**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA – A.D. 2018**

**CORAM: ANSAH, JSC (PRESIDING)**

**ADINYIRA (MRS), JSC**

**DOTSE, JSC**

**YEBOAH, JSC**

**BAFFOE-BONNIE, JSC**

**CRIMINAL APPEAL**
**NO. J3/02/2016**

**6TH JUNE, 2018**

**ABDULAI FUSEINI ..... 3RD ACCUSED/APPELLANT/APPELLANT**

**VRS**

**THE REPUBLIC ..... RESPONDENT/RESPONDENT/RESPONDENT**

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# JUDGMENT

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**DOTSE JSC:-**

This appeal is at the instance of the 3rd Accused/Appellant/Appellant, (hereafter referred to as Appellant) against the judgment of the Court of Appeal dated 28th May 2015. By their judgment, the Court of Appeal coram: Marful-Sau, Acquaye and Gertrude

Torkornoo (Mrs) JJA of even date, considered an appeal lodged by the Appellant herein against his conviction and sentence of 20 years by the High Court, Accra on the 20th July, 2010 in respect of two counts of conspiracy to commit robbery and robbery contrary to section 23 (1) and 149 of the Criminal and other Offences Act, 1960 Act 29 as amended by Act 646 of 2003.

**FACTS**

On or about **5th October 2003** at about 1:00am at Old Water Works near Akuse on the Kpong- Tema Motorway, the appellant and four other persons armed with guns and cutlasses robbed one Teye Ameko. They made away with a shot gun valued at 1.5 million cedis (old cedis) , one packet BB Cartridge valued at eight hundred thousand old cedis (800,000) and cash the sum of one hundred and Forty four million, eight hundred thousand (old cedis) (144,800,000) all belonging to the said Teye Ameko( hereinafter called the victim). In the process, the victim was slashed with a cutlass by the first and fifth accused persons and was severely injured with a deep cut at the left hip of his spinal cord and his shoulder. The accused persons left the victim, who bled profusely until he was rescued by two of his children. Upon finding their father in such a critical state with his intestines gushing out, the children rushed him to the Akuse Government Hospital where he was also referred to Narh-Bita Hospital in Tema.

**On 7th October 2003, two days after the incident, the Police acting upon a tip off arrested the accused persons at a drinking spot in Akuse. The fifth accused person however evaded arrest and was subsequently arrested at Ashiaman Lorry Station. An identification parade was conducted where all accused persons including the appellant were identified by witnesses.**

**DECISION AT THE TRIAL COURT**

On the 20th of July 2010, His Lordship Kusi Appiah JA sitting as an additional Justice of the High Court (Fast Track Division) found all accused persons including the appellant guilty of all the charges, convicted and sentenced all of them to 20 years IHL.

The trial court was of the opinion that the prosecution had proved their case beyond reasonable doubt and that all the ingredients of the conspiracy and robbery had been established. In respect of the appellant, the trial judge, per the facts and evidence before the court, found inconsistencies in the appellant's testimony given during the trial and his caution statement taken upon arrest, when the events were still fresh in his memory. The court therefore found the appellant as an untruthful and unfaithful witness, whose testimony under oath was, to the court, an afterthought and thus could not be relied on. At page 20 of the Record of Appeal, the learned judge stated:

> *" I find the story of the 3rd accused under oath as an afterthought. The apparent inconsistencies, contradictions, ambiguities and lingering doubts in the evidence of the 3rd accused destroy his credibility and make him an untruthful witness.* ***I therefore accept the evidence of PW1, PW2 and PW3 that the 3rd Accused was among those who acting together robbed PW1 on the date above mentioned." Emphasis***

We have verified the above conclusions of the learned trial Judge and found them to be consistent with the record of appeal. We therefore accept them as credible findings and conclusions.

**COURT OF APPEAL**

The appellant, dissatisfied with the decision of the High Court, appealed against the decision of the Court of Appeal.

**DECISION OF THE COURT OF APPEAL**

The Court of Appeal however on the 25th day of May 2015 by a unanimous decision dismissed the appeal filed by the appellant.

The Court of Appeal held that from the evidence adduced by the prosecution, per the record of appeal, the prosecution had discharged their burden of proof beyond reasonable doubt. The court held at page 108 of the record of appeal thus:

> ***" At this point the other accused persons including the appellant fired their guns to scare anybody from coming to the scene. Later the 1st and 5th accused joined the rest including the appellant in ransacking the victim's room and took away the amount of 144,800,000.00. This was after they had inflicted the cutlass wounds on the victim. From this narration how can it be argued that the appellant played a minor role in the robbery and for that matter he should be dealt with differently from the others particularly, the 1st and 5th accused persons. From the undisputed evidence on record the appellant was part in beating the victim and he was among those who were firing shots to scare people from coming to the rescue of the victim and his family. The record revealed that when the Police visited the crime scene, sixteen empty shells of BB Cartridge were found at the scene." Emphasis***

The Court of Appeal finally concluded that, ***"having examined the record of appeal and also noting the circumstances under which the convicts executed the crime, the sentence imposed by the trial court was not harsh and excessive". Emphasis***

**APPEAL TO SUPREME COURT AND GROUNDS OF APPEAL**

Still undaunted and dissatisfied with the decision of the Court of Appeal, the Appellant herein on the 30th day of June 2015 appealed against the said judgment and filed the following as the grounds of appeal.

1. The judgment of the Court of Appeal occasioned miscarriage of injustice by failing to appreciate that, from the totality of evidence of the records, the appellant deserved a lesser sentence.

2. The judgment of the Court of Appeal occasioned miscarriage of injustice by failing to appreciate that from the totality of evidence of the records, the standard of proof for criminal conviction was doubtful to sustain the conviction and, suo motu, they could have acquitted and discharged the appellant.

However, pursuant to leave granted by this court, the appellant filed an amended Notice of Appeal on the 12th day of May 2017 with the following one ground of appeal which reads as follows:-

***"The judgment of the Court of Appeal occasioned miscarriage of justice as appellant's conviction was against the weight of evidence."***

We have read the written statement of case of learned Counsel for the Appellant, Ahumah Ocansey. Indeed, from this statement of case, he sought to justify why the judgment of the Court of Appeal should not be allowed to stand, and by necessary inference, that of the trial court.

We have also read the written statement of case of Elizabeth Sackeyfio (Mrs) learned Senior State Attorney for the Republic/Respondent who not only submitted that the conviction of the appellant was in order, but also urged on this court to maintain the sentence in order to serve as a deterrence to others.

For the purpose of brevity, we will consider all the grounds of appeal together.

**BURDEN OF PROOF IN CRIMINAL TRIALS**

The first issue we want to discuss is the principle that, in criminal trials, the burden of proof against an accused person is on the prosecution. The standard of proof is proof beyond reasonable doubt. Section 11(2) of the Evidence Act 1975 (NRCD 323) states that:

*"In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of a fact beyond a reasonable doubt."*

The standard of proof beyond reasonable doubt was explained by Lord Denning in the case of ***Miller v Pensions (1972)2 ALL ER 372*** as follows:

***"Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is strong against a man as to leave a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice". Emphasis***

See cases like the following, which all illustrate the fact that what proof beyond reasonable doubt actually means is *"proof of the essential ingredients of the offence charged and not mathematical proof."*

1. ***Tetteh v The Republic [2001-2002] SCGLR 854***

2. ***Dexter Johnson v The Republic [2011] 2 SCGLR 601***

3. ***Frimpong a.k.a Iboman v Republic [2012] 1 SCGLR 297*** just to mention a few of the relevant cases.

**DEFINITION OF ROBBERY**

Section 150 of Act 29 defines robbery 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 the other person to the stealing of the things."*

At the trial, the learned Judge, having analysed the law on robbery found as a fact that the offence of robbery had been committed by the accused persons. At page 26-27 of the record of appeal, the learned trial judge stated that:

*" There is overwhelming evidence which I find credible from PW1, Teye Ameko MacCarthy, PW2, Happy MacCarthy and PW3, Jacob Yao MacCarthy as to how some amount of money totaling up to 144,800.00 cedis were taken away from the victim by the accused persons"*

This statement has also been verified and found to be credible.

There was evidence, by PW2, whom the court deemed a credible witness, that the accused persons fired shots to scare neighbors away. Also the disfigurement of the victim is also proof that harm was caused to him by the accused persons in the process. There is evidence that the accused persons used the butt of their gun to hit the victim several times on the eyes and other parts of the body till he became weak and could not struggle with them anymore. There is also unchallenged evidence that the 1st and 5th accused persons slashed the victim with a cutlass on his left hip and shoulder.

**IDENTIFICATION OF THE APPELLANT**

In this appeal however, learned counsel for the appellant, Ahumah Ocansey, has confined his arguments in the statement of case on the identification of the appellant

during the identification parade that was conducted in which the prosecution witnesses identified the appellant, among others.

The crux of the arguments of learned counsel for the appellant on this issue can be summarised briefly as follows:-

That because the robbery incident took place at midnight, it was presumably dark and for that reason, the PW2 could not have truly identified the appellant to have made him out during the identification parade. This is irrespective of the fact that witness stated that there was moonlight.

Secondly, learned counsel also referred to the fact that since the PW2, referred to the dress of the appellant as black and once appellant, was not wearing black attire during the identification parade, it meant that the witness was untruthful.

Thirdly, learned counsel argued that, from the position of the witness, (who stated that he hid himself in his room) and had ocular vision through small holes from the room, this meant that, PW2 did not have adequate opportunity to have been able to identify the appellant if he was really present.

The facts in the record of appeal however does not support these reasons stated by learned counsel for the appellant.

It must be noted that, PW2 was quite forthright in his evidence. The witness was emphatic that, even though he did not know the appellant before the robbery attack on his father, he was able to make him out and therefore recognised him as a participis criminis during the robbery attack.

Furthermore, it should be noted that, even though the robbery incident took place on the 5th of October 2003, at midnight or thereabout, it was not until the 7th day of October 2003, that the accused persons, including the appellant were arrested at a drinking spot at Akuse. The subsequent identification parade at the Akuse Polce Station

was conducted on the 9th October 2002. The appellant and the others could not have been in the same dress since 5/10/2003.

It should therefore be further noted that, from the 5th of October, 2003 up to 7th October, 2003 when the appellant and his accomplices were arrested, was sufficient for them to have gone to wherever they came from, changed their dresses before re-surfacing.

On this point, the case of ***Adu Boahene v The Republic [1972] 1 GLR 70*** CA which was relied on by the appellant rather supports the case of the prosecution. This is because the witness creditably stated that he saw the appellant among the group and he committed the offence charged.

Furthermore, the Defence, in this case the appellant has not succeeded in casting any irregularities on the way and manner the identification parade was conducted. As a matter of fact, the witness was emphatic that he identified the appellant and the other accused persons during the identification parade. This is irrespective of where he was at the material time.

Finally, it is a fact that, there was moonlight during that time of the season, and this fact has not been denied. It is therefore our view and conviction that the witness could have indeed identified the appellant properly during the identification parade as someone who took part in the robbery. Also, it must be noted that, the appellant herein did not cross-examine PW4, the Investigator who took over the conduct of the case on all the material evidence that he led on this case.

With the above rendition of the facts as they appear in the record of appeal being put in proper perspective, it is our opinion that, the reliance by the appellant on this issue of identification is a red herring with no substance. The reference to and reliance on the many legal authorities such as the following are therefore irrelevant and out of context and not applicable to the circumstances of this appeal.

See cases like

1. **R V Williams (1912) 8 Cr. App. R. 84 CCA**

2. **Agyiri v Commissioner for Police [1963] 2 GLR 380 SC**

3. **Karim v The Republic [2003-2004] SCGLR 812 just to mention a few.**

The facts and ratio of the above cases are entirely inapplicable to the circumstances of the instant appeal and therefore does not deserve any meritorious consideration.

**ISSUE OF SENTENCE**

The second issue we want to deal with briefly is whether the sentence imposed on the appellant is harsh and or excessive.

Section 149(1) of the Criminal Offences Act 1960(Act 29) as amended provides as follows:

> *"Whoever commits robbery is guilty of an offence and shall be liable, upon conviction on trial summarily or on indictment, to imprisonment for a term of not less than 10 years, and where the offence is committed by the use of an offensive weapon or offensive missile, the offender shall upon conviction be liable to imprisonment for a term of not less than 15 years."*

In ***Kwashie v The Republic (1971) 1 GLR 488***, the court in dealing with sentencing power of the court had this to say:

> *"In determining the length of sentence, the factors which the trial judge is entitled to consider are: (1) the intrinsic seriousness of the offence; (2) the degree of revulsion felt by law-abiding citizens of the society for the particular crime; (3) the premeditation with which the criminal plan was executed; (4) the prevalence of the crime within the particular locality where the offence took place; or in the country generally; (5) the sudden increase in the incidence of the*

*particular crime; and (6) mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed"*

See also the cases of ***Frimpong @Iboman v Republic supra***, ***Adu-Boahene v The Republic [1972] 1 GLR 70, CA and Kamil v The Republic [2011] SCGLR 300***.

The crime committed by the appellant and the four other accused persons was a serious one; which left the victim bleeding profusely with his intestines gushing out. It took his children, who had to push his intestines with a cloth, to rescue their father from dying. Also, the appellant and two other accused persons fired shots to scare neighbours away. The argument of the appellant that the role he played was a lesser one and thus deserved a lesser sentence is untenable. Punishment is justifiable as a deterrent not only to the criminal himself, but also, to those who may have similar criminal propensity.

Looking at the violent manner in which the crime was committed and the gruesome way the appellant and the four others left the victim, the learned trial judge was right in imposing such a sentence on them.

Section 149(1) of Act 29 is clear on the minimum sentence to be imposed when robbery is committed with an offensive weapon, that is; 15 years. From the facts and the evidence at trial, the accused persons were armed with cutlasses and guns.

The police on their visit to the crime scene found sixteen empty shells of BB Cartridge. The learned trial judge in imposing the sentence on the appellant rightly stated thus:-

*"I have taken into consideration the plea of mitigation put in by counsel for the 1st and 5th accused persons and for that matter all the accused persons in this case.* ***But having regard to the gravity of the offence, the violent manner in which the offence was committed which almost led to the***

***death of the victim, leaving him with permanent disability and disfigurement, I am satisfied that the sentence of the accused persons should be punitive, deterrent and above all to safeguard the entire country from the menace of armed robbery.*** *However, taking into account that the accused persons have been in custody since their arrest on 7th October 2003* ***and pursuant to Article 14(6) of the Constitution, 1992, I sentence the accused persons as follows:-***

*"All the accused persons are sentenced to 20 years IHL each on each of their respective counts. I order that all sentences are to run concurrently for each of the accused persons." Emphasis*

In our view, the Court of Appeal was right in affirming the decision of the trial High Court in the imposition of the sentence having taken into consideration the period spent by the appellant in custody before his conviction and sentence.

**CONCLUSION**

In our evaluation of the record, the prosecution has duly discharged their burden of proof beyond reasonable doubt considering the evidence adduced and thus the judgment of both the trial court and the Court of Appeal should be upheld.

In his brief but incisive judgment, Marful-Sau JA, speaking for the Court of Appeal stated as follows:-

***"In conclusion, having examined the record of appeal and noting the circumstances under which the convicts executed the crime, I do not consider the 20 years IHL sentence imposed on the appellant by the***

***trial court harsh and excessive. The appeal is accordingly dismissed." Emphasis***

We find the above statement very apt and we accordingly endorse same. Under the circumstances, we find no merit whatsoever in this appeal. The appeal herein against conviction therefore fails in its entirety and by necessary implication that against sentence as well.

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

**ANSAH, JSC:-**

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

**J. ANSAH**
**(JUSTICE OF THE SUPREME COURT)**

**ADINYIRA (MRS), JSC:-**

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

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

**YEBOAH, JSC:-**

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

**ANIN YEBOAH**
**(JUSTICE OF THE SUPREME COURT)**

**BAFFOE-BONNIE, JSC:-**

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

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

**COUNSEL**

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