

**IN THE CIRCUIT COURT HELD AT SOGAKOPE ON MONDAY, 3RD
OCTOBER, 2022 BEFORE HIS HONOUR ISAAC ADDO, THE CIRCUIT
COURT JUDGE**

CASE NO: 206/2021

THE REPUBLIC

VRS

- 1. ATITSOGBUI SELORM aka AGBAYISA**
- 2. AZIEDU BRIGHT**
- 3. AGBADO MOSES**

ACCUSED PERSONS PRESENT

CHIEF INSPECTOR JACOB AWIAGAH FOR THE REPUBLIC PRESENT

**JOAN AKORFA OSEI. ESQ. HOLDING THE BRIEF OF EMILE ATSU
AGBAKPE, ESQ. FOR THE ACCUSED PERSONS PRESENT**

JUDGEMENT

Before I start reading this judgement, let me put it on record that the defence counsel, Emile Atsu Agbakpe, Esq. failed to file his Written Submission of No Case to Answer on behalf of the Accused persons.

The Accused persons were arraigned before this court charged with the following offences:

- a. Conspiracy to commit crime to wit Defrauding by False Pretences contrary to sections 23(1) and 131, and

- b. Defrauding by False Pretences contrary to section 131 of the Criminal Offences Act, 1960 (Act 29).

THE CASE OF THE PROSECUTION

The facts of the case as presented by the prosecution were that on the 3rd March, 2021, A1 approached the complainant and told him he had a friend who was a galamseyer who had gold and wanted a buyer. The complainant consulted his brother, Robert Obitrim who was the potential buyer and he developed interest in the gold. A1 then introduced the complainant to A2 as the seller of the gold at Mafi-Wute in A3's house. A2 brought out the gold and both parties tested it and it was proven to be a real gold. After the test, A2 offered to sell the gold to the complainant at the cost of GH¢10,000.00. The complainant contacted his brother, the potential buyer and he sent him GH¢10,000.00 which he paid to A2 at Mafi-Wute in A3's house. Instead of the Accused persons together with the son of A3 by name Light Agbado who is at large to give out the original gold that was tested by both parties to the complainant, he rather gave him a stone well decorated in gold colours. When the complainant sent the gold to the prospective buyer, he detected that it was not an original gold but rather a stone. The complainant quickly lodged a complaint at the Mafi Kumase Police Station where A1 and A2 were arrested and an amount of GH¢1,500.00 retrieved from A1 and GH¢1,000.00 was brought to the station by A2 being part of their share from the sale of gold. A3 also gave an amount of GH¢3,000.00 to his friend, one Agbenyo Samuel being his share of the transaction to be given to the police and absconded upon hearing of the arrest of A1 and A2. He was subsequently arrested.

The prosecution in establishing its case called three (3) witnesses to testify in support of its case.

The testimony of PW1 (Semanu Deku) and PW2 (Robert Obitirim) confirmed the facts as presented by the prosecution.

PW3 (G/Constable Nartey Ebenezer Awarthey) investigated the case. He relied on his Witness Statement together with the exhibits attached.

At the end of the prosecution's case, the court was enjoined to determine whether or not a prima facie case had been made out against the Accused persons to warrant them to enter into their defence.

Sections 173 and 174(1) of the Criminal offences (Procedure) Act, 1960 (Act 30) provides:

"173 Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require the accused to make a defence, the Court shall, as to that particular charge, acquit the accused.

174(1) 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 sufficiently to require the accused to make a defence, the Court shall call on the accused to make the defence and shall remind 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."

In the case of Michael Asamoah & Another vrs The Republic [2017] DLSC 2628 @ page 4, the Supreme Court speaking through Adinyira JSC stated the law on submission of no case as follows:

“The grounds upon which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under a summary trial or trial on indictment may be restated as follows:

- a) There had been no evidence to prove an essential element in the crime;*
- b) The evidence adduced by the prosecution had been so discredited as a result of cross-examination; or*
- c) The evidence was so manifestly unreliable that no reasonable tribunal could safely convict upon it;*
- d) The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt and one with innocence. See also the cases of Tsatsu Tsikata v. The Republic [2003-2004] SCGLR 1068; Affail v. The Republic [1975] 2 GLR 69; Apaloo and Others v The Republic [1975] 1 GLR 156-192; State v. Ali Kassena [1962] 1 G.L.R. 144, S.C.”*

This being a criminal case, the prosecution bears the burden of proof to establish the guilt of the accused person beyond reasonable doubt as per sections 11(2) and 13(1) of the Evidence Act, 1975 (NRCD 323) and also as was stated in the case of Bruce-Konuah v. The Republic [1967] GLR 611 – 617, where Amissah J.A. stated thus:

“Barring the well-known exceptions, an accused is under no obligation to prove his innocence. The burden of proof of the accused person’s guilt is on the prosecution.”

Section 23(1) of the Criminal Offences Act, 1960 (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 or abet the criminal offence.

In law, Conspiracy consists not merely in the intention of two or more persons, but also in the agreement of two or more persons to do an unlawful act or to do a lawful act by an unlawful means. And a person could be charged with conspiracy to commit a crime whether he was involved in the conspiracy before the act (accessory before the fact) or after the act (accessory after the fact). What is material is whether there was a common design by the parties to commit the crime.

To found conviction for conspiracy, the prosecution has the duty to establish the following ingredients:

1. That the offence involved two or more persons;
2. That those persons agreed or acted together; and
3. That they acted together with a common purpose, i.e. to commit a crime or do an unlawful act or a lawful act by an unlawful means.

Section 132 of Act 29 provides:

“A person defrauds by false pretences if, by means of a false pretence, or by personation that person obtains the consent of another person to part with or transfer the ownership of a thing.”

In Republic vrs Selormey [2001-2002] 2 GLR 424, the court stated the following ingredients in an offence of defrauding by false pretences:

“A person shall make a false representation or by a personation either by written, spoken or sign language or any other means whatsoever; the said representation was made in regard to the existence of a state of facts to obtain the consent of another person; the said representation was made in regard to the existence of a state of facts to obtain the consent of another person; the said representation was false or made without the belief that it was true; as a result of the false representation the accused person caused the other person to part with or transfer ownership of a thing.” See also Sarpong vrs The Republic [1981] GLR 790, Adobor vrs The Republic [2008] 19 MLRG 23 CA.

Section 133 of Act 29, in defining defrauding by false pretences, lays out the following ingredients:

1. Representing the existence of a state of fact,
2. Either with the knowledge that such representation is false or without the belief that it is true,
3. The representation should be made with the intention to defraud.

The Accused persons denied the offences throughout the trial when they cross examined the prosecution witnesses. Even in their Cautioned and Charge Statements given to the police, they denied all the charges.

It is not in dispute that the first test carried out on the item indicated that it was a real gold. What is also not in dispute is the fact that it was PW2 who directed and instructed PW1 on how the item should be tested and same was complied with by PW1. Also, the test was carried out in the presence of PW1.

It is the case of the prosecution that PW1 returned to the Accused persons to take the item that was tested earlier and proved to be gold and paid the money.

Surprisingly, PW1 did not cause for a second test of the item to be carried out to confirm whether it was the same item that was earlier tested in his presence or not. According to PW1, when he sent the gold away, he realized it was a stone and not a genuine gold. The Accused persons have also maintained that they handed over a real gold to PW1. For the avoidance of doubt, I reproduce part of the cross examination of PW1 by the 2nd Accused person on the 19th April, 2022 as follows:

Q. When I gave you the item did you test it?

A. Yes My Lord.

Q. Didn't you see that it was a genuine thing so you paid me?

A. Yes, it was genuine.

Q. Why did you get home and later caused my arrest that I gave you stone?

A. When we tested it the first time it was gold. I told you I was going to Mafi Kumase for money from my brother. When I came the second time to pay for it, you tied it in a rubber for me. We didn't test it again.

Q. As a businessman who initially tested something, when you are coming to pay for it and collect same, what were you expected to do?

A. I explained to you that I knew about nothing about gold. That it was my brother who knows about it so I called him to come and he came.

Q. Was your brother present when we tested it?

A. I came alone to test it.

Q. Wouldn't it mean that you knew much about it so you came alone to test it before taking it away?

A. The nature it was supposed to be in when tested, my brother told me that is why I came alone.

Q. So the nature, it was supposed to be, wasn't that what you saw as your brother told you that you paid after?

A. Yes, that is why.

Q. Why did you cause our arrest that we gave you a wrong thing?

A. When I came for it the second time, I took it to my brother's place, he used acid to test it as I did earlier. He realized it was a fake gold.

Q. I put it to you that you tested the thing and it was a pure gold, and you went to change it before handing it over to your brother.

A. It is not true.

Q. I put it to you that you are not truthful to the court.

A. It is not true.

Q. Are you aware you took something from me and gave me money?

A. Yes My Lord.

The following is also what transpired when PW2 was cross examined by the 2nd Accused person on the 16th May, 2022:

Q. When you sent PW1 to come and buy the item and you gave him something to test, did he tell you it was a genuine thing when he tested it?

A. It was genuine. He even videoed it and sent it to me.

Q. Isn't it because the video of the test showed that the item was genuine that was why you gave him money to buy it.

A. Yes, I gave him the money per the video I saw. But when he came you gave him a stone.

Q. I put it to you that I took the money because I gave him a genuine thing.

A. You didn't give him a genuine thing so you run away from the town that day.

Q. I sold a genuine thing to PW1. I didn't run away from the town. I went to visit my wife and child.

A. It wasn't a genuine thing.

Q. You initially tested and it was genuine and paid. What test did you conduct again after receiving it to prove that it was not genuine so that we refund you money to you?

A. I gave back the item to the police.

Q. We sold a good thing for you.

A. It is not true.

What is also surprising is the fact that the police officer who investigated the case did not carry out any test on the items presented to him by the complainant to know its genuineness. It is therefore not surprising when he answered under cross examination that the items presented to him by the complainant were real gold. The following is part of what transpired when PW3 was cross examined by the defence counsel on the 17th August, 2022:

Q. Do you know how to test a real gold from a fake gold?

A. Yes My Lord.

Q. How is it done?

A. You send them to the Minerals Commission to test the gold.

Q. Did you carry out any test in the instant case?

A. No My Lord.

Q. PW1 told you that they tested the gold and it was real gold.

A. Yes My Lord.

Q. Same was confirmed by PW1?

A. Yes My Lord.

Q. It was based on that test the item was purchased.

A. Yes My Lord.

Q. They later on turned to say it wasn't a real gold.

A. Yes My Lord.

Q. You took hold of that particular item.

A. Yes My Lord.

Q. Did you send it to the Minerals Commission?

A. Yes My Lord.

Q. How do you want this court to believe that this item which was tested and paid for is not a real gold?

A. The pictures Accused sent to complainant was different from what he gave to the complainant.

Q. Do you have the pictures the Accused sent to complainant?

A. Yes My Lord.

Q. Are they before this court?

A. Yes My Lord. It is Exhibits 'D' and 'D1'.

Q. I put it to you that Exhibits 'D' and 'D' are real gold.

A. Yes My Lord. (Emphasis mine)

So who is telling the truth? At this stage the court is unable to believe either the story of the prosecution or the defence. The evidence adduced at this stage of the trial is evenly balanced in the sense that it is susceptible to two likely explanations, one consistent with guilt and one with innocence. In such a situation, the Supreme Court in the Michael Asamoah case (supra) enjoins this court to uphold a submission of no case to answer.

Upon the totality of the evidence adduced at this stage of the trial, I find that the prosecution has not been able to make out a prima facie case against the Accused

persons. In the circumstances, I hereby acquit and discharged the Accused persons.

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ISAAC ADDO
CIRCUIT JUDGE
3RD OCTOBER, 2022