IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2010

CORAM: BROBBEY JSC (PRESIDING)
ADINYIRA (MRS)JSC
OWUSU (MS) JSC
DOTSE JSC
GBADEGBE JSC

CRIMINAL APPEAL
NO. J3/5/2010

18TH JANUARY, 2012

KWAKU FRIMPONG A.K.A IBOMAN - **APPELLANT**

VRS

THE REPUBLIC - **RESPONDENT**

J U D G M E N T

INTRODUCTION

JONES DOTSE JSC:

The appellant herein and three others were tried and convicted by the High Court, Fast Track Division, Accra on the following charge sheet:

Count One

Conspiracy to commit crime namely robbery contrary to sections 23 and 149 of the Criminal Code 1960 Act 29 as amended by Act 646, 2003.

Particulars of Offence

Kwaku Frimpong a.k.a Iboman, Ernest Ababio a.k.a Blackie, Daniel Amewu a.k.a Coffie and Raymond Kwasi Wilson on 23rd April, 2002 at about 2.30am you did act together to rob, Albert Mawusi Biga's BMW No. GR 2158Q and other items in his house at Lashibi within the jurisdiction of this court.

Count Two

Statement of Offence

Robbery, contrary to section 149 of the Criminal Code 1960, Act 29 as amended by Act 646, 2003

Particulars of Offence

Kwaku Frimpong a.k.a Iboman, Ernest Ababio a.k.a Blackie, Daniel Amewu a.k.a Coffie and Raymond Kwasi Wilson on 23rd April 2003 at about 2.30 am you did rob Albert Mawusi Biga's BMW No GR 2158Q and other items in his house at Lashibi in

the Greater Accra Region and within the jurisdiction of this court.

and sentenced to a term of imprisonment for 65 years on each count with hard labour.

On the 23rd day of October 2008 the Court of Appeal dismissed an appeal lodged by the appellant against the conviction and sentence of the High Court.

Following that dismissal, the appellant filed this appeal to this court with the following as grounds of appeal:

GROUNDS OF APPEAL

a. That the Court of Appeal failed to properly evaluate the evidence which formed the basis for the conviction of the appellant by the trial court.

b. That the dismissal by the court of Appeal of Appellant's appeal was unreasonable and occasioned the Appellant a substantial miscarriage of justice.

c. That the Court of Appeal and the trial court failed to give adequate and proper consideration by appellant's defence.

d. That the Court of Appeal ought to have mitigated the sentence imposed on appellant by the trial court.

BRIEF FACTS

The undisputed facts before the trial High Court are that, on the 23rd day of April 2002 the appellant and his three accomplices armed with a gun and other offensive weapons attacked the residence of PW1 and PW2, namely Albert Mawusi Biga and Ebo Jackson at Lashibi a suburb of Accra. Under threat of death, the appellant and his group managed to procure the keys to a BMW 5 series car belonging to PW1. It was into this BMW car that some electrical gadgets including two Toshiba DVD players, a Pioneer

DVD player, a JVC amplifier, a CD player, wrist watches and mobile phones were put and thereafter the appellant drove the car off with the items and the other robbers.

The appellant later procured the services of someone at Dansoman and had the original number plate of the BMW car changed from GR 2158Q to GR 9204Q and then drove the car to his hometown Domeabra, near Konongo in the Ashanti Region.

As the robbery had been reported to the Police, investigations led to the arrest of one Daniel Amewu, the 3rd accused who mentioned the names of the appellant and the others.

The said Daniel Amewu, led the Police to arrest the appellant and a search in the house of the appellant led to the retrieval of a DVD player that was stolen from the house.

In the course of the Police investigations, the appellant admitted and confessed his involvement in the offence and led the Police to retrieve the BMW car from his hometown where he had gone to hide the vehicle.

It was based upon these facts that the appellant and the three others were prosecuted and convicted. It must be noted at this stage that even though the appellant challenged the voluntary nature of the confession statement that was procured from him, a mini trial conducted by the learned trial Judge upheld the prosecution's case that the confession statement was voluntarily given and witnessed by an independent witness as required by and under section 120 of the Evidence Act, NRCD 323.

Even though learned Counsel for the appellant argued the ground of appeal on sentence first, for purposes of clarity, it is considered imprudent to follow the same pattern. We will therefore consider grounds (a) and (c) together, then ground (b) and lastly ground (d) on sentence.

GROUNDS A AND C

Ground A: **That the Court of Appeal failed to properly evaluate the evidence which formed the basis for the conviction of the appellant by the trial court.**

Ground C: **That the Court of Appeal and the trial court failed to give adequate and proper consideration by the appellant's defence.**

In his submissions in support of the above two grounds of appeal, learned counsel for the appellant made heavy weather of the admissibility of the confession statements Exh E and EI. Learned Counsel contended that on the basis of provisions contained in section 120 of the Evidence Act, NRCD 323 and the testimony of the independent witness during the mini trial, the court should not have relied so much on the confession statement without carefully enquiring into the circumstances under which the said confession statement was procured.

Learned Counsel therefore submitted that the learned trial Judge should have hastened slowly in concluding that the appellant was guilty in view of the many lapses inherent in the procuration of the confession statement.

On the basis of the above, learned Counsel pointed out that, it was equally wrong for the learned trial Judge to have relied on pieces of CIRCUMSTANTIAL EVIDENCE to draw the necessary inferences of guilt especially where there was clear evidence that the bits and pieces of circumstantial evidence do not irresistibly lead to guilt. See the case of **Bosso v Republic [2009] SCGLR 420**.

In this respect, learned Counsel for the appellant drew attention to the following:

i. Failure of the Court of Appeal to detect the inconsistency in the prosecution's case which stems from their failure to call material witnesses like a houseboy, watchman and his wife.

ii. Failure of the Court of Appeal to link the presence of the appellant at the crime scene to the crime, e.g. inability of the prosecution to establish for instance that the DVD player that was retrieved from the appellant's room was among the items stolen from the house of PWI contrary to appellants assertion that they were found in the car. See case of ***Dogbe v Republic [1975] 1 GLR at 118.***

iii. That the Court of Appeal failed to consider the issues of whether the conduct of the appellant in the crime in relation to offences after the robbery had been committed were relevant to the offences with which he had been charged.

iv. That the mere possession of items stolen from the crime scene does not automatically lead to proof of guilt of robbery, at worst, learned counsel contended that the appellant could have been charged with stealing or dishonestly receiving.

v. That the offence of robbery is a one off event, but not a continuous one for which acts committed after the robbery continue to be used to ground an offence of robbery.

On the basis of all the above points, learned Counsel for the appellant finally submitted in respect of the above grounds of appeal that it was wrong for the appeal court to have confirmed the conviction of the appellant on the basis of suspicion where his defence that the vehicle had been brought to him to purchase had not been considered.

Learned Counsel for the Respondent, Mrs Evelyn Keelson, Principal State Attorney, in her brief but incisive submissions as contained in the Respondent's statement of case, made light work of the

submissions made by learned counsel of the appellant Edward Darlington.

Learned Counsel made references to the evidence of PW1 and PW2, both of whom were robbed and were therefore eye witnesses to the crime. In addition to the evidence of PW1 and PW2, learned Principal State Attorney made references to the evidence of PW3, D/Insp. Philip Anipa, the Police Investigator who investigated the crime and made very positive and crucial findings which confirmed the testimony of PWI, PW2 and the confession statement of the appellant at the trial court.

FAILURE TO CALL MATERIAL WITNESS

It must be noted that, evaluating 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.

This court in a unanimous decision in the case of ***Gligah & Anr v the Republic [2010] SCGLR 870,*** at holden 5, where the Supreme Court, speaking with one voice through me stated thus:

> *"The Supreme Court would affirm as good law, the principles 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."

See also the cases of ***Tettey v Republic [2001-2002] SCGLR holden 2*** and ***Dexter Johnson v Republic*** to be reported in [2011] SCGLR 601.

It is therefore clear that the inability or failure of the prosecution to call the houseboy, watchman or his wife has not resulted into a miscarriage of justice for which appellant should have any benefit.

What is important to consider is whether the evidence of the three 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.

See sections 51 (1) and (2) of the Evidence Act, 1975 NRCD 323 which states as follows:-

1. *"Relevant evidence is admissible except as otherwise provided by an enactment.*

2. *Evidence is not admissible except relevant evidence."*

In this case, as has already been stated, PW1 and PW2 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.

PWI testified under cross-examination that whilst he actually saw and identified A2, A3 and A4 there was a fourth person outside at the entrance of the outhouse whom he did not identity.

PW2 also in his evidence in chief narrated coherently the sequence of events in which by his narration he also identified 4 robbers in all, corroborating the evidence of PW1. Since the evidence of PW1 and PW2 were relevant and germane to the crux of the case, there was no need to look elsewhere.

It is important to note that in this case, it is sufficient if the prosecution succeed in proving the essential ingredients of the offences of conspiracy to commit robbery and robbery. For the offence of conspiracy, it is necessary to establish the following:-

i. Agreement to commit the unlawful act of robbery – acting for a common design. There need not be any prior deliberation.

ii. Intention on their part to commit that unlawful act – this was manifested in their common pursuit of the robbery agenda.

See the following cases which have all espoused the provisions on section 23 of the Criminal and other Offences Act, 1960, Act 29 which deals with conspiracy:

i. **Behome v Republic [1979] GLR 112**

ii. **State v Boahene [1963] 2 GLR 554**

iii. **State v Otchere & Others [1963] 2 GLR 463**

iv. **Azametsi v The Republic [1974] 1 GLR 228 CA**

In this latter case, the first appellant who was the head of a fishing group decided to offer human sacrifice to the sea god for a bumper catch. The victim, a member of the group was killed in the house of the first appellant and this was witnessed by the appellant, his wife and others after which the body was disposed off. The first appellant was convicted inter alia, of conspiracy to commit murder. On appeal against the **conviction, the court held that there was**

enough evidence of a common purpose and therefore he was guilty of the offence of conspiracy.

For the offence of Robbery, it is important to establish the following ingredients:-

1. That the appellant stole something from the victim of the robbery of which he is not the owner.

2. That in stealing the thing, the appellant **used force, harm or threat of any criminal assault on the victims.**

3. That the intention of doing so **was to prevent or overcome the resistance.**

4. That this **fear of violence must either be of personal violence to the person robbed or to any member of his household or family in a restrictive sense.**

5. The thing stolen must be in the presence of the person threatened.

For example it was held in the case of ***Behome v Republic [1979] GLR 112*** 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 the intent thereby to prevent or overcome the resistance of his victims to the stealing of the thing.*"

Thus, as in the instant case, where it was the appellant who kept guard outside, whilst his accomplices used threat to procure the stolen items and the keys to the BMW car which he drove away and kept the car, he is as much guilty of the offence as those who used the threat. For it was he who facilitated the committing of the offence and their exit from the scene.

As is well known, it is trite law that in criminal cases, the duty on the prosecution is to prove the allegations against the appellant beyond all reasonable doubt.

The prosecution have a duty to prove the essential ingredients of the offence with which the appellant and the others have been charged beyond any reasonable doubt. The burden of proof remains on the prosecution throughout and it is only after a prima facie case has been established i.e. a story sufficient enough to link the appellant and the others to the commissioning of the offences charged that the appellant, therein accused is called upon to give his side of the story. See cases like:

1. **Amartey v The State [1964] GLR 256 at 295**
2. **Gligah and Anr. v The Republic referred to supra.**
3. **Dexter Johnson v The Republic to be reported in the [2011] SCGLR at 601.**

Based on the above principles, it is clear that the prosecution led relevant evidence and satisfied the standard of proof that is required in a criminal case.

In the instant case, the prosecution in our opinion have led credible and cogent evidence to support all the necessary ingredients of the offence charged.

For instance, the fact of the robbery having occurred in the house of PW1 and PW2 on the night of 23rd April, 2002 is not in doubt.

Secondly, the fact that the robbers were armed and put the inmates of the house in which the BMW car number GR 2158Q was stolen into fear and threat of death is also not in doubt.

Thirdly, the fact that during investigations into the case, the appellant was mentioned and evidence was adduced which showed his total and unequivocal involvement in the dastardly act i.e. he

was the one who stood outside and kept guard whilst the others robbed and it was he who finally drove the stolen vehicle away and kept it.

Fourthly, the role and importance of the evidence given by Investigative officers during trial of accused persons needs to be put into proper contest and in this case the evidence of P.W.3 D/Insp. Anipa had to be understood in that contest.

CIRCUMSTANTIAL EVIDENCE

What must be noted is that, a crime is always investigated after the act had been committed. However, during the investigation, the Police are able to put together strings of activities and draw the necessary inferences and conclusions. Some of the evidence might be direct and therefore quite conclusive, but others might be indirect, and referred to as circumstantial.

Some crimes are investigated based solely upon circumstantial evidence as apart from the accused there might not be any living eye witness of the crime. But courts of law will not throw their hands in despair only because there is no other eye witness account of the crime. This is the relevance and importance of circumstantial evidence which can be used to put together a very strong credible case capable of securing conviction for the prosecution.

The Supreme Court in the celebrated case of **State v Anani Fiadzo [1961]GLR 416** held on the issue of circumstantial evidence as follows:-

> *"Presumptive or circumstantial evidence is quite usual as it is rare to prove an offence by evidence of eye-witnesses and inference from the facts may prove the guilt of the appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption follows irresistibly from the circumstances proved in evidence, and in order to justify the inference of guilt the inculpatory facts must*

be incompatible with the innocence of the appellant, and incapable of explanation upon any other reasonable hypothesis other than guilt. A conviction must not be based on probabilities or mere suspicion."

See also:

1. **R v Onufrejczyk [1955] 1 QB 388**
2. **Bosso v Republic [2009] SCGLR 420, holden I**
3. **Gligah & Anr v The Republic referred to supra**
4. **Dexter Johnson v The Republic referred to supra where the Supreme Court again stated as follows at 605 holden No. 2**

"Circumstantial evidence was quite usual as it was rare to prove an offence by evidence of eye-witnesses; and inferences from the facts proved might prove the guilt of the appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption would follow irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis other than that of guilt.

In the instant appeal, even though the trial Judge in directing the jury, had not referred to the magic word "circumstantial", the Judge had taken pains to refer in great detail to pieces of evidence from both the prosecution and defence on record which linked the appellant irresistibly to the commission of the offence. Furthermore, there had been no substantial miscarriage of justice resulting from the directions to the jury and the conviction for murder would therefore be affirmed.

See also **Dogbe v The Republic** [1975] 1 GLR 118, holden I, where the High Court, per Ata-Bedu J, stated thus:

> "*In criminal trials, the identity of the accused as the person who committed the crime might be proved either by direct testimony or by circumstantial evidence of other relevant facts from which it might be inferred by the court. Thus opportunity on the part of the accused to do the act and his knowledge of circumstances enabling it to be done were admissible to prove identity.*"

As at now, so far as the evidence on record is concerned, there are bits and pieces of evidence connecting the appellant to his deep involvement in the commissioning of the offences with which he was charged. In this instance, we will venture to state that, the inferences that have logically been made in this case appear so strong, cogent, credible and reasonable that assuming the confession statement is even disregarded, they constitute the best evidence against the appellant and upon which the court must convict.

Other forms of evidence which can be termed circumstantial and accepted by the law courts are some of the following:

i. Forensic examinations etc.

ii. DNA

iii. Mobile phone conversations or SMS messages

iv. Email messages where these are available and relevant

v. Crime scene investigations, and others.

In this case, the evidence of PW3, the Investigator even though got involved in the case after the robbery event, his evidence is so material that no fair minded court can disregard it.

For instance how come that, out of the many people in Accra, it was only the appellant and his two other friends that the 3rd accused Daniel Amewu pointed out as being part of the robbery gang.

This event is significant in many respects. This is because not only was the appellant mentioned, but he led the Police to retrieve the car that was stolen and used to carry the other stolen items away.

Secondly, he also led the Police to discover how he changed the number plate of the BMW car No GR 2158Q to GR 9204Q

Thirdly, the many things that the appellant said in his caution statement which as it were is a confession statement could only have been made by a participis criminis.

PW3 D/Insp. Anipa is definitely not a magician, in any case, no such evidence has been given to credit him with any magical or martial arts powers to read the minds of persons. Quite clearly therefore, only the appellant could have stated those things which themselves are consistent with the general tenor of the case. The only matter to critically consider is whether this confession statement was voluntarily made.

ADMISSIBILITY OF THE CONFESSION STATEMENTS

We have no doubt that the mini Trial was properly conducted and meets the Standard required in section 120 of the Evidence Act, NRCD 323.

The only issue we would want to deal with here is the role Independent Witnesses perform during the taking down of confession statements and the relevance of what the independent witness did in this case.

It is provided in sections 120, sub-sections (1) (a) (b) (c) and 2 (a) & (b) 3 (a) and (b) and 4 (a) (b) (c) as follows:

(1) "In a criminal action, evidence of a hearsay statement made by an accused admitting a matter which:

(a) constitutes, or

(b) forms an essential part of, or

(c) taken together with other information already disclosed by the accused is a basis for an inference of,

the commission of a crime for which the accused is being tried in the action is not admissible against the accused unless the statement was made voluntarily.

(2) Evidence of a hearsay statement is not admissible under subsection (1) if the statement was made by the declarant while arrested, restricted or detained by the State unless the statement was made in the presence of an independent witness, who

(a) can understand the language spoken by the accused,

(c) can read and understand the language in which the statement is made,

and where the statement is in writing the independent witness shall certify in writing that the statement was made voluntarily in the presence of the independent witness and that the contents were fully understood by the accused.

(3) Where the accused is blind or illiterate, the independent witness

(a) shall carefully read over and explain to the accused the contents of the statement before it is signed or marked by the accused, and

(b) shall certify in writing on the statement that the independent witness had so read over and explained its contents to the accused and that the accused appeared perfectly to understand it before it was signed or marked.

(4) For the purposes of this section, a statement that was not made voluntarily includes, but is not limited to a statement made by the accused if

(a) the accused when making the statement was not capable because of a physical or mental condition of understanding what the accused said or did; or

(b) the accused was induced to make the statement by being subjected to cruel or inhuman conditions, or by the infliction of physical suffering upon the accused by a public officer or by a person who has a direct interest in the outcome of the action, or by a person acting at the request or direction of a public officer or that interested person; or

(c) the accused was induced to make the statement by a threat or promise which was likely to cause the accused to make the statement falsely, and the person making the threat or promise was a public officer, or person who has direct interest in the outcome of the action, or a person acting at the request or direction of a public officer or the interested person."

The relevance of these provisions is seen in the light of the objections taken to the admissibility of the charged cautioned statement of the appellant. In those statements exhibits E and E I, the appellant opened his mouth very loosely as if he was suffering from a mouth diarrhoea. This is in essence what is called a

confession statement, where the statement admits of the declarant's involvement in the commissioning of the offence.

The objection of learned Counsel for the appellant at the trial court, Mr. Hoeyi to the tendering of the statement is in the following terms:-

> *"My Lord the statement was not that of his, it was not voluntarily given by him. The statement was given under duress and infact he was compelled to thumbprint it, he is an educated young man who can read and write and since he was not agreeing to sign they compelled him to thumbprint it. So it is inadmissible in law".*

However, in his evidence during the mini trial, the appellant stated thus:-

> *"My Lord, I did make a statement to the Police but I don't know the content of the statement you have in hand".*

It is interesting to observe and note that, the appellant admitted that he saw PW3 write down the statement that he gave him at the CID Headquarters in Accra.

Appellant however denied ever meeting the independent witness or seeing him anywhere during the taking down of the statement.

After a careful perusal of the proceedings during the mini trial, we are satisfied that the statement was procured in accordance with the provisions of the Evidence Act, referred to supra.

This is because, according to the appellant, whatever he said he saw that PW3 put it down on paper. Thereafter he read it over to him and it was exactly what he told him. Out of abundance of caution, this is what the appellant said in answer to a question:-

> *Q. "What he wrote down, was read back and explained to you in Twi language."*

A. My Lord, after writing down the statement the investigator read over the statement exactly what I said."

The only difference is that the appellant denied admitting the crime and the presence of the independent witness. During cross-examination, the appellant admitted thumbprinting the statement he gave to PW3 and stated clearly that he made several thumbprints. This is consistent with the many thumbprints on the statements, exhibits E and E1.

The appellant also admitted that he gave the statement of his own volition. This is what he said:-

"Yes my Lord, I did give the statement on my own volition".

The above evidence clearly renders illogical the basis of the objection by learned Counsel for the appellant that the statements were procured from the appellant under duress and therefore not voluntary.

From a careful reading of section 120 of the Evidence Act, 1975, NRCD 323, the following procedure must be complied with to give validity to a confession statement and make it admissible in law.

1. If the declarant of the statement made the statement while arrested, restricted or is detained by the State then the statement is admissible only if:

   i. it was made in the presence of an independent witness, who

   ii. understands the language in which the declarant spoke i.e. accused therein, herein appellant.

   iii. can also read and understand the language in which the statement is made.

iv. *whenever the statement is in written form, the independent witness* ***shall certify in writing on the statement as follows:***

"that the statement was voluntarily made in his presence and that the contents were fully understood by the accused."

v. *where the declarant is illiterate or blind, there are further provisions to protect the declarant by ensuring that the state does not take advantage of his disability by ensuring that*

vi. *the independent* ***witness shall carefully read over and explain to the declarant the exact contents of the statement before it is marked or signed.***

vii. ***the independent witness shall certify on the statement in writing that he had so read over*** *and explained the contents of the statement to the declarant and that* ***he appeared perfectly to understand it before making his mark or signature.***

The rationale for the above elaborate provisions are clear. They are to ensure that the rights of the declarant, i.e. accused who is under restriction are not trampled upon by the Police or the investigative agencies. These constitute the rights of all accused persons as has been protected in the Constitution 1992.

For example, what is meant by an independent witness? Taken literally, this should mean someone other than the person, institution or body taking down the statement. The Longmans English Larousse, defines independent as follows:-

"adj. free from the authority, control or influence of others, self governing, casually unconnected, these factors are independent

of each other, self supporting, not dependent on others for one's living, not subordinate, not depending on another for its value."

The Chambers 20th Century Dictionary, (Geddie) Revised Edition defines the word independent also as follows:-

"adj. not dependent or relying on others, not subordinate, completely self governing, thinking or acting for oneself, too self respecting to accept help, not subject to bias etc."

From the above definitions of the word independent, the definition which best suits the use of the word independent witness in the context can be said to be the meaning subscribed as follows:-

"An independent witness is a person who is free from the authority, control or influence, or is not dependent or relying on anybody for direction, and or assistance."

This means therefore that, in the scheme of things, the independent witness envisaged under section 120 of the Evidence Act, referred to supra must be someone who satisfies the above definition.

Such a witness must not be subordinate to or under the authority, control or influence of the person investigating the crime and for which the independent witness is needed to authenticate the statement that has been given by the declarant.

Coming home to the instant case, it means that the independent witness in the case, Abukari Atta, who was procured by the Police to perform and satisfy a statutory requirement in section 120 of the Evidence Act referred to supra, undertook the performance of that duty to achieve a given result, so however that in the actual execution of that duty or requirement, he was not supposed to be under the order, control, influence or authority of the person for whom he did the work, i.e. the Police.

In this case, the independent witness gave his name and occupation as follows:-

"My name is Abukari Atta"

I live at house No. D203/3 Timber Market

I am a secretary to Nanumba community Chief resident in Accra here"

The independent witness stated that he visited a cousin of his, who is a Police Detective Sgt. at the CID Headquarters and it was there that he was invited by the Investigator to witness the taking down of the statement.

We are more than satisfied that the independent witness herein is competent as such and there has not been any imputation of bias against him to make him lose his independent stature. Learned Counsel for the appellant, did not pursue the evidence of his being a friend to the Police and therefore incapable of being an independent witness.

Under the circumstances of this case, we are more than convinced that the independent witness having satisfied the qualities expected of an independent witness as defined supra and having also satisfied the proficiency test as was shown and found by the trial court and the court of appeal, has complied with section 120 of the Evidence Act, referred to supra.

We believe the law does not allow the Police to secure the services of any person for this exercise. Care must be taken to ensure that the said independent witness is however known to the Police so that if as happened in this case, the need arises for a mini trial, the witness can be contacted.

However, it must also be ensured that the said person is not tied to the apron strings of the Police such as to question his neutrality and independence as was depicted in the definition or meaning of independent.

It was quite unfortunate that learned Counsel for the appellant did not pursue the frequent use of the independent witness by the Police in other cases to strengthen his case against his being independent. If Counsel had been diligent he could easily have procured the necessary evidence to back that claim. This would have been overwhelming in view of the vague, inconsistent and unreliable answers given by the independent witness on the subject matter during cross-examination.

In short, an independent witness must not be someone who is so closely connected to the Police as to make him more or less dependent on the Police. Such a scenario will defeat the purpose for which the law was enacted.

Secondly, the independent witness must not only understand the language in which the declarant spoke, but also understand the language in which the statement was written down if it was written by someone other than the declarant.

Thirdly, the independent witness must also be able to read and understand the language into which the statement was written so as to enable him explain the contents to the declarant.

For example if the appellant, who spoke Twi, and the statement was taken down in English by PW3 it meant that the independent witness, must demonstrate sufficient proficiency in the Twi language and also show ability to read English and interpret same into Twi for the benefit of the declarant.

It also means that, if the investigative officer does not speak and understand the language which the declarant spoke, then the skills

of the independent witness as provided for in section 120 of NRCD 323 become more relevant and crucial.

Unfortunately, we have not seen anywhere in the record of appeal any cross-examination of PW3 to test his ability to understand Twi language which was spoken by the appellant.

The only demonstrable test that was conducted during cross examination at the mini-trial was that of the independent witness who was given a clean bill of success and competence by the learned trial judge and confirmed by the Court of Appeal.

We believe that, any attempt by a party to invalidate a confession statement on the basis of non-compliance with section 120 (2) & (3) of the Evidence Act, 1975, NRCD 323 must begin with a demonstration of the competence of not only the independent witness of the language spoken by the declarant, but also by the investigator or person who writes down the statement. This becomes more crucial when the statement is thumbprinted which gives the rebuttable presumption that the declarant is illiterate.

The various Investigating Agencies especially the Police must ensure that independent witnesses they procure for witnessing such statements satisfy these requirements.

In addition, the Investigators themselves must be proficient in the said language, otherwise they will be depending upon the competence of the independent witnesses, and if their skills or proficiency are suspect, then the whole edifice will crumble i.e. the statements will not meet the test in the Evidence Act.

Finally, it is desirable but not mandatory that the certificate on the statement must be in the hand of the independent witness. Thus, counsel should not only look at the form of such statements, but unravel the circumstances under which they were procured through cross-examination and proficiency tests conducted during trials.

These are the only methods by which the courts will ensure that the provisions in section 120 of the Evidence Act are complied with, save for allegations of torture, duress and other reasons which have to be proved on their own standing.

Unfortunately, in this case, the appellant has not succeeded in casting any doubts on the proficiency of the independent witness in the Twi language as was found by the learned trial Judge and confirmed by the Court of Appeal. And since no test was performed on the Investigator, PW3, we are of the considered view that exhibits E and E1 were obtained in compliance with section 120 of the Evidence Act

From the above analysis, it is clear that, Exhibits E and E1 had been voluntarily procured and the Court of Appeal was therefore right in confirming the findings of the learned trial Judge.

We similarly find and hold that the Court of Appeal was right in confirming the decision of the trial Court to convict on the pieces of circumstantial evidence.

It is therefore our conclusion that the failure of the prosecution to call other witnesses like the houseboy, watchman and his wife has not created any lapses in the prosecution's case. The Court of Appeal was thus not in error when it affirmed same.

Similarly, even though robbery might be a one off event, series of activities before, during and after the event can be used to effectively nail an accused person in the offence of conspiracy and robbery itself. However, the fact that it was the appellant who drove the BMW car from the scene of the robbery meant that he was present at the scene. Whether he took part in the actual threat on the inmates or not is immaterial. The transaction is a one whole event, any person who engages in any part of the transaction is liable for the offence. The person who keeps watch whilst the

inmates of the house are subjected to torture and threat is as guilty as the person who threatens.

In this case, what must be noted is that, the appellant was not convicted because items stolen from the robbery scene were found in his possession. He was inextricably linked to active participation from the crime scene, i.e. driving the car from the scene and hiding it in his hometown.

It is therefore clear that, the confirmation of the conviction of the appellant by the Court of Appeal had been based on cogent and properly evaluated evidence that cannot be disturbed by this court.

After an evaluation of the entire appeal record and the statement of case of the parties, what comes out clearly is that, the trial court, and the Court of Appeal did evaluate and consider the defence of the appellant. The fact that the defence of the appellant did not find favour with both the trial and the first appellate court did not mean that it was not considered.

For our part, we cannot but agree with the learned trial Judge that the defence of the appellant was but an attempt to extricate himself from the crime at that last stage. As a matter of fact, the defence of the appellant not only lacked substance, but was infantile and lacked merit.

The appellant was therefore properly convicted by the trial court and the confirmation of same by the Court of Appeal was in order.

Ground B: **THAT THE DISMISSAL BY THE COURT OF APPEAL OF APPELLANT'S APPEAL WAS UNREASONABLE AND OCCASIONED THE APPELLANT A SUBSTANTIAL MISCARRIAGE OF JUSTICE**

From the analysis that has been made supra, it is apparent that the Court of Appeal considered the appeal that the appellant lodged before it and after evaluating same on sound principles of criminal law dismissed same. In any case it must be noted that an appeal is by way of a re-hearing and the Court of Appeal did just that.

In this regard, it must be pointed out that from the facts, the evidence of both the prosecution and defence and the law applicable, the dismissal of the appeal of the appellant did not occasion a substantial miscarriage of justice to the appellant.

In coming to this irrevocable conclusion, this court based its decision on the fact that the appellant has not been able to proffer any convincing reason why he should be acquitted and discharged.

Having perused the entire appeal record in detail it is our conclusion that both the trial and appellate courts applied all the tests that are deemed to be applicable in criminal cases before coming to their decisions. See case of ***Amartey v Republic*** already referred to supra.

Once the proper tests for evaluating the evidence of the witnesses and appellant has been properly done before the conviction of the appellant, this court is of the opinion that the dismissal of the appeal by the Court of Appeal was not unreasonable.

Indeed, as was stated earlier, the defence the appellant proffered in court was a complete pathological lie which was very childish and bereft of any merits. That notwithstanding, the learned trial Judge duly considered same but came to the conclusion that *"obviously, either the accused person was deliberately lying or his memory had been befuddled by the effluxion of time".*

What must be noted is that in a criminal trial or appeal, the fact that the conclusion reached by a trial court or an appellate court which is inconsistent with the defence of the accused or appellant

should not be construed as the failure of the court to consider the case put forward by the accused/appellant.

It is enough if in the judgment the court makes references to the defence story, considers same and gives reasons why that story or defence cannot be believed.

In the instant case, both courts, trial and appellate did just that and in all cases concluded just like this court that the appellants defence is wishy washy, unconvincing, unreasonable and quite inconsistent with normal acceptable behaviour and conduct.

Secondly, taking all the circumstances of this case into consideration, the appellant has not suffered any miscarriage of justice, much more substantial.

We will as well dismiss this ground of appeal.

GROUND D: THAT THE COURT OF APPEAL OUGHT TO HAVE MITIGATED THE SENTENCE IMPOSED ON APPELLANT BY THE TRIAL COURT.

In view of what is at stake here in the consideration of the sentence of 65 years imposed on the appellant, we are inclined to commence our discussions and analysis with this quotation of a U. S States man John Tay in 1778:-

> *"I am now engaged in the most disagreeable part of my duty, trying criminals – punishment must of course become certain, and mercy dormant – a harsh system, repugnant to my feelings but nevertheless necessary".*

This brings us to a discussion of the last ground of appeal which is on sentence.

In dismissing the appeal against sentence, this is what the court of appeal stated per Acquaye J. A.

> *"I notice from the record of proceedings that the appellant was said to be a first offender and most of the items stolen was recovered. The evidence on record is that it was the appellant who drove the stolen car from the complainant's house at Lashibi, Accra to his hometown in the Ashanti Region.*
>
> ***To reduce his sentence will be unfair to the other accused persons who are all serving 65 years jail sentence. The appeal against sentence is also dismissed." emphasis mine***

In his statement of case before this court, learned Counsel for the appellant, Edward Darlington, based his arguments on the reasons why the sentence of 65 years should be varied.

1. That the appellant is a first offender and is young.

2. That modern view of punishment is to look at the correctional and reformative approach rather than attempting to crack a walnut with a sledge hammer. That appellant needs a second chance.

3. That the period the appellant spent in lawful custody on remand was not taken into consideration when the sentence was passed as he was constitutionally mandated to do under article 14 (6) of the Constitution 1992. ***Bosso v Republic [2009] SCGLR 420***

4. That the learned trial Judge and the appeal court failed to explain or justify the sentence of 65 years on each count without making it to run concurrent or consecutive as they were obliged to do under the circumstances.

On her part, learned Principal State Attorney Mrs. Evelyn Keelson argued as follows:-

1. That, robbery, being a first degree felony with no maximum sentence, meant the trial Judge acted within his discretion in imposing the 65 years in hard labour.

2. Considering the factors of punishment as laid down in the celebrated cases of ***Kwashie v Republic 1971 1 GLR 488*** and in **Republic v Adu Boahen 1972 GLR 70-78**, what was desirable under the circumstances was deterrent sentence. See unreported Supreme Court case of ***Kamil v Republic*** Criminal Appeal No.J3/3/2000 dated 8th December, 2010

3. That the learned trial Judge should have stated whether the sentences are to run concurrent or consecutive. Learned Counsel however stated that, the failure of the trial and appellate court to have stated the concurrent nature of the sentence has not occasioned any miscarriage of Justice as contained in section 30 of the Courts Act 1993, Act 459. Learned Counsel urged this court to correct it.

4. Whilst conceding that the trial court did not state whether the time spent by the appellant in lawful custody before sentence was taken into consideration as is provided under article 14 (6) of the Constitution, learned counsel for the Republic stated that under the authority of the decision of the Court of Appeal in the case of ***Ojo v The Republic [1999-2000] GLR 169-181*** it is to be presumed that the court took the period the appellant spent in lawful custody into considertion before imposing the sentence.

Based on the above, learned Principal State Attorney prayed this court not to interfere with the sentence imposed by the trial court and confirmed by the Court of Appeal.

From the above arguments, the following issues need to be discussed and analysed in order to resolve the arguments raised

over the inappropriateness of the sentence imposed on the appellant by the trial court and confirmed by the Court of Appeal.

i. Whether or not on the totality of the facts and law, a sentence of 65 years on the appellant, a first offender according to the record then aged 31 years is appropriate.

ii. That a trial court ought to take into consideration the period served by an accused person in lawful custody before sentence is imposed, pursuant to article 14 (6) of the Constitution 1992.

iii. That the sentence of 65 years each on the offences should have been expressly made to run concurrent and not leave it blank as was done by both the trial and appellate courts.

APPROPRIATENESS OF SENTENCE OF 65 YEARS ON APPELLANT AS A FIRST OFFENDER

There is absolutely nothing on record to contradict the fact that the appellant is a first offender.

Despite the misgivings expressed by the learned trial Judge on the accuracy of Police reports and or information that the appellant is a first offender, for now, Police records constitute the most authentic and reliable source of data upon which the courts act, in cases where records on accused persons are demanded by the courts.

It is also generally accepted that a first offender must normally be given a second opportunity to reform and play his or her role in society as a useful and law abiding citizen.

That is why it is desirable for a first offender to be treated differently when a court considers sentence to be imposed on a first offender vis-à-vis a second or a habitual offender. However, all that will change and evaporate into thin air if the crime committed by the first offender is such that the minimum sentence is fixed by law. For example, narcotics offences where the minimum sentence is 10 years, then the principle of considering first offenders will only be

taken into account after the court considers that minimum and mandatory sentence.

Again if a first offender commits murder for example and the jury return a guilty verdict, the presiding Judge is mandated to impose the death penalty. See **Dexter Johnson v Republic** referred to supra.

There are other examples like defilement, rape and some motor offences where death results. In all these cases, the minimum custodial sentence is fixed by law upon conviction and the fact that the accused/appellant is a first offender would be of no consequence. The minimum sentence in these cases would have to be imposed before the fact of being a first offender will be considered.

The point being articulated here is that, notwithstanding the general principle that first offenders should be treated leniently when sentence is being imposed, the measuring rod or standard in any circumstance is the offence creating statute and the punishment provided therein.

Where, as in the instant case, just like the other examples given, the minimum sentence is imposed, then the hands of the courts are tied.

Secondly, the court will also have to consider whether the first offender indeed acted as a first offender i.e. a novice. This can be deduced from the ***type of crime committed***, ***the circumstances under which the crime was committed*** and ***the casualties if any.***

Therefore if a first offender commits a serious crime like robbery which is a first degree felony, then it is to be presumed that the first offender himself had divested himself of any lenient considerations. In this case for example, section 149 of the Criminal Code 1960 Act 29, under which the appellant was charged provides as follows:-

Section 149

(1) *"Whoever commits robbery is guilty of an offence and shall be liable, upon conviction on a trial summarily or on indictment, to imprisonment for a term of not less that* ***ten years****, and where the offence is committed by the use of an offensive weapon or offensive missile, the offender shall upon conviction be liable to imprisonment for a term of not less that* ***fifteen years****."*

(2) *For the purposes of subsection (1) the Attorney-General shall in all cases determine whether the offence shall be tried summarily or on indictment.*

(3) *In this section "offensive weapons" means any article made or adapted for use to cause injury to the person or damage to property or intended by the person who has the weapon to use it to cause injury or damage; and "offensive missile" includes a stone, brick or any article or thing likely to cause harm, damage or injury if thrown.*

Then section 150 of the Criminal Code 1960 Act 29 as amended at the time defines robbery as follows:-

> *"A person who steals a thing is guilty of robbery if, in and for the purpose of stealing the thing, he uses any force or causes any harm to any person, or if he uses any threat of criminal assault or harm to any person, with intent thereby to prevent or overcome the resistance of that or of any other person to the stealing of the thing."*

What is to be noted here is that, whilst the minimum sentence for robbery has been fixed at 10 years simpliciter, in cases where offensive weapons have been used, the legislature has deemed it fit and proper to enhance the minimum to 15 years imprisonment. Being a first degree felony means that the legislature has categorized the offence of robbery as a grave one. The maximum

sentence can therefore be any number of years that a court deems suitable and appropriate under the circumstances unless the statute states otherwise.

There is no doubt that robbery is a serious crime and various legislations in this country have sought to deal with it as best as they could.

In the unreported criminal appeal case of **Daniel Ntow v The Republic**, Criminal Appeal No. CRA No. H2/25/05 dated 6th April, 2006 the Court of Appeal, Coram Owusu-Ansah JA presiding, Jones Dotse JA as he then was, and Iris May Brown J (Mrs) as she then was in a consideration of the legal regime and effect of the various amendments to section 149 of the Criminal Code, 1960 Act 29 observed as follows:-

> "*In an attempt to rationalise the seriousness which society attached to the menace of armed robbery, NRCD II*"

(which is the suppression of Robbery Decree 1972, NRCD II) went to the other extreme by limiting the courts to only two sentences upon conviction in a robbery charge, namely:-

1. Life Imprisonment and
2. Sentence of death

This was the situation until Act 646 was enacted in 2003 which has indirectly amended and or repealed not only the original section 149 of Act 29 referred to supra, but also NRCD II as it is relevant and applicable to section 149".

Continuing further, the Court of Appeal observed in the **Daniel Ntow v Republic** case referred to supra as follows:-

> "**In effect, the result of the enactments in Act 646 are to do away with life imprisonment and sentence of death in**

all cases of robbery, even where violent means are used which results in death."

The result has been the lengthy sentences that trial courts started to impose on convicted robbers. This has led to inconsistency in the sentences handed down by the courts. **Whilst the minimum sentences have been fixed by operation of law, i.e. 10 or 15 years as the case might be, the sky appears to be the limit for the maximum**. That is where the court in appropriate cases must consider the factors of punishment before sentences are imposed on convicted robbers.

What this court has been requested to do is to consider whether the sentence of 65 years is appropriate under the circumstances.

The learned trial Judge indicated what factors influenced him in imposing the sentence of 65 years. Speaking for ourselves we will state that the sentence of 65 years is undoubtedly harsh and severe. But is the trial Judge not justified?

Considering the menace of robbery in our Ghanaian society and the high incidence of the crime coupled with the revulsion which right thinking members of society feel about the crime, there is the urgent need to deal swiftly, and in a manner that will serve as a deterrent to other like minded citizens. The principles upon which sentences are imposed have been stated in the locus classicus case of ***Kwashie v The Republic [1971] 1 GLR 488 at 493*** where it was stated thus:-

"In determining the length of sentence, the factors which the trial Judge is entitled to consider are:

i. The intrinsic seriousness of the offence.

ii. The degree of revulsion felt by law abiding citizens of the society for the particular crime.

iii. The premeditation with which the criminal plan was executed.

iv. The prevalence of the crime within the particular locality where the offence took place, or in the country generally.

v. the sudden increase in the incidents of the particular crime

vi. Mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed."

Coming closely on the heels of the ***Kwashie v The Republic*** case supra, is that of ***The Republic v Adu-Boahen, [1972] GLR 70-78*** where the court stated thus:

> *"Where the court finds an offence to be grave, it must not only impose a punitive sentence,* ***but also a deterrent or exemplary one so as to indicate the disapproval of society of that offence once the court decides to impose a deterrent sentence the good record of the accused is irrelevant." Emphasis mine.***

See also the caution of the Supreme court in the unreported case of ***Kamil v Republic, Criminal Appeal No. J3/3/2009*** dated 8th December 2010 where the Supreme Court, speaking through Ansah JSC stated in relation to the harshness or otherwise of a sentence as follows:-

> *"Where an appellant complains about the harshness of a sentence he ought to appreciate that every sentence is supposed to serve a five-fold purpose, namely to be* ***punitive****,* ***calculated to deter others****,* ***to reform the offender****, to appease the society and to be a safeguard to this country considering the sentence of 20 years which was passed on the appellants in the* ***Kamil v Republic*** *case supra, and considering also the principles on sentencing enunciated in the*

case of ***Hodgson v Republic [2009] SCGLR 642****, this court held on the said sentence as follows:"- Considering all this we find no good reason to disturb the sentence on the appellant by the Court of Appeal, and think it was even on the low side and should have been increased."*

Using all the factors and principles enunciated in the above cases, it would appear that the trial court had some justification in imposing the sentence it did.

This is because if one uses the factors in the ***Kwashie v The Republic*** case supra, there is no doubt that robbery is one of the most serious cases that has plagued this country for about two decades now.

The security and law enforcement agencies have been battling to control the menace of robbery with varying degrees of success and or failure.

Secondly, it is quite certain that the degree of revulsion felt by law abiding citizens at the mention of (armed) robbery is such that there appears to be complete unanimity that robbery is a canker that must be eliminated from our society.

Thirdly, there is also no doubt that the appellant and his gang of robbers actually planned and swiftly executed their robbery agenda successfully. As a matter of fact, the ease with which the robbery was executed gives the impression that the gang must have been experts at the criminal conduct.

The only snag was that, there was no criminal record on them as at that time. The appellant and his team acted professionally in the robbery act.

Fourthly, it will be an understatement that the prevalence of (armed) robbery was pronounced at the material time April 2002. We believe judicial notice can be taken of the fact that, that was the

period during which hardly a week passes by without a robbery incident being reported in the national dailies. What about those that never get reported for us to read about?

Fifthly, it is correct to say that as at the material time and beyond there was an upsurge in the crime of robbery with or without violence.

It is only the last factor that enure's to the benefit of the appellant. Even then, there is a big question mark. We have already stated and discussed the youthful age of the appellant. But then, as a young man, the appellant did not act according to his age, but acted like a matured, swift and experienced professional robber.

Unfortunately, there was no solid and concrete evidence of good character about the appellant on record save the fact that he was not known by the Police records.

Even under a consideration of this last factor, the violent nature with which the offence was committed is an aggravating circumstance rather than mitigating.

For us, the most appropriate and encompassing principle is to be found in the case of the ***Republic v Adu-Boahen*** supra which concerns the deterrence nature of sentences. Whenever we talk of deterrent or exemplary nature of sentence, whom are we really referring to as being deterred?

We believe it cannot be the accused/appellant himself. This is because he himself would have been in the "cooler" and nothing can deter him at that stage. Perhaps the length and nature of the sentence can deter him from committing offences in future. That is after serving and completing the current sentence.

In reality, it is our belief that those to be deterred are the members of the society who know about the severity of sentences imposed for this or that crime. Under these circumstances, assuming persons

with criminal propensities will think properly, then they might be deterred from any criminal conduct and realise that it does not pay to engage in criminal activities to wit robbery, rape etc as the case might be.

It might also be necessary sometimes to protect society by keeping such persons away from society for a long time. The primary duty of any government is to ensure that citizens go about their duties in peace, tranquility and in safety.

The organs of the state constitutionally mandated to ensure that there is law and order have a responsibility to enforce due observance and maintenance of law and order.

However, considering the five fold effect of sentences propounded in the ***kamil v Republic*** case referred to supra, it does appear that the punishment in this case has been punitive enough. It may also deter others who are right thinking.

We however, doubt really, if such a sentence, or long sentences by their nature reform offenders. There is absolutely no doubt that such a long sentence of 65 years will appease society and safeguard them from criminal conduct.

It is however our view that for such sentences to be really deterrent to others, then a different approach must be adopted to the imposition of sentences. This is because as in this appeal, if the appellant successfully completes the term of 65 years, we doubt even if his peers in Domeabra, near Konongo will be alive for them to be deterred upon his release, that is, if he survives the hard prison conditions in this country

We similarly doubt if those around Kantamanto, in Accra where appellant had a store will also be available upon his release after serving the 65 years to be deterred from engaging in criminal conduct. The greatest deterrence to our mind is the swift but unlawful mob action that society unleashes upon those suspected

of committing crimes especially, stealing, robbery and ritual murders. If what happens to suspects in robbery cases is anything to go by, there would have been no robbery or stealing cases by now. We will therefore advocate a scheme of sentence where the length of the sentence whilst 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.

In this case for example, we think there is the need for a reduction in the sentence. In the case of **Daniel Ntow v Republic,** referred to supra, the Court of Appeal confirmed a sentence of 18 years imposed on the appellant by the trial High Court because he was young and a first offender whilst his two co-accused were handed 30 years prison terms.

Given the age of the appellant as at the material time, he was 31 years at the time the crime was committed in April, 2002 then by parity of reasoning he would be 40 years plus as at date of this judgment.

The remission that the appellant would benefit from ought to be considered in any reduction of sentence.

In that scenario, people in his community, peers, old and young will then have something to learn from the hopelessness of engaging in crimes such as robbery when reference is made to the appellant and others in same category.

We will also consider the fact that even though the robbery gang was violent, no one was injured or harmed during the robbery. In addition, most of the items were retrieved.

To us, these factors constitute sufficient mitigating circumstances which should have been considered by both the appellate and trial courts. In any case, one cannot fault them because at all material

times society was highly enraged at the menace of robbery at the time, and the courts need to complement the efforts of the law enforcement agencies whenever there was proven, cogent, reliable and credible evidence upon which they could convict.

Finally, we believe also that long sentences such as was imposed on the appellant, 65 years, meant that he was virtually being consigned to a life in prison throughout his active adult life. This would mean an extra strain on the scarce resources of the state to cater for him for all the period in prison.

The time has perhaps come for more reformative methods of punishment to be fashioned out by the state. For example, it is not desirable to consign convicted robbers to lengthy prison terms say 65 years without taking into account the social effects it will have on the social fabric of society generally.

This is because if as is happening, the lengthy prison sentences have failed to deter people and the resultant effect is that many more young people are sentenced to long prison terms, then what type of society are we building? In no time, most of the productive young men and women will be behind bars and this no doubt will have a negative effect on the country.

The time is indeed ripe for us as a country to seriously take a second look at our criminal justice system with a view to carrying out serious reforms. If caution is not exercised in our quest as a nation to exact severe punishment for serious offences like robbery, then we will as a country be guilty of what Thomas Paine wrote about in 1795 on the *"Dissertation on First Principles of Government"*, where he stated as follows:-

> *"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret and to misapply even the best of law."*

This will ensure that quite apart from incarcerating convicts in prison for determined periods, steps will also be taken to train them such that they become reformed citizens to be productive rather than being dependent upon the state throughout their life and after their release become a burden on their families or become destitutes.

What must not be lost sight of is that, if one of the reasons why convicts for say an offence for robbery must as of necessity serve long prison sentences like 65 years in order for society to be safe from the criminal conduct of such deviant's, then that would be the failure of the state to perform its role effectively.

The state institutions must come out with other methods of punishment which will take into consideration society's monitoring mechanism.

This must include things like community service in the community where the offence was committed or where the convict lived, parole, upon good conduct and in some cases confiscation of property to prevent convicts coming out of prison to enjoy properties and funds which were generated or derived by their criminal conduct.

The time is therefore ripe for a major and radical reform of sections 296-316 of the Criminal and other Offences (Procedure) Act, 1960 Act 30, which deals with punishment.

APPLICATION OF ARTICLE 14 (6) OF THE CONSTITUTION – 1992

Article 14 (6) of the Constitution 1992 provides as follows:-

> *"where a person is convicted and sentenced to a term of imprisonment for an offence,* ***any period he has spent in lawful custody before the completion of his trial shall be***

taken into account in imposing the term of imprisonment".

The above are the provisions of the Constitution that the appellant contends have not been complied with. The operating words of the provision are quite straightforward.

It states that any period of confinement that a person has spent in lawful custody during the trial of the case and before the completion of the case shall be taken into account by the trial court in the imposition of sentence by the court after conviction.

There is no evidence on record that the trial court expressly adverted its mind to the said provisions of article 14 (6) of the Constitution. The Court of Appeal also failed to do the same.

In the case of Ojo & Anr v The Republic [1999-2000] I GLR 169 the Court of Appeal, coram: Wood JA, as she then was, Brobbey J.A, as he then was, and Benin JA, considered the applicability of the said article 14 (6) of the Constitution. Benin JA, in expressing the Court's opinion stated as follows:-

> "*Although article 14 (6) of the Constitution enjoined a court before sentencing a convicted person to take into account any period he had spent in lawful custody, since by the provision of section 315 (2) of the Criminal Procedure Code, 1960 Act 30, a sentence of imprisonment should start from the date it was pronounced, a court was not entitled to backdate a sentence. Accordingly, under the law, the Judge had to take the period spent in lawful custody into account before imposing the sentence. Thus when a court imposed a term of imprisonment, it should be presumed to have imposed it in the light of article 14 (6) of the Constitution, 1992."*

On the other hand, Brobbey J.A, as he then was in an obiter stated what he considered to be a guide to trial courts on the applicability of the article 14 (6) as follows:-

"As a general guide, trial courts will be well advised to state expressly in the record of proceedings when they take a period of prior incarceration into account in imposing terms of imprisonment. This should be incorporated in the record and read out or announced before the precise period to be served in prison has been announced publicly by the trial Judge."

The Supreme Court had an opportunity to pronounce on the applicability of this article 14 (6) in the case of ***Bosso v The Republic [2009] 420*** in a unanimous decision, Coram: *Wood C.J, Brobbey, Ansah, Anin-Yeboah and Baffoe-Bonnie JJSC.*

The Supreme Court, speaking with one voice through Wood CJ stated as follows at page 429 of the report:-

"*This clear constitutional provision enjoins Judges, when passing sentence, to take any period spent in lawful custody before the conclusion of the trial into account. A legitimate question which might arise in any given case and which does, indeed arise for consideration in this instant appeal, is how do we arrive at the conclusion that this constitutional mandate has been complied with? We believe this is discernible from the record of appeal. We would not attempt to lay down any hard and fast rules as to the form, manner or language in which the compliance should be stated, but the fact of compliance must either be explicitly or implicitly be clear on the face of the record of appeal."*

There is therefore no doubt that, the more explicit an expression by the court that it had taken into account article 14 (6) in the imposition of sentence the better. For our part, we definitely prefer the exposition and applicability of article 14 (6) in the ***Bosso v Republic*** case supra to that of Benin JA in ***Ojo v Republic*** case. The Supreme Court must therefore be seen to have settled the law on the application of article 14 (6) as is stated in the Bosso case.

It must therefore be clearly understood that, since there is no harm by the trial court in stating that it had taken the period spent by the convict in lawful custody before imposing sentence in the particular case into consideration, that explicit approach is a better method than not stating it at all or leaving the appellate court to make inferences.

In the instant appeal, there is absolutely nothing on record to suggest that the trial court and the court of appeal considered this basic but important constitutional provision. This is procedurally wrong and since an appeal is by way of a re-hearing this court will do what the trial and appellate courts failed to do.

See case of **Dexter Johnson v Republic** referred to supra where the Supreme Court stated that what was meant by an appeal being by way of re-hearing was that the appellate court had the powers to either maintain the conviction and sentence, or set it aside and acquit and discharge or increase the sentence.

This Supreme Court will therefore consider the period spent by the appellant in lawful custody. From the records, the appellant was arrested on 11th May 2002 and he remained in lawful custody until the 22nd day of August 2006 when he was convicted and sentenced. The period of four years that the appellant spent in custody before his conviction and sentence should have been taken into consideration by the trial and appellate court, by virtue of article 14 (6) of the Constitution 1992. That not having been done, this court declares it unconstitutional and accordingly declares that it considered and featured it into the consideration of the appropriateness of the sentence that had been considered fit and proper for the appellant.

This now leaves us with a resolution of the last issue, and that is the failure by the trial and appellate court to state whether the sentences are to run concurrent or consecutive.

Admittedly, the learned trial Judge in imposing sentence on the appellant and the others stated as follows:-

> *"Such people are a menace to society. If they got the second chance they will not allow their victims to live to tell their story and reveal their identities. The society will be better of being rid of them. They are each sentenced to a term of 65 years I.H.L on each of the two counts."*

As can be observed from the record, there is no mention about whether the sentence of 65 years is concurrent or consecutive.

Learned Principal State Attorney, Mrs Evelyn Keelson had in the best traditions of the Bar conceded to the point but argued that it has not led to any substantial miscarriage of justice. The Court of Appeal also did not address this issue specifically.

It has repeatedly been stated in this judgment that an appeal is by way of re-hearing and as such this court can put itself in place of the trial and first appellate courts and do what they have failed to do.

See cases of **Dexter Johnson v Republic** referred to supra, **Tuakwa v Bosom [2001-2002] SCGLR 61** and **Apaloo v Republic [1975] 1 GLR 156 at 169.**

In this regard, this court will have to consider what principles guide the courts in the imposition of concurrent or consecutive sentences.

It has generally been accepted that if a person is convicted in respect of several counts emanating from one grand design or criminal conduct, sentence in respect of those counts must run concurrent because the criminal act arose out of one transaction.

See case of **Tetteh Asamadey a.k.a Osagyefo & Another v C.O.P [1963] 2 GLR 400**. In the case of **Commodore a.k.a Kayaa v The**

Republic [1976] 2 GLR 471 the court was called upon to make a determination whether the trial court was right in imposing consecutive sentences on the appellant. In this respect, the court considered the combined effect of sections 302 (a) and 303 of Act 30, the Criminal and other Offences Procedure Act, 1960.

What are the facts in the Commodore Case? The appellant Commodore was convicted on two charges of conspiracy to commit robbery and dishonestly receiving proceeds from robbery.

The prosecution alleged during the trial that the acts supporting the two charges were acts done in execution of one criminal design or purpose and formed one continuous transaction. He was given a consecutive sentence.

It was held on appeal that since the alleged acts supporting the two charges were acts done in the execution of the same criminal design or purpose and formed one continuous transaction, the combined effect of sections 302 (a) and 303 of Act 30 required the sentences to run concurrently.

See also **Adomako v The Republic [1984-86] 2 GLR 766** which applied the same principle in the Commodore case.

The principle might very well be re-stated that where in a trial of a person in respect of more than one count and those counts arise in respect of only one common criminal design and or purpose, forming part of a grand criminal design, sentence upon conviction in respect of the various counts must be made to run concurrent by virtue of the combined effect of section 302 (a) and 303 of the Criminal and other Offences Procedure Act, 1960 Act 30.

We have carefully considered all the submissions made by learned Counsel for the appellant and the state/respondent, particularly on the effect and applicability of article 14 (6) of the Constitution 1992 and the other arguments on mitigation of the sentence of 65 years that was imposed on the appellant.

We accordingly substitute a sentence of 30 years on each count in place of the 65 years in respect of the two counts of conspiracy to commit robbery and robbery contrary to section 23 and 149 respectively of the Criminal and Other Offences Act, 1960 Act 29. The sentences are to run concurrent.

CONCLUSION

Before we conclude our opinion in this appeal, let us share with you the first stanza of ***RUDYARD KIPLING'S*** poem titled ***"IF":***

"If you can keep your head when all about you

Are losing theirs and blaming it on you;

If you can trust yourself when all men doubt you,

But make allowance for their doubting too;

If you can wait and not be tried by waiting,

Or, being lied about, don't deal in lies

Or being hated don't give way to hating,

And yet don't look too good, nor talk too wise;"

The above is relevant in the instant appeal because from the records, the appellant had a thriving business at Kantamanto. Besides that, he was married and had a stable life. If only the appellant could have resisted the temptation from the other co-conspirators, i.e. keeping his head cool when all those, around him were losing theirs, and wait patiently for his natural turn of events to unfold, the unfortunate scenario he found himself in, would have been completely avoided. This indecent haste on the part of the appellant to get rich overnight was unnecessary

At this moment, we are of the considered opinion that the battle against indiscipline in the society is being lost, and decadence of the society is rising at an alarming rate. This trend must however

change. This change must be the collective responsibility of all, state and society.

To conclude, the appeal against conviction fails in its entirety, whilst the appeal against sentence succeeds by the substitution of the sentence of 65 to 40 years I.H.L on each count to run concurrent.

As Judges we are obliged and mandated by law to exact prison sentences on convicted persons. This task, difficult though it might

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

(SGD) S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

ADINYIRA (MRS.) JSC:

I have read beforehand the judgment of my eminent and learned brother Dotse J.S.C. and I agree with his reasoning and conclusion that the appeal against conviction is without merit and ought to be dismissed.

I also agree with his reasoning and conclusion that the appeal against sentence be allowed.

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

(SGD) R. C. OWUSU [MS.]
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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