IN THE CIRCUIT COURT HELD AT MPRAESO MONDAY 27TH DAY OF MARCH 2023 BEFORE HIS HONOUR STEPHEN KUMI ESQ, CIRCUIT JUDGE.

C. C. NO. B1/33/2021.

THE REPUBLIC

V

ABUBAKARI SIDDIQUE AND 3 OTHERS.

JUDGMENT:

The accused person herein- Abubakari Siddique together with some three others, Umaru- Amadu and Osumanu- who are said to be at large was charged with and arraigned before this court on the following offences: Which are one count each of ***conspiracy to commit crime, to wit: robbery; contrary to sections 23 (1) and 149 of the Criminal Offences Act, 1960, Act 29; and robbery contrary to section 149 of Act 29/1960.***

It happened that accused person upon his arraignment before this court, denied both charges against by pleading not guilty to the said charges.

It is without doubt that the obvious legal effect of his pleas- which joined issues on the counts with the prosecution - resulted in the prosecution assuming the burden of proving his guilt on the counts against him beyond reasonable doubt in criminal proceedings of this nature.

This is because under Article 19 (2) (c) of the 1992 Constitution, a presumption of innocence has been created in favour of the Accused upon pleading not guilty as follows;

> ***"Article (2) (c) A person charged with a criminal offence shall…. be presumed innocent until he is proved or has pleaded guilty".***

BRIEF MATERIAL FACTS

The brief material facts of this case as supplied by the prosecution are essentially that on 26th September, 2022, the Mpraeso District Police Command received intelligence or information of an on-going robbery between Kwahu Asuboni and Nketepa road. The police patrol team proceeded to the scene of

crime located between Asuboni and Nketepa and met the A1 having been arrested by the Nketepa watchdog committee members with multiple gunshot wounds at his back.

The police had gathered that the said robbers fired indiscriminately upon the arrival of the members of the watchdog committee and in the process, the Accused person was hit by a pellet from behind rendering him incapacitated. Accused was handed over to the police.

A search conducted on the Accused revealed some two mobile phones. During interrogations, it is alleged that the Accused admitted to the offences and listed the above-mentioned names as his accomplices.

That some three days later on 29th September, 2022, one Philip Amaglah Mustapha, an alleged victim in the said robbery incident, came to the police station and identified the Accused as one of the robbers who on 26th September, 2021, between Asuboni and Nketepa and robbed him and some others of his Itel and Nokia mobile phones valued GHC 400 and cash the sum of GHC900.00.

The prosecution further alleges that in the investigation cautioned statement of the Accused, he admitted the offences; leading to the prosecution charging and putting the Accused before this court.

EVIDENCE ADDUCED BY THE PROSECUTION AT THE TRIAL:

The first prosecution witness (PW1) was Kofi Akorli. He identified himself as a farmer and resident of Amartey and doubles as a member of the village's watchdog committee, which was formed by the community with the support of the local authority for the purpose of combating armed robbery as majority of victims in such robberies are inhabitants of the Amartey village. They also communicated their resolve and role to the drivers who ply the road.

In addition, the prosecution called the following witnesses as part of their witnesses:

- Anthony Abroh, a resident of Amartey village, a farmer and also a member of the watchdog committee.
- Detective Sergeant Emmanuel Kofi Eduku, the police investigator, as PW6.

The relevant parts of their separate and cumulative pieces of evidence or testimonies would- where necessary- be referred to in the determination of the issues below. They testified per their filed witness statements. In the case of the police investigator, he also tendered into evidence the following documents or exhibits in support of the case of the prosecution:

Exhibit A was a picture of an amount of GHC 550.00 allegedly taken or retrieved from the Accused at the scene of crime and handed over to the police investigator. The Exhibit B is a picture of a knife allegedly retrieved from the Accused at the scene of crime on that date of the alleged crime.

It is also instructive to add that, following the conclusion of a mini trial- due to an objection raised by the Accused to the admissibility of cautioned and charge statements- the court overruled the said objection and held that the Accused gave same to the police voluntarily and within the requirements of the law under section 120 of the Evidence Act (infra). The cautioned and charge statements were thus admitted into evidence and marked as Exhibits C and C1 respectively.

Meanwhile, at the close of the case of the prosecution, the court determined that the prosecution had, by their evidence, made out a *prima facie* case against the accused person on the two counts warranting him to open his defence to avoid a ruling of the court on the issues against them. ***See section 174 of the Criminal Procedure Act, 1960, Act 30.***

I need to add that even though the prosecution originally filed witness statements for some three other witnesses, however the prosecution informed the court they could not find and get them to court to testify in the trial. The court accordingly struck out the said witness statements; and thus would not be considered in this judgment.

CASE/EVIDENCE OF THE FIRST ACCUSED PERSON, IBRAHIM MOHAMMED.

The accused person in his sworn defence told the court that he was arrested at Asuboni whiles he was on his way to a kraal in the bush from town at around 8:00am. He said he had lived at Asuboni for about two years and the kraal belonged to someone.

According to him, some three people arrested him and claimed he was involved in a robbery, which he denied. He had explained to them he was on his way to the kraal in the bush from town where he had gone to charge his two mobile phones.

He had added that the men had guns on them so he decided to ran away and in the process he was shot at by the men who took him to the Amartey village, where the assembly man came and asked him to admit to the offences in order for him to be delivered to the police. Based on that, he admitted to the offences and was later taken away by the police.

It is his further defence that at the time of his arrest, he had two mobile phones on him, which he owns; as well as an amount of GHC 550.00, which was his income from the sale of his cattle, which he had sold for GHC 1,500.00.

He told the court that he had no other persons with him at that time and that he was innocent of the charges. The Accused opened his defence in the presence of and being led by his Counsel. He however closed his case without calling any witness.

EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW:

Before I evaluate the evidence as adduced by both the prosecution and the accused person so as to determine if the prosecution succeeded to prove his guilt beyond reasonable doubt on the above-mentioned charges or counts, I have found it necessary to discuss in some reasonable detail the burden of proof that the prosecution assumes in this case.

Ordinarily, in criminal proceedings, the received learning is that it is the prosecution- upon a plea of not guilty by an accused- that assumes the burden of proof, which they must establish beyond reasonable doubt. In the popular English case of ***Woolmington v DPP (1935) AC 462;*** where ***Lord Sankey*** (as he then was) held thus;

> ***"Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to…. the defence of insanity and subject also to any statutory exception….. No matter 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".***

The above Common Law principle has enjoyed both statutory and case law blessings in Ghana. Under the statute, ***sections 11 (2) and 13 (2) of the Evidence Act, 1975, NRCD 323,*** state of the burden of proof on the prosecution as follows:

> ***"11(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 reasonable doubt."***
>
> ***"13(1) 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."***

It is also statutorily provided that;

> ***"Unless it is shifted, the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion on that issue". See section 15 of the Evidence Act, 1975, NRCD 323.***

Similarly, in the case of ***Donkor v The State [1964] GLR 598, SC***, it was held inter alia by the Supreme Court of Ghana that in criminal trials, the burden of proof in the sense of the burden of establishing the guilt of the accused is generally on the prosecution or The Republic.

So that is the burden the prosecution assumes in the case. However, the law is generally that an accused person in a criminal trial does not assume any burden of proof. He has no duty to prove his innocence or disprove anything. At worst, an accused only has to lead evidence to raise a reasonable doubt as to his guilt. And even with that the standard is lower- on the balance of probabilities. See ***sections 11 (3) and 13 (2) of the NRCD 323 (supra).***

The above statutory provisions are consistent with the requirement and duty of the courts to consider any explanations or defence that an accused gives and which favours his or her case on the contested issues. In the case of ***Attah v Commissioner of Police (1963) 2 GLR 460, SC,*** the judgment of the trial district court even though confirmed by the High Court, was however quashed on appeal to the Supreme Court because the judgment of the trial court failed to consider the defence fully in that it did not consider the accused statement on caution or even the evidence of his witnesses.

Therefore in assessing or evaluating the evidence in this judgment, the Court would have to apply what is known as the three-tier test to each of the elements of a crime, which would involve the court giving full consideration to the defence of the accused person in terms of what he stated in his cautioned and charge statements to the police; as well as his sworn evidence-in-chief in court

Reference is thus appropriately made to the case of ***The Republic v Francis Ike Uyanwune [2013] 58 GMJ 162, C.A, where it was held per Dennis Adjei J.A*** that;

> ***"The law is that the prosecution must prove all the ingredients of the offence charged in accordance with the standard burden of proof; that is to say the prosecution must establish a prima facie case and the burden of proof would be shifted to the accused person to open his defence and in so doing, he may run the risk of non-production of evidence and/ or non-persuasion to the required degree of belief else he may be convicted of the offence.***
>
> ***The accused must give evidence if a prima facie case is established else he may be convicted and, if he opens his defence, the court is required to satisfy itself that the explanation of the accused is either acceptable or not. If it is acceptable, the accused should be acquitted, and if it is not acceptable, the court should probe further to see if it is reasonably probable. If it is reasonably probable, the accused should be acquitted, but if it is not, and the court is satisfied that in considering the entire evidence on record the accused is guilty of the offence, the court must convict him. This test is usually referred to as the three- tier test".***

In order to satisfy the Constitutional, statutory and Common Law threshold of proof beyond reasonable doubt, the law is that "***the prosecution has a duty to prove the essential ingredients of the offence with which the appellant (accused) and the others have been charged…" See the case of Frempong alias Iboman v The Republic [2012] 1 SCGLR 297, SC per Dotse JSC.***

In the same vein, in the case of ***Homenya v The Republic (1992) 2 GLR 305, Acquah J (as he then was),*** sitting at the High Court, Ho, held and reiterated the position of the law thus;

> ***"…the first and mandatory duty of a trial judge in a criminal trial is to examine the case of the prosecution so as to determine whether the prosecution had established all the essential ingredients of the charge leveled against the accused person…".***

As a necessary corollary to the above discussion- in terms of the need for and the bounden duty of the court or judge to do justice by taking a fair and holistic assessment of the evidence before them- in the case of ***Dabla v The Republic (1980) GLR 501, Taylor J (as he then was)*** held that in a criminal trial, there are generally three ***types of facts*** that may emerge at various stages of the proceedings that a judge has to consider. There are;

a. The facts which the prosecution may give before the commencement of the actual trial, indicating the material they intend to prove by admissible evidence.
b. The facts which the accused person, may, if he chooses, lead in evidence in his defence; and
c. The facts which on the consideration of the respective facts of the prosecution and accused/defence mentioned above, the presiding judge or magistrate finds as ***representing in his opinion the actual facts (emphasis mine).***

In fidelity to the above guidelines, in resolving the instant charges, I will accordingly discuss what the elements of the offences are and then determine whether on the evidence as adduced by the prosecution as well as on the competing facts, the respective charges have been established or proven against the accused person.

In doing that, the court has distilled from the whole of the evidence, the following as the main issues for determination in this judgment:

1. Whether or not the A1 conspired with some others at large to rob the victim of their phones and money.
2. Whether or not the accused person together with some other accomplices at large were the ones who robbed the victims of their above-mentioned items.

I need to indicate that just for the sake of convenience, I will resolve the issues 1 and 2 jointly or simultaneously as one as they are inextricably linked together and flow from the other; albeit while looking out for the distinctive or independent evidence in proof of the separate charges.

COUNTS 1 AND 2:

The offence of conspiracy is provided for under section 23 (1) of Act 29/1960 (supra) as amended by the ***Statute Law Review Commissioner per the Revised Edition Act, 1998, Act 562,*** as follows:

> ***"Where two or more persons agree to act together with a common purpose for or in 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". See also the case of Republic v Augustina Abu and Others, (Unreported) Criminal Case No. ACC/15/2013; per Marful-Sau J.A, (as he then was).***

This definition is admittedly different from the old definition of conspiracy which was defined in section 23(1) of the old Criminal Code 1960 (Act 29) as follows:

> ***"If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation each of them is guilty of conspiracy to commit or abet that crime as the case might be."***

In the case of ***Francis Yirenkyi v The Republic, (Unreported) Criminal Appeal No. J3/7/2015, Dotse JSC held inter alia*** that the new formulation no doubt reinforces the view that conspiracy is an intentional conduct; observing that under the new formulation, a person could no longer be guilty of conspiracy in the absence of any prior agreement. So that the mere acting together of two or more persons in a criminal enterprise is not enough to sustain conviction. Beyond that, there must be proof that the accused person agreed to act together to commit the crime with at least another person.

In effect, the definitions of and positions on conspiracy based on previous decisions have failed to be good law. For example in the case of ***Commissioner of Police v Afari and Addo (1962) 1 GLR 483,*** it was held inter alia that law on conspiracy in Ghana was wider in scope and content than the English law on that subject; consisting not only in the criminal agreement between two minds but also acting together in furtherance of a common criminal objective.

In simple terms, a court could convict and punish an accused person just on the evidence that he and some co-accused persons acted to commit a criminal offence. Suffice it to say that, evidence of prior or previous agreement by the accused persons to commit the offence was not required to be proved to

obtain conviction. Therefore, in the case of ***State v Otchere and Others (1963) 2 GLR 463,*** the position of the law was that;

> ***"A person who joins or participates in the execution of a conspiracy which had been previously planned would be equally as guilty as the planners even though he did not take part in the formulation of the plan or did not know when or who originated the conspiracy…".***

However, as has been stated above, there is a new formulation on the law of conspiracy in Ghana now. It is now an intentional conduct, and that there must be evidence that the accused persons had a prior agreement to commit the crime or offence. See the ***Francis Yirenkyi v The Republic*** case (supra).

Therefore, the prosecution in order to prove the guilt of the accused person before the court on the allegation that he conspired agreed with or aided the said persons at large to rob the victims of their alleged items, would only succeed if there is evidence of not only that they acted together but more importantly evidence that prior to acting together, they had an agreement to use force or arms to steal.

The prevailing position of the law is thus that a charge of conspiracy without proving that the accused persons involved agreed to act together to commit the offence shall fail. It is however not a defence for an accused person who is charged for conspiracy to state that he did not have prior or previous concert or deliberation with the other accused persons to commit the offence where there is evidence that they agreed to act together to commit the offence, even if just before the commission of the substantive offences.

See Dennis Dominic Adjei: "Contemporary Criminal Law in Ghana" at page 89; as well as the case of The Republic v Kwame Amponsah and 6 Ors; Unreported; CC. No. FT/0066/2016; delivered on 18th April, 2019; per Asare-Botwe J.

It is instructive to state also that even on the authorities that applied the old formulation of conspiracy- where they agreed or acted together to commit the substantive offence- the law still required separate and independent evidence of conspiracy which constituted and concerned with conspiracy from the main and actual substantive offence in question.

In the case of *The State v Agyekum and Amofa (1962) 1 GLR 442, Djabanor J (* as he then was), in acquitting and discharging the accused persons on the conspiracy charge, quoted and applied the following dictum of Van Lare, Ag. CJ in the case of *C.O.P v Dimbie (1959) GLR 202 @ 203* thus;

> *"…. conspiracy to commit a criminal offence is by itself a criminal offence, whether the offence contemplated is or is not committed. It follows, therefore, that where there is a specific charge of conspiracy, that is to say in addition to the offence itself, there must be some evidence directed and confined to the facts which constitute or are concerned with the conspiracy…".*

Meanwhile, in terms of the offence of robbery, which is the sole substantive offence in this case, the offence of robbery under the Act 29/1960 (supra), is provided for or created under ***section 149.*** It reads as follows:

> ***" A person who commits robbery commits a first degree felony:***

However, robbery is defined under the ***section 150 of Act 29/1960 (supra) as follows;***

" A person who steals a thing commits robbery,

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

In the case of ***Behome v The Republic (1979) GLR 112, Osei-Hwere J(as he then was) sitting at the High Court, Sunyani, held inter alia as follows to describe what robbery is;***

> ***"One is only guilty of robbery if in stealing a thing he used any force or caused any harm or used any threat of criminal assault with intent thereby to prevent or overcome the resistance of his victims, to the stealing of the thing".***

See also the case of ***R v Dawson (1977) 64 CAR 170,*** where it was held that when a person is charged with robbery, the sole question is whether he used force on any person in order to steal. I now proceed to address the two issues identified in the judgment.

Now, the twin issues to be determined in this judgment is whether or not the prosecution succeeded to prove their case against the accused person that he together with the above-mentioned persons conspired to rob the victim and whether they succeeded in robbing the victims of their stated items.

In determining that, I will look at the various pieces of evidence as adduced by the prosecution witnesses and indeed on all the evidence before the court to determine that. Ultimately, I am thus to make a finding or decision whether or not the above crimes were committed by the accused person herein or otherwise.

That is in conformity with the duty a trial judge in a contested matter- such as this one- assumes to make findings of fact of primary facts in dispute based on the two versions of the story before it. ***See the case of Quaye v Mariamu (1961) GLR 93, SC;*** where it was held by the Supreme Court of Ghana as follows as to the duty of a trial judge in a contested matter like this one;

> ***"To make up his mind one way or the other on the primary facts and when he has made up his mind he should state his findings and then proceed to apply the law. It is only then that this court can properly found or the inference properly drawn or the law properly applied".***

On the evidence before me, it appears that there are some different species of evidence adduced by the prosecution and indeed by the parties for that matter. It is a mixed bag of evidence essentially. For example, there is the direct evidence of the PW1 and PW2.

There is also circumstantial evidence which relate to the amount of money and knives found on and retrieved from the Accused at the crime scene. In addition, there are the statutory statements of the accused person (his respective cautioned and charge statements).

In terms of the relevant pieces of the direct evidence adduced by the prosecution, the Kofi Akorli and Anthony Abroh, have testified at the trial that they and other members of the Amartey village watchdog committee saw the Accused person herein together with some others at the crime scene using guns and force and threat to steal from some passengers on board a vehicle along the Asuboni Nketepa road.

Specifically, the PW1, Kofi Akorli, has testified to have been on the road from Asuboni to Nketepa with the other members and saw vehicles coming from the Adawso direction and suddenly saw that the robbers, numbering about four people came out of the bushes at the road sides , who began to stop the vehicles in order to rob them.

He had added that he had seen two of the said robbers including the Accused person, Abubakari Siddique, who were holding single barrel short guns with which they fired warning shots at the scene. He managed to get closer to where the Accused and the others were collecting monies from and beating up the passengers, at which point in time the Accused person herein saw one Selorm Koffie Akorli- a member of the watchdog committee- and fired warning shot at him.

PW1 added that he then went to hide in the bushes while watching the robbery and that from his position, he saw the Accused continued to fire warning shot at the PW3, which compelled him (PW1) to also shoot the Accused from behind, who fell down and screamed in pains.

At that point, one of the robbers came to take the gun from the Accused, and then ran into the bushes together with the others. They then went to comb the bushes and came across the Accused, Abubakari Siddique, hiding in the bushes and bleeding. They then arrested the Accused and brought him to the road .

It was his further testimony that they found the Accused wearing a nose mask and also wore a talisman around his waist and upon a search conducted on him, they found and retrieved a small double edged knife in its sheath hidden around the waist band of his pair of trousers, an amount of GHC 550.00 squeezed in his pocket, four mobile phones- two of which the Accused admitted was his while the rest were identified by some market women as theirs.

The testimony of the PW2, Anthony Abroh was essentially the same as that of the PW1 before him. He had seen the Accused with some other at large. He has seen the Accused fire warning shots with a single barrel short with the intention to stop incoming vehicles from the Sub direction.

He added that he saw a member of the watchdog committee called Kofi Akorli got closer to the Accused and succeeded in shooting the Accused from behind, who fell behind. He corroborated the evidence of the PW1 that the Accused ran into the bushes but the members went and searched they and found the Accuse hiding in the bushes and arrested him.

During the cross-examination of the above-mentioned witnesses of the prosecution, the then learned Counsel for the Accused, Osumanu Mohadeen, asked some number of questions to deny their testimonies. The following are excerpts of the said exchanges:

Q: I put it to you that you did not see the Accused at the scene of the crime?

A: Yes. I saw him.

Q: I put it to you that you did not see any knife or gun on the Accused?

A: It is not correct. He had a gun and two cutlasses.

Q: So at what point in time was the Accused holding the gun and cutlasses?

A: He was standing behind the vehicle.

Q: How many people made up the group- of the town watchdog committee?

A: Five (5) people. We were five (5) people".

Meanwhile, the following ensued between the Counsel and the PW2:

"Q: So around what time of the day did the incident happened of which you were a member of the watchdog committee?

A: Around 5 o'clock am.

Q: You told the court that you saw some four (4) men with two of them holding guns? How did you know the men were Fulanis?

A: The Accused person told us he was a Fulani.

Q: You told the court that the PW2 shot at the Accused (A1)?

A: Yes.

Q: Did you see the gun that the PW2 used?

A: Yes.

Q: Was it a locally manufactured gun or a foreign one?

A: A locally manufactured gun.

Q: Which part of the body of the Accused did the bullet from the gun of the PW2 enter?

A: At the back of the A1

Q: You told the court that you found the Accused I'm the bushes lying in a pool of blood; not so?

A: Yes.

Q: At what point was the A1 shot by the PW2?

A: At the time they were collecting money from the people.

Q: From where you were lying ambush, did you see clearly what was going on?

A: Yes.

Q: Did you see the Accused collecting any money or any item from the victims?

A: No. He was only holding a gun.

Q: Did he point the gun at any one?

A: Yes.

Q: Whom did he point the gun at?

A: At one of the passengers".

I must quickly indicate that the "PW2" as mentioned above is Kofi Akorli, who was the original PW2. He was made the PW1 at the trial; while the Anthony Abroh, who was the original PW5, became the PW2 after the other witnesses failed to come to court to testify. Now back to the evaluation of the evidence.

Now, from the above exchanges during the cross-examination of the witnesses, the court finds that their testimonies remained intact and were not discredited despite the good efforts of the Counsel. What then stands out that the witnesses clearly and positively identified the Accused at the crime scene, from his presence at the scene, his role or involvement and how he was shot at, how he was arrested and later taken to the hospital for treatment for his wounds.

The law on such a situation is this: It is that;

> ***"where the identity of an accused is in issue, there can be no better proof of his identity than the evidence of a witness who swears to have seen the accused committing the offence charged".*** See the case of ***Adu Boahene v The Republic (1972) 1 GLR 70*** at ***74***.

There were also the cautioned and charge statements of the two person, in which he admitted to have committed the above-mentioned offences together with his accomplices at large. In the cautioned statement of the Accused, he had amongst others admitted agreeing with Umaru, who had called him to come and meet him and came and met the Umaru and the two others, who asked him to follow them to Ekye Amanfrom with an agreement to go and rob. He went on to admit moving to the road with the others at around 3:30am, where the Umaru gave him a gun to use for the operation.

Although the Accused had raised objection to the admissibility of the cautioned statement on grounds that he did not give that statement and was only asked to thumbprint, the evidence at the mini trial proved otherwise, showing that the Accused gave the statement voluntarily and in the presence of an independent witness, who read out the contents to him in the Twi language. The circumstances had satisfied the minimum requirements for the taking and using of such documents under section 120 of the NRCD 323 (supra).

Based on the above, the authorities would show that the accused person, just based on his statement in the Exhibits C and C1 respectively has even relieved the prosecution of its duty to prove the charges against them. A legal effect or consequence flows from that.

In the case of ***Agogrobisah v The Republic (1995-96) GLR 557, Acquah JA (as he then was),*** held inter alia thus;

> ***"I concede that a free and voluntary confession of guilt by an Accused, whether in court or outside the courtroom, if it is direct and positive, and is duly made and satisfactorily proved is sufficient to warrant a conviction without any corroborative evidence…".*** See also the case of ***Ayobi v The Republic (1992-93) 2 GBR 769 at 777, CA, per Amuah JA (as he then was).***

The explanation given in the commentary to ***section 11 (4)*** of the Evidence Act in respect of the burden of producing evidence appears to entitle the prosecution to benefit from the statements of the accused

person in discharging the legal burden of proving the guilt of the accused person beyond reasonable doubt;

> ***"A party with the burden of producing evidence is entitled to rely on all the evidence in the case and need not rest entirely on evidence introduced by him. The party with the burden of producing evidence on the issue may point to evidence introduced by another party which meets or helps the test of sufficiency. It is for this reason that the phrase " on all the evidence" is included in each of the tests of sufficiency".***

In the case of ***Tiduri v The Republic (1991) 1 GLR 209,*** it was held inter alia that the trial magistrate was right in placing reliance on the cautioned statement of the accused and he could even have convicted him solely on the statement as the statement which was admissible was tendered as part of the prosecution's case without any objection.

Nonetheless, it has been held in the case of ***State v Owusu and Another (1967) GLR 114***, that an extra-judicial confession by an accused that a crime had been committed by him did not necessarily absolve the prosecution of its duty to establish that the crime had actually been committed by the accused and that it was desirable for the prosecution to have, outside of the confession statement, be it slight, circumstances which made it probable that the confession was true.

Ostensibly mindful of that, the prosecution adduced some circumstantial evidence to support the probability of the commission of the offences by the accused persons, and even beside the testimonies of the PW1 and PW2 above.

Specifically, from the evidence of the prosecution witnesses, some exhibits including an amount of GHC 550.00 and two mobile phones taken from passengers and a double edged knife were retrieved from the Accused. These were pieces of evidence that corroborated the circumstances within which the PW1 and PW2 have testified to have come across the Accused and his accomplices at large using force and weapons to steal from passengers on board a bus.

In the case of **R v Taylor (1928) 21 CR. App. R. 20 @ 21, Lord Hewart LCJ** (as he then was) explained the nature of circumstantial evidence as follows:

> ***"It has been said that the evidence against the applicants is circumstantial: so it is but circumstantial evidence is very often the best. It is evidence of the surrounding circumstances which by undersigned co-incidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial ". See the also the case of Duah v The Republic [1987-88] 1GLR 343;***

A typical example of circumstantial evidence is afforded by a statement of a witness at a murder trial that he saw the accused carrying a bloodstained knife at the door of the house of the victim. On even the case of the existence of the accused's fingerprints at the scene of the crime or on the murder weapon. Despite the importance of circumstantial evidence in criminal proceedings, it is not without its own frailties and limitations.

And as has been stated above, the PW1 and PW2 have testified to have seen the accused at the crime scene holding a gun with which Jr threatened passengers on board that bus; the PW1 has testified to have shot the Accused who fell down in the process but managed to escape into the bushes; they have testified to tracing the Accused in the bushes, who had been injured and incapacitated from the gun shot and eventually arresting the Accused to the Amartey village.

And at the police station and in court, they have continued to identify the Accused as part of some four men whom they came across and exchanged fires with at the crime scene. The facts show that even though they had not known each other before the date of the incident, however I find that it was not dark and it was a close contact encounter that aided recognition or identification.

In the case of ***Dogbe v The Republic (1975) 1 GLR 118 (holding 1),*** the court held as follows:

> ***"In criminal trials, the identity of the accused as the person who committed the crime might be proved either by direct testimony or by circumstantial evidence of other relevant facts from which it might be inferred by the court…."***.

As I have said above, in all this, I have a bounden duty to consider the defence or explanations of the accused person even in the face of the above pieces of evidence that strongly link him to the crimes in question: To assess if his explanations or defence were at least reasonably probable or reasonably true. See the case of ***Mahamadu Lagos v Commissioner of Police (1961) GLR 181, SC.***

Upon consideration of the said explanations or defence of the accused person, it is the judgment of the court that apart from them being not believable, they were also not reasonably true or reasonably probable. But why do I hold so?

It Is mainly because of the material inconsistencies in his sworn and usworn evidence in terms of what he said in court and what he said in his cautioned statement respectively. For while in his unsworn cautioned statement given around the time of his arrest and detention at the police station he had admitted to the offences, however in his sworn evidence-in-chief in court more than a year after, he denied the offences. He failed to give any reasonable explanation for the inconsistency and he is deemed not trustworthy. He is not deemed credible under section 80 (2) of the NRCD 323.

Apart from that, the court had found his sworn evidence not reasonably probable or reasonably true. This is because the Accused had explained that he was a cattle farmer or herdsman and was on his way to a kraal in the bush from Asuboni village where he had gone to charge his phones,; saying that he had lived for about 2 years preceding the incident. According to him, the kraal belongs to someone whose name he failed to mention in his evidence-in-chief and also during the cross-examination.

In the opinion of the court, these were positive assertions or averments as part of his defence which he had relied on to suggest or show his innocence that the prosecution had challenged He therefore assumed the evidential burden to have called satisfactory evidence to prove that as they were facts capable of proof. See sections 10 and 11 of the NRCD 323 (supra).

In particular, section 11(4) of NRCD 323 is as follows:

> ***"11(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leaves a reasonable mind to conclude that the existence of the fact was more probable than its non-existence."***

The Accused could have called people from Asuboni who have known him at the village and could testify to his trade; he could have called the owner of the kraal or colleague herdsman; or the person he claimed to have sold of his cattle to from which he was paid some GHC 1,500 as the probable source of the GHC 550.00 found on him upon a search just following the incident.

These were facts and positive assertions capable of proof ad facts peculiarly within the knowledge of the Accused, for which the law required the Accused to call, and not the prosecution, who had as part of their case denied same.

The Accused had been represented at the trial by a lawyer of more than ten years standing at the Bar and he ought to have known the importance of calling such corroborative evidence if they existed..

The Supreme Court in the case ***COP v. Antwi [1961] 1 GLR 408 held:***

> ***"The fundamental principles underlying the rule of law are that the burden of proof remains throughout on the prosecution and the evidential burden shifts to the accused only if at the end of the case of the prosecution an explanation for circumstances particularly within the knowledge of the accused is called for. The accused is not required to prove anything if he can merely raise reasonable doubt as to his guilt, he must be acquitted".***

Inasmuch as I concede that that the proof of those assertions would not have been fully and automatically exculpatory, however their proofs would have raised some reasonable doubt in the mind of the court on the charges against him; showing that he did not know the others found with him at

the scene before the date of the incident and that he was accidentally was found at the scene, removing the probability of a prior agreement to commit the robbery and also being involved in the crimes.

In the light of the above- based on the strong pieces of evidence adduced by the prosecution and the failure of the accused person to either individually or cumulatively to offer reasonably probable or reasonably true, the court accordingly makes the following findings of fact:

That the accused person met and planned or agreed to go to the Asuboni Nketepa road together with the other accomplices at large to use force and weapons to steal the items of passengers who ply that road.

The court finds that the two accused person herein together with the others at large attacked and assaulted and threatened the victim in order to steal their items from them.

The court finds and holds that the Accused was present and involved in the commission of the crimes by holding a gun with which he pointed at and threatened the passengers, which compelled them to surrender their items.

Accordingly, the court resolves the two issues as follows:

1. That the prosecution succeeded to prove beyond reasonable doubt that the Accused person herein, Abubakari Siddique, together with some accomplices at large conspired to rob the victims of their item along the Asuboni Nketepa road.
2. That the accused person together with the others at large succeeded in using force and assault and threats to collect the items of some passengers at the scene before they were shot at by the members of the Amartey village watchdog committee, which included the PW1 and PW2, who have positively identified the Accused.

The law is that to qualify one as an accomplice, the presence of the person must at least have encouraged the other (s) in the commission of the crime. See the case of ***Amoah v The Republic (1980-90) 1 GLR 266, per Kpegah J*** (as he then was).

Similarly, in the case of R v. Gray (1917) 12 Cr.App. R. 244, C.C.A, which had been quoted and relied on in the Amoah v The Republic (supra), His Lordship the Chief Justice (as he was then) had delivered of himself at 246 as follows which I hold applies to the instant case against the A1 and A2 ***mutatis mutandis***;

> ***"It is not necessary that a man, to be guilty of murder, should actually have taken part in a physical act in connection with the crime. If he has participated in the crime—that is to say, if he is a confederate—he is guilty, although he has no hand in striking the fatal blow. Equally it***

must be born in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence."

In applying the above authorities to the instant case, I find and hold that the prosecution succeeded to prove the guilt of the accused person, Abubakari Siddique, on the counts 1 and 2 beyond reasonable doubt. The Accused is thus convicted on the one count each of conspiracy to commit robbery and robbery respectively. He is found guilty on both counts accordingly.

SENTENCING

The punishment for conspiracy is provided for under section 24 (1) of Act 29/1960 (supra) as follows:

"Where two or more persons are convicted of conspiracy for the commission or abetment of a criminal offence, each of them shall, where the criminal offence is committed, be punished for that criminal offence, or shall where the criminal offence is not committed, be punished as if each had abetted that criminal offence".

Meanwhile, the punishment for the substantive offence of robbery is also statutorily provided per section 149 (1) of Act 29/1960, thus;

"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 not less than ten years, and where the offence is committed by the use of an offensive weapon or offensive missile, the offender shall on conviction be liable to imprisonment for a term of not less than fifteen years".

In passing the sentence, the convict, per the facts and on the evidence, it has been found pointed a gun at the passengers, in order to steal from them. A gun is a weapon. The court also considered the fact the offences in question have become prevalent within the jurisdiction of this court that need to be curtailed and reined in.

I have also considered that the convict is a first offender and he is of youthful age. He also appeared remorseful. He has spent almost 2 years in lawful police custody after he failed to find sureties for his bail. See Article ***14 (6) of the Constitution, 1992.***

In the light of the above, the court hereby imposes the minimum sentence on him: That is the convict, Abubakari Siddique, is sentenced to ***serve fifteen (15) years imprisonment*** in hard labour on each of

the two (2) counts without the option of a fine; which sentences are to run concurrently. He is informed of his statutory right of appeal if is not satisfied with both the conviction and sentences.

SGD:

STEPHEN KUMI, ESQ

CIRCUIT JUDGE.

LEGAL REPRESENTATION:

Prosecution: Chief Inspector Beatrice Larbi for Chief Inspector E. Ankrah present:

Osumanu Mohadeen, Esq, Counsel for the Accused absent.