

**CORAM: HER HONOUR MRS ADWOA AKYAAMAA OFOSU, CIRCUIT COURT
JUDGE SITTING AT THE CIRCUIT COURT MPRAESO, EASTERN REGION ON
THE 30TH OF JANUARY, 2024**

B18/11/2022

THE REPUBLIC

V

SAMUEL NKANSAH & 6 ORS

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TIME: 10:56

ACCUSED PERSONS: A1, A2, A4, A7 PRESENT

A3, A5, A6 ABSENT

CHIEF INSPECTOR BEATRICE LARBI FOR PROSECUTION PRESENT

ACCUSED PERSONS SELF-REPRESENTED

JUDGMENT

The accused persons herein were charged with Gaming in Public contrary to section 34 (a) and (b) of **the Gaming Act, 2006 (Act 721)**. On the 1st of November 2021, the accused persons with the exception of A5 who was absent were arraigned before this court and their pleas were taken. They all pleaded not guilty to the charge. On the 29th of November,

2021, A5 appeared before the court and he also pleaded not guilty when the charge was read to him. The pleas of the accused persons thus put the facts in dispute thereby triggering the prosecution's burden to prove the guilt of the accused persons beyond reasonable doubt as imposed by law.

The facts in support of the charge are that the complainants are personnel from the Nkawkaw Divisional CID whilst the accused persons are students, mason, driver DJ, unemployed and mechanic respectively from Kwahu Nkwatia. Recently there has been crime hike in the municipality and as a result, the command has taken it upon itself to rid criminals in the area. On the 21st of October, 2021 at about 10:00pm, personnel from the command embarked on foot patrols to track down criminals in Nkawkaw and its environs. In the course of the patrols, police had information that a group of boys were gambling in a drinking spot and the accused persons were arrested in the act. A search on them revealed ten packets of playing cards and cash of GH¢488.00. The accused persons in their cautioned statements denied the offence. After investigations, they were charged with the offence and arraigned before this court.

It is trite that he who alleges must prove. The standard of proof differs depending on whether the allegation is in respect of a civil matter or a criminal matter. In criminal matters such as the instant one, the burden of proof 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 reasonable mind could find the existence of the existence of the fact beyond reasonable doubt".

In explaining reasonable doubt Lord Denning in the seminal case of **Miller vs. Minister of Pensions (1947) 2 All ER 372** stated 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. If the evidence is strong against a man as to leave a remote possibility in his favour which can be dismissed with the sentence, "of course it is possible but not the least probable" the case is proved beyond reasonable doubt but nothing short of that will suffice

Therefore since the prosecution in the instant case alleges that the accused persons have committed the crime for which they stand trial, it has the burden to prove what it alleges against the accused persons because Article 19(2) (c) of the 1992 Constitution presumes the innocence of an accused person until he has pleaded guilty or has been proven guilty of course based on the standard of proof in criminal trials.

To prove its case therefore, the prosecution called three witnesses who testified and were duly cross examined by the defence. It must be placed on record that the accused persons were initially represented by counsel and so PW1 was fully cross examined by counsel for the defence but subsequently, counsel withdrew his representation and the accused persons themselves albeit not all of them (by choice) cross-examined PW2 and PW3.

PW1, Detective Sergeant Atta Blessing testified that he is a police officer stationed at Nkawkaw Divisional CID. That on the 21st of October, 2021, he, including personal of the Division CID, were on foot patrols in Nkawkaw township and they had information that a group of people were gambling in a drinking spot at Nkwatia Kwahu. They rushed to the said spot and saw the accused persons gambling with playing cards and cash behind

the counter. They were then arrested and ten packets of playing cards and cash of GHC488.00 were also retrieved from them behind the counter at the spot.

PW2, Detective Inspector Masawood Tanko testified that he is stationed at the Divisional CID Nkawkaw. That on the 21st October, 2021, they were on foot patrols within Nkawkaw and its environs. In the course of the exercise, the team had information that a group of young men were gambling in a drinking spot at Nkwatia. They proceeded to Nkwatia and met a number of young men in a drinking spot gambling behind a wooden counter. Upon seeing the police, the young men attempted to escape but seven of them were overpowered and arrested. A search conducted at the scene revealed 10 packets of playing cards and an amount of GHC480.00. Some playing cards were also found scattered on the ground behind the said drinking spot. The suspects were thus escorted to the Nkawkaw Divisional CID for investigations.

PW3, N0. 35720 Detective Sergeant Gershon Hallo, the investigator testified that he is a detective sergeant stationed at Nkawkaw Divisional CID. That on the 21st of October, 2021, a case of gambling involving the accused persons was referred to him for investigation. The complainants submitted witness statements and he also took investigation cautioned statements from the accused persons. He took photographs of the exhibits and the parties were paraded before the crime officer who instructed that the accused persons should be charged with the offence of gaming in public. PW3 duly tendered the exhibits of the prosecution in support of its case.

At the close of the case for the prosecution, this court differently constituted ruled that there was a case for the accused persons to answer and so they were called upon to open their defence based on which they (with the exception of A6) filed their witnesses statements and that of their witnesses as ordered by the court.

Even though A5 filed a witness statement, he did not testify at the trial. A6 also did not testify at the trial.

A1 Samuel Nkansah testified that he lives in Nkwatia and owns a plot of land adjacent the drinking spot where the incident occurred on which he had employed some workers to work for him. On the 21st of October, 2021 around 21:00 GMT, he went to the said drinking spot to buy drink and while waiting in front of the counter to be served, a group of anonymous armed men, numbering about 9 entered the drinking spot and ordered that nobody should move and started searching the inner corridors of the drinking spot. A1 further stated that he asked them to identify themselves since there have been incidents of kidnapping but they refused. He tried to explain to them that he came to buy pork at the entrance of the bar and entered the bar to buy drink but was delayed by the bar attendant. The pork seller from whom he bought the pork came and told the men that he just left his place a few minutes ago and entered the spot but he was told to step aside else he would be included.

A1 again testified that before they were put into the cells, they were ordered that they should hand over their mobile phones and monies since they are not allowed to take them into the cells so he gave the police his phone and an amount of GHC100.00 and the others followed suit. On the next day when their families came to bail them, he requested for his money only to be told that they were going to be used as exhibit and that if they are adjudged innocent by the court the monies will be given back to them. He stated that he has never been involved in gambling.

A2, Kwadwo Odei, testified that he is a student at Koforidua Polytechnic University and he is usually based in Koforidua but comes home during vacations or whenever there is the need. He told the court that on the 21st of October, 2021, he went to the said spot to eat banku and pork and was also taking some rest with his two friends. After eating, they

were discussing football and making some arguments. A few guys later joined them and his other two friends left. As they were chatting and arguing, they saw some unknown men who rushed to the spot and started lifting and searching the tables. According to A2, he thought they were looking for someone. All of a sudden, one of them said “you people are gambling and they responded “we are not”. He said that whilst some of them were talking to them, he saw some of the men move to the counter. Shortly thereafter, one of them ordered that they be arrested and handcuffed. They did not resist the arrest and they marched them to their vehicle. They tried to explain to them but they would not listen and they were sent to the Police Division Nkawkaw. He stated that he did not even know some of the accused persons.

A2 further testified that at the Division, they were asked to empty their pockets before being detained. He therefore handed over his two phones and GHC90.00. On the next day after he was granted bail, he requested for his money and the phones from the station officer and he told him that the night officers had sent them away so he had to wait for them to come back. He was later told that the money will be used as exhibit in court and that it may be released to him after court. He said that he has no idea of the gambling and has never engaged in gambling or any criminal activity.

A3, Richmond Nyarko, told the court that he is a mason and resides in Nkwatia. That on the 21st of October, 2021, he went to the said spot to relax. When he got there, he saw the 2nd accused person and some other people arguing over football and as the argument was going on he fell asleep. He said that whilst he was sleeping, he heard “Handcuff them”. Before he realised, he had been handcuffed and moved into a vehicle and transported to Nkawkaw Divisional police station. He persistently asked what he had done and been

handcuffed but nobody listened to him but he later got to know the reason why he had been arrested when they were detained.

He continued that at the station, they were asked to empty their pockets before being detained so he gave them his two phones, room keys and GH¢85.00. He said that the next morning when they were granted bail, he asked for his items and he was only given the two phones and his room keys but was told that the money will be used as exhibit in court.

A4, Samuel Mensah, testified that he is a taxi driver and resides at Nkwatia. He said the bar owner is his customer so on the 21st October, 2021, he went to the spot on the invitation of the spot owner after he closed from work. When he got there, he saw some young men including A2 engaged in argument over football. As they were sitting down chatting, they saw some men in plain clothes rush into the spot and started lifting the bottles and the chairs in front of them. They asked them whether they were gambling and they answered in the negative. One of the officers then told them that they have been informed that they have been gambling but they said they were not. One of the officers ordered that they should be arrested and hand cuffed and they were marched into their vehicle and sent to Nkawkaw Divisional CID.

A4 further told the court that at the station they were ordered to handover their belongings for safekeeping so he gave them GH¢167.00 and his phone. The money was however not given to him because he was informed that they will be used as exhibits. He stated that there is nowhere that he said he was not part of the people playing cards and that the officer asked who were those playing cards and he responded in twi that he did not see any one playing cards. He stated that he has never been involved in gambling or any criminal activity.

A7, Birifa Kwasi Koranteng said that he is a mechanic and resides at Nkwatia. That on the 21st of October, 2021, he decided to take a stroll and refresh himself as well with a malt drink from the said spot. As he took the malt from the bar attendant and walked a few meters from the counter, he saw some unknown men, numbering about seven rushed in and started searching the place. He said that what he heard was “What are you doing at this time of the night, you are gambling”

He further testified that the officers said they had information that they were gambling. He tried to explain to them but they insisted they should go to their office before they will allow them to talk. They handcuffed him together with the other accused persons and marched them to their vehicle and sent them to Nkawkaw Divisional Police station. He said that he has absolutely no idea of gambling whatsoever and he denies same.

A1 called a witness Affum Nicholas, DW1 and all the accused persons called Odei Dennis DW2 as their witness.

DW1 testified that he is a pork seller and resides at Nkwatia. He testified that on the 21st of October, 2021 around 9:00 pm, A1 together with a lady came to buy pork from him when he was about to close. Whilst he was serving them, A1 told the lady to wait for him and that he was going to buy drink from the drinking spot. Shortly after A1 entered the shop, a group of men numbering about 9 with some of them armed rushed into the drinking spot to arrest all the men in the spot leaving about two men, the bar attendant and one other person. According to DW1, he entered the spot personally with the pork he had served to tell the men that the 1st accused was buying pork from him and just entered the spot to buy drink and so if there had been any incident he should be left out. One of the policemen who had hand cuffed the accused told him not to interfere else he would arrest him too. According to DW1, the policeman told him that if he had any

evidence to defend A1, he should meet them in court. He therefore took A1's room keys from him and sent it to the lady that A1 was walking with.

DW2 testified that he is the owner of the spot in question which has been in operation for several years without having any issue. That he sells both alcoholic and non- alcoholic beverages. He testified that normally during the afternoon when the spot is quiet, he has all kinds of indoor games such as draughts, ludu and cards and sometimes oware to entertain those who come there and he normally closes when the spot is empty or they are no more buying anything from him. DW2 further said that in front of his shop there is someone who sells pork so sometimes people buy some and bring to his spot to eat same especially the youth.

DW2 again said that on the 21st of October 2021, at about 9:30 pm, he was serving the 7th accused person whilst talking to the 1st accused person at the counter and the other guys were sitting at the other side of the drinking spot when some men numbering about nine rushed into my spot and started searching around where the guys were sitting. Whilst he was talking to the 1st accused person, he was watching them closely and the 1st accused asked them of their mission. One of them responded "what are they doing here at this hour". He then commanded their arrest.

According to DW2, he asked them to calm down but they declined talking to him and asked him to come to their office if he cared to know. They handcuffed the 7 accused persons and sent them to Nkawkaw police station. He testified that the cards that they claim the accused persons were playing is false and that the armed men rather picked one pack of the cards from the top of his counter at the spot where he normally keeps them after playing, without the accused persons' knowledge. He told the court that at the spot people come there to entertain themselves with other games but not gambling and that he will not even entertain that in his spot and moreover those games are not played

in the night. He was therefore surprised that a charge of gambling was levelled against the accused persons including a driver that he called to come and was waiting for him. He insisted that the accused persons are innocent.

Section 34 (a) & (b) of Act 721 supra under which the accused persons are charged provide as follows:

A person who:

(a) Carries on gaming or bets in a public place, or

(b) Plays a game or pretended game of chance at a table or with a card, coin, token or other article used as an instrument or means of betting or gaming which is not approved for betting and gaming by the board commits an offence and is liable on summary conviction to a fine of not more than 500 penalty units or a term of imprisonment of not more than two years or both.

From the particulars of offence, it is clear that the accused persons are charged under section 34 (a) and for that, to secure a conviction, the prosecution must prove the following ingredients:

1. The accused persons carried on or were involved in gaming or they betted
2. That where the gaming or betting took place was a public place

Section 72 of Act 721 define gaming as:

Gaming means playing a game whether of skill or chance or partly of skill and partly of chance for staked hazarded by the players but does not include lotto.

The said section further defines a game of chance as:

“Game of chance includes a game other than lotto in which the participants in anticipation of winning a reward on the results of the game which depends on luck and which cannot be determined before the end of the game, pay money for the right to participate in the game”

For ease of analyses, I shall first deal with the 2nd ingredient of the offence which is that the alleged act took place in a public place. In the instant case, the prosecution alleges that the incident took place at a drinking spot. This was not denied by the accused persons. The question therefore is whether or not a drinking spot is a public place within the meaning of the law. Section 72 of Act 721 defines a public place as”

“Public place means an area which is generally accessible to all manner of persons”

There is no doubt that a drinking spot is generally accessible to all manner of people as can be gleaned from the instant case where all the seven accused persons are of different backgrounds and not related in any way. I therefore hold that the drinking spot where the alleged incident took place was a public place within the meaning of the Act under reference.

I shall now deal with the first ingredient of the offence. Here, the prosecution witnesses claim that they met the accused persons at the spot playing cards behind a wooden counter. According to them they retrieved the said cards and tendered photographs of same in evidence as Exhibit H series. The accused persons denied this assertion of the prosecution witnesses and asserted that no one was playing cards at the time the arresting team got to the spot and that the said cards were retrieved from the counter where they are kept by the spot owner. The spot owner who testified as DW2 indicated that he has all kinds of indoor games at his drinking spot to entertain those who come there particularly in the afternoons when the place is quite. He disclosed that the arresting officers did not meet the accused persons playing cards and that they picked one pack of the cards from the top of his counter at the spot where he normally keeps them. There

was no evidence to contradict the evidence of the defence as far as the playing of the cards are concerned. The evidence shows that the officers rushed into the drinking spot and so there was no opportunity for the accused persons, assuming even that they were gaming to have tampered with the evidence. The reasonable inference is that the police team caught the accused persons in the act. However, they could not tender any photographs showing the accused persons seated around a table or behind the said counter playing the cards. I therefore find from the evidence that the arresting team which included PW1 and PW2 did not meet the accused persons in the act of playing cards or gaming as they wanted the court to believe.

With regards to the money that the prosecution alleges was retrieved at the scene in support of their claim that the accused persons were gambling, it is the case of the prosecution that an amount of GHC488.00 was found on the accused persons at the time they allegedly met them playing the cards. This was denied by the accused persons who insisted that the monies and their phones were taken from them individually at the police station when they were being put into the cells with the explanation that they cannot take anything into the cells. The accused persons were able to state the respective amounts that were taken from them individually at the station and indicated that same were recorded in a book.

Following from my finding that there was no body playing cards at the time the police officers entered the spot, it cannot be true that the monies were retrieved from the accused persons at the scene. I therefore prefer the version of the accused persons and it is my finding that the monies that the prosecution exhibited per exhibit H which they claim were found at the scene were not found at the scene but were taken from some of the accused persons at the police station. This makes the prosecution's claim that the accused persons were gaming or gambling very doubtful

Furthermore, assuming without admitting that the accused persons were gambling behind the counter, it meant that the bar owner permitted them to do so yet the bar owner who testified for the accused persons was not arrested for abetting the crime. During cross examination of PW1, counsel for the accused asked:

Q: Isn't it surprising that the spot owner is not here in court or part of the accused persons

A: May be at that moment he was not present at the scene

Meanwhile the bar owner DW2 testified that on the day of the incident he was present at the scene. This means that the arresting team did not even bother to look for the owner of the spot for interrogation and it also suggests to me that there was no crime being committed because if there was, the arresting team would have definitely looked for the owner who had permitted a crime to be committed in his premises and caused his arrest. The bar owner was however not arrested even though he was at the scene.

Besides, during cross-examination of PW2 by A6, the question was posed:

Q: What shows we were gambling at the scene?

A: We met the accused persons with some 10 boxes of playing cards together with some amount of money to the tune of GHC480.00. We had observed them for some time before effecting their arrest so I strongly believe that you were gambling.

Again, if indeed the arresting team had been observing the accused persons for some time and actually saw them gamble, PW2's response would not have been "I strongly believe you were gambling" This means that the accused persons were arrested on suspicion that they were gambling. It is trite that however strong a suspicion may be, it cannot take the place of proof beyond reasonable doubt to ground a conviction.

Furthermore, during cross examination of PW1, he admitted that not all the seven accused persons were playing the cards but added that all of them were at the crime scene. When he was asked whether he can tell the court which of the accused persons were playing the cards he said he could not tell because it was in the night and further stated that one of them was asleep.

With this evidence, it is clear that assuming without admitting that there were some gambling activities going on, not all the seven accused persons were involved. The arresting officers themselves are not able to tell which of the accused persons were not involved and are not able to tell which of the accused persons was asleep even though they conceded that one of them was asleep. How then is the court supposed to identify from among the seven accused persons those who were actually involved in the alleged gambling?

To make the prosecution's case worse, the evidence shows that the investigator did not conduct any investigations whatsoever into the case that was referred to him. Apart from telling the court that the complainants submitted witness statements, that he took investigation cautioned statements from the accused persons, that he took photographs of the exhibits, paraded them before the commander and he was instructed to charge them, he did nothing else.

On the evidence led, I find that the arresting witnesses did not find any of the accused persons involved in gambling when they entered the spot. The prosecution thus failed to prove the first ingredient of the offence.

In the case of **Dexter Johnson v. The Republic [2011] SCGLR 601**, Dotse JSC had this to say about the standard of proof in criminal matters:

Our system of criminal justice is predicated on the principle of the prosecution proving the facts in issue against an accused person beyond all reasonable doubt. This has been held in several cases to mean that, whenever any doubts exists in the mind of the court which has the potential to result in a potential miscarriage of justice those doubts must be resolved in favour of the accused person

The learned judge continued that:

I believe this principle must have informed William Black Stones's often quoted statement that 'better than ten guilty persons escape than one innocent suffer' which was quoted and relied upon by me in the unanimous decision of this court in the case of Republic v. Acquaye alias Abor Yamoah II , Exparte Essel and Others [2009] SCGLR 749 @750

Again in the case of **State v Sowah and Essel [1961] GLR 743-747, Crabbe JSC** held that:

A judge must be satisfied of the guilt of the crimes alleged against the accused person only on consideration of the whole evidence adduced in the case; and only then can he convict

I must say that having evaluated the evidence on record, this case need not have travelled beyond the evidence led by the prosecution because the evidence did not establish a prima facie case against the accused persons. Thus even though A5 and A6 did not testify when the accused persons were called upon to open their defence, same is not fatal because the prosecution's evidence did not warrant them to be called upon to open their defence. Be that as it may, on the totality of the evidence adduced by both the prosecution and the defence, it is my view that the prosecution failed woefully to prove the guilt of all the accused persons beyond reasonable doubt.

Accordingly, the accused persons are acquitted and discharged.

RELEASE ORDER

It is hereby ordered that the sum of GHC488.00 retrieved from the accused persons which is in the custody of the police be released to accused persons forthwith.

H/H ADWOA AKYAAMAA OFOSU (MRS)

CIRCUIT COURT JUDGE