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

CORAM: ADINYIRA (MRS), JSC PRESIDING
YEBOAH, JSC
AKOTO-BAMFO (MRS), JSC
BENIN, JSC
APPAU, JSC

CRIMINAL APPEAL
NO. J3/8/2013

5TH JULY, 2017

FAISAL MOHAMMED AKILU ……. 2ND ACCUSED/APPELLANT/APPELLANT

VRS

THE REPUBLIC ……. RESPONDENT/RESPONDENT/RESPONDENT

JUDGMENT

APPAU, JSC:-

The appellant is before us on a second appeal against the majority decision of the first appellate court which affirmed his conviction and sentence by the trial High court. The brief facts of this case are that the appellant and three other friends chartered a taxi-cab to Nyaho Clinic area for one of them to collect money from someone. On the way, it was alleged an attempt was made by the appellant and his friends to snatch the taxi-cab in which they were, from the driver. In the process, they took an amount of GHc40.00 from the driver but could not drive away the car. A military officer, who ventured onto the scene, assisted the driver of the taxi cab to arrest one of the accused persons while the others, including the appellant who was the 2nd defendant at the trial, managed to escape. They were later arrested with the exception of one person who was tried in absentia with the others on charges of conspiracy to rob and robbery contrary to sections 23 (1) and 149 of Act 29/60.

Appellant and the others were convicted by the trial High court and each sentenced to 15 years IHL on each of the counts to run concurrently. The appellant appealed

against his conviction and sentence to the Court of Appeal but the court dismissed the appeal and affirmed the judgment of the trial court. The only eye witness account of the alleged attempted robbery that the prosecution gave at the trial was the testimony of the victim who testified as P.W.1. The appellant consistently denied his involvement in the crime. He denied the charges against him in his investigation caution statements and in his evidence in court. The question for determination was therefore to be settled on the oath of the victim as against that of the appellant.

Though the appellant lined up as many as eight (8) grounds of appeal for determination by this Court, the main contention in this appeal was that both the trial court and the first appellate court did not give any consideration at all to the defence of the appellant before finding him guilty on the two counts of conspiracy and attempted robbery. The appellant's case is that both the trial court and the Court of Appeal did not comply with the principles laid down by this Court in the *Amartey case* (infra) before convicting him on the charges.

In the celebrated case of **AMARTEY V THE STATE [1964] GLR 256**, this Court held that; ***"where a question boils down to oath against oath, especially in a criminal case, the trial judge should first consider the version of the prosecution, applying to it all the tests and principles governing credibility of witnesses; when satisfied that the prosecution's witnesses are worthy of belief, consideration should then be given to the credibility of the accused's story, and if the accused's case is disbelieved, the judge should consider whether, short of believing it, the accused's story is reasonably probable".***

The decision in the Amartey case quoted supra, re-stated the principle laid down by the West African Court of Appeal in the case of **R v ABISA GRUNSHIE [1955] 1 WALR 36- WACA.** The principle is that; in a criminal trial, where a court does not believe the story or an explanation of an accused person, the court should nevertheless go ahead to consider whether that explanation is reasonably probable when considered together with the evidence on record as a whole before deciding on the guilt of the accused. This principle has been applied in several cases including; **R v ANSERE [1958] 3 WALR 385– CA; DARKO v THE REPUBLIC [1968] GLR 203- CA; KWESI v THE REPUBLIC [1977] 1 GLR 448- CA** and **LUTTERODT v C.O.P. [1963] GLR 429– SC.**

In the *Lutterodt case* supra, this Court settled on three stages that every court had to go through in determining the guilt of an accused at the close of a criminal trial. The Court held that:

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

i. Firstly, it should consider whether the explanation of the defendant is acceptable. If it is, that provides complete answer and the court should then acquit the defendant;

ii. 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

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

The question is; did the trial court and later the first appellate court, which was obliged to determine the appeal as if it was hearing the case afresh, subject the evidence from both the prosecution and the defence, to the 'Oath against Oath' test or the test laid down in the Lutterodt case supra?

On the first count of conspiracy to commit crime to wit; robbery, the particulars were that appellant and the three others did act together to rob P.W.1, whilst on the substantive charge under count two, they were said to have robbed the said driver of cash the sum of GHc40.00 and his car. The trial court, as affirmed by the Court of Appeal, found the appellant and the others guilty of conspiracy to rob and attempted robbery but not robbery.

From the definition of conspiracy as provided under section 23(1) of Act 29/60, a person could be charged with the offence even if he did not partake in the accomplishment of the said crime, where it is found that prior to the actual committal of the crime, he agreed with another or others with a common purpose for or in committing or abetting that crime. In such a situation, the particulars of the charge normally read: *"he agreed together with another or others with a common purpose for or in committing or abetting the crime".* However, where there is evidence that the person did in fact, take part in committing the crime, the particulars of the conspiracy charge would read; *"he acted together with another or others with a common purpose for or in committing or abetting the crime".* This double-edged definition of conspiracy arises from the undeniable fact that it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. Conspiracy could therefore be inferred from the mere act of having taken part in the crime where the crime was actually committed. Where the conspiracy charge is hinged on an alleged acting together or in concert, the

prosecution is tasked with the duty to prove or establish the role each of the alleged conspirators played in accomplishing the crime.

In the instant case before us, the only evidence against the appellant in the alleged attempted robbery was that he was in the taxi-cab at the time the attempt was made to rob P.W.1 of the car. The primary witness called by the prosecution was the victim (P.W.1). He gave an account of the role played by each of the accused persons. He said it was the 1st accused who snatched the ignition key from him when he stopped the vehicle while the 3rd accused pointed a gun at the back of his head. When asked what the appellant did, his answer in sum was that; *he did nothing…however; he was among the others in the car.* This was the only evidence of the part appellant was alleged to have played in the attempted robbery claim.

In his statement to the police and testimony in court, the appellant had been consistent all along as to how he came to be in the car with the others. He denied strongly that he had knowledge of any plan by his friends to rob P.W.1 of his car. The victim himself corroborated the testimony of the appellant that when the others struggled with him over his ignition key, the appellant did nothing. The appellant got out of the car and ran away. On why he had to run away, appellant said he was afraid that was why he ran away. He said further that on the following day in the morning, he confronted one of his friends as to why they did not tell him of their plan to rob P.W.1 of his taxi. This testimony was not challenged by the prosecution.

Some of the questions that should necessarily have come to the mind of the trial court in determining appellant's involvement are;

- ***(i)*** *which were the subsequent acts done in concert with the other accused persons to suggest that appellant planned with the others to steal the taxi-cab?*
- ***(ii)*** *Is it not possible that the only agenda the appellant knew of on the night in question was that they were going to Nyaho Clinic area for the 4th accused to collect money from a friend as he was told when he was requested to join them in the taxi?*

As was held by this Court in **LOGAN v THE REPUBLIC [2007-2008] SCGLR 76 @ 78,** in conspiracy charges where there is no direct evidence, "***the conspiracy is a matter of inference, deduced from the certain criminal acts of the persons accused, done in pursuance of an apparent criminal purpose in common between them".***

Though it could be said that sitting together with the others in the taxi-cab when the incident happened was an element of acting in concert, that alone is not conclusive on the point. There must be further proof that, being in the taxi-cab with the others was for a common purpose; i.e. to rob the driver of the car in which they were being

conveyed or simply to rob. This could be inferred from the conduct or the acts of the appellant at the time he joined the others in the taxi-cab up to the time of the attempted robbery. However, the testimony of the victim of the crime P.W.1 was that appellant did nothing apart from his mere presence in the car. This evidence corroborates the testimony of the appellant throughout the trial that he knew nothing about the conspiracy and that he was unfortunate to be in the car at the time. It also corroborates that of the other accused persons that the appellant did nothing to support what they were doing.

This Court held further in the Logan case (supra) that mere presence at the scene of a crime without more is not proof of guilt. As the appellant rightly contended in his written statement of case, the trial judge and the learned majority justices of the first appellate court should have asked themselves whether it was not possible for an innocent person to be among evil doers, be in their company and yet have no knowledge of their intentions. Clearly, the record before us suggests overwhelmingly that both the trial judge and the first appellate justices in the majority did not give any consideration at all to the evidence of and for the appellant. The two lower courts completely failed to subject the explanation or story of the appellant to the three-stage test propounded by this Court in the *Lutterodt and Amartey cases* supra, which every court is obliged to do before pronouncing the guilt of an accused person. We want to lay emphasis on the principle in criminal trials that; all reasonable doubts that make the mind of the court uncertain about the guilt of the accused are always resolved in favour of the accused. By reasonable doubt is not meant mere shadow of doubt. Where, from the totality of the evidence before a trial court, a soliloquy of; *'should I convict', or 'should I acquit'* takes control of the mind of the court, then a reasonable doubt has been raised about the guilt of the accused. The appropriate thing to do, in such a situation, is to acquit, as required by law.

We agree with the minority decision of the Court of Appeal that the trial judge and the majority in the first appellate court did not adequately consider the defence of the appellant before finding him guilty on the two counts. The appellant's explanation that he knew nothing about the plan of the other accused persons and that he did not take part in what they did, was not only reasonably probable but was, in our view, more probable than not, judging from the totality of the evidence on record.

Having failed to attract adequate consideration at the trial level, the Court of Appeal, from the grounds of appeal before it, was obliged to give the defence that adequate consideration as spelt out by the authorities. Unfortunately, the Court of Appeal failed to do this. The court, per its majority decision, lumped up all the accused persons together instead of considering the role each played in the alleged committal of the offences, thereby making wrong deductions from the evidence on

record as to the guilt of each of them to the charges. Nowhere in the judgment did the majority in the first appeal, just like the trial court, give a thought to the case of the appellant. The Court of Appeal was under an obligation to consider separately the defence put up by each of the accused persons to determine how they coordinated each other in the commission of the offences as alleged by the prosecution. The minority decision was that the majority did not do this. Her view was that even if the defence of the appellant was not believable, it was reasonably probable judging from the particular circumstances of the case, which she enumerated. We fully share this view. We admit that the evidence led by the prosecution in proof of the charges against the appellant did not meet the requisite standard of proof, which is; proof beyond reasonable doubt. We therefore quash the conviction and sentence of the appellant on the two charges of conspiracy to rob and attempted robbery.

With regard to the other leg of the appeal that the appellant was a juvenile so the trial court should have referred him to the Juvenile Court for the imposition of sentence, we think it would be superfluous to waste time on that ground. Having admitted that the trial High Court had the authority to try him in the circumstances he found himself, his conviction by the trial court whether rightly or wrongly done, was proper. There would therefore be no need to go into the sentence when the conviction, which is the foundation of the sentence, has crumbled. We therefore refrain from discussing that issue.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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