IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: APPAU, JSC (PRESIDING)
OWUSU (MS.), JSC
LOVELACE-JOHNSON (MS.), JSC
AMADU, JSC
PROF. MENSA-BONSU (MRS.), JSC

CRIMINAL APPEAL
NO. J3/08/2020

28TH JULY, 2021

KWEKU QUAYE alias TOGBE ..... APPELLANT

VRS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

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

This is an appeal against conviction, and in the alternative, against sentence, for a crime of robbery committed in February 2002. The High Court, Cape Coast, tried and convicted the appellant on 27th July, 2005 and sentenced the accused to 45 years imprisonment with hard labour. An appeal to the Court of Appeal some nine years later affirmed the conviction by the High Court on 24th May, 2016, but reduced the 45-year sentence imposed to 40 years.

FACTS

At about 1 a.m. on 9th February 2002, some intruders invaded the residence in Cape Coast, of an Anglican Priest, who was also an employee of University of Cape Coast. Their arrival at the premises was heralded by gunfire and loud noise. They were armed with guns and cutlasses and numbered about seven or eight. The purpose of their intrusion was to steal some money that had been given to the priest to purchase a plot of land for another Anglican Church at Tema. The intruders first went to the Outhouse (Boys Quarters) occupied by the house help of the Priest, threatened him with cutlasses, and was so put in fear of his life, that he screamed for help from the Priest. The Priest and other occupants of the main house who had been woken up by the noise, also started screaming for assistance from the neighbours, but no help came. They scrambled for hiding places in the house, and so some took refuge in the toilet. The intruders broke down the door of the building by smashing it with cement blocks, and then three of the intruders entered. Two wore mask, but one, who was dressed in military "camouflage" shorts, a black Tee shirt, boots and cap, was not masked. He carried a pistol and torch. One of the masked ones kicked the priest from behind and asked "Where is the money, where is the money?" The robber, who was not masked, fired two shots at the priest, wounding him in both thighs. Those outside shouted back that they were not to kill the priest but to only take the money. In the course of these events, the priest heard the person who shot him being referred to by the name 'Togbe'. He was then made to lead them to his bedroom, which the robbers ransacked for the money, as well as other items. When leaving, the robber, who had fired the two shots, fired a third shot at his stomach. He fell down, groaned and played dead. The robbers then left, taking with them the following items:

1. 18 Million cedis
2. $100 note
3. $5 note
4. One wrist watch
5. A bottle of perfume

6. One radio
7. One office bag.

After the attackers left, help came, and the priest was rushed to the hospital for medical treatment. He was treated and discharged. A report was also made to the police.

Later that same morning of 9th February, and upon a tip-off, the police visited a house known to be occupied by certain persons associated with criminal activities and arrested three suspects. The priest was requested to attend at the police station. Upon his arrival at the Police Station, and without any prompting, he immediately pointed out one person in a cell as the intruder who was not masked, and who had fired the three shots at him, and was called 'Togbe'. The suspect, now the appellant in the instant case, was still wearing the 'camouflage' shorts but without Tee Shirt or cap. Two days later, the priest was called again to the Police Station, this time, to identity the Tee Shirt and cap; which he positively identified as what 'Togbe' was wearing.

After further investigation by the Police, the accused was charged with the offence of robbery. Four other persons were later arrested at different locations in Cape Coast, but were released for lack of evidence. At the end of the trial, the High Court sentenced the accused to 45 years (IHL). On appeal to the Court of Appeal, the conviction was affirmed, but having regard to the fact that the accused was a first offender, reduced the sentence to 40 years. This is the appeal that has arrived at this honourable court.

GROUNDS OF APPEAL

> *"a. The Learned Justices of the Court of Appeal respectfully erred when they held that the learned Trial Justice was right in ruling that a prima face case was made against the appellant to warrant the appellant to open his defence.*
>
> *b. The Learned Justices of the Court of Appeal erred when they held that the prosecution proved their case beyond reasonable doubt and the conviction and sentence passed on him by the trial judge was right.*
>
> *c. In the unlikely event, without admitting same that the conviction was sustainable, the sentence of 40 years*

(Imprisonment with Hard Labour) imposed by the Court of Appeal, is yet too harsh in the light of the fact that the Appellant is a first offender".

CASE FOR THE APPELLANT

The appellant contends first that the judgment of the High court was not included on the record of Appeal because it could not be found. He further contended that the prosecution presented only two witnesses and out of the two only one, the priest (PW1) testified as an eye-witness to the robbery, and that his testimony was vehemently challenged by the appellant that he was not the "unmasked man" who "allegedly shot PW1 during the alleged robbery". Appellant now insists in his statement of case that

"From the testimony of PW1, at the time of the alleged robbery, he was not alone but was with other persons including a houseboy who also witnessed the same event. Indeed, according to PW1, it was this house [sic] who was first attacked by the robbers and who shouted PW1's name for help…. My Lords, it is clear from PW1's testimony that the houseboy had a close encounter with the alleged armed robbers and stood in a better position to corroborate the testimony of PW1 that the appellant was one of the alleged robbers."

The issues in this case, then, are that the appellant is challenging his conviction upon procedural and substantive grounds. On the procedural front, he suggests that there is a concern that the judgment of the trial court was not available to the Court of Appeal; and also contends that although the prosecution failed to make a prima facie case against him, the trial court did not call upon counsel to make a submission of no case. On the substantive evidence upon which he was convicted, appellant is challenging the process of his identification; and contends that since it was on the evidence of only one witness that he was convicted, there was no corroboration. Further, that there were other "eye-witnesses" to the event who could have been called to testify, but were not called. He is, by this, suggesting that his conviction was unsafe, and ought to have been set aside. Appellant further argues in ground c of his appeal that in the event that this court is

minded to affirm his conviction, the sentence of 40 years imposed by the Court of Appeal should be reviewed downwards in light of the fact that as he was a first offender.

As grounds **a** and **b** were argued together the same mode will be applied in the instant appeal.

The appellant, in his statement of case, merely remarked that the trial court's judgment was not on the record of appeal. Although this was not a ground of appeal to the Supreme Court, the fact that it had been mentioned in the Statement of Case is sufficient reason to address the matter of what an appellate court must do when vital records of a trial court cannot be found. This fact was acknowledged at the Court of Appeal when some of the records of the trial court, in particular, the court's judgment, could not be found. This issue of lost records confronted the Supreme Court in *Bonuah alias Blay* v. *The Republic* [2015-2016] 2 SCGLR 1494, and the court took the opportunity to lay down the law in respect of when appellate courts confront a problem of lost or destroyed trial records. *Bonuah alias Blay* was a case in which the accused had been convicted of conspiracy to commit robbery and robbery by the High Court, Sunyani in February, 2002, and sentenced to life imprisonment. He appealed against the sentence, contending that it was harsh and excessive, considering the fact that although the offence was committed by use of offensive weapon, there had been no death, which might have justified such harsh punishment. The Court of Appeal declined to interfere on jurisdictional grounds since life imprisonment was the minimum sentence under the prevailing law at the time of his conviction. After many years, he applied for, and was granted, leave to appeal to the Supreme Court out of time.

At the hearing of the appeal at the Court of Appeal, it became clear that a substantial part of the records of the trial court could not be located, thereby disabling the appellate court from conducting a re-hearing of the case. The Court of Appeal affirmed the judgment of the High Court. On appeal to the Supreme Court it transpired that *"the entire testimony and evidence of nine prosecution witnesses, as well as the appellant's, could not be traced,"* but the Court of Appeal had gone ahead and heard the appeal anyway. This issue of lost trial records caused the court to examine the jurisprudence on lost or

destroyed judicial proceedings. At p. 1502, Georgina Wood C.J., grounding the basis in every person's right to fair trial within a reasonable time, as enshrined in article 19(1) of the 1992 Constitution, stated the law as follows:

> *"Generally, the responsibility of keeping court records in safe and proper custody and producing them on demand rests on the Registrar of the relevant court…. This right, on demand and subject to the fulfilment of all necessary legal and administrative requirements, includes an untrammeled access to the full record of the trial proceedings. We state this as the standard rule, as clearly, this right may be lost or curtailed through an appellant's own criminal actions; the clearest example being where an appellant conspires with others to have all his trial records destroyed. But, an appellant's inability, through no fault of his, to fully access the trial records, for purposes of obtaining a merit-based determination of his appeal, is a clear violation of his constitutional right to fair hearing. In this instant case, the only available judicial records were the statement of offence, the facts of the case, the bill of indictment, the appellant's cautioned statements, the summing up and the sentencing and consequential orders of the trial court."*

The learned Chief Justice surveyed a number of jurisdictions, some of which had statutes on the subject, and others which only had judicial authorities on the point. She found that there was a common thread of practice running through the two distinct positions. At p. 1510 she stated thus:

> *"The clearly distinct jurisprudence which emerges from a comparative analysis of the governing principles in both*

statutory and non-statutory jurisdictions alike is this: an appellant is not automatically entitled to acquittal upon the mere proof of lost or destroyed trial proceedings. The quantum or magnitude of the missing record, lost or destroyed and the centrality to the resolution of the appeal is the first criterion that merits attention. Thus, it is not every missing part of a trial record that would prejudice a merit-based determination of an appeal but only that which is vital to its fair, just and conclusive determination…"

Further rules were enunciated on this subject to guide appellate courts on such occasions, as appropriate.

The loss of records also became an issue in *Kwame Nkrumah @Taste* v *The Republic* [2020] Criminal Law Report of Ghana p.294. This case was decided as the instant appeal, in the same High Court in Cape Coast; in the same week (one on 27th July, 2005, and the other on 28th July 2005); and whose records could not be found for ostensibly the same reasons – the death of the trial judge. The uncanny resemblance of the facts pertaining to the loss of records in both cases bears noting. The facts of *Kwame Nkrumah @Taste* were that there had been a robbery attack on a hotel in Dunkwa-On-Offin in the Central Region. The appellant had been identified by some of the victims of the crime, and so he and his co-accused were tried by the High Court, Cape Coast, on two counts of conspiracy to commit robbery, and robbery. They were convicted and sentenced to 20 years imprisonment each, on the charge of conspiracy, and 45 years imprisonment in hard labour for robbery. Both sentences were to run concurrently.

Six years after conviction he appealed against his conviction. Although some of the judicial records could not be found. The Court of Appeal affirmed the conviction. The appellant brought this appeal contending, inter alia, that the Court of Appeal erred in hearing the appeal without a full record of the trial court proceedings. The judgment of the Court of Appeal noted the following:

> *"The charge sheet, caution statement of the appellant which the appellant relied upon during trial, and the … 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 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 records required for* [sic]".

It then went ahead to re-hear the case and dismiss the appeal. On further appeal to the Supreme Court, the Court, speaking through Sophia Adinyira JSC at p.301 said

> *"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… 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 a 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."*

The trajectory of the instant appeal is almost on all fours with the *Kwame Nkrumah @Taste* case. In the instant case, the Court of Appeal, apprised of the situation, sought to find out whether it would be possible to re-hear the case, despite the loss or unavailability of the record. This was because counsel for the appellant had sought to use the loss of trial records as the basis for seeking bail pending appeal; and to request a trial

de novo, ten years after the appellant was convicted. On 24th November, 2015, the Court of Appeal ordered the Registrar of the High Court, Cape Coast to reconstruct the record of proceedings with whatever materials he had at his disposal, so that the case could proceed. This was done, and on 25th January, 2016 , when enough of the record had been reconstructed, counsel for appellant, was ordered to file his submissions within 21 days, and he obliged. Presumably he was satisfied with the reconstructed record and that was why he abandoned his quest for a trial *de novo*, and the appeal was able to proceed to a conclusion. It is true that the reconstructed record did not include the judgment of the trial court and medical report exhibits. However, on the reconstructed record, the reports from the Medical Officer on the extent of the victim's injuries were tendered without objection and admitted into evidence by the trial court as Exhibits. Therefore, the absence of those documents notwithstanding, no miscarriage of justice had been occasioned to the appellant. It therefore sounds strange for counsel in the instant appeal to continue to complain that the judgment of the trial court was not on the record, when it was not a critical component for a successful re-hearing of the case by the Court of Appeal.

Ground **a** of this appeal complains of the fact that a prima facie case had not been made before the accused was called upon to open his defence. What, then, is a prima facie case? Black's Law Dictionary defines "prima facie case" thus: *"A party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour*". Thus, the trial court was required to come to a particular conclusion if enough evidence had been produced to allow the court to "infer the fact at issue and rule in the party's favour". What was the evidence to be led by the prosecution in the instant appeal for the trial court to be able to make such inference? The offence of robbery is defined under section 150 of the Criminal Offences Act, 1960 (Act 29) thus:

> *A person who steals a thing commits robbery*
>
> *(a) if in, and for the purpose of stealing the thing, that person uses force or causes harm to any person, or*

(b) if that person uses a threat or criminal assault or harm to any other person, with intent to prevent or overcome the resistance of the other person to the stealing of the thing.

In *Behome* v. *The Republic* [1979] GLR 112, it was held that

"One is only guilty of robbery if in stealing a thing he used any force or caused any harm or used any threat of criminal assault with intent thereby to prevent or overcome the resistance of his victims, to the stealing of the thing."

In its turn, the offence of stealing, which lies at the core of the offence of robbery, is defined in section 125 of Act 29 as *"A person steals who dishonestly appropriates a thing of which that person is not the owner*." Therefore, the elements of the offence of robbery are:

1. The accused dishonestly appropriated a thing not owned by him or her, and in the care or custody of the victim;

2. The accused used force or harm or threat of force on the victim or on the person of another;

3. The force or threat of force or harm was intended to prevent or overcome any resistance to the stealing.

When these elements of the offence of robbery have been proved by the evidence, a prima facie case would have been made against the accused. It would then require the accused person to lead evidence to create reasonable doubt as to his guilt. Such evidence was led by the prosecution. The Court of Appeal rightly held that

"*It is our finding and holding that the evidence of PW1 and PW2 proved the offence of robbery and therefore a prima facie case was made. The learned trial judge was therefore right in ruling that a prima facie case was made against the appellant to warrant the appellant to open his defence. … the*

> *prosecution was required to prove all the ingredients of the offence of robbery at least not beyond reasonable doubt when considering whether a prima facie case was made by the prosecution for the accused to be called upon to open his defence."*

The Court of Appeal rested its decision on the Supreme Court decision of *Tsatsu Tsikata* v *The Republic* [2003-2004] SCGLR 1068 on the standard of proof that would suffice as satisfying the requirement of 'prima facie case', for an accused to be called upon to open his or her defence. At pp. 1094-95, the Supreme Court per Prof Ocran, JSC stated that the standard of proof at that stage could not be at the same level of 'proof beyond reasonable doubt' as required at the end of the case.

> *"Indeed, if the submission of no case is made just at the close of the prosecution's case and cross-examination of its witnesses, how could one seriously speak of proof beyond reasonable doubt when the defence has not had a full chance of punching holes in the prosecution's case to possibly raise doubt in the mind of the trier of facts by calling its own witnesses and presenting counsel's address? It seems as if we have to look for a lower standard of proof at this preliminary stage in the criminal proceedings*."

Therefore, concluded the Court of Appeal,

> "*the decision as to whether or not the prosecution's case has been proved beyond reasonable doubt should be made after the end of the entire trial after the consideration of the prosecution's case and that of the defence*".

On this exposition of the law, we cannot fault the conclusion of the Court of Appeal that a prima facie case was, indeed, made against the appellant.

Ground b

The appellant has also attacked the conviction on the ground that the Court of appeal was wrong in holding that the prosecution proved its case beyond reasonable doubt. On this score the appellant questioned the identification of the perpetrator by PW1; the credibility of PW1 as a single witness without corroboration; and the failure of the prosecution to call a material witness, as all tending to undermine the discharge of the prosecution's burden as to the standard of proof.

It is trite law that the burden of proof in criminal cases rests on the prosecution and that the standard is "proof beyond reasonable doubt". Section 11(2) of Evidence Act, 1975 (NRCD 323) states that

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

The burden thus has two aspects: the duty to lead evidence on any fact required to be proved; and the duty to provide sufficient evidence to persuade a reasonable mind as to existence of any such fact otherwise known in American criminal jurisprudence as 'the burden of going forward'; and 'the burden of persuasion'. To satisfy the burden of persuasion, the standard of 'proof beyond reasonable doubt' must be met.

The meaning of this hallowed phrase of 'proof beyond reasonable doubt' has been the subject of many decisions. The most cited of these is by Lord Denning in *Miller* v *Minister of Pensions* [1947] 2 All ER 372 when he explained the standard of proof at p.373 thus:

> *"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to*

deflect the course of justice. If the evidence is strong against a man as to leave a remote possibility in his favour which can be dismissed in a sentence of course it is possible but not the least probable, the case is proved beyond reasonable doubt, but nothing short will suffice."

This is a very high standard indeed. What was the evidence produced against this appellant? The appellant had denied involvement in the crime and questioned the mode of identification of his person by PW1, as the intruder who was not masked, and who shot him. On this score, the Court of Appeal analysed the evidence into some detail. The evidence showed that the priest described the attire of the intruder who was not masked, and who was addressed by his co-operatives as 'Togbe', in succinct detail. In any case, according to the witness, "All the lights in the house were on". What difficulty would there be for an adult of sound mind to meet a person without a mask when "all lights are on", and who is wearing military "camouflage" shorts, a black Tee Shirt and a cap, to be able to give a vivid description of the person's attire at the material time and to identify that person later? In *Abdulai Fuseini* v *The Republic* [2020] Criminal Law Reports 331, the appellant, who together with four others, had been charged with, and convicted of conspiracy to rob and robbery appealed to the Supreme Court after the Court of Appeal affirmed his conviction. He contended that since the event took place at midnight, he could not have been properly identified by the prosecution witness. The evidence, however, showed that it was a moonlit night so it was not impenetrably dark. The Supreme Court, speaking through Dotse JSC, agreed with the Court of Appeal that his challenge could not be upheld because it was possible for a person seen under moonlight to be recognized later. In the instant case the appellant was seen under the full glare of electric lights so there should be no surprise if the witness was able to identify him by day. Consequently, PW1 had reason to be emphatic in his testimony under cross-examination, when he stated, "*My Lord he shot me and I saw him*." Was it also by coincidence that the appellant was arrested while wearing shorts identical to those worn by the attacker a few hours earlier? PW1 maintained that when he saw and identified

appellant at the police station, he was without the Tee shirt and cap, so his mention of those items of clothing and subsequent identification of them as Exhibits are instructive of how well he observed his attacker. Was it also a coincidence that the police found in the appellant's possession a cap and black Tee shirt matching the exact description, which were then identified and admitted into evidence without objection? The excuse that those items could be bought by anyone at a second-hand clothes market qualifies as the "fanciful possibilities" of which Lord Denning spoke, in *Miller*'s case. Was it also by coincidence that one who owned the exact same items of clothing identified by PW1 also happened to answer to the name 'Togbe', which PW1 had heard used, to call him? PW1 had led evidence which was not challenged under cross-examination. In PW1's testimony, he stated that they took the money, and after 'Togbe' fired another shot at him in the stomach, he played dead in order to let them go away. The robbers went outside and he heard them say, "Cpl Togbe, we said you should not kill him." This was not challenged on cross-examination. What clearer evidence could there be that the person who fired the "unnecessary shot" after they had taken the money and other items was 'Cpl. Togbe'? Was there not an irresistible inference that killing the victim was contrary to the group's plans for the robbery, hence their displeasure at 'Cpl Togbe' for what he had done? Under cross-examination, when asked whether he was "called 'Togbe' by the armed robbers at the premises of PW1, his response was an obtuse "that is not exact", and yet he had been responding confidently to every question "That is not true". Was the "that is not exact" answer a denial that he was, or was not 'Togbe' or 'Cpl Togbe'? Does a man who is asked to confirm or deny a certain name as his, raise a reasonable doubt with a "that is not exact" answer?

Again, in respect of the identification, he alleged that the shorts he wore when he was arrested were bought in open market in Accra, so anyone could acquire such second-hand clothes. There was evidence that PW1 identified him at the Police Station as his attacker. However, under cross-examination, he claimed "I am not an armed robber and secondly I don't know him anywhere" Yet, on the evidence his positive identification at

the police station was by PW1. In sum, all his denials could not create a reasonable doubt in anyone's mind that he was not the attacker that night.

The appellant has also complained about having been convicted without calling a material witness. The Appellant claimed that he was with one Peter Eshun, and that if they were together as he claimed, why had Peter Eshun not been called as a witness; and why was he the only one charged? One can make short shrift of this complaint. The appellant had denied having participated in the attack. He claimed he was with his wife when the Police broke down his door and arrested him and wondered why she had not been called to testify. However, in a statement given on 10th February, the day after the event, he alleged that when he saw many policemen outside his door he ran away. Faced with two inconsistent accounts of the location of his arrest only a day earlier, the judge sought clarification:

> *Accused. "I was arrested in the vicinity*
>
> *Judge. Not in your room?*
>
> *Accused. When I was arrested in my room they released me".*

Asked to reconcile the two statements he gave as to the location of his arrest, he claimed both were true. He even had a third account of having been arrested while on his way to his wife's place. He stated that he did not believe there was sufficient evidence linking him to the case; and that had he been guilty of the offence he would have run away to Togo where he comes from, and not wait to be arrested a few hours later while *en route* to visit his wife. Having already stated earlier that he and his family, (his wife included) lived with him where he had been arrested, he had something different to say about where his wife lived. These three accounts did not clear the doubt as to where he was arrested, but only compounded the confusion and showed his testimony up as not credible. How, then, could the wife be a material witness, when even the issue of whether or not they were together at the time of his arrest could not be conclusively established?

Again, the appellant did not call any witness in his defence. He could have done so as he was required under section 10(1) of NRCD 323 when the burden of persuasion shifted to

him after a prima facie case had been made against him. Section 10(1) provides that his burden of persuasion required him

> *"to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of probabilities…"*

With a much lighter burden than that of the prosecution's, section 11(3) provides that

> *"In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to his guilt.*

The appellant was therefore not prohibited from calling any witnesses, but he did not do so.

The appellant has also complained that he alone had been charged with the offence of robbery, when he was with his business partner Peter Eshun' at the material time. Unfortunately for the appellant, the offence with which he was charged was not one that required a plurality of minds, such as conspiracy. He was charged with robbery, which is capable of being committed by a solo act of one person. Therefore, even though on the evidence there were many other people, who could not be identified because they were masked, that fact does not affect the liability of appellant in any way. It is perfectly possible for a person to be liable for an offence even when his associates are unknown, or cannot be found. Section 13(3) of the Criminal Offences Act, 1960 (Act 29) provides as follows:

> *"Where an event is caused by acts of several persons acting jointly or independently,* ***each of those persons*** *who intentionally or negligently contributed to cause the event*

> *has, for the purposes of this Act, …* ***caused the event****;"(*emphasis supplied.)

The law is thus clear that one person can alone answer for an offence committed by him and other persons. Therefore, the prosecution in the instant appeal did no wrong by prosecuting the appellant alone for the offence, since the others could not be identified by the victim.

The appellant further complains that he was convicted on the uncorroborated testimony of a single witness. The response to this complaint is in the dictum of Dotse JSC in *Gligah & Atiso* v *The Republic* [2010] SCGLR 870. 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 position has also been supported and relied on by Sophia Adinyira JSC in *Kwame Nkrumah @Taste* (supra). Dotse JSC went on further and said that if the witness was going to give any evidence that had already been corroborated, nothing had been lost by not calling the person. As the Court of Appeal in the instant case, rightly noted that,

> *"Any other witness like the house help would only repeat the evidence led by PW1 [the priest]… The testimony of PW1 together with that of PW2 were credible and established all*

the ingredients of robbery. Consequently, the failure by the prosecution to call the houseboy had not resulted into a miscarriage of justice against the appellant."

We do agree with this conclusion of the Court of Appeal. In any case, on the evidence on record, the house help was not in the main house, whose door was smashed with cement blocks by the intruders. He remained outside, with the rest of the four or so other attackers who had threatened him and got him to come out of the Boys Quarters [Outer house]. How was he going to be able to testify to the events that occurred in the room of the main house when he was not there? In his evidence on 22nd June, 2005, PW1 testified thus:

"We all retreated, some went to the toilet and locked themselves in and I came out and the one holding the pistol shot me: this young man standing here (they called him Togbe) shot me on the right thigh and the left thigh and I was bleeding. One of them who was wearing a mask kicked me from behind and they were saying "where is the money, where is the money" and those outside were shouting: "don't kill him take the money, don't kill him and they led me to my room"

From this evidence, which stood unchallenged under cross-examination, there was no other real eye-witness to the entire sequence of events that occurred inside the house, because the other occupants had taken refuge in the toilet, and other locations to escape the attackers. Fortunately, as Justice S.A. Brobbey observes in his book, `*Essentials Of The Ghana Law Of Evidence* –Datro Publications Accra, Ghana 2014, p.86, "*the position of the law is that a case can be decided on the evidence of one witness"*. On both grounds **a** and **b** the appeal fails.

Gound c

> *c. In the unlikely event, without admitting same that the conviction was sustainable, the sentence of 40 years (Imprisonment with Hard Labour) imposed by the Court of Appeal, is yet too harsh in the light of the fact that the Appellant is a first offender".*

This ground of appeal raises issues of the application of principles of sentencing. The appellant complains that the sentence is harsh because he is a first offender. During sentence, Counsel who was denying that the accused was involved at all said:

> *"My Lord at this stage we would like to ask the court to have the greatest mercy in terms of sentence on the accused person. He is a young man and his first brush with the law is just this one and I believe the bench would have sympathy on him"*.

The appellant appears to think that being a first offender or being young gives one an entitlement to lighter punishment than would otherwise be imposed. Nothing could be farther from the truth. It is important to highlight the fact that these are only two of the many factors that the court considers in imposing punishment Any examination of a list of the factors would put the seriousness of the offence first before mitigating factors that the court could consider at its discretion. There is no entitlement since it is at the discretion of the court. A long line of cases, such as *Kwashie* v *The Republic* [1971] GLR 488, *Gligah & Atiso* v *The Republic* [2010] SCGLR 870; *Kamil* v *The Republic* [2011] 1SCGLR 300, and *Frimpong alias Iboman* v The Republic [2012] 1SCGLR 297, provide a list of the factors a court may consider during sentencing. However, the list is not an exhaustive one, and the courts continue to add to it as appropriate.

In *Owusu Banahene* v *The Republic* [2017-2020] SCGLR 606, the Supreme Court per Sophia Adinyira JSC at p. 608 restated the factors that a court could consider in determining the length of sentence to include*:*

> *1. Any period of time spent in lawful custody in respect of that offence before the completion of his trial [Article 14 (4) of the Constitution,1992]*
>
> *2. The intrinsic seriousness of the offence.*
>
> *3. The degree of revulsion felt by law abiding citizens of the society for the particular crime.*
>
> *4. The premeditation with which the crime was convicted.*
>
> *5. The prevalence of the crime within the particular locality where the offence took place, or in the country generally.*
>
> *6. The sudden increase in the incidence of the particular crime.*
>
> *7. Mitigating circumstances such as the extreme youth, good character, remorse and reparation*
>
> *8. Aggravating circumstances such the violence or the manner in which the crime was committed.*

A consideration of these factors clearly indicate that the youthfulness or inexperience of the accused are only two of the important factors for consideration. To the contrary, a consideration of the "aggravating circumstances such the violence or the manner in which the crime was committed", does not operate in this appellant's favour. In the instant case, the evidence of PW1, which stood unchallenged, was that the robbers believed he was dead, as he pretended to be, and allegedly criticised their partner-in-crime that he should have just taken the money, and not killed the Priest. Knowing that a dead body was bound to bring the law onto their tracks very quickly, they were unhappy with what he

had done. On the evidence, firing a third shot at a man already immobilized by two shots to both his thighs and bleeding was needless cruelty, even for his co-robbers.

Counsel for respondent observed in the statement of case that there was nothing about appellant's behaviour that showed that he was a first offender. The notion of "first offender" usually means that it is the first time the person has been caught in the net of the law, and not necessarily that it is the first time he has indulged in that activity.

What the appellant did was very grave. To attack a man in his own home, and in his own bedroom is a grievous act. Sir Edward Coke stated in *Semayne's* Case (1604) 5 Co Rep. 91; 77 ER 195, "*That the house of every one is to him as his …castle and fortress, as well for his defence against injury and violence, as for his repose*." This has been restated in the now-hallowed principle at common law as, "*A man's house is his Castle*". However, the full meaning of that principle is that one's home is more than a sleeping place. It is also a place of safety and security. Therefore, where an intruder, by acts of violence overcomes a man's ability to protect the sense of safety and security that his home must offer, the psychological scars left on the victim are immeasurable.

Despite all these considerations above, however, the sentence of 40 years is somewhat harsh, and a sentence of 30 years imprisonment in hard labour should certainly be adequate punishment for the crime he committed. Therefore, in consonance with the sentence imposed by the Supreme Court on *Kwame Nkrumah @Taste*, and the dicta of Dotse JSC in *Frimpong alias Iboman* (supra), we would reduce the sentence of 40 years and substitute 30 years in hard labour, from the date of conviction.

The appeal against conviction fails in its entirety but the appeal against sentence succeeds.

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