IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX (CRIMINAL COURT '2') HELD IN ACCRA ON 30TH DAY OF OCTOBER 2023

CORAM: HER LADYSHIP JUSTICE MARIE-LOUISE SIMMONS (MRS)

JUSTICE OF THE HIGH COURT

CASE NO. CR/0193/2021

SAMUEL ATO - APPELLANT

VS

THE REPUBLIC - RESPONDENT

JUDGMENT

This is a judgment hinging on a petition of appeal filed on the 27th February 2023 on behalf of the above named Appellant pursuant to leave granted to file appeal out of time.

The Appeal is against the conviction and sentence for the offence of **Robbery.** The Appellant was sentence to twenty (20) years IHL by the Circuit Court 1, Accra, then presided over by His Honour Aboagye Tandoh Esq. (as he then was).

The grounds of appeal were stated as follows:

1. *There was lack of sufficient evidence to support the charge of robbery. The evidence relied upon by the trial Court to convict and sentence the Appellant was clearly tainted with and highly prejudicial against the Appellant.*
2. *The trial Circuit Court judge erred in law in in convicting of the Appellant without taking into consideration his denial of the offence which is contrary to sound legal jurisprudence*

3. *The trial Circuit Court judge misdirected himself when he concluded that to the extent that the spouse of the Appellant was asleep at the time the crime was purported to have been committed and not say explicitly that she was with the Appellant and also the mother of the Appellant did not share the same room with the Appellant, then the Appellant could be at the scene of crime.*
4. *The conviction and sentencing is not supported by law, as there was no corroboration by witnesses on what happened or whether any witness saw the Appellant since there was only one witness on record to have testified and the other who started having had his testimony expunged from the proceedings of the Court for refusing to attend to the Court.*

The Appellant therefore sought for the following reliefs:

> *That the decision of the trial Court be set aside or in the alternative the sentence be reduced as the sentence is harsh and excessive.*

THE SUBSEQUENT APPLICATION

Subsequent to the filing of the Appeal, the Appellant caused to be filed on his behalf, an application to adduce fresh evidence upon receipt of some information obtained from the prisons on whether the Appellant had once benefited from the "Justice for All Program" (as a person who had once been arrested and incarcerated).

This information which the police gave to the Court is alleged by the Appellant's counsel to have played on the mind of the trial judge in taking his decision. The said application was heard on the **16th May 2023** and dismissed for not satisfying the conditions for the grant of such an application.

Written submissions were filed on behalf of the Appellant and Respondent on the 26th June 2023 and the 3rd July 2023 respectively for the determination of the Appeal.

THE CHARGE AND ITS ELEMENTS

From the record before me, the charges the Appellant faced was the charge of Robbery which is created under **Section 149 of the Criminal and Other Offences Act, 1960 (Act 29)** as follows:

> *"A person who commits robbery, commits a first degree felony"*

This section as amended by the **Criminal Offences (Amendment Act) 1993, Act 2003** reads as follows:

> *"(1) whoever commits robbery is guilty of an offence and shall be liable upon conviction either summarily or on indictment to imprisonment for a term of not less than ten (10) years and where the offense is committed by the use of an offensive weapon or missile, the offender shall upon conviction be liable to imprisonment for a term of not less than fifteen (15) years"*

Meanwhile, the offence of robbery is defined under **Section 150 of Act 29** as follows:

"A person who steals a thing commits robbery

a) *if in and for the purpose of stealing the thing, that person uses force or causes harm to any other person or*
b) *if that person uses a threat or criminal assault or harm to any other person with intent to prevent or overcome the resistance of that other person to the stealing of the thing"*

A reading of the definition of robbery therefore indicates that the offence is highly dependent on the offence of stealing. For it is in stealing a thing, that the offence of robbery can be committed. The elements of the robbery, therefore have to be partly founded under the offence of stealing.

Section 125 of Act 29 defines the offence of stealing as follows:

> *"A person steals a thing if he dishonestly appropriates a thing of which he is not the owner"*

Section 122 (2) of Act 29 further provides clarity to the offence by explaining the word appropriation as follows:

> *"Any moving, taking, obtaining, carrying away or dealing with a thing with intent that some person may be deprived of the benefit, or of his ownership or of the benefit of his right or interest in the thing, or in the value of proceed or any part thereof"*

See the case of **JOHN COBBINA VRS THE REP, CRIM APP NO 13/07/2019, dated 19th February 2020 CA.**

The elements therefore, that the Prosecution in a criminal charge of robbery as in this case was expected to prove beyond reasonable doubt were:

1. That the Appellant herein (and his accomplices who were at large) did appropriate a thing or things on the day of the incident.
2. That in appropriating the thing or things they used force, caused harm, or used threat of criminal assault on anyone they met at the house.
3. That they used such force, harm, or threat in order to overcome the resistance of those persons or person to the appropriation of the thing or things
4. That the appropriation was dishonest such that it aimed to deprive the owner or anyone with interest, benefit or right of claim to the thing appropriated from enjoying it.

APPEAL BY WAY OF RE-HEARING

One of the clearly settled principles of law, which cannot be controverted, is that an Appeal is by way of rehearing. This means that the Appellate Court or body is to examine the entire proceedings or decision that is the subject of the appeal to determine whether the decision can be supported in law or in fact or both. Numerous case law support the principle that is relevant to both civil and criminal appeals. The cases include.

TUAKWA VS. BOSOM (2001-2002) SCGLR 61, OPPONG VS. ANERFI (2011) 1 SCGLR 556, KWA KAKRABA VS. KWESI BO (2012) 2 SCGLR 834, DEXTER JOHNSON VS. THE REPUBLIC (2011) SCGLR 601, NAGODE VS. THE REPUBLIC [2011] SCGLR 975

In the case of **AMANKWAH VS. THE REPUBLIC (J3/04/2019) (2021) GHASC 27 DATED 21ST JULY 2021**. The Supreme Court through Dotse JSC explained the concept as pertains to criminal trials as follows:

> *"….. applying the above principle in a criminal appeal might result in the Court embarking upon the following, to analyze the entire Record of Appeal and this must include the charge sheet, the Bill of Indictment (where applicable), the witness statements of all witnesses, all documents and exhibits tendered and relied on during the trial, as well as the evidence during testimony and cross examination. To satisfy itself that the Prosecution has succeeded in establishing the key ingredients of the offence charged against the Appellant beyond reasonable doubt. And that the entire trial conformed to settled procedures under the Criminal and Other Offences Procedure Act, (Act 30) and that the acceptable rules of evidence under the Evidence Act (NRCD 323) have been complied with including the Practice Directions issued following the decision in the **REPUBLIC VS. BAFFFOE–BONNIE AND 4 OTHERS (2017-2020) 1 SCGLR 327** case"*

The Court went ahead and laid guidelines for an Appellate Court to consider in the art of re-hearing a criminal case by way of Appeal. The guidelines were:

1. *The Appellate Court must undertake a holistic evaluation of the entire Record of Appeal*
2. *This evaluation must commence with a consideration of the charge sheet with which the Appellant was charged and prosecuted at the trial Court. This must involve an evaluation of the facts of the case relative to the charges preferred against the Accused.*

3. *This also involves an assessment of the statute under which the charges have been laid and the evaluation of whether these are appropriate vis-a-vis the facts of the case.*
4. *An evaluation of the various ingredients of the offences preferred against the appellant(s) and the evidence led at the trial. This is to ensure that the evidence led at the trial Court has established the key ingredients of the offence(s) preferred against the Appellant.*
5. *There must be an assessment of the entire trial to ensure that all witnesses called by the Prosecution lead evidence according to the tenets of the* ***Evidence Act (NRCD 323).***
6. *Ensure that the entire trial conforms to the rules of natural justice.*
7. *An evaluation of all exhibits tendered during the trial, documentary or otherwise to ensure their relevance to the trial and in support of the substance of the offence and applicable evidence.*
8. *A duty to evaluate the application of the facts, the law and the evidence at the trial vis-a-vis the decision of the trial Court.*
9. *To ensure that the basic principles inherent in criminal prosecution, that is to ensure that the Prosecution had proved or established the ingredients of the offence charged beyond reasonable doubt, against the Appellant had been established.*
10. *In other words, the Appellate Court and a final one like the Supreme Court, must ensure that even if the Appellant's defense was not to be believed, it must go further to consider whether his story did not create a reasonable doubt either.*

APPEAL ALLOWED ONLY ON SUBSTANTIAL MISCARRIAGE OF JUSTICE

By way of statutes, the **Courts Act (NRCD 323),** regulates the conduct of criminal appeals by its Section 31 when it states:

"(1) subject to subsection (2) of this section, an Appellate Court in hearing any appeal before it in a criminal case, shall allow the appeal if it considers that the verdict or

conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case, shall dismiss the appeal.

(2) The Court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or the point raised in the appeal consists of a technicality or procedural error or a defect in the charge sheet or indictment but there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the caused could have been convicted upon that charge or indictment"

THE LAW AND BURDEN ON PROSECUTION

The requirement of the law per **Article 19 (2) (c) of the 1992 Constitution** is that a person charged with a criminal offence is presumed innocent until he is proved guilty or he pleads guilty. The Article reads:

"(2) A person charged with a criminal offence shall - (c) be presumed to be innocent until he is proved or has pleaded guilty"

The burden of proof in a criminal action therefore totally rests on the Prosecution.

Section 11 (2) of the Evidence Act, 1975 (NRCD 323) provides that for the Prosecution to succeed in discharging that burden of proof, it must produce evidence as to facts that are essential to the guilt of the Accused person in such a manner that the totality of the evidence would tell a reasonable mind that those facts exist beyond reasonable doubt.

Section 11 (2) of NRCD 323 reads:

"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 a reasonable doubt."

Relying on these principles and case law on criminal appeals, I proceed to analyze the present appeal.

THE CHARGES AND FACTS

The Appellant was charged on five (5) counts of robbery in the year 2015 before the Circuit Court, Accra originally presided over by his Honour Francis Obiri (as he then was) and then later by his Honour Aboagye Tandoh (as he then was).

The facts of the case as presented by the police prosecuting team indicated that the complaints were co-tenants who resided at Kwashieman in Accra. The Appellant was said to have been a steel bender. It was stated that on the 31st May 2015, at about 1:00am, the Appellant and two others who were declared at large, armed with a gun, entered the compound of the complaints' house and robbed them room by room. Sometime later, by way of some divine intervention, unknown to the Appellant, he entered the shop of one of the victims (later a witness) who sells phones at Tip Toe lane, at circle. The Appellant was said to have gone there in possession of some items which he was offering for sale. These items were, "a pineng back up power, a royal burst power back up". Whilst in the shop, the victim recognized and realized that one of the power banks as well as an "air max canvas and tommy Hilfiger wrist watch" which the Appellant was wearing were items he had been robbed off, on the dawn of the robbery. With the assistance of other persons who were around, they identified the Appellant as one of the robbers and they sent him to the police station. The Appellant was later charged and put before Court.

The Appellant pleaded not guilty to all counts on the 12th June 2015 and the trial continued until a prima facie case was established against him on the 23rd February 2017. He was made to open his defense on the 9th May 2017.

THE REPRESENTATION OF THE ACCUSED AT THE TRIAL

It is important to point out that the records indicate that the Appellant was unrepresented on the 1st day of his appearance in Court on the 12th June 2015. He was however represented by a lawyer on the fourth time of his appearance on the 19th August 2025 by a lawyer, one Kofi Bonin. The records do not tell what occurred but on the day the PW1 testified and completed his evidence, the Appellant had no lawyer representing him and did conduct his own cross-examination.

On the issue of the Appellant conducting his own case on the day PW1 testified, the Appellant counsel in his submissions sought to create the impression that this led to the appellant not being able to properly defend his case. Counsel even went ahead to blame the trial court for not having aided the appellant to conduct his case. At pages 8 and 9 of his submission he said inter alia:

> *"One thing that should not be glossed over is that at the trial and at the time that the 1st Prosecution Witness gave evidence, the appellant was at the time not represented by a lawyer and so on the part of the appellant, he could not have probed effectively the issue of the gun or any of the claims made against him, and so he asked only two questions by which he was essentially interested in saying that he was not at the scene of crime at all….. the bench unfortunately did not help either as it did not undertake to ask any questions to shed some light on the claims and allegations being made by the witness especially so when at the time the appellant was not represented".*

He also stated at page 24 paragraph 58 that:

> *"the judge, knowing that the offence before him being armed robbery carried a minimum sentence of fifteen years and should have advised the appellant to look for a lawyer or that he should have directed that the appellant be made to access legal Aid services. Incidentally, that was not done. It therefore beggars (sic) belief that the honorable judge uses this obvious unintentional lapse on the part of the appellant to make a case against him"*

It is important to note that an Accused person in a criminal case is allowed to defend his own case by himself or by a lawyer. The practice of persons defending their own cases have never been frowned upon especially if the trial is a summary one. Under **Article 19 (2) (f)** of the constitution, it is stated:

> "19. (2) a person charged with a criminal *offence shall*
>
> *(f) Be permitted to defend himself before the court in person or by a lawyer of his choice."*

This constitutional right has been aptly interpreted by the Supreme Court in the case of **REPUBLIC VS. HICH COURT (FAST TRACK DIVISION) ACCRA, EX-PARTE TSATSU TSIKATA (REPUBLIC INTERESTED PARTY) (2007-2008) SCGLR, 1200**.

In that case, the apex Court stated *inter alia:*

> *"It was clear from the language of Article 19 (2) (f) that an Accused has a right of self-representation. On the affidavit evidence, the trial judge did indeed in the course of proceedings draw the applicants attention to that fact and gave him an opportunity to do so which the applicant insistently declined. Also under the provision, an accused person has the right to decide to be represented by a counsel of his choice…*
>
> *However, the phrase 'lawyer of your choice' did not mean a particular lawyer if such a lawyer had knowingly chosen to absent himself at time when he had put a legal process into motion on behalf of his client. To hold otherwise would be to place the criminal*

justice process at the mercy of the whips and fancies of defense counsel at the risk of grinding the criminal justice process to a halt.

The court further stated per in curium that it is important to bear in mind that the focus of Article 19 (2) (f) of the constitution is the right of an accused person to be permitted [not to be prevented from] to defend himself, rather than the form of representation. The purpose of the provision is to assure that whether by himself or through counsel chosen by him, [rather than force on him] a person accused of a criminal offence is enabled to fight his case".

Under **Section 172 of the Criminal and Other Offences Act, 1960 (Act 30)**, when an Accused pleads not guilty in a summary trial, the Court shall proceed to hear the evidence adduced in support of the charge by the Prosecution.

Sub section (2) states:

"The Accused or his counsel may put questions to each witness produced against the Accused".

Of more importance is sub section (3) which states:

"where the Accused does not employ a counsel, the Court shall at the close of the examination of each witness for the prosecution ask the Accused whether the Accused wishes to put questions to that witness and shall record the answer of the Accused"

Sub section (4) states further that:

"where the Accused instead of questioning the witness makes a statement regarding the evidence of that witness, the magistrate shall, if desirable in the interest of the Accused put the substance of the statement to the witness in the form of questions".

From the constitutional and statutory provisions and case law, therefore, an Accused has to conduct his own case and put questions to witnesses if he has no lawyer or his lawyer he has hired for some reason chooses not to attend Court. It is obvious from a reading of **Section 172 of Act 30** that a trial Court is mandated to inquire if an Accused

with no lawyer wishes to cross-examine. If he has questions under cross-examination, he does so on his own, there is no mandate on a judge to descend into the arena of conflict, and conduct the case of the Accused for him as counsel seems to have requested of the trial judge. It is only under 172 (4) where the Accused does not seem to know how to ask his questions but rather puts them in the form of statements that the law requires the trial judge to aid the Accused by reframing his questions for him to the witness in the form of questions. Even here, note that the judge does not do the questioning, he only guides the Accused to ask his questions.

At page 170 of the book **ESSENTAILS OF THE GHANA LAW ON EVIDENCE** by the revered S. A Brobbey JSC. He says of the judge under such circumstances:

> *"It is important to point out that the court has no power to cross examine witnesses".*

The Court may only ask questions. This is emphasized by section 68[3] of NRCD 323 which reads:

> *"The Court may ask questions of witnesses whether called by a party or the Court"*

He continues and states that:

> *"the professional approach is for the trial judge to ask questions to clarify or elucidate matters which remain obscure after the parties have concluded their evidence in chief, cross examination and re-examination".*

In this case, the Record of Appeal does not indicate if the trial judge did ask the Accused if he has questions, yet it is evident that the Accused now Appellant, did ask questions of PW1. There is also no indication that he had any difficulty in asking the said questions which required the trial judge to have come to his aid. The blame therefore that the trial judge did not help matters by not asking *'questions to shed more light* on *the claims and allegations'* made by the witness was uncalled for and was indeed a call not based on any known criminal procedure. What that call seeks, is to ask the judge to have descended into the arena of conflict. The Appellant was duly

represented at the trial by a lawyer who appeared before the said day and if this lawyer for whatever reason, chose not to avail himself on any day, the blame must go to the said lawyer not the trial judge.

THE PROSECUTION WITNESSES AND THEIR EVIDENCE

From the Record of Appeal **(ROA),** the prosecution called three witnesses. PW1 was Nana Prempeh who sells phones and was a resident of La Race course. He testified that the house he lived in had four 'self-contained' rooms occupied by himself and others. He told the Court that on the 31st May 2015, he heard the gate of the house pulled down and noises from a room next to his with demands for the occupants of the room '*to bring money or they will be killed'*. He said that not long after, he heard that the next room neighbor was being asked who sleeps in the next room and his name was mentioned. He was then asked to open his door by one of the robbers who had a gun and asked him to bring money. The said robber he identified as the Appellant herein. PW1 further told the Court that he gave out cash of GHC1,300.00 to the Appellant who still demanded for more. The Appellant therefore according to PW1, took away his two (2) watches, a shoe and an iPhone six (6) in addition to the money before leaving for the next rom. He narrated that later, the Appellant came to his workplace to sell power banks and he noticed him wearing the shoe and a watch that were robbed from him. He therefore got other persons who aided him to cause the arrest of the Appellant. It is important to state that PW1 said that on the way to the police station (which station he did not mention) the Appellant made them an offer of GHC8,000.00 to abandon the matter.

Under cross examination by the Accused/Appellant who asked only two questions about his identity and denied being part of the robbery, the PW1 maintained that he knew the Appellant as one of the robbers.

PW2 was Samuel Adjanor who also lived at Kwashieman and sold cars. He confirmed that on the 31st May at about 1am to 1:30am, he was asleep when his door was suddenly opened and he said three (3) boys entered his room with the Appellant leading the other two. He said they demanded for money, phones and laptops. PW2 told the Court that with a gun pointed at him, he showed the robbers his money and phone which they took but he told them he had no laptops. According to his evidence, the shoe they took was an *'air mass'* and cash of GHC1,400.00. He corroborates the story of PW1 that the robbers asked him for the occupant of the next room who he named as PW1 and they entered PW1's room by hitting the door open. He emphasized that he saw the others had their faces covered but the Appellant did not. PW2 told the Court that the police arrive in their house about five (5) minutes after the robbers left, and said that the case was reported to the Hong Kong police the next day. PW2 was cross examined by the counsel of the Appellant who was present that day.

Under cross examination, he reiterated in his evidence that the incident occurred between 1am to 1:30 am. He described the house as self-contained rooms close to each other and explained that there was light in his room and outside as well on the day of the incident. Further cross examination of the PW2 revealed that there was a gun pointed at him, hence his inability to shout or call for help. Again, he was able to describe the other two (2) robbers and confirmed that the others had covered their mouths with a piece of cloth.

It is evident that the cross examination of PW2 did not complete and he was expected to be further cross examined on another date (page 14 of the ROA). However, the records does not reveal any further cross examination of this witness and nothing in the records indicate what occurred or the reason for the absence of the further cross examination of the PW2. **I will come back to discuss this issue and the claim by the Appellants counsel that the evidence of PW2 was expunged.**

PW3 was the case investigator who testified after about nine (9) adjournments after the testimony of PW2 (page 24). He was Detective Corporal Solomon Manlokiya of

the Regional CID. He testified that the case of robbery was assigned to him to investigate on the 31st May 2015 after a complaint of robbery. According to him, PW1 met the Appellant on the 4th June 2015 at his shop at Tip Toe lane at Circle where the Appellant went to sell power banks to PW1. His story corroborated the story of PW1 about the fact that he noticed the Appellant wearing his canvas and watch and caused has arrest. **He tendered into evidence the canvas that was robbed as exhibit "A", the wristwatch as exhibit "B" and the power banks as exhibits "C" and "C1". These are all items said to have been seized from the Appellant after his arrest. PW3 also tendered into evidence exhibit "D" which was the cautioned investigation statement of the Appellant and exhibit "D1" as his charged cautioned statement (pages 24-39).**

Under cross examination, PW3, the case investigator confirmed the date of the incident as the 31st May 2015 and he said the time was between 12midnight to 1am. He denied that the Appellant was nowhere near the scene of the incident at the time and place it was said to have occurred. He also confirmed that he interrogated the Appellant who told him that he bought the items found on him by the PW1 from the Nkrumah circle by a roadside. Again, PW3 told the Court under cross examination that the Appellant took him to a roadside where he said he bought the items on the 11th June and no one was there.

Meanwhile, he answered that he came into contact with the Appellant on the 9th June. Further cross examination also confirmed that the Appellant was arrested by the Kwashieman police. He consistently denied that that the Appellant did not commit the robbery and also denied that the Appellant was not at the scene of crime but rather at Pokuase during the time of the robbery. **A demand for the police statement of the PW1 was later abandoned by counsel for the Appellant during the course of the cross examination of PW3.**

At the end of the evidence of PW3 on the 29th December 2016, the Prosecution closed its case (page 39 of the ROA).

A subsequent filing of a submission of no case (pages 41-45) was not relied on by the Court. The trial Court decided that after consideration of the entire evidence of the prosecution, that a *prima facie* case had been made out against the then Accused now Appellant (page 51 of the ROA].

The Appellant opened his defense and mounted the box on the 9th May 2017, this can be found at pages (54-56) of the ROA.

He denied having any knowledge about the robbery and told the Court that he was at Pokuase at the time of the robbery. He claimed that he went to repair his wife's phone on the 28th May 2015 at circle. Then on the 3rd June he said, he again went to ask for a phone repairer and he was asked to sit and wait for one that it was during that moment that he was approached by some three persons who pointed to the watch and canvas he had had on as belonging to one of them. He said he went with them to the police to show where he bought the items but it had rained that day so they could not go and that day was the 4th June.

According to his evidence at page 54, he was not taken to the crime scene by the police though he was promised that he will be taken there. Under cross examination he denied being involved in the robbery. He rather claimed ownership of the air mass canvas and denied that the watch belonged to the complaint. Again, he claimed that he did not go to circle to sell any item but rather to repair his wife's phone.

The Appellant called two (2) witnesses; DWI was his mother who testified on the 11th May 2015, whilst DW2 was his wife. She also testified on the 5th June 2015. Their evidence can be found at pages 57-61

DW1 testified that on the 31st May 2015, she stated that she the Appellant, his wife and an uncle were at home at Pokuase but later went to the building site and came back home in the evening. She failed to mention the time of day. She said she was a trader at the Pokuase market and her son was as steel bender. Then on the 14th May 2015, they came home at about 9pm and did not go anywhere else.

Under cross examination she told the Court that she and the Appellant live in the same house and she sees him every time he goes out of the house. She even went ahead to say that whenever the Appellant is going out anywhere he will come to inform her about it before he goes.

DW2 testified that the Appellant was her husband and that all the items found on him on the day of his arrest were his personal properties. She insisted under cross examination that it was her phone the Appellant sent to the Kwame Nkrumah circle to be repaired before he was arrested.

WHETHER PW2'S EVIDENCE WAS EXPUNGED OR OUGHT TO HAVE BEEN EXPUNGED

At page 5, paragraphs 16 and 17 of the Appellant's written submission, his counsel stated *inter alia*:

> *"16. We submit that the Honorable judge got a lot of his analysis of the facts wrong especially factoring the testimony of Samuel Adjanor into his decision making, when the said testimony had been expunged from the records of the Court and so can never be related in anything done or said during the trial.*
>
> *17. If the Honorable trial judge's reasons that he did not find the Appellant guilty because the complaints in counts one, two, four and five failed to avail themselves for the trial, then same should be in respect of count three because Samuel Adjanor after his first appearance in Court, did not come to Court again and hence the expunging of his evidence. That being the case, he, Samuel Adjanor also failed to avail himself for the trial and so the count in respect of him also fails. Thus the only count supposedly left against the Appellant was only count one".*

As I have already stated above at the last paragraph of page 10, the PW2 from the records, did not reappear to complete his cross examination after his first and only

appearance in Court, notwithstanding the fact that he went through extensive cross examination on that day.

It is pertinent at this point for me to make reference to **Section 62** of the **Evidence Act, 1975, NRCD 323**. It states as follows:

> *"62 (1) at the trial of an action, a witness can testify only if he is subject to the examination of all parties to the action, if they choose to attend and cross examine.*
>
> *(2) if a witness who has testified is not available to be cross examined by all the parties to the action who choose to attend and examine and the unavailability of the witness has not been caused by any party who seeks to cross examine the witness, the Court may on its discretion exclude the entire testimony or any part of the testimony as fairness requires'*

This section makes it clear as a general practice that every witness who testifies must make himself available to be cross examined. However, the sub section provides some exceptions and goes ahead to make it permissive not mandatory, for a trial judge to expunge testimony that has not gone through cross examination. The exception as provided is when the unavailability of the witness for cross examination has been caused by the opponent who was to cross examine. Examples of such may be when the witness is threatened with death or harm by the party who is to cross examine from appearing to be cross examined and such a threat indeed plays on the mind of the witness, thereby preventing him or her from appearing in Court. Of course, proof of the occurrence of such an allegation has to be by way of evidence or information to the Court and such information or incidents must be evident in the records of the Court. The section also provides that a Court may use its discretion to choose to expunge entire or part of some evidence after the consideration of the principle of fairness to the parties.

What is in issue now is, if a witness goes through 'some' cross examination but does not appear to have the cross examination completed, would he still be deemed to have gone through cross examination ?

It is my considered view that in such situations the court is enjoined to use its discretion fairly to decide to expunge the entire evidence or part of it or not.

In the consolidated civil cases of **DAVID AKWETER & ANOR. VS. TEYE JOSEPH & ORS AND TEYE JOSEPH & ANOR VS. DAVID AKWETER NAKOTY & ORS, REPORTED IN THE DENNIS LAW AS DLCA 16053 (2022), C.A**, the Court of Appeal, re-emphasized the relevant section on cross examination, **Section 62 (2) of NRCD 323** and the discretion of the Court to accept or reject evidence not subject to cross examination and said *inter alia*:

> **"***Furthermore, it is observed that under the rules of evidence, a court has discretion in dealing with evidence which was not subject to cross examination. It continued, from the foregoing, it is correct to say that depending on the peculiar circumstances of each case, a court may jettison the entire testimony which was not subjected to cross examination or take into account part of the testimony as fairness requires. In doing so, a court must caution itself on the dangers of relying on testimony which has not been tested by way of cross examinations."*

In this case, the ROA indicates at pages 12-14 that the PW2 gave his evidence in chief on the 9th September 2015 and went through cross examination that day. Cross examination was to continue and the case was adjourned to the 22nd September. Subsequently on the 18th March 2016, the Prosecution produced another witness instead of PW2. No mention of the absence of PW2 was made on any of the previous adjourned dates or on this day when another witness appeared. No questions were asked by the Court as to the unavailability of PW2.

In the absence of any information, it is difficult to tell what prevented PW2 from coming back to complete his cross examination. It is therefore difficult to tell that the

absence of PW2 in Court was due to the fault or actions of the Accused person. I can only therefore conclude that the PW2 failed to reappear to complete his cross examination. Thereby making it difficult to rely on his evidence as credible or having stood the test of time.

For emphasis, may I restate that from the proceedings, there was no express statement made in the records that the evidence of PW2 was expunged. It is therefore strange as to how counsel for the Appellant in his submission stated severally that the Court did use its discretion to expunge the evidence of PW2. However, relying on the principle that an Appellate Court is bound by the records of appeal as held in cases like **ABDULAI IBRAHIM @ YARO VS. THE REPUBLIC, CRIM APPEAL NUMBER H2/0/2019 DATED 25TH JUNE 2020 (CA)**

I cannot gloss over the fact that after several adjourned dates when a different witness appeared after the PW2, the records described the new witness also as PW2 (page 24). I am in no position to state whether that impliedly therefore suggests that Samuel Adjanor was no longer the PW2 and that his evidence had been expunged. Be that as it may, I will rely on **Section 30 of the Courts Act, Act 459** (as amended) which provides the powers of an Appellate Court in a criminal case, and on the case of **ATUAHENE VS. COMM. OF POLICE (1963) 1 GLR, PG 448 @ 451** and have the evidence of PW2, Samuel Adjanor expunged. I wish to produce the relevant portions of the ATAUHENE case (supra) in the said report as follows:

> *"On the 18th January 1963, the State Attorney told the Court that Edmond Asare Addo who was to have appeared in Court for cross examination had left Ghana for Russia and was not available for cross examination by counsel for the defense……*
>
> *In the interest of justice, the learned Magistrate should have expunged the incomplete evidence of the witness from the records or insisted upon his appearance in Court, on the contrary, he just proceeded to hear the other witnesses without expressing disapproval.…"*

In this particular case as aforementioned, no reason was provided as to why the PW2 failed to reappear for cross examination, it was therefore most unfair that counsel for the Appellant found for himself a reason why PW2 failed to reappear and stated under paragraph 31 of page 11 of his submission thus:

> *"Not surprisingly, when Samuel Adjanor came to Court thinking there was going to be no lawyer and that he would have free passage like PW1 but incidentally met a lawyer for the Accused, after he was grilled a bit by counsel for the Appellant and the mouth was sealed, he stopped coming to Court and the rest of the supposed complainants/victims also failed to come to Court".*

Having by way of rehearing expunged the evidence of the original PW2, Samuel Adjanor, it is important to state that the prosecution witnesses whose evidence I will now consider will be PW1, Nana Prempeh and PW3, Detective Corporal Solomon Manlokiya.

Being guided by the guidelines provided by the Supreme Court to an Appellate Court in a Criminal Court in the case of **AMANKWAH VRS THE REPBLIC (SUPRA),** I will analyze the entire case in consideration of the submissions made by both counsel.

THE ANAYLSES OF THE EVIDENCE AND CHARGES

The charge sheet filed had five counts of Robbery with each count specifying a different victim of the offence. A careful study indicates that the date of the offences were all on the 31st May 2015 and the venue of scene of crime were all stated as Kwashieman in Accra. Counts 1 and 3 named the PW1, Nana Prempeh and PW2, Samuel Adjanor as the victims. In count 1 the items said to have been robbed were, an iPhone, Micheal Kors and Tommy Hilfiger wrist watches, an air mass canvas and a

Pineng power bank and cash of GHC1,300.00. As noted, only the victims of counts 1 and 3 appeared in Court to testify.

The learned trial judge was right when at page 82 of the record and page 20 of his judgment, where he found the Appellant not guilty on counts 2, 4 and 5 and accordingly acquitted him on those counts. He stated as follows:

> *"With respect to count two, four and five, the complainants failed to avail themselves for the trial and unfortunately, the evidence led by the prosecution witnesses especially the investigator PW3, said nothing about counts two, four and five."*

Having also expunged the evidence of Samuel Adjanor in this appeal, I will rely only on count one (1) in my analysis.

The facts of the case, as attached to the charge sheet provided confirm the date of the incident as 31st May at about 1am. The complainant and victim was Nana Prempeh.

In the first ground of appeal on the lack of evidence to support the charges, counsel for the Appellant in his submission argues from paragraphs 29 to 31 at pages 10 and 11 of his submission that the date and time of the incident was not stated in the facts and was in issue.

This Court has found upon perusal of the ROA that the charge sheet failed to name a time, it only provided the date, however the facts of the case, provided both. In the evidence of PW1, he stated the date but not the time. Under cross examination, he was not asked to provide the time of the incident.

Under **Section 112 (1) and (2) of the Criminal and Other Offences Procedure Act, 1960, Act 30**, the statement of offence of charge sheets, indictment, complaints, summons warrant or any other document laid before a Court for an offence shall describe the offence shortly in ordinary language avoiding as far a possible the use of technical terms, and without necessarily stating all the essential elements of the

offence. Where the offence is one created by an enactment, it may contain reference to that enactment.

Again, **Section 112 (4)** provides that after the statement of offence, the necessary particulars of the offence shall be set out in ordinary language in which the use of technical terms is not required. **Therefore though the charge sheet in this case failed to state the time, at least it did furnish the date and the facts did provide both, thereby giving the Accused/Appellant enough information together with the other relevant information to enable him defend his case.**

The relevance of the facts in any criminal trial has been stated by the Supreme Court in the case of **THE REPUBLIC VS. ERNEST THOMPSON AND OTHERS, CRIM. APP NO. J3/ 05/2020 DATED 17TH MARCH 2021 page 34** states *inter alia*:

> *"as justice is the ultimate aim in all criminal trials, the practice enjoins the Court and the Accused persons to rely on the facts recounted by the Prosecution as fairly representing the foundation of the Prosecution's case. It is on the basis of the facts that the Court will form a preliminary opinion of the decision to grant bail. If the Court were to operate from the premises that the facts recounted by the Prosecution must be presumed unreliable, then it will put the Court itself in a difficult position with respect to the directions to make for the future conduct of the case. The Accused person is also required and enjoined to rely on the facts recounted by the Prosecution to prepare his defense''*

Again in the cases of **ALI YUSIF ISSA VS. THE REPUBLIC (NO.) 2003/2204 2 SCGLR 289** and **THE REPUBLIC VS. ALI YUSIF ISSA [2003/2004] 2 SCGLR 104** (quoted in the Ernest Thompson case)

The Supreme Court considering the charge sheet in that particular case heard before the Ernest Thompson case, gave some criteria for inclusion in a charge sheet or Bill of Indictment and stated that it is sufficient if a charge sheet has the:

1. *The name of the Accused person (s)*

2. *The date of the alleged commission of the offence (not the time)*
3. *The Region*
4. *The amount involved and no other detailed information.*

As a matter of caution, the Supreme Court in the subsequent case of ERNEST THOMPSON (supra) made it clear that that the criteria in the ALI ISSA case is not meant to be a binding authority on what all particulars of offences in charge sheets must contain. Amadu JSC when delivering the judgement stated that *"what evidence needs to be provided is dependent on the peculiarities of each case."*

Relying on these cases and the statutory provisions, it can be said that the time of the incident of the robbery was 'around' 1am on the 31st May 2015. The failure of the PW1 either intentionally or inadvertently to state the time of the incident, in my view does not offend his case, neither does it affect any of the ingredients to be proved.

The PW3, Solomon Manlokyia in his evidence also did not state the time of the incident, however under cross examination, he did state that he was informed that the incident occurred between 12 midnight to 1am. Certainly, that should not pose any issues for the Appellant and his counsel especially when the facts indicate the time with the word, ***'about'***. If there was any issue at all, it was on the **one hour period between 12 midnight and 1am**, and this does not constitute any grave inaccuracy that must affect the evidence of the Prosecution and did not, in my considered opinion cause any substantial miscarriage of justice.

Further, the issue of which police station the Appellant was taken to after his arrest and where he was investigated does not seem to me to be relevant issues to be considered in this appeal (see page 8 of the paragraph 23 of the Appellant's submission).

The police has the constitutional mandate as long as it relates to arrest and investigations to choose the appropriate venue conducive to their security arrangements and intelligence, all in the interest of public safety and security.

According to PW1, the Police patrol team asked them, the complaints to report the case to the Hong Kong police station which they did. There was therefore a report to a police station. It turned out that eventually the investigations was conducted or further conducted by the Regional Police C.I.D where the case investigator, the PW3 was stationed.

What is important upon arrest is that information is provided to families, as to where a suspect is kept so the suspect can have access to family or legal aid. If however, counsel is of the opinion that the Appellant was unduly kept in custody beyond the constitutionally allowed period, his remedy lies in issuing a writ against the police service for wrongful imprisonment or detention. In this Criminal Appeal, where the Appellant was kept upon arrest or which group of policemen arrested him is not relevant.

THE IDENTITY OF THE ACCUSED AND THE ROBBED ITEMS

It has been submitted on behalf of the Appellant that the PW1 was unable to sufficiently identify the Appellant to the police and during the trial as one of the robbers, neither was he able to identify any of the items he claimed ownership of. Again, it has been submitted that the gun said to have been used for the robbery was not sufficiently described or identified at the trial. However, the trial judge relied on this information of the use of a gun to convict and sentence the Appellant.

In his testimony at the trial, PW1 told the Court that he knows the Accused. He subsequently informed the Court after his narration of the robbery incident that the Appellant "was the one holding the gun". In addition he stated that:

> *"I gave all my money of GHC1,300.00 to the Accused but he said it was not enough so he took two watches, my shoe and iPhone."*

Later after some days, the PW1 told the Court that he again saw the Accused when the Accused by chance or divine intervention found himself at the work place of the PW1. In his narration of the events of that 2nd encounter PW1 said:

> *"later whist at work, the Accused came to my work place that he has power banks to sell. I then saw the Accused wearing my shoe and wearing my watch. I asked him to sit down and went and called some of the boys to help arrest him. We took the Accused to the police station and on the way he promised to give us GHC8,000.00 to stop the matter".*

Clearly, from the narration of the PW1, he had enough opportunity to identify the Appellant as one of the robbers, not only did he see the Appellant once, but twice. It is again evident from his account that it was not the items the Appellant wore to his shop that he observed first when he saw him, as the Appellant's counsel seem to portray in his submission but that he noticed the Appellant first before later noting the items he wore, which were the shoe and watch. He further stated an attempt by the Appellant to pay him and others money in order for them to drop their complaint. This important fact was not cross examined by the Appellant nor denied in the opening of his defense which he had the opportunity to do when he was ably represented by a lawyer.

For emphasis may I restate part of his account:

> *"the Accused came to my work place that he has power banks to sell. I then saw the Accused wearing my shoe and watch…"*

The phrase, **"I then saw"** confirms that the seeing of the shoe and watch was a subsequent occurrence of an event, after an initial one which in my view was seeing the Accused himself. In addition to the identification of the Appellant by the PW1 at his work place, the PW1 also went ahead and led a group of people to take the Appellant to the police. All that time was enough opportunity for any person to have identified his attacker.

The law in the criminal jurisprudence of this country has been, and still is, that there be no better identification of an Accused than the evidence of a witness who swears to have seen or witnessed the Accused committing the offence. The case of **ADU BOAHENE VS. THE REPUBLIC (1972) GLR 70**, supports this principle and has been affirmed on subsequent cases including the case of **IGNATIUS HOWE VS. THE REPUBLIC, CRIM. APP NO J3/3/2013 and reported in Ghali as GHASC 159, 22ND MAY 2014**. Akamba JSC. **Not only was the above stated principle in ADU BOAHENE affirmed in the HOWE case but the Supreme Court also affirmed the principle that the holding of identification parades and proof of the personal characteristics of the accused are not the only modes by which an identity of a person Accused of a crime can be established.**

With the PW1 having clearly identified the Appellant as one of his attackers on the night of robbery and with his evidence not having been discredited under cross examination, I am convinced by the finding of the trial judge at page 79 of the Record of Appeal that the Appellant was one of the robbers who entered their residence and robbed him on the night of the robbery.

On the items listed on the charge sheet, it is accurate for counsel to state that these item were not particularly identified as the items owned by PW1, which he was robbed of. However, once again, no questions were asked of the PW1 who claimed ownership of them under cross examination. Of more importance is the fact that the case investigator, PW3 during his testimony on the 18th of March 2016, (at page 24 of the ROA) tendered into evidence without objection, a pair of canvas, a wrist watch and a power bank **as items robbed from the PW1 which PW1 saw the Appellant wearing on the 4th June 2015.** These items went into evidence as exhibits "A", "B", "C", and "C1" also without objection.

There is no doubt that the per the ROA, the PW1 testified that he saw the Appellant and his accomplices use a gun to rob on the day of the incident. He went ahead to state that it was the Appellant who held the gun and asked him to bring his money which

he said he gave to the Accused. PW1 indeed did not describe the gun and I do not believe than he had any legal burden to do that as a victim of an attack. As long as the offence of robbery was concerned, PW1 had established that the on the day of the incident some items were taken from him including money, watches and a shoe and they were taken by the Accused who in the company of others had in his hands a gun. This piece of evidence constitutes enough *prima facie* evidence against an Accused in a robbery trial if the Accused fails to cross examine such evidence and to render it discredited, then it becomes credible evidence to be accessed by a Court. When evidence has been tendered without objection, what other evidential steps was the Prosecution expected to take when they had laid the necessary foundation as to tendering of documents. What was the trial judge also expected to do apart from deciding on what weight to put on the exhibits?

The submissions therefore made by counsel for the Appellant under his paragraphs 39 and 40 on his question whether the trial judge erred in merely relying on the tendered exhibits without more, can only be answered in the negative.

It is trite that the purpose of cross examination is to bring out the case of the examining party and to test the credibility of witnesses and their testimony. If the PW1 whose story was corroborated by that of the PW3, claimed that he was robbed of some items by the Appellant and sought to tender those items, the only way for the **neural arbiter, the judge, to test** the credibility of the witnesses and to declare that their stories were credible or not (having been so manifestly discredited), was for good cross examination to have been conducted to discredit the witness. If the Appellant and his counsel failed to do that and a *prima facie* case had already been made, the trial Court cannot be blamed.

The PW1 testified to matters which he said he had personal knowledge of, and the court had no obligation than to accept his testimony as a vital witness with direct evidence on the issue. If such testimony was not subjected to scrutiny by the party against whom it is offered, the Court was only to assess the weight to put on it.

The **Evidence Act, NRCD 323, Section 80** lays out some criteria for trial Courts to use to determine the credibility of a witness, however, it is obvious by this same sub section that it is through cross examination mainly that the Court can ably make such determination after witness has gone through the mill. **The determining factors includes, the existence or non-existence of facts testified to by the witness, the capacity of the witness to recollect or perceive the existence or non-existence of matters, the existence of bias, interest or other motive, a statement admitting truthfulness etc.**

It must be borne in mind and reiterated that under **Section 51 of the Evidence Act, NRCD 323,** all relevant evidence is admissible except as provide under **Section 52** which exception can be exercised by a trial judge using his discretion. Again, it must be noted that it is not in all cases that identification or authentication of exhibits is a pre-condition for the admissibility of evidence.

S**ee PART 11 of the Evidence Act and the decision of the C.A in the case of SELORMEY VS. THE REPUBLIC (2001-2002) 1 GLR 14.**

The evidence of PW3, the case investigator as well as the exhibits he tendered without objection constituted enough corroborative evidence of the evidence of PW1. Appellant's counsel's assertion therefore that the evidence of the investigator did not amount to corroborative evidence and the admission of his evidence had led to a miscarriage of justice is misconstrued.

The trial judge committed no error when he relied on the exhibits tendered by PW2 and his evidence as well as the one evidence of PW1 as credible evidence.

THE DEFENSE OF THE ACCUSED

On the part of the defense that is the Appellant, all that he needs to do by way of producing evidence is to raise a doubt as to his guilt.

WOOLMINGTON VS. DIRECTOR OF PUBLIC PROSECUTION (1935) AC 462 is the *locus classicus* on this principle where the Appeal Court of England per Sankey LC expressed the view that:

> *"….while the Prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."*

However, under **Section 11 (3) of NRCD 323**, an Accused has a duty to produce sufficient evidence by way of raising doubts, the converse of which is guilt if a *prima facie* case has been made out against him.

The Appellant did open his defense on the 9th May 2017 as captured at pages 54-56 of the ROA. He called two (2) witnesses being his mother, DW1 and his wife, DW2.

The Appellant denied any knowledge of the offences leveled against him. He informed the Court that on 28th May 2015, he had gone to repair his wife's phone at circle. Then on the 3rd June 2015, still on the repairing of his wife's phone he was directed to a phone repairer who asked him to sit and wait and as he waited he was approached by three (3) people. He said done of these persons then pointed to the watch and canvas he had on as items belonging to that person. He informed the Court that he was arrested and went with the police in order to show where he bought his clothes but it had rained so the police could not go with him. According to him, the C.I.D officer promised to go with him but failed to do so.

The Appellant from the records did deny being involved in the offence.

The Appellant's counsel at pages 21-25 of his submission, devoted much time arguing on the defense of the Appellant at the trial and submits *inter alia* that the trial judge failed to consider the defense of alibi of the Appellant. It is also posited, that the

learned trial judge failed to consider the evidence of the two (2) defense witnesses produced by the Appellant at the trial.

THE PLEA OF ALIBI:

An alibi simply put, means the fact of state of the Appellant claiming to have been elsewhere when the offence was alleged to have been committed. This plea or defense is governed by **Section 131 of Act 30** in these terms:

> *"(1) Where an Accused intends to put forward as a defense a plea of alibi, the Accused shall give notice to the Prosecutor or counsel with particulars as to the time and place and of the witnesses by whom it is proposed to prove,*
> *(a) prior, in the case of a summary trial, to the examination of the first witness for the prosecution, and ..."*

There is no prescribed form for the notice to the Prosecutor for an alibi and an Accused person may give the required notice and particulars in his Investigative Cautioned Statement to the police. The issue here is, did the appellant properly plead the defense of alibi? Did the Appellant file the necessary notice? Did the failure by the Appellant to file the required notice of alibi have any effect in law?

BEDIAKO VS. THE REPUBLIC (1976) GLR 39, deserves consideration.

In that case, there was no notice of alibi filed by the third Appellant therein and **Sarkodee J.** did not think the mere mention by the Accused in his statement that he was not at the scene amounted to notice. The learned judge considered that the sum total of the defense was a complete denial of the charge which was considered and rejected by the trial Court. He had earlier held that where the Accused failed to give such notice as was required of him under **Section 131 (1) of Act 30**, it must appear to the trial Court that there was no defense of alibi properly before Court. (See page 42).

The learned judge went on to hold however that nothing stopped the Accused from calling his witnesses, the people he said he was with to confirm his defense if it was true.

In this appeal, the Appellant both in is Cautioned Statement to the police and in his defense failed to put forward the defense of alibi. He also failed to file any such notice when he was ably represented by a lawyer. Nevertheless, he was allowed to call two witnesses to support his defense, not of alibi, but to the effect that the items being the watch, canvas and power banks found on him upon his arrest belonged to him and he bought them.

In criminal law and procedure, "if an Accused puts forward an alibi as an answer to a criminal charge, he is simply saying that whoever might have committed the offence, if it was committed at all, it was not him; and to support this he leads evidence that he was elsewhere at the material time." See **BEDIAKO V THE STATE (1963)** supra.

The onus of making good the plea of alibi was on the person asserting in this case, I find that there was no semblance of alibi put forward by the Appellant and counsel's assertion that the trial judge misdirected himself when he failed to consider the alibi of the Appellant is misplaced.

This Court has found as a matter of fact that the trial judge did consider the defense of the Appellant in his judgment (from pages 73-76). What the Court rather did not do, was to accept the story of the Appellant as against that of the Prosecution and that is what the Appellant's counsel consider as the evident of the Appellant not having been considered. At page 75 the trial judge stated on the issue of an alleged alibi as follows:

> *"even though the issue of alibi was introduced first by counsel for the Accused… when cross examining PW3, he had preferred to present DW1 and DW2 to testify to that effect in Court. Strangely the Accused himself in his evidence said virtually nothing*

about where he was exactly at the time of the alleged robbery and hold that partying around 9pm and not sleeping in the same room could not allow DW1 to ascertain where the Accused was when she was asleep at 1am."

When it comes to the analysis of the defense of an Accused, the Court is guided by the three (3) pronged approach laid down by the Supreme Court in the case of **LUTTERODT VS. COMMISSIONER OF POLICE (1963) 2 GLR 429** where the Court in relying on the old case of **REGINA VS. ABISA GRUNSHIE (1955) 11 W.A. L.R 36** noted at page 439 of the report 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 defense in three (2) stages:

1. *Firstly it should consider whether the explanation of the defense 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 defense taken by itself, the Court should consider the defense such as it is together with the whole case, i.e. Prosecution and defense together and be satisfied of the guilt of the Defendant beyond reasonable doubt before it should convict, if not, it should acquit."*

A reading of pages 73-76 of the ROA, is a basis to find that the trial Court did make use of this approach before disregarding the case of the Applicant.

In his Cautioned Statement, exhibit "D", which was tendered without any objection by counsel who was present in Court, the Appellant clearly stated that he bought

some items being a Nike Air max footwear, Tommy Hilfiger wrist watch, white pineng power bank and royal power bank form circle on the 1st June and took them home. On the 3rd June, he said he came back to sell them and some men rushed on him and one of them identified the items as his and he was arrested. This statement was not a confession, however, it is so inconsistent with his story to the Court and those of his two witnesses. If he denies the offences, why does he choose to provide two (2) different versions? Which of these stories are to be believed? The previous written statement or his oral evidence. Clearly, the Appellant's story was not reasonably probable. The fact that he bought all these items listed at one location from one seller who apparently was on the street and the fact that within two (2) days after the alleged purchase, he had to sell them. Why didn't he return them to the seller who sold them to him? Why did he choose to go the same location and rather sell to other persons when all the seller failed to supply according to him was chargers for the power banks? All these makes his case difficult to believe.

The rule as reiterated by Brobbey JA (as he then was) in the case of **ODUPONG VS. THE REPUBLIC (1992-93) VOL 3 GBR 1028** and other cases that:

> *"The law is now well settled that a person whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn, is not worthy of credit (emphasis mine) and his evidence cannot be regarded as being of any probative value in the light of his previous contradictory statement unless he is able to give a reasonable explanation for the contradict"*

*Under **Section 11 (3)** the burden of producing evidence when it is the Accused as to any fact, the converse of which is essential to guilt, requires the Accused to produce sufficient evidence so that on all the evidence a reasonable mind could have reasonable doubt as to his guilt.*

CONCLUSION

From the foregoing after carefully evaluating the submissions made by counsel for the Appellant and having dealt with almost all the issues raised and having considered the submissions of the Respondent, studying the record and from the analysis I have made so far, I do not hesitate in stating that the Prosecution adduced sufficient evidence in proof of the charges against the Appellant. I found that there had been no substantial miscarriage of justice caused to the Appellant herein by the trial Court. The trial Court did consider his defense and by use of his discretion, he disbelieved the story of the Appellant as against that of the Prosecution.

SENTENCING

This Court stands by the age old principle that the only way an Appellate Court can interfere with a sentence is where a wrong principle of evidence was applied in passing the sentence or the sentence is excessive**.** In arriving at their decision with regard to the sentence, the Court considered all the mitigating and aggravating circumstances there are. In the cases of **APALOO VS. THE REPUBLIC (1975) 1 GLR 156, BANDA VS. THE REPUBLIC (1975) 1 GLR 152, SAMUEL AGOE MILLS ROBETSON VS. THE REPUBLIC (2013-2014) SCGLR 1505 AND OTHERS**, it has been held that:

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

I conclude that the punishment of 20years for robbery when an offensive weapon was used was justified. Bearing in mind **Section 149 of Act 29** and **Section 296 of Act 30.**

The appeal against both conviction and sentence therefore fails and the appeal is accordingly dismissed.

(SGD)

JUSTICE MARIE-LOUISE SIMMONS (MRS)
(JUSTICE OF THE HIGH COURT)

COUNSEL:

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SELASI KUWORNU FOR THE REPUBLIC/RESPONDENT.