IN THE CIRCUIT COURT HELD AT MPRAESO ON MONDAY 28TH DAY OF NOVEMBER 2022 BEFORE HIS HONOUR STEPHEN KUMI, ESQ, CIRCUIT JUDGE.

CASE NO: B1/ 75 / 2022.

THE REPUBLIC

V

1. **KELVIN BARCLAYS**
2. **EMMANUEL (AT LARGE).**

J U D G M E N T:

The accused person herein- Kelvin Barclays- together with a certain Emmanuel who is at large- is before this court to answer to some two charges. They jointly face one count each of conspiracy to steal; contrary to ***sections 23 and 124 (1) of the Criminal Offences Act, 1960, Act 29;*** and also to one count of stealing contrary to section **124 (1)** of the **Criminal Offences Act 29 (supra)** as amended by **the Criminal offences (Amendment) Act, 1998, Act 554.** The accused person upon his arraignment before the court denied the charges against him by pleading not guilty on both counts.

The accused is before the court on the above charges because the prosecution allege amongst others that in the evening of 9th May, 2022, at Atibie, the accused persons conspired and came down to Atibie from Nkawkaw to steal and succeeded in stealing some two nanny goats of the Complainant in the case, Nana Adjei Frempong.

It happened that a witness in the case- who doubles as a neighbour of the Complainant- came across the accused persons while they were standing by the roadside and waiting for a car to move the animals. He suspected the animals to be for the Complainant and thus confronted the accused persons, who failed to give any reasonable explanation as to how they had come by the animals.

Just after the Complainant had been called to the scene, the Emmanuel managed to run away, leaving the accused person behind, who was arrested and handed over to the police.

However the accused denied any knowledge of and involvement with the allegedly stolen animals. At the end of police investigations, he was charged and put before this court to answer to the above two counts.

As has been indicated above, the accused person pleaded not guilty to the charges against him. The effect of his plea of not guilty on the two counts was as follows:

> *"On a plea of not guilty the statutory duty of the court as imperatively set down in* ***Act 30, S. 172 (1)*** *required that the court should proceed to hear such evidence as the prosecution might adduce. That duty was mandatory. The trial judge therefore erred by not complying with that compulsory statutory duty…."*. See the case of **Dabla** and **Others v The Republic [1980] GLR 501**.

Owing to this requirement under the law, the case proceeded to trial for the court to take evidence from the prosecution.

CASE OF PROSECUTION:

The prosecution in proving their case ultimately called three (3) different witnesses; comprising the complainant, the witness, Bismark Atta Poku and the police investigator in the case, Detective Sgt Eric N. Tetteh.

It is also important to state that as part of his duties in the witness box, the police investigator tendered into evidence the cautioned and charge statements of the accused, Kelvin Barclays; marked as Exhibits A and B respectively. Also tendered into evidence was Exhibit C, a picture of the accused in a pose with the allegedly stolen two nanny goats of the Complainant.

CASE OF THE DEFENCE/ACCUSED PERSONS:

After the close of case of the prosecution, I determined, pursuant to section **174** of ***Act*** 30/1960;otherwise known as the **Criminal Procedure Act**, that the case of the prosecution has succeeded to raise a prima facie case against the accused persons to warrant them opening their defence on both charges or counts against them:

The section reads as follows:

> ***"Where at the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the accused to make a defence, the court shall call on the accused to make a defence and shall remind him the***

accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement"

Similarly, in the case of **Michael Asamoah and Another v The Republic, Civil Appeal No. J3/4/2017**, delivered on 26th July, 2017, Adinyira JSC, quoted for approval and relied on the dictum of **Lamer CJ** in the Canadian case of **R v P(MB) [1994] 1 SCR 555** as follows:

"Perhaps the single most important organizing principle in criminal law is the right of the accused not to be forced into assisting in his or her 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".

The accused person in his sworn defence continued to deny the offence. He did not call any witness and closed his defence.

ISSUES FOR DETERMINATION:

On the whole of the evidence before the court at the end of trial, I found the following to be the two (2) main issues for determination:

i. **Whether or not the the two accused persons conspired to steal the animals of the Complainant.**
ii. **Whether or not the two accused persons succeeded to steal the animals of the Complainant .**

ADDRESSING THE ISSUES:

Before I resolve the two issues, I have found it imperative to make the following comments. It is that as the accused had pleaded not guilty to the two charges, the effect of his pleas was as follows in law, especially in a criminal case of this nature:

"Unless it is shifted, the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion on that issue". See section **15** of the **Evidence Act, 1975, NRCD 323.**

Similarly, in the case of **Donkor v The State [1964] GLR 598, SC**, it was held inter alia by the Supreme Court of Ghana 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.

Therefore, in this case, I find that the prosecution, for alleging that the accused person, conspired to steal and succeeded in stealing the animals of the complainant, which has been denied by the accused person, came to assume the onus of proof to establish by sufficient evidence and proven beyond reasonable doubt that the accused person committed the alleged crimes. See also section **11 (2)** of the **NRCD 323** (supra).

In order to satisfy this legal burden, the law is that *"the prosecution has a duty to prove the essential ingredients of the offence with which the appellant (accused) and the others have been charged…"* See the case of **Frempong** alias **Iboman v The Republic [2012] 1 SCGLR 297, SC per Dotse JSC.**

It is essential that this court sets out in detail the essential ingredients of the offences of conspiracy and stealing under the law. I will first deal with offence of conspiracy.

Conspiracy is provided for under section 23(1) of Act 29/1960 (supra) as amended by the ***Statute Law Review Commissioner per the Revised Edition Act, 1998, Act 562,*** as follows:

> ***"Where two or more persons agree to act together with a common purpose for or in 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". See also the case of Republic v Augustina Abu and Others, (Unreported) Criminal Case No. ACC/15/2013; per Marful-Sau J.A, (as he then was).***

In the case of ***Francis Yirenkyi v The Republic, (Unreported) Criminal Appeal No. J3/7/2015, Dotse JSC held inter alia*** that the new formulation no doubt reinforces the view that conspiracy is an intentional conduct; observing that under the new formulation, a person could no longer be guilty of conspiracy in the absence of any prior agreement.

Meanwhile, section **124 (1)** of **Act 29/1960** creates the offence of stealing. It states that *"a person who steals commits a second degree felony"*. However, section **125** of **Act 29/1960**, defines the offence of stealing under our statute: Stealing is defined under that section as;

> ***"A person steals who dishonestly appropriates a thing of which that person is not the owner".***

So in the case of **Brobbey** and **Others v The Republic [1982-83] GLR 608**, the essential elements of stealing under Ghana laws were stated to be as follows:

> ***(i) The person charged must have appropriated the thing allegedly stolen.***
>
> ***(ii) The appropriation must be dishonest***
>
> ***(iii) The person charged must not be the owner of the thing allegedly stolen.***

Thus in my considered opinion, the two main (2) elements that must exist or be established in a case of stealing is dishonesty and appropriation; or simply dishonest appropriation. In the case of **Anang v The Republic [1984-86] 1 GLR 458**, dishonestly in the offence of stealing was stated to connote *"moral obloquy…….such a nature as to cast a slur on the character revealing him as a person lacking in integrity or as a plainly dishonest person…."*

Meanwhile, appropriation is defined under **section 122 (1)** of **Act 29/1960** (supra) to mean *"dealing with the thing by the trustee, with the intent of depriving a beneficiary of the benefit of the right or interest in the thing, or in its value or proceeds, or a part of that thing".*

Similarly, under section **122 (2)** of the same **Act 29/1960** (supra) 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 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…."***

Now, armed with little discussion about the nature of the offence of stealing and the essential ingredients that the prosecution ought to prove in a case of stealing, I would now go ahead and determine the two issue in this case of whether or not the case of the prosecution succeeded to prove beyond reasonable doubt that the accused persons herein committed the alleged two offences.

I will resolve the identified two issues together or jointly as one as they appear to flow from each other; albeit I will be careful to look out for the distinctive pieces evidence adduced in support and in respect of the two charges.

It is instructive to state that the current position on the offence of conspiracy is in sharp contrast to the previous position on conspiracy. For example in the case of ***Commissioner of Police v Afari and Addo (1962) 1 GLR 483,*** it was held inter alia that law on conspiracy in Ghana was wider in scope and content than the English law on that subject; consisting not only in the criminal agreement between two minds but also acting together in furtherance of a common criminal objective.

In simple terms, a court could convict and punish an accused person just on the evidence that he and some co-accused persons acted to commit a criminal offence. Suffice it to say that, evidence of prior or previous agreement by the accused persons to commit the offence was not required to be proved to obtain conviction. Therefore, in the case of ***State v Otchere and Others (1963) 2 GLR 463,*** the position of the law was that;

> ***"A person who joins or participates in the execution of a conspiracy which had been previously planned would be equally as guilty as the planners even though he did not take part in the formulation of the plan or did not know when or who originated the conspiracy…".***

However, as has been stated above, there is a new formulation on the law of conspiracy in Ghana now. It is now an intentional conduct, and that there must be evidence that the accused persons had a prior agreement to commit the crime or offence. See the ***Francis Yirenkyi v The Republic*** case (supra).

Therefore, the prosecution in order to prove the guilt of the two accused persons before the court on the allegation that they conspired to steal the cattle of the Complainant, would only succeed if there is evidence of not only that they acted together but more importantly evidence that prior to acting together, they had an existing agreement to steal.

Now, I have examined or evaluated the evidence on conspiracy as offered by the prosecution and indeed on the whole of the evidence at the end of the trial, and I find sufficient evidence that establishes the guilt of the accused.

From the evidence, the accused person together with the other at large was found by the PW1 and PW2 with the two nanny goats at a place close to the house of the PW1. The PW1 had left home moments before with his animals at the house. Before he could return, he received a call from the PW2 who told him he had come across the accused persons with the two nanny goats.

The A1 does not deny that. He together had been found in possession the two nanny goats, which the PW1 and PW2 identified and testified to belong to the PW1. It was why the court had determined that there was a prima facie case against him.

In that state of affairs, the evidential burden was on the accused to offer reasonable explanation as to how he came by the animals. On the evidence, the court holds that the Accused woefully failed to adduce any reasonably probable evidence in that regard.

He also failed to offer any reasonable doubt as to how he came into possession of a recently stolen property. The law is that where there is no evidence as to how goods or property got into the possession of an accused person, and the goods or property are proved to have been recently stolen, the doctrine of recent possession will apply.

The law dealing with the principle of recent possession is discussed in paras. 2102 and 2103 of Archibold, Criminal Pleading Evidence and Practice (35th ed.), pages 838-839. Paragraph 2103 says:

> ***"Where the only evidence against the prisoner is that he was in possession of recently stolen property, the jury should be directed that they may infer guilty knowledge, (i) if the prisoner***

has offered no explanation to account for his possession of the property, or (ii) if they are satisfied that the explanation, if any has been given, is untrue. They should also be told that if an explanation has been offered which leaves them in doubt as to the knowledge of the prisoner that the property had been stolen, the offence has not been proved, and the verdict should be Not Guilty.

If there is evidence that the prisoner was in possession of property recently stolen, and there is also other evidence tending to show guilty knowledge, the judge should direct the jury, so far as they are dealing with recent possession, in the same terms; and he should then go on to review the other evidence which may or may not be consistent with the explanation given by the prisoner . . ."

Moreover, from the evidence, he failed to call evidence to support some of his positive assertions which could have helped to raise a reasonable doubt in the mind of the court.

For example, evidence to show he had arrived at Nkawkaw that same day from Accra to work at a construction site, or evidence of him going to the game center for the first time and his meeting with the Emmanuel at large. All these positive assertions were capable of proof.

The court thus rejects the explanations or version of the accused person as being not reasonably probable or reasonably true for good reasons. In that the court finds his explanations- to the fact that he came to Nkawkaw for the first time, went to a game center and gave money to the said Emmanuel whom he had not known until then and who later asked to follow him to Atibie for him to refund the money to accused at that time of the night- to be a complete fabrication; one in the realm of fanciful possibility only given to deflect the course of justice as cautioned by Denning J (as he then was) in the case of ***Miller v Minister of Pensions (1947) 2 ALL ER 372 at 373. See also the case of***

I find that the A1 and A2 planned and agreed to come to Atibie to steal and that in fulfillment of the said agreement, succeeded in taking and moving away the animals the PW1 from his compound at Atibie.

It is my considered opinion that there is sufficient and credible evidence of conspiracy against the accused person. The A1 is therefore convicted and found guilty on the two counts.

SENTENCING

The punishment for conspiracy is provided for under section 24 (1) of Act 29/1960 (supra) as follows:

"Where two or more persons are convicted of conspiracy for the commission or abetment of a criminal offence, each of them shall, where the criminal offence is committed, be punished for that criminal offence, or shall where the criminal offence is not committed, be punished as if each had abetted that criminal offence".

Now section 124 (1) of the Criminal Offences Act, 1960, Act 29 categorizes the crimes of stealing as a second degree felony; albeit that that provision does not specify or state the punishment for the said offence.

However, sub-section 5 of section 296 of Act 30, mentions or lists specific offences involving the sections or provisions on stealing, fraudulent breach of trust, defrauding by false pretences, unlawful entry etc. and stipulates that in such cases the sentence should not exceed 25 years.

In the light of the above, the court hereby sentences the convicts, Kelvin Barclays, to pay a fine of one hundred and fifty (150) penalty units on each of the counts 1 and 2 respectively. In default, he is to serve six (6) months imprisonment in hard labour on each of the said counts. For the avoidance of doubt, the above sentences are to run concurrently.

In passing the above sentences, I considered the pleas in mitigation of sentence by the convict. I also considered the fact of the convict being a first offender, the remorse he showed from the dock and the about six (6) months he spent in lawful police custody following his failure to meet the bail conditions. See Article 14 (6) of the Constitution, 1992. The court however finds the sentences appropriate and deterrent enough.

He is however informed of his statutory right of appeal.

SGD:

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H/H STEPHEN KUMI
(CIRCUIT JUDGE)