



Accused's right to silence | Prima facie case requirement | No case submission grounds | Lesser proof preliminary stage | Conspiracy agreement elements | Causing harm ingredients | Material witness obligation | Intent inference circumstances | Acquittal absent prima facie | Appellate review standard | Prosecution burden proof | Evidence discreditation cross-examination | Manifestly unreliable testimony | Balanced evidence tilting | Constitutional innocence presumption | Inchoate offence scope | Unlawful harm definition | Intent natural consequences | Witness materiality impact | Fatal non-calling witness

**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE COURT OF APPEAL**

**KUMASI – A.D. 2026**

**CORAM:      KWAMINA BAIDEN, JA [PRESIDING]  
                  KOGYAPWAH, JA  
                  BOAKYE, JA**

**CIVIL APPEAL**  
**NO. H2/006/2025**  
**22<sup>ND</sup> JANUARY, 2026**

- 1. KWAKU FRIMPONG**
- 2. KWAME GANGA**
- 3. KOFI AGYAPONG aka TROBLE**
- 4. KWAKU BOATENG aka E K**
- 5. KWAKU AGYEKUM**
- 6. JOSEPH OPOKU aka  
CORPORAL [DECEASED]**
- 7. KWAME ABUNUA**
- 8. YAW FRIMPONG [DECEASED]**
- 9. KWAKU YEBOAH aka AMATUEAR**

**3<sup>RD</sup> APPELLANT**

**4<sup>TH</sup> APPELLANT**

**7<sup>TH</sup> APPELLANT**

**VS.**

**THE REPUBLIC**

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**RESPONDENT**

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## JUDGMENT

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### **BOAKYE, JA:**

#### **INTRODUCTION**

Let me preface my judgment with the dictum of Lane CJ in the Canadian case of R v P [MB] [1994] 1 SCR 555 on submission of no case:

*"Perhaps the single most important organizing principle in criminal law is the right of the accused not to be forced into assisting in his own prosecution. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her".*

My Lords, it would be recalled that effectively on 10th February 2021, Kwaku Frimpong, Kwame Ganga, Kofi Agyapong alias Troble, Kwaku Boateng alias E K, Kwaku Agyekum, Joseph Opoku alias Corporal [deceased], Kwame Abunua, Yaw Frimpong [deceased], hereinafter called accused persons were jointly charged with two [2] counts namely conspiracy to cause harm and causing harm contrary to sections 23 [1] and 69 of the Criminal and Other Offences Act 1960 [Act 29]. Kwaku Yeboah alias Amatuear, who was the last accused person was charged with one [1] count of abetment of crime to wit causing harm contrary to sections 21 [1] and 69 of Act 29 and put before the Circuit Court, Kumasi.

At the close of the prosecution's case, the Circuit Court, Kumasi over-ruled the submission of no case by Counsel for and on behalf of Kofi Agyapong alias Troble, Kwaku Boateng alias E K and Kwame Abunua, who for purposes of this ruling I prefer to call 3rd, 4th and 7<sup>th</sup> appellants in that order, and ordered all the accused persons to open their defence. Dissatisfied and being aggrieved with the decision of the Circuit Court, Kumasi, appellants caused their Counsel to appeal against same to the High Court, Kumasi which also upheld the Circuit Court's decision. Now, the appellants have lodged the instant appeal to the Court of Appeal against the ruling of the High Court, Kumasi.

## FACTS OF THE CASE

The facts giving rise to the trial of appellants and others at the Circuit Court, Kumasi are that on 18th June 2020 at about 9:30 am, Nana Yaw Boatey [Adumasehene] of Seniagya went to invite Paul Asenso, victim herein, from his shop to unlock his locked door for him. The victim and Adumasahene were later joined by their relatives who had returned from Seniagya after witnessing the swearing of Oath of Allegiance ceremony by the newly installed Chief of Seniagya. On their way back to the victim's shop, they met the accused persons who were armed with sticks, motor chains and cement blocks and had mounted a barricade on the main road that leads to the shop. They accused Adumasahene for facilitating the enstoolment of the newly installed Chief of Seniagya for which reason they heckled him. The victim went to the rescue of Adumasahene and the accused persons turned on him, subjected him to severe beatings. Kwaku Yeboah alias Amatueur held the victim's hand from behind while Kwame Owusu alias Ganga whipped him on the face with a motor chain. Kwame Agyekum hurled stones at him whereas Joseph Opoku alias Kwasi Poku also whipped him with a stick. When the victim attempted to flee from his attackers, Kwaku Frimpong threw cement at him. The victim became unconscious and fell on the ground. He sustained multiple injuries on his face, body and two of his teeth were removed. He was rushed to the Effiduase Government Hospital.

As stated earlier in this judgment, at the close of the case for the prosecution in the Circuit Court, Counsel for all the accused persons made a submission of no case on their joint behalf. The Circuit Court over-ruled the submission of no case and ordered all the accused persons to open their defence. Dissatisfied with the decision, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> appellants lodged an appeal against the said decision to the High Court, Kumasi which in turn upheld the Circuit Court's earlier decision. 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> appellants now invoke our jurisdiction under Rule 38 of the Court of Appeal Rules, 1997 [C.I. 19] as amended, with a Petition of Appeal filed on 3rd June 2024.

## SUMMARY OF THE HIGH COURT JUDGMENT

The High Court, relying on the cases of **Dexter Johnson vs The Republic [2011]2 SCGLR 601**, **Henry Kwaku Owusu vs The Republic [2016] 98 GMJ 95**, **The**

**Republic vs John Cobbina and Anor [2018] GMJ 98 and Gligah and Atiso vs The Republic [2010] SCGLR 870**, held in the manner following:

*"Having examined the testimonies of the witnesses, especially that of P.W.1, the main victim in the case, P.W.2 an eye-witness, P.W.3 another eye-witness and P.W.4. the case investigator, I am of the honest opinion that, a prima facie case has been made against the appellants herein at the trial court as the prosecution witnesses described the roles played by each of the appellants in the commission of the crimes/offences".*

Whilst dismissing the appeal and thereby affirming the trial court's decision, the High Court proceeded to hold that the ruling of the trial court calling on the appellants to open their defence as a prima facie case has been made against them is supported by the evidence on record. The High Court then ordered appellants herein to go back to the trial court to open their defence.

## **GROUND OF APPEAL**

The Petition of Appeal contains three [3] grounds namely:

1. The judgment of the High Court affirming the Ruling of the Circuit Court cannot be supported by the evidence led by the prosecution at the trial.
2. The High Court failed to find that whatever evidence led by the prosecution against appellants had been discredited in cross-examination as same was manifestly unreliable and for which reason the Circuit Court ought to have sustained the Submission of No Case.
3. The High Court failed to find that the evidence led by the prosecution at the trial also did not connect the appellants to the offences charged or prove an essential element in the charges.

## **SUBMISSIONS BY COUNSEL FOR APPELLANTS**

Counsel for appellants filed his written submissions on 23<sup>rd</sup> December 2024 together with a reply on 28<sup>th</sup> April 2025. In essence, Counsel submits that the evidence led at the Circuit Court by the prosecution cannot support the ruling of the trial Circuit Court which was affirmed by the appellate High Court. According to him, this is especially so when the evidence led does not connect appellants to the offences charged. In simple terms, from the facts presented by the prosecution, Kofi Agyapong alias Troble, Kwaku Boateng alias E. K. and Kwame Abunua were not mentioned at all not to talk of any allegation made against them specifically in respect of the counts against them. Sarcastically, he argues that appellants had not been charged with any offence relating to holding sticks and mounting a barricade which were the only things allegedly done by them and that whereas the prosecution led evidence to support its allegations against the other accused persons by stating exactly what each of them did in relation to the offences charged, the same cannot be said of the appellants. As a result, Counsel contends that there is no case for appellants to answer.

Further, Counsel contends that the prosecution has the burden to prove beyond reasonable doubt that each of the appellants is guilty of the count charged against him. It is only when such a prima facie case had been made against an accused person that he could be called upon to open his defence.

Arguing further, he says that in PW'3 evidence, he claimed that 7<sup>th</sup> appellant herein poked his fingers into the eye of the Chief of Adumasa in his paragraphs 5 and 6 of the witness statement. Meanwhile, it is important to note that the Chief of Adumasa was not a complainant in this case. The Chief of Adumasa refused to come to Court to testify. Of the four [4] prosecution witnesses, only PW3 made allegations against 7<sup>th</sup> appellant. To this end, Counsel submits that since the Chief of Adumasa was not a complainant and or refused to come to Court to testify that indeed, 7<sup>th</sup> appellant poked his fingers into his eye, PW3's allegations against 7<sup>th</sup> appellant stands uncorroborated in the teeth of the challenge to this allegation in cross-examination. Therefore, the 7<sup>th</sup> appellant has not caused or conspired to cause harm to PW1 in the sense that PW1 is not the Chief of Adumasa.

Counsel notes that apart from PW1 stating that all the accused persons, thus including appellants herein beat him up, he never mentioned any specific things the appellants did

to him as he said about some of the other accused persons. Accordingly, he submits that there is a conflict between the evidence of PW1 on one and that of PW2 and PW3 on other hand and that the presence of appellants at the crime scene without more is not sufficient to establish the offence of conspiracy to cause and causing harm.

Counsel forcefully argues that the standard of proof required of the prosecution at the close of the prosecution's case is one beyond reasonable doubt. He extensively referred to the cases of **Osei Adjei vs The Republic [2010-2012] 2 GLR 754, CA**, alongside **Patterson Ahenkan and 2 Others vs The Republic, Criminal Appeal No.H2/07/10**, dated 25<sup>th</sup> March 2014.

### **SUBMISSION BY COUNSEL FOR REPUBLIC/RESPONDENT**

In Counsel for the Republic/Respondent's written submissions filed with leave of Court on 16th April 2025, she contends that PW1 and PW2's respective pieces of evidence were not in any way discredited. She adds that PW3's evidence corroborates the evidence offered by PW1 and PW2 at the trial Circuit Court and sought to justify them with reference to the relevant portions of the record. Therefore, the appellate High Court's decision affirming that of the trial Circuit Court cannot be faulted in any way in that no error had been committed by the High Court.

On the standard of proof required of the prosecution at this stage, Counsel submits that the focus for the trial was to determine whether or not the prosecution had adduced sufficient evidence that compels a reasonable mind to find that the accused persons had committed the elements of the offences they have been charged with. She continues to argue that the focus at this stage is not to determine their guilt beyond reasonable doubt but to establish that a prima facie case has been made against them for which they must open their defence. On her part, she referred to the following authorities: *Apaloo vs The Republic* [1975] 1 GLR 156, *Ali Kassena vs The State* [1962] 1 GLR 144, *Moshie vs The Republic* [1977] 1 GLR 258, *The State vs Sowah* [1961] 2 GLR 745, *Mali vs The State* [1965] GLT 710, *Michael Asamoah and Anor. vs The Republic*, [unreported] Criminal Appeal No. J3/4/17, dated 26th July 2017 and *The Republic vs Eugene Baffoe-Bonnie and 4 Others* Suit No. CR/904/2017, dated 23rd May 2019.

## THE LAW ON SUBMISSION OF NO CASE TO ANSWER

Now, before I deal with the question as to whether or not appellants have a case to answer at the trial Circuit Court, let me comment on the new development in Criminal Procedure that came into effect on 1st November 2018. It has to do with Practice Direction [Disclosures and Case Management In Criminal Proceedings]. Section 5 [2][a] thereof states:

*"At the close of the case for the Prosecution, the Court shall, on its own motion or on a Submission of No Case to Answer, give a reasoned decision as to whether the prosecution has, or has not, led sufficient evidence against the Accused person as to require the Accused person to open his defence".*

This means that the Court ought to set out reasons for its conclusion on the case as to whether or not the accused persons have a case to answer. For the above reason, although it is in the discretion of the Court to determine the Submission of No Case To Answer, the Court is required to deliver a reasoned Ruling whether or not the accused persons make a formal submission.

Section 173 of the Criminal and Other Offences [Procedure] Act, 1960 [Act 30] provides:

*"Acquittal of accused when no case to answer;*

*Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require the accused to make a defence, the Court shall, as to that particular charge, acquit the accused".*

Judicial pronouncements on this particular provision abound. The oft-quoted case *State v Ali Kassena*, supra, is the 'locus classicus'. In that case, it had been held at page 148 that:

"A submission that there is no case to answer may properly be made and upheld [a] when there has been no evidence to prove an essential element in the alleged offence; [b] when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could

safely convict upon it".

In *Moshie vs The Republic*, supra, Azu-Crabbe, CJ, as he then was, added a fourth ground that is where the evidence is balanced and tilts towards guilt or innocence.

Aside these situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to produce has been placed before it. See also the case of *Apaloo vs The Republic*, supra.

### **STANDARD OF PROOF AT THE CLOSE OF PROSECUTION'S CASE**

Clearly, it appears to me in this appeal that both Counsel differ on the above topic. Whereas Counsel for appellants strenuously and forcefully argues that in criminal proceedings such as the one under review, at the close of the prosecution's case, the standard of proof for the prosecution is not whittled down because any of the appellants herein was yet to defend himself. Therefore, to him, the law imposed a duty on prosecution to prove the charges leveled against appellants beyond reasonable doubt. On the other hand, Counsel for The Republic/Respondent submits that the focus for the trial was to determine whether or not the prosecution has adduced sufficient evidence that compels a reasonable mind to find that the accused persons had committed the elements of the offences they have been charged with. She continues to argue that the focus at this stage is not to determine their guilt beyond reasonable doubt but to establish that a prima facie case has been made against them for which they must open their defence.

The issue as to whether or not the prosecution is required by law to establish the essential elements or ingredients of the offences charged at the close of the prosecution's case beyond reasonable doubt featured prominently in ***Kwabena Amaning alias Tagor vs The Republic [2009], 23 MLRG 78, CA, pages 129-130, per Apau JA***, as he then was.

Now, listen to Apau JA, in Tagor's case, supra:

*"The law is that before the prosecution could secure conviction of an accused person under any criminal charge, the prosecution is obliged under the law to*

*establish the guilt of the accused person beyond reasonable doubt. This means that under count one [1] of the instant case before us, the prosecution was required by law, while in the Court below, to prove beyond reasonable doubt that the two appellants did agree to commit the offence provided under section 3 [2] of P.N.D.C. Law 236 while under counts two and three, the prosecution had to establish also beyond reasonable doubt that the appellants committed the substantive offence prescribed under section 3 (2) of the same law. This is an obligation that the law imposes on the prosecution always. The prosecution could only do or achieve this if at the close of its case, it was able to prove or establish all the necessary or essential ingredients constituting the offence[s] for which the appellants were charged.*

*The question is; was the prosecution able to establish at the close of its case that the appellants did commit the said offences under the three counts?"*

In Apau JA's view [as he then was], this requirement is the sole prerogative of the prosecution. He explains that the accused person does not contribute in any way to it and the prosecution is supposed to do that by the close of its case. He adds that the accused person in a criminal trial, has the right to remain silent throughout the trial. This means that the accused person could decide not to say anything after the close of the prosecution's case and the fact that an accused person decides not say anything does not whittle down or make less the burden of the prosecution to establish the charge [s] leveled against him beyond reasonable doubt at the close of its case.

It should be noted that in Tagor's case, *supra*, Apau JA, [as he then was], re-echoed his earlier statement he made in his dissenting judgment in the case of Daniel Kwasi Abodakpi vs The Republic decided by the Court of Appeal on 20th June 2008 in respect of the scope or application of the principle of standard of proof in criminal cases, ie. 'proof beyond reasonable doubt'.

Now let's hear him:

*"However, I wish to stress and with much importance that this duty to prove charges leveled against another beyond reasonable doubt is a standard one. The principles that underline this duty and how it has to be accomplished are the same.*

*They do not change according to the status or disposition of either the accused person or the complainant involved neither do they change according to the charge[s] preferred nor the public perception, concern or reaction in respect of the offence and or the accused person in question".*

According to Apau JA, [as he then was], it is a misstatement of the law to suggest that at the close of the prosecution's case, the standard of proof cast on the prosecution is not one which is beyond reasonable doubt. He criticized what Professor Modibo Ocran, JSC, [as he then was], said in **Tsatsu Tsikata vs The Republic [2003-2004] SCGLR 1068** that the court cannot seriously speak of proof beyond reasonable doubt when the defence has not testified so a lesser standard must be sought for when considering whether a prima facie case has been made. However, it is important to note that Apau JA, concedes that the Court of Appeal is constitutionally bound by the decisions of the Supreme Court.

At this stage, I find it expedient to refer to the position of Atuguba, JSC, as he then was, in his dissenting opinion in Tsikata's case, supra. This was what he said:

*"To my mind the provision in section 11 [2] of the Evidence Decree [now Evidence Act], 1975 means that, a reasonable mind, applying his powers of reasoning to the evidence led by the prosecution at the close of its case, will end in the conclusion that, if contrary evidence is led, it could be said that the relevant fact which has to be established by the prosecution has been established beyond reasonable doubt. This certainly calls for an assessment of and not merely a reading of the evidence so led, in a manner consistent with the requisite standard of conviction that must at that stage of the trial be induced in the mind of the reasonable person".*

In his written submissions referred to earlier in this delivery Learned Counsel for appellants contends and insists that at the stage of submission of no case, just as at the conclusion of a full trial, the prosecution has the burden of proof beyond reasonable doubt. This submission, in my considered view is, in many ways is the crux of the whole case. That is the criteria for the determination of the circumstances under which a submission of no case may be upheld.

Let me say that historically, this matter has posed conceptual difficulties for our courts as well as those in other common law jurisdiction. Indeed, in Tsatsu Tsikata's case, *supra*, their Lordships took the opportunity to consider it at some length and to re-state the law as they understood it. In their Lordships' view:

*"in whatever fashion one wishes to label the evidentiary standard adopted whether through the prism of 'clear and convincing evidence', substantial evidentiary standard', 'preponderance of evidence', 'prima facie case', 'probable cause', ..... it is certainly not the standard of proof beyond a reasonable doubt' that a judge in the United States deciding on a motion for a judgment would utilize".*

In fact the deployment of such traditional phrase as the standard of proof required by law', 'reasonable doubt', etc, in the discussion of submission of no case, has tended to cause so much confusion that some legal authorities and some superior courts now prefer to use phrases such as 'probable cause', prima facie evidence', 'sufficient case', etc, in describing the standard of evidence required to uphold or reject such submissions. Therefore, in our own jurisdiction, our learned Justice Brobbey in his book *Practice and Procedure In **The Trial Courts and Tribunals of Ghana [2001] page 115***, commenting on when it could be appropriate for a judge, either suo motu or at the invitation of the defence, to uphold submission of no case, writes only in terms of a failure on the part of the prosecution to make out 'a sufficient case to warrant calling on the accused to open his defence'.

I am tempted to say that in the Ghanaian context of a trial without a jury, such as the one presently before us, what all of this exposition amounts to is that the trial judge, as the determiner of the law and the trier of facts, will have to apply different levels of proof depending on whether he or she is pronouncing on a motion for submission of no case, or a substantive verdict of guilty.

It appears to me that on a submission of no case, the judge's function is primarily and essentially to determine whether there is a genuine case for trial. This judicial inquiry has to focus on the threshold question whether the evidence presents a sufficient disagreement to require submission for a full-scale trial, or whether it is so one-sided that one party must prevail as a matter of law. Put another way, the inquiry is whether there

are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favour of either party.

I have taken pains to look at the submissions urged on us by Counsel for appellants on the above issue. Quite discernible from the submissions is that the judicial authorities referred to in the submissions all came from the Court of Appeal. In the hierarchy of the Courts, no doubt, the Court of Appeal follows the Supreme Court. My research on the issue suggests that after *Apaloo vs The Republic*, supra, but before *Osei Adjei vs. The Republic* together with *Patterson Ahenkan and 2 Others vs. The Republic*, supra, which Counsel for appellants copiously alluded to, our Supreme Court had settled the matter in *Tsatsu Tsikata's* case, supra. The Supreme Court, being the highest court and the final court of appeal in our jurisdiction, I am compelled, as a matter of law to apply the ratio that emerged out of *Tsikata's* case as a binding principle.

In ***Tsatsu Tsikata vs. The Republic [2003-2004] SCGLR 1068, SC***, it had been decided that on a submission of no case, the Judge's function was essentially to determine whether or not there was a genuine case for trial. For example, whether or not there were any genuine factual issues that could properly be resolved only by a finder of fact because they might reasonably be resolved in favour of either party. The enquiry had to focus on the threshold question whether or not the evidence presented sufficient disagreement to require a full trial, or whether or not it was so one sided that one party must prevail as a matter of law. Therefore, where reasonable minds differ as to the import of the evidence presented in a submission of no case, that motion should not be upheld. If, on the other hand, there could be but one and only one reasonable conclusion favouring the moving party, even assuming the truth of all the prosecution had to say, the judge grants the motion. Where the submission was rejected and the case went to trial, it was then that the Judge or jury as appropriate, being the trier of facts, would be called upon to determine whether or not the guilt of the accused person had been proved beyond reasonable doubt. In this instance, it was very difficult for anyone who has studied the record of the case against the trial Circuit Court or the first appellate High Court to conclude that there was no evidence upon which the trial judge or jury could hang either of the evidence led on all the essential elements of all the crimes charged was a possible result; a reasonable doubt or no reasonable doubt. Whether satisfactory evidence has

been led on all the essential elements of all the crimes charged, was an open matter at that point. His Lordship, Prof. Ocran stated, delivering the majority decision;

*"indeed, if the submission of no case is made just at the close of the prosecution's case and the cross-examination of its witnesses, how could one seriously speak of proof beyond reasonable doubt when the defence has not had a full chance of punching holes in the prosecution's case to possibly raise reasonable doubt in the minds of the trier of facts, by calling its own witnesses and presenting the counsel's address? It seem..... we have to look for a lower proof at this preliminary stage in the criminal proceedings".*

Similarly, in Eric Asante vs The Republic, Criminal Appeal No. J3/07/2013, dated 26<sup>th</sup> January 2017, our respected Pwamang, JSC, speaking on behalf of the Supreme Court observed the following cardinal principle on criminal trials.

*"Our law when a person is charged with a criminal offence, it shall be the duty of the prosecution to prove his guilt beyond reasonable doubt, meaning the prosecution has the burden to lead sufficient admissible evidence such that on an assessment of the totality of the evidence adduced in court, including that led by the accused person, the court would believe beyond reasonable doubt that the offence has been committed and that it is the accused person who committed it".*

Now, it is clear that the decision as to whether or not the prosecution's case has been proved beyond reasonable doubt should be made after the end of the entire trial, ie. After the consideration of the case of the prosecution and that of the defence.

Consequently, on my part, I endorse the decision in Tsikata's case, supra, and rule that in the instant case, at the close of the prosecution's case all that is required of it is to establish the essential ingredients or elements of the charges of conspiracy to cause harm and causing harm. Definitely, the standard is not proof beyond reasonable doubt. This standard should be applied after the consideration of the case of the prosecution and that of the defence.

To conclude then on the topic of the duty of the prosecution at this stage of the trial, I wish to refer to the Learned Brobbey in the Essentials of the Ghana Law of Evidence,

page 55:

*"The law is well-settled that at the end of the case for the prosecution, only a prima facie case can be made against the accused. This principle was well articulated in the case of **The State vs Sowah and Essel [1961] GLR 743** where it was held at page 745 that:*

*"it is wrong therefore to presume the guilt of an accused merely from the facts proved by the prosecution. The case for the prosecution provides prima facie evidence from which the guilt of the accused may be presumed, and which therefore calls for explanation by the accused".*

At this stage, I remind myself that from the dictates of the principles enunciated by the above authorities, I am not expected to do anything beyond a determination of whether or not a prima facie case has been made out against appellants on the charges leveled against them. In so doing, I have to consider whether so far, the evidence adduced has been so discredited as a result of cross-examination that it would be unreasonable to continue with the trial, or whether an essential ingredient or element of the charges against appellants has not been established by the evidence adduced by the prosecution witnesses.

In **Atsu vs. The Republic [1968] 716 at 719**, it had been held that:

*"As a general rule, evidence from the defence is not taken until the court has held that the prosecution has established a prima facie case. This is based upon the well-known principle that it is the prosecution which has an onus to prove the guilt of the person they accuse of an offence, and not the accused who should establish his innocence, the accused should therefore not show his hands until the need arises".*

What then is a prima facie case?

Prima facie evidence is the type of evidence which on its face value or first appearance, without more, could lead to conviction if appellants fail to give a reasonable explanation to rebut it. It is evidence that the prosecution is obliged to lead if it hopes to secure conviction of the person [s] charged. See Kwabena Amaning alias Tagor vs The Republic

[2009], supra.

At this stage, the trial court is not supposed to make findings of fact since the other side has not yet spoken to determine who was being factual. What the trial court has to find out at this stage that the prosecution has closed its case is whether or not the evidence led has established all the ingredients of the offence [s] for which the accused persons [appellants] could be convicted if they failed to offer explanation to raise doubts in the said evidence.

My Lords, we should remember that evidence that can lead to the conviction of appellants must be evidence that satisfies the standard of proof required by law whether appellants would testify in explanation or not. It is trite law that an appellate court is not a trier of facts. In other words, it will not, on its own, determine the truth or falsity of matters alleged by the parties and their witnesses at any stage of the trial. It is also accepted that in the case of an appeal on a submission of no case, the court, for its own limited purpose, will have to consider the evidence at the trial court to the extent that it is necessary to determine whether the requisite level of proof was present in respect of all the essential ingredients of the offences charged. My Lords, this does not put the appellate court in the position of the Trial court in any significant sense, for as indicated above, the trial court, if the case should go back for trial, will be the ultimate determinant of the veracity of the evidence and its sufficiency for the purposes of conviction.

I have chosen to go on this tangent to discuss the law as it is clearly because the standard of the law at this stage of the trial, ie., at the end of the prosecution's case, is not as high as that which is required at the end of the full-scale trial. It is a lesser proof at this preliminary stage in the criminal proceedings' according to Professor Ocran JSC.

The bottom line is that this same issue had been resolved in the recent Supreme Court decided case of **Micheal Asamoah and Anor. vs The Republic, Criminal Appeal No.J3/04/2017**, dated 26th July 2017 in which it was stated inter alia:

*"The grounds under which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trial or trial by indictment may be restated as follows;*

*a] there had been no evidence to prove an essential element in the crime....*

*b] the evidence adduced by the prosecution had been so discredited as a result of cross-examination,"*

*c] the evidence was so manifestly unreliable that no tribunal could safely convict upon it;*

*d] the evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt, and one with innocence".*

In his recent publication, *Criminal Procedure and Practice in Ghana*, Dennis Dominic Adjei, JSC, states at page 275 inter alia:

*"the underlying factor in fair trial is that an accused is presumed to be innocent until he/she is proved or has pleaded guilty. Where the prosecution fails to prove an essential element of the offence charged and the court calls upon the accused to open his defence, the court breaches a constitutional provision by in substance saying that the accused shall open his/her defence to prove his innocence. Therefore, the courts are duty-bound to ensure that whenever prosecution fails to establish a prima facie case against an accused at the close of the case of the prosecution, it stands to reason that the prosecution has failed to meet the constitutional requirement imposed on it by paragraph [c] of clause [2] of article 19 of the Constitution which provides thus:*

*[2] a person charged with a criminal offence shall-*

*[c] be presumed to be innocent until he is proved or has pleaded guilty".*

As a result of the foregoing, I will begin to assess evidence adduced at the trial in the light of the law as discussed above to find out whether or not the prosecution indeed, has established the essential ingredients of the offences charged and that there is a genuine case for the appellants to answer by means of opening their defence.

**In *The Republic vs Aaron Kwesi Kaitoo [HC] Case No. H2/25/2017***, dated 23<sup>rd</sup> May 2017, the accused person who incidentally was the appellant raised the issue of the failure of the trial court to deal with the charges individually or failing to address the

charges in accordance with each count in assessing the case amongst others in an interlocutory appeal as regards the trial court's decision calling him to open his defence. The Court of Appeal unanimously held that there was no such need when the charges are inter-related.

## **THE CHARGES OF CONSPIRACY AND CAUSING HARM**

I shall therefore proceed to discuss the elements of the offences brought 'against appellants and determine whether the prosecution has established prima facie case against them or any of them and with respect to which charge [s].

Now, as far as the charge of conspiracy is concerned, I would like to state that Ghana has reshaped the meaning and scope of its law on conspiracy through the new formulation as set out by the Statute Law Revision Commission and as affirmed by Dotse JSC in the case of **Francis Yirenkyi vs The Republic [2016] 99 GMJ 1**. In the new formulation of conspiracy under section 23 [1] of the Criminal and Other Offences Act, 1960 [Act 29], it has been restated as follows:.

*"Where two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence".*

What used to be rendered as two or more persons agreeing or acting together with a common purpose has now been changed to one of agreement to act together. For prosecution to be deemed to have established a prima facie case, the evidence led without more, should prove that;

- a. there were at least two or more persons,
- b. there was an agreement to act together,
- c. the sole purpose of the agreement to act together was for a criminal enterprise.

The new rendition, no doubt, has narrowed the scope of the law on conspiracy in Ghana. It is however no defence for an accused person to claim when found acting together with

others, to contend that it cannot be used as evidence of a prior concert or deliberations. For any interpretation that appears to ignore the latter part of Section 23 [1] of Act 29 to the effect that;

"whether with or without any previous concert or deliberation",

would have missed the import of the offence of conspiracy. Indeed, under the illustrations to Section 23 [1] of Act 29, subsection [1] illustration is still maintained to the effect that 'if a lawful assembly is violently disturbed [Section 204j, the persons who take part in the disturbance have committed conspiracy to disturb it, although they may not have violently committed any violence and although they do not act in pursuance of a previous concert or deliberations'. As the illustration cannot be deemed to be part of the law, as a common law principle of interpretation, it points to a better appreciation and illumination of our understanding of the provisions under consideration, the explanation provided as quoted above shed light on the ambit of the law on conspiracy. The Supreme Court has thrown a more search-light to illuminate one's appreciation of the new law on conspiracy in the case of **Faisal Mohammed Akilu vs The Republic [2016-2017] SCGLR 444** dated 5<sup>th</sup> July 2017 wherein Yaw Apau JSC, stated on conspiracy under Ghanaian law as follows;

*"From the definition of conspiracy as provided under section 23 [1] of Act 29/60, a person could be charged with the offence even if he did not partake in the accomplishment of the said crime, where it is found that prior to the actual committal of the crime, he agreed with another or others with a common purpose for or in committing or abetting that crime..... However, where there is evidence that the person did in fact, take part in committing the crime, the particulars of the conspiracy charge would read;*

*'he acted together with another or others with a common purpose for or in committing or abetting the crime'. This double-edged definition of conspiracy arises from the undeniable fact that it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. Conspiracy could therefore be inferred from the mere act of having taken part in crime where the crime was actually committed. Where the conspiracy charge is hinged on all alleged acting together or in a concert, the prosecution is tasked with the duty to*

*prove or establish the role each of the alleged conspirators played in accomplishing the crime".*

See also the cases of **Martin Kpebu [No. 3] vs Attorney-General [No.3] [2015-2016] 1 SCGLR 511** and **Agyapong vs The Republic [2015] 84 GMJ 142, CA, per Korbich JA**, as he then was.

So I ask, what then will constitute the offence of conspiracy to commit crime and the related substantive charge of causing harm?

In her book, *The General Part of Criminal Law-A Ghanaian Casebook*, Vol. 2, the Learned Professor HJAN Mensah-Bonsu, now a Justice of the Supreme Court of Ghana, discusses very extensively all the inchoate offences including conspiracy.

At page 386 of the book, she states as follows:

*"The constituent elements of the crime are; plurality of minds, ie. two or more persons; agreeing to act together with a common purpose; and acting together for a common unlawful purpose".*

Then she continues at page 393 thus:

*"The agreement may be referable to a particular time or place, as when a meeting is organized [Azametsi]. It may also take place at different times and places, as when a plan is discussed with several people. There may also be occasions when there is no such previous deliberations at all although the parties are acting in concert. In such situations, it is sufficient for the purposes of this crime that the alleged conspirators have been found acting together for common unlawful purpose [Kamberly]. Thus, as long as it can be established that the alleged conspirators were united in their intentions to achieve an unlawful purpose, they would be guilty of conspiracy".*

The law as stated above is clearly in consonance with what was expressed by the Learned Apau JSC, in the Akilu's case, supra. Therefore, in the case under review, the prosecution is supposed to prove, in relation to the offence of conspiracy that, appellants [Kofi Agyapong alias Troble, Kwaku Boateng alias EK and Kwame Abunua] acted in consonance

to commit crime namely causing harm contrary to law. The law equally enjoins prosecution, in furtherance of its duty, to show at this stage, prima facie, the role [Kofi Agyapong alias Trouble, Kwaku Boateng alias EK and Kwame Abunua] the alleged conspirators played in accomplishing the crime.

In fidelity to the law, in dealing with the instant appeal, I will accordingly discuss what the essential elements or ingredients of the offence of conspiracy are and then proceed to determine whether on the face of the evidence led so far by the prosecution, these essential elements or ingredients have been established. In doing that I have to distil from the whole of the evidence produced by the prosecution witnesses called, the following as the main issues for determination in this judgment so as to call the appellants to open their respective defence: whether or not the appellants herein did agree or acted together with others to cause harm to Paul Asenso and Nana Yaw Boateng since the prevailing position of the law is thus that a charge of conspiracy without proving that the appellants agreed to act together with others to commit the offence shall fail. See Dennis Dominic Adjei: "Contemporary Criminal Law in Ghana", at page 89 as well as the case of **The Republic vs Kwame Amponsah and 6 Others; unreported; CC. No.FT/0066/2016**; delivered on 18<sup>th</sup> April 2019, per Asare-Botwe, J, as she then was.

As noted from the records, the appellants have been charged with conspiracy to cause harm and causing harm contrary to law. From the charge sheet, the Statement of Offence for the charge of conspiracy reads:

*"Conspiracy to cause harm, contrary to sections 23 [1] and 69 of the Criminal Offences Act, 1960 [Act 29]"*.

The particulars thereof are as follows:

*"KWAKU FRIMPONG, KWAME GANGAA, KOFI AGYAPONG alias TROUBLE, KWAKU BOATENG alias E.K., KWAKU AGYEKUM, JOSEPI OPOKU alias CORPORAL, KWAME ABUNUA and YAW FRIMPONG: You on 18th June 2020 at Seniagya near Effiduase in the Ashanti Region and within the jurisdiction of this Court did agree to act together with a common purpose to cause unlawful harm to Paul Asenso and Nana Yaw Boateng"*.

In count two [2] the statement of the offence of causing harm reads:

*"Causing harm, contrary to section 69 of the Criminal Offences Act, 1960 [Act 29]"*

The particulars of the offence are as follows:

*"KWAKU FRIMPONG, KWAME GANGAA, KOFI AGYAPONG alias TROUBLE, KWAKU BOATENG alias E.K., KWAKU AGYEKUM, JOSEPH OPOKU alias CORPORAR.KWAME ABUNUA and YAW FRIMPONG: You, on 18th June, 2020, at Seniagya near Effiduase in the Ashanti Region and within the jurisdiction of this Court did intentionally and unlawfully cause harm to Paul Asenso and Nana Yaw Boateng by subjecting them to severe beatings".*

Section.69 of Act 29 provides that:

*"A person who intentionally and unlawfully causes harm to any other person commits a second degree felony".*

In order to prove the essential elements or ingredients of the offence of causing harm, the prosecution witnesses would have to lead sufficient evidence to show that appellants were amongst others who intentionally caused harm to PW1 and Nana Yaw Boateng and that the harm was unlawful. In the first place, the evidence so far led by the prosecution should show the element of intentionally causing harm to PW1 and Nana Yaw Boateng. Over here, I am to ascertain whether there was any act by appellants, if so whether it was intentional. Finally, whether the intentional act caused harm to PW1 and Nana Yaw Boateng.

Harm is defined in section 1 of Act 29 in the following manner:

*"Harm means a bodily hurt, disease, or disorder whether permanent or temporary".*

Also, in section 76 thereof, unlawful harm is:

*'Harm is unlawful which is intentionally or negligently caused without any of the justifications mentioned in Chapter One of this Part".*

The provisions relating to intent is given under section 11 [1] of Act 29. It states:

*"If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event".*

The Learned author P.K: Twumasi in his book 'Criminal Law in Ghana", page 77 stated that:

*"The general principle of our law is that intention, like many other states of mind, is incapable of direct proof, it is always inferred from proven facts. This is a principle of English Common Law which has been accepted as an important principle of our criminal law".*

In the Republic vs. Mailam Ali Yusif Isa, with case number FT/MISC. 1/2000, judgment delivered on 20th July 2001 by Ansah JA, as he then was, sitting as Additional High Court Judge in Accra, the learned Justice had this to say on intent at page 14 of the judgment;

*'Now, in law it is not always possible to prove intent by direct. or possible evidence. As the popular cliché goes, no one can know the intent and mind of a man. It is said even the devil does not know this. That being so intent is often and has been inferred from proven circumstances in a particular case. The general presumption in Criminal Law is that a person intends the natural and probable consequences of his acts".*

In effect, the appellants should be deemed to have intended the natural and probable consequences of their acts if any. Here, intention, if any, can only be inferred from the facts or evidence adduced so far by the prosecution witnesses.

In short, it is therefore my onerous duty to find out whether or not the appellants intentionally caused unlawful harm to PW1 and Nana Yaw Boateng.

Now, the ultimate question is what is the evidence led so far by the prosecution in respect of the charges of conspiracy and causing harm?

## PROSECUTION'S EVIDENCE LED AT THE TRIAL SO FAR

According to the witness statement of Paul Asenso [PW1] which was adopted by the trial Circuit Court as his evidence in-chief on 26th October 2021, on his way back to his shop, he met the appellants together with others who were armed with sticks, motor-chains and cement blocks on the day in question. He adds that the appellants and others accused Adumasahene of facilitating the enstoolment of the new chief of Seniagya for which reason they pounced on him. It is his evidence that he saw each of the appellants and others beating up the Adumasahene with different implement. Specifically, he mentioned Kwame Gangaa, Agyekum, Frimpong and Yeboah as those who hit the Adumasahene on the face, head and all over the body with the different implements they wielded. He told the trial Circuit Court that he could not stand the embarrassment so he attempted to rescue the Adumasahene from their grips to enable them escape from the scene. In the process, Kwaku Yeboah vented his anger on him. Kwaku Yeboah then folded his arms behind him while Kwame Gangaa hit him on his head with a motor-chain after which the rest of the accused persons relentlessly beat him up. He indicated that Kwaku Yeboah continued to push him until he fell into a nearby gutter by the road side. According to him, the rest of the accused persons kept beating him with sticks, motor-chain, etc. He mentioned that Kwaku Agyekum ran towards him and hit him on the head with a cement block while lying down in the gutter. It is his evidence that notwithstanding the fact that he had fallen into the gutter, the accused persons continued to beat him up mercilessly with different implements. In sensing danger that the accused persons were about to lynch him, he gathered all his strength and tried to escape. At this point, Kwaku Frimpong finished off by hitting his head with a cement block and he fell down the second time unconscious.

Under cross-examination by defence counsel, the following transpired and I refer to the relevant portions thereof:

*"Q. None of A2 to A8, none of them assaulted or touched you in any way.*

*A. My lady that is not correct.*

*Q. I am putting it to you that if anyone beat you up, it was Al-Kwaku Frimpong that you attacked and he over-powered you.*

*A. My lady, that is not correct.*

*Q. From your account all the accused persons were beating you at the same time. Is that not so?*

*A. My lady that is so.*

*Q. You claim you were being hit with chains, blocks, stones, is that not it?*

*A. My lady that is so.*

*Q. And at a point in time you claim you fell unconscious is that not so?*

*A. My lady that is so.*

*Q. So how did you know you were unconscious?*

*A. When I regained consciousness, I was on admission at the Effiduase Government Hospital.*

*Q. I am putting it to you that you never knew who hit you and with what throughout this mainly apart from A1, that you fought with. The rest you did not know who hit you with what.*

*A. My lord, I saw them".*

See pages 67 to 68 of the record.

On that score, Learned Counsel for the appellants contends that the appellants were never mentioned at all in the facts presented by the prosecution as having agreed to act together with a common purpose to cause unlawful harm to PW1. He submits that apart from the general statements that all the accused persons beat up PW1 without sufficient evidence of what appellants did cannot amount to proof capable of sustaining the guilt of appellants in the event they decide not to say anything in their defence.

On the other hand, Learned Counsel for the Republic submits otherwise. According to her, the prosecution led sufficient evidence-oral testimonies, written documents and an electronic device [pen-drive] to show that not only had the accused persons acted

together to inflict unlawful harm on PW1 but that they had also inflicted unlawful harm on PW1. Again, she contends that at no point was the evidence led so far by the prosecution discredited by the defence. The evidence adduced shows no conflict between the testimonies and no contradictions based on which certain testimonies could be discredited. Finally, she argues that Exh W [pen-drive] corroborates the testimonies of the other prosecution witnesses. It shows the extent of the unlawful harm inflicted on PW1.

The relevant portion of evidence of Joyce Biowuo [PW2] is that on their return from Adumasahene's house, they met the accused persons on the road. Kofi Agyapong shouted that when they went to Mampong. didn't they hear what happened? Then Kwame Abunua poked his fingers into Adumasahene's eyes and slapped him. According to her evidence, accused persons pounced on Adumasahene [Nana Yaw Boateng] and accused him of facilitating the enstoolment of the chief of Seniagya. According to the evidence, they subjected him to severe beatings in her presence. She testified that PW1 whom she calls Wofa Atta intervened and the accused persons shifted their focus on him stating that he [PW1] was the very person they were looking for. They continued that they were going to kill him.

Now, listen to PW2 whilst under cross-examination by defence counsel.

*"Q. I am putting it to you that Kwame Abunua never put his finger into Adumasahene's eyes.*

*A. My lady, he put his finger into the eyes of Adumasahene and slapped him as well. I was present when it happened.*

*Q. The person you call Adumasahene is the same as Nana Yaw Boateng.*

*A. Yes, My lady.*

*Q. I am putting it to you that the accused persons never together or individually beat up the said Yaw Boateng as you claim.*

*A. My lady the beat Yaw Boateng.*

*Q. I put it to you that Kwame Gangaa did not beat Yaw Boateng with a motor-chain*

*either on his face or any part of his body.*

*A. My lady, he used it to hit him.*

*Q. Is Wofa Atta the same as PWI-Paul Asenso?*

*A. Yes, My lady*

*Q. I am putting st to you that none of the accused persons told Wofa Atta that he was the one they were looking for and that they were going to kill him.*

*A. Some of them told Wofa Atta that they will kill him. Some of the accused persons even came to my house that they will kill Wofa Atta".*

See page 79 of the record.

Francis Appiah took his turn as the third prosecution witness [PW/3]. Essentially, his evidence is that Kwaku Abunua stood behind the chief of Adumasa and used his fingers to poke his eyes. He added that when PW1 intervened, the accused persons shifted their focus on him stating that PW1 was the one they were looking for and that they were going to kill him. He testified that Kofi Agyapong continued hitting PW1 with a big stick. He indicated that Kwaku Boateng returned from his house which is by the road side with a copper wire with which he beat PW1.

The last prosecution witness was No. 44782, D/Sgt Nicholas Amoako, stationed at the District Head-quarters of the Ghana Police Service-Effiduase. He testified as the Police Officer who investigated the matter when same was reported to the Police. He brought in evidence a picture of PW1 which he claims he took whilst PW1 was on admission at the Government Hospital, Effiduase as Exh A. Again, he brought in evidence a Medical Form he issued to Kwaku Frimpong as Exh B together with that of PW1 as Exh. B1. Finally, the cautioned and charged statements he took from the accused persons as Exhs. C, D, E, F, G, H, J and K.and L, M, N, P, Q, S, T and U in that order.

Let me state that I have critically looked at and assessed the totality of the evidence produced by PW1 and PW4 in material particular. Per the evidence of PW1himself and PW4, the former is the victim together with Nana Yaw Boateng of the offences herein. In his evidence repeated by that of PW4, PW1 who is a victim of the offences herein testified

that he was beaten up by all the accused persons on the day in question. To my understanding, the accused persons include the appellants herein. The question I ask is what role did the appellants specifically play in beating him up? Nothing, I mean nothing. On record, both PW1 and PW4 could not show the exact role of the appellants in the beating up of PW1. It should not be lost on us that in this interlocutory appeal, the focus is on appellants and not all the accused persons standing trial in the trial Circuit Court. I find these statements by PW1 and PW4 to be general statements. Consequently, it is my ruling that these general statements without sufficient evidence of the role played by appellants in the commission of the crimes cannot amount to sustaining prima facie case. The evidence by PW3 that Kwaku Boateng, one of the appellants herein came back with copper wire from his house which is by the road side to beat up PW1 is not borne out by Exh. W. In Exh. W, Kwaku Boateng could be spotted standing in front of his house watching the incident unfold when he came out from the house. There is no shrewd of evidence from Exh W that he took part in committing the offences. PW3's evidence on that issue stood uncorroborated at the time prosecution closed its case at the trial Circuit Court. The net effect is that PW3's evidence is unreliable. Also, PW3's evidence that Kofi Agyapong, an appellant herein hit PW1 with a stick is not borne out of Exh. W. It is equally uncorroborated so far.

I agree with Learned Counsel for appellants that there is conflict between the evidence of PW1 on one hand and PW2 and PW3 on the other hand. Equally, I agree with him that there is conflict between the evidence of PW2 and PW3 on one hand and that of PW4. Whereas PW4 did not lead any evidence to link appellants herein to any of the offences charged herein, PW2. and PW3 claim in their respective pieces of evidence that appellants caused harm to PW1 and Nana Yaw Boateng. Exh W supports PW4's evidence that appellants did not do anything to PW1 and Nana Yaw Boateng. Indeed, PW1 himself did not lead sufficient evidence to link appellants to the offences herein as he did against the others.

Equally, I have closely examined the evidence offered by PW2 and PW3 as far as the charges with which appellants are facing are concerned. Let me indicate that on record, PW2 and PW3 claim to be eye-witnesses to the incident by which PW1 and Nana Yaw Boateng were the victims. In fact, going by the respective pieces of evidence by both

witnesses [PW2 and PW3], Kwame Abunua, who is one of the appellants herein poked his fingers into Nana Yaw Boateng's eyes. The ultimate question is where is Nana Yaw Boateng in these proceedings?

On record, there is no iota of evidence that he even offered a statement to Police. There is no medical form or report on him in evidence, he did not testify at the trial Circuit Court when prosecution closed its case. Indeed, no explanation has been offered.

In the light of the evidence led at the trial, that is at the close of prosecution's case, Nana Yaw Boateng is a material witness if the prosecution would want to sustain conviction against appellants should appellants decide not to talk at the trial. If it is the desire of the prosecution to hide his identity from the public for example, he could be heard in-camera. I rule that Nana Yaw Boateng is a material witness in the wake of the evidence adduced so far and the failure or refusal of the prosecution to call him as such is fatal to its case. I am fortified in this direction on the authority of *Tetteh vs The Republic* [2001-2002] SCGLR 845 at 866, per Adzoe, JSC of blessed memory that:

*"As a general rule, the prosecution has the discretion to present such witnesses as it elects to call in support of its case. But the discretion must be exercised in a manner that would further the interest of justice and ensure fairness to the accused so that he does not suffer any disadvantage. See R vs Oliva [1965] 3ALL ER 116. The rule that the prosecution must call material witnesses becomes therefore, an important qualification on the prosecution's discretion-whether or not a witness is material depends on the quality and content of the evidence he is expected to offer in relation to the case on trial. The witness will be deemed to be material if the evidence expected from him is deemed to be so vital as to be capable of clearly resolving one way or the other an important and decisive issue of fact that is in controversy. The evidence must appear likely to have a profound impact on the facts of the case to the extent that if it is accepted as true, it will compel the Court to come to a conclusion that is different from the decision it has taken".*

The evidence on record is that Kwame Abunua poked his fingers into Nana Yaw Boateng's eyes. We should remember that Kwame Abunua has denied the charge when his plea

was taken. PW2 and PW3 say that they know Kwame Abunua and that on the day in question, they met him together with others when the incident occurred. Certain questions come to mind. If PW2 and PW3's pieces of evidence are anything to go by why didn't Nana Yaw Boateng come to Court to testify? What prevented the prosecution from calling him or at least tendering his medical report in evidence to establish a prima facie case against Kwaku Abunua? By this failure and or refusal, appellants lost the chance of cross-examining him to ascertain the veracity or otherwise of the allegation against Kwame Abunua. I maintain that Nana Yaw Boateng was a material witness who prosecution should have called and their failure and or refusal to do so was very fatal to their case.

## **CONCLUSION**

Finally, I rule that both the trial Circuit Court and the first appellate High Court erred in calling appellants to open their respective defences to the charges leveled against them when the prosecution closed its case at the trial Circuit Court by which time the prosecution had not been able to establish the essential elements or ingredients of the offences with which appellants herein were charged, that is to say conspiracy to cause harm and causing harm and that the prosecution's case had been so discredited under cross-examination and therefore manifestly unreliable.

In our criminal jurisprudence, it is the duty of the trial Court or Judge to be sure that a prima facie case has been made by the prosecution against the accused person and in this appeal against appellants on the offences charged before inviting them to open a defence. Every crime has its ingredients or elements which had to be established by the prosecution to warrant the accused person [appellants herein] being called upon to open a defence. It is a cardinal principle of law that the prosecution is bound to prove all the essential elements or ingredients of the offences charged. Failure to so do, the trial Court or Judge has no option than to acquit and discharge the accused persons [appellants herein] since that would create doubts in the prosecution's case.

Upon the above discussion and analysis of the facts, evidence and the law, I draw the irresistible and inevitable conclusion that the prosecution has been unable to produce

sufficient prima facie evidence to substantiate the charges of conspiracy to cause harm and causing harm as contained in counts one [1] and counts two [2] of the charge sheet herein. Appellants herein [Kofi Agyapong alias Troble, Kwaku Boateng alias E.K. and Kwame Abunua] would accordingly be acquitted and discharged on that score.

The appeal therefore succeeds.

**(SGD.)**

**KWASI BOAKYE**

**(JUSTICE OF APPEAL)**

**I AGREE**

**(SGD.)**

**RICHARD M. KOGYAPWA**

**(JUSTICE OF APPEAL)**

**I ALSO AGREE**

**(SGD.)**

**PATRICK KWAMINA BAIDEN**

**(JUSTICE OF APPEAL)**

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