

IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 10TH MARCH 2023 CORAM:
HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B7/14/2023

THE REPUBLIC

VS

FRANK OBENG *alias* SHATTA

ACCUSED PERSON PRESENT

DETECTIVE INSPECTOR PETER SADAARI PRESENT, HOLDING THE BRIEF OF
SERGEANT PRINCE ADU AMOAKO FOR PROSECUTION

COURT'S DECISION ON SECTION 173 OF ACT 30

Section 173 of the *Criminal and Other Offences(Procedure)Act*, 1960(Act 30) states:

If 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 him to make a defence, the Court shall, as to that particular charge, acquit him.

Accused person is facing prosecution on the following charge:

STATEMENT OF OFFENCE

STEALING, CONTRARY SECTION 124(1) OF THE CRIMINAL OFFENCES ACT,
1960(ACT 29)

PARTICULARS OF OFFENCE

FRANK OBENG @ SHATTA, AGED 24YEARS, TAXI DRIVER: For that you on the 17th day of December 2022 at about 09:30pm at Mfuom Powerline near Dunkwa-On-Offin in the Central Circuit and within the jurisdiction of this court, stole Apsonic zone one motor cycle valued GH¢15,000.00 the property of one Mustapha Sulley.

Section 124(1) of Act 29 states:

Whoever steals shall be guilty of a second degree felony.

Accused pleaded NOT GUILTY to the charge.

The set of facts on which prosecution relied to charge Accused person is as follows:

“Complainant Mustapha Sulley is an excavator operator and lives at Dunkwa-On-Offin. While accused person Frank Obeng @ Shatta, is a Taxi Driver and reside at Mfuom near Dunkwa-On-Offin. On 17/12/2022 at about 9:00am, the complainant hired the accused person’s Taxi cab for a funeral program for a fee of GH¢150.00. The complainant after taken[sic] the vehicle also handed his Apsonic zone one motor bike value GH¢15,000.00 to the accused for safe keeping. On his returned[sic], complainant asked accused to bring the said motor bike and come for the said taxi cab. The accused sent the complainant’s motor bike to him as agreed and complainant gave the accused a sum amount of GH¢150.00. Accused person after collecting the said amount told the complainant that he was using his motor bike for his errands which he agreed. On

18/12/2022 at about 3:00am, the accused person called the complainant on phone and told him he parked the motor bike in his house that thief or thieves had stolen the said motor bike. The complainant was not satisfied with the explanation the accused gave and he reported the case to Police. On 21/12/2022, accused was arrested and he was charged with the offence as stated in the charge sheet and arraigned before this honourable court.”

To prove their case against Accused, prosecution called three witnesses and closed their case. The said witnesses were referred to as PW1, PW2 and PW3 in the order they testified. PW1 is complainant herein. PW2 is the investigator herein. PW3 is one Amoah Mike, who claimed he saw the motorbike parked by the road in a reckless manner and informed Complainant about it.

Section 125 defines ‘Stealing’ as:

A person steals if he dishonestly appropriates a thing of which he is not the owner.

In section 122(2) of Act 29, appropriation in a context other than in subsection 122(1) is defined as:

An appropriation of a thing in any other case means any moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that some person may be deprived of the benefit of his ownership, or of the benefit of his right or interest in the thing, or in its value or proceeds, or any part thereof. (3) An intent to deprive can be constituted by an intent to appropriate the thing

In a criminal case such as the instant one, there must be the guilty mind otherwise known as *mens rea* and the wrongful act otherwise known as *actus reus*. See R v Tolson.

The prosecution witnesses testified to the facts as attached to the charge sheet supra. PW2 tendered in evidence a document he said contained the investigation cautioned statement of Accused and it was marked Exhibit A. The following is the statement:

“On 17/12/2022 at about 9:30am, Makito who is also a Taxi driver called me phone that I should go and pick up the complainant and send him to some place. After we ended the call he called again and I told him that there was no fuel in my vehicle. Makito then told me that the complainant will[sic] buy some of the fule[sic] and even give my sales to me. I sent the vehicle to the complainant and he gave his motor bike to me that when he comes[sic], he will[sic] call me to come for my vehicle. I sent the motor to a washing bay near Mfuom cemetery and I washed the motor bike by myself. After that, I gave GH¢4.00 to one Kofi who was the caretaker of the washing bay. While I was at the place the complainant called me on phone that he had returned. When I went to the complainant[sic] house with his motorbike he asked me whether I will[sic] go somewhere with my vehicle or take someone to some place. I told him no. I only told him that the fuel was my problem but he told me not to worry that he will[buy] some of the fuel into the car. He then gave me GH¢150.00 and told me that he had already bought fuel into the vehicle. The complainant then told me to take his motor bike to my house that this[sic] evening he will[sic] call me to meet him at *Prety* Palace. He failed to call me and I also did not call him. Same day at about 7:00pm, I went a[sic] parked the complainants[sic] motor bike at Mfuom Last Stop and asked my sister Ama who stays at the place to take good care of the motor bike. I then went to my girlfriends[sic] house[;] her name is Abigail. While I was there with my girlfriend Makito called and asked me where I was. I told him I was with my girlfriend. He told me that he was standing by the motor bike that he was waiting for me. I told him to go that I will[sic] come later. I went and parked the motor in my house at about 9:20am. I parked it in a toilet and bath room of our story builden[sic] at the back of our house. The place I kept the motor bike is not secured. I wake[sic] up at about 3:00am the

following morning and found that unknown person had stolen the motor bike from the place I kept it. I quickly called the complainant and informed him of the issue. I also called Makito and told him[;] he asked me whether I am[sic] jocking[sic] but I told him it was true. It is never true that Makito called me around 12:00am about the motor bike. The complainant[,] Makito and I then started looking for it but we did not see it."

I find from Prosecution's evidence vis-a-vis definition of stealing as in section 125 of Act 29 supra that it cannot be said that Accused had the *mens rea*, so can it not be said the *actus reus* took place. The evidence of Prosecution suffers from kwashiorkor as regards proof in law.

In *Majolagbe v. Larbi* [1959] GLR 190, Ollennu J(as he then was) gave a dictum which I find to be spot on as regards proof in law. The learned judge stated.

"Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'."

See *Klutse v. Nelson* (1965)GLR 537 @ 542 and *Baah Ltd v. Saleh Brothers* [1971] 1GLR 119 @ 122.

In recent times, Sophia Adinyira JSC stated the following as regards proof in law which I find pertinent to the analysis here. The learned judge stated:

"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish

the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable[sic] than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree[sic]."

Section 10(1) of NRCD 323 defines "Burden of Persuasion" and it states:

For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

Section 10(2) of the Evidence Act adds that:

The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section 11 of NRCD 323 defines "Burden of Producing Evidence" and states further as follows:

(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(2) 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 a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient

evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

It can be gathered that there was a contract between Complainant(PW1) herein and Accused. It is pure and simple:- Accused should give his taxi cab to PW1 for PW1 to use same to make some rounds and PW1 should give his motorbike to Accused so that when PW1 returned the taxicab to Accused, he would take back his motorbike.

A contract is defined by *Black's Law Dictionary* 11th edition, 2019. *inter alia*, as:

"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."

What we have here is a criminal matter and so we look at things with the criminal law telescope and microscope.

Section 13(1) of NRCD 323 states:

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 a reasonable doubt.

Before the Evidence Act came into being, Ollennu JSC had held in *Oteng v The State*[1966] GLR 352@ 354, SC that:

"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 criminal case the prosecution cannot obtain conviction upon mere probabilities."

See also *Fenuku v John - Teye* [2001-2002] SCGLR 985

Prosecution did not lead evidence on PW1's assertion that he suspected that Accused sold the motorbike. Where is the appropriation here? There is none. It is PW1 who gave the motorbike to Accused and it is not Accused who took same from PW1 without his consent. See section 122 of Act 29 supra. As stated earlier the evidence does not show in anyway that Accused had the intention of stealing the motorbike. It can be inferred from the evidence on record that Accused was careless – he did not exercise due discretion in parking the motorbike at where he did. The Accused himself admitted that in Exhibit A that he was careless as he stated that where he parked the motorbike was not secure.

I hold that a case has not been made out against Accused, to warrant him being called upon to open his defence.

This is a case where the complainant might consider suing Accused for recovery of the motorbike or the value of same. That will be a civil action. The criminal action herein falls flat in face of the law.

Accused is acquitted and discharged.

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

10/03/2023