THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: DOTSE, JSC (PRESIDING)
BAFFOE-BONNIE, JSC
MARFUL-SAU, JSC
DORDZIE, JSC
AMEGATCHER, JSC

CRIMINAL APPEAL
SUIT NO. J3/7/2017

30TH OCTOBER 2019

RICHMOND KWABLA DZANGMATEY ..... APPELLANT

VRS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY AMEGATCHER JSC, AS FOLLOWS-:

The appellant was convicted of murder by the High Court, Koforidua, after a murder verdict of the jury. Following the conviction, he was sentenced to death by hanging. An eighteen-year-old JSS school girl, Christiana Apafo was the victim of the crime. The appellant lived with the deceased in the same vicinity in Volivo, in the Eastern Region. The parents of the deceased had warned him about his amorous association with the deceased. On 4th March 1995, after the deceased and her father had returned from buying food and her father had gone into his room, the appellant and the deceased engaged in a quarrel which resulted in him stabbing her. When the deceased's father, who was just next door rushed to the aid of his daughter following shouts from her, the appellant also stabbed him in the neck. The struggle and accompanying shouts attracted a crowd in the

area. Some men grabbed the appellant and took him to the police station. Christiana Apafo could not make it as she died almost instantly. In the case of the father, he ended up in hospital with his wounds.

From the perspective of the appellant, the death and attack came out of self-defense. The appellant claimed that the deceased had been pledged to be married to him but that because she was still in school, her father had told him to stay away from her until she was older. According to his testimony, at the time of the murder, the deceased had been pulling and biting on his penis while the father held him at his neck; he claims that he grabbed the bottle and stabbed them both out of self-defense.

The jury was not swayed by the explanation of the appellant after receiving the summing up direction from the trial judge. It returned a verdict of guilty of murder. Dissatisfied with the verdict, the appellant appealed to the Court of appeal on 3rd February 2014 seeking to quash the conviction on four main grounds of appeal: that the trial judge misdirected himself in his summing up to the jury; that the trial judge misdirected the jury in his summing up; that the verdict of the jury is unreasonable in light of the evidence before it; and that the trial judge erred when he failed to consider the defence of the appellant adequately.

On 28th October 2015, the Court of Appeal dismissed the appeal, stating emphatically that not every misdirection or non-direction will persuade an appellate court to allow an appeal, unless it was such as to render the judgment unreasonable or unsupported by evidence on record or based on a wrong decision or occasioning a miscarriage of justice. The Court of Appeal held that the trial judge properly directed the jury on all material aspects, including the defences of self-defence and provocation; and stated further that if it were, as an appellate court, to assume the position of a reasonable jury hearing the evidence, it would convict the appellant of murder.

The appellant has lodged the instant appeal to this court on the following grounds:

1. The court of appeal erred when it affirmed the conviction and sentence of the trial high court.

2. The court of appeal erred when it held that the irregularities at the trial court was not fatal.
3. Additional grounds may be filed upon receipt of a certified true copy of the judgment.

The jury instruction was the main point of contention by the appellant. Even though the appellant in his statement of case has stated that he was arguing grounds one and two together, appellant abandoned ground two and limited himself to ground one which he argued under four sub-headings.

The first is that "*The Trial Judge misdirected himself in his summing up to the Jury.*" The submission on behalf of the appellant argues that the trial judge failed to properly sum up to the jury according to Section 277 of the Criminal Procedure Act, 1960 (Act 30). Its failure amounted to failing to break down the law as regards the burden of proof. The appellant states that according to **R v Afenuvor [1961] 2 GLR 655**, the jury should not be merely satisfied but must either be satisfied beyond a reasonable doubt or be so completely and entirely satisfied as to be quite sure of the guilt of the accused. The appellant argues that the judge failed to instruct as so.

Additionally, the appellant argues that the judge went against **R v Spencer (1995) Crim LR 23** by suggesting in his opinion that the accused was guilty of murder when he stated "the evidence is so overwhelming that no reasonable person can entertain any doubt about it." The Appellant points out that it is the duty of the trial judge to direct the jury on points of law and to evaluate the evidence of the prosecution in a fair manner to the jury.

We have reviewed the summing-up of the learned trial judge. At pages 70-71 the judge quoting section 11(2) of the Evidence Act, 1975 (NRCD 323) directed the jury as follows:

"...requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of the fact beyond all reasonable doubt. This is what is referred to in popular parlance as proof beyond all reasonable doubt. There are therefore five ingredients the

prosecution must prove to you beyond all reasonable [doubt] before you can return a verdict of murder against the accused."

And at page 76 the judge went further in his direction as follows:

"...you must bear in mind that the accused person has no duty to prove his innocence or to prove his case beyond all reasonable doubt. He only has a duty to lead evidence that is reasonably probable. So the question to ask yourself is whether what the accused told you is reasonably probable.....If you are in any doubt about those scars, then I direct you to resolve your doubts in favour of the accused."

The trial judge went ahead to direct the jury on the defences available to the appellant i.e., self-defence and provocation. The judge also at page 68 of the record made it clear to the jury that the law allows him to express his own views on pieces of evidence, but the jury is not bound to accept or agree with any such view or opinion. In effect the jury may ignore the judge's opinion and form their own since they are the judges of fact while he is the judge of law.

In our view, the requirements of section 277 of the Criminal Procedure Act, 1960 (Act 30) is for the judge to carefully direct the jury in simple language on the law and evidence relevant to the matters place before him at the trial. One clear example is the law on the burden of proof which rests on the prosecution to prove its case against the accused beyond all reasonable doubt. This burden never shifts unto the accused person who may even choose to remain silent or raise reasonable doubts in the prosecution's case. It must be noted that there are no templates showing the form in which the direction should be made to the jury. What is important is the substance of the summing-up based on the peculiarity of the evidence led in the particular case. In sum, the summing-up must be looked at as a whole and not in piecemeal. From the detailed analysis of the summing-up as more particularly reproduced above, it is our opinion that the learned trial judge complied with the requirements of section 277 of Act 30. The jury was instructed with the following laws: sections 47, 52, and 70 of the Criminal Code, 1960 (Act 29), section

11(2) of the Evidence Decree, 1975 (NRCD 323), and section 37 of Act 29 (the law on self-defense).

The judge also instructed the following: **"There are five ingredients the prosecution must prove to you beyond all reasonable before you can return a verdict of murder against the accused person. These five ingredients are; i) that Christina Akpafo is dead, ii) that she died as a result of an unlawful hard, iii) that the harm was caused intentionally, iv) that the harm was caused by the accused person herein, Richard Kwabla Dzangmatey, and no other person and v) that the deceased died from the injuries she sustained**." (sic)

With this plethora of evidence available on the record, we have no hesitation in agreeing with the analysis made and conclusion reached by the Court of Appeal. The trial judge applied correctly the law on the burden of proof to the jury.

The next submission canvassed against the learned trial judge is that "*The Trial Judge misdirected the Jury in his summing up.*" The appellant cites the **State v Amuah (1961) GLR 195,** SC stating, "it is of the greatest importance that the jury should be directed in an impartial way on the facts, and not in such a way as to indicate what they should find." The appellant points out that the trial judge, in his summing-up notes, stated, "Ladies and gentlemen (of the jury), at the end of the evidence in this case almost all the ingredients in the charge of murder have been proved…. The evidence is so overwhelming that no reasonable person can entertain any doubt about it." The appellant argues that this direction went directly against the call to be neutral and impartial on the facts.

Allegation of bias or partiality on the part of a trial judge must be supported by evidence. Mere vituperation or suspicion was not enough. In this case there is no foundation whatsoever in the allegation of partiality on the part of the trial judge.

Looking at the summing-up as a whole, the learned trial judge directed the jury to those matters in the evidence which were not in dispute, i.e., that Christiana Apafo is dead; that she died through harm and that the harm was caused by the appellant. It is to these

matters that the trial judge drew the jury's attention stating that the evidence was "**overwhelming that no reasonable person can entertain any doubt about it**". However, when it came to establishing the *mens rea* of the accused, the parties were divergent regarding whether there was a fight before the deceased died, who started the fight, and the circumstances leading to the stabbing of the deceased. It is the evidence establishing the *mens rea* which the trial judge directed the jury on, to form their own opinion who to believe. This is how the trial judge put it at page 75:

"But there are two conflicting accounts about who started the fight. PW 2, David Apafo, the victim's father stated that it was the accused who first attacked his daughter and stabbed her, so he went to her aid and got stabbed himself by the accused. It is for you to decide whether you believe him. It is the case of the accused that he inflicted the wounds on the deceased inn self-defence when PW 2 attacked him with a knife…. Self defence is a total defence in the sense that the accused admits killing the deceased but says that he did so in order to save his own life…… It is your duty to decide whether the accused is telling the truth… (sic)

This direction asking the jury to form its own opinion who to believe before coming to a conclusion that that ingredient in the crime of murder had been established did not in any way prejudice the case of the appellant. It did not by any stretch of imagination portray bias on the part of the trial judge in favour of the prosecution and against the accused. It is important in cases of this nature for the appellant to read the summing-up as a whole and demonstrate to the appellate court where the trial judge misdirected the jury by non-direction. Where, as observed by Mensa Boison J.A in the case of **Awedam v The Republic [1982-83] GLR 902 at 912** the appellant "pick up solitary phrases or clauses or sentences" in a summing-up as the basis for his attack, the true meaning put up or intended to be put to the jury by the trial judge will be distorted. In our view the learned judge did not shift the burden of proof on to the defence.

Our duty as an appellate court in such appeals is not to put ourselves in the position of the jury or have the case re-tried. Our duty is to review the record and satisfy ourselves whether firstly the jury was directed properly on the law and secondly whether the evidence supported the conviction. In the Supreme Court's case of **Yirenkyi v The State [1963]1 GLR 66 at 77,** Akufo-Addo JSC (as he then was) in addressing a similar attack on the trial judge in a summing-up expounded the legal position as follows

"To borrow the words of Lord Goddard C.J. in R. v. Whybrow, we do not for a moment seek to put ourselves into the position of a jury. We take the verdict of the jury, which is one of guilty, and which means that the jury were satisfied that the appellant did do a criminal act. We then have to see how far the case is affected by the wrong direction given by the trial judge, and in doing so we take the whole of the facts into account and regard the whole of the circumstances."

In **Ketsiawah v The State [1965] GLR 493, t**he appellant was convicted of the murder of his former wife. On the day of the crime, the two of them had left their village together to go to a farm. A search party later discovered the dead body of the deceased in the bush covered with palm leaves. Later the accused was arrested and he made a statement to the police that on the day of the crime he had drunk a bottle of akpeteshie, unknown to his former wife. He further stated that he appealed to his former wife for reconciliation, but that his former wife replied with abuses. Stung by these abuses and being totally drunk, he cut her with a cutlass he was holding. At the trial the closing sentence of the judge's summing-up notes said: "If you believe that accused was so drunk that he did not know what he was doing or that he was highly provoked then say he is guilty of manslaughter. If you are not sure, or if you think his explanation might reasonably be true, then return a verdict of guilty of manslaughter." On appeal against that direction to the jury, Ollennu JSC held at page 488 that the trial judge's direction to the jury that if they believed the accused was so drunk that he did not know what he was doing then they should return a verdict of guilty of manslaughter was a misdirection since

it did not explain to the jury that if they formed the opinion that the accused did not know what he was doing, then, in law, he was insane and they should return the special verdict of guilty but insane, as provided in section 28(3) of the Criminal Code, 1960. But according to Ollennu JSC, this misdirection had not occasioned a miscarriage of justice since, by returning the verdict of guilty of murder, the jury showed that they did not believe that the accused was intoxicated to the extent that he did not know the nature of his act."

Another case on this issue is **Barkah v The State [1966] GLR 590. T**he appellant was charged with murder. The evidence of the prosecution was that there was a quarrel between the appellant and his half-brother Amadu Wangara, over a loan for which one Laba stood surety. The lender demanded repayment of the loan from Laba but the appellant advised him not to pay it as he was not directly liable for repayment. Thereupon Amadu Wangara accused the appellant of insolvency. This insult infuriated the appellant who felt that he had been disgraced before his friends. He attacked Amadu Wangara and the deceased with a cutlass and the deceased died later as a result of the injuries sustained. The trial judge directed the jury, inter alia, as follows: "If, however, you are not so satisfied, but feel that because of some sure and reasonable doubts, the guilt of the defendant cannot be said to have been proved with certainty, then you must find the defendant not guilty." He was convicted and, on appeal, his counsel submitted that the summing-up by the trial judge shifted the burden of proof on to the defence and that the use of the phrase "some sure and reasonable doubts" by the trial judge confused the minds of the jury. Mills-Odoi JSC held at page 596 that:

"there is no set formula for explaining to the jury that the burden of proof lies on the prosecution. In our view, the phrase "some sure and reasonable doubts" used by the trial judge was an unfortunate expression, but in this particular context, it did not give a wrong impression to the jury;

At page 597 Mills-Odoi JSC concluded:

"**This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice and a substantial one. Learned counsel failed to show that the summing-up or any portion thereof had occasioned a miscarriage of justice; therefore, this ground also fails**."

In our opinion, the Court of Appeal was right in its conclusion. For a conviction to be quashed on appeal on grounds of misdirection, it must occasion a substantial miscarriage of justice. Since no miscarriage of justice has been established in the summing-up of the trial judge the verdict of the jury and conviction of the appellant for murder is supported by the evidence adduced in this case. We, therefore reject the invitation by the appellant to quash the conviction on the basis that the trial judge misdirected the jury in the summing-up.

Another issue raised under this ground by the appellant is that "*The verdict of the jury is unreasonable in light of the evidence before it.*" According to the appellant, one of the most crucial issues in the case was whether or not the accused/appellant acted in self-defense or under provocation when he stabbed the deceased. The Appellant argues that the accused/appellant did not have the intention to cause death but to free himself. At worst, the appellant argues, the accused should have been convicted of manslaughter had it not been for the misdirection from the trial judge.

We have already concluded that in this case, the jury who were in court and heard the evidence were not convinced that the appellant acted out of self defense after being properly directed by the judge to discharge the appellant if they believed him. It is not the duty of the appellate court to disturb the verdict of the jury and substitute it with a lesser offence if the evidence was conclusive that the crime was committed. In the Court of Appeal case of **Beniako and Another v The Republic [1995-96] 1 GLR 32 at 44** Forster JA delivering the unanimous judgment of the court on a similar invitation

dismissed the request and stated that the jury as triers of fact, determine the credibility of witnesses, evaluate all evidence adduced in the court and ultimately decide the guilt or innocence of the accused. Unless there had been some serious misdirection by the trial judge or the evidence was incapable of sustaining the verdict of the jury, an appellate tribunal was bound to recognise and defer to the verdict. Forster concluded that since, in the instant case, there was overwhelming evidence in support of the verdict of the jury, no misdirection by the judge had been found on the record, and it was impossible to say that on the evidence before them the verdict was one at which the jury might not properly have arrived, the court would affirm the conviction and sentence of both appellants by the High Court.

We adopt the reasoning and the conclusion of Forster JA in this appeal and decline the invitation to substitute a lesser punishment for the verdict of the jury.

The final argument urged on us under this ground is that "*the Trial Judge erred when he failed to consider the defense of the Appellant adequately.*

The Appellant argues that the learned trial judge neither assessed the defense of the accused/appellant adequately nor explained same to the jury adequately. The appellant believes that had the trial judge adequately considered the defense of the accused/appellant and explained the same to the jury, then the accused/appellant would have been, at worst, convicted of manslaughter and not murder.

We have demonstrated in this opinion that the trial judge put forth the case of the appellant especially on self-defense and invited the jury to discharge the accused if they believed he spoke the truth. In our opinion, the defense of the appellant was adequately explained to the jury by the trial judge and in doing so he was not obliged to reproduce every part of the defense which was already on record and available to the jury.

In **Opuni v The State [1965] GLR 82,** Acolatse JSC held that it is no misdirection not to tell the jury what is already available to them on record. **"The jury who were the sole judges of fact heard this evidence which was given in plain language, and which was not fraught with any technicalities. They heard the whole evidence**

of this expert witness and the failure on the part of the learned trial judge to tell them something which is already on record is, in our view, not fatal to conviction. It is no misdirection not to tell the jury everything which might have been told them, if the material is already on record."

Further in **Barkah v The State (supra) Mills-Odoi JSC at page 598** stated that,

"In our opinion omission in a summing-up to tell the jury in terms what the defence is does not amount to mis-direction if the issues in the case are in substance put to them. Sometimes, no doubt, non-direction may amount to mis-direction; but in our judgment the omission by the trial judge, in the instant case, to call the attention of the jury to particular matters which are already given in evidence did not amount to mis-direction. In all the circumstances, we were satisfied that the jury were properly directed by the learned trial judge and there was evidence on which they could act. The court cannot therefore substitute itself for a jury to re-try the case."

We conclude that the Court of Appeal properly reviewed the summing-up of the trial judge and came to the right decision that the appeal has no merit. Applying the provisions of section 31 of the Courts Act, 1993 (Act 459), we endorse the previous decisions of this court in **Sabbah v The Republic, [2009] SCGLR 728** and **Nogode v The Republic, 975 [2011] SCGLR** that misdirection by trial judge by itself will not necessarily lead to the quashing of the conviction unless the misdirection occasioned a grave miscarriage of justice. We cannot fault the Court of Appeal for coming to that conclusion. The appeal is dismissed.

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

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

SGD P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

SGD S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

SGD A.M. A. DORDZIE
(JUSTICE OF THE SUPREME COURT)

COUNSEL

KWAME OBOUR FOR THE APPELLANT.
FRANCES MULLEN-ANSAH, CHIEF STATE ATTORNEY FOR THE RESPONDENT.