IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 23RD MAY 2023 CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B7/29/2022

THE REPUBLIC

VS

KWABENA ADJEI

ACCUSED PERSON ABSENT

SERGEANT PRINCE ADU AMOAKO FOR PROSECUTION, PRESENT

JUDGMENT

INTRODUCTION CUM PRELIMINARY REMARKS

In *Dexter Johnson v. The Republic* [2011] 2 SCGLR 601 @ 663 Dotse JSC made reference to a statement by Lord Viscount Sankey L. C. in *Woolmington v. Director of Public Prosecutions* [1935] AC 462, to wit:

> "*Throughout the web of the English Criminal law, the golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt…if at the end of, and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner… the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*"

So, it is for Ghanaian Criminal Law in respect of an accused person. Thus, in Ghana, when a person is charged with a criminal offence, the prosecution is saddled with an uphill task to establish the guilt of the accused person. The prosecution ought to produce ample and cogent evidence to seek to persuade the court that, indeed and in fact, the accused person is worthy of condemnation in the eyes of the law, as the investigative mechanism of the prosecution has established.

Section 11 of the *Evidence Act*, 1975(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.

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 NRCD 323 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.

The prosecution cannot charge an accused in a vacuum. They ought to have gathered some facts as the basis for charging the accused person.

In the instant case, the salient facts that the prosecution relied on are distilled as:

1. There are two complainants herein; one is Bismark Tawiah and the other is Victor Kuwornu. [The complainants will be referred to subsequently as Bismark and Victor respectively.]

2. On 24th April 2022 at about 12:25pm, whilst complainants were at their shop, Accused went to collect scraps around the shop.

3. Whilst collecting the scraps, he took Victor's dustbin without his consent.

4. Victor confronted Accused and Accused rained insults on him.

5. During the confrontation, Accused took Bismark's phone which was on a table in front of the said shop; Accused bolted with the phone.

6. Few minutes later, Accused returned to the shop with a cutlass and demanded money from the complainants before he would give the phone to them.

7. Accused again left the shop with the phone whereupon, the complainants followed him and got hold of him and retrieved the phone from him.

8. The complainants also collected the cutlass from Accused and allowed him to go.

9. Few minutes later, Accused once again returned to the shop and this time, he aggressively attacked Victor in the shop with a broken bottle; Accused stabbed him in his head, slashed his right hand, right side of his chest, his cheek and beneath his lower lip. Accused bolted afterwards.

10. Victor was rushed to the hospital and he was admitted for treatment.

11. Bismark then reported the matter to the police and the police issued a police medical form in respect of Victor.

12. Accused was subsequently arrested on 27th April [2022].

The investigative team cannot rely on the accounts of only potential prosecution witnesses. They ought to seek the side of the story of the suspect in order to arrive at a logical conclusion upon their investigations. In this regard, the prosecution took a statement from Accused. Here is what Accused is said to have said (as in the very first exhibit in this case – Exhibit A):

"I am unemployed and a resident of Kyekyewere station at Dunkwa-On-Offin. I do not know the complainant. It was[sic] never true that I stole the complainants[sic] phone. I did not go to his store as he claim[sic]. It was[sic] also not true that I have stabbed him with a broken bottle. Infact[sic] all the allegation leveled[sic] against me are false."

After the police had concluded their investigations, they charged Accused and arraigned him before the court. I hereby produce the charge sheet verbatim:

"COUNT ONE

STATEMENT OF OFFENCE

STEALING: CONTRARY TO SECTION 124(1) OF THE CRIMINAL OFFENCE[sic], 1960(ACT 29) AS AMENDED BY PARA. 4 OF NLCD 398/69

Particulars of offences[sic]

KWABENA ADJEI: AGE[sic] 27 YEARS, UNEMPLOYED: For that you on the 24th day of April, 2022 at about 12:25pm at Dunkwa-On-Offin in the central circuit and within the jurisdiction of this court did steal Itel mobile Phone valued Gh650.00[sic] the property of Bismark Tawiah.

COUNT TWO

STATEMENT OF OFFENCES[sic]

CARRYING OFFENSIVE WEAPONS: CONTRARAY[sic] TO SECTION 206 OF THE CRIMINAL CODE[sic] 1960(ACT 29)

Particulars of offences[sic]

KWABENA ADJEI: AGE[sic] 27YEARS, UNEMPLOYED: For that you on the 24th day of April, 2022 at about 1:50pm at Dunkwa-On-Offin in the central circuit and within the jurisdiction of this court without lawful authority, you[sic] had in your possession an offensive weapon to wit: cutlass and broken bottle.

COUNT THREE

STATEMENT OF OFFENCE

USE OF OFFENSIVE WEAPON: CONTRARY TO SECTION 70 OF THE CRIMINAL CODE[sic] 1960(ACT 29)

PARTICULARS OF OFFENCE

AKWESI ADJEI[sic]: AGE[sic] 27 YEARS, UNEMPLOYED. For that you on the 24th day of April, 2022 at about 1:50pm at Dunkwa-On-Offin in the central circuit and within the jurisdiction of this court you[sic] intentionally and unlawfully caused harm to Victor Kuwornu with offensive weapon to wit broken bottle.

COUNT FOUR

STATEMENT OF OFFENCE

CAUSING UNLAWFUL HARM: CONTRARY TO SECTION 69 OF CRIMINAL CODE[sic] 1960(29)[sic]

[PARTICULARS OF OFFENCE][HEADING OMITTED IN THE CHARGE SHEET]

AKWASI ADJEI: AGE[sic] 27YEARS, UNEMPLOYED. For that you on the 24th day of April,2022 at about 1:50pm in the afternoon at Dunkwa-On-Offin in the central circuit and within the jurisdiction of this court you[sic] caused harm to one Victor Kuwornu with offensive weapon to wit: broken bottle."

Section 124(1)of Act 29 states:

Whoever steals shall be guilty of a second degree felony.

Section 206 of Act 29 states, *inter alia:*

(1) Any person who, without lawful authority the proof where, of shall lie on him, has with him in any public place any offensive weapon shall be guilty of a misdemeanour.

(4) In this section "offensive weapon" means an article made or adapted for use for causing injury to the person or intended by the person having it with him for such use by him.

Section 70 of Act 29 states:

Whoever intentionally and unlawfully causes harm to any person by the use of any offensive weapon shall be guilty of first degree felony.

Section 69 of Act 29 states:

Whoever intentionally and unlawfully causes harm to any person shall be guilty of second degree felony.

Count Three(3) of the Charge Sheet was struck out as this court does not have jurisdiction to entertain that.

PROSECUTION'S CASE

Testifying for the prosecution were the said Victor, the said Bismark, one Seth Kuwornu and the investigator herein. They were referred to at the hearing as PW1, PW2, PW3 and PW4 respectively.

According to PW1, he was in his shop on the said date and time with PW3 when Accused came to take his dustbin without his consent. Accused rained insults on him when he confronted Accused over that. Accused then took the said phone and went away only to return with the phone as well as a cutlass. Accused then threatened PW1 and PW3 and demanded that they gave him money before he would give the phone back.

In further evidence of PW1, he stated the following in paragraphs 8 through 21 of his witness statement:

> "8. Whilst the accused person was going, I, the complainant in count one together with the witness Seth Kuwornu trailed the accused to a certain distance.
> 9. We were able to grab him to retrieve the mobile phone and the cutlass he armed himself with and allowed him to go.
> 10. The accused person who was not satisfied with his bad behavior[sic] returned again.
> 11. Whilst at the shop the accused person emerged from my back and attacked me with a broken bottled.
> 12. The accused person started stabbing me in my heads[sic] several times.
> 13. I managed to run but the accused person chased me to the back of my shop as he continued to stab me with the bottle and blood started oozing from my head and my body.
> 14. The accused chased me to a certain container shop where he stabbed me severely on my head, my chin, my cheek, my right hand and on my chest which I sustained deep cuts.
> 15. He continued to stab my chin, right hand and also hit my mouth which one of my teeth removed.

16. The accused person struggled with me for long which he wanted to head me but I managed to attack him hardly.

17. A certain young man came to my aid and rescued me. That man even sustained serious injuries from the broken bottle.

18. I quickly run[sic] to the roadside and went to the hospital where I was admitted and discharged the following day.

19. I was issued with police medical report form for treatment and endorsement which I did and I returned the medical form dully[sic] endorsed by the medical officer at the hospital.

20. The phone and the cutlass were handed over to police.

21. I led the police officers to the scene where the accused person intentionally harmed me without any reasonable course[sic]."

According to PW2, he came to meet PW1 and Accused having an altercation in front of PW1's shop. PW2 stated later on in his evidence-in-chief that he had information that the accused person returned to the shop and stabbed PW1 severely with a broken bottle. PW2 corroborated the other aspects of PW1's evidence that according to PW1 happened in the presence of PW2. See section 7(1) of NRCD 323.

PW3 also corroborated the aspects of PW1's evidence that PW1 said happened in the presence of PW3. PW3 stated further that after they rushed on Accused and retrieved the phone from him and took the cutlass from him, he(PW3) had information that Accused came back to the shop and attacked PW1 and stabbed him several times with a broken bottle.

PW4 tendered in evidence the police medical report form. The endorsement of the medical officer is at this juncture produced below:

"Victim alleges that he was assaulted by the assailant after an altercation.

He suffered multiple lacerations on face and upper limbs.

Victim seen in the facility. Laceration cleaned and sutured.

Seen & Examined by

Dr. Ofosu

[SIGNED]

25/2/22"

There is a stamp after the endorsement and the stamp bears the following inscription:

"DR. BENJAMIN P. Y. OFOSU

MEDICAL OFFICER

MUNICIPAL HOSPITAL

DUNKWA - OFFIN"

The endorsement on the medical report is dated 25/02/2022 but the date it was issued is 242/04/22 and as in the charge sheet, the matter the subject matter of this case took place on 24th April 2022. This is preposterous; either it is predetermined or the medical doctor was negligent in writing wrong date. The medical officer did not testify. PW4 may have the right or mandate to so tender in evidence such a report but he ought to be able to explain whatever features on the document. See section 121 of the *Criminal and Other Offences(Procedure) Act*, 1960(Act 30).

Besides, the medical report is empty factually and offers no clue to assist the court. Telling us what the victim had suffered is not sufficient. We would like to know the nature of the injuries and the possible cause(s) so that we can link it to other evidence on record to see if Accused herein may be liable for the cause(s) of those injuries. After all, PW4 tendered in

evidence photographs that he said depicted the injuries suffered by PW1. It is intriguing that the medical officer did not write anything about PW1's tooth getting removed.

After the prosecution had closed their case, the court held that the prosecution had made out a case against Accused on all counts to require him to open his defence. See section 173 of Act 30. The court explained section 174(1) of Act 30/ section 63 of NRCD 323 to Accused. The court also explained Article 19(10) of the *Constitution* to Accused.

Section 174(1) of Act 30: *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 him to make a defence, the Court shall call upon him to enter into his defence and shall remind him of the charge and inform him that, if he so desires, he may give evidence himself on oath or may make a statement. The Court shall then hear the accused if he desires to be heard and any evidence he may adduce in his defence*.

Section 63 of NRCD 323 states: *(1) An accused in a criminal action may make a statement in his own defence without first taking an oath or affirmation that he will testify truthfully and without being subject to the examination of all parties to the action.*

(2) Such a statement by an accused is admissible to the same extent as if it had been made under oath or affirmation and subject to examination in accordance with sections 61 and 62.

(3) The fact that the evidence was given without oath or affirmation, or that there was no possibility of examination, may be considered in ascertaining the weight and credibility of the statement, and may be the subject of comment by the court, the prosecution or the defence.

Article 19(10) of the *Constitution*, 1992 states: *No person who is tried for a criminal offence shall be compelled to give evidence*.

Accused chose to testify on oath(from the witness box).

TESTIMONY OF ACCUSED

Accused is called Kwabena Adjei. He is a scrap dealer. On 24th April 2022 at about 01:50pm, he was around Kyekyewere Station area in Dunkwa-On-Offin with the aim of looking for scraps to buy. Whilst he had gathered some scraps and he was carrying them away, some of his load fell off. As he gathered the scraps that had fallen on the ground, PW1 started insulting him that he(Accused) was a thief and that Accused had stolen his(PW1's) dustbin. At that point in time, some two young men who were with PW1 scattered the scraps that had fallen on the ground by kicking them. Nevertheless, Accused continued to gather his fallen scraps. PW1, all of a sudden hit Accused's head with a stick and Accused collapsed and fell on the scraps. Some two young men joined PW1 and the two young men above referred to, and the five beat Accused up. Accused struggled and escaped from them and fled leaving the footwear he was wearing behind. Accused later went back to take his said footwear. As, he was taking the footwear, PW1 said to Accused that he (Accused) would not take a cue from what had happened earlier and he(Accused) had returned to that place. Exchange of words ensued between Accused and PW1. In the process, PW1 hit Accused's forehead with a stone and blood gushed out. Accused then felt dizzy and sat down. Some people around shouted: "You will kill somebody Ooo". As Accused sat down, PW1 asked somebody to pick a cutlass from his(PW1's) shop. That cutlass is Exhibit G herein(as according to Accused). When Accused regained consciousness and got up from the ground, he saw PW1 holding a cutlass and approaching him with the cutlass. Accused rushed on PW1 and struggled with him and both of them fell into a nearby stream called Popopo. Whilst Accused and PW1 were in that stream, the other four people above referred to, approached where Accused and PW1 were. At that point in time PW1 bit off Accused's lip. Accused felt weak as his lip had been bitten

and he had had a cut on his forehead. Accused submitted: "It appears when I and PW1 fell in that stream that PW1 got injured. But I can't tell whether it is PW1 falling in that stream that he got injured or not." Accused concluded that it was not true that he caused harm to PW1, neither did he steal any phone.

ANALYSIS AND FINDINGS

By the nature of the offences Accused was charged with, I will combine Counts Two and Four in my analysis and analyse Count One separately.

Count One

Section 125 of Act 29 defines stealing as:

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

Section 122(2) of Act 29 defines appropriation in the context as in this case as:

> *An appropriation of a thing ...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.*

Accused took the phone but returned with it, demanded money as a condition precedent to he giving the phone to PW1 and co. In criminal law, when it comes to an offence such as stealing, there must be the guilty mind which is otherwise referred to as *mens rea*, and this must go with wrongful act which is otherwise referred to as *actus reus*. This is as enshrined in the latin maxim: *actus non facit reun, nisi mens sit rea.* See the case of *R v. Tolson* (1889) 23 QBD 168 per Stephen J.

It is obvious from the evidence that Accused did not have the *mens rea* in the circumstances. Accused is therefore not guilty of stealing, just as he pleaded.

Counts Two and Four

PW1, PW2 and PW3 were emphatic that Accused was holding a cutlass and they took it from him. PW1 further stated that Accused attacked him with a broken bottle. Accused denied ever carrying a cutlass on that occasion and said that the cutlass belonged to PW1. In his evidence-in-chief, Accused stated that PW1 asked somebody to bring that cutlass from his(PW1's) shop. It was also the story of Accused that after the cutlass had been brought to PW1, PW1 approached Accused with it. PW1 was corroborated by two witnesses on this issue about the cutlass Exhibit G herein.

Section 7(1) of NRCD 323 states:

> *Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.*

Accused did not call any witness to seek to buttress his claim about the cutlass though he stated that there were people around who shouted: "You will kill somebody Ooo". In fact, Accused called no witness at all in this case.

In Commissioner of Police v. Isaac Antwi[1961] GLR 408 SC, Korsah CJ stated:

> "*The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution and that the evidential burden rests on the accused where at the end of the case of the prosecution an explanation is required of him, are illustrated by a*

series of cases. Burden of proof in this context is used in two senses. It may mean the burden of establishing a case or it may mean the burden of introducing evidence. In the first sense it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt; but the burden of proof of introducing evidence rests on the prosecution in the first instance but may subsequently shift to the defence, especially where the subject-matter is peculiarly within the accused's knowledge and the circumstances are such as to call for some explanation."

The learned judge continued, referring to Archbold's Criminal Pleading, (34th ed.) at p. 371, para. 1001, that:

"Where the prosecution gives prima facie evidence from which the guilt of the prisoner might be presumed and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of 'guilty'. But if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted, because if upon the whole of the evidence in the case the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them."

Accused did not offer any tenable explanation as to whether or not he wielded any of those weapons.

I therefore pronounce Accused guilty on Count Two.

But did Accused use any of those weapons to cause harm to PW1. In Exhibit A, Accused simply denied any wrongdoing. He relied on that statement in his charged statement – Exhibit B. It must be stated that investigation cautioned statement is taken for the purpose of investigation, so that the investigative team will factor the side of the story of an accused into

the investigations. If all that Accused stated to the police is what is contained in Exhibit A, then what Accused stated in court by way of evidence is an afterthought or maybe the evidence of the prosecution witnesses ignited the senses of Accused to present to the court all that evidence he gave. If he had said what he said to the court to the police at the investigation stage then the investigation might have gone a different dimension. Accused appears to be alluding to self defence.

Section 37 of Act 29 states:

> *For the prevention of, or for the defence of himself or any other person against any crime, or for the suppression or dispersion of a riotous or unlawful assembly, a person may justify any force or harm which is reasonably necessary extending in case of extreme necessity, even to killing.*

Section 38 of Act 29 deals with 'Unlawful Fights' and it states:

> *No force used in an unlawful fight can be justified under any provision of this Code; and every fight is an unlawful fight in which a person engages, or which he maintains, otherwise than solely in pursuance of some of the matters of justification specified in this Chapter.*

The said chapter which is chapter 1 of part II of Act 29 has the broad heading 'JUSTIFIABLE FORCE AND HARM'.

Under that chapter, section 30 of Act 29 reads:

Section 30—Justification for Force or Harm.

> *(1) For the purposes of this Code, force or harm is justifiable which is used or caused in pursuance of such matter of justification, and within such limits, as are hereafter in this Chapter mentioned.*
>
> *(2) Throughout the remainder of this Chapter, expressions applying to the use of force apply also to the causing of harm, although force only may be expressly mentioned.*

Section 31 of Act 29 gives grounds on which Force or Harm may be justified, which include the ground stated in section 37 of Act 29 supra.

I find from the totality of the evidence that Accused and PW1 engaged in an unlawful fight.

It must be said that it is a case made by PW1 that is being dealt with in this matter. If all that Accused stated in his evidence-in-chief were to be true, then PW1 might also be liable for some crimes.

In cross-ex of Accused by Prosecution, the following, *inter alia*, took place:

> "Q. I am putting it to you that you did not report any case to the police on 24th April 2022.
>
> A. I did not report any case to the police on 24th April 2022 because the person who was to lead me to make such a report and take care of my medical expenses had travelled out of town then. So I went to a medical facility at Dankro for medical attention. So whilst I was waiting for the said person who would assist me to go to the police to lodge a complaint, I was arrested."

Section 80 of NRCD 323 states**:**

> *(1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the truthfulness of his testimony at the trial.*
> *(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:(a) the demeanour of the witness;*
> *(b) the substance of the testimony;*
> *(c) the existence or non-existence of any fact testified to by the witness;*
> *(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about*

which he testifies;

(e) the existence or non-existence of bias, interest or other motive;

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

It was held in *Ntiri* v. *Essien* [2001-2002] SCGLR 451 that the trial judge has the duty to ascertain credibility of a witness.

In *Ackah v. Pergah Transport Limited and Others*[2010] SCGLR 728; Sophia Adinyira JSC stated at page 736 that:

> *"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]."

For reasons as to corroboration and consistency, I find Prosecution's evidence as to whether any harm was caused to anybody credible.

Considering that Accused left and came back to cause such mayhem, I hold that self defence as provided for in section 37 of Act 29 will not avail him.

I find Accused guilty on Count Four also.

Accused is acquitted on Count One.

Accused is convicted on Counts Two and Four.

SENTENCING

In sentencing Accused, I have considered the violent nature of the crime he committed as regards Count Four. I find that such a character ought to be isolated from the regular society for a while. Accused is sentenced to six(6) months imprisonment in hard labour on Count Two. Accused is sentenced to three(3) years imprisonment in hard labour on Count Four. The sentences are to run concurrently.

(SGD)

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

23/05/2023