THE CIRCUIT COURT HELD AT MPRAESO ON FRIDAY 17TH DAY OF FEBRUARY 2023 BEFORE HIS HONOUR STEPHEN KUMI ESQ CIRCUIT JUDGE.

COURT CASE NO. B18/81/2022.

THE REPUBLIC

V

DANIEL AKOTO

JUDGMENT:

It is provided under section 38 (2) of the Narcotics Control Commission Act, 2020 (Act 1019) as follows:

> ***"A person who without lawful authority sells, trades in, purchases, trafficks or undertakes an activity for the purpose of establishing or promoting an enterprise relating to narcotic drugs commits an offence"***

The accused person before me has been charged under the above provision; that is for the offence of prohibited business relating to narcotic drugs.

The statement of offence and particulars of offence that specify and amplify the alleged offence are as follows:

STATEMENT OF OFFENCE:

Engaging in prohibited business relating to narcotic drugs: contrary to section 38 (2) of the Narcotics Control Commission Act, 2020 (Act 1019).

PARTICULARS OF OFFENCE:

"DANIEL AKOTO: Driver; aged 20: You, on the 16th day of April, 2022 at 12:45am at Kwahu Obomeng in the Eastern Circuit and within the jurisdiction of this Court without

lawful authority, did engage in prohibited business relating to narcotic drugs by selling ninety six wrapped cannabis with net weight of 136.03 grams".

The brief material facts as supplied by the prosecution are that the complainants are police officers Counter-Terrorism Unit of the Ghana Police Service stationed in Koforidua whilst the Accused is a driver by trade and resident of Ntomem near Mpraeso-Kwahu.

It is alleged that on 16th April, 2022, whilst the Complainants were on their usual patrols in Kwahu Obomeng township during the Easter festivities at about 12:45am, they spotted the Accused at the Nkawkaw-Obomeng junction exchanging some item with another person.

The Complainants became suspicious, and as a result arrested the Accused and conducted a search on him, which revealed some 96 wrapped substances suspected to be Indian hemp in the bag of the Accused. They questioned the Accused about the suspected substances. The Accused claimed or admitted ownership of same. The Accused was arrested and taken to the Mpraeso police station.

On 24th May, 2022, the exhibit was sent for testing and analytical at the forensic crime laboratory at the Criminal Investigations Department headquarters in Accra. On 25th June, 2022, the test report was received and it proved positive for cannabis with a net weight of 136.03 grams. Based on the above, the Accused was charged and put before this court to answer to the above-mentioned charge.

The Accused person pleaded not guilty to the charge, which imposed a mandatory duty on the court to conduct a trial to receive evidence as to his guilt. In this trial, the prosecution is enjoined by sections 11(2) and 13(1) of the Evidence Act, 1975 NRCD 323 to prove the guilt of the accused person beyond every reasonable doubt. From

The prosecution called number 57047 G/Constable Saviour King Adeti of the Eastern Regional Counter Terrorism Unit, in Koforidua, as its first witness. He testified that he was one of some policemen in the region detailed to the Kwahu area for the Easter festivities to beef up security. He together with one Joseph Adinkra and some others were sent on duty at Obomeng.

According to him, while on duty and upon getting to the Obo-Nkawkaw junction, he spotted the Accused selling some substances to someone. He had seen the Accused holding a bag which he had hanged around his neck. PW1 said he became suspicious based on the behavior of the Accused and proceeded to arrest him.

They then searched the bag of the accused and found some ninety six (96) wrapped substances of dried leaves together with some packets of cigarettes. The Accused admitted ownership of same upon being questioned. They then took the Accused to the Mpraeso police station together with the exhibits for further investigations.

The second prosecution witness (PW2) is number 60165 General Constable Joseph Adinkra. According to him, he was with the PW1 and some others police men when they came across the Accused. I must state that the evidence or testimony of the PW2 was essentially a rehash or corroboration of the previous testimony of the PW1.

In other words, he testified that they came across the Accused, interrogated him, searched him and found some ninety six wrapped substances of dried leaves together with some packets of cigarettes, which the Accused admitted ownership of.

The third and last prosecution witness was Detective Chief Inspector Gershon Hallo, stationed at the Nkawkaw Divisional CID. He told the court that after the PW1 and PW2 arrested and brought the Accused to the Mpraeso police station, the Accused was subsequently brought to his station and the case was referred to him for investigations. On the same day, he said he obtained an investigation cautioned statement from the accused person and he tendered the same as exhibit A.

PW2 said he forwarded the 96 wrapped dried leaves to the police forensic laboratory at the police headquarters in Accra for testing; after which they received the report on the exhibit which proved to be Cannabis. He tendered the report as exhibit C. PW2 indicated that he charged the accused person and he volunteered a statement as Exhibit B.

It must be stated that the Accused did not cross-examine the PW3. He had also earlier on refused to cross-examine the PW1 and PW2. In each occasion, the court explained to the

Accused the legal effect of the Accused not cross-examining the witnesses after they had testified against him. However, the Accused insisted and stood his grounds.

In the case ***Takoradi Flour Mills v. Samir Faris (2005-2006) SCGLR 882,*** the Supreme Court cited with approval the case of ***Hammond v. Amuah (1991) 1 GLR*** 89 at 91 where Brobbey J, *as he then,* was reiterated the principle in the earlier case as follows;

> ***"The law is quite settled that where a party makes an averment and that averment is not denied no issue is joined and no evidence need be led on that averment. Similarly, when a party has given evidence of a material fact and is not cross examined upon it, he need not call further evidence of that fact: see Fori v. Ayirebi (supra). Indeed it was also held in the case of Quagraine v. Adams (1981) GLR 599, CA; that where a party makes an averment and his opponent fails to cross examine on it, the opponent will be deemed to have acknowledged,*** **sub silentio,** ***that averment by failure to cross-examine."***

CASE OF THE ACCUSED PERSON:

The court, at the close of the case of the prosecution, was satisfied and convinced that the evidence as adduced by the prosecution, had succeeded to establish a ***prima facie*** case against the accused person on the sole count against him.

The court therefore called upon and asked him to open his defence on the count in order to avoid a ruling of the court against him on the issues in dispute.

This position is statutorily provided for under section 174 of the Criminal Procedure Act, 1960, Act 30, as follows:

> ***" "At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused sufficiently to require him to make a defence, the court shall call upon him to enter into and shall remind him of the charge and inform he that, if he so desires, he may give evidence himself, or make a statement…"***

The Accused when it was time for him to open his defence announced to the court that he had nothing to say. He said he did not wish to open his defence. He also told the court he had no witness to call.

As the Accused was unrepresented by Counsel at the trial, the court once again advised and warned the Accused of the legal effect of not opening his defence and offering a reasonable explanation to the charge against him in the light of the prima facie evidence established against him at the close of the prosecution's case.

At that stage, the establishment of the prima facie evidence against him required him to call other quality and credible evidence to show as to how he came by the the exhibit or that he any legal right to possess same.

That is a reasonable explanation as to how he came by the narcotic substance; in the absence of which the court would be entitled to convict him. In the case of ***Kwabena Amaning @ Tagor v The Republic (2009) 23 MLRG 78 CA, at pages 129-130, Appau JA (as he then was)*** stated the effect of an accused person refusing or failing say anything in defence when a prima facie case has been established as follows:

> ***"Prima facie evidence is nothing other than evidence that can lead to the conviction of accused if the accused leads no evidence to rebut presumption(s) raised in it. The standard required in establishing a prima facie case is therefore not lesser than the standard required in establishing or proving a case beyond reasonable doubt….***
>
> ***Prima facie evidence is evidence, which on its face or first appearance, without more, could lead to conviction if the accused fails to give reasonable explanation to rebut it. It is evidence that the prosecution is obliged to lead if it hopes to secure conviction of the person charged." See the case of Kwabena Amaning @Tagor v The Republic [2009] 23 MLRG 78 CA; @ pages 129-130; per Appau, J.A. (as he then was)".***

EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW

As has been said above, the accused person came to the court and pleaded not guilty to the charge. The effect of his plea was as follows in law, especially in a criminal case of this nature:

> ***"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.***

It may also be important to mention section 11 (2) of the Evidence Act, NRCD 323, which provides as follows:-

> ***"11(2) in any civil or 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."***

Meanwhile, in terms of judicial pronouncements on this burden and standard of proof in criminal trials, 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, which burden must be discharged beyond reasonable doubt.

This burden of proof that the prosecution must satisfy in the present proceedings was famously captured in the following *ipsissima verba* of Viscount Sankey, LC in the case of Woolmington v. DPP (1935) AC 462. The learned Lord Chancellor delivered of himself thus;

> ***"No matter what the charge or what 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…."***

See also Article 19 (2) (c) of the Constitution, 1992.

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.**

By way of useful recapitulation, section 38 (2) of the Narcotics Control Commission Act, 2020 (Act 1019) is that;

> ***"A person who without lawful authority sells, trades in, purchases, trafficks or undertakes an activity for the purpose of establishing or promoting an enterprise relating to narcotic drugs commits an offence"***

From the above provision, I find that as long as the evidence from the prosecution or on the record shows that a person or an accused person sold, traded in, purchased, trafficked or undertook an activity for the purpose of establishing or promoting an enterprise relating to narcotic drugs without lawful authority, then the person or accused in question has committed an offence.

In the Act 1019 (supra), lawful authority is defined as;

> ***"lawful authority" means authority given by a person or body as the Minister may prescribe".***

It is realized that prosecutions under this section or provision essentially places the burden on an accused to prove the existence of lawful authority; a clear exception to the general principle in criminal proceedings that places the burden of proof on the prosecution or Republic; that is after the prosecution has initially established that an accused was selling or trading in or engaging in any of the impugned acts under section 38 (2).

In ***R. v. Agu (1949) 12 W.A.C.A. 486*** this double duty upon the prosecution and upon the defence, was explained at p. 487 as follows, which I find applies to the instant case ***mutatis mutandis;***

> ***"The onus lies on the prosecution to prove that the accused had knowledge of his possession of forbidden articles or at least to prove facts which would justify the***

> ***inference that he had such knowledge. Only in that case does the onus lie upon the accused to prove lawful authority or excuse for his possession, a burden it would be impossible for him to discharge unless it be established that he had knowledge of the possession."***

See the case of ***Sokoto and Ano. v The Republic***; delivered on 21st July, 1972, at the Court of Appeal, per Kingsley-Nyinah JA (as he then was).

In this case, the evidence on the record- especially those of the PW1 and PW2- which were unchallenged, amply shows that the Accused was found selling some of the wrapped substances and a search of the Accused person's bag revealed a total of 96 wrapped substances which have now been tested and confirmed to be cannabis as per the Exhibit C. Cannabis is a narcotic drug within the descriptions specified in the Sixth Schedule to the Act 1019 (supra).

Indeed, in the cautioned and charge statements of the Accused, which were admitted into evidence without any objections, the Accused admitted ownership and knowledge of the cannabis and also admitted selling the narcotic drug at the time of his arrest by the police to assist him earn a living. For emphasis, the Accused in his cautioned statement stated amongst others as follows;

> ***"… I am a driver resident at Ntomem near Bepong. The items found on me belong to me. I took them from Paa Kwasi of Ntomem about a week ago to sell and got something to eat. Yesterday, I was selling some and cigarettes at Obomeng. A guy rushed me to buy some and in the process the police came to arrest me. The items were found on me. I am pleading for mercy… ".***

In that state of affairs, I hold that the evidential burden or onus reversal had shifted onto the Accused to prove that he had lawful authority from the Minister of Interior to sell or trade. However as has been said above, the Accused failed or refused to open his defence, telling the court from the dock that he had nothing to say.

The result is that he failed or refused to discharge the evidential burden on him to prove the existence of any lawful authority from the Minister of Interior to sell or trade in the said narcotic drug.

The net result or consequences in law was that on the authority of the ***Kwabena Amaning @ Tagor v The Republic (supra)*** the court was entitled to use the prima facie case or evidence established by the prosecution against the Accused as the only evidence on record to arrive at the guilt of the Accused.

In addition, the court was also entitled to rely on and to conclude on the guilt of the Accused based on his cautioned statement in which he confessed to the crime. 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).***

On the totality of the evidence produced by the prosecution, I hold that the prosecution has succeeded to establish beyond every reasonable doubt that the 96 wrapped dried leaves found with the accused person at Obomeng on the date in question are Cannabis; that the accused was very much aware that the dried leaves seeds are cannabis and that he was found while selling some and with the intention to sell them to members of the public.

I also find that after the evidential burden shifted onto him, the accused could not prove that he had any lawful authority from the Minister of Interior for having and selling or trading in the narcotic drugs.

In the light of the above findings and conclusions, I find the accused guilty of the offence of engaging in the prohibited business relating to narcotic drugs by sale. He is accordingly convicted.

SENTENCE.

The convict is a young man. The charge sheet gave his age as 20 at the time of arraignment. He has spent some almost seven (7) years in lawful police custody after he failed to meet the bail conditions. He has also shown to be remorseful for his actions. Those are mitigating factors.

However the court notes that the convict is an ex-convict who has obviously failed to reform. He agreed with the prosecution that he was convicted and sentenced by this same court-albeit differently constituted- to serve one year imprisonment- some few years back for the offence of stealing, a second degree felony, for which was only released two years before his arrest for this more serious offence.

The quantity of Cannabis found in the accused person's possession is reasonably large comparatively. These are the extenuating factors. The drug menace in this area and within Ghana generally is an elephant in the room situation that needs to be curbed.

I therefore sentence him to pay a fine of ten thousand penalty units; or in default he is to serve three (3) years imprisonment in hard labour.

In addition, he is to serve twelve (12) years imprisonment in hard labour without the option of a fine. He is informed of his right to appeal if he is dissatisfied.

SGD:

STEPHEN KUMI, ESQ

CIRCUIT JUDGE.

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