IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, J.S.C (PRESIDING)
BROBBEY, J.S.C
DATE-BAH (DR), J.S.C
ANSAH, J.S.C.
GBADEGBE, J.S.C

CRIMINAL APPEAL
NO. J3/3/2009
8TH DECEMBER, 2010

MOHAMMED IBRAHIM KAMIL - - - APPELLANT

VRS

THE REPUBLIC - - - RESPONDENT

J U D G M E N T

ANSAH, JSC:

The appellant and five others were charged jointly with a count each of the following offences before the High Court, Accra:

Count One

Statement of offence.

"Engaging in criminal conspiracy to commit crime relating to Narcotic Drug contrary to section 56 (c) of the Narcotic Drugs (Control, Enforcement and Sanctions) Law, PNDCL 236, 1990".

The particulars of offence were that: all the accused persons engaged themselves in Spain, the United Kingdom and Tema, Ghana, on a date between September 2003 and 7th January 2004 in criminal conspiracy to commit an offence relating to narcotic drug.

Count Two

Statement of Offence.

Importation of narcotic drug without licence contrary to Section 1 of the Narcotic Drugs Control Enforcement and Sanctions Law,1990, PNDC Law 236.
The particulars of the offence were that the accused imported 588.33 kilograms of cocaine a narcotic drug without a licence issued by the Minister of health.

Count Three

Statement of Offence

Possession of Narcotic Drug without lawful authority contrary to section 2 of the Narcotic Drugs (Control Enforcement and Sanctions Law, 1990 PNDCL 236.
The particulars of the offence were that between 30 December 2003 and January 2004 the accused persons possessed cocaine weighing 588.33 kilograms at Tema.

Count Four

Statement of Offence

Use of property for Narcotic Offence contrary to section 10(1) (a) of the Narcotic Drugs (Control, Enforcement and Sanctions Law) 1990, PNDCL236.
The particulars of the offence were that the accused person, Kevin Dinsdale Gorman, used his property House No. 33/137, Community 10, Tema, with the intention of carrying on a narcotic offence.

It is not necessary to consider count four in this appeal for the appellant was not charged with it, or convicted and sentenced for that offence either.

Each accused pleaded not guilty to the offence but was found guilty at the trial, convicted and sentenced to a jail term of twenty (20) years imprisonment, and also confiscated all monies found on the accused persons as well as the house in

which they were arrested. The Court of Appeal subsequently acquitted and discharged the convicted 1st, 2nd and 3rd accused persons on counts one and two by a 2-1 majority, but dismissed the appeal on count three and sentenced the appellant to 15 fifteen years IHL; whereupon the 2nd accused appealed further to this court on the following grounds quoted in extenso, hereunder:

> "a. That the Court of Appeal erred in law in upholding the decision of the trial High Court that the Appellant was guilty of possession of Narcotic Drug without lawful authority contrary to section 56 of PNDCL 236, 1990.
>
> b. The judgment was not supported by the evidence on record.
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> c. That the conviction and sentence of the appellant to a term of 15 years IHL is harsh and excessive and has occasioned a miscarriage of justice.
>
> d. Further grounds would be filed upon the receipt of the records of proceedings."

Facts and evidence of the case.

The facts and evidence grounding this appeal need recounting in order to appreciate the reasons for our judgment. They were that: following intelligence reports from sister international agencies, the Ghana Narcotics Control Board mounted surveillance on the first accused in the trial, a shareholder and operations manager of Tuna-To-Go a Tema based Shipping Company for some time. Telephone bills intercepted on 31-12-03 between 2.00 and 7.00 a.m. showed that the first, second and sixth accused persons were engaged in conversation with each other. At the same time, one Craig, and four 'black men' non-accused non-appellants, landed what was supposed to have been fish at the Prampram beach.

In the meantime, the accused persons began to arrive in Ghana in a sequential order; thus, on 2-1-04, the 1st accused arrived from Venezuella through London, on 30-12-03, with the 3rd accused arriving at the Kotoka International Airport on…, and the 4th accused on 6-1-04. On the 3-1-04, the 5th accused followed suit.

We can now shift focus to have a shot at what happened at the Prampram beach; the PW2, Tetteh Kofi, who worked there as a watchman at the Captains Lodge, said between December 2003 and New Year's Day, 1-1-2004, the second accused, (hereafter called the appellant herein), told him they were bringing fish from abroad and three days later, the sixth accused brought the 'fish' in parcels; he PW2 and PW3, Jonathan Lartey Awuley discharged the 'fish' from a boat and loaded them into a vehicle brought and driven there by the appellant. The appellant paid him ¢200,000.00 (two hundred thousand Cedis) for his services.

The PW2 was supported by the PW3, Jonathan Lartey on all material particulars for he was also paid the same amount for doing the same piece of work that day. Events that followed showed what was truly or exactly the 'fish' in question.

We may shift attention to events taking place in the house now. Kwame Boateng, the houseboy of Gorman the first accused, testified as the PW4 and said Gorman traveled but returned on 30-12-03. The next day he saw the appellant and 6th accused come to the house in a big car like what the appellant drove. He the PW4 received some boxes from the car which the 1st accused asked him to carry upstairs and he did so. The appellant brought some more boxes later which he the PW4 similarly carried upstairs.

Then on 7-1-03, a combined team of personnel from the Narcotic Control Board and the Drug Enforcement Unit of the Ghana Police Service raided the residence of the 1st accused and discovered 'bails' and parcels of whitish substances suspected to be cocaine concealed in specially recently constructed compartments in a wall covered by a large dressing mirror. The 3rd, 4th and 5th accused at the trial were in the house at the time of the raid.

When confronted with the substance the first accused said it was 'cocaine' brought to the house by one Yakuba for safekeeping for a fee of $50,000.00. All the accused persons who were in the house were arrested and sent to the Narcotic control board offices and later charged with the offences.

The case for the prosecution was further strengthened by the evidence of the PW1, Husseima Iddrisu, a house-help of the first accused who traveled to London but returned with money which she counted. After that 'Krail' and the appellant came for the money. She saw the 5th accused a mason, partition a room in the house into two and plaster them; he removed a cupboard upstairs and replaced it with a big mirror previously in the room of the first accused; then the 1st and 5th accused rebuilt the compartment. During the raid on the house on 7-1-04, the police found the boxes in the compartment behind the mirror.

The PW5 David Tei Ahulu saw Hodgson, the 5th accused, working on the wall on 7-1-04 and corroborated the evidence on how he also heard PW11 Ben Ndego ask the 1st Accused what the parcels contained whereupon the latter said it was cocaine given him by a friend called Yakuba for safekeeping for a fee of $50,000.00

Ben Ndego said upon the receipt of intelligence from sister international bodies the National Narcotic Control Board mounted surveillance on the accused persons. They identified the accused and their associates as involved in the illicit activities. When his outfit conducted a raid on the house of the 1st accused, 22 boxes of substance suspected to be cocaine were found hidden in a concealed

compartment behind a big sized mirror in the house of the 1st accused upstairs. A field test conducted on the samples tested positive for cocaine. A further search in the house led to the discovery of a book entitled 'Cocaine'

On his part the PW10 said he took photographs of the scene and tendered them in evidence as Exhibits D, D1 to D19. Forensic evidence by PW6 and 8 the analysts, confirmed that the substances were indeed cocaine in exhibit 8, weighing 588.33 kilos.

At the close of the case of the prosecution the learned trial judge ruled that the prosecution established a prima facie case against each accused and called upon him to enter his defence.

Each accused flatly denied the offence charged against him and led evidence in his defence. At the end of the trial, the court held the prosecution succeeded in proving its case against each accused beyond reasonable doubts, found each guilty of the offence and convicted him accordingly. It then imposed a jail term of 20 years IHL imprisonment on each accused. It also confiscated all monies found on them during the raid as well as the house in which the contraband drugs were found.

The convicted accused persons were dissatisfied with the conviction and sentence and appealed to the Court of Appeal, which dismissed the appeal on count 3 by a 2-1 majority decision. The 3rd and 4th accused appealed further to this court on numerous original and additional grounds and on 7 February 2007, and in its unanimous judgment upheld the appeal; see *Logan & Laverick v the Republic [2007-2008] SCGLR 75.* Allan William Hodgson, the 5th accused at the trial, had his appeal to this court against the judgment of the Court of Appeal dismissed in *Hodgson v The Republic [2009] SCGLR 642.*

As it is only the second accused at the trial who is appealing against the judgment of the Court of Appeal, this time, I shall therefore recap the evidence he led in his defence. He said he went to Kevin Gorman, his brother in law, in his house on 31-12-03 in the morning to see him and one Aisha; he denied going there to offload boxes. He denied the offences leveled against him, and the evidence by the Prosecution witnesses, particularly that he hired and paid some of them to offload the boxes in which the cocaine was found.

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In his statement of case, counsel for the appellant stated that there was nothing in PNDC Law 236 which required, or, created a strict liability offence on an accused person so that a person who did not know the nature and quality of the substance he possessed cannot be said to have been engaged in dealing in Narcotic Drug but is a mere 'luckless victim'.

This being a criminal trial, the prosecution bore the onus of proof that the appellant possessed the narcotic drug as charged against him, which they must discharge on proof beyond reasonable doubts.

To secure the conviction of an accused person on such a charge, Atuguba JSC after considering the authorities in an exhaustive manner, stated the ingredients of the offence in *Bonsu alias Benjillo v The Republic [2000] SCGLR 112* at 138 to be as follows:

> 'I hold that on a charge of possessing a narcotic drug under PNDCL 236 the prosecution must prove: (i) custody or control of the drug by the accused; (ii) knowledge of the presence of the drug: see *Warner v Metropolitan Commissioner [1969] AC 256 HL*; *R v Boyeson [1982] 2 All ER 161* and *Akosah v The Republic [1979] GLR 250*; and (iii) knowledge of the nature of the drug possessed."

The trial court found that the appellant had possession of the drugs and the first appellate court concurred with the trial judgment.

If the evidence on record was studied carefully, it would show that even though the drugs were not found in the actual possession of the appellant, whether or not the appellant possessed it constructively, or by imputation, could be inferred from the circumstances that they were under his control. There was evidence it was the appellant who drove the vehicle, (a van), containing the boxes, hired the services of some of the prosecution witnesses to offload boxes supposed to contain fish upstairs; he himself carried some of those boxes upstairs. Of course, once the appellant denied the evidence by the prosecution, it became a question of which version of the rival facts as between the prosecution and the appellant the court ought to believe. The trial court cast its preference in favor of the case of the prosecution and was affirmed on appeal. Thus on the vital issue of whether or not the appellant had anything substantially to do with the boxes and their contents, the concurrent findings of fact by the lower courts was that he did carry the boxes found to contain the drugs physically and also hired and paid carriers to send them upstairs for hiding in the specially constructed compartments.

It was now well settled in our jurisprudence that it is not easily permissible for a second appellate court like this one to interfere with concurrent findings of fact by lower courts unless such findings were not supported by evidence so as to make the findings unreasonable. We have not spared ourselves the burden of reading the evidence several times over and come to the conclusion the findings by the lower courts were supported by the evidence on record thus rendering them amply supported by the evidence and thus were by no means perverse. On

this reference is hereby made to *Achoro v Akanfella [1996-97] SCGLR 209* cited in *Obrasiwa v Otu [1996-97] SCGLR 618.*
The conditions under which this court will interfere with concurrent findings of facts by lower appellate courts have been stated several times in this court. In the Achoro case, this court said:
"…in an appeal against findings of facts to a second appellate court like court where the lower appellate court had concurred in the findings of the trial court, especially in a dispute,….this court will not interfere with the concurrent findings of the lower courts unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunals dealt with the facts."
See pages 214-215 where some of the errors which must be established, such as the lower courts had clearly erred in the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied: see Thakur Harihar Buksh v Thakur Umon Parshad (1886) LR 141 A7; or, as pointed out Robins v National Trust Co. [1927] AC 515, that the finding is so based on erroneous proposition of the law that if that proposition be corrected, the finding disappears. In short it must be demonstrated that the judgments of the courts below are clearly wrong. The examples are by no means exhaustive.

It is equally well settled that physical possession alone would not be sufficient to prove a case of possessing narcotic drugs against the appellant. The issue was, was there evidence establishing that the appellant had the requisite mens rea or guilty knowledge, or evidence from which it was reasonable to presume the appellant proved to be in possession well knew, or ought to have known that the article he possessed was prohibited drugs, in this case cocaine? In Ghanaian criminal jurisprudence, this ingredient in the offence was stated by Ollennu JSC in *Armartey v The State [1964] GLR 256* at 261, that:

> "What is the possession proof of which without more, makes a person guilty of an offence under section47 (1), unless he proved that his possession is lawful. Upon a proper construction of the section, the possession must be possession with knowledge of the nature and quality of the article; awareness that what is possessed is 'opium or Indian Hemp' or residue from the smoking of Indian Hemp'. Physical possession without knowledge of the nature and quality of what is possessed physically is no offence. Without that knowledge there is no legal possession which can support the charge. Therefore to succeed on such a charge, the prosecution must prove legal knowledge; that is, in addition to proving physical or constructive possession, they must go further to lead evidence which establishes that the defendant had the requisite knowledge, or evidence from which it will be reasonable to presume that the defendant proved to be in possession well knew or ought to have known, that the

article he possessed was 'opium or Indian Hemp' i.e.' cocaine' in this context.

In *Warner v Metropolitan Police Commander [1969] AC 132, [1969] 2 All E.R. 356,* a majority of the House of Lords held that a person could not be in possession of dangerous drugs unless he was at least aware of the nature of that which was under his control although it was unnecessary for the prosecution to show that he knew of its quality. The current statutory English law is contained in the Misuse of Drugs Act, 1971, which provided that an accused might be acquitted and discharged if he proves he neither believed nor suspected nor had reason to suspect that the substance he possessed was a controlled drug. We would say English law was different from the Ghanaian on the requirement of knowledge sufficient to fix an accused with liability for the possession of what was found in his possession. We must observe that whether or not our law on the subject created a strict liability offence was adequately considered in *Bonsu alias Benjilo v The Republic [supra*] where Atuguba JSC held it did not.
We fully endorse his view for our criminal law is on all fours with the common law principle that a crime such as we have in question requires a mental element, or a mens rea.

The *Amartey* case (supra) made it clear that possession is physical or constructive control coupled with knowledge of the nature and quality of that which was possessed. Therefore the settled law in Ghana is that to sustain a charge under section 2 of PNDCL 236, 1990, the prosecution must prove that the appellant had not only physical control or custody of the drugs but also was aware of its nature and quality. Whether or not the appellant had legal possession of the substance in question was a matter of evidence.

To be fair to the appellant the cocaine was not found on him physically, but hidden in a specially constructed chamber in the wall of the house of first accused. Was there proof of any connection or nexus by the appellant to these things?

There was evidence he carried or hired and paid carriers to carry boxes containing the substances from the beach in a van to the house and into the recently constructed chamber in the wall. It is not usual to carry boxes of fish into such chambers for anything.

But by far the most important fact consideration was that whether or not the appellant carried the boxes from the beach into the house or hired and paid prosecution witnesses for the job were issues of fact to be determined by the trial judge, and when he who had the advantage of seeing and hearing the witnesses as they gave evidence had come out with a finding of fact on those vital matters, and concurred in by a first appellate court, then a second appellate

court like this court must be very slow indeed to interfere with the findings of fact so made; unless it can be demonstrated that the findings if facts were perverse as lacking any credible evidential support.

In a brazen effort to avoid detection, was the fact that the chamber was covered with a mirror, so that behind the façade of a mirror, was the chamber in which were hidden boxes containing the noxious substances. There was evidence the appellant drove the van containing the boxes from the beach, carried some of them himself, hired others to do it for him and paid them for their labor. He who does anything through others does it himself. Whichever way one looks at it, either actually or constructively, the appellant was found to have possessed the boxes and known their contents at one stage or the other.

It was settled it was not sufficient for the prosecution to prove only physical handling of the substance but equally important was this coupled with knowledge of the nature and quality of what was possessed. Knowledge, in this context, was akin to what was requisite for stolen goods under section 147 of the Criminal Code, 1960, Act 29. To constitute an offence under the section was proof of the knowledge that the property in question was obtained or appropriated by an offence and the issue was how that was proved.

In *Republic v Bayford [1973] 2 GLR 421*, the court said guilty knowledge was largely a matter of inference from the circumstance and on the merits of a particular case; the nature of the property was important. It is not derogatory of evidence to say it was circumstantial; it is often the best. In cases of this nature such as we are considering in this appeal, seldom does an accused admit or confess this all important knowledge. It is often inferred from the circumstances, albeit not in a rash manner. Care ought to be and is often taken that the evidence must support the inference. The parameters are well circumscribed and adumbrated in the local locus classicus on the subject, namely, *State v Anani Fiadzo [1961] GLR 416* where the Supreme Court held at page 418 that:

> "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 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."

In the celebrated case of *R v Onufrejcyk [1955] 1 QB 388*, it was said in further explanation of circumstantial evidence that

> "It is often the best evidence. It is evidence of surrounding circumstances, which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."

Thus, a judge is permitted to infer from the proven facts, other facts necessary to complete the elements of guilt or to establish innocence. It is not permissible to castigate a judgment simply because it was founded on circumstantial evidence as was done by the counsel for the appellant.

A close study of the evidence revealed that there was more than sufficient evidence to support the findings of fact by the trial court so that the first appellate court was perfectly right in affirming them.

The evidence showed the role played by the appellant in the saga which may easily win laurels in any annual best film award contest as recounted above (by which he first drove the vehicle that transported the boxes from the beach with he himself carrying some of the boxes, hiring and paying others to assist him in so carrying the boxes upstairs for hiding and hiding them in that compartment in the wall), were acts suggestive of one fact, namely that he knew he was handling an obnoxious substance, and as it turned out to be, cocaine. The appellant before us played a pivotal role in the affair.

We do not entertain the least doubt the trial court was right in its findings of fact concerning him. The first appellate court was equally right in affirming the trial court in finding the appellant guilty, convicting him and sentencing him according to law. The ground of appeal that the judgment was against the weight of evidence finds no merit and is therefore dismissed.

The ground of appeal against sentence can be disposed of in only a few words: it did not carry merit for it was adequate under the circumstances. The trial court considered a lot of factors before passing sentence on the appellant. He said even though he was not obliged to give reasons for his sentence:

> "But taking into consideration the method or design of the mode of importation of the offending drug – cocaine into the country and by the very huge quantity of the drugs brought in and the modus operandi of all the accused persons in this case, they appear to be leaders or grand masters for the distribution of this condemned drug in Ghana and elsewhere."
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> Where the trial judge got that information or evidence from about the distribution of the condemned drug in Ghana so as to make that damning sweeping statement about the accused persons was not indicated and certainly was not disclosed in the entire evidence. Excluding that statement

from that part of the judgment for this reason, it could be said the trial judge was right in taking these factors into consideration in sentencing the appellant. In fact, sentencing either after conviction in a trial of first instance or, on appeal, is a matter entirely within the discretion of the judge or the court. The factors a court would consider in determining the length of sentence are stated in *Kwashie v The Republic [1971] 1 GLR 488 at 493, CA* to be:

> "(1) the intrinsic seriousness of the offence; (2) the degree of revulsion felt by law-abiding citizens of the society for the particular crime; (3) the premeditation with which the criminal plan was executed; (4) the prevalence of the crime within the particular locality where the offence took place, or in the country generally;(5) the sudden increase in the incidence of the particular crime: and (6) mitigating or aggravating circumstances such as extreme youth, good character and the violent manner in which the offence was committed. Thus a judge in passing sentence may consider the offence and the offender as well as the interest of society".

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 see; also what this court said in a similar situation in *Hodgson v The Republic (supra)*.

However one looks at it, counsel for the appellant did not make any submissions on the ground of appeal against sentence and it is deemed he abandoned that ground *sub silentio*; other than that, that ground is without any merit and is therefore dismissed.

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.

In conclusion, we hold that the judgments of the lower courts were impeccable, for the evidence amply supported the finding of guilt and conviction for possession of the drug by the appellant. The sentence ought to be and is hereby affirmed; we also affirm their decision and dismiss the appeal as it failed entirely.

J. ANSAH
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT
S. A. BROBBEY
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