IN CIRCUIT COURT '1' HELD AT TAKORADI IN WESTERN REGION ON THURSDAY, 13TH OCTOBER, 2022, BEFORE HIS HONOUR MICHAEL KUDJO AMPADU, CIRCUIT COURT JUDGE.

SUIT NO. C1/4/21

THE REPUBLIC

VS.

1. JAMES ATSU @ HAMBO

2. SERVANCE AFAREBA @ SULLEY

JUDGEMENT

Accused Persons: Present

Prosecution: DSP Isaac Mensah Apenteng – present

The accused persons were charged with conspiracy to commit robbery, contrary to section 23(1) and 149 of the Criminal Offences Act, 1960, Act 29 and the first accused person, James Atsu a.k.a. Hambo was further charged with three other counts of Causing Unlawful Damage contrary to section 172 of Act 29/60, Unlawful Entry contrary to section 152 of Act 29/60 and Attempt to Commit Crime, to wit Robbery contrary to sections 18(2) and 149 of the Criminal Offences Act, 1960, Act 29.

Both pleaded not guilty to the charges. The facts of the case are that the complainant, Joseph Essien is a mason and stays at LOVERS IN Spot opposite Railway Station,

Takoradi. The first accused (A1), James Atsu alias Hambo is a head porter resident adjacent the Takoradi Railway Station at a place popularly called BOTTOM THREE. Second accused person (A2), Servance Afareba alias Sulley is also a head porter and stays in the same room with A1.

On 29/09/2020 at about 2:30am, complainant woke up to urinate and saw that a window of the drinking spot leading to the sales desk area was opened. He suspected that a thief had come in to steal so he went closer to check the area. He climbed that window into the sales desk area and saw the A1. When he tried to arrest him, the A1 struggled with him and inflicted knife wounds on him before escaping through that opened window. Complainant chased him and raised an alarm and witness Kwaku Ofori who stays adjacent the drinking spot had also woken up. He came to the frontage of the said drinking spot, saw the A2 fleeing the frontage of the drinking spot in a black dress so he pursued him to the lorry park on the WAMCO grounds. When witness Kwaku Ofori came out of the lorry park towards the Takoradi Railway Station, he met witness Helena Nkrumah who flashed the light beam of her flashlight at the face of the A2. The A2 succeeded in running away from the witnesses and entered the Railway Station. The case was reported and a police medical form was issued to complainant to seek medical attention. Complainant duly submitted his endorsed medical form to the police. During investigations, witness Musah Ayidana visited the crime scene and retrieved a black canvas with brown lace, a pinch bar, a kitchen knife and brought same to police. Witness Justice Ofori identified the pinch bar and the kitchen knife as belonging to the A1. He also identified the black canvas with brown lace to belong to the A2. The accused persons were arrested. During further investigations, the body of accused persons were physically examined. Two shallow cuts were found at the back of A1.

At the crime scene, police found that there were two small nails fixed to the upper part of the window through which A1 escaped. The size of the nail and its shape suggests that accused grazed his back against those nails during his escape which he had the cut.

During interrogation at the police station, A1 admitted committing the offences. A short video footage of his admission was taken but he subsequently denied committing the offences in his investigation cautioned and charge statements.

The prosecution called five witnesses to establish their case. They were Joseph Essien (PW1), Musah Ayidana (PW2), Kwaku Ofori (PW3), Mary Batuame (PW4) and No. 36589 Detective Sargent Edward Twum Ampofo (PW5).

Accused persons testified on their own and A1 called one witness after his evidence-in-chief, Emmanuel Jackson (DW1) but the A2 did not call any witness after his evidence-in-chief.

Section 11(2) of the Evidence Act, Act 323 of 1975 puts the burden on the prosecution to establish the facts that are essential to the guilt of the accused person, to produce sufficient evidence so that the Court can find the guilt of the accused beyond reasonable doubt.

Section 13(1) of the Act states as follows;
"In any 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".

A further explanation of this requirement of proof by the prosecution is provided for at section 22 of the Act that *"in a criminal action, a presumption operates against the accused as*

to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond reasonable doubt…"

The accused is however not supposed to prove that he is innocent and it is enough if he raises reasonable doubt in the case of the prosecution. It was stated in the English case of **Woolmingtom vs. D.P.P. [1935] AC 462 at 481 per Sankey L. C.** that *"whiles the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury of his innocence".*

Count One

Section 23(1) of Act 29 provides that *"where two or more persons agree to act together with a common purpose for or in committing or 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"*

To succeed on a charge of conspiracy, the prosecution may prove first, that the accused persons agreed together with a common purpose for or in committing or abetting a crime or two, that the accused persons acted together with common purpose for or in committing or abetting a crime.

It was however held in the case of **Commissioner of Police vs. Afari and Addo [1962] 1GLR 483, SC** that *"it is rare in conspiracy cases for there to be direct evidence of the agreement which is the gist of the crime. This usually has to be proved by evidence of subsequent acts done in concert and so indicating a previous agreement".*

The A2 both in his caution and charge statements, denied his involvement in the crime. In defence, the A2 stated that he was watching TV at No Hurry in Life Drinking Spot around 4:00am when witness Musa, PW2 came to woke him up whiles he was dozing to go and call Atsu (A1) from the room. DW2 asked them to accompany him to the police station and at the police station the PW2 pointed them out as the persons who committed the offence in question. PW3, in his evidence to this Court stated that "… I woke up and rushed to the main gate leading to the spot and I saw someone going outside but I did not see his face". PW3 could not therefore tell whether the person rushing out was A1 or A2. The other person who witnessed the crime is the PW1, the complainant and he was the victim of the incident. In his evidence to the Court, he did not mention the A2 anywhere as participating in the crime.

The object that is being used to connect the A2 to the crime by the prosecution is the black canvas with a brown lace, Exhibit "H" which was alleged to be for the A2. The A2 stated all through that the said canvas was not his. This evidence that the said canvas was for the A2 was not proved before the Court. The said canvas was allegedly found at the scene of the crime that is in the drinking spot.

In cross-examination of the PW1 by the A2, the PW1 answered this way;

Q: You said you saw the person who struggled with you, did you see me also?

A: I did not see you. It was A1 I saw.

Q: Do you remember after struggling with the person you claim to have seen, you met somebody who told you he had seen the person you struggled with?

A: Yes.

Q: No further question.

Considering the above exchanges in cross examination, the facts and evidence of the prosecution and the defence of the A2, it is difficult to connect the A2 to this crime. In the case of Commissioner of Police vs. Afari supra, the Supreme Court opined that it is difficult in the offence of conspiracy to have any direct evidence of the agreement and so usually it has to be proved by evidence of subsequent acts done in concert and so indicating a previous agreement. The facts and evidence before this Court, unfortunately do not give any clue to any subsequent acts that can connect the A2 to the crime. As established in the case of the Woolmington vs. D.P.P. supra, there is no burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt.

The A2 has been able to raise this doubt in the mind of the Court. The A2 is therefore acquitted and discharged on the count one which is conspiracy to commit robbery contrary to section 23(1) and 149 of Act 29/60. Since one person cannot conspire with himself, A1 is also acquitted and discharged on the first count which is conspiracy.

The A1 was additionally charged with counts two, three and four which are Causing Unlawful Damage, Unlawful Entry and Attempt to Commit Crime, to wit, Robbery. These three counts will be decided together since they are inter-related.

In the case of **The Republic vs. Aaron Kwesi Kaitoo, HC Suit No. FTRM/198/2014** dated 23rd May, 2017, the Court of Appeal had this to say to the Accused/Appellant per Mariam Owusu JA (as she then was) that the issue of the failure of the Court to deal with the charges individually or failing to address the charges in accordance with each count in assessing the case before directing the accused to open his defence was not fatal since there was no such need especially when the charges are inter-related. The three counts

against the A1 are seriously inter-related and that is why, as said earlier, will be determined together.

Section 18(1) of Act 29 provides that;
A person who attempts to commit a criminal offence shall not be acquitted on the ground that the criminal offence could not be committed according to the intent

a. By reason of the imperfection or other condition of the means; or
b. By reason of the circumstances under which they are used; or
c. By reason of the circumstances affecting the person against whom, or the thing in respect of which the criminal offence is intended to be committed; or
d. By reason of the absence of that person or thing.

In her book "The General Part of Criminal Law – A Ghanaian Casebook, the learned author, J. Mensah Bonsey explains what will amount to an attempt at pages 455 to 460 as follows; *"An attempt" in ordinary usage, suggests that an activity which was begun but did not see completion… thus an attempt may describe an act which was not completed before detection or one which was completed but which failed to achieve its objects…"*

From section 18(1), the evidence of the prosecution must be such that the offence would have been committed if any of the factors enumerated above had not intervened or happened to prevent the accused from achieving his final criminal objective, he would have achieved same. The A1 denied all the other three counts made against him both in his caution, charge and evidence in chief to this Court.

In his cautioned statement, the A1 stated that he knew the complainant, PW1 because he has worked with him before at Duty Free Area at Harbour and that it is not true that he agreed with anybody to commit any crime. He also denied causing any unlawful damage

nor enter any premises unlawfully or attempted to rob anybody. He again denied causing any harm to the complainant, PW1. He relied on the above cautioned statement when he was charged.

In his evidence-in-chief to the Court, the A1 alleged that on the said date, he was sleeping about 3:00am when Musah (PW2) came and woke him up and asked him and A2 to put on dress and follow him to the police station. At the police station, they were identified to the police as the persons who caused harm to the PW1.

He said he was not the person the complainant alleged he saw in the said drinking spot on that faithful night and he said he wondered whether the complainant could actually identify an attacker in an inner bar of a shelter that had no lights on. According to him even though the PW5 alleged he (A1) had sustained two small cuts on his back as he ran through the window of the inner bar, the PW5 failed to back that claim with any medical or scientific proof of his claim. It was his defence also that the complainant also stated that he also came out of the inner bar through the same window and he wondered why the complainant did not sustain same injury and that the evidence of the prosecution is inconsistent with the facts. According to him, he remembered telling the PW5 that he sustained the injury at his back at No Hurry in Life Drinking Spot on 28/09/2020 during a small struggle with Obourfa.

After his evidence-in-chief, the A1 called one witness, Emmanuel Jackson. The import of his evidence was to let the Court know that it was not true that the accused person confessed to the crime as the prosecution wants the Court to believe by the tendering of an alleged pen drive that contains an alleged confession statement from the A1. According to him, the A1 was compelled by the complainant, PW1, to admit the offence so that he will withdraw the case from the police. That it was based on that promise that

the A1 admitted that he committed the offence and that he (DW1) was instrumental in that negotiations.

To this Court, the evidence of the DW1 does not have any significant impact on determination of this matter because the alleged pen drive containing the alleged confession statement of the A1 was not tendered in evidence by the prosecution either during the time of disclosures at C.M.C. or any other time even though it was mentioned by the PW5 and stated somewhere by the prosecution during cross-examination. The mere mention of the fact of the confession statement without any further proof will not entice the Court to consider such a fact in law and more so not when it is done in a criminal trial.

The determination of this matter will therefore be based on the prosecution's case and the defence of the A1.

The A1 here stands charged with the offence of attempted robbery contrary to sections 18(2) and 149 of the Criminal Offences Act, Act 29/60.

In fact an "attempt" at a crime has been defined and explained earlier on and section 149 of Act 29 as amended by Act 646 of 2003 provides that "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 imprisonment of not less than ten (10) 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 not less than fifteen (15) years"

Section 150 of Act 29/30 defines Robbery and provides that

"a person who steals a thing commits robbery

a. If in, and for the purpose of the stealing the thing, that person uses force or causes harm to any other person; or
b. If that person uses a threat of 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.

The A1 denied attempting to rob on the said day. He alleged he was sleeping in his room when PW2 came to wake him up and lured him to the police station and identified him to the police as the person who attacked the PW1 when he attempted to rob from the Lovers Inn. The PW1 insisted that it was the A1 he saw on that night.

The A1 alleged in his defence that he was not the person the PW1 saw that night. He said he wondered how it was possible for the PW1 to recognize him as the victim when there was no light in the premises of the Lovers Inn.
In cross-examination of the A1 by the prosecution, he also answered this way;

Q: You know PW1 very well?

A: Yes.

Q: And you worked with PW1 as a casual labourer at Port before?

A: Yea.

Q: So PW1 can identify you at any time?

A: Yes, but sometimes, some people look alike.

From the above, the PW1 has denied that he was not the person the PW1 met in the drinking spot. It is clear from the facts so far that the offence of unlawful damage, entry

and attempt at robbery were made but the issue is whether or not the person that the PW1 saw is the A1.

A1 admitted in cross-examination, in his defence, cautioned and charged statements that he knows the PW1 very well because they have both worked together as casual labourers at harbour. This means that PW1 also knows A1 very well for the same reason that the A1 knows him.

This Court believes that this knowledge of themselves should be enough for the parties to identify themselves even in darkness. However, the A1 stated that sometimes people look alike so the person whom the PW1 saw may not be him. It is however the knowledge of themselves that made the PW1 to identify the A1 from his hospital bed as the one who stabbed him with the knife. Because the A1 said the person whose back which the PW1 saw was not his back, the Court will agree that that back was somebody's back and not the back of the A1.

The next consideration is the injury at the back of the A1. A1 said even though the prosecution identified those injuries at his back as shown on Exhibit "A", the prosecution could not produce any medical or scientific proof of that injury. This Court does not understand what scientific or medical proof the A1 talked about. The injuries were physically at his back. He admitted that he had the injury at his back. He however denied that the injury occurred as a result of the alleged nails fixed at the window that he grazed through.

In his evidence-in-chief to this Court, that is in his witness statement, the accused stated at paragraph 14 that "it was the counter at that bar that cut me on 28/09/2020 during a small struggle with Obourfa".

In cross-examination by the prosecution, the accused answered this way concerning the injury at his back.

Q: Per paragraph 15, did you not sustain any injury?

A: I sustained an injury but the wound at my back was from T & J which injured me a day before the incident. Rather, it was the same night that I got the injury and the police said it was not fresh.

The A1 did not call Obourfa as witness to explain how he got the cut at his back and how his struggle with him resulted in that injury at his back. This cut was also said to be caused from an injury from the counter and also from a cut from T & J. All these causes were not properly woven together for the Court to understand the actual cause of the injury at the back of the A1. In his cautioned and charge statements also, the A1 never mentioned about the origins of his cut neither did he mention the name of his friend Obourfa. **Majolagbe vs. Larbi [1959] GLR 190, Zabrama vs. Segbedzi [1991] GLR 221; Bonsu vs. Kusi [2010] SCGLR 60** and others as well as section 10, 11(1) & (4), 12 and 14 of the Evidence Act, 1975, Act 323 cast a standard of proof on a party alleging the existence of a fact before a finding could be made in his favour that he alleges exists.

The A1 failed to prove the cause of the injury at his back. The prosecution on the other hand proved the cause of the injury, even though the A1 may not admit this prove as medical or scientific, by showing that the injury was caused by two nails fixed at the upper part of the window through which the A1 tried to escape after struggling with the PW1. Exhibit "F" shows the damaged window through which the A1 allegedly passed through into the Lovers Inn. Exhibit "G" shows the two nails that allegedly scratched the back of the accused person and caused his injury. A1 said he got this injury from an injury caused to him by a T & J. He could not tell how this T & J caused this injury to him.

He also stated at paragraph 16 of his defence that if that injury at his back was caused by the two nails at the top of the damaged window from where he was alleged to have escaped, then same injury should have been caused to the PW1 also since he also alleged he passed through the same window.

As much as the above argument sounds logical, the circumstance and the exigencies of the A1 at the time he grazed through the window was not the same on the complainant (PW1) at the time he passed through the same window.

From the demeanour and presentations made by the A1 before this Court, this Court has no doubt in its mind that the A1 was the person the PW1 saw or met in Lovers Inn and who tried to harm him in other to escape from his stealing syndicate. The Court comes to this conclusion because the parties agreed they know themselves very well and so could identify themselves when they meet and also the Court believes that the injury at the back of the A1 was caused by the nails at the time of his escape. In his cautioned and charge statements, he never mentioned this injury anywhere and how he sustained them. Their reference at the time of his witness statement can only be seen as an afterthought. He is therefore convicted of the offence of Robbery contrary to section 149 of Act 29/60 as amended by Act 646 or 2003. The A1 committed the offence with the use of an offensive weapon by which he caused harm to the complainant and this is evidenced by Exhibit "J".

Since he was found insider the Lovers Inn, he is also convicted for Unlawful Damage and Unlawful Entry.

In passing his sentence, the Court has taken into consideration the rate of armed robberies and their increase in the metropolis, the remorse exhibited by the A1 throughout the trial which could be seen from his demeanour and his youthful age.

He is therefore sentenced to sixteen (16) years imprisonment in hard labour on each of the three counts and the sentences are to run concurrently.

SGD

H/H MICHAEL KUDJO AMPADU

CIRCUIT COURT JUDGE