

**IN THE CIRCUIT COURT OF GHANA HELD AT CAPE COAST CENTRAL
REGION ON FRIDDAY 19TH DAY OF MAY, 2023 BEFORE H/H DORINDA SMITH
ARTHUR (MRS.), CIRCUIT COURT JUDGE.**

SUIT NO. 31/2023

THE REPUBLIC

VRS

1. JOSEPH KOKA ALIAS TUNDE

2. NII ARMAH HARA

JUDGMENT

The Accused persons were arraigned before this Court on September 19, 2022 for the offence of Unlawful Possession or Control of Narcotic Drugs contrary to Section 37(1) of the Narcotics Control Commission Act, 2020 (Act 1019).

The Forensic Science Laboratory of the Criminal Investigation Department of Ghana Police Service test report dated 29th July 2021 stated that the all the fifty eight (58) brown paper wrappers of plant material in a black polythene bag, seven plain polythene sachets of plant material, thirty three (33) brown paper wrappers of plant material in a black polythene bag and one white paper wrapper of plant material with the weight of

127.17, 110.56 and 11.32 grams tested positive for Delta-9-tetrahydrocannabinol, cannabinol and cannabidiol, all active ingredients of cannabis. exhibit tested positive for Heroin and has a net weight of 2.6459g.

The 2nd accused person pleaded guilty and he was convicted and sentenced on the same day he was arraigned before the court on 23rd January, 2023. However, the 1st accused person pleaded not guilty to the charge preferred against him for which reason the prosecution assumed the burden of proof and must prove the charge against the accused person beyond reasonable doubt in accordance with **Section 11(2) of the Evidence Act 1975 NRCD 323** which states that;

“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 will find the existence of the facts beyond reasonable doubt.”

Further, **Section 13(1) of NRCD 323** provides that the standard of proof is nothing less than proof beyond reasonable doubt no matter the offence charged.

See the case of **Ampabeng vs. Republic [1977] 2 GLR 171 CA**

The prosecution in order to discharge the burden placed upon them called one witness and tendered eight exhibits in evidence.

THE PROSECUTION CASE

A summary of prosecution witnesses' evidence is that:

On 25th May 2021 at about 08.00 hours, the police embarked on a crime check exercise within Abura and its environs in the Cape Coast Metropolis and A1 was among those arrested. PWI who is a detective stationed at the Regional CID said A1 had on him fifty-eight wraps of suspected narcotic drugs and he with others were taken to the station.

The case was referred to him and he took investigation caution statement from A1 and he forwarded the retrieved exhibits to the Forensic Science laboratory for examination and testing. When they received the report from the laboratory the exhibits tested positive so A1 was charged. According to PW1, A1 led the police to a section of Abura cemetery where he A1 claimed one Ekow Makayeko handed over the parcel of narcotic plant in polythene bag to him but A1 could not lead them to the said Ekow. He tendered in evidence all the eight exhibits.

THE DEFENCE

The first accused person gave an unsworn testimony from the dock to the effect that he was not a bad person and that the police did not take him to his house when he was arrested but rather took him to the police station. He stated that he had two children who are all deceased and does not have any relative. He continued that he only smokes cannabis and does not possess it.

EVALUATION OF EVIDENCE, FINDINGS OF FACT AND APPLICATION OF LAW

Section 37(1) (2) of the Narcotic Control Commission Act, 2020 (Act 1019) states that;

“(1) A person who without lawful authority, proof of which lies on that person, has possession or control of a narcotic drug for use or for trafficking commits an offence.”

In respect of the ingredients of the offence of unlawful possession or control of narcotics drug, there are plethora of authority on this issue including these cases of **ELLIS**

TAMAKLOE VRS THE REPUBLIC (SUIT NO:13/2/2009, (JUDGMENT DATED 17TH FEBRUARY 2010) AND LOGAN & ANOTHER VRS THE REPUBLIC [2007-2008] SCGLR, that the prosecution must prove that;

- i. The accused person had custody and control of the drugs.
- ii. He knew of the nature of the drugs;
- iii. The purpose of possession was either for use or trafficking
- iv. The accused had them without lawful authority.

See **BONSU ALIAS BENJILO V THE REPUBLIC [2000] SCGLR 112 at 123**

To satisfy the court with a conviction for the charge, the prosecution must prove the aforementioned four ingredients beyond reasonable doubt.

All prosecution witnesses including PW4 who was later treated as a hostile witness provided that A1 was the person who was peddling in drugs at the prison yard. A report was made to the chief warden of the sale of some cocaine at the yard. A Ghc20 was given to an inmate to buy some of the cocaine where the serial number was recorded. The inmate returned with some of the cocaine with the name of A1 as the person who sold it to the inmate. A1's cell was searched but nothing was found but he admitted to the offence when he was called and interrogated and led the officers with two inmates to locate where he had hidden the cocaine. A1 mentioned A2 as the one who gave him the cocaine through food A2 received from a visitor. The cocaine was retrieved and others who have been given some to sell returned their consignment to the officers. A2 asked one Domfeh to receive his visitor for him who also asked Kwadwo Owusu to receive the visitor. Kwadwo Owusu received the visitor and gave the items to Domfeh and Domfeh also gave them to A2. A2 received the items and gave

Kwadwo Owusu some of the food stuffs and was with A1 when he saw the drug. He enquired from Akurugu who confirmed the drug is heroin.

From the evidence of prosecution, the accused persons knew the nature of the drugs they had received and selling.

Was A1 in possession of the drugs?

Under **Section 2 (1) and (2) of the Narcotic Drugs (Control, Enforcement and sanctions) Act, 1990 (PNDCL 236)** the prosecution must as per the decision of the Supreme Court in **BONSU ALIAS BENJILO VRS THE REPUBLIC [1999-2000] 1 GLR 199-236** prove that not only was the accused person in physical possession of the drugs but also knew of the contents in the parcel. And in the Supreme Court case of **AMARTEY VRS THE REPUBLIC [1964] GLR 256 AT 26**, it was held that mere physical possession without knowledge of the nature and quality of the article possessed is no offence.

For the prosecution to succeed under this Section, the Supreme Court emphasized as per Her Ladyship Bamford-Addo JSC in **BONSU ALIAS BENJILO** case (supra) held that;

“To prove the charge of illegal possession of drugs it must be shown that the Appellant not only had physical possession, but also knew the contents of the parcel.”

Therefore to succeed on such a charge, the prosecution must prove legal possession; that is, in addition to proving physical or constructive possession, they must go further to lead evidence which establishes that the accused person had the requisite knowledge, or evidence from which it will be reasonable to presume that the accused

person proved to be in possession well knew or ought to have known that the article he possessed was heroin.

Here, an inmate bought cocaine from A1 and according to prosecution witnesses A1 led them to where he has hidden some of the cocaine. They returned with the cocaine and he mentioned A2 as the person who gave him the cocaine and A2 was called to the chief warden's office. Even though the officers did not find the cocaine on A1 in his person, he led them to retrieve some of the cocaine from where he was hiding them. Therefore it can be inferred that A1 had constructive possession of the drugs and he knew what he had was cocaine.

In **REPUBLIC V MUNKAILA [1996-97] SCGLR 445** the court decided that:

A person is said to be in constructive possession or joint possession of an object if he has control over the other person in physical control or article at his disposal, control or otherwise. The actual manual possession or touch of the goods by the prisoner, however, is not necessary to the completion of the offence. It is sufficient if the prosecution can prove that the article was in the possession of a person over whom the defendant or accused had control so that the article would be forthcoming if he ordered it: See **RV SMITH DEARSLEY AND PCC 494; R V GLEED (1917)** 12 CR APP. R. 32a and Archbold Criminal Pleading, Evidence and Practice (36th ed.) at 780 at para 1532.

Here, A1 was selling the drugs either personally or through other people as prosecution evidence revealed that others who had received some of the cocaine to sell returned them upon hearing that A1 was been searched. A1 also led the officers to retrieve the cocaine he was hiding and that amount to possession of the drug.

It is noted that prosecution may not always discharge their burden of proving the guilt of accused persons beyond doubt through direct evidence. This is because there are sophisticated means with which narcotic offences are being committed and those means are increasing over time. Thus, there are times circumstantial evidence may be resorted to as stated in **Section 18(2) of the Evidence Act NRCD 323, 1975**. Here, circumstantial evidence should point to one and only one inference which may be sufficient to prove the guilt of accused persons. See **The STATE V ANANI FIADZO [1961] GLR 416 S.C. at 419** where the Supreme Court held that:

A presumption from circumstantial evidence should be drawn against an accused person only when the presumption follows irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

Here, it is only when the guilt of an accused person can only be inferred from the facts adduced by prosecution before the court that it would be safe for a court to act upon circumstantial evidence. See **DUAH V THE REPUBLIC[1987-88] 1GLR 343-360** also in **LOGAN V THE REPUBLIC supra**.

A2 received a visitor through another and A2 admitted that drug was hidden in slippers he got from the visit. A2 asked Akurugu and it was confirmed the drug is heroin. A1 had few days to finish his sentence and needed money badly so Akyibonka the visitor brought the drug for him to sell. A2 received the drug and gave it to A1. A1 started selling and word got around. The chief warden was informed and he Ghc20 money was given to an inmate to buy some and the serial number recorded. The inmate bought some of the drug from A1 and A1 was searched and the Ghc20 was found on

him. A1 mentioned A2 as the one who gave him the drugs to sell and A2 was called to the chief warden's office. A1 led the officers and others to where he had hidden some of the drug and it was retrieved. Other inmates who had been given some of the drugs were reported and the drugs retrieved from them. These pieces of circumstantial evidence link A1 and A2 to the offences because no other person was mentioned as the person selling the drugs and the visitor was received for Kwadwo Owusu for A2 and each event followed each other contemporaneously.

In **GLIGAH AND ATISO V. THE REPUBLIC [2010] SCGLR 870**, the Supreme Court held in holding (3) that where:

There were pieces of evidence which if put together made a very strong case against the accused person[s]. The same with circumstantial evidence. It was generally accepted that when direct evidence was unavailable, but there were bits and pieces of circumstantial evidence available, and when those were put together, they would make stronger, corroborative but more convincing evidence than direct evidence.

From **Gligah**, the court can accept pieces of evidence or circumstantial evidence where direct evidence is not available.

See **THE STATE VRS BROBBEY AND NIPAH [1962] 2 GLR 101** where the court held that circumstantial evidence must lead to one and only one irresistible inference that the appellant is guilty of the offence charged.

I therefore find that A2 received the drug through a visit and gave them to A1 who had constructive possession of the drug.

Did A1 supply the drug?

In OKINE AND ANOTHER v THE REPUBLIC per Baddoo and Afreh JJA) the word “supply” in **Section 6 (1) of the Narcotic Drugs (Control, Enforcement and Sanctions) Law, 1990 (PNDCL 236)** was to be given its ordinary meaning, namely to furnish with something that was required or to make available or provide something that was desired as lacking. Hence **Section 6 (1)** simply meant that anyone who without lawful authority, proof of which was on him, provided or furnished any narcotic drug to any person committed an offence. Thus, the legislature simply intended to proscribe the furnishing or provision of or making available narcotic drugs to others and it would consequently be unreasonable to hold that a person, who supplied a narcotic drug to another person without taking money for the drug, committed no offence; while the person who sold the drug committed an offence. It was therefore not necessary to show that there was valuable consideration before supplying a narcotic drug would be unlawful under **Section 6 (1) of PNDCL 236**. Whether or not there was a monetary consideration was irrelevant to the charge of supplying narcotic drug without lawful authority.

Here, prosecution is required to prove that A1 furnished the drug or made it available to others whether with or without valuable consideration. When an inmate informed Aryee Aryeetey that someone was selling cocaine at the yard A1’s name was mentioned. When the matter was reported to the chief warden and Ghc20 was given to an inmate to buy some, the person returned with A1’s name as the person selling the drug. Thus A1 furnished or provided others with the drug meeting the criteria for supply under Section 6(1). So whether the Ghc20 was found on A1 or another is

immaterial though that is a further corroboration of the fact that it was A1 who was selling the drug. From Okine, if the accused person furnished or made available the drug with or without valuation consideration, supply can be said to have been completed.

Therefore, the court can safely infer that A1 supplied the drug at the Maximum security yard.

For the offence of **Conspiracy under Section 23(1) of Act 29**, the court need not go through the analyses again as in proving the offence of possession and supply of narcotic, the offence of conspiracy has also been proven. Prosecution was able to prove beyond a reasonable doubt that the accused persons agreed to act together with a common purpose to supply narcotics in the Prison yard and the drug was supplied. For it was A2 who received the drug through a visit and gave same to A1 to supply.

It can be inferred that accused persons deliberately made sure the drugs passes through different hands to avoid connection of the drug to them. These deliberate acts of concealment that is making sure someone else receives the visitor, giving the drug to another to sell, and concealing the drug in his cell, point irresistibly to an awareness of the illegality of the whole venture of being in possession and supply of narcotics breaching the provisions of the Narcotic laws as preferred against them.

I therefore find that accused persons agreed to act together with the common purpose to supply narcotic in the prison yard and was supplied.

Did Accused persons raise a reasonable doubt?

The burden of introducing evidence was shifted to the accused persons when they were called to open their defence or to raise a reasonable doubt and this is emphatically

covered under Section 17 of the Evidence Act NRCD 323. See also Commissioner of Police vs. Antic (1961) GLR 408.

Further, in the case of ALI YUSIF ISSA (NO.2) VRS THE REPUBLIC [2003-2004] SCGLR 174 it was held that; "...even though an accused person was not required to prove his innocence during the course of the trial he might risk of non-production of evidence and or non-persuasion to the required degree of belief particularly when he was called upon to open his defence."

Here, accused persons are required to lead evidence to either raise a doubt in prosecution's case or discredit it. And especially where the charges preferred against them places a burden on them to prove their innocence accused person are required to provide cogent and or credible evidence such that a reasonable mind would accept their evidence than the evidence of prosecution.

However, I do not find the evidence of both accused persons credible, they are not truthful witnesses. This is because the evidence of both accused persons have been weighed against that of prosecution witnesses and the court prefer the evidence of the prosecution witnesses than accused persons.

Accused persons' defence is that of denial, that they do not know each other and that the drug was taken from another and not from them. Under cross examination A1 answered among others the following questions:

Q. You had about one month and few days before you serve your sentence. Is that so?

A. Yes, I mentioned that in my statement.

Q. In your statement dated 4/6/18 you told the police that you were informed by one Yaw Nomo that your cell was being searched.

A. Yes

A1 had earlier rejected that the two statements he made were procured when he had no legal representation and another when he was very weak because he was fasting. He stated in his evidence in chief that he was fasting and so weak that he told the police he wants to rely on his previous statement. Meanwhile, he is admitting under cross examination that he made certain statements.

He stated in his evidence in chief that he was searched by Chief Assam at Block B1 but in the same evidence in chief he said he was searched at Chief Assam's office when he was sent to Chief Assam.

He only wanted to deny every question and by so doing discredited his own evidence. Some of the questions run as follows:

Q. But in Exhibit F your caution statement you stated that the Chief Warden called A2 and another and A2 lied about you.

A. No.

Q. I am putting it to you that A2 did not lie about you.

A. A2 lied about me. I had no idea.

Whereas he denied A2 lied about him because that would amount to some admissions, he answered later that A2 lied about him. Here A1 admitted another statement he made in his statement though he denied he said that in an earlier question. The court gets the impression that A1 mounted the witness box only to deny everything and not necessarily to tell the truth he swore an oath to do. This made him deny statements he had earlier admitted and admit statements he had earlier denied as depicted by some of the questions extract.

Q. Can you tell this court why A2 would lie about you?

A. I cannot tell.

During cross examination A1 answered some of the questions in a way to depict that he knew he was lying but had to answer that anyway. There were times he would answer a question in a cynically laughing.

For A2, he lied right from the first sentence he gave in his evidence in chief, that he did not know the prosecution witnesses except Aryee Aryeetey. When he was asked under cross examination why he said that he answered he did not know they were witnesses it went like this;

Q. You only said you know Aryee Aryeetey

A. Yes, I said that because I do not know they are witnesses.

Q. But they all came to court, testified and you cross examined them.

A. Yes.

Q. So now you know all the prosecution witnesses.

A. Yes.

Q. So you were lying when you said you do not know them.

A. No.

A2 later denied knowing Aryee Aryeetey until this case.

Q. What is your relationship with Aryee Aryeetey?

A. I do not know him until I saw him in court.

Q. So you do not know Aryee Aryeetey until this case.

A. Yes, I only heard he is the national president.

Q. But you told this court in your evidence in chief that Aryee Aryeetey is the only prosecution witness you know.

A. Yes.

At the end it was very difficult to believe anything A2 said at the dock.

He denied knowing A1 as he said they are in different block but in his evidence in chief he said he was in Chief Assam's office with A1.

Here, it was clear that A2 decided not to admit he knows A1 at all cost. He would say I do not know him because he is not my friend. However, he earlier testified in his evidence in chief that when he went to Chief Assam's office he was informed narcotics were found on A1. He earlier answered under cross examination that he does not know Kwadwo Owusu but later admitted Kwadwo Owusu was invited with about eight others to chief Assam's office when he was there.

When Kwadwo Owusu came to the court to testify, A2 did not ask him about his evidence that he A2 gave him some of the food items Akyibonka brought to him. The court therefore accepted the evidence of Kwadwo Owusu wholly and none of his evidence was denied by A2.

Furthermore, A1 and A2 accounts of the incident differed so much. For instance, whereas A1 said it was one Big Joe who handed over the drugs to Chief Assam, A2 said it was Paa Kwesi, here A1 never mentioned Paa Kwesi's name in his evidence at all.

The witness for A2 did not also help resolve issues in favour of A2. DW1 had earlier testified as prosecution's witness and was treated as a hostile witness. The evidence he gave that time contradicted the evidence he gave as a witness to A2. The court therefore does not accept the evidence of DW1 as credible. He gave different accounts and contradicted himself so much. Prosecution noted some of them and cross examined DW1 on them. These are some of the questions:

Q. In your statement on 24/5/19 you stated that after you had searched A1's cell and you were leaving another inmate came to inform you that it was Raphael who sells the drugs so you proceeded to Raphael.

A. We did not go to Raphael. Raphael and Otofo are in the same block.

Q. So what you told the court earlier was a lie because you never mentioned that Raphael came and handed over the cocaine to you.

A. Nobody came to inform that Raphael is rather selling the cocaine. He brought it.

Q. You also mentioned today not long ago that Raphael is not in the same block as Otofo. So how do you reconcile that Raphael and Otofo are in the same block.

A. I never said that because Raphael and Otofo are not in the same cell but same block.

Here, DW1 attempted in vain to throw dust into the court's eyes. He was specific when he testified in his evidence in chief that very day that Raphael and Otofo are not in the same block and later same day that they are in the same block.

Other questions run as follows:

Q. You said when Raphael handed over the cocaine to you, you handed over it to ACO Addo.

A. Yes.

Q. In your previous evidence you said Raphael handed the cocaine to PW1- ACO Addo. You said it was PW1 who searched Raphael and found the cocaine on him.

A. I did not say that but rather that Raphael brought the cocaine to me.

Then later:

Q. You said you returned to Chief Assam's office with the narcotics. What transpired when you went to Chief Assam's office with the narcotics.

A. The narcotics were with ACO Addo and he handed over to Chief Assam. Just after that someone came to call me and I left the office.

Q. So the person came to call you and you left.

A. When I left I did not return.

Q. You never returned to Chief Assam's office.

A. Yes.

Q. So whatever transpired at Chief Assam's office after you and ACO Addo returned when Raphael gave the drug you cannot tell.

A. Yes.

Here, DW1 had earlier indicated that he was in the office when a message came that Paa Kwesi was selling drugs. Then he later said after they returned after retrieving the drug from Raphael he left and did not return to Chief Assam's office. Prosecution questioned DW1 step by step for him to see the contradictions and he rather contradicted himself further. He was asked again:

Q. So when the person came after you had gone to Chief Assam's office with narcotics you retrieved from Raphael someone came and told you that it was Paa Kwesi.

A. That person came to inform me.

In totality DW1 was not a credible witness as each question he answered was so discredited that it was so embarrassing. He admitted under cross examination that he gave the police his statements which were tendered in evidence by prosecution but later denied giving any statement. He however admitted he did not inform either prosecution or the investigator about Raphael and Paa Kwesi even though he was visited by the investigator where his statements were taken, visited by prosecution and had conference with prosecution before the trial. The court therefore finds DW1 as an untruthful witness.

I have considered all the evidence on record and come to a firm conclusion that A1 supplied narcotics to some inmates of Ankafu Maximum prison. Both prosecution witness and defence admitted that A1 was the person who sold some narcotics to an inmate which brought about the whole case. The person who was sent to buy the drug brought the name of Otofo, PW3 who was later treated as a hostile witness admitted that the drug was bought from Otofo and confirmed under cross examination that A1 admitted he supplied the drug but mentioned A2's name as the person who gave him the drugs. Without possession one cannot supply. A1 had control of the drug even if he was not in physical possession. It was A2 who received the drugs. He gave some to A1 and others and thus it is safe to conclude that he agreed together with A1 to supply narcotic drugs being sold at the prison yard

A2 was the one who received the visit and from his statement he admitted receiving a visitor through Domfeh. PW4 testified in court that he rather received the visitor for Domfeh for A2 and he was given some of the food stuffs. In exhibit G, A2 admitted his friend Akyibonka visited but he had agreed with Domfeh to receive the visitor who also sent another person. He admitted receiving the items but in his evidence in chief and under cross examination he denied knowing Akyibonka. He denied receiving a visitor through Domfeh. I have also stated that A2 was not a credible witness and as prosecution witnesses were credible, I can safely infer that A2 received the visit through PW4. PW4 was in court and yet A2 did not cross examine him on his evidence of receiving the visit for him.

The most common attribute of the defence witnesses was their lack of ability to tell the truth.

I have considered accused persons' caution statements, charge statements and DW1's evidence and find that accused person failed to discharge the burden of persuasion placed on them and they were not able to raise a reasonable doubt as to their guilt as required of them under **Section 13(2) and 14 of NRCD 323** supra.

DISPOSITION/ HOLDING

I find A1 guilty of count one, two and three the offences of Conspiracy to commit crime to wit supply of narcotic and supply of narcotics and convict him.

I find A2 guilty of count one, count two and count three and convict him.

Presentencing hearing.

I have considered the mitigating factor presented by Counsel for A1 that the court should deal leniently with him. I have also considered that A1 and A2 look remorseful. I am of the view that accused persons should be given a chance to come back to the community and demonstrate to the society that they have reformed by their incarceration and to contribute meaningfully to the community, society and Ghana at large.

Prosecution indicated that accused persons are known but there was no documentary proof of the assertion. The court takes judicial notice of the fact that A1 was in prison and had served his sentence and A2 is still in prison for a crime he committed. However, the crimes that sent them to the prison were not furnished to the court. The court therefore cannot enhance the sentence as there was no proof of previous conviction of similar crime.

I thereby sentence A1 for Count one Conspiracy to commit crime to wit supply of narcotic drug – five years IHL

Count two –Supply of narcotics – seven years IHL

Count three – possession of narcotics – thirteen years IHL.

Sentence to run concurrently.

For A2 I sentence him for count one –five years IHL. Sentence to run after he has served his pending sentence.

With regard to the narcotic drugs, I make an order for the destruction of the thirty three (33) wrappers of heroin with net weight/vol of 2.6459g by the Environmental Protection Agency in the presence of the police investigator D/PW/L/CPL Benedicta Twum-Ampofo, the court registrar and one court clerk from this court.

Case is hereby struck out as ended as accused persons are convicted and sentenced.

H/H DORINDA SMITH ARTHUR (MRS.)

CIRCUIT COURT JUDGE