

CORAM: HER HONOUR MRS ADWOA AKYAAMAA OFOSU, CIRCUIT COURT
JUDGE SITTING AT THE CIRCUIT COURT MPRAESO, EASTERN REGION ON
THE 18TH OF OCTOBER, 2023

B18/1/2024

THE REPUBLIC

V

KWASI SARFO @ OPOO

.....

TIME: 11:30

ACCUSED PRESENT

CHIEF INSPECTOR BEATRICE LARBI FOR PROSECUTION PRESENT

JUDGMENT

The accused person herein was arraigned before this court on the 2nd of August 2023, charged with *Engaging in prohibited business relating to narcotics* contrary to section 38 (2) of the **Narcotics Control Commission Act, 2020 (Act 1019)** and *Use of narcotic drug*

without authority contrary to **section 37(2)(a) of Act 1019** supra. He pleaded not guilty to the charge and so the prosecution assumed the burden to prove the guilt of the accused beyond reasonable doubt.

The brief facts in support of the charges are that the complainants in this case are police officers stationed at the Divisional CID Nkawkaw whilst the accused person Kwasi Sarfo @ opoo aged 31 is an electrician resident at Nkawkaw Adoagyiri. On the 31st of March, 2023, at about 4:00pm, the police acting upon intelligence that some youth numbering about 30 were in a wooden structure at Nkawkaw Adoagyiri abusing narcotic drug substances moved in to enquire.

Upon police arrival, many of them managed to escape by breaking through the sides of the wooden structure but nine suspects including the accused person who managed to escape to hide in one of the rooms were arrested. A search on the accused person revealed one rocky whitish substance which he concealed on his body. He was arrested to the station together with the eight others for screening and further action. A rubber container containing some substances believed to be narcotics was also retrieved from the wooden structure as well for investigations. The suspects were screened and eight of them were released after the screening whilst the accused person who police detected to be the dealer was detained for investigations. The exhibits were forwarded to the crime laboratory in Accra for analytical examinations and the report received proved positive for narcotic drugs with a gross weight of 23.06 grams including the one found on his body. After investigations, the accused was charged with the offences as mentioned on the charge sheet and brought before the honourable court for action.

It is trite that in criminal trials, the burden of proof in the sense of the burden of establishing the guilt of the accused is generally on the prosecution. The failure to discharge that burden should lead to the acquittal of the accused. The standard of proof

placed on the prosecution in order to discharge its burden is 'proof beyond reasonable doubt'. **Section 11(2) of the Evidence Act, 1975 (NRCD 323)** thus provides that:

"In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind will find the existence of the facts beyond reasonable doubt."

The term "reasonable doubt" as explained by Lord Denning in the case of **Miller vs. Minister of Pensions (1947) 2 All ER 372** is as follows;

"It needs not reach certainty but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful positions to deflect the course of justice"

Pursuant to discharging its burden of proof, the prosecution led evidence through three witnesses namely Detective Chief Inspector Peprah Kofi Yakubu, PW1, Detective Inspector Kwame Appau, PW2 and Detective Inspector Gershon Hallo, PW3, the investigator. PW3, tendered the following exhibits in evidence in support of the prosecution's case:

Exhibit A	The cautioned statement of the accused person
Exhibit B series	Photographs of the substances found at the crime scene
Exhibit C	The Forensic Lab report on the substances
Exhibit D	The Charge statement of the accused

Section 38(2) of the Narcotics Control Commission Act, 2020 (Act 1019) under which the accused is charged on count one provides that:

“A person who without lawful authority, sells, trades in, purchases, trafficks or undertakes an activity for the purpose of establishing or promoting an enterprise relating to narcotic drugs commits an offence”.

Sub section (6) of section 38 of Act 1019 further provides that:

“a person who commits an offence under this section is liable on summary conviction to a fine and a term of imprisonment as specified in the second schedule”

Under section 38(2) of Act 1019 therefore, the prosecution is required to prove the following ingredients:

- 1. That the accused sold, traded, purchased, trafficked or undertook an activity relating to narcotic drug*
- 2. That the accused sold, traded, trafficked or undertook the activity relating to narcotic drug for the purpose of establishing or promoting an enterprise*
- 3. That the accused did so without lawful authority*

The evidence of the prosecution is that based on police intelligence that some people had gathered in a house abusing narcotic drugs, they proceeded to a house in Adoagyiri a suburb of Nkawkaw where they met a group of people in a wooden structure smoking substances believed to be narcotic drugs. On seeing the police, however they bolted leaving behind a container containing substances believed to be Indian Hemp and cocaine. Information gathered was that, it was the accused person who comes there to sell the substances. The prosecution tendered in evidence exhibit C which is a forensic laboratory report on the substances found at the crime scene which proved to be cocaine, heroin and Indian hemp.

The prosecution also tendered in evidence without objection, photographs of the said container with its contents being boxes of matches, wrapped papers, a rubber containing

a herb-like substance, some coins of various denominations and one cedi notes. These exhibits that is, **Exhibits B series** and **Exhibit C** leave me with no doubt that there was some trading activity involving the said narcotic drugs retrieved at the crime scene thus satisfying the first ingredient of the offence. Even though the accused denied being at the crime scene for the reason that he was sick and had been taken to the hospital by an auntie, the accused could not provide any evidence of his indisposition. He was also unable to mention or lead the police to the hospital where he went for treatment. The accused was also unable to bring his supposed auntie who took him to the hospital to testify in court.

On the evidence therefore, I find that the accused person was present at the crime scene and was involved in the trading that went on at the scene.

However, the prosecution was unable to prove to the court that the trading activities that went on at the crime scene was for the purpose of *establishing or promoting an enterprise* as stipulated under section 38(2)(b) of Act 1019. This ingredient in my view is important because, that is what distinguishes it from section 37 (2) (b) which provides that:

- (1) *“A person who, without lawful authority, proof of which lies on that person, has possession or control of a narcotic drug for use or for trafficking commits an offence”.*
- (2) *A person who commits an offence in sub section (1):*
 - (b) *For **trafficking** is liable on summary conviction to the fine and imprisonment specified in the 2nd schedule and an additional term of imprisonment specified in that schedule if the fine is not paid*

Note that both provisions have elements of trafficking which is defined under section 113 (a) as follows:

“Trafficking includes doing or being concerned in any of the following, whether in this country or elsewhere

(a) Trading, supplying or in any other manner dealing in narcotics, precursors, or controlled equipment in contravention of this Act”...

Even though the Act did not define an ‘enterprise’ as used in section 38(2), a careful reading of both section 38(2) and section 37(2)(b) of Act 1019 shows that the kind of prohibited business the law envisages under section 38 (2) is not the same as what the accused person engaged in on the day in question. This means that the evidence led has established an offence different from what the accused was charged with.

Section 154 of the Criminal and other Offences (Procedure) Act, (1960) (Act 30) provides that:

“Where a person is charged with an offence and facts are proved which reduce it to a lesser offence, that person may be convicted of the lesser offence although not charged with”.

In the instant case, the prosecution chose to charge the accused under section 38(2) of Act 1019 and even though the evidence shows that the accused engaged in the trading of narcotic drugs, the accused cannot be convicted under that section because the offence under section 37(2)(b) which the evidence has established is no lesser offence to the offence under section 38(2) considering the punishment attached to both offences under the second schedule of Act 1019.

In the circumstance it is my view that the prosecution failed to prove count one against the accused beyond reasonable doubt.

The accused person is also charged under Section 37 (2) (a) of Act 1019 which provides that:

“A person who, without lawful authority, proof of which lies on that person, has possession or control of a narcotic drug for use or for trafficking commits an offence”.

2. A person who commits an offence in subsection (1)

(a) for use is liable on summary conviction to a fine imposed in accordance with the penalty specified in the second schedule and an additional term of imprisonment specified in that schedule if the fine is not paid

Under this section, the prosecution only has to prove that the accused person had in his possession Narcotic drug which was for use.

The evidence led by the prosecution is that on the material date, when the police had the information about the activities of the accused and his cohorts and they went to the scene, most of them managed to escape but they were able to arrest nine persons including the accused person who went to hide in an old lady's room.

The corroborated evidence of the prosecution witnesses is that when they went into the room the accused person was naked but had covered himself with a cloth and lying on a mattress claiming he was sick and had just returned from the hospital. When the accused was asked to get up, a whitish rocky substance which they believed to be cocaine fell from him. The said substance as per exhibit C proved to be cocaine after being tested at the police forensic laboratory. The evidence further shows that the net weight of the substance found on the accused per the report exhibit C was 0.6964 and so it can reasonably be inferred that it was for use by the accused person.

In the **State v Afenuvor [1961] GLR** the court explained that:

“the burden of proof is used in two senses. It may mean (a) the burden of establishing a case which rests upon the prosecution or (b) the burden of explanation which shifts to the prisoner once the

prosecution has produced some prima facie evidence from which the guilt of the prisoner may be presumed if no answer or explanation is given"

Thus in the instant case once the prosecution led evidence to show that the accused person possessed narcotic drugs for use, the burden shifted unto the accused to prove that he had lawful authority to use the drug. The accused person however did not provide any such proof. The reasonable conclusion therefore is that the accused person did not have the authority to possess and use the narcotic drug found on him.

From the evidence therefore it is my view that the prosecution was able to successfully prove the guilt of the accused person on count two beyond reasonable doubt.

In the premise since the prosecution failed to prove the guilt of the accused person beyond reasonable doubt on count one, he is acquitted and discharged on count one. The accused is however pronounced guilty and convicted on count two.

SENTENCING

In sentencing the accused, I have taken into consideration his plea in mitigation, the fact that he has no previous conviction, the quantity of drugs found in his possession, the period he has spent in custody in compliance with article 14 (6) of the 1992 Constitution. I have also considered the fact that the accused person did not plead guilty simpliciter

but wasted the courts time to go through the full haul of trial. I therefore sentence the accused person to a fine of 400 penalty units on count two in default 12 months' imprisonment.

H/H ADWOA AKYAAMAA OFOSU (MRS)

CIRCUIT COURT JUDGE