IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO (MRS), JSC

CRIMINAL APPEAL
NO: J3/6/2016

DATE: 26TH JULY, 2017

KWAME NKRUMAH @ TASTE ... APPELLANT

VRS

THE REPUBLIC ... RESPONDENT

J U D G M E N T

ADINYIRA (MRS), JSC:-

Facts and Procedure

My Lords, permit me to start my judgment with this preface on loss or destruction of judicial records:

> *The first fundamental principle is that an appellant is not entitled to an acquittal on the mere basis of the loss or destruction of the judicial*

records, notably, trial proceedings.

An allegation that court proceedings are lost or destroyed require investigations into three important areas, the veracity of the claim, the quantum or magnitude of the lost, missing or destroyed record and its relevance to the determination of the appeal in question.

Per Wood CJ **in John Bonuah @Eric Blay v The Republic Criminal Appeal No. J3/1/2015, 9th July, 2015**, unreported

On the 5th of June, 2004 at about 1.30 a.m. some armed men attacked the lodgers, at Richland Hotel in Dunkwa-on-Offin with weapons of guns and a cutlass and took away their clothings, mobile phones and various sums of money in dollars and local currency. On a tip off, Kwame Nkrumah @ Taste [the Appellant] and two others were arrested. They were identified by some of the victims through identification parades.

They were subsequently charged and tried, at the High Court, Cape Coast, presided over by Nana Gyamera-Tawiah J. On 28 July 2005 they were convicted on the charges of conspiracy to rob and robbery and each of them were sentenced to a term of 20 years on conspiracy and a term of 45 years IHL on two counts of robbery; the three sentences were to run concurrently

Six years after the conviction, the Appellant appealed against his conviction and sentence, upon leave granted by the Court of Appeal on 1/2/2011. The appeal was assigned to Augustines Obuor Esq. by the Court Appeal. Counsel noticed that the record of proceedings was incomplete. The charge sheet, caution statement of the Appellant, which the Appellant relied upon during trial, and the reasoned judgment of the trial court were missing.

The registrar of the trial court was ordered to rectify the record but was unable to do so with the explanation that : "I have been informed by the Court Clerk of the late Justice Nana Gyamera-Tawiah that after he had delivered a lot of judgments he took away some record books, judgments and proceedings. The Court therefore finds it difficult to lay hands on a lot of his records required for."

Counsel therefore filed additional grounds of appeal contending that the Court of Appeal could not hear the appeal without a full record of proceedings and requested for the acquittal and discharge of the Appellant.

The Court of Appeal nevertheless decided that it is competent to hear the appeal with

the record available. After examining the record available, the Court of Appeal dismissed the appeal and affirmed both the conviction and sentence.

The Appellant then filed an appeal before the Supreme Court on ten grounds, which are set out as follows:

1. That the Court of Appeal erred when their lordships affirmed the conviction without the full record of proceedings
2. That the Court of Appeal erred when their lordships affirmed the sentence.
3. The Court of Appeal erred when their lordships inferred the story of the Appellant from the cross examination
4. The Court of Appeal erred when their lordships preferred the testimonies of the prosecution witnesses to none from the Appellant
5. The Court of Appeal erred when their lordships affirmed both the conviction and sentence without charge sheet, full judgment and caution statement
6. The Court of Appeal erred when their lordships failed to consider the issue of alibi raised by the Appellant
7. That the Court of Appeal erred when their lordships failed to consider the issue of material witness raised by the Appellant
8. The Court of Appeal erred by affirming both the conviction and sentence imposed on the Appellant without assessing the reasons by the trial High Court
9. Whether or not the lost or destroyed record of proceedings constitutes a material or significant part of the record of proceedings.
10. The sentence is harsh and excessive in the circumstance of the case.

The grounds of appeal are inter related and they can be considered under three main heads (a) the missing part of the record covering grounds 1,2,3,5,8 and 9 of appeal, (b) the evidence before the trial court covering grounds 4, 6 and 7 and (c) ground 10 on sentence.

Consideration of the Grounds of Appeal

(a)The Missing Part of the Record of Appeal

The main argument of Counsel in this appeal is that the Court of Appeal in the absence of the full record of proceedings ought to have set aside the conviction and sentence of the appellant and acquit and discharge him**.**

The Chief State Attorney, Evelyn D. Keelson, Esq. argues that the submission by Counsel for the Appellant was flawed and has no basis in law. She drew the Court's attention to the recent Supreme Court decision of **John Bonuah @Eric Blay v The**

Republic Criminal Appeal No. J3/1/2015, 9th July, 2015, unreported.

We recall that the Supreme Court, in the **Bonuah** case ***supra*** was faced with a similar situation, and Wood CJ remarked:

> "The unavailability of judicial precedent in this unchartered area of our law made it imperative that we resort to foreign case- law to guide our formulation of the relevant legal principles.
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> …It emerges from the jurisprudence of foreign courts that in some jurisdictions, the law on lost or destroyed judicial proceedings is codified, while in others the legal principles have developed from case-law. But, invariably, these principles conform largely to those that obtain in the statutorily controlled regimes."

The Supreme Court proceeded to review statutes of jurisdictions such as the USA and the Philippines, where the law on lost or destroyed judicial proceedings is codified. The Court similarly looked at jurisdictions and where the legal principles have developed from case-law as in South Africa, Kenya and Nigeria.

The Court examined the South African legal position from three cases **S v Siibelelwana (A401/2011) [2012] ZAWCHC150 (3 August 2012); S v Van Standen (105/2007)[2008] (2)SCAR, 626** and **The State v Nare Benjamin Chokoe,** decided by the **North Gauteng High Court on 28th March 2014.**

The Court also looked at the Kenyan cases of **Benjamin Onganya & Another v Republic [2013]EKLR** and **Joseph MainaKariuki v Republic; Criminal Appeals Nos. 53&105 of 2004 EKLR**

The Supreme Court held in its judgment per Wood JSC proffered this opinion:

> "We would adopt the enlightened approaches that consistently run through the decisions of the jurisdictions we have referred to and state the following as the general rule. ***The first fundamental principle is that an appellant is not entitled to an acquittal on the mere basis of the loss or destruction of the judicial records, notably, trial proceedings.***
>
> ***An allegation that court proceedings are lost or destroyed require investigations into three important areas, the veracity of the claim, the quantum or magnitude of the lost, missing or destroyed record and its relevance to the determination of the appeal in question*** [Emphasis

supplied]

Next, what or who caused the loss or destruction? Who stands to benefit? Depending on the finding, a reconstruction may be ordered from a variety of sources depending on the availability of contemporaneous and reliable material from which to reconstruct, with the parties, their counsel and finally the court being satisfied beyond reasonable doubt about the accuracy of the reconstructed record.

If appellant is not blamable for the loss or destruction, or if reconstruction is impossible, then a retrial may, depending on the circumstances, be ordered and genuine efforts made to trace the witnesses

In the event of the prosecution's clear inability to secure witnesses, the ultimate order of conditional or unconditional discharge must inure to the benefit of an innocent appellant. But this extreme order must be made sparingly. It must apply in those exceptional cases, where the evidence points beyond reasonable doubt to the innocence of the appellant in relation to the missing records, the nature of the offence the appellant was charged with and the length of time spent in custody"

We will conveniently summarise the relevant factors that must inform an appellate court seized with an incomplete trial proceedings or records, on account of all or a significant segment of the trial records being lost or completely destroyed:

1. An Appellant shall not be at fault, responsible or blamable for the loss or destruction
2. An appellant is not automatically entitled to an acquittal upon the mere proof of lost or destroyed trial proceedings
3. The quantum or magnitude of the missing record- lost or destroyed- and its relevance to the appeal in question shall be determined by the court
4. Where it is proven that the missing record is material to the determination of the appeal it is for the court to determine the viability of a reconstruction of the lost record
5. Where reconstruction is impossible then a retrial may be ordered depending on the circumstances such as the nature of the offence and the length of time spent in custody

In the **Bonuah** case ***supra*** the entire record was missing with no fault attributed to the Appellant and since a reconstruction of the record was not possible, the Supreme Court granted a conditional discharge of the Appellant for a period of five years during which the prosecution may prosecute the case afresh when they are able to trace the witnesses. The appellant shall be entitled to a complete discharge if not prosecuted within the specified five year period.

We acknowledge the appellant's unfettered constitutional right of appeal and the right to a fair and just appeal hearing on the merits, by direct access to the trial record. In the instant case there is no evidence of collusion however, but on the principles enunciated above, the Appellant is not entitled to automatic acquittal.

We have examined the available record and we find a certified true copy of the day to day proceedings of the trial obviously obtained from the record book; starting with hearing from the taking of the plea of the Appellant and the other two accomplices, the evidence in chief and cross-examination of the prosecution witnesses, the Appellant and the two others being called upon by the trial judge to open their defence at the close of the prosecution case, as in the opinion of the court a prima facie case has been established against them; the evidence in chief and cross-examination of the Appellant and two others, addresses by the prosecutor and counsel for the second accused and the pronouncement by the court of the conviction and sentence of the Appellants and two others. What is missing from the appeal record are the charge sheet, caution statement of the Appellant, and the exhibits and the reasoned judgment of the trial court.

Even though the charge sheet is missing, it is plain on the face of the record that the Appellant and the two others were charged with three offences; conspiracy to commit robbery and two counts of robbery which were read to them before their pleas were taken and the facts in support of the charges were given by the prosecutor. The absence of a reasoned judgment embodying factual findings resolved in the context of evidence led at a trial, is not in itself conclusive proof of the correctness or otherwise of those findings when they are impugned. It is the hard evidence received at the trial that an appellate court uses to determine the correctness or otherwise of those findings

We have examined the grounds of appeal in the light of the available record of proceedings and we are of the firm belief that the part of the record which is missing is not material to the determination of the appeal and it would not occasion any miscarriage of justice. After all an appeal is by way of rehearing and the Court of Appeal was under a duty to examine the evidence on the record to ascertain whether there was sufficient evidence to support the conviction.

.Accordingly we hold that the Court of Appeal came to the right conclusion that it was capable of disposing of the appeal with the available record before it and there was no occasion of miscarriage of justice, to warrant the setting aside of the judgment of the appellate court.

(b) The evidence before the trial court

Counsel for the Appellant submits that the Court of Appeal erred by not considering the defence of alibi and that of a material witness raised by the Appellant and by preferring the evidence of the prosecution to that of the Appellant

It must be noted in fairness to the appellate justices that the appeal ground and indeed the arguments marshaled in support thereof were not on the merits of the case but targeted at the technical point as to whether in the absence of certain documents from the record of proceedings the appellate court is disabled from hearing the appeal and ought to acquit and discharge the Appellant simpliciter..

We have a duty to examine the record of proceedings to satisfy ourselves whether the prosecution succeeded in proving the essential ingredients of the offences of (a) conspiracy to commit the unlawful act of robbery contrary to section 23 (1 and section 149) of Act 29 and (b)for robbery contrary to r section 149 of Act 29- The essential ingredients are whether the Appellant and the two others agreed or acted together with a common purpose to commit a criminal offence, and whether the appellant and the others stole from the victims and in so doing used any force or caused any harm or used any threat of criminal assault or harm on the victims with intent thereby to prevent or overcome the resistance of their victims to the stealing of the thing. **See Behome v Republic [1979] GLR 112, Frimpong alias Iboman v The Republic [2012] 1SCGLR 297.**

Case for the Prosecution

In this case, the prosecution led evidence through PW1, PW2, PW3 and PW4, that on 5 June 2004 they were sleeping in their hotel rooms at the Richmond Hotel in Dunkwa-on – Offin when the Appellant and two other armed men attacked and robbed them at gun point. The Appellant and the 2nd accused were both wielding guns and the 1st accused a cutlass which they used to threaten them; some of them were asked to lie down while their rooms ransacked. We are satisfied by the evidence on record that the prosecution led sufficient evidence to establish a prima facie case for the accused persons to answer.

Case for the Defence

Alibi

The Appellant elected to give evidence on oath and merely relied on his statement given to the police. Unfortunately this statement is lost. However the answers he gave during cross-examination by the prosecution and his own cross-examination of the prosecution witnesses did not disclose any defence of alibi; that he was at a different place at the time of the robbery. He merely stated under cross-examination that he did not know Dunkwa- on – Offin and has never been there and nor met the 1st and 2nd accused persons before. All the four prosecution witnesses were positive of their identity of the three armed robbers from their distinct features.

. Material Witness

On the issue of material witness, the Supreme Court recalls its holding in **Frempong alias Iboman, *supra*** at pages 310 to 311 of the law report:

> "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 defence, but the quality of the evidence that the witnesses proffer at the trial. Thus the Supreme Court in a unanimous decision in the case of **Gligah v Republic [2010] SGCLR 870** held (as stated in holding (5) of the headnote that:
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> "The Supreme Court would affirm as good law, the principle of law regarding the need for a party to call a material witness in support of its case. However, the said principle of law did not apply in the circumstances of the instant case. In establishing the standard of proof required in a civil or criminal trial, it was not the quantity of witnesses that a party who had the burden of proof, called to testify, that was important; but the quality of the witnesses called and whether at the end of the day the witnesses called by the party had succeeded in proving the ingredients required in a particular case. In other words, the evidence led must meet the standard of proof required in a particular case. If it did, then it would be a surplusage to call additional witnesses to repeat virtually the same point or seek to corroborate evidence that had already been corroborated."

In this case, the prosecution witnesses were the victims of the robbery attack and were able to give detailed testimony that linked not only the appellant, but also the other convicted persons to the commission of the offences. Since the evidence of the prosecution witnesses was relevant and germane to the crux of the case, there was no need to look elsewhere.

It is therefore clear that the inability or failure of the prosecution to call the lorry station chairman, Kofi Badu has not resulted in a miscarriage of justice for which the appellant should have any benefit. What is important to consider is whether the evidence of the prosecution witnesses who gave evidence in the case, testified upon what is relevant and material evidence. If their evidence is relevant and material in establishing the necessary ingredients of the offence charged, then the prosecution must be deemed to have discharged the burden of proof that lies upon them.

Upon consideration of the entire evidence, we come to the conclusion that there is sufficient evidence to establish the charges of conspiracy to commit robbery and robbery against the Appellant and the other accused persons, beyond reasonable doubt.

Accordingly we hold that the appeal against conviction fails and is therefore dismissed. We affirm the conviction of conspiracy to commit robbery and robbery against the appellant and the two accused persons.

(C) Sentence

Counsel for the Appellant submits the concurrent sentence of 45 years for the two counts of robbery is harsh and excessive in the circumstance of the case.

What this court has been requested to do, is to consider whether the sentence of 45 years' imprisonment is appropriate under the circumstances. In the absence of the judgment we cannot tell what factors influenced the trial judge in imposing the sentence of 45 years' imprisonment which is undoubtedly is harsh and severe. But is the trial judge not justified?

Whilst the minimum sentences of robbery have been fixed by operation of law, at ten years where no weapon was used and fifteen years where a weapon was used, the sky appears to be the limit for the maximum sentence. Considering the principles on sentencing enunciated in the cases of **Kwashie v The Republic [1971]1 GLR 488, Adu-Boahene v The Republic [1972]1 GLR 70, *Kamil* v The Republic [2011] SCGLR 300** which we restate as follows:

1. The seriousness of the offence,
2. the premeditation with which the criminal plan was executed,
3. the prevalence of the crime within the locality in particular and the country in general,
4. the degree of revulsion felt by the law abiding citizens of the society,
5. Mitigating circumstances such as extreme youth, first offender and good character.

We also recall the purpose of sentencing to be punitive, calculated to deter others, to reform the offender, to appease the society and to be a safeguard to this country. We note that Counsel for the Appellant failed to urge any mitigation circumstances in favour of the Appellant but rather concentrated on the lost cautioned statement of the accused.

Considering the high incidence of robbery, the effect of the menace of robbery on human life and property in the society and coupled with the fear and revulsion which right thinking members of society feel about the crime, there is the urgent need to deal with it in a manner that will serve as a deterrent to other likeminded citizens. Using all the factors and principles enunciated in the above-stated cases, it would appear that the trial court had some justification in imposing the sentence it did. There is absolutely no doubt that such a long sentence of 45 years' imprisonment will appease society and safeguard them from criminal conduct.

Nevertheless this Court in **Frimpong alias Iboman v The Republic, supra** Coram: Brobbey, Sophia Adinyira, Rose Owusu, Dotse and Gbadegbe**,** while considering a plea for leniency in a sentence of 65 years imposed in a robbery case was doubtful whether such long sentences by their nature do reform offenders. The court at page 334 of the law report, per Dotse JSC said:

> We would therefore advocate a scheme of sentence where the length of the sentence, whist being commensurate to an extent with the gravity of the crime and revulsion which law-abiding citizens feel towards the crime, will be such that, the peers and younger persons of society will have an opportunity to observe the life of the convict after his release and hopefully be deterred thereby.

The Court went on to reduce the sentence from 65 years to 30 years. In adopting the same sentiments we will allow the appeal against sentence on the two counts of robbery. We would leave undisturbed the 20 years sentence for the conspiracy charge.

We would accordingly substitute a sentence of 30 years on each count in place of the 45 years in respect of the two counts of robbery contrary to section 149 of the Criminal and Other Offences Act, 1960, (Act 29). The sentences are to run concurrently

To conclude, the appeal against conviction fails in its entirety, while the appeal against sentence succeeds by the substitution of the sentence of 45 to 30 years' imprisonment with hard labour in respect of the two counts of robbery to run concurrently.

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

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