IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)

AMEGATCHER JSC

PROF. KOTEY JSC

TORKORNOO (MRS.) JSC

KULENDI JSC

CRIMINAL APPEAL NO. J3/04/2021

9TH NOVEMBER, 2022

DOUGLAS AFRIYIE ..... 1ST ACCUSED/APPELLANT/APPELLANT

AND 10 OTHERS

VRS

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

JUDGMENT

PREAMBLE

DOTSE JSC:-

On the 9th of November 2022, this court by a unanimous decision dismissed this appeal by the appellant against the decision of the Court of Appeal which was rendered on the 29th of June 2012. But we reserved our reasons for the said decision which we now proceed to give.

Thomas Hutchinson, a US. Statesman of International repute, in his writings titled *"Charge to the Grand jury"* in Quincy's Reports, 232, 234 published in 1767 stated as follows:-

> *"There is one general observation I would make; that the End of Government is the Happiness of every individual, so far as is consistent with the Good of the Whole. To attain this End is impossible without laws, and their due execution. Tis necessary that Laws should be established, else Judges and Juries must go according to their Reason, that is their will; and this is in the strictest sense arbitrary. On this Reason, I take to be grounded that well known maxim, that the Judge should never be the Legislator: Because, then, the will of the Judge would be the Law; and this tends directly to a state of slavery. The Rules and orders of a state must be known, and must be certain, that the people may know how to act, or else they are equally uncertain, as if the Law depended upon the arbitrary opinion of another."*

See "The Quotable Founding Fathers" edited by Buckner F. Melton Jr. pages 194-195.

The above statement is very appropriate to the circumstances under which the 1st accused/appellant/appellant hereafter referred to as the appellant, finds himself. Fact of the matter is that, he must be deemed to be aware of the consequences of his act or actions that night. Let us take note of the following:-

i. That, there also exists laws and judicial processes under which he was arrested, investigated, prosecuted and convicted.
ii. That it is also because of the certainty and clarity of the due processes that the appellant has had the opportunity to appeal up to the present level of the judicial ladder.
iii. That, in all these, the personal will and idiosyncrasies of the judges does not matter, rather it is the laws of the state that are applicable and have indeed been applied so far.

We are therefore of the view that, persons of full age and maturity like the appellant whatever the circumstances they find themselves in, must be prepared to act reasonably, and if they act otherwise, then must be prepared to accept the consequences thereof.

COMMENCEMENT AND FACTS

The appellant herein was the 1st accused with ten (10) other accused persons who were arraigned before the High Court, Sunyani on three counts as follows:-

Count one

Statement of offence

Conspiracy to commit Murder, contrary to sections 23 (1) and 46 of the Criminal Offences Act, 1960 (Act 29).

Particulars

For that on or about the 8th day of April 2007 at Atronie in the Brong-Ahafo Region of the Republic of Ghana did agree to or act with a common purpose and with others at large to commit Murder.

Count Two

Statement of Offence

Murder contrary to Section 46 of the Criminal offences Act, 1960 (Act 29)

Particulars

For that you on the 8th day of April 2007 at Atronie in the Brong-Ahafo Region of the Republic of Ghana did intentionally cause the death of one Anthony Yeboah Boateng by unlawful harm.

Count Three

Causing unlawful damage contrary to section 172 (3) of the Criminal Offences Act, 1960 (Act 29).

Particulars of offence

For that, you on the 8th day of April, 2007 at Atronie in the Brong-Ahafo Region of the Republic of Ghana did intentionally and unlawfully cause damage to Audi Saloon Car No. GR 844-V the property of one Anthony Yeboah Boateng.

FACTS UPON WHICH THE ACCUSED AND THE OTHERS WERE ARRAIGNED BEFORE THE COURT

In March 2007, two persons died in the bush at Kuffour Camp near Atronie and there were rumours that the deceased were murdered by serial killers. On the 8th of April 2007 at about 9.30 pm a group of about 15 young men including the appellant were in possession and wielding guns from Kuffour Camp to Atronie. They informed the Atronie Chief and the Police that they had cited serial killers in two private cars at Kuffour camp and had chased the two vehicles away. From the Chief's palace, the group retired to a dance which was in progress in the town. Not quite long the deceased Anthony Yeboah Boateng was driving Audi Saloon car with registration number GR. 844 V from Sunyani to Goaso with his wife Mrs. Cecilia Yeboah Boateng, a Catholic Nun, Diana Ofosu, one Mrs. Philomena Akwaa Yeboah **and the corpse of one Madam Mary Ansah**. The vehicle pulled up between the Atronie Police station and the chief's palace. When the crowd saw the private car they claimed it was one of the private cars they had earlier cited at the Kuffour camp and when they saw the corpse in the car they concluded the driver was a serial killer.

The appellant and others now on the run barricaded the road and attacked the vehicle and the occupants with stones, sticks and other harmful objects. A Policeman and a police labourer at the Atronie Police station rescued the three women. The Policeman was hit and he became unconscious. The appellant and others now on the run went berserk and they stabbed and crushed the man to death. When the irate mob realized they have killed an innocent person they fled the scene leaving behind the deceased, the corpse which was being conveyed from Sunyani to Goaso and the vandalized vehicle. At about 10.30

pm the Sunyani Police received a phone call from the Atronie Police about the mayhen at Atronie. The Sunyani Police proceeded to Atronie and began a full scale investigation. The full scale investigation led to the arrest of 17 suspects. From the available evidence the Attorney General's Department Sunyani advised that the eleven accused persons including the appellant should be charged with conspiracy to commit murder, murder and causing unlawful damage. Based on these facts they have been arraigned before the High Court for trial on indictment on the charges referred to supra.

The facts as recited supra are not only horrific but also brutal and demonstrates the inhumanity of the appellant and the others therein to the Deceased and those who were with him on board the vandalized vehicle. Not even the presence of a Catholic Nun, on board the vehicle could quench the violence perpetrated by the appellant and his irate mob.

After a jury trial in which the prosecution called nine (9) witnesses, including the independent witness to the statement of the appellant person herein the appellant and the others opened their Defences. It must also be reiterated that the appellant and the other accused persons through their counsel cross-examined the witnesses. After that, the appellant also testified and was cross-examined. Thereafter, the learned trial Judge summed up the facts and the law to the panel of jurors and accordingly directed them to consider their verdict.

The jury returned a guilty verdict on all the counts with which the accused persons were charged except the 4th accused person, Kwaku Agyeman Badu, who was subsequently acquitted and discharged.

Following the return of the guilty verdict by the jury against the appellant and the others, the learned trial Judge proceeded to convict and sentenced him accordingly as follows:-

> *"A1, A2, A3, A5, A6, A7, A8, A9, A10 and A11 as per the verdict of the jury you are all convicted on all the three counts of conspiracy to murder, murder and causing unlawful damage. Before passing sentence do you have anything to say why sentence should not be passed upon you according to the law?"*

After learned counsel for the appellant herein put in a plea for mitigation, the learned trial Judge proceeded to sentence the appellant including the other accused persons therein as follows:-

Count 1 – Death

Count 2- Death

Count 3 – 20 years imprisonment to run concurrently.

APPEAL BY THE ACCUSED TO THE COURT OF APPEAL

An appeal by the appellant herein to the Court of Appeal was unanimously dismissed by the Court of Appeal. Korbieh JA, speaking on behalf of the Court of Appeal summed up their reasons as per their judgment dated 29th June 2012 as follows:-

> "In the case of the ***State v Anane [1963] 2 GLR 65***, S.C Crabbe, JSC said as follows:-
> *"But we think that lack of medical evidence as to the cause of death is not necessarily fatal provided that the possibility that death may have been caused by other causes is excluded; and provided also that cumulative effect of the evidence on record leaves no room for doubt that the deceased upon whom the prisoner inflicted the injuries by unlawful harm died therefrom shortly after the injuries were inflicted."*
>
> Besides, the ground presupposes that there must have been just one murderer. I am not aware of any legal principle that says two or more people cannot be jointly charged with murder. In any case, the medical report (exhibit A) lists eleven different wounds of varying degrees of severity on the body of the deceased all of which are directly attributable to one or the other of the acts of the appellants and the others at large. But above all, it did not give only one cause of death. It listed two major causes of death and several sub-causes of death. There is no gainsaying that all the injuries found on the body of the deceased were consistent with injuries

inflicted by the kinds of objects used by the appellants on the deceased. The injuries therefore further corroborate the evidence against the appellants. For instance the 1st appellant confessed to stabbing the deceased on the side. The others threw cement blocks, sticks etc. at him. Still others hit him over and over again with pestles and big sticks. So it does not lie in the mouth of counsel to say for instance that the fact that the 1st appellant may have stabbed the deceased could not be the cause of his death. The medical report mentioned the word "hemorrhage" twice as one of the causes of death. Hemorrhage means severe bleeding. So supposing that it was even only the stab wound that was inflicted on the deceased and he was left dying there without medical attention, would he not have died? Counsel also contends that the 4th appellant might have hit the deceased with the butt of his gun and that alone could not have killed the deceased. But the evidence on record is that when the 4th appellant hit the deceased with the butt of the gun, the deceased fell down and then all the others joined in to finish him off.

Again the evidence is that when the deceased was pulled out of the car, he faced he chief's house. But for the fact that he was knocked down by the 4th appellant, he may have managed to run away and take refuge either at the palace or the nearby police station. It is not for nothing that the appellants (and the other persons) were charged with conspiracy to commit murder. Conspiracy is not just planning to commit a crime but acting together to commit the crime. As for the argument that what happened at Atronie on the 8/4/2007 was mob action and therefore cannot ground a charge of murder, the less said about it the better.
Counsel did not advance one single reason, much less a legal one, to try to persuade us that the crime of murder cannot be committed during mob action.
Counsel's very feeble attempt to justify what he called "mob action" on that fateful day at Atronie does not merit any further comment. I will therefore not consider the last ground of appeal at all." Emphasis

The reasons stated therein supra as to why the appeal was dismissed are not only sound but based on the evidence on record and supported by legal principles.

We have considered in very great detail the fact that the trial of the appellant at the High Court was based on the principles of fair trial enshrined in Article 19 provisions of the Constitution 1992.

That aside, from the rendition of Korbieh J.A referred to supra it bears emphasis that the appellant and the others were very cruel and inhuman in their attack on the deceased and the others who were injured. Indeed the evidence of P.W.4, who was an eye witness is so lucid and detail that, it is quite apparent that the appellant and the others intentionally acted with determination to kill the Deceased.

APPEAL TO THIS COURT

Be that as it may, the Court of Appeal, on the 28th day of July 2020 granted extension of time to the appellant herein to file an appeal to the Supreme Court within 21 days.

Accordingly, the appellant herein on the 30th of July 2020 pursuant to the said leave, filed the following as the grounds of appeal against the Court of Appeal judgment.

GROUNDS OF APPEAL

a. "The Court of Appeal erred when it failed to recognize that the trial Judge failed in his duty to direct the jury on the burden and standard of proof required in criminal trials and which said failure has resulted in a substantial miscarriage of justice.
b. The Court of Appeal erred when it failed to notice that the trial Judge's failure to explain to the jury the ingredients required to prove the offences of conspiracy to commit murder and murder was a serious non direction and which non direction has resulted in a substantial miscarriage of justice.
c. The Court of Appeal erred when it failed to draw its attention to the fact that the trial Judge in his summing up failed in his duty to touch on the defences put up by the Appellant and which said failure has occasioned a substantial miscarriage of justice.

d. That the Court of Appeal erred when though it recognised that the summing up was not ideal, nevertheless went ahead to confirm the verdict of the jury.
e. That, having regard to the non direction on the part of the trial Judge on the law, facts and defence put up by the Appellant, the Court of Appeal erred in dismissing the Appeal.
f. Additional grounds shall be filed upon receipt of records of Appeal."

CONSIDERATION OF THE GROUNDS OF APPEAL

We observe that, all the grounds of appeal deal with the learned trial Judges' summing up to the jury. In this respect, it is considered convenient to deal with all the grounds of appeal, (a-e) together.

We have diligently considered the judgment of the Court of Appeal vis-à-vis the grounds of appeal that were lodged against it. In dealing with the grounds of appeal that the appellant filed in the Court of Appeal, the Court of Appeal delivered itself after considering the decisions in ***Gligah and Atitso v The Republic [2010] SCGLR 870*** and ***Mathew Kwame Sabbah v The Republic, Part 27 [2010] 27 GMR 116***, and delivered itself thus:-

> *"In a criminal appeal therefore, the summing up must be the target of the appeal since it is what determines whether or not the appeal will succeed. So if, as in this appeal, the summing up is scarcely mentioned and the appeal is treated as if it is a civil appeal, the approach taken might not adequately portray what the appellants and their counsel perceive to be wrong with the case at the trial court or the court below and addresses what the appellate court needs to know."*

The original grounds of appeal filed against the High Court judgment to the Court of Appeal by the appellant and from which this appeal lies has been couched in the following terms:-

1. The judgment is against the weight of the evidence.
2. The sentences meted out to the appellants were harsh; and

3. Further grounds to be filed upon receipt of the record of appeal.

The reliefs sought therein were that the convictions and sentences should be set aside and the appellants acquitted and discharged.

The following additional grounds were subsequently filed upon receipt of the record of appeal.

ADDITIONAL GROUNDS OF APPEAL AGAINST THE HIGH COURT DECISION TO THE COURT OF APPEAL

1. The learned trial Judge erred in not ordering an investigation into the alibis of the appellants when many of them had pleaded alibi in their statements given to the Police.
2. The learned trial Judge and the jury erred when they ignored the report and evidence of the medical officer on the actual cause of death in determining the murderer.
3. **The learned trial Judge erred when he failed to direct the jury that the incident was principally the effect of mob action.** Emphasis

It is therefore clear from the three original grounds of appeal and the three additional grounds that only one of the grounds mentions the directives or summing up of the Judge to the jury. Even then, it was principally that the learned trial Judge failed to direct the jury that it was mainly a mob action that led to the death of the deceased.

In view of the above grounds to the Court of Appeal, which the court adequately dealt with and acquitted themselves creditably, how can the grounds that have been filed to this court be deemed as legitimately flowing from the decision of the Court of Appeal?

The Court of Appeal dealt a fatal blow to the additional ground three in their delivery as follows:-

> "*As for the argument that what happened at Atronie on the 8/4/2007 was mob action and therefore cannot ground a charge of murder, the less said about it the better. Counsel did not advance one single reason, much less a legal one, to try*

to persuade us that the crime of murder cannot be committed during mob action. Counsel's very feeble attempt to justify what he called "mob action" on that fateful day at Atronie does not merit my further comment. I will therefore not consider the last ground of appeal at all."

Per Kobieh JA speaking on behalf of the court.

Admittedly, the summing up of the learned trial Judge is not the best.

Learned counsel for the Republic/Respondent, Principal State Attorney, Ms. Dufie Prempeh submitted on these grounds of appeal in the following terms:-

"We acknowledge my Lord, that the learned trial Judge did not address the jury on the standard of proof and the burden required in criminal trials, as he was expected to do, but his failure to do so in his summing up did not result in material miscarriage of justice. The trial Judge went ahead to direct the jury on what their duty is (i.e. the triers of facts)."

Again the trial Judge made it clear to the jury that their decision should be based solely on evidence adduced in court. He further made it clear to the jury that they are entitled to reject his opinion on matters relating to the facts. At page 365 of the record of proceedings, the trial Judge stated as follows;-

"…But before then, I must caution that you are to base your verdict entirely on the evidence you have heard in this court and not on any other consideration whatsoever. As Judges of facts your opinion on matters of facts is supreme, you are entitled to reject my opinion on any matter of facts that I may express. However, what I express to be the law you are bound to accept and consider."

The Court of Appeal itself recognized the deficiency in the summing up by the learned trial Judge. They commented on this phenomenon in the following terms:-

"On my part, I must say that the summing up may not have been the ideal summing up. But could they have returned a verdict other than what they did."?

Per Kobieh J.A

In our evaluation of the entire case and taking into consideration the evidence led and the defence of the appellant herein, we are of the undisputed opinion that, even though the summing up may have been deficient, it did not result into any shred of substantial miscarriage of justice. See case of ***Ketsiawah v State [1965] GLR 493*** where the Supreme Court found part of a summing up but concluded as follows:-

> *"But this misdirection has not occasioned a miscarriage of justice, for by returning the verdict of guilty of murder, the jury showed that they did not believe that the appellant was intoxicated to the extent that he did not know the nature of his act."*

In this case, the learned trial Judge commenced the summing up with a brief summary of the evidence led by the prosecution to establish the guilt of the accused persons. He accordingly referred to the evidence of PW4, Bossman Duah who was an eye witness and who gave graphic details of the gruesome events of that fateful night. The learned trial Judge also referred to the testimony of PW5, Agbomovi Abuyaa. This witness was identified as a kenkey vendor in Atronie and witnessed the evidents of the night. She was emphatic that she saw the appellant and some others remove the deceased Anthony Yeboah Boateng from the car to Nana (the chief of the town) who was close by the place where the events occurred.

What must be noted is that, the learned trial Judge referred to all the necessary ingredients which constituted the offence of murder. **Principally, it was established that, the deceased Anthony Yeboah Boateng, died, and that he died as a result of unlawful harm caused by the appellant and others. From the facts, it was also established that the unlawful harm meted out to the Deceased as a result of which he died was intentionally caused by the appellant and the others**. In addition, the evidence of the appellant herein, which is a confession statement in which the appellant made a clean breast of the part he played in the incident must also be taken into consideration.

We are thus convinced that, on the totality of the facts and the law in this case, the appellant has not made a sufficient case for us to differ from the decision of the Court of Appeal.

As a matter of fact, we are rather convinced based on the record of appeal that the standard of proof required by the prosecution as provided under Sections 10 (1) (2) and 11 (2) and (3) of the Evidence Act, NRCD 323 have been duly complied with.

These provisions state as follows:-

10. "Burden of persuasion defined

(1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

(2) The burden of persuasion may require a party

(a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or

(b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

11. Burden of producing evidence defined

(2) 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.

(3) In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that

on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt."

We are satisfied that, the prosecution satisfied the standard of proof required to establish the guilt of an accused person in such cases as has been stated in the Evidence Decree and also dealt with and applied in the following cases:-

- ***Tetteh v Republic [2001-2002] SCGLR 854 2***
- ***Dexter Johnson v The Republic [2011] 2 SCGLR 6013***
- ***Frimpong aka Iboman v Republic [2021] 1 SCGLR 297***

We are therefore satisfied that, the standard of proof stated in the cases supra were met.

CLOSING STATEMENTS

It bears emphasis that, learned Counsel for the appellant, whom I have decided to raise to Hon. Moses Kofi Obah completely lost focus in his bid to present the case on behalf of the appellant. Learned Counsel went completely off tangent, and we could have summarily dismissed the appeal as not arising from the judgment of the Court of Appeal. But we have decided to take sometime to educate him and guide him in his future engagement on behalf of other clients. We did so mainly because the punishment which the appellant faces is capital punishment, to wit-death. This is the main reason why we decided to delve deep into this unfounded and baseless grounds of appeal

In our view, once we are satisfied that the jury performed their statutory duty as laid out in Section 279 of Criminal and Other Offences Procedure Act, 1960 which sets out the duty of the jury, we do not think it is necessary to disturb the decision of the Court of Appeal.

In our considered opinion, the allegation of the misdirection of the jury have not been properly laid and made out. Under normal circumstances, this court will only overturn the decision of the jury if it is found that there has been a substantial miscarriage of justice on the face of the record, and since none has been found in this case we dismiss the

appeal. From the summing up, the learned trial Judge made the necessary references to evidence that we consider relevant under the circumstances.

The appeal herein by the appellant thus fails and is accordingly dismissed.

The judgment of the Court of Appeal dated 29th June 2012 and by necessary implication that of the trial High Court, dated 24th August 2010 are hereby affirmed.

EPILOGUE

We end this rendition by relying and adopting the following words of Alexander Hamilton in his "Federalist Papers of 1787" when he stated as follows:-

> *"It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, infact amount to nothing more than advice or recommendation."*

See page 196 of *"Quotable Founding Fathers"* already referred to supra.

Where we have reached as a nation requires that we pay serious heed to the above words of wisdom and by so doing ensure that we instill in our enforcement of laws the spirit of strict compliance with laws without fear or favour as the Constitution 1992 stipulates.

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

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

COUNSEL

MOSES KOFI OBAH ESQ. FOR THE 1ST ACCUSED/APPELLANT/APPELLANT.

STELLA OHENE APPIAH (PRINCIPAL STATE ATTORNEY) FOR THE RESPONDENT/RESPONDENT/RESPONDENT.