

IN THE CIRCUIT COURT "A", TEMA, HELD ON MONDAY, THE 30TH DAY OF
DECEMBER, 2022, BEFORE HER HONOUR AGNES OPOKU-BARNIEH, CIRCUIT
COURT JUDGE

SUIT NO: D4/09/19

THE REPUBLIC

VRS:

KWAME SAM

ACCUSED PERSON

ABSENT

INSP. EMMANUEL ASANTE HOLDING THE BRIEF OF C/INSP. SUSANA
AKPEERE FOR PROSECUTION

PRESENT

NO LEGAL REPRESENTATION

JUDGMENT

FACTS:

The accused person was charged and arraigned before this court on 6th December 2018, on a charge of Stealing Contrary to **section 124(1)** of the Criminal Offences Act, 1960 (Act 29).

The brief facts presented by the prosecution are that the complainant, Jack Otchere is a businessman whilst the accused person is a welder and owns a workshop at community 9, Light Industrial area in Tema. The prosecution alleged that the complainant owns two stores where he keeps his heavy-duty machines for sale. In June 2016, the complainant travelled to Holland and asked the accused person to replace the locks in

his stores and give the keys to his sister by name Belinda. According to the prosecution, the accused person started selling the machines in the complainants' stores. When witnesses in the case saw the accused selling the machines and questioned him about it, he told them that the complainant asked him to sell them. In July 2017, the complainant returned to Ghana and when he visited his stores, he found out that all the machines valued at GHC 217,900.00, which he kept in the store were not there but the keys to the said store were still with the accused person. The complainant made a report to that effect to Regional Criminal Investigations Division, Tema, and the accused was arrested for investigations. According to the prosecution, the accused admitted having sold the complainant's machines but could not identify those who bought them to the police. After investigation, the accused person was charged with the offence and arraigned before the court.

THE PLEA

The accused person who was self-represented at the time his plea was taken pleaded not guilty to the charge after it had been read and explained to him in the Twi language. The accused person having pleaded not guilty to the charge, the prosecution assumed the burden to prove the guilt of the accused person beyond reasonable doubt.

ANALYSIS

It is trite learning that in criminal cases, the prosecution bears the burden to prove the guilt of the accused person beyond reasonable doubt. See Sections 11, 13, and 15 of the Evidence Act, 1975, (N.R.C.D. 323). 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."

Here, the accused person is charged with stealing contrary to **section 124 (1)** of Act 29. Under **Section 124(1)** of Act 29, a person who steals commits a second-degree felony. **Section 125** of Act 29 defines stealing as *"a person steals who dishonestly appropriates a thing of which that person is not the owner.*

In the case of **Cobbina v. The Republic** (J3 7 OF 2019) [2020] GHASC 4 (19th February 2020), the Supreme Court stated that the essential ingredients of the crime of stealing which the prosecution must prove beyond reasonable doubt, are;

1. The subject matter of the theft must belong to another person.
2. The accused person must appropriate it.
3. The appropriation must be dishonest.

Firstly, *the prosecution must prove that the person charged is not the owner of the item, which is the subject matter of the charge of stealing.* In the case of the **Republic v. Halm, Court of Appeal (full bench), 7 August 1969, unreported; digested in (1969) C.C. 155**, the full bench of the Court of Appeal per Amissah J.A., stated in its holding 1 as follows:

"The preliminary relationship for consideration in a charge of stealing is not so much a relationship between the person charged and some other person; identified as the owner, as a relationship between the person charged and the thing alleged stolen..."

The fact that the accused person is not the owner of the machines alleged to have been stolen is not in issue. Throughout the trial, the accused person did not challenge the fact that the complainant is the owner of the machines alleged to have been stolen. Thus, the prosecution proved beyond reasonable doubt that the accused person is not the owner of the machines alleged to have stolen.

Secondly, **the prosecution must prove that the accused person appropriated the said vehicle.** This is the most contentious issue. **Section 122(2)** of Act 29, defines appropriation of a thing as “...*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 that thing or of the benefit of his right or interest in the thing, or in its value, or a part of a thing.*”

To prove that the accused person appropriated the machines, the first prosecution witness (PW1), Kwame Okyere testified that he is an auto mechanic and owns a shop located near the accused person and the complainant’s warehouses at Community 9, Industrial Area, Tema. According to him, on several occasions, he saw the accused person bringing some people to sell some of the machines of the complainant to them. When he enquired from him, he stated that the complainant instructed him to sell the machines. As a result, he, together with his coworkers held a meeting with the accused person to ascertain the sale of the goods and the accused person again insisted that the complainant asked him to sell the goods. The elders on the premises asked for the complainant’s contact number for them to enquire from him, but the accused person said his phone was off and promised to give the number the next day but failed to do so. The next day, when they asked for the number again, he refused to give the phone number to them. As a result, they told one Abeka to inform the complainant about what was going on in the yard. When the complainant returned to Ghana, he denied authorizing the accused person to sell the items and reported the matter to the police.

The second prosecution witness, Kwame Agyei testified that he is a sprayer and has a shop close to the complainant and the accused person’s shops. PW2 testified that in the

year 2016, whilst the complainant was abroad, he saw the accused person selling out some of the machines but he did not know where he got complainant's keys to have access to his shop. Consequently, one day, about eight of the tenants at the premises confronted the accused person over the sale of complainant's machines. The accused person admitted to the selling of the machines but told them that he has been selling and sending the proceeds to the complainant. He further testified that one day, he saw the accused person conveying a jerk from the shop and when he asked him how much he was selling it, he told him GHC 100.00. When they asked the accused person to give the complainant's number for them to confirm, he refused to give the phone number to them. When the complainant returned to Ghana, it came out that he had not authorized the accused person to sell the goods and based on that the complainant reported the case to the police.

The third prosecution witness Mahmud Mohammed also testified that he was one of the tenants who confronted the accused person over the sale of the machines of the complainant and the accused person told them that it was the complainant who authorized him to sell the machines but when the complainant came, it turned out that he had not authorized the accused person to sell the machines.

The first to the third prosecution witnesses all testified that they saw the accused person selling some of the machines and they thought the complainant had instructed him to sell the machines but they later realized that he did not have such authorization.

The fourth prosecution witness testified that the complainant is his biological brother. He testified that the complainant owns some shops at Tema Community 1 where he

keeps machines. According to him, since the complainant travelled to Holland, he occasionally goes to inspect the machines. In January, 2017, he had information from some of the tenants on the premises that the accused person has been disposing off items in the shop. When he confronted him, he stated that the complainant instructed him to sell the items. When he informed the complainant, he denied knowledge of it and asked him to go and inspect the place. When he went, he realized that the accused person was able to take some of the items because he had the keys to the place. When the complainant returned to Ghana, he made a report to the police. The fourth prosecution witness under cross-examination by accused person stated that he did not see the accused person taking the machines from the shop but when he was confronted, he admitted taking some of the cables, sawmill motor and others.

The fifth prosecution witness, *No. 36803 D/Sgt. Tawiah-Amprofi* the investigator testified that when the complainant reported the case of stealing against the accused person, it was referred to him for investigation. The complainant pointed out the accused person as the one who stole his machines and based on that the accused person was arrested. When they went to the shop, he realized the shop was empty. However, when a search was conducted in the house of the accused person, they did not find any incriminating evidence. He tendered the investigation caution statement and the charge statement of the accused person as **Exhibit "B"** and **"C"** respectively. According to him, when he interviewed tenants on the premises, they confirmed that they saw the accused person selling the machines but they thought he was authorized by the complainant to do so. He also tendered in evidence **Exhibit "A"**, a list of items the accused person is alleged to have stolen totaling GH¢217, 900. Under cross-examination by the accused person, PW1 testified that the complainant gave him the list as items in the shop but the accused person maintained that the complainant sold the items himself.

The accused person in his investigation caution statement admitted and marked as **Exhibit "B"** without objection, stated that the complainant left Ghana for Holland in June 2016 and gave him money to fix his shop for him and put a lock on it but he kept the keys because he did not instruct him to give the keys to his sister as he is alleging. He further stated that the complainant did not instruct him to sell them but he sold some of the valuables including cables, pumping machine and motor at a reduced price and made an amount of GHC5,000, which he had spent. He further stated that he was ready to refund the money and requested for time to pay the money. This statement was repeated in his charge statement, **Exhibit "C"**. The statements of the accused person were admitted and marked in evidence without objection from Counsel for the accused person.

In the case of **State v. Owusu & Anor** [1967] GLR 114, the court held in its holding 1 that:

"an extra-judicial confession by an accused that a crime had been committed by him did not necessarily absolve the prosecution of its duty to establish that a crime had actually been committed by the accused. It was desirable to have, outside the confession, some evidence, be it slight, of circumstances which made it probable that the confession was true. From the evidence adduced in the instant case, there was sufficient corroboration which confirmed that the confession of each accused was true."

Contrary to the contents of the investigation caution statement and the charge statements, the accused person in his evidence on oath denied having stolen the items. According to his testimony, in the year 2017, the complainant informed him that some items were missing from his shop and he informed him that he had not seen the

machines. Again, he states that he has been operating in the shop since the year 2000 but he never sighted the machines. According to him, the complainant asked him to accompany him to the police station, which he did but at the police station he denied in his statement having stolen the items.

Under cross-examination, the accused person denied having stolen the machines and stated that if indeed the complainant's machine valued at GHC217,900, he would have come to court to testify and be cross-examined on the evidence and the alleged missing items were not found on him. The accused person also denied having admitted that he stole the machines in his investigation caution statement. According to him, he denied the charge of stealing but the investigator stated that he will write what he knew what to write and after writing the statement, he did not allow him to go through it and detained him in the cells.

On the totality of the evidence led, I find that the accused person voluntarily gave the statement to the police and that his evidence on oath recanting his statement is an afterthought. The accused person in his statement rather shows that he took part of the items and not all the items listed on the charge sheet.

In the case of **Lucien v. The Republic** [1977] 1 GLR 351, the court held that:

"It is a general principle that on a charge of stealing property, if it is proved that only part of the property was stolen, a conviction would not be invalid."

The Court in the Lucien case relied on the case of **Obeng alias Donkor v. The State** [1966] G.L.R. 259, S.C, where a man was charged with stealing £G321 19s. 6d. but the prosecution proved that he stole £G315. Apaloo J.S.C. (as he then was) sitting as an

additional judge, with assessors, at the High Court, Accra, acquitted the man on the ground that only part of the amount was proved to have been stolen and not the whole amount charged. At the then Supreme Court, Azu Crabbe J.S.C. (as he then was) delivering the judgment of the court deprecated this approach to criminal justice when he said at pp. 260-261:

“With all due respect to the learned trial judge, we think he erred in the view he took of the law . . . where a person is charged with stealing a certain sum it is sufficient if the prosecution proves that he in fact stole part of that sum.”

The statements of the accused person aside, there are ample evidence on record that the accused person appropriated some of the machines. The people who saw the accused person selling some of the machines gave evidence and were cross-examined upon. According to them, they even had a meeting with the accused person to ascertain if he had the authority of the complainant to sell the machines, which the complainant denied and reported the accused person to the police before returning to Holland. I therefore hold that the accused person appropriated some of the machines belonging to the complainant.

Lastly, **the prosecution must prove that the appropriation is dishonest.** Under **section 120(1) of Act 29**, a person can be guilty of dishonest appropriation in the following two circumstances:

(a) if it is made with intent to defraud, or

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

Under **section 16** of Act 29, intent to defraud is defined as

“an intent to cause by means of forgery, falsification or other unlawful act, any gain capable of being measured in money, or the possibility of any such gain, to any person at the expense or to the loss of any other person”

In the case of **Ampah v. The Republic [1976] 1 GLR 404 @413**, Per Abban J., the court held that:

“It can therefore be said that section 120 (1) of the Criminal Code, 1960 (Act 29), contemplates two kinds or types of dishonest appropriation. The first type is where the appropriation is made with intent to defraud; and the second type is where the appropriation is made without a claim of right and without the consent of the owner. That is, an appropriation with intent to defraud can amount to dishonest appropriation; and that an appropriation without a claim of right and without the consent of the owner is just an alternative definition which the section gives to the term “dishonest appropriation.” Proof of an appropriation with intent to defraud or of an appropriation without the consent of the owner, either one of them, can constitute dishonest appropriation. So that proof that an accused person appropriated the subject-matter of the charge with intent to defraud will by itself amount to dishonest appropriation and in such a case further proof of lack of consent of the owner to the appropriation will be absolutely unnecessary. It will be superfluous.”

In the instant case, the prosecution proved that the accused person appropriated the machines. The accused person was only authorized by the complainant to change the locks to his store and not take and sell some of the machines. The taking and selling of the machines in the shop even if only two valued at about GHC5,000 as the accused person would want the court to believe, was without the consent of the owner and that the appropriation if known to the complainant, he would have objected to.

On the totality of the evidence led by the prosecution and the defence put up by the accused person, I hold that the prosecution proved its case beyond reasonable doubt that the accused person appropriated the machines without the consent of the complainant and that the appropriation of the machines by the accused person is dishonest. I therefore pronounce the accused person guilty of the charge and convict him accordingly.

Sentencing

In sentencing the accused person, the court takes into consideration the fact that he is a first-time offender, the fact that the items stolen have not been retrieved and the value of the items stolen. The accused person failed to appear in court to plead in mitigation of sentence.

I therefore sentence the accused person to serve a term of imprisonment of four (4) years in hard labour.

Ancillary Orders

A bench warrant shall be issued together with the warrant of commitment of sentence. Upon arrest, the arresting officer shall endorse the date of arrest at the back of the warrant and the sentence of imprisonment shall commence from the date of the arrest of the convict.

**H/H AGNES OPOKU-BARNIEH
(CIRCUIT COURT JUDGE)**