

Appeal rehearing | Appellate review | Prosecution prove doubt | Burden prosecution | Prima facie needed | No interfere findings | Leave Supreme appeal | Special leave refused | Notice invokes appeal | Supreme merits focus | ID modes vary | Witness ID proof | Prove accused ID | Mistaken ID reverses | Judge ID factors | ID law reform | Alibi weakens case | Alibi needs notice | No notice barred | Sentencing discretion | No interfere proper | Interfere excessive wrong | Grave offense deterrent | Sentence factors seriousness

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: **BAFFOE-BONNIE JSC (PRESIDING)**
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J3/01/2023
6TH DECEMBER, 2023

FREDERICK AKWASI ASAMOAH **APPELLANT**

VRS

THE REPUBLIC **RESPONDENT**

JUDGMENT

BAFFOE-BONNIE JSC:

This is an appeal from the judgment of the Court of Appeal dated 14th November, 2018. The Appellant was tried by the Circuit Court, Dunkwa-on-offin on three counts of conspiracy, three counts of robbery and one count of possession of firearm without permit. According to the prosecution the Appellant together with the other accused persons (at large) on the 21st day of December, 2014 at about 5:30pm, on the 15th day of January 2015 at about 5:30pm, on the 5th day of February, 2015 at about 5:30 pm did conspire and did commit the offence of robbery with the Appellant also in the possession of a firearm without permit.

The case of the prosecution during the trial was that sometime in December 2014, mining sites at Adeade near Diaso experienced series of armed robberies. On the 21st day of December 2014, the police received a complaint that at about 5:30 pm that day, three (3) armed robbers with two AK 47 assault rifles and a pump action gun, attacked their workers after the close of work and robbed them of their black concentrate containing gold. Subsequently, on 15th January, 2015, there was another report of an armed robbery attack by the same complainant at his mining site in Adeade and a police team was dispatched to the area. On reaching one of the mining sites, the armed robbers fired at the policemen which caused two policemen to sustain injuries. The two policemen were then rushed to the hospital for treatment and were on admission for a couple of weeks. After shooting the two policemen, the armed robbers proceeded to one other mining site, shot one Chinese man in the leg and thereafter robbed them of their mobile phones and black concentrate containing gold. Then again on 5th February 2015, the police received a distress call that there had been an attack by armed robbers wielding two AK 47 assault rifles and a pump action gun who blocked a section of the road at the outskirts of Adeade and took away their three basins of black concentrate containing gold. In that encounter, the armed robbers compelled three of the victims to carry the black concentrate containing gold to a safe place in the forest and ordered them to extract the gold for them. Whilst the victims were with the robbers, the robbers stated that they were the same people who shot at the police in the previous attack and that they intended to kill them. On 8th March, 2015, the armed robbers attacked another mining site at Maudaso near Diaso. Military personnel were alerted and they proceeded to the area. Immediately they got there they were fired at by the armed robbers, they also fired back and succeeded in hitting the Appellant. The Appellant was arrested but his accomplices fled the scene. On his arrest, the accused had in his possession an AK 47 assault rifle with sixteen rounds of ammunition. On the same day, witnesses in the case who had information about the arrest rushed to the Diaso Police station and identified the Appellant as one of the armed robbers who had attacked them on a number of occasions with two AK 47 assault rifles and a pump action gun. After investigations, the Appellant was charged with three counts of conspiracy, three counts of robbery and one count of possession of firearm without permit.

When the Appellant opened his defence on oath, he denied the evidence of the prosecution and claimed that he was rather a victim of kidnapping by the armed

robbers. The Appellant denied being in the area prior to the day he was captured. He stated that when he woke up that day, which is the 8th day of March, 2015 he decided to trek to Diaso to see whether he could get a mining site to mine. On his way he saw two men emerge from the bush who called him and asked whether he was a worker with a Chinese company and he denied same. However they told him he was lying and captured him into the bush. The leader of the gang then sent for a bag to be brought. When the bag was opened, they asked him what was in the bag and he realized that it was a gun. He was then bound with cellotape and made to sit down. Not long after, the sound of an approaching vehicle was heard and he was taken to the roadside. The armed robbers stopped the vehicle and there was an exchange of gunshots between the armed robbers and the military men. The robbers then left the scene. The case of the Appellant is that he thought the soldiers were coming to his rescue but as soon as he popped his head out of the bush, he was shot in the head. He was then arrested and was told he was an armed robber. The soldiers took a gun which was lying somewhere on the ground and said it was his.

After a full trial, the Appellant was convicted and sentenced on all counts as follows;

1. Counts one and two, 18 years to run concurrently
2. Counts three and four, 18 years to run concurrently
3. Counts five and six, 18 years to run concurrently and
4. Count seven, 24 months to run concurrently with counts one to six.

The trial court further ordered that the concurrent sentences under counts one and two, three and four, five and six shall run consecutively thereby making it a total of fifty-four (54) years I.H.L.

The Appellant, aggrieved with the judgment of the trial court appealed to the High Court, Cape Coast against his conviction and sentence. It must be noted that the Appellant abandoned the first ground of his appeal which is that the conviction be set aside. The reason given by his counsel was that the Appellant has come to reality with the gravity of his offence and has become remorseful. However, the High Court after considering all the evidence available, also dismissed the appeal against the sentence.

Obviously dissatisfied with the decision of the High Court, the Appellant filed an appeal to the Court of Appeal, Cape Coast against his conviction and sentence. Once again, the

appeal was dismissed and the Court of Appeal further affirmed the decision of the trial Circuit Court which was endorsed by the High Court, Cape Coast. Still dissatisfied with the decision of the learned justices of appeal, the Appellant is before this court seeking a reversal of the whole judgment and an award in his favour.

JURISDICTION OF THE SUPREME COURT

The first question we asked ourselves was whether our Jurisdiction had been properly invoked.

The Record of Appeal reveals that the matter before us started in the Circuit Court. For a matter which started in a court below the High Court, to travel on appeal from the Court of Appeal to the Supreme Court, the law provides that leave to appeal must be sought from/granted by, the Court of Appeal. Thus the Appellant herein is required by law to first seek leave to appeal to the Supreme Court before an appeal can be made before this court. If this leave is refused by the Court of Appeal, the Appellant may then apply for special leave to appeal to the Supreme Court at the Supreme Court. It is only after such leave is granted that the jurisdiction of the Supreme Court would be said to have been properly invoked.

Section 4(1)(b) and (2) of the Courts Act, 1993 (ACT 459) provides as follows;

Section 4 – Appellate Jurisdiction of the Supreme Court

(b) An appeal shall lie from a judgment of the Court of Appeal to the Supreme Court-

(b) with the leave of the Court of Appeal, in any other cause or matter, where the case was commenced in a court lower than the High Court or a Regional Tribunal and where the Court of Appeal is satisfied that the case involves a substantial question of law or is in the public interest;

(2) Notwithstanding subsection (1) of this section, the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in any cause or matter (including interlocutory matter) civil or criminal, and may grant leave accordingly.

This means that for an Appellant to gain an opportunity to appeal to the Supreme Court in a matter which started in a court below the High Court, the Appellant must first seek

leave to appeal to the Supreme Court which must be dealt with by the Court of Appeal before the matter can proceed. This is the first and most important step in cases such as these because it is this step which activates the jurisdiction of this court. Jurisdiction is very fundamental in every case and just like capacity absence thereof can have catastrophic effects on any case. Due to this, any person coming before a court must properly invoke the jurisdiction of that court. In an appeal, it is the Notice of Appeal which invokes the appellate jurisdiction of the court and so where the law provides a step to be taken before a Notice of Appeal can be filed, that step is of utmost priority because without that step any step taken thereafter is of no effect. It is only when that step has been taken that the jurisdiction of the court can be said to have been properly invoked.

Since this matter began in the Circuit Court, the Appellant should have first sought leave at the Court of Appeal to appeal to the Supreme Court. The Appellant does not have an automatic right of appeal. He must necessarily seek leave to appeal to the Supreme Court from the Court of Appeal as provided in Section 4(1) (b) of the Courts Act. And not only the Application for Leave, the conjunctive word “AND” in the Law implies that the Court of Appeal should be satisfied that there is a substantial question of law to be determined or the case is in the public interest before granting such leave. The importance of this requirement was clearly explained by this court in the case of **Skylimit Structure Builders Ltd & Anor Vrs Tullow Ghana Ltd** Civil Motion No. J8/109/2017 Dated 13th May, 2017.

Upon perusal of the Record of Appeal, there is nothing on record to show that the Appellant brought an application for leave to appeal to the Supreme Court. From the Record of Appeal, the Appellant rather brought an Application for extension of time within which to file an appeal and same was granted by the Court of Appeal. See page 232 of the ROA. However, not only did the Court of Appeal grant the said Application, they went further to order the Appellant to file his Notice of Appeal within ten (10) days of the order. This was erroneous. Our view is that, the Appellant should rather have applied for an extended time within which to file an Application for Leave to appeal to the Supreme Court. The Court of Appeal pre-empted the issue and went ahead not only to extend time but also ordered the Appellant to file his Notice of Appeal and this has inured to the benefit of the Appellant. The Appellant cannot be faulted for the errors of

the Court of Appeal. Most importantly, this is a criminal matter and this court is ordinarily inclined to overlook certain technicalities so as to deal with the substantive matter in order that real justice to prevail. See the case of **Adomako Anane Vrs Nana Owusu Agyeman & Ors** Civil Motion No. J4/42/2013 Dated 26th February, 2014, where this court held;

“The Supreme Court in recent years leans more towards judgments that go to the merits or roots of a case instead of technicalities”.

So even though our Jurisdiction has not been properly invoked, we shall proceed to deal with the appeal before us.

The grounds of appeal filed in the Notice of Appeal after leave for extension of time within which to file an appeal was granted, are captured as follows;

- 1.The conviction is against the weight of evidence on record.
- 2.The issue of alibi was not properly considered
- 3.The court erred in convicting the convict/Applicant for robbery, using offensive weapon.
- 4.The sentence was too harsh in the fact that the Convict/Applicant is a first time offender.

It must be noted that in the written submissions filed on behalf of the Appellant, Counsel for the Appellant introduced a fifth ground of appeal which was not provided for in the Notice of Appeal. That ground of appeal reads as follows;

V. The police erred in the identification parade of the suspect

Particulars of error

The identification was done the very day the Appellant was arrested.

There was only one suspect at the identification exercise.

The suspect alone was lying in the police car and complainants called on phone to come and identify him.

ANALYSIS

It is a statutory and well known principle of law that an appeal is by way of rehearing. What this means is that the Appellate Court is put in the place of the trial court to

consider the entire Record of Appeal and determine as to whether the decision conforms to the settled principles of law which have been established. In shedding more light on this settled principle, this court in the case of **Amankwa Vrs The Republic** Criminal Appeal No. J3/04/19 dated 21st July, 2021 cited with approval the case of **Tuakwa Vrs Bosom [2001-2002] SCGLR 61** and stated as follows;

"... Applying the above stated principle in a criminal appeal might result in the court embarking upon the following to analyse the entire record of appeal and this must include the charge sheet, the Bill of indictment where this is applicable, the witness statements of all witnesses, all documents and exhibits tendered and relied on during the trial as well as the evidence during testimony and cross-examination to satisfy itself that the Prosecution has succeeded in establishing the key ingredients of the offences charged against the appellant beyond any reasonable doubt and that the entire trial conformed to the settled procedures under the Criminal and other Offences (Procedure) Act and that the acceptable rules of Evidence under the Evidence Act, (1975) NRCD 323 had been complied with including the Practice Directions issued following the decision of this court in the case of Republic v Baffoe-Bonnie & 4 Others [2017-2020] 1 SCGLR 327.."

In this appeal therefore, this court is obligated to consider the entire Record of Appeal and to come to a conclusion either affirming the decision of the courts below or departing from it.

In criminal cases, the duty on the prosecution is to prove the allegations levelled against the accused person(s) beyond all reasonable doubt. There is a duty imposed on the prosecution to prove the essential ingredients of the offence with which the Appellant has been charged beyond any reasonable doubt. This burden of proof remains on the prosecution throughout and it is only after a prima facie case has been established that the Appellant is called upon to give his side of the story. See the case of **Amartey Vrs The State [1964] 256**.

In the case of **Gligah & Atiso Vrs The Republic [2010] SCGLR 870** this court reiterated the constitutional laws regarding criminal trials and held that;

"Under article 19 (2) (c) of the 1992 Constitution, everyone charged with a criminal offence was presumed innocent until the contrary was proved. In other

words, whenever an accused person was arraigned before any court in any criminal trial, it was the duty of the prosecution to prove the essential ingredients of the offence charged against the accused person beyond any reasonable doubt. The burden of proof was therefore on the prosecution and it was only after a prima facie case had been established by the prosecution that the accused would be called upon to give his side of the story."

This being our guiding principles, we would therefore review and evaluate the entire record of appeal based on the principles established by law to determine whether it would be prudent to disturb the concurrent decisions of the trial court and Court of Appeal in this case.

The first ground of appeal filed by counsel for the Appellant is the omnibus ground of appeal which is that the conviction is against the weight of evidence on record. This ground of appeal would be considered together with the third ground of appeal which is that the court erred in convicting the convict/Applicant for robbery, using offensive weapon. The effect of this appeal having been anchored on the omnibus ground of appeal is that this court has been invited to exercise its power of re-hearing to evaluate the entire evidence on record so as to determine whether the concurrent findings of the trial court and Court of Appeal are amply supported by the evidence on record. The authorities from this court are clear that an Appellate Court must be slow in interfering with concurrent findings of the trial court and Court of Appeal unless there is some blunder or error which will result in a miscarriage of justice.

In the case of **Fosua & Adu-Poku Vrs Dufie (Deceased) & Adu-Poku Mensah [2009] SCGLR 310**, this court reasoned that:

"A second appellate court would justifiably reverse the judgment of a first appellate court where the trial court committed a fundamental error in its findings of facts but the first appellate court did not detect the error but affirmed it and thereby perpetuate the error. In that situation, it becomes clear that a miscarriage of justice had occurred and a second appellate court will justifiably reverse the judgment of the first appellate court"

See also the case of **Kamil Vrs The Republic [2011] 1 SCGLR 300**

Counsel for the Appellant contended that the Appellant was wrongly convicted on facts concocted by the prosecution witnesses. He argued that the Appellant was innocent but

fell into captivity in the hands of the real conspirators and armed robbers on the 8th March, 2015, when he decided to look for land for gold mining. It is the case of the Appellant's counsel that the Appellant was in Adeade area for the first time when he was arrested as seen in both his caution and charged statement. Counsel for the Appellant submitted that it is surprising how all the prosecution witnesses identified the Appellant as the leader of the gang without any evidence in support of same. His case is that there is a trend which suggests that all the witnesses say the same thing about the Appellant-leader, description of the gun, shirt etc. which leads to the conclusion that the gun was planted on the Appellant by the police at the Police Station and they all agreed to find a common gun for the Appellant since the description of the gun by all the prosecution witnesses were the same. This is because at the time the Appellant was arrested he did not have any gun with him and this was established during cross-examination. Counsel argues that it is clear on record that the evidence is not enough to establish the guilt of the Appellant and the judgment is against the weight of the evidence.

Counsel for the Republic responded by discussing the ingredients of the offence of Robbery and linked the actions of the Appellant to the offence of Robbery. Counsel argued that the Prosecution witnesses who saw and observed the Appellant and his accomplices were able to lead sufficient evidence to demonstrate to this court that it was the Appellant, acting with his accomplices, who committed the unlawful act. The prosecution witnesses gave vivid testimonies of their encounter with the appellant and his accomplices, and were able to describe them because they were not masked. Counsel states that there is evidence to show that each accused person played a part in ensuring that the robbery was a success which means that they were at the scene for a common purpose, which was, to commit robbery. Counsel, finally submitted that the defence of the Appellant failed to cast any doubt on the case of the prosecution. There were also inconsistencies in his statements and evidence which made his story wholly untrue.

The Appellant and his accomplices (at large) were charged with three counts each of Conspiracy to commit crime to wit Robbery contrary to **Sections 23(1) and 149** of the **Criminal and other Offences Act, 1960 (Act 29)**, Robbery contrary to **Section 149** of Act 29, 1960 as amended by Act 646 and Possession of firearm without permit contrary to **Section 1** and **26(1)(a)** of the **Arms and Ammunitions Act, 1972**

(NRCD 9). Based on these charges there is a duty upon this court to satisfy itself that prosecution has been able to prove beyond reasonable doubt the ingredients of this offence and have established that indeed the Appellant was the one who committed this unlawful act. Relying on the case of **Frimpong alias Iboman Vrs The Republic [2012] 1 SCGLR 297** the essential elements of the offence of conspiracy and robbery are whether the Appellant and the two others agreed or acted together with a common purpose to commit a criminal offence, in this case robbery, and whether the Appellant and his accomplices stole from the victims with the use of force or caused any harm or use the threat of criminal assault or harm on the victims with the intent to prevent or overcome the resistance of their victims to the stealing of the thing. In **Behome Vrs The Republic [1979] GLR 112** this court held that;

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

During the trial, the prosecution presented nine (9) witnesses most of whom were victims of this robbery attack. The prosecution led evidence through their witnesses that on 21st December 2014, 15th January 2015, 5th February, 2015 and 8th March, 2015 the Appellant and his accomplices violently attacked their victims and robbed them of their black concentrate containing gold. Prosecution was also established that on 21st December, 2014 whilst some mine workers were on their way back from work, the Appellant and two other men attacked them and robbed them at gun point. The Appellant and one other accomplice were both wielding an AK 47 rifle and the third robber, had a pump action gun which they used to threaten them. Then again on 15th January 2015, prosecution established that there was another robbery attack in which these same robbers, two of them wielding AK 47 rifle and the third, a pump action gun shot two police men and a Chinese man and robbed them of their mobile phones and black concentrate containing gold. Yet again on 5th February, 2015 these same robbers blocked a section of the road, took away the black concentrate and compelled their victims to extract the gold from the black concentrate. As if that was not enough, on the 8th day of March, 2015, the robbers once again attacked another mining site, after a series of exchange of gun shots, the Appellant was arrested but his accomplices fled the scene. The evidence on record shows that prosecution had led sufficient evidence to establish a prima facie case for the Appellant to answer.

The Appellant in answer to this stated that he had never been to Adeade and that the 8th of March was his first time ever going to that place. He indicated that he was rather captured by the real robbers who left the scene after the exchange of gun shots and just when he thought the soldiers were coming to his aid, they rather shot him and presented him as the robber.

From the evidence on record, it is clear that the prosecution witnesses were victims of the robbery attack and were able to give detailed testimonies that linked the Appellant to the commission of the crime. They were able to identify him as the one who committed the crime. The evidence is abundant on the record that the men who committed these robberies were not masked and due to the extended nature of the time they interacted with their victims, the victims were able to observe them closely to identify them and to even describe the weapons which were used. They interrogated some of them and led some up and down which was enough for the victims to take a good look at the robbers. The prosecution witnesses were consistent and clear in their testimonies because they were able to identify the Appellant who was not masked during the robbery and used the same gun throughout. It was not a single attack but were series of them and the witnesses observed how the robbery operations were conducted and it was so easy for them to tell who was in charge during the robberies. The unusual wrapping of cellotape around the gun, the fact that a part of the gun was broken and that the same gun had been used during the robbery attacks was something the eyewitnesses had clearly registered on their minds. The defence of the Appellant which was meant to dislodge the case of the prosecution by raising the required doubt was not convincing.

Both PW1 and PW2 testified on oath that they saw the Appellant personally with an AK 47 rifle and the said AK 47 rifle they saw was the same as the one the Appellant had when he was arrested by the police. The time of the incident was also day time and there was proximity between them and the Appellant. During cross-examination of PW1 whose attack occurred on 21/12/2014 this is what ensued;

Q: The AK 47 you are referring to was deposited at his feet by the police at the police station.

A: Not true for the gun A1 was arrested with was the same gun he was holding when he and the two others robbed us.

Q: How did you identify that the gun A1 allegedly was holding to be the same as the one he was arrested with.

A: I was able to identify that gun for the gun A1 had when we were attacked, the gun had two magazines sealed together with a cellotape and it had the same size and also there was the same broken part near the end of the gun.

Q: So at which police station was the gun shown to you

A: I first saw the gun when we were robbed and when A1 was arrested and he was being photographed at Dunkwa On Offin police station.

PW3 also gave evidence and testified that he was sure the Appellant was the leader of the gang who robbed them. The time of the robbery was daytime and he even had a conversation with the Appellant during the robbery because it was the Appellant who was giving instructions on that day and leading him up and down. When counsel for the Appellant insisted that the AK 47 rifle was not for the Appellant, all the witnesses answered that the gun belonged to the Appellant. PW6 whose attack occurred on 05/02/2015 gave an emphatic answer in the following words;

Q: I am putting it to you that the fact that a gun was lying beside the accused does not mean that it was for him.

A: It was for him as the gun I saw lying by him was what I saw with him on 5th February, 2015.

PW7 also testified as one of the three persons that the Appellant and his gang commanded to carry the black ore they had robbed to a safe place. A careful reading of the evidence of PW7 would reveal that PW7 had the time and opportunity to observe the Appellant very well. He also insisted that he saw the Appellant very well and gave the same description of the AK 47 rifle as had been described. It is obvious from the record and the evidence led that the Appellant had in his possession the said AK 47 rifle which he used for his unlawful act.

In the Caution Statement (Exhibit G) made by the Appellant when he was first arrested the Appellant stated as follows;

...They gave me a gun used by the police and asked me to pull the trigger and it will fire...

...the group members gave me a cap to hide my identity. The cap was placed in a small bag I was holding by the gang...

I want to state that the AK 47 assault rifle with double magazine, sixteen rounds of ammunition and an empty shell was given to me by the gang of three who were hiding with me at the bush.

...I was arrested by soldiers together with AK 47 assault rifle with double magazine, sixteen rounds of ammunition and a small bag containing three wrapped mercury...

This was again maintained in the 2nd Caution Statement (Exhibit H). However in the charged Caution Statement (Exhibit L), the Appellant stated that he was not in possession of the firearm at the time of his arrest but the military personnel who shot at him picked the AK 47 assault rifle from the ground close to where he was shot and said it was his. During cross-examination the Appellant made an attempt to explain the conflict in his statements and this is what he said;

Q: In Exhibit G you told the police that the people whom you alleged took you hostage gave you a gun and told you that if you pressed the trigger, it will shoot.

A: I said so but I did not mean that the gun was given to me physically but that the gun was only showed to me.

This is indeed an attempt by the Appellant to put forward a different story contrary to what he stated earlier. How the Appellant was even able to give the details of the AK 47 assault rifle is surprising. How was he able to know that it had sixteen rounds of ammunition and an empty shell? This is clearly someone who is well versed in this area. Interestingly when the Appellant was arrested he only stated that he was a car dealer and maintained this throughout but suddenly when the Appellant opened his defence he stated that he was a small scale miner as well. The trial court rightly found that the Appellant only now added being a small scale miner to his profession because of Exhibit F which is the mercury used in the extraction of gold that was found in his possession. This court cannot in anyway be swayed by such concocted facts. The court will not lend aids to such endeavours. Upon consideration of the entire evidence, we come to the conclusion that there is sufficient evidence to establish the charges of conspiracy to

commit robbery and robbery against the Appellant and the other accused persons (at large), beyond reasonable doubt.

Identification parade was not properly done.

In arguing this ground of appeal, Counsel for the Appellant contended that the identification the police did on that fateful day of arrest of the Appellant was wrong and self-serving. Counsel for the Appellant seems to suggest to this court that once the police had suffered casualties in the hands of armed robbers in the area, they became blind as to how to treat suspects during identification, and wrongly invited the public to identify Appellant whilst bleeding from gunshot when he was arrested. Learned counsel for the Appellant argues that because there was only one person available for identification, all agreed to identify the Appellant as the person they had encountered in their attacks. Counsel contends that the statement made by the Appellant in his caution statement that he does not know Aboloway and chief of Adeade and also the fact that he had never been to Adeade and the evidence of the Appellant's witness that the Appellant was with her on 5th February, 2015 required that a proper identification parade be done to ascertain the innocence of the Appellant. Counsel stated that the **Ghana Police Regulation 195** require that in undertaking an identification parade, a minimum of eight persons are used. However, in this case there was only one person, which is the Appellant, and this has created a miscarriage of justice. Counsel therefore submits on this ground that there was no consistency in the identification of the Appellant and no proper identification parade to implicate the Appellant.

In her erudite submission to this court, counsel for the Republic cited relevant cases in support of her submission that the Appellant was properly identified and there was no error in the identification of the Appellant.

Regarding the issue of identification this court stated in the case of **Razak Vrs The Republic** Criminal Appeal No. J3/6/2011 dated 25th April, 2012 held that;

"In every criminal trial it is not only necessary for the prosecution to prove the commission of the crime, but also to lead evidence to identify the accused as the person(s) who committed it. That was of a very crucial importance for a proven case of mistaken identity is a good ground for reversing a conviction for a crime on appeal. Thus, where the ground of appeal bothers on mistaken identity, a trial or

appellate court ought to carefully examine the evidence on it. A judge is to guide himself by considering factors such as the period of time over which the witness saw or observed the accused (appellants in this appeal), the conditions in which the observation was made, whether or not the area or vicinity was lit to make the observation possible, the distance between the witnesses and the appellants, or whether or not the description by the prosecution witnesses agreed with that of the appellant(s). On this see the guidelines by Lord Widgery CJ in R v Turnbull [1977] QB 224"

This court further stated that;

*"Thus, it is fair and reasonable to say that the modes of identifying the perpetrators of a crime vary and holding an identification parade **may** (emphasis mine) be one of the acceptable modes."*

In the case of **Adu Boahene Vrs The Republic [1972] 1 GLR 70** the court held that where the identity of an accused person is in issue, there can be no better proof of his identity than the evidence of a witness who mounts the witness-box and swears that the man in the dock is the one he saw committing the offence which is the subject-matter before the court.

Some pieces of evidence in the Record of Appeal are captured herein

Cross-examination of PW7

Q: You are alleging that accused is part of the robbers because A1 is also dark in complexion.

A: I saw A1 in the day and so I can identify him.

Cross-examination of PW8

Q: Apart from the bag that you saw in A1's custody, there was no AK 47 in his possession

*A: Not true and even **A1 had his finger on the trigger** even whilst he was lying on the ground wounded.*

Q: You mistakenly involved A1 in the crime that took place on 08/03/15.

*A: Not so **I saw accused commit the crime personally.***

Q: At what time of the day was it.

A: It was around 4:00pm and after

Q: What you actually did was that you saw accused loitering in the bush and as you could not arrest the true robbers you rather arrested A1.

*A: Not true. I have been on peace keeping missions. **It was A1 who was firing the gun.***

The evidence on record is overwhelming. The testimonies and vivid account of what happened that day by the victims shows clearly that the Appellant was the one who committed the unlawful act. All the victims attest to the fact that the Appellant and his accomplices were not masked and they saw him commit the crime.

In the case of **Mohamed Vrs The Republic** Criminal Appeal No. J3/1/2019 dated 22nd November, 2019 the Supreme Court spoke extensively on identification parade and opined that there is the need for an extensive and quick reforms in our laws to bring it in line with best practices worldwide. The court went further to state that in certain cases other methods of identification other than a line up can be used for the identification. This is what the Supreme Court said;

"This is because in the 21st century with the advance acts of criminality and the widespread and the phenomenon of high tech nature of crime, it may be difficult to comply with the existing procedural rules in Ghana, if we have to apprehend suspects of crime.

*Secondly, when like it has happened in the instant case the prosecution witnesses, like PW1, especially PW2, who was alleged to have been sexually assaulted by the appellant, and PW3, the houseboy of PW1, who had a close contact with the appellant and his criminal gang, **other methods of identification other than a lineup can be used for the identification.***

In such situations, eyewitnesses who have direct contact with the suspects which can aid them give sufficient information to the Police which may aid them to arrest suspects should be the norm rather than the lineup procedure".

The court in convicting the Appellant therein concluded by stating that;

*"In the instant case, we have reviewed the entire evidence on record. We have also taken guidance from both the learned trial Judge's narration of the facts which we have referred to in extenso as well as the Court of Appeal judgment to infer that **there are indeed verifiable pieces of other evidence on record other than the lineup identification to link the appellant to the crime**".*

Relying on the above stated cases, even though no identification parade was conducted to identify the Appellant, the evidence is so overwhelming against the Appellant that this error cannot exonerate him. Indeed PW8 testified that he saw the Appellant committing the crime. Notice must also be taken of the extent of time the Appellant interacted with his victims, this was enough for the victims to take a good look at him to be able to identify him as he was not masked. In the instant case, prosecution witnesses all positively identified the Appellant so well and without any doubt because he and his accomplices were not masked. He was even shot at the crime scene when he and his accomplices opened fired on the security personnel.

This is the cross-examination of PW3

Q: Were the alleged robbers masked?

A: No

Q: Did you identify accused in an identification parade.

*A: No but when I went to Diaso police station, A1 was in a pick-up **and I easily identified A1 as the robber who robbed us as he was leading me up and down at gun point on the day of the robbery.***

Q: If any person or persons robbed you on 15/1/15, then it was not A1

A: Not true as I carefully looked at A1 during the robbery

Q: Your identifying of A1 as one of the robbers was only a case of mistaken identity.

*A: **Not true for I positively identified A1 as the robber who led me up and down on the day of the incident and though there have been several robberies, I have never identified any other person as the robber who was leading me up and down on that fateful day of the robbery on I and my colleagues.***

During cross-examination of PW4 who was one of the policemen who sustained gunshot wounds in the robbery on the 15/01/15 he also stated as follows:

Q: Because you were in the car you could not properly identify the culprits.

A: Yes I could as the distance between us and them were very close.

The evidence is enough to establish that it was the Appellant who committed the crime. All the prosecution witnesses were able to positively identify him as most of them saw him committing the crime. From the numerous and long encounters between the robbers and the prosecution witnesses during the robbery, the Appellant and his accomplices particularly exposed themselves to their victims and they were in good position to identify them well. We therefore come to the conclusion that there are pieces of evidence of record which link the Appellant to the commission of the crime.

The plea of Alibi

On the issue of alibi raised by the Appellant, the Court of Appeal stated that the defence of alibi was duly considered by the trial judge even though no particulars were taken and that the time the Appellant raised the alibi was as a result of an afterthought. Counsel for the Appellant thinks otherwise. This is because Counsel is of the opinion that there cannot be an afterthought in a Caution Statement as the alibi was in the Appellant's Caution Statement. The Appellant said in his Caution Statement that he was never in Adeade in December, 2014. This alibi was made long before the trial. He also stated during his testimony in court that on 5th February, 2015, he was in Kumasi celebrating the birthday of his first child. This was corroborated by the Appellant's witness who stated that the 5th day of February, 2015 is their son's birthday and so the Appellant came to her place on 4th February and on the 5th February, 2015 they were together the whole day. Counsel for the Appellant stressed that with this overwhelming evidence of the Appellant's absence at the crime scene, yet state sponsored witnesses testified in court that they saw the Appellant on the 5th February and that he was the one that robbed them. This tends to expose the fact that the witnesses have been coached to testify against the Appellant, using the gun, being leader and having observed him closely. Counsel further argued that the trial court failed to direct the Appellant on the alibi as required by law and it is therefore wrong for the Appellate Court to have relied on the Appellant's failure to do so and claim that the particulars

were made late in the trial. Counsel for the Appellant relied on the case of **Nagode Vrs The Republic** to say that the Supreme Court has held that the accused person's statement to the police must be considered by the court and that any defence in law raised must be considered and the failure to consider Caution Statement amounts to a rejection of the defence which can be a ground for setting aside the judgment on appeal. Counsel for the Appellant says that unfortunately in the instant case, the trial judge failed to comply with the provisions of **Section 131 of Act 30** and on that basis, the judgment of the court must be set aside.

It is often said that a strong defence of alibi weakens the prosecution's case and creates a reasonable doubt as to whether the accused is the perpetrator of the crime he is charged with. See **Bediako Vrs The State [1963] 1 GLR 48**. An alibi is meant to cast a doubt on the case of the prosecution and if successfully proved can result in the acquittal of the accused person.

Section 131 of Act 30 provides as follows:-

"(1) Where an accused intends to put forward as a defence a plea of alibi, the accused shall give notice of the alibi, to the prosecutor or counsel with particulars as to the time and place and of the witnesses by whom it is proposed to prove,

a. Prior, in the case of a summary trial, to the examination of the first witness for the prosecution, and

b. Prior, in the case of a trial on indictment, to the sitting of the trial Court on the date to which the case of trial has been committed for trial.

(2) Where the notice is given the Court may, on the application of the prosecution, grant a reasonable adjournment

(3) Where the accused puts forward a defence of alibi without having given notice, the Court shall call on the accused to give notice to the prosecution of the particulars mentioned in subsection (1) forthwith or within the time allowed by the Court and after the notice has been given shall, if the prosecution so desires, adjourn the case.

(4) Where the accused refuses to furnish the particulars as required the case shall proceed but evidence in support of a plea of alibi is not admissible in evidence

The law is clear on the requirements and procedures when an accused puts up a defence of alibi. The above section requires that in cases like these the trial judge should call upon the accused to file a notice of alibi when such a defence is raised without the notice of its particulars and if necessary adjourn the matter. It is only when the court has complied with this requirement and the accused has failed to furnish the details of his alibi as directed that any evidence of the alibi is shut out and excluded. Notice must be taken of the fact that this section also imposes a duty on an accused who intends to rely on alibi as his defence to give notice to the prosecution with particulars as to the time and place and of the witnesses by whom the alibi is to be proved. In summary trial such as this, such notice is required to be given before the first witness of the prosecution is called. As noted in the case of **Bediako Vrs The Republic [1976] 1 GLR 39-43**, it is the duty of the accused therefore to indicate to the prosecution that he intends to put up a defence of alibi and to give them notice and particulars of same. As rightly noted by the court in **Bediako Vrs The Republic** supra, the mere mention in the accused's statement that he was not at the scene does not amount to notice. It is worthy of note that the Appellant was represented by a counsel throughout the proceeding but Counsel failed to raise this issue of defence of alibi. Even though no notice of alibi was filed, the accused still called up his witness to substantiate his defence of alibi. Whatever evidence he had regarding his defence of alibi was still made before the court. The unfortunate thing is that the evidence led could not confirm the defence of alibi pleaded by the Appellant as was held by the trial judge. In our view, the trial judge considered the evidence of the Appellant regarding the defence of alibi and found it to be untrue. He therefore came to the conclusion that the defence of alibi was an afterthought and the evidence of the Appellant's witness corroborating the evidence of the Appellant was simply a story of a desperate lover trying to save her boyfriend. After reading the statements made by the Appellant to the police, it is clear that the Appellant merely stated that he had never been to Adeade in December, 2014 without giving any details. It was only during his evidence in court that he introduced for the first time that he was celebrating his son's birthday with his girlfriend. The defence raised by the Appellant in this case can be

compared to the defence raised by the Appellant in the case of **Frimpong alias Iboman Vrs The Republic [2012] 1 SCGLR 297** where this court held the view that the defence of the Appellant was but an attempt to extricate himself from the crime at the last stage. This court also stated that the defence of the Appellant not only lacked substance, but was infantile and lacked merit.

In **Okeke & Ors Vrs The Republic** Criminal Appeal No. J3/2/2011 dated 30th May, 2012 the Supreme Court speaking on a similar issue where there was no notice of alibi given stated that;

"In the matter before us, though the trial judge failed to comply with the requirements of subsection (3) of section 131, in that he failed to call on the accused persons to give notice to the prosecution of the particulars of the alibi they were raising, he did not exclude the evidence. Rather, he considered the evidence in his summing up to the jury. He asked the jury to consider the statements of the accused persons and their testimony before the court and to convict or acquit based on all these..."

Even in the case of **Adabele and Others Vrs The Republic [1984-86] 1 GLR 478-481** where the pleas of the accused persons were not taken during the trial. It was held that because counsel for the accused persons had actively participated in the proceedings and had never at any stage raised this issue, the conviction of the accused persons could not be interfered with solely on the ground that their plea was not taken. In the matter before us, the trial court duly considered the defence put forward by the Appellant and came to the conclusion which we agree that the plea of alibi of the Appellant was only an afterthought. This was because the Appellant never, throughout the trial, when he gave his statement to the police or even faced his accusers, stated so. He was represented by Counsel and Counsel never sought to raise this defence of alibi. Even when PW6 and PW7 swore on oath that they saw the Appellant on that day and that he was the one who robbed them, Counsel for the Appellant never stated that on the said date the Appellant was in Effiduase with his son. From the proven facts of this case, the Appellant's plea of alibi failed and the evidence is so clear that it was the Appellant who robbed the victims on the said dates. Even the victim the Appellant robbed that day was able to describe his attire and the bag he was having which he

admitted was his.

PW7 in answering said as follows;

Q: Can you recall the outfit of the person who told you that he will blow off your head?

A: Yes. He was wearing a brown singlet and black pair of trousers. A check check brown small bag and the AK 47 gun. (This bag the Appellant admits to be his)

Since no miscarriage of justice had been occasioned by the failure of the trial judge to call upon the Appellant to give notice of his alibi, the Appellant could not rely on it to overturn his conviction.

In the instant case, the concurrent findings were not perverse. They were amply supported by the record and consistent with the totality of the evidence. No miscarriage of justice had been occasioned by those findings and conclusions and therefore we would not interfere with them

Appeal against Sentence

On this ground, in his plea for a reduced sentence Counsel for the Appellant, spoke extensively on the laws regarding sentencing. He also cited the case of **Impraim Vrs The Republic [1991] 2 GLR** in a bid to convince the court that mitigating factors such as age, status of the offender (i.e known to the law) are to be considered in fixing the sentence. Counsel subsequently argued that the Appellant is not known to the law and never intended to fall foul of the law. He only fell into this predicament because he decided to go out to discover new areas of business. As a first offender, he must be shown mercy by giving him the minimum sentence of 15 years. Counsel is of the opinion that the sentence of 54 years IHL is too harsh.

It is provided in **Section 30 (a)** of the Courts Act, 1993 (Act 459) as follows:-

Subject to the provisions of this sub-part, an appellate court may in a criminal case

(1) on an appeal from a conviction or acquittal:

*reverse the finding and sentence and acquit and discharge or convict the accused as the case maybe or order him to be retried by a court of competent jurisdiction, or commit him for trial, or alter the finding, **maintaining** the sentence or with or without altering the finding, **reduce or increase the sentence,**"*

Section 149(1) of Act 29 as amended provides that

"Whoever commits robbery is guilty of an offence and shall be liable, upon conviction

on trial summarily or on indictment, to imprisonment for a term of not less than 10 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 than 15 years."

Robbery is a felony and where harm is caused, as in this case the minimum sentence imposed by law is 15 years I. H. L.

In the case of **Kwashie v The Republic (1971) 1 GLR 488**, this court held that

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

(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"

See also **Adu-Boahene Vrs The Republic [1972]1 GLR 70**, **Kamil Vrs The Republic [2011] SCGLR 300**.

In **Robertson Vrs The Republic** Criminal Appeal J3/4/2014 dated 28th May, 2014 this is what the Supreme Court said regarding sentencing;

Sentencing is discretionary and where the discretion has been judicially exercised, an appellate court has no just cause to interfere with the exercise of discretion. The principles upon which the court would act on an appeal, against sentence were that it would not interfere with a sentence on the mere ground that if members of the court had been trying the appellant they might have passed a somewhat different sentence. The court would interfere only when it was of opinion that the sentence was manifestly excessive having regard to the

circumstances of the case, or that the sentence was wrong in principle. "Grave offences (such as in the instant case) usually called for deterrent sentences. But the general principle was that a sentence of imprisonment, even though intended specifically as a general deterrence must not be excessive in relation to the facts of the offences - - - - - " See the case of APALOO VRS THE REPUBLIC[1975]1 GLR 156 at 159

It is not in doubt that the purpose of sentencing is to reform the offender, appease the society, safeguard the country and must be punitive in nature. In sentencing the Appellant herein to that long sentence, the trial judge in this case stated as follows;

In sentencing accused, this honourable court has taken into consideration the plea of mitigation of counsel for the accused, the length of time accused had been on remand, the series of robberies carried out by A1 and his gang, the premeditation involved in the robberies, the violence with which same was carried out as explained by the witnesses and as told by PW3 who told the court as to how the Chinese man who has since left Ghana, was shot in the leg by A1. The two police men who were shot by A1 and his gang but who survived to identify A1, has also been considered. Finally the fear A1 and his gang has successfully instilled in the mining area has also been taken into consideration.

One question that keeps on ringing in our ears is whether long sentences serve its intended purpose considering the state of our prisons in Ghana. This court is not unmindful of the sentiments expressed by the Supreme Court in the case of **Frimpong alias Iboman Vrs. The Republic** (already cited) thus;

"the court adopts the sentiment for a scheme of sentence whereby 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.

"Long prison sentences purely by their nature and prison conditions does not and will not achieve any of the stated objectives of punishment stated elsewhere in this delivery"

However, considering the brazen nature of the robberies, the weapons used and the casualties, the trial judge had some justification in imposing the sentence that it did on

the appellant. Note must be taken of the fact that the crimes were committed on different occasions with the appellant using an AK 47 rifle on all those occasions where he shot two policemen and one Chinese man. In the case of **Howe Vrs The Republic** Criminal Appeal No. J3/3/2013 dated 22nd May, 2014 this court in considering whether the sentence imposed on the Appellant was harsh reasoned that;

"In this context we are not determining how we would have exercised our discretion in the given situation. We are considering whether given the wide spectrum of the discretion at the trial judge's disposal he exercised it within the parameters of the law"

It is our view that the learned trial judge exercised his discretion within the limits of the law when he imposed the said sentence.

The appeal against the sentence therefore fails and the sentences imposed by the trial Judge and affirmed by the CA are hereby confirmed.

The appeal fails in its entirety and same is dismissed.

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(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A . LOVELACE-JOHNSON (MS.)
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