

IN THE CIRCUIT COURT HELD IN MPRAESO, EASTERN REGION ON
THURSDAY 7TH MARCH, 2024 BEFORE HER HONOUR MRS ADWOA
AKYAAMAA OFOSU, CIRCUIT COURT JUDGE

B7/39/2024

THE REPUBLIC

V

MBO AWINBE

.....

.....

TIME: 1:45

ACCUSED PRESENT

CHIEF INSPECTOR BEATRICE LARBI FOR THE PROSECUTION PRESENT

ACCUSED SELF- REPRESENTED

JUDGMENT

On the 22nd of November, 2023, the accused was arraigned before this court on a charge of Robbery contrary to section 149 of the **Criminal Offences Act 1960, (Act 29)**. He pleaded not guilty to the charge and so the prosecution assumed the burden to prove his guilt.

The facts presented by the prosecution in support of the charge are that the complainant Isaac Nyamekye is a security Guard at Kambala Small Scale Mining Company Ltd, Abepotia near Nkawkaw. Accused Mbo Awinbe aged 22 is a galamseyer and resides at Yakokor near Nkawkaw. On 30th October, 2023 at about 5:30pm, the complainant was escorting a quantity of gold ore from the said mining site to the Accra Kumasi Highway to board a waiting car to their office at Nkawkaw. On reaching a section of the road, about 50 meters away from their site at Abepotia, the accused person and one Issaka Issifu now deceased who were hiding in palm plantation wielding pump action guns, crossed them and ordered them to surrender the gold ore amidst firing gun shots. The complainant who was also holding a pump action gun returned fire. In the process, one of the robbers dropped his gun and they managed to escape. The complainant took the said gun to the Nkawkaw Central Police station and reported a case.

Whilst the police was attending to the complainant, information was received from the holy family hospital, Nkawkaw that a certain man was rushed to the said facility with gunshot wounds on his abdomen and left thigh. Police together with complainant visited the said facility and met the accused person at the emergency ward of the said hospital with gunshot wounds. The complainants identified the accused person as one of the robbers who attacked them. He was arrested and placed in police guard at the said facility. On 31st October, 2023, police together with the complainant visited the scene of crime at Abepotia near Nkawkaw on the Accra Kumasi Highway. The area was combed and police found deceased lying dead in a prone position about 100 meters away from the scene wearing a pair of jeans over a black jacket. He was also found wearing a black nose mask with ash bag hanged on his neck. The body was inspected and multiple gunshot wounds were found on his face and chest. A search in his bag and pocket revealed one Techno Android mobile phone, 10 BB live cartridges, one T. spanner, one

pluck spanner and one machine oil. The body was conveyed and deposited at the holy family hospital mortuary, Nkawkaw for preservation and autopsy.

On same day, the accused person was referred to the Koforidua General Hospital where he underwent a successful abdominal surgery. The accused person in his investigation cautioned statement denied the offence and stated that on the 30th of October, 2023 at about 2:30 pm, he and one Kwame went to a galamsey site at Ampeyo and were attacked by some three guys who he cannot identify. In the process, one of them pulled a pistol and shot at him twice. The accused person led police to the alleged scene of crime at Ampeyo near Nkawkaw and some galamsey operators told police that no such incident has happened there since their stay there for about a year now. The accused could not lead police to trace the said Kwame. The accused person was later charged with the offence and arraigned before court.

It is trite learning that a person charged with a criminal offence is presumed innocent until he has pleaded guilty or proven guilty. See Article 19(2)(c) of the 1992 Constitution. The burden and standard of proof required of the prosecution in criminal cases is codified in the **Evidence Act, 1975, NRCD 323, section 11 (2) and 13 (1)** which respectively provides as follows: —

11(2) In a criminal action, the burden of producing evidence when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt."

13(1) In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt."

In the case of **Oteng v. The State [1966] GLR 352 at page 354 -355**, the Supreme Court held:

"One significant respect in which our criminal law differs from our civil law is that while in civil law a plaintiff may win on a balance of probabilities, in a criminal case, the prosecution cannot obtain conviction upon mere probabilities"... The citizen too is entitled to protection against the State and that our law is that a person accused of a crime is presumed innocent until his guilt is proved beyond reasonable doubt as distinct from fanciful 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"

In proving the guilt of the accused person, the prosecution filed witness statements for three witnesses namely Isaac Nyamekye, Kwabena Osei, and Detective Sergeant Matey Stephen.

It was detected that the intended 2nd witness of the prosecution Kwabena Osei was not present at the scene at all and so his proposed evidence as contained in his witness statement was hearsay. The prosecution therefore did not present him at the trial.

PW1, Isaac Nyamekye, the complainant, told the court that he is a security guard at Kamala Small Scale Mining Company Ltd, Abepotia near Nkawkaw. He testified that on

the 30th of October, 2023, at about 5:30 pm, he was escorting a quantity of gold ore from their site to Accra Kumasi Highway to board a waiting car to their office at Nkawkaw. On reaching a section of the road about 50 meters away from the site, suddenly the accused person and one other person now deceased emerged from a palm plantation wielding a pump action gun and ordered the boys to surrender the gold ore amidst firing gunshots. He testified that he also returned fire and the robbers started running back amidst firing. In the process, one of the robbers dropped his gun and they managed to escape. He took the gun to the Nkawkaw Central Police station and reported the matter. Whilst the police was attending to him, they told him that they had information from the holy family hospital to the effect that someone was rushed to the said facility with suspected gunshot wounds on his body. The police took him to the hospital and he identified the accused person as one of the robbers.

The investigator, Detective Sergeant Matey testified as PW2. He told the court that on the 30th of October at about 7:10 pm, PW1 came to the Nkawkaw Central police station with a Tata pump action gun number KANG (™) 21-1121YT00292 and made a robbery case which was referred to him for investigation. He obtained a statement from him and also took a picture of the gun. He had information from the Nkawkaw Holy family hospital that someone with gunshot wound have been rushed to the facility. He proceeded to the hospital together with PW1 where they met the accused and PW1 identified him as one of the robbers who attacked them. The accused was thus arrested and placed under police guard whiles responding to treatment.

PW2 further testified that on the 31st of October, 2023, he and PW1 visited the crime scene where they found empty shells at the scene and also found one of the robbers known as Issaka Issifu dead in a prone position in a bush about 100 meters from the scene. The body was inspected and multiple gunshot wounds were found on his face and his body. A search on the deceased revealed one techno android phone and 10 live cartridges. He

took photographs of the scene. He also took cautioned statement from the accused. On the same day, the accused was referred to the Koforidua General hospital where he underwent successful surgery.

According to PW2, the accused person told him he went to a galamsey site with one Kwame and were shot by armed robbers but he could not lead the police to the said Kwame. The accused also took police to the alleged galamsey site and pointed a place as the scene where they were allegedly attacked. The police searched the area but no empty cartridge was found. Investigation conducted in the area showed that no shooting incident had happened at the place. Efforts to get the people who rushed the accused to the hospital to assist with investigation proved futile. Investigation also revealed that the accused person and the deceased were friends and were spotted on the 30th of October, 2023 on the deceased's motorbike going up and down. He took charge statement from the accused. PW2 tendered the gun brought to the station by PW1 as Exhibit A, the empty cartridge as Exhibit A1, the cautioned statement of the accused as Exhibit B, photograph of the alleged deceased robber as Exhibit C, a photograph showing the techno phone and cartridges retrieved from the deceased as exhibit D, photographs of the crime scene as Exhibit E and E1, charge statement of the accused as Exhibit F and photograph of the accused pointing to where he was allegedly attacked by robbers, Exhibit G.

THE DEFENCE

The accused person testified that on the day in question he did not go to work early. His machine developed a fault so he took it to Anyinam for repairs. He returned around 2:00 pm and went to work. When he went to work, he met his friend called Kwame and they went to a site called Odenkyem site. They closed around 4:00 pm and on their way they saw a heap of sand called somp and they used their shovel and got gold from it. As they

were standing there, three people came to him using the same kind of machine that he had. One of them asked him to surrender the gold and his machine and he asked him why he should do that. At that time the gold was with his friend. One of them slapped him and he gave his machine to his friend and he struggled with the one who slapped him. His friend started running away with the machine and the two others pursued him and caught him.

The accused continued that one of them attempted to remove something from his bag so he thought it was a knife he was removing to hurt his friend with so he decided to run towards him to prevent him. As he got closer, he realised that it was a gun that he removed. He stopped and asked him to be patient but he shot him and ran away. His friend also ran away so he managed and got to a town called Ampeyo. When he got there, he was weak. He met some boys and explained what had happened to them and they took him to the hospital. The nurses asked the boys to go and report to the police station. He was there when the police came and interrogated him and he told them he will be able to identify his assailants if he sees them.

Here, the accused person is charged with robbery contrary to **section 149 as follows** of Act 29.

The particulars of offence in the instant case reads as follows:

MBO AWINBE, AGE 22, GALAMSEY OPERATOR: On the 30/10/2023 at Abepotia, Nkawkaw in the Eastern Circuit Court and within the jurisdiction of this court, you and one Issaka Issifu now deceased robbed quantity of gold ore belonging to Kambala Small scale mining company limited, Abepotia near Nkawkaw.

Section 149 (1) and (3) of Act 29, respectively provide as follows;

“(1) Whoever commits robbery is guilty of an offence and shall be liable, upon conviction on trial summarily or on indictment, to imprisonment for a term of not less than ten years, and where the offence is committed by the use of an offensive weapon or offensive missile, the offender shall upon conviction be liable to imprisonment for a term of not less than fifteen years.

(3) In this section “offensive weapon” means any article made or adapted for use to cause injury to the person or damage to property or intended by the person who has the weapon to use it to cause injury or damage; and “offensive missile” includes a stone, brick or any article or thing likely to cause harm, damage or injury if thrown.”

Section 150 of Act 29 further defines robbery in the following terms;

“A person who steals a thing commits robbery—

(a) if in, and for the purpose of stealing the thing, that person uses force or causes harm to any other person; or

(b) if that person uses a threat or criminal assault or harm to any other person,

with intent to prevent or overcome the resistance of the other person to the stealing of the thing.”

Thus in the case of **Kweku Quaye Alias Togbe v The Republic [2021] DLSC 10794** the Supreme Court speaking through Mensa Bonsu JSC espoused the law on robbery as follows:

The offence of robbery is defined under section 150 of the Criminal Offences Act 1960 Act (29) thus

“A person who steals a thing commits robbery—

(a) if in, and for the purpose of stealing the thing, that person uses force or causes harm to any other person; or

(b) if that person uses a threat or criminal assault or harm to any other person,

with intent to prevent or overcome the resistance of the other person to the stealing of the thing.”

*In **Behome v. The Republic**, [1979] GLR 112, it was held that “one is only guilty of robbery if in stealing a thing, he used any force or caused any harm or used any threat of criminal assault with intent thereby to prevent or overcome the resistance of his victims, to the stealing of the thing.*

In its turn, the offence of stealing which lies at the core of the offence of robbery, is defined in section 125 of Act 29 as “a person steals who dishonestly appropriates a thing of which he is not the owner. Therefore the elements of the offence of robbery are:

- 1. The accused dishonestly appropriated a thing not own by him or her and in the care or custody of the victim*
- 2. The accused used force or harm or threat of force on the victim or on the person of another*
- 3. The force or threat of force or harm was intended to prevent or overcome any resistance to the stealing*

When these elements of the offence of robbery have been proved by the evidence, a prima facie case would have been made against the accused, it would then require the accused person to lead evidence to create reasonable doubt as to his guilt.

See: Frimpong alias Iboman v. The Republic [2012] 1 SCGLR 297 at 312.

In the instant case, there is evidence to show that the accused person and another now deceased, used guns at the scene of the alleged robbery attack. This is evident by Exhibit A and the spent cartridges that were found near the deceased Exhibit A1. Per the

prosecution's evidence when the accused person and the deceased started firing gunshots and ordered the boys to surrender the gold, PW1 also opened fire at them. The evidence shows that shortly after this incident happened, the accused was taken to the holy family hospital having sustained gunshot wounds. Subsequently upon a visit to the scene, the deceased was found dead also having sustained gunshot wounds. The evidence led by the prosecution therefore showed that there was an exchange of fire resulting from the accused person and the deceased's first attack on PW1 and his colleagues by opening fire on them. This implies the accused person and the deceased used force thus satisfying one of the ingredients of the offence.

The next important question is whether or not the prosecution was able to prove that the accused person stole a quantity of gold ore as stated in the particulars of offence. Section 124 of Act 29 under which the accused is charged on counts two and three provides that:

"A person steals who dishonestly appropriates a thing of which he is not the owner"

Here the following ingredients of stealing must be proved:

1. That the person charged must not be the owner of it
2. That he must have appropriated it
3. That the appropriation must have been dishonest

See: **Ampah v The Republic** [1977] 2 GLR 171

Mensah v The Republic [1978] GLR at 419,

Section 120 of Act 29, stipulates that an appropriation of a thing is dishonest,

(a) If it is made with an intent to defraud or

(b) If it is made by a person without claim of right and with a knowledge or belief that the appropriation is without the consent of a person for whom that person is a trustee or who is owner of the thing or that the appropriation would, if known to the other person, be without the consent of the other person.

Section 122(2) of Act 29 explains appropriation of a thing as follows:

"An appropriation of a thing in any other case means any moving, taking, obtaining, carrying away, or dealing with a thing with the intent that a person may be deprived of the benefit of the ownership of the thing or of the benefit of the ownership of that thing or of the benefit of the right or interest in the thing or in its value or proceeds or part of that thing"

The question here is whether or not the prosecution was able to prove that the accused person dishonestly appropriated a quantity of gold ore. According to P.K. Twumasi in his book **Criminal Law in Ghana at page 311**;

"To amount to appropriation, it is enough if there be evidence that the accused caused others to take the thing and there was intent on the part of the accused to deprive the owner of the benefit of his ownership or of the benefit of his right or interest in the thing".

In the instant case, there is no evidence that the accused person appropriated any gold ore let alone to talk about it being dishonest. The facts supporting the charge sheet did not state so and PW1 did not testify that the accused person and or his colleague took the gold ore. The only evidence is that the accused person and his colleague ordered the boys to surrender the gold amidst firing. There is no evidence that the boys indeed surrendered the gold ore but PW1 also returned fire at that point and the accused and his colleague started running back amidst firing and they escaped.

Besides, the evidence shows that the accused sustained gunshot wounds and was sent to the hospital shortly after the incident and his colleague was also found dead a few meters from the alleged scene of crime but there is no evidence that any gold was found on any of them.

In the circumstance, having regard to the facts supporting the charge and upon a careful evaluation of the prosecution's evidence, the court comes to the conclusion that there is no evidence to support the element of stealing in the instant case.

This means that the prosecution failed to establish an important ingredient of the offence of robbery thus it was unable to establish a prima facie case against the accused as far as the charge of robbery is concerned. Nonetheless, the accused was called upon to open his defence because under section 153 of the Criminal and Other offences procedure Act, 1960 [Act 30], *"a person charged with an offence may be convicted of having attempted to commit that offence although the attempt is not separately charged"*

Section 18 (2) of Act 29 provides that:

"A person who attempts to commit a criminal offence commits a criminal offence and except as otherwise provided in this Act, is liable to be convicted and punished as if the criminal offence has been completed".

In his defence, accused denied the charge and his evidence did not raise any reasonable doubt as far as his attempt to commit robbery is concerned.

In the circumstance the accused is convicted of attempt to commit robbery.

SENTENCING

In sentencing the accused, the court takes into account his plea in mitigation, the fact that he is a young person and a first time offender as well as the period he has spent in custody pending trial in consonance with article 14(6) of the 1992 Constitution of the Republic of Ghana. The court further takes into consideration aggravating factors such as the fact that the accused did not plead guilty simpliciter when he knew he had committed the offence thereby necessitating a full trial, the fact that weapons were used in committing the offence and also the fact that the offence is rampant in the jurisdiction and therefore there is the need to impose a deterrent sentence. On the basis of the above, the accused is sentenced to 20 years imprisonment I.H.L

H/H ADWOA AKYAAMAA OFOSU (MRS)

CIRCUIT COURT JUDGE