

GHANA / JUDGMENT

COMMEY VRS. REPUBLIC (CR/0750/2021) [2024] GHAHC 258 (4 July 2024)

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IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX (CRIMINAL DIVISION “2”) HELD IN ACCRA ON THURSDAY, 4TH DAY OF JULY, 2024 BEFORE HER LADYSHIP JUSTICE MARIE- LOUISE SIMMONS (MRS.), JUSTICE OF THE HIGH COURT SUIT NO.: CR/0750/2021 EMMANUEL COMMEY VRS. THE REPUBLIC

JUDGMENT

===== This is a judgment to be delivered pursuant to a Petition of Appeal filed on the 7th September 2021, on behalf of the above named Appellant by the Prison authorities as he was then not represented. He was the 1st Accused person at the trial Court. The appeal was filed pursuant to leave granted to file appeal out of time by the High Court on the 2nd August 2021. Appeal is against the sentences of twenty (20) years IHL each for one (1) count of Conspiracy to commit Robbery and two (2) counts of Robbery to run concurrently. Page 1 of 15 The Appellant was convicted and sentenced on the 23rd March 2016 by the Circuit Court, Accra, then presided over by His Honor Aboagye Tandoh (as he then was). THE GROUNDS OF APPEAL The grounds of Appeal were stated as follows:

1. That the sentence imposed on the Appellant is harsh and excessive considering the conditions of detention within the Prison confines, hence the plea of reduction in his sentence. Further grounds of Appeal were:
2. That the Appellant has deeply regretted his actions and is out of deep remorse and a contrite heart that he is praying this Honourable Court to reduce his sentence.
3. That the Appellant being a first time offender has really learnt his lessons over the period of time he has served so far in incarceration under severe and harsh conditions of detention, hence his pleas for mitigation of his sentence

4. That the Appellant's prolonged stay in prison custody may not achieve the reformatory effect but rather may produce a hardened criminal instead. Therefore as a reformed person, it would be beneficial for him to contribute to society hence his plea for mitigation of his sentence. THE ANTECEDENTS OF THIS APPEAL As stated, the Petition of Appeal was filed on the 7th September 2021 on behalf of the Appellant by the "Prison Teacher". The appeal was first fixed for hearing on the 27th May Page 2 of 15
2022. However, per the records available before me, it was called on the 14th June 2022 before this Court differently constituted. It was noted by the Court that the Record of Appeal including a copy of the judgment was not attached to his application. Upon several adjournments and with several orders to the Registrar of the trial Circuit Court, the records was not transmitted to this Court and with very little regard to this Court, the Registrar also failed to appear before the Court to offer any explanation, except for one occasion when the Deputy Registrar appeared and pleaded with the Court to be allowed some time to go and to retrieve the docket on the case. The State Attorney in charge of the Appeal was later able to produce a copy of the Judgment to the Court as she said she had handled the earlier application for Extension of Time to Appeal. The Court afterwards tried to determine the appeal based only on the judgment available as it is an appeal against only sentence. The Appellant however disputed some information in the judgment, claiming that he did not use any weapon in committing the offence as stated in the judgment. With knowledge of the laws on punishment for Robbery, it was important that the Court obtained accurate information as to the facts, that is, if a weapon was used or not as it may affect the punishment to be meted out. With no information still from the Registry of the trial Court, this Court referred the said Registry and their actions to the Office of the Judicial Secretary and is yet to receive an outcome. A counsel for the Appellant later appeared before the Court in this case and offered to produce the records, and indeed has done so, as he had once acted for the Appellant in this case. He now represents the Appellant in this appeal. These delays obviously have affected the expeditious hearing of this Appeal. Page 3 of 15 Back in 1975, the revered and bold spirited Taylor J (as he then was), had cause to complain in a similar fashion of the existence of these kind of unfair and non-chalant attitudes and behaviors of judicial officers that leads to grave injustice. In the case of FORSON VS. THE REPUBLIC decided on the 24th November 1975 and reported in Judy Law as 1975 JELR 66385 HC, I quote Taylor J extensively when he stated thus: "I must preface this judgment with an expression of a deep concern which has built up gradually in our Courts to dispense justice to our people particularly the poor class. I have had Criminal Appeals in which the Record of Proceedings is bulky running into hundreds of pages, but the record has nevertheless been prepared and certified within a month or a few weeks after judgment. In the cases before me, the Appellant was convicted on 12th August 1974, his Record of Appeal in one of the cases is about 11 pages... in the second case the actual Record of Proceedings is less than five pages. There is in my view no reason or possible excuse why such a record should not be available a week or so after 6th September 1974, the date the Appellant appealed and yet the case came before me for summary hearing for

the first time on 12th November 1974, more than one year after the trial and even the record was not complete.... There can be no doubt that the machinery of justice devised by the legislature to protect this Appellant has worked havoc in his case and has been operated so as to produce an injustice. This must be looked into by the authorities to avoid such future situations. In this respect, it seems to me that it is of utmost importance for the efficient and fair administration of criminal justice in this country, that our Registries should be properly supervised and their work undertaken by men dedicated with a sense of responsibility, men who must appreciate the demoralizing effect and the suffering which their careless and non- Page 4 of 15 chalant attitude to work could cause to persons allegedly involved in crime, particularly as often happens when such person are found innocent and are discharged. By their irresponsible conduct they could cause such persons to serve unlawful sentences.” It is sad to know that these sentiments expressed in 1974 by this Judge seem to be the same sentiments expressed today in this case about delays in obtain proceedings. I am therefore grateful to counsel both for the Appellant and the Republic/Respondent, Saani Rashid and Joyce Yinsoma Tindana who took pains to locate the judgment and proceedings and have now produced same for the Court. SUBMSIONS FILED The Republic/Respondent has filed its written submission on the 13th May 2024. Counsel for the Appellant filed his submission on the 2nd July 2024. The Respondent has submitted that the sentence be maintained and the appeal dismissed as the sentence was within the limits allowed by the law and was commensurate with the crime, considering the facts of the case. Reference was made to the case of MOHAMMED IBRAHI KAMIL VS. THE REPUBLIC (2011) SCLGR 300 and HARUNA VS. THE REPUBLIC (1980) GLR 192 in support of this submission. Reference was also made to the cases of APALOO VS. THE REPUBLIC (1975) I GLR 190 @ 191 to support the submission that an Appellate Court may not interfere with the sentence meted out by a trial Court unless the sentence was manifestly excessive considering the circumstances or was wrong in law. Counsel for the Appellant has also submitted that the sentence be reduced. He has submitted further that the trial Court dealt more on the aggravating instead of the mitigating factors available to the Appellant. Counsel prays that the Appellant has learnt Page 5 of 15 valuable lessons and has reformed. He prays for the minimum sentence of 15 years. Cases such as ABU VS. THE REPUBLIC (1980) GLR 294, FELIX UGOCHUKWA VS. THE REPUBLIC UNREPORTED IN CASE NO. H2/6/2010 DATED 25TH FEBRUARY 2010 HARUNA VRS THE REPUBLIC (1980) 189 were cited in support of his submission. APPEAL BY WAY OF REHEARING It is a settled principle of law, that an Appeal is a creature of statute and as such the right to appeal at any stage of a trial, whether criminal or civil, is all governed by law. Under the Criminal Procedure Act, 1960 (Act 30), the right to appeal to the High Court in a criminal case from a lower Court is provided for by Section 324 as well as under Section 44 (2) of the Courts (Amendment) Act 2002 (Act 620). An appeal is also said to be by way of rehearing. This means that the Appellate Court or body is to examine the entire proceedings or decision that is the subject of the appeal to determine whether the decision can be supported in law or in fact or both. Numerous case law support this principle that is relevant to both civil and criminal appeals. See cases such as DEXTER JOHNSON VS. THE REPUBLIC (2011)

SCGLR 601, NAGODE VS. THE REPUBLIC (2011) SCGLR 975, AMANKWAH VS. THE REPUBLIC (J3/04/2019) (2021) GHASC 27 DATED 21ST JULY 2021. In AMANKWAH supra, the Supreme Court through Dotse JSC explained the concept as pertains to criminal trials inter alia: "...applying the above principle in a criminal appeal might result in the Court embarking upon the following, to analyze the entire Record of Appeal and this must include the Charge Sheet, the Bill of Indictment (where applicable), the witness statements of all witnesses, all Page 6 of 15 documents and exhibits tendered and relied on during the trial, as well as the evidence during testimony and cross examination." APPEAL ALLOWED ONLY ON SUBSTANTIAL MISCARRIAGE OF JUSTICE By way of statutes, the Courts Act (NRCD 323) regulates the conduct of criminal appeals by its Section 31 when it states: "(1) subject to subsection (2) of this section, an Appellate Court in hearing any appeal before it in a criminal case, shall allow the appeal if it considers that the verdict or conviction or acquittal ought to be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment in question ought to be set aside on the ground of wrong decision of any question of law or fact or that on any ground there was a miscarriage of justice and in any other case, shall dismiss the appeal.

- (2) the Court shall dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred or the point raised in the appeal consists of a technicality or procedural error or a defect in the charge sheet or indictment but there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the caused could have been convicted upon that charge or indictment" THE APPEAL AGAINST SENTENCE I have given detailed consideration to the submissions filed by both counsel for the Republic and Appellant. I have also considered the charges and facts of the case and the fact that the Appellant was not represented at the trial Court and went through a full trial Page 7 of 15 after a plea of guilty with explanation was made. The fact that this appeal is only against sentence cannot be ignored. It has been decided severally that an appeal against sentence only means that the Appellant did accept, that they were rightly convicted, especially when the Appellant pleaded guilty simpliciter. A plea of guilty simpliciter if found made voluntarily and unequivocal also implies that no further proof of the case is necessary. This principle is enunciated in cases including the ones below: FIIFI KOFI ADU VS. THE REPUBLIC (2015) JELR 63662 C.A FORSON VS. THE REPUBLIC (1975) JELR 66385 HC TAYLOR J. DARKRUGU VS. THE REPUBLIC (1989-1999) 1 GLR 308 ATTA BONSU AND ANOTHER VS. THE REPUBLIC (2018) JELR 66461, CA However, it is also the principle that an Appellate Court can interfere with a conviction which it deems wrong in law or not borne out of the facts and set it aside notwithstanding the fact that the appeal was not against conviction. It was stated in FORSON VS. THE REPUBLIC (supra), Taylor J (as he then was) thus: "it is my opinion that an appeal against sentence where the conviction is not being challenged as in this case necessarily implies that the conviction is prima facie in order. However, if the conviction is not in fact in order it cannot support a sentence and in such a case the sentence is set aside as it ought to be and with it gives the conviction" THE ANALYSIS BY THE COURT Page 8 of 15 In a Criminal Appeal dealing

especially with sentencing, it has been determined severally as submitted by the counsel for the Respondent that an Appellate Court must not disturb the sentence of a trial Court which had the discretionary power of sentencing provided the sentence fell within the maximum permitted by law and the trial Court considered mitigating factors as well as aggravating factors. See cases such as *BANDA VS. THE REPUBLIC* (1975) 1 GLR 152, *SAMUEL AGOE MILLS ROBERTSON VS. THE REPUBLIC* (2013-2014) SCGLR 1505 SC. An Appellate Court is therefore on appeal, by way of rehearing to consider whether the sentence meted out was manifestly excessive or low having regard to the law, sentencing guidelines and to consider if the sentence was wrong in law or fact. Considering that sentence was wrong in fact, an Appellate Court is to consider both aggravating and mitigating factors available to it and may interfere with the sentences if there is evidence that the trial Court failed to make the necessary considerations in law and in fact. The Appellant having been charged with the offences of Robbery and conspiracy to commit crime, namely Robbery, he came under Sections 23(1) and 149 of Act 30. Under Section 149 of Act 29 as amended by the Criminal offences (Amendment) Act, 2003 (Act 646), the punishment for Robbery is 10 years minimum, without the Use of an Offensive Weapon and 15 years minimum for the Use of an Offensive Weapon in the commission of Robbery. Offensive weapon is defined under Section 149 (3) of Act 646 to be, any article made or adapted for use to cause injury to a person or cause damage to property or intended by the person who has the weapon to use it to cause injury or damage. See the case of *THE REPUBLIC VS. URMAR ABDUL WADU & ORS (AT LARGE)* DATED 5TH MAY 2015, REPORTED ONLINE ON GHALI. Also under Section 206 (3) (b) of Act 29, a similar definition is provided. Page 9 of 15 It has become important to consider and refer to the definition of the offensive weapon because it is obvious throughout the records of Appeal, from the time the Appellant pleaded guilty with explanation to his cross examination of all the prosecution witnesses that he challenges the fact that he used a weapon, much more an offensive one. Indeed, in this Court room when the Court decided to rely on only the judgment of the Court and not wait for the entire record as it was not so relevant to an appeal against sentence, the Appellant once again challenged the judgment. He did inform this Court that he did not plead guilty, neither did he use any weapon, specifically a broken bottle in committing the robbery, this prompted the Court to then wait to receive the entire proceedings of the trial Court. See the proceeding of this Court on the 15th June 2023. With the entire Record of Proceedings now procured, it is evident that the weapon the Appellant is said to have used in the course of the robbery was a Guinness bottle. The Appellant and his co-convict then 2nd Accused, all admitted before the trial Court that the Appellant, then 1st Accused was in possession of an empty Guinness bottle when they stole the mobile phones and bags of their victims, he however denied that he used it to harm or threaten any of the three (3) victims. In his explanation to the plea of "guilty with explanation" on counts one (1) and two (2), he said this: "we went to the beach the day in question and we were with our girlfriends to swim. I told A2 to buy me Guinness which he did. We saw the mobile phones with the complaint, I did not know what came over me to take the phones and run with the phones. I am pleading for mercy in respect of count one and two." In the cross examination of PW1, Kwadwo Owusu, 1st Accused denied that he

“pulled” a bottle on PW1. He rather admitted: Page 10 of 15 “Q: I took the phones and we run away with the phones which were on the floor. A: You pulled a bottle on us Q: No one threatened you with bottles A: You did, that was why you were able to take the phones away.” In the evidence of PW2, she testified inter alia: “suddenly, the Accused persons came to us and stood in front of us and A2 stood beside me and took my purse and my husband asked him to stop but A1 pulled a bottle. A1 saw our phones and took them and he hit me....” In cross examining PW2 and PW3, the investigator, he insisted that Appellant insisted not pulling a bottle on PW2. In his evidence in chief, in his defense, the Appellant stated inter alia: “..... on the 23rd November 2015, we decided to go to the beach with 2nd Accused to swim with my girlfriend. We then saw some people sitting at the beach and a table with their phones on the table. We did not know what happened we collected the phones and run away, my girlfriend was arrested and sent to the Police station. The lady mentioned my name to the Police so I was in the house when the lady mentioned our names as having taken the phones so my brother asked me to bring the phones but before I could hand over to my brother who he said he was going to see my wife, the Police arrest me (sic)....” Clearly, in his defense, the Appellant changed his story, different from what he told the Court in his explanation to his guilty with explanation plea. He cleverly took away the fact that he had in his possession a Guinness bottle as he has previously told the Court. Page 11 of 15 The trial Court at the completion of the case, in his judgment, after consideration of both the case of the Prosecution and the Accused person, believed the story of the Prosecution that the Appellant used a Guinness bottle to threaten PW1 and PW2 and took away their phones. At page 49 of the Record of Appeal, the Court stated: “the complainants and victims of the alleged robbery said the Accused person who were holding Guinness bottles threatened them and rushed and took their phones and money away. The 2nd Accused however said he bought the Guinness at the time and that was the only thing they were holding but not to threaten anyone with it. The Accused further argues that they took the items when the alleged victims had gone and turned their backs to the items. From the foregoing, I find as a fact that the Accused person indeed pulled out the Guinness bottles they were holding, rushed on the victims with a threat of harm and succeeds in taking their properties away. Indeed the holding of the Guinness bottles were not for fun, rather a well-designed strategy to rob unsuspecting victims at the beach at Kokrobite. I am therefore inclined to believe to accept the case of the Prosecution as the true state of affairs as compared to that of the defense motivated by afterthought.....” From the proceedings, it is evident that the Appellant was represented at the trial on the 1st day when his pleas were taken but later had to continue the trial to the end by himself. There is however no cause to suspect from the Record of Appeal that he had no opportunity to effectively defend his case because he was unrepresented. The Appellant went through a full trial and had the chance to defend his case as supported by Article 19(2) (c) of the Constitution. I cannot agree more with the trial Court in his analysis of the facts, on the use of the Guinness bottle. A trial Court is enjoined to first analysis the case of the Prosecution applying all the tests and principles on credibility of witnesses and the relevant law. He Page 12 of 15 is also to consider the case of the Accused and to determine if the Accused is to be disbelieved and if short of disbelief, the Accused’s

story is at least reasonably probable. See the case of AMARTEY VS. THE STATE (1964) GLR 203 SC, OLLENNU JSC. The trial Court, in my view did analyze well the story of the Appellant before making his finding that a Guinness bottle was used to threaten the victims. The Appellant throughout the trial never challenged that he and his co-convict did steal the phones and bag of the complainants/victims in their presence. They admit that the phones were on a table and they snatched them and run away. The offence of robbery as defined under Section 150 (a) and 9 (b) is defined to include the use of force, causing harm to any person, or use of threats or criminal assault, all with intent to prevent or overcome the resistance of the person to the stealing of the thing. Again, under Section 17 of Act 29 which is on the Meaning and Use of Threats, 17 (4) explains threat to include the following: "it is immaterial whether a threat or offer is conveyed to a person by words, or by writing or in any other manner, and whether it is conveyed directly, or through any other person, or in any other manner." From this definition, the Appellant in admitting to the Court (when he pleaded guilty with explanation) that he was holding a Guinness bottle at the time he took away the phones of the complainants, he was also admitting to the use of threats. He need not have verbally told them that "I am holding an item" or that "I will use it to cause harm to you if you try to resist my taking away of your items". It is not reasonably probable, that a person will consume the contents of a bottle at a beach, and will have nowhere to place the bottle, but will carry it around especially when he seeks to forcibly take away the items of persons he sees at the beach. Why carry such an item at the beach when you have no use for it? Page 13 of 15 From the evidence of PW1 and PW2, they did indeed feel threatened by the use of the said bottle and thus failed to resist the taking away of their items. A Guinness bottle per the definition of offensive weapon afore stated, can be classified as such. Bottles have been used in many crimes to cause Harm which have sometimes led to death. In the situation in which the Appellant used it, it would have been obvious to any reasonable person that it could cause harm, no doubt there was no resistance by the complainants to the stealing of their items by the Appellant and his co-convict. It is obvious that the Appellant and his accomplice chose to use that weapon and not a gun or knife because, at the beach, during daytime, they could easily have been found out. Using an empty bottle at a beach was therefore unsuspecting and that was the "well designed plan" that the trial Court stated. From the foregoing, by way of rehearing, I also find that the Appellant used an offensive weapon in committing Robbery on the PW1 and PW2. Having found as such, the minimum sentence that the Appellant can receive by way of sentencing is 15years. Form the judgment, the trial Court did consider the plea of mitigation of the Appellant that he had a young son, the Court also considered that he had spent about four (4) months in custody prior to his conviction, which are all mitigating factors. In aggravation, the Court considered the interest of society and to make robbery unattractive to potential criminals. The Court however failed to consider a very important mitigating factor, which is that, the Accused was a first time offender. There is no statement of fact in the Record of Appeal that the Appellant was known or not, and with no evidence that he was known, this Court will consider the Appellant as not known and have this inure to his benefit. Page 14 of 15 Having also considered that the Appellant took the Prosecution through a full trial and wasted the time

of the Court, I will not give the Appellant the barest minimum of the punishment. I will, in the circumstance, set aside the concurrent sentences of twenty (20) years meted out to the Appellant, Emmanuel Commey on both counts one (1) and two (2), and substitute same for a sentence of seventeen (17) years on each count, to run concurrently. The sentence takes effect from the day it was pronounced, that is the day the Appellant was convicted on the 23rd March 2016. The Appeal against sentence therefore succeeds. (SGD) JUSTICE MARIE-LOUISE SIMMONS (MRS) (JUSTICE OF THE HIGH COURT) COUNSEL: ISAAC WILBERFORCE MENSAH STANDING IN FOR JOYCE YINSOMA TINDANA (SA) FOR THE REPUBLIC/RESPONDENT. LAWRENCIA KORLEY HOLDING THE BRIEF OF SAANI RASHEED FOR THE APPELLANT. Page 15 of 15

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