IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
LOVELACE-JOHNSON (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC

CRIMINAL APPEAL
NO. J3/01/2022

27TH APRIL, 2022

GEORGE ABORMEGAH ..... APPELLANT

VRS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

PROF. MENSA-BONSU (MRS.) JSC:-

This case arose because two young men who chose friendship with one another, which choice turned out to be unwise, ended up with prison terms, having been accused of committing a heinous crime. They "loved but not too wisely."

BACKGROUND AND FACTS

The 1st accused, Charles Modzaka, was employed as a driver by a company known as 'Phase Two Consultants and Contracts Limited' (hereinafter referred to simply as Phase

Two) at Adenta near Madina in Accra. This company was owned by one David Ararat Tetteh, who also doubled as the Technical Director of the company. The 2nd accused (and appellant herein), George Abormegah (also spelt Abomagah during the trial at the High Court) was a welder and friend of the 1st accused. They both inhabited the same compound house – the 2nd accused (now appellant) as a tenant, and the 1st accused, as a guest of his cousin who was co-tenant to 2nd accused.

The 1st accused was employed at Phase Two on probation for six months. He was, however, discharged after two-and-a-half months on the job, for unsatisfactory service. It transpired that at some point, the 1st accused was asked by his cousin to move out of the room he shared with him because he intended to get married. Homeless and jobless, but in possession of a vehicle – a red Ford Escort vehicle - the 1st accused began to use it as a sleeping place, though his personal effects remained in the room of his cousin. His homelessness and joblessness seemed to have had some connection with his urgent need for money, for that led to the commission of the offence with his associate, for which they were tried, convicted and sentenced to prison.

On Sunday, 19th February, 2006,at about 7 a.m., the 1st accused together with 2nd accused, drove in the Ford Escort car to the premises of the Company. They managed to enter the premises, carry six computers and accessories out of the office, pack them into the vehicle and drive off. All of these activities on the premises, took place despite the supposed presence of a security man who was resident on the premises. A witness at the trial, Juliana Brown (PW1), also an employee of the company and niece of the owner, went to the premises around 9 a.m., as she normally did, to switch off lights and air conditioners. She saw the caretaker lying on the floor. Thinking he might be drunk or needing help she raised an alarm, and it was when help came that it was discovered that the security man was lying dead in a pool of blood. She then looked around and saw six computers and accessories were missing from the office. A report was consequently made to the Police.

The Technical Director and owner of the company, David Ararat Tetteh, who was then at church, was informed of what had happened at his company premises that morning

by PW1 and an accompanying policeman. He rushed to the premises to find the security man, Asare Larbi Bruce, lying in a pool of blood, and still bleeding from a nasty wound at the back of his head. A neighbor, the queen-mother of Adenta, informed him that she saw a vehicle that visited the premises earlier that morning, and that those people might have committed the crime. She narrated to him that a red vehicle came to park in front of her house. Believing the occupants of the vehicle, who were three in number, had come to see her, she waited to receive them. However, it turned out she was wrong, for her house was not the destination. The vehicle remained parked for a few minutes, and then one of the occupants of the vehicle got out and walked to the premises of Phase Two. He returned to the car after about ten minutes and an attempt was made to move the vehicle. It would not start, and so it had to be pushed, obviously by the occupants, till it started and was then moved to the frontage of Phase Two. These facts are important because the length of time the vehicle stayed parked in front of the queen-mother's house gave her the opportunity to observe it closely. She gave a vivid description of the vehicle, as well as at least one of the occupants, i.e. the one who got out of the vehicle and went into the office premises. The description she gave fitted the 1st accused who had previously worked with the company, and so the information was given to the police. Relying on that information, the police arrested Charles Modzaka, the 1st accused and later George Abormegah, the 2nd accused (now appellant). There was no evidence of who the third occupant may have been.

The two men were charged with two counts:

> *1. "Conspiracy to commit robbery contrary to Sections 23 (1) and 149 of the Criminal Code 1960, Act 29 as amended by the Criminal Code Amendment Act 2003*
>
> *2. Robbery contrary to Section 149 of the Criminal Code 1960, Act 29."*

Caution statements were taken from them which were later tendered in evidence. According to the facts provided by the prosecution the two accused persons killed the security man, Asare Larbi Bruce, and by that act managed to have access to the office where they stole the computers. The two accused persons admitted stealing the computers but denied killing the security man. They also led the police to a location in James Town where all the computers and accessories were retrieved from a friend of the 1st accused.

On these facts, they were tried by the High Court, Accra and convicted on both charges on 10th June 2008. They were accordingly sentenced to 40 years imprisonment on each count; the sentences to run concurrently.

On 18th June, 2008, the appellant filed a notice of appeal against his conviction and sentence to the Court of Appeal. His grounds of appeal were:-

> *"a. The conviction is unreasonable and cannot be supported having regard to the evidence.*
>
> *b. There was substantial miscarriage of justice.*
>
> *c. The sentence is harsh and excessive having regard to the fact that the appellant has no previous criminal conviction."*

One year later, on 25th June 2009, the Court of Appeal affirmed the decision of the High Court and dismissed the appeal.

After nearly eleven years, the appellant applied for extension of time within which to appeal and was granted time to appeal to the Supreme Court by the Court of Appeal on 24th March, 2021. The instant appeal to this honourable court was filed on 21st July, 2021.

Preliminary observation

The evidence showed that the security man found dead on the premises had died a violent death, but strangely enough, no real investigation appears to have been done, or charges laid against the accused persons for the death of the security man at the premises. From the testimony of PW2, the security man was lying in a pool when he was found. The original information, as well as his own ocular observation, told him so. He stated that

> "with the back of the skull, looked like it was crushed in and blood was oozing out so I asked the police how, if they found the instrument that was used to perpetrate the act. …
>
> They started looking around the premises and then they found this Moore Hammer, a huge hammer with blood on it so they picked it". (ROA p.10)

Even in the absence of expert forensic evidence, it is clear that a huge blow to the back of the head broke the skull. It was also clear that from the look of the injury, it could not have been self-inflicted, and that the blow that caused it must have been struck by another person. One did not need to be an Agatha Christie, to surmise all this. Yet, from the evidence, it took PW2, the owner of the premises and the employer of the deceased security man, to get the police to look "around the premises" before the likely weapon of attack, a 'Moore hammer', with some blood on it, was found. Needless to say, no action seemed to have been taken thereafter by the police in respectof the killing, despite the police believing that it was related to the robbery they were investigating. The only use to which the information was put, was to use it as evidence of the force that was applied to enable the stealing to take place. With such clear evidence of force used against the security man and the supposed murder weapon retrieved with blood on it retrieved, it is that much more shocking that no charge related to the killing was laid on the accused persons. Abraham Asare (PW3), the brother of the deceased security man, testified thus:

> "They allowed me to enter the place [i.e the office] and I entered and I saw that he was lying in a pool of blood and some blood was also falling from the inside into the main gate. So the police made some red cross and told us to take him to Korle Bu Mortuary, then they did the necessary arrangements for the burial". (ROA page 17)

This is a shocking dereliction of duty for the body of a security man who had died a violent death at work, and at the scene of the crime to be permitted to be buried without any investigation, as an ordinary person who had died a natural death. From the account of PW3, the brother, the police did not even follow up to deposit the remains at Korle Bu Mortuary, but left it to the family of the deceased to do so.At the time of the trial, the original investigator was said to have gone on United Nations Peacekeeping duties. With the case in the hands of an entirely new person, questions pertaining to the crime scene and the events surrounding it could not be posed or answered. The death of the security man remained uninvestigated and so someone literally "got away with murder". This depicts a highly unsatisfactory state of affairs.

Another matter of concern is the lengthy time lapse between the judgment of the Court of Appeal in June 2009, and the application for extension of time within which to appeal to the Supreme Court, sometime in 2021, that was granted by the Court of Appeal on 24th March, 2021. The record does not indicate when the application for extension of time was filed, but it certainly was about eleven years after theCourt of Appeal affirmed the conviction.

Rule 31 (1) –(3) of Supreme Court Rules, 1996,(C.I. 16) , provide that :

> *(1) Where the Republic or any person desires to appeal to the Court in a criminal cause or matter he shall give notice of an application for leave to appeal* ***within one month*** *of the decision of the court below.*

*(2) The period within which notice of a criminal appeal may be given **may be extended** at any time by the court below or by the court on an application on notice.*

(3) The notice of a criminal appeal or notice of an application for leave to appeal or notice of an application for extension of time within which such notice shall be given shall be filed with the court below.(emphases supplied)

Yet it would seem that to call the period between 18th June 2009 when the Notice of Appeal was filed and 24th March 2021, when the extension of time was sought, an "extension" of the statutory "one month" is an undue stretch of language. The new Notice of Appeal was filed on 19th April 2021, but it was not until 21st July, 2021, three clear months afterwards, that the Statement of Case for the appellant was filed. This appellant appears not to be bound by any rules of procedure at all. Care must be taken to ensure that criminal appeals are taken in compliance with Rules of Court, for they were put in place for a purpose.

Ground of Appeal

The appellant has appealed against the conviction and sentence to this honourable court on the sole ground that:-

> "The evidence and circumstance of the crime do not provide the requisite proof of guilt required to sustain the conviction and the sentence of conspiracy to rob and robbery, contrary to Sections 23 (1) and 149 respectively of the Criminal Code 1960, Act 29 as amended by the Criminal (Amendment) Code 2003, Act 646.

The sole ground of appeal has been drafted in a manner that sins against rule 33 (1) - (3) of the Supreme Court Rules,1996 (C.I. 16).

"1. The notice of criminal appeal or notice of an application for leave to appeal shall set out concisely and under distinct heads numbered seriatim the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative.

2. No ground of appeal which is vague or general in terms or disclosed no reasonable ground of appeal shall be permitted except the general ground that the judgment is unreasonable and cannot be supported having regard to the evidence.

3. Any ground of appeal or any part of it which is not permitted under sub-rule (2) may be struck out by the court on its own motion or an application by the respondent."

The appellant was convicted on two counts of conspiracy to commit robbery and robbery. Having rolled both charges into one with the filing of only one composite ground of appeal, how is an appellate court to address the plaint when it is possible for one charge to be substantiated on the evidence whereas the other might not be? Had the original charges been filed against him in that fashion, the trial court would have struck them down for being bad for duplicity, as provided under section 109(1) of the Criminal Procedure Act, 1960 (Act 30). On this occasion, but for the fact that the liberty of the citizen is involved, this sole ground of appeal ought to be struck down for non-compliance as prescribed by Rule 33 (3).

Case of the Prosecution (Respondent)

The case of the prosecution was that on the morning of Sunday, 19th February, 2006, around 7 a.m. some persons drove a red Ford Escort vehicle and parked in front of the residence of the queen-mother of Adenta, which was only a short distance away from the premises of Phase Two. From the account of the queen-mother as told to PW2, the owner of the premises, she took a good look at them because she thought they were

her visitors from the way they parked the red car in front of her house. She waited for them to come in, but instead

> "one of them got out of the car and went towards the office, … and came back after ten minutes then they started the car…. I hear the car wouldn't start so they had to push the car until it started and then the car went and parked in front of our main gate and then one man got out again and went inside from the car."

The evidence of PW2, though largely hearsay and based on the queen mother's account, was substantially corroborated by other events and by the evidence of Caution Statement "Exhibit A1" of 1st accused.

The queen-mother was not called in evidence. There was some suggestion that she had travelled out of the country at the time of the trial. Be that as it may, the police did not appear to have treated her as a material witness since she did not know or see what happened inside the office. However, the hearsay evidence narrated by PW2 was significant because it was the queen-mother's description of the person she saw who got out and went to the office, that eventually led to the arrest of 1st accused. This means her description was pretty accurate.

Upon arrest, the 1st accused first denied the crime completely, but upon the arrest of 2nd accused his story changed. The confirmation by 2nd accused that 1st accused owned a red car matching the description of the one whose occupants paid a visit to Phase Two that Sunday morning, implicated the 1st accused. He admitted his involvement, and gave his version of events of that morning, that bore out the veracity of the queen-mother's account. He claimed that the 2nd accused was the one who got down from the vehicle to go into the office as narrated by the queen-mother. Yet the description given by the queen-mother so fitted him, the 1st accused, that it led to his arrest. Clearly, he had good reason for seeking to shift that act onto the 2nd accused, for, as the evidence

showed, whoever the "scout" was who first went to the office had to be able to explain the eventual state in which the security man was found.

According to the 2nd accused, it was 1st accused who told him that he had been instructed to pack the computers from his office by his employer, PW2.Appellant said he was innocent of the crime as he did not know that the computers were being stolen by the 1st accused whom he believed was an employee of that company. However, subsequent events did not bear out the innocence of that venture. He claimed to have been asked along to help 1st accused to carry out an official assignment, but on his evidence, he had given no help at all except for driving 1st accused, who himself was a driver, to the area and then to the premises. Why would a driver instructed to carry computers and accessories out of an office get another to drive him, park some distance from the office, check if there was a security man on duty before getting back on board to get the car to the premises itself and begin packing out the things? What questions did he ask and what answers or explanation was he given? His conduct in the entire enterprise was not consistent with one who did not know of the illegal nature of the activity. In the end, both of them led the Police to where the computers and accessories had been taken to a friend of the 1st accused at James Town, Accra. It was from there that they were all retrieved by the police.

Although 1st accused sought to discredit the policeman's (PW4) evidence, because he had only inherited the docket, the documentation available was sufficient to tell the story. His admission that "*I led them, fine, so retrieved from whom*?" was good confirmation that as 2nd accused had stated, it was the 1st accused who knew the location in James Town where they had taken the computers, and directed the police to the location, leading to their retrieval.

When called upon to open his defense at the trial, 1st accused set up alibi that he travelled to his village to see his mother and returned to Adenta on Monday only to be arrested on Tuesday by the Police for a crime that occurred on Sunday when he was not in Accra. He claimed he was tortured and forced to admit the offence. He claimed that it was the 2nd accused who was brought to implicate him that he should agree they

went together. He stated further that later he heard 2nd accused had shown where the items were and they had been retrieved. In essence he laid the blame for the crime and his supposed involvement on 2nd accused; and on the Police for torturing him to admit his involvement. Yet, he was the one whose recently-terminated employment was with the company; whose car was the vehicle that transported the computers to James Town; and whose acquaintance was the person at James Town into whose care the stolen computers were entrusted.

Cross-examined by the prosecution he maintained that he had no idea why PW2, his former employer, and the 2nd accused the appellant herein, wanted to implicate him in a case of which he knew nothing.

The cross-examination made interesting reading.

> *"Q. According to your statement you led the Police to retrieve the items?*
>
> *A. I did not lead them to retrieve any item.*
>
> *Q. You did not?*
>
> *A. Lead the Police to retrieve any item, but they joined me to the car.*
>
> *Q. They joined you?*
>
> *A. They joined me to the 2nd Accused to the place but I did not lead them. I did not direct them or give any direction to them"*

On his alibi, he claimed he went to his hometown of Mepe, and that it was upon his return that 2nd Accused, who lived in the same compound house, alleged that he had gone to rob with him. The details of the alibi were not given to the investigator as required by Section 131 for them to be checked out. The only person he mentioned as witness, but did not name, was his mother who he claimed was too old to come and

testify. He tried to deny that the statements he gave were voluntary. He denied having taken 2nd accused along as his driver.

Even if the 2nd accused believed the statement that it was an official errand, how about when the goods were taken to a friend of the 1st accused for safekeeping? His curiosity was not peaked nor his suspicions aroused in any way? Fortunately, he admitted under cross examination that he was aware the enterprise that morning was criminal.

On these facts the two persons were arrested; charged with the offence of conspiracy to rob and robbery; tried; and convicted of the offences. Luckily for them, they escaped being put on a charge of murder based on the violent death at the scene of the crime, of Asare Larbi Bruce, the security man.

Case for Appellant

At the trial the 1staccused was not represented by counsel, but he did not join in this appeal and so his evidence would be relied upon, only as it has any reference to the 2nd accused, the appellant herein, who was fully represented by counsel. The original investigator, one Detective Sergeant Frimpong Manso, was unavailable at the time of the trial and so had handed documents to his successor-in-office, PW4, to take over and continue with the case. Consequently, PW4could not testify to any happenings at the crime scene, except what was contained in the documents that the original investigator had handed over to him. The accused persons tried to capitalize on this to challenge his credibility. They were unsuccessful. The cross-examination, even by counsel, was ineffectual.

A caution statement taken from 2ndaccused on 1stMarch, 2006, was admitted into evidence after being tendered without objection and marked Exhibit 'B'. A charge statement was also taken from 2ndaccused on 23rdMay, 2008. It was tendered and admitted into evidence without objection, and marked Exhibit 'B1'.

The 2ndaccused testified in his defence and gave a vivid account of what happened that Sunday morning

" Q. How did you and 1st accused get to Adenta on that day, tell the court?

A. My Lord I live with him in the same house and then one Sunday morning I was doing my washing and then he said when I finish washing my clothes I should accompany him to his master's place and that his master says he should come over. So after washing he handed over his keys to me for me to drive him to his master's office.

Q. His master's place is at where?

A. It is at Adenta Frafraha. So as soon as he got into the yard of the building he alighted from the car at the entrance of the house and I was still in the car and he entered the house. So I was waiting in the car when he said his master has asked him to send those computers to his customer at James Town, so I drove him to James Town so when we got to James Town I was still waiting in the car and then he came out…

So when he got to James Town he alighted from the car, so I was in the car when he called a certain young man along and they started conversing and later I saw them packing the computers from the car so after they had taken the computers out of the car then we returned with the car to Adenta"

He asserted that the car they drove in belonged to the 1st accused and that he already owned that vehicle when he, 2nd accused moved into the house and became a co-tenant of the cousin of the 1st accused's. Whilst 2nd accused admitted to knowing the 1st accused and he being a co-resident in the same compound house and with whom he had a friendly relationship, the 1st accused denied any friendship and, at first, stated

that 2nd accused was not even a casual acquaintance of his. He knew him only because he sometimes took the company car to him for welding. He denied being a co-resident, and, blamed 2nd accused of having involved him in a case of which he knew nothing.

Later, during the trial, the 2nd accused tried, unsuccessfully, to disown the caution statement as having been obtained in violation of the provisions of section 120(3) of the Evidence Act, 1975 (NRCD 323). He claimed the statement was taken in Twi, a language he did not understand, being an Ewe. He said,

> *"I told them I couldn't speak any language but my language which is Ewe but the one who wrote it asked me whether I would Twi (sic) and I said not very clearly and he forced me to speak Twi and he wrote it down in English My Lord"*

Despite having said that he spoke only Ewe in order to repudiate his Caution Statement which was essentially a confession, it is clearly stated on the record (page 42 ROA)that *"2ND ACCUSED GEORGE ABOMAGAH, SOB IN TWI TO BE LED IN EXAMINATION-IN-CHIEF BY HIS COUNSEL …"*

It is interesting that someone, who in the presence of his counsel elected to speak in Twi and was sworn in Twi to enable him give his Evidence-in-chief which was also in Twi, should indicate in cross-examination that he "couldn't speak any language but his own language which was 'Ewe' (ROA page 48).

Again when examined by the court

> *"Q. George, and after giving the statement you led the police to retrieve the items that were stolen?*
>
> *A. That is so My Lord but I told him that since that place was the first time I went there, I could not locate the place unless Charles Modzaka accompanied us, so they went and picked Charles Modzaka and brought him there. When they brought him they sat him in the car and I sat at the back so*

Charles Modzaka directed the police to the place and retrieved the items.

Q. That you went to the place. The true position of the story is that you went to Phase 2 Company Limited and it was when you were there with the 1st accused that these items were robbed. That the two of you succeeded in robbing the company of these items.

A. Yes at the time we went there was the time that the incident took place.

Q. And you were there when the watchman was killed and the items were robbed?

A. Well like I said earlier on when we got there I remained in the car whilst he told me that his master has sent him to take some computers and then give them to his customer at James Town so I do not know there was a watchman who had been murdered in the house. I did not know anything about what happened in the house, my Lord."

(ROA page 49)

The appellant was represented by counsel who took some objections as appropriate. However, Counsel did not object to the admission of the Caution and Charge Statements into evidence, and they were duly admitted. Section 6(1) of the Evidence Act 1975, (NRCD 323) required the objection to be raised at the time the statement was being tendered. The appellant who was represented by counsel, and who did not do so, cannot now come back and repudiate the statement.

The evidence against them was sufficiently proved by the prosecution. The efforts at casting doubts on their own statements were not convincing and showed a desperation to have their confession excluded from the evidence. The High Court convicted them. In

the detailed judgment by Charles Quist J., he analysed all the evidence and convicted both accused persons on both counts. He sentenced them to 40 years' imprisonment on each count to run concurrently.

In the instant appeal, counsel for the appellant begins his submissions by citing Section 23 (1) of the Criminal Offences Act 1960 as amended. Counsel is clearly of the old school since the enactment relied on is no longer known as the 'Criminal Code', but the 'Criminal Offences Act' following the work of the Statute Law Revision Commissioner that ended in 2007. It is thus no surprise that he cites section 23 (1) in the form in which it was framed under the Criminal Code. Under the Criminal Offences Act, the provision has been amended to read

> *"If two or more persons agree **to** act together with a common purpose for or in committing or abetting a criminal offence, whether with or without any previous concert or deliberation each of them commits a conspiracy to commit or abet the criminal offense."*(emphasis added)

The provision has thus undergone a significant change by the slight amendment, and counsel did not show any knowledge of the new formulation.

The difficulties inherent in the new formulation have been discussed in a number of cases and articles. In earlier cases, such as, ***Agyapong v The Republic [2013-2015] 2 GLR 518 (CA),*** an effort had been made by the Court of Appeal to address the controversy and lay it to rest. This *was eventually done by the Supreme Court in* ***Francis Yirenkyi v. The Republic [2017-2019]1 SCGLR 433.*** The Supreme Court deliberated on the controversy arising from the new formulation of Section 23 (1)which had been made and properly enacted, even though apparently on the blindside of the legal profession, leading to some controversy as to the legitimacy of the new formulation. The Supreme Court, in reaction to the controversy surrounding the legitimacy of work of the Statute Law Revision Commissioner in respect of the new formulation of section 23(1) of Act 29, commented at page 458 thus:

"We endorse the view of the Court of Appeal for it is only a proper challenge to the Supreme Court to the work by the Statute Law Revision Commissioner that can result in the striking down of the new formulation in Section 23 (1) of Act 29."

With the issue of the controversy surrounding the work of the Statute Law Revision Commissioner firmly laid to rest, it is now clear what evidence must be led by the prosecution to establish a crime of conspiracy. (For a more comprehensive discussion of the issues arising out of the work of the Statute Law Revision Commissioner, see: H.J.A.N. Mensa-Bonsu, "O, the Difference that a Word Makes – Remaking the Laws of Ghana by the Statute Law Revision Process." vol XXVIII (2015),*University of Ghana Law Journal*,pp.1-41).

In essence, criminal conspiracy isa mental crime. Athought of a criminal act begins in the mind of one person and is then communicated to the mind of another. Once the minds find agreement to undertake that common criminal purpose, the crime is complete. Thus, the mens rea for the offence is an intention to agree, and the actus reus is the agreement. There need not be any acts done in furtherance of the agreement for liability to accrue. See **State** v. **Otchere** [1963] 2 GLR 463.

For the offence of conspiracy to commit an offence to exist, there must be proof of

1. Plurality of minds - that there was more than one mind.

2. Intention to agree (mens rea);

3 Agreement to act together for a common criminal purpose (actus reus ;

There need be no proof of previous concert or deliberation.

What evidence was led against the accused in respect of the charge of conspiracy to commit robbery? To establish the crime of conspiracy to commit robbery to succeed, there had to be proof; that they were in agreement to act towards a common criminal purpose to wit, to steal computers from a premises by force, if need be, since the

premises was guarded by a resident security man. In the Caution Statement that the 1st accused sought unsuccessfully to exclude from the evidence, he stated that when he stopped the vehicle away from the office premises (and in front of the queen-mother's house), he it was who asked the 2nd accused to check whether the security guard was around. In his Caution Statement, the 2nd accused only admits to driving straight to the office premises, and so skips that part of the story. However, the account of 1st accused which includes first parking elsewhere and then one man getting out of the vehicle to go to the office premises is largely confirmed by the queen- mother's account of events that transpired that morning. What is different is which of the two men got down and went to the office. Whilst the 1st accused says he asked the 2nd accused to do so, the queen-mother's account of who she saw, so well described the 1st accused that it could lead the police to him, for him to be arrested for the crime. What is uncontroverted is that one man got out of the vehicle; went into the office premises; and returned after about ten minutes. As between the two accounts, it is more likely than not that it was the 1st accused whose former office it was, rather than the 2nd accused who had never been to the premises and therefore did not know the security man or know where on the premises he could be found, who went there. At least 1st accused admits that the purpose of first parking some distance away was to find out where the security man was, before going to the premises with the vehicle. Even if what to do with the security man if he was on the premises had not been discussed between them, it was implicit in the enterprise they were undertaking that morning, that any opposition to their access to the computers would be resisted. Indeed, even on the evidence of the 1st accused, it was after receiving the 'All's clear' information from his emissary that he moved the car to the premises itself; entered the office; and began to pack off the computers. However, the 2nd accused maintained that he was the driver of the vehicle throughout the operation, so must have moved the vehicle after 1st accused informed him it was safe to do so. What was he told by the "scout" about the whereabouts of the security man for him to believe he could drive to the premises for the computers to be packed out and taken away? Even if he was told nothing, by this time, did the 2nd accused still have no concerns or suspicions?

In his Statement of Case, counsel for the appellant attempts to present the evidence against his client on the charge of conspiracy in tabular form. He then states on page 15 of his statement of case that:-

> *"From the tabular facts given it is apparent the appellant George, never at any time sat with the 1st accused to plan and agree on the events of the crime. He did not know what went on in 1st accused's office: to wit, that he had been dismissed. There is no evidence that they even discussed the matter between them. George was a welder and concentrated on his work…*
>
> **The first element of Conspiracy by the Ghanaian definition is thus not applicable to the appellant."**
> (Emphasis in original)

Counsel admits the two men drove in the same vehicle for some time. How could he state "never at any time sat with the 1st accused to plan and agree on the events of the crime"? What venue did counsel consider appropriate for the 2nd accused to have "satwith the 1st accused to plan and agree on the events of the crime"? He claims further, "*There is no evidence that they even discussed the matter between them*", but does not lead any evidence to show why they could not have discussed the enterprise they were embarking upon; nor the nature of their conversations in the vehicle prior to the commission of the crime. On the evidence, they had ample opportunity to discuss what they were going to do at the premises, so counsel's statement has no foundation.

Counsel continues in the Statement of Case thus:-

> "1st accused contemplated reprisal against Phase Two *employers who dismissed him. He formed the intention to steal the computers from the office. This act was known only to him. Whereas he had a grievance against Phase Two, the appellant, George, who never had any dealings with Phase*

> *Two, as a Welder had no grievance against them. 1st accused acted out his criminal objective in his mind. George had no criminal objective against Phase two. He merely drove 1st accused to the office of the former as a friend. He knew nothing about 1st accused's intention.* ***Thus the second element of the Ghanaian definition of a "common criminal objective" is not applicable to the appellant****." (Emphasis in original)*

Counsel for appellant then proceeds to evaluate the evidence against the appellant on his own terms. He does not mount a convincing explanation of how he came to form the impression that his client, 2nd accused could not have participated in the crime because he had no motive. Counsel accepts the motive of 1st accused which he derives from the Caution Statement, but insists his client did not have his own separate motive so had no reason to join his friend to commit the crime – as if a friend's grievance was not enough to motivate one to act in redress of that grievance. Counsel is unconvincing when he maintains on behalf of is client that it was 1st accused who thought up the crime in order to punish his previous employers, but kept all that to himself, even after he asked for help from his friend, the 2nd accused. Unfortunately for the appellant, there is no requirement of motive in establishing the crime of conspiracy, or, indeed, even the crime of robbery.

According to the eye-witness account of the queen-mother, they parked in front of her house for about ten minutes till the one who walked into the office premises returned before the car was moved to the office premises. This fits in with the statement of the 1st accused as to what they did before driving to the premises itself. If the 2nd accused believed it was a lawful enterprise he had gone on, why did they not go directly to the premises, seek out the security man and inform him of the errand, as anyone on a lawful errand would do? Why did they need to park the vehicle some distance away to check for the presence of the security man, before driving to the premises in the supposed absence of the security man? It is clear that there was a criminal purpose to

the subterfuge they adopted that morning in order to access the premises and carry away the computers.

At this point counsel mixes up evidence supporting the two distinct charges of conspiracy to rob and robbery. This is again confirmation of the risk one runs in rolling up two charges into one and setting up one defence for the two charges. At page 17 of the Statement of Case, Counsel submits thus:-

> *"What the Prosecutor wanted him to say he said it without knowing his answer simplied he took active part in robbing the company of their computers. In other words whereas appellant was there in person with 1st accused, he did not know that 1st accused was in the office to rob.* ***His answer simplied that he knew***. (Emphasis supplied)
>
> *That's the mischief in cross-examination*".

Counsel does not explain what he means by "mischief in cross-examination", but clearly Counsel knew his case had been dealt a body blow by the answers 2nd accused had given in admission of the mens rea for the offence, hence his lament.

Earlier in the Statement of Case, counsel had reproduced a part of the cross-examination thus:-

> *"Q. That you went to the place. The true position of the story is that you went to Phase Two Company Limited and it was when you were there with the 1st accused that these items were robbed. That the two of you succeeded in robbing the company of these two items.*
>
> *A. Yes, at the time that we went there was the time the incident took place."*

Counsel still undaunted despite the admission of involvement by his client, attempts to make light of it when he submits in explanation:

> *"There are under currents of meanings in the question. First you were physically present at Phase Two office. Yes, say appellant because that was the truth,* ***but he never entered the office.*** *Neither was he on guard! When he answered yes, the prosecution took it to mean affirmation of his involvement in the robbery act. That was not what appellant meant though."(emphasis in original).*
>
> Second, 1st accused took the computers at that time. Yes, says appellant because that was the truth, **but he did not aid 1st accused to take the computers from the office! And neither did he know they were stolen items**(emphasis in original).

In concluding his discussion of the effect of the admissions made by the appellant in the trial court, Counsel submits on page 17

> *"What I wish to stress is that whereas the court would say appellant had "admitted" his crime, such "admission" is no "confession of guilt on the basis of which appellant is convicted and sentenced."*

Strange submission indeed. If an "*admission of guilt*" is not sufficient to found a conviction, then what is?

Counsel, again, shows the tenor of his thinking when he proceeds to cite an English authority on 'aiding and abetting', which is a specie of accessorial liability, to support his argument on conspiratorial liability. With respect, this is a complete misconception of the charge faced by the accused. The incidents of 19thFebruary, 2006, consisted of one chain of events and so the entire crime covered every aspect of the acts the two accused persons undertook that day. The 2nd accused was not a mere accessory, a secondary party, but a participant, but a primary party, to the robbery. Counsel is therefore wrong in submitting that he was not a participant in the robbery, merely

because he stayed outside and did not enter the office. In **Frimpong alias Iboman v. The Republic [2012] 1 SCGLR 297,** the appellant who remained outside in the course of a robbery and then drove a vehicle stolen from the premises was held to have been an integral part of the effort to commit the offence of robbery. Thus, the fact that the appellant in the instant case did not enter the office did not exculpate him in any way; after all the parties were engaged in one criminal enterprise, and his role was not severable from the entire operation. Indeed, this was noted by the Court of Appeal when it concluded that

> From the evidence it is clear that the appellant (Abormegah) was present at the scene of the crime from the beginning to the end of the robbery. He even assisted in packing the computers into the vehicle used in committing the crime. He hovered around the premises while the first admittedly was inside the premises. Was the appellant keeping guard for intruders or was it that he acted as a look out? We shall never know but our law is that if two or more persons acted together with a common purpose for or in committing a crime each of them is guilty of conspiracy."

Robbery.

The elements of the offence of robbery are as stated in Section 150 and expatiated upon in **Frimpong alias Iboman**v **The Republic**, supra by Dotse JSC as follows:

That to prove the offense of robbery there had to be proof that:-

i. the accused had stolen something from the victim of the offence;

ii. in stealing the thing the accused had used force, harm or threat of any criminal assault on the victims;

iii. the intention of doing so was to prevent or overcome any resistance;

iv. the fear of violence must be either of a personal violence to the person robbed or to any member of his household or family;

v. the theft must have been in the presence of the person threatened.

The evidence against the accused persons is unexceptionable. Indeed, the prosecution proved every element of the offence. Neither the 1st nor the 2nd accused said anything about the death of the security man on a premises they had visited at a time contemporaneous with his death by violence. Neither did they mention the presence or absence of the security man, although they had at first parked away from the premises for fear of being prevented from accessing the computers. Indeed, after the 1st accused had spent some time on the premises (ten minutes, by the queen mother's account), they drove to the office and behaved as if they were in no danger of interruption by the security man. Clearly, they must have known the security man could no longer be a threat to them hence the brazen way in which they drove into the premises, and packed off the computers. From the evidence, where the body of the security man was found in the office showed it was in plain view of anyone entering the office. Why did the 1st accused not see the bleeding body of Asare Larbi in the office as he packed off the computers? It was because he had been overcome with force in such a manner as to put him out of action. Having thus literally "got away with murder", they cannot be heard to complain that they did not use force on the premises to overcome the resistance of anyone to the stealing of the items. The circumstantial evidence against them of their use of force against the security man was too strong to ignore, and their failure to lead evidence to dislodge same did not inure to their benefit. The Court of Appeal was right in affirming the conviction, and we hereby do same.

Material Witness

Counsel discusses the law on material witness, and the need for corroboration. He complains that the queen mother who was an eye-witness and gave the leads that led

to the arrest of the accused persons was not called to testify. This could not be fatal to the case for the prosecution.

On the effect of not calling a "material witness" In **Tetteh** v. **The Republic** [2001-2002] SCGLR 854, the appellant was convicted by a court martial for offences prejudicial to good conduct for striking an officer who challenged him for jumping a red light. The court did not record any conviction, nor provide a reasoned judgment. He was dismissed. He appealed to Court of Appeal which dismissed the appeal. On further appeal to the Supreme Court, the appeal was upheld since the evidence did not meet the required standard of proof for failure to call a material witness. Adzoe JSC, explained who a material witness is. He stated that :

> "Whether or not a witness is a material witness depends on the quality and content of the evidence he is expected to offer in relation to the case on trial. The witness will be deemed to be material if the evidence expected from him is denied to be so vital as to be capable of clearly resolving one way or the other as important and decisive issue of fact that is in controversy. The evidence must appear likely to have a profound impact on the facts of the case to the extent that, if it is accepted as true, it will compel the court to come to a conclusion that is different from the decision it has taken."

To the question whether every material witness had to be called by the prosecution, Dotse JSC in **Gligah & Atiso** v **The Republic** [2010] SCGLR 870 proffered an answer. At p. 887 he stated:

> *We have always held the view that in establishing the standard of proof required in a civil or criminal trial, it is not the quantity of witnesses that a party upon whom the burden of proof rests, calls to testify that is important, but*

> *the quality of the witnesses called and whether at the end of the day the witnesses called by the party have succeeded in proving the ingredients required in a particular case. In other words, does the evidence led meet the standard of proof required in a particular case? If it does, then it would be a surplusage to call additional witnesses to repeat virtually the same point or seek to corroborate evidence that has already been corroborated.*

This was reiterated in **Frimpong alias Iboman** v. **The Republic**, supra, when at page 310 Dotse JSC stated that:

> *"It must be noted that, the evaluation of the evidence in a criminal trial such as one involving a serious offence of robbery and indeed any other criminal offence, is not based on the quantity of witnesses called at a trial in proof of the case of the prosecution or defense, but the quality of the evidence that the witnesses proffer at the trial."*

These dicta are relied on in a number of Supreme Court cases such as ***Nkrumah @ Taste v The Republic*** [2016-2017] 1GLR 32 and ***Kweku Quaye alias Togbe*** v. **The Republic** CRA J4/8.2020; Unreported; judgment delivered on 28th July 2021. Therefore, it is not the number, ie quantity, of witnesses called that makes the case for the prosecution, but the quality of evidence the witnesses called provide.

All the authorities relied on by counsel state that where there is doubt a material witness ought to be called by the prosecution to clear the doubt. In this case there was no doubt. Both accused persons admit that 2nd accused drove the car to the premises and stayed in the car. Even the slight doubt created by the 1st accused as to which of them got out of the vehicle to go into the office to reconnoiter and report back that it was safe to enter the premises and carry out the plan, could not be cleared by the queen mother because she did not know either of them. Second, the queen mother did

not know what happened in the office during the commission of the crime. What information she had was in respect of who could possibly have done it. Fortuitously, her keen sense of observation provided a description which led to the arrest of the 1st accused. After both men admitted to their participation in the events of that Sunday morning, what more could she testify to? Her evidence had become "mere surplusage", therefore, the inability to call her was not fatal to the case of the prosecution.

Corroboration

Counsel also submits that with a number of conflicting pieces of evidence the prosecution should have called witnesses to corroborate. Counsel seemed to rely on the head notes of cases he cites. It must be understood that head notes are produced by the editors of the particular publication and do not form part of the judgment. Therefore, head notes should not be substituted for the wording of the judgment unless it makes direct quotes from the judgment, or unless a court has previously adopted those head notes.

S.A Brobbey, the eminent retired Supreme Court Justice in his book '*Essential of the Criminal Law of Evide*nce', Datro Publications, Accra, Ghana 2014, states at page 84

> *"In simple terms corroboration is the information which connects, affirms or makes more certain the relevant portions of previous or future evidence in such ways that it enables the court to believe that the second (or corroborating evidence) confirms the precious evidence and that confirmation makes the previous evidence true. Being concerned with an aspect of the ascertainment of truth, corroboration is one of the collateral issues relating to proof."*

He goes further and cites ***R v Baskercille [1916] 2KB 658 at 667*** per Lord Reading CJ, that

> *"…evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only that crime has been committed but also that the prisoner committed it."*

In **Ekow Russel** v **The Republic**[2017-2020] 1 SCGLR 469 at 484, Akamba JSC stated the law on corroboration as follows:

> *Corroboration is defined in section 7 (1) of the NRCD 323 as consisting 'of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.' The essence of corroboration is to confirm or support a proof of a specific fact on which other evidence has already been given or would be given in due course. This will give the inference that the evidence already given or yet to be given, when given is more likely than not to destroy or establish the fact in issue.*

The 1st accused wrote in his Caution Statement, (page 86 ROA)" *I alighted suspect George Abormegah nearby and directed him to the office to check whether the security man Larbi was there."*To this allegation, Counsel's response is that it false. His basis for so declaring, is that one of the witnesses saw only one person enter the office, and that person seen was 1st accused. This may well be so, but as already established on the authorities cited, the fact of the appellant remaining in the vehicle throughout the operation did nothing to undermine his liability for the crime.

Again, 1st accused alleged in his Caution Statement that

b. The car was full, so George walked home and so we packed the computers into his room. In the evening of the same day George told me he did not want the computers to be kept in his room so I decided to send them to a friend in James Town.

Counsel submits that this is another "another falsehood"; and that it was preposterous to say that George who drove 1st accused to the office was ordered by the latter to walk home. Secondly the event took place in the daytime, and the computers were taken immediately and directly to James Town. It is unclear why counsel raises the issue of corroboration on these pieces of evidence when there were other pieces of extrinsic evidence that tied his client to the crime. The very fact that the two accused persons led the police to James Town to retrieve the stolen computers confirm the fact that they took them there, all the way from the office of Phase Two in Adenta. What is there to seek corroboration on? There is absolutely no basis to question the conviction of the appellant.

Conclusion

The appellant appealed on the sole ground that the evidence led in support of the two charges did not support the conviction. He has failed to dislodge the judgment of the trial court and of the Court of Appeal. The evidence supports his agreement to participate in a criminal act and his participation in that act. The Court of Appeal affirmed the judgment of the trial court, and we now do also. This appeal is wholly unmeritorious and we dismiss same.

Appeal dismissed.

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

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