IN THE GENDER-BASED VIOLENCE CIRCUIT COURT AT SEKONDI –W/R, HELD ON TUESDAY, 28TH MARCH 2023 BEFORE H/H NAA AMERLEY AKOWUAH (MRS.)

……..…….

C18/17/21

THE REP.

vs.

STEPHEN KOBENA

EVANS ESSIEN

SEBASTIAN ARGO

ACCUSED PERSONS: PRESENT & PRO SE

PROS.: CHIEF INSP. VERONICA TIBSON

JUDGMENT

Section 99(2)(a) of the Minerals and Mining (Amendment) Act, 2019 (Act 995) creates the offence of undertaking mining operation without a licence granted by the Minister and proscribes the punishment, upon conviction, as not less than 10000 penalty units and not more than 15000 in addition to a custodial sentence of not less than 15 years and not more than 25 years. In section 23 of the Criminal (And Other Offences) Act, 1960 (Act 29), the offence of conspiracy attracts a sentence commensurate with the substantive offence, should accused persons be found guilty. An important distinction between the Minerals & Mining Act, 2006 (Act 703) and its amendment in Act 995 is the expansion of activities that can be described as mining. S. 99 (2) (a) of Act 703 restricted the offence to 'small-scale mining operation 'without a licence from the Minister while the amendment in Act 995 widened it to 'undertaking a mining operation without a licence from the Minister leaving the activities that constitute 'illegal

mining' also known as 'galamsey' to be determined by a court within the guidelines made in subsection 6 of s. 99. Subsection 6 of S. 99 makes the use of any '*… floating platform or any other equipment for mining, dredging or other mode of mining for the purpose of obtaining minerals in or along the banks of a natural water body including a river, a stream, a water course, …'* an offence, separate from the offence created by subsection 2, et al, but this provision is useful in the instant case as will unfold forthwith.

When arraigned, accused persons pleaded "Not Guilty" necessitating a trial in accordance with the Criminal (Procedure) Act, 1960 (Act 30) with Prosecution calling two witnesses to prove its case.

PW1 and complainant was Ignatius Appiah, a forest Range Supervisor with the Forestry Commission. He testified that on 24/06/2021, as part of a team comprising 3 Rapid Response personnel and 4 Forest Guards, they proceeded to the Cape 3 Point Forest Reserve after receiving complaints from the Morrison village of water pollution. He also told the Court that when the team entered the Forest Reserve, he saw *'some people indulging in illegal mining to quest for gold mineral*'. Immediately the people saw his team they took to their heels but together, he and his team were able to arrest the three accused persons. The team retrieved three shovels and a pickaxe from the accused persons. He concluded that after arresting the accused persons, the team inspected the site and observed that a large portion of the area had been cleared, the topsoil of earth removed, several trees cleared and trenches dug. The team took several pictures of the site and handed over the accused persons to the police for further investigations, which pictures were admitted and marked as Exhs. B, B1-B5. His initial statement dated 25/06/2021 was admitted and marked as Exh. A

To test PW1's credibility, then Counsel for accused persons, J.E. Abekah who subsequently withdrew his services, cross-examined him extensively on his testimony. Counsel put it to PW1 that with the exhibits of accused persons at the crime scene, particularly Exh. B5, it was rather the case that accused persons were there to undertake sand winning, not illegal gold

mining. PW1 explained that be it sand winning or illegal mining, the presence of accused persons inside the forest was unlawful and also because the area is a designated Globally Significant Bio Diversity Area (GSBDA) by the United Nations and affirmed by the Forestry Commission of Ghana. PW1 clarified that being a GSBDA no one was permitted entry. Besides, accused persons were the ones found in the forest and obviously mining. He disputed that the accused persons were in the forest reserve for sand-winning purposes because when they were arrested, there was no vehicle nearby into which they were carting sand. Counsel also put it to the witness that the team did not find a water pumping machine or bucket at the scene, necessary tools for 'galamsey' and so could not conclude that the accused persons were engaged in 'galamsey'. To this, the witness explained that they found a broken bucket at the scene but did not retrieve it because they did not think it was of material relevance. Further, because of nearby water bodies, from his knowledge of 'galamsey', operators often did not need a water pumping machine to transport the water to the specific site that they were at. Interestingly, Counsel posited that since PW1 did not see the accused persons clearing the forest cover, but merely at the site, he could not conclude that they undertook that activity.

PW1 insisted that looking at Exh. B series, the river polluted by accused persons 'galamsey' activities could be seen in the background. When Counsel put it to him that the same effects could be from sand winning PW1 countered that sand winning does not involve washing the sand collected in water.

PW2 was the investigator, No. 5970 DPW/ Sgt. Rebecca Ellimah. She testified to visiting the crime scene in the forest and taking additional photographs. In response to an objection raised, a Voire Dire was held and a Ruling delivered by this Court on the admissibility of accused persons' respective Investigation Caution and Charge Statements (ICS & CS). Immediately, however, the first leg of the objection to the 4 photographs was overruled, admitted, and marked as Exhs. C, C1-C3 on stated grounds. In its Ruling on the ICS & CS, the Court found that the allegations that accused persons were severely beaten and forced to give their

statements were unfounded. Indeed, the evidence of witnesses supported the fact on the face of the record that an independent witness was present when the respective statements were taken. Accordingly, the second leg of the objection was overruled and the relevant Investigation Caution Statements and Charge Statements, all dated 25th June, 2021 of A1, A2 & A3 admitted as Exhs. D, E, F, G, H & J.

The narrations in Exhs. D-J were very similar in contents, even down to the diction used. All three accused persons stated that they were contacted by a friend whose name they did not know. He told them that he had a job for them and asked each to bring along a cutlass to a rendezvous. The unnamed friend took them into a forest and told them that the work he had in mind for them was 'galamsey'. A1, A2 & A3 said that they refused to do as instructed by the unnamed friend and rather asked for transportation fare back home but the unnamed friend refused. They had no choice than to do the 'galamsey' in order to get fares back home. While doing the 'galamsey', the forest guards came upon them and arrested them.

Considering that Exhs. D – J were tested in the *voire dire* and allegations of involuntariness and undue influence found to be false, I find them to be in satisfaction of s. 120 of the Evidence Act, 1975 (NRCD 323) being confession statements or at the very least, taken together with other pieces of evidence on record, constitute confession statements. See ***Billa Moshie v The Rep. [1977] 2GLR 418, CA*** and ***Ofori v The State [1963] 2 GLR 452, SC*** where it was held that a free and voluntary confession of guilt by an accused person, if it is direct and positive, duly made and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence.

Juxtaposed with their testimonies given in their defences, accused persons denied undertaking 'galamsey'. Culled from their testimonies, accused persons posited that even though they were found in the forest, their arrest was merely for entering into a forest reserve, not because they were undertaking 'galamsey'. Indeed, all accused persons passionately put it to PW1 & PW2 that since they did not find gold dust on them, it was unfair to conclude that they were

undertaking 'galamsey'. Accused persons vehemently denied ownership of the tools allegedly retrieved from the site, arguing that since PW1 and his team did not find a water pumping machine, blanket, board or the other usual 'galamsey' equipment at the site, it was unfair to charge them with the instant offences. Secondly, that they only entered the forest to win sand for a brother who was putting up a building in the nearby village.

As a preliminary observation, I find it interesting that after denying ownership of the tools found at the site, the accused persons wanted the Court to believe that they went sand winning with their bare hands. Either way, in light of their defences, a few questions should help clarify the relevant issues at stake;

Do the Prosecution's exhibits conclusively lead to 'galamsey? Are there other conclusions that the same set of facts & exhibits could lead to? Possibly sand winning? NO! Possibly tree felling? NO! Merely entering a forest? Maybe! But the accused persons failed to give a reasonable explanation as to their presence in the Forest Reserve, they were not found with hunting or fishing gear as their then lawyer wanted this Court to believe and the story of an unnamed friend tricking and enticing them with a job is simply untenable. Indeed, even accused persons did not say that at the time of their arrest, they were in possession of hunting or fishing gear. Did this raise reasonable doubt? Perhaps.

It is trite law that a witness whose testimony before a court is contradictory of a statement earlier made, sworn to or unsworn, and who does not give any plausible explanation for the difference is not worthy of credit and should be disregarded. See ***State v Otchere &Ors. [1963] 2GLR 463***. Having found that Exhs. D – J were proper and complied with the relevant provisions of NRCD 323, I find that same were credible unlike the testimonies given during the trial.

In addition to the above, I find as a fact that PW1 was an eyewitness and saw accused persons in the very act of 'galamsey'. This is contained in his testimony to the Court as well as Exh. A.

The weight attached to an eye witness account is heavier than the circumstantial evidence deduced from other facts related to a case. Further, PW1's testimony was corroborated by Exhs. B & B1 which has A1-A3 depicted at the scene of arrest, in working gear and with mud visible on their bodies. A1-A3 do not dispute their presence and arrest in the forest. I must say that, should PW1 even be disbelieved, Exhs. B &B1 would carry the heaviest legal corroborative weight provided for in s. 7 of NRCD 323 and exemplified in the case of ***Francis Arthur v The Rep. [Criminal Appeal No. J3/02/2020].***

Apart from the eyewitness account of PW1, the totality of the evidence on record, especially the pictures showing accused persons covered in mud, the devastation to the forest cover, and pollution of the water behind them is testimony of their handiwork, of course with the assistance of the other 'galamseyers' who absconded. In law, the preceding analysis is termed circumstantial evidence, and from which the only conclusive finding that could be arrived at is the guilt of the accused persons to the charge in Count 2. See the cases of***Frimpong@ lboman [2012] ISCGLR 297@313***, with reference to the cases of ***State v AnaniFiadzo [1961] GLR 416 and R. v Onufrejczyk [1955] 1 QB 388***.

Being an inchoate offence, the charge of conspiracy will now be discussed in light of its ingredients of prior agreement or acting together as rephrased in Act 29 by the Justice VCRAC Crabbe Commission. Sections 23 & 24 of Act 29 defines conspiracy, the scope and the punishment upon conviction and does not bear repeating. The essence of a charge of conspiracy against a person with named or unnamed persons under the new Act 29, as Marful-Sau JSC explained in ***Republic v Augustina Abu [AC] 2010 delivered on 23/12/2010*** was that "*the persons must not only agree or act, but must agree to act together for common purposes. This to my mind raises the degree and standard of proof for the offence of conspiracy, since by the Criminal Offences Act, the prosecution must establish that the persons agreed to act, rather than just agreeing or acting*".

From their own Exhs. D – J, there is evidence of prior agreement amongst accused persons to work together when their unnamed friend contacted them. In fact, when they arrived at the rendezvous too, after finding out the nature of work they were to do, accused persons agreed to do it and undertook same, without compulsion from the unnamed friend who refused to give them money back home. Despite the incredulity of the 'unnamed friend' story, all three accused persons admitted that they did act together, even if the incredible story is that they did not dig the dugouts.

It is at this point that reference is made to s. 99(6), Act 995 on what may be described as a 'galamsey' activity. Accused persons' handiworks are amply exhibited in Exhs. C series which shows acts of degradation of the forest with pooled polluted water bodies obviously used in gold prospecting.

I find that gold dust not being found on accused persons is immaterial to the proof of the charges the offence is not in the products derived from the activities, but rather the activities engaged in to derive the products.

CONCLUSION

In conclusion, I find that Prosecution has proved the offences of conspiracy to commit a crime and undertaking small-scale mining without a licence contrary to sections 23 of Act 29 and 99(2)(a) of Act 995. Unfortunately, the punishment under Act 995 is bracketed in minimum and maximum custodial sentences, together with hefty fines. With this, a court can only comply with the dictates of the law, notwithstanding reservations when factors such as the ages of the accused persons and perhaps, being first-time offenders. On the other hand, however, is the destruction of the environment by the activities of 'galamsey', dire medical consequences on communities nearby, etc., and which despite public admonitions on its consequences, persons such as the accused persons herein, still refuse to heed. Unfortunately, I have no choice but to apply the law and so I shall.

CONVICTION

A1, A2 & A3 are hereby convicted of the offences of conspiracy to commit a crime and undertaking small-scale mining without a licence contrary to sections 23 of Act 29 and 99(2)(a) of Act 995.

SENTENCES

	A1	A2	A3
Count 1	2 years	2 years	2 years
Count 2	10000 p.u	10000 p.u	10000 p.u
In addition	15 years IHL	15 years IHL	15 years IHL

All sentences to run concurrently