDENT

JUDGMENT

YEBOAH, JSC:-

My Lords, this appeal raises an issue for our consideration in respect of failure on the part of a trial court to record a conviction before sentence.

To appreciate the reasons for our decision, a brief summary of the facts will suffice. The appellant herein and six others were charged with the offences of conspiracy to commit robbery contrary section 23(1) and 149

of Act 29, and Robbery contrary to section 149 of Act 29 of 1960. It appears that he was solely also charged with possession of firearms without lawful authority contrary to section 6 of Act 112 of 1962. The appellant and others whose appeal is now before us on 3/11/2002 had boarded different vehicles from Accra bound for Mankessim in the Central Region and all of them alighted at Enyisam Abbor, a town near Mankessim. On the following day, which was the 4th /11/2002, the appellant and others armed with pump action gun, cutlasses, knives, etc mounted a road block on the main Accra – Mankessim road, succeeded in stopping all vehicles from both sides and subjected the passengers to severe beatings and robbed them of their monies.

The timely intervention of the police and the people of Eyisam Abor led to the arrest of the appellant and other accomplices. All of them were later identified by the victims of the robbery who testified when they were arraigned before the High Court, Cape Coast for trial on the charges referred to above.

The learned High Court judge sentenced the accused person herein to thirty years imprisonment in hard labour after the trial. He lodged an appeal at the Court of Appeal, Cape Coast, against his sentence and had the sentence reduced to twenty-five years. The appellant has lodged this appeal before us and counsel for the appellant has raised as one of his grounds of appeal that the learned trial High Court judge did not convict the appellant before sentencing him and therefore the sentence imposed thereafter was wrongful in law. Counsel placed reliance on section 177(1)

of the Criminal and other Offences (Procedure Act) Act 30, 1960 which provides thus:

> (1). The court, having heard the totality of the evidence, shall consider and determine the whole matter and may
>
> (a). Convict the accused and pass sentence on or make an order against the accused, or
>
> (b). Acquit the accused and the court shall give its decision in the form of an oral judgment, and shall record the decision briefly together with the reasons for it, where necessary.
>
> [emphasis ours]

On this issue, learned counsel for the appellant left the court unassisted and did not cite any decided case which was decided on Section 177(1) of Act 30 of 1960.

This issue first arose in our criminal procedure in the case of COMMISSIONER OF POLICE V MARTEFIO & ORS (9 WACA 40). In the above case the West African Court of Appeal laid down the law that since the non-compliance with a statutory requirement and the failure on the part of the trial court to convict was a serious omission, no lawful sentence could be passed without the conviction. This dictum was applied in the case of REGINA V MENSAH & ORS [1960] GLR 53 CA which was an appeal before the Court of Appeal but the trial was with assessors whose opinions were conflicting on record.

However, in the case of SEEDI v COMMISSIONER OF POLICE [1946] 12 WACA 29, in which the appellant was tried summarily by a magistrate court, the appellant was sentenced without record of findings of guilty or conviction against him. The West African Court of Appeal was of the view that the omission to convict or pronounce guilty against the appellant was a mere technicality and substantial justice could be done if the omission could be corrected. However, in the case of BINEY V THE REPUBLIC [1969] CC 70 CA the Court of Appeal, then the highest court of the country formed the view that the SEEDI case was given per incuriam on the grounds that the court did not refer to the MARTEIFIO case which was decided by the West African Court of Appeal. It must be pointed out that in the BINEY's case the court failed to convict on one of the two charges that the appellant was charged. The Court of Appeal, relying on the two West African Court of Appeal cases referred to above quashed the conviction and rejected the principle in the SEEDI case.

The courts in this country, however, have on countless times been confronted with those conflicting authorities and regardless of the fact that the BINEY's case is the latest Court of Appeal decision on the issue of whether failure to convict amounts to a serious irregularity which would lead to quashing of a conviction is not free from doubt.

The problem resurrected in the case of STATE V WUNAMA [1965] CC 60 even though the court did not fully discuss the previous authorities in detail on the effect of omission to convict but nevertheless relied on the SEEDI's case and held that the omission was a mere irregularity. However, in the case of KINI V THE REPUBLIC [1980] GLR 412, Taylor J

(as he then was) reviewed all the existing authorities and in a more comprehensive manner ignored the ratio decidendi in the BINEY'S case and applied the SEEDI case. He referred to section 7 of the Criminal Procedure Code (Amendment) Act, 1965 (Act 261). It states thus:

> "Provided that the court shall, notwithstanding anything to the contrary in the foregoing provisions, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or that the point raised in the appeal consists of a technicality or procedural error or of a defect in the charge but that there is evidence to support the offence alleged in the statement of offence or any other offence of which the accused could have been convicted upon that charge"

He subjected all the decided cases which has been referred to above to review, including the only Supreme Court case of C.O.P v SARPEY & NYAMEKYE [1961] GLR (PART II) 756 SC and concluded that in his view, with the coming into force of the Criminal Procedure Code (Amendments) Act, 1965 (Act 261) S7, which was the law as it stood at the time of the BINEY's decision in 1969, that the decision was given in error. The issue was lately raised again, this time before KANYOKE J (as he then was) in the case of NYARKO V THE REPUBLIC [1999-2000] 2 GLR 252. His Lordship also referred to all the previous authorities and the conflicting judicial pronouncement on this issue. He cited with approval the dictum of Archer J (as he then was) in the case of DONTOH V THE STATE [1967] GLR 280 which probably eluded Justice Taylor in the KINI's case and held inter alia thus:

"the failure by a court to record a conviction or convict an accused who pleaded guilty to an offence before passing sentence on him was a mere technical or procedural irregularity and not a fundamental error in law" [emphasis ours]

His Lordship did not follow the BINEY's case and proceeded to dismiss the appeal. In this case, the learned Principal State Attorney has referred us to the definitions of CONVICT and CONVICTION in BLACK'S LAW DICTIONARY 9th edition thus:

"CONVICT is to find (a person) guilty of a criminal offence upon a criminal trial, a plea of guilty or a plea of bolo contendere (no contest)"

CONVICTION is defined thus

"The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime".

The record of appeal reveals adequately what the learned trial judge said before passing sentence as follows:

"BY COURT: All the accused found guilty of the various offences. A1 is found guilty of the offence of robbery. The role of A1 in procuring the assistance of others in committing the offence makes his case exceptional. A1 is sentenced to 30 years I.H.L on count 1, 30 years on count 2 and 30 years on count 3. Sentences to run concurrently"

In our respectful view, we find from the submission of counsel for the appellant that the mere absence of the word CONVICT in the above order of the court renders the thirty years sentence bad in law as very disturbing indeed. In as much as in all criminal cases in this country and elsewhere the liberty of the accused person is paramount, a court of law naturally in the course of judicial proceedings may make errors in the nature of omissions, but it is the duty of appellate courts to carefully consider whether such errors are fundamental and occasion injustice to an appellant. This has found statutory support in section 406(1) of The Criminal and other Offences (Procedure) Act, Act 30 of 1960 which section was not referred to in all the cases referred to in this judgment. The section falls under Irregular Proceedings and states thus

> "406 (1) subject to this part, a finding sentence or order passed by a court of competent jurisdiction shall not be reversed or altered or altered on appeal or review on account
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> (a). <u>of an error, omission, irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or any other proceedings before or during the trial or in an inquiry or any other proceedings under this Act,</u> or
>
> (b). of the omission to revise a list of Jurors in accordance with Part five, or
>
> (c). of a misdirection in a charge to a jury, unless the error, omissions irregularity or misdirection has in fact occasioned a substantial miscarriage of justice"

We find that the so-called error to convict which counsel for the appellant seeks to make maximum complaint about was a mere irregularity as found by Taylor J (as he then was) in the KINI's case which was subsequently approved by and adopted by KANYOKE J (as he then was) in NYARKOH's case. In our respectful view the failure to convict has not occasioned any substantial miscarriage of justice when the trial judge merely said "All the accused persons found guilty of various offences" including the first accused who is the appellant herein.

In our view the trial court after evaluating the evidence proceeded to say that it had found the accused person guilty of the offences charged without using the magic word CONVICT, It should be reasonably construed and presumed that the court had on finding the accused guilty, convicted him of the offence(s) charged. The mere failure to use the word CONVICT does not occasion any miscarriage of justice in any way whatsoever.

We accordingly dismiss this appeal which was based on arid technicality of no significance.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Yeboah, JSC.

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

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Yeboah, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Yeboah, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Yeboah, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

AUGUSTINE OBOUR FOR THE APPELLANT.

FRANCES MULLEN ANSAH, PRINCIPAL STATE ATTORNEY WITH HIM VICTORIA ASIEDUA, SENIOR STATE ATTORNEY FOR THE RESPONDENT.