IN THE CIRCUIT COURT '1' SITTING IN ACCRA ON MONDAY, 27TH DAY OF FEBRUARY 2023 BEFORE HER HONOUR AFIA OWUSUAA APPIAH (MRS.) CIRCUIT COURT JUDGE

SUIT NO.D2/215/2019

THE REPUBLIC

VRS:

1. BENJAMIN DOGBE

2. MOHAMMED AWAL **ACCUSED PERSONS**

JUDGMENT

A1 herein was arraigned before this court together with A2 now deceased on one count of conspiracy to commit offence to wit robbery contrary to section 23 (1) 149 of Criminal Offences Act 1960, (Act 29), and robbery contrary to section 149 of Act 29. A2 was further charged with possessing firearm and ammunition without authority contrary to section 11 of Arms and Ammunition Act 1972 NRCD 9.

The facts in support of the charges preferred against the accused persons by the prosecution are that the Complainant in this case is a Mobile Money Vendor at Taifa-Burkina @ Mr. Adjei, Accra. The 1st accused person Benjamin Dogbe is a Painter whilst the 2nd accused person Mohammed Awal is a Fabricator. On 27th March 2019 at about 8:45am, the accused persons attacked the Complainant with a pistol at his Mobile Money Shop at Taifa-Burkina @ Mr. Adjei fired indiscriminately and robbed him off cash the sum of GHC12,000.00 and Credit Cards valued at GHIC800.00 and sped off with an unregistered Motor bike. The accused persons were given a hot chase by the

Complainant with his Pontiac Vibe salon car and succeeded in knocking them down with his car and as a result the motorbike landed in a dish. With the help of some angry mobs, the 1st accused person was arrested and sent to Taifa Police Station. The 2nd accused person managed to escape from arrest. Later, the second accused person was arrested by a team of Policemen from his hideout from a big gutter around Taifa-Burkina. The 2nd accused person then led Police to his hideout and showed Police where he hid a revolver which was used for the scene of crime for evidential purpose. During investigation, the accused persons confessed their involvement in the commission of the crime in both their investigation and charge cautioned statements as well. Accused person led Police to the scene of crime and demonstrated to Police how their operation was carried out. The 2nd accused person claimed ownership of the gun used for the operation.

THE PLEA

The accused persons pleaded not guilty to the charge after the charges had been explained to them in Twi, the language of choice of the accused persons.

BURDEN OF PROOF

In every criminal prosecution, when an accused person denies an offence, prosecution assumes a statutory obligation to prove beyond reasonable doubt the guilt of accused. **Section 11(2) of the Evidence Act, 1975, NRCD 323** (hereinafter referred to as NRCD 323) with specific reference to criminal

cases reads *"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."*

In every criminal prosecution, when an accused person denies an offence, prosecution assumes a statutory obligation to prove the guilt of the accused beyond reasonable doubt. **Section 11(2) of the Evidence Act, 1975, NRCD 323** (hereinafter referred to as NRCD 323) with specific reference to criminal cases reads

> "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."

Section **13(1) of the Evidence Act 1975 NRCD 323** provides the extent of proof or the burden on the prosecution in a criminal action thus:

> **(1) In a 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 a reasonable doubt.**

In the case of **Oteng v. The State** [1966] GLR 352 at page 354 -355, the Supreme Court held:

"*One significant respect in which our criminal law differs from our civil law is that while in civil law a plaintiff may win on a balance of probabilities, in a criminal case, the prosecution cannot obtain conviction upon mere probabilities"… The citizen too is entitled to protection against the State and that our law is that a person accused of a crime is presumed innocent until his guilt is proved beyond reasonable doubt as distinct from fanciful doubt."*

And there seems to be a further emphasis under **section 22 of the NRCD 323** that provides

> 'in a criminal action, a presumption operates against the accused as to a fact which is essential to guilt **only** if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond reasonable doubt…'

In the case of **TAMAKLOE VS THE REPUBLIC (2011) SCGLR 29** at 46 it has been held that, where a statute creates an offence, it is the duty of the prosecution to prove each and every element of the offence which is sine qua non to securing conviction, unless the same statute places a particular burden on the accused. It is also important for this Court to bear in mind that the Constitution 1992 Article 19(2)(c) presumes everyone innocent until the contrary is proven. In other words, whenever an accused person is arraigned before any court in any criminal trial it is the duty of the prosecution to prove the essential ingredients of the offence charged against the accused person beyond any reasonable doubt. The burden of proof is therefore on the Prosecution and it is only after a prima facie case has been established by the

Prosecution that the accused person is called upon to give his side of the story." See the case of **Gligah & Anr. v The Republic [2010] SCGLR 870** Prior to prosecution opening their case, A2 passed on and Prosecution therefore proceeded against A1 and called the investigator of the matter as its sole witness. Considering that count three was in relation to only A2 and he is deceased, same becomes mute and is dismissed forthwith.

PW1, D/C/inspector Philip Kwaku Perdison relied on his witness statement filed on 11/9/2020. He also tendered in evidence statement of Dennis Amuzu dated 27/3/19 as exhibit A; the investigation and charge statement of deceased A2 as exhibit B, B1; photograph of a blue motorbike as exhibit C. photograph of Black revolver and the real black revolver as exhibit D, D1 and a photograph of a Pontiac Vibe vehicle marked E and the charge statement of A1 as exhibit F. A1 also testified in his defence without calling any witness. The caution statement of accused dated 28/03/2019 which was a confession statement did not have the certification of an independent witness was rejected by the court and same marked exhibit R.

I shall proceed to analyse the evidence of both prosecution and accused person against the principles and rules of law in relation to the charges accused person is answering to.

Conspiracy to commit crime to with robbery

Here, the accused persons are charged with conspiracy to commit the offence of robbery and robbery. S**ection 23 (1) of Act 29 reads:**

"Where two or more persons agree to act together with a common purpose for or in committing or abetting a crime, whether or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet".

In the case of **Kwaku Frimpong a.k.a Iboman v The Republic Criminal appeal J3/5/2010, 18th January 2012, the Supreme Court per Brobbey (Presiding), Adinyira, Owusu(Ms) , Dotse and Gbadegbe JJSC** held the view that it is important to note that in a charge of Conspiracy, it is sufficient if the prosecution succeed in proving the essential ingredients of the offences of conspiracy to commit robbery and expounded same as follows :

i. Agreement to commit the unlawful act of robbery – acting for a common design. There need not be any prior deliberation.

ii. Intention on their part to commit that unlawful act – this was manifested in their common pursuit of the robbery agenda. The position of the Supreme has watered down to a large extent the challenge the review posed.

The Supreme Court of the land in the recent case of **FAISAL MOHAMMED AKILU v THE REPUBLIC [2016-2017] SCGLR 444 per Yaw Appau JSC** stated the current Ghanaian law on conspiracy as follows:

"From the definition of conspiracy as provided under section 23(1) of Act 29/60, a person could be charged with the offence even if he did not partake in the accomplishment of the said crime, where it is found

that prior to the actual committal of the crime, he agreed with another or others with a common purpose for or in committing or abetting that crime… However, where there is evidence that the person did in fact, take part in committing the crime, the particulars of the conspiracy charge would read; "he acted together with another or others with a common purpose for or in committing or abetting the crime". This double-edged definition of conspiracy arises from the undeniable fact that it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. **Conspiracy could therefore be inferred from the mere act of having taken part in the crime where the crime was actually committed. Where the conspiracy charge is hinged on an alleged acting together or in concert, the prosecution is tasked with the duty to prove or establish the role each of the alleged conspirators played in accomplishing the crime**". (Emphasis mine).

Section 149 (1) and (3) of Act 29, respectively provides as follows;

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

(3) In this section "offensive weapon" means any article made or adapted for use to cause injury to the person or damage to property or intended by the person who has the weapon to use it to cause injury or damage; and

"offensive missile" includes a stone, brick or any article or thing likely to cause harm, damage or injury if thrown."

Section 150 of Act 29 further defines robbery in the following terms;

"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."

The essential ingredients of the offence that the prosecution must establish to secure conviction as stated by the Supreme Court in the case of **Frimpong alias Iboman v. The Republic** [2012] 1 SCGLR 297 at 312, per Dotse JSC are as follows;

i. That the accused person stole something from the victim of the robbery of which he is not the owner.

ii. That in stealing the thing, the accused person used force, harm or threat of any criminal assault on the victim.

iii. That the intention of doing so was to prevent or overcome the resistance of the victim.

iv. That this fear of violence must either be of personal violence to the person robbed or to any member of his household or family in the restrictive sense

v. The thing stolen must be in the presence of the person threatened.

PW1 formerly stationed at Regional CID, Accra testified that on the 27/3/2019, complainant, one Dennis Amuzu assisted by a number of angry mob arrested A1 who had originally been sent to Taifa Police Station to the Regional CID for further investigations. Subsequently, A2 was also arrested by a team of policemen from his hideout in a big gutter around Taifa Burkina and brought to him. Complainant lodged a complaint of robbery against accused persons herein. According to PW1, A1 and A2 confessed their involvement in the crime and reconstructed how they committed the offence in the full glare of the police and other witnesses. He testified further that investigations revealed that A1 and A2 on the said date attacked complainant a mobile money vendor at Taifa Burkina at gun point amidst indiscriminate firing and succeeded in robbing him of the cash sum of GHC12,000 and GHC800 credit cards and sped off on an unregistered motor bike. However complainant chased them in his Pontiac Vibe vehicle, crushed them down and over powered and arrested A1 whilst A2 managed to escape. Exhibit C, is a photograph of the motorbike used by accused and exhibit E the photograph of complainant's Pontiac Vibe vehicle. According to PW1, exhibit D1 was retrieved from A2 who led police to where he had hidden same.

A1 on oath denied any knowledge whatsoever of the robbery incident and stated that he is a farmer engaged in the rearing and trade in cattle. According to him on the day of the incident, he was on his way to meet a

customer friend of his at Lybia Quarters, Madina, Accra when all of a sudden he was hit by a car from behind without any warning and fell off the road and momentarily lost consciousness. When he regained consciousness, he found himself at the police Taifa Police station. All his protest of his innocence at the police station and cry of being a victim of a running down accident was not heeded. Later, A2 whom he had never seen before was brought to the station and he was accused of having committed the robbery together with A2.

The evidence of prosecution on record is solely that of PW1 and the exhibits in evidence. PW1's evidence of the revelations of his investigations and the confessions by accused persons to the commission of the crime has been denied by accused. The charge statement of accused i.e exhibit F merely states that he relies on his investigation caution statement. Unfortunately, the court rejected the said investigation caution statement and same marked R. PW1's contention that A1 confessed to the offence therefore is unproven.

In exhibit B and B1, A2 confess to the commission of the robbery together with A1 as his accomplice. This evidence was however was not or could not be repeated or relied on under oath by A2 who passed away prior to the hearing of the prosecution's case. The Supreme court speaking through Bamford Addo JSC in the case of **BONSU ALIAS BENJILLO v THE REPUBLIC [1999-2000] 1 GLR 199** held that An unsworn statement by an accused person unless repeated by him on oath at the trial and he had been cross-examined on it, would be admissible evidence against only the maker and not a co-accused. Exhibits B and B1 being a confession statement of A2 therefore cannot be admitted as evidence against A1 herein to prove

his guilt to the offences he stands charged. Exhibit B and B1's admissibility and weight could only be against A2 and not A1. The court accordingly accord no weight to exhibit B and B1 in determination of the guilt or otherwise of A1 of the offences he stand charged with.

Exhibit C is the photograph of the motorbike on which accused persons allegedly were fleeing on and exhibit E a photograph of complainant's Pontiac vibe vehicle used to crush down the motorbike. Exhibit D and D1 are not attributable to A1 as per the evidence of PW1 same was retrieved from A2 and acknowledge by A2 as the owner. A1 does not dispute having been knocked down or crushed to ground by a vehicle. The defence of A1 is that he was on his way to see a customer of his when a vehicle from behind knocked him down. He contends that he knows nothing of the alleged robbery and was only a victim of motor accident.

S.A Brobbey JSC in his book Trial Courts and Tribunals of Ghana at page 167 paragraph (XIII) 355 making reference to the case of C.O.P v Kwashie supra stated "a conviction can be based on the evidence of a single witness who is an eye witness."

PW1 is not an eyewitness. Prosecution filed witnesses statements of complainant Dennis Amuzu, one Faustina Sakyi, G/Sgt Isaac Adoku who per the contents of the filed witness statements were eyewitnesses of the incident and arresting officer of A1 respectively.

These persons were material witnesses in the establishment of the guilt of A1 herein. A material witness has been defined in the case of **ADAM v. THE REPUBLIC [199 2] 2 GLR 150 by BENIN J** per holding 6 thus *"in a*

criminal prosecution a "material witness" was one whose evidence would help the court decide on the ingredients of the charge before it or whose evidence would help remove any doubt that might exist in the prosecution's case, or whose evidence would help displace any reasonably probable defence that the accused might have. Accordingly, a material witness was necessarily a witness for the prosecution and not the defence since the prosecution assumed the burden of proving guilt"

Prosecution however failed to call any of these eyewitnesses but relied solely on the evidence of the investigator who has secondhand evidence of what had actually transpired on the said date. Admitted being the investigator evidence amassed during his investigations are admissible as part of the exception to the hearsay rule hence the court admitted exhibit A. Complainant in exhibit A narrated in details the happening of the day and stated that two men attacked him with a gun amidst firing of the gunshots into the air and at him, took away cash sum of GHc15,000 credit cards of over GHc800. He stated that he chased them in his Pontiac Vibe vehicle and crushed into the motorbike they were fleeing on. One managed to escape but the short one was trapped under the car. The short man was arrested beaten and sent to Taifa police station. Per exhibit A, the statement of complainant, he identified his attackers by describing one as short. It is this short man he stated was trapped under the vehicle and was arrested and sent to Taifa Police station. Taking these pieces of evidence together with the evidence of PW1, exhibit C and E it can be inferred that A1 is the said short man whom complainant state in exhibit A to have robbed him and fled on a motorbike

which he crushed with his Pontiac vibe vehicle and had arrested. This evidence in exhibit A however remains admissible hearsay evidence, which has not undergone the tested of cross-examination to know it's evidential weight. The admission of the said hearsay evidence differs from the weight that the court should accord to such evidence.

In the case of **Ekow Russel v. The Republic** [2017-2020] 1SCGLR at 469, the court held at its holding 6 that:

"it was correct to state that the admission of a statement by a court did not necessarily mean that the statement was of evidential value so as to automatically result in conviction. A statement that was admitted into evidence must be weighed to determine whether it was valuable enough to sustain the conviction sought."

The Accused in his defence does not deny being knocked down by a vehicle. he contends that he was on his way to meet a customer when he was knocked down from his motorbike from behind and momentarily lost consciousness only to wake up to find himself at Taifa Police Station.

Even though the prosecution had discretion as to which witness to call, the discretion is exercised judicially and sometimes, the failure to call such a witness could be of dire consequences for the case of the prosecution. Thus in **TETTEH v THE REPUBLIC [2001-2002] 1 GLR 200** 2**,** the Supreme Court per its holding held *"as a general rule, the prosecution had a discretion to present such witnesses as it elected to call in support of its case. But the discretion had to be exercised in a manner that would further the interests of*

justice and ensure fairness to the accused so that he did not suffer any disadvantage. Thus the rule that the prosecution had to call material witnesses was an important qualification on the discretion of the prosecution. However, whether or not a witness was a material witness depended on the quality and content of the evidence he was expected to offer in relation to the case on trial. He would be deemed to be material if the evidence expected from him was deemed to be so *vital as to be capable of clearly resolving one way or the other, an important and decisive issue of fact in the controversy. The evidence had to appear likely to have a profound impact on the facts of the case to the extent that if it was accepted as true it would compel the court to come to a conclusion that was different from the decision given".*

In the absence of these material witnesses evidence, the court is faced with the evidence of prosecution witness against that of accused person. In the case of **LUTTERODT V COMMISSIONER OF POLICE [1963] 2GLR 429, SC** the court held "Where, as in this case, the decision turns upon the oath of one prosecution witness against that of a witness for the defence, it is incumbent upon the trial court to examine the evidence of each of those two witnesses carefully along with other evidence in the case, oral, documentary and circumstantial as well, before preferring one of the conflicting evidence to the other; and where his preference is for the prosecution he must make it appear from his judgment that his said preference is reasonable, for the principle of law is that if the court could not find reasonable grounds for preferring the evidence of the prosecution witnesses to contradictory evidence given by a defence witness, the prosecution has failed, because

there would, at least, be reasonable doubt as to which of the two conflicting versions of the story is true, and the benefit of that doubt must be given to the defence." Also in the case of **AMARTEY V THE STATE [1964] GLR 256 AT 259 SC** held " where a question boils down to oath against oath, its solution does not depend upon the whim and caprice of the judge; thus it is particularly so in criminal case where the decision rejects the version of the defence. To do justice, the court is under a duty to consider firstly the version of the prosecution, applying to it all the tests and principles governing the credibility and veracity of a witness; and it is only when it is satisfied that the particular prosecution witness is worthy of belief that it should move on to the second stage i/e. the credibility of the Defendant's story; and if having so tested the defence story should disbelieve it, move on to the third stage i.e whether short of believing it the defence story is reasonably probable"

PW1 as noted supra is not an eye witness of the unfortunate incident which led to the complainant losing not only his money and credit card but also severe damaging of his Pontiac Vibe vehicle. From the evidence, A1 was arrested on the spot after the accident and A2 arrested at his hide out in a gutter at Taifa Burkina. A2 per Pw1 led police to retrieve exhibit D1 from where he had hidden it. No mention is made by the prosecution of the retrieval or finding of the amount of GHC12,000 and credit cards of GHC800 on either of the accused persons upon their arrest. These items are the items that were allegedly appropriated from complainant by his attackers prior to them fleeing on the motorbike. The finding or retrieval of some or all of these items belonging to complainant on or around the accused persons or scene of

the accident after complainant crushed into the fleeing motorbike would be cogent evidence sufficient to establish through circumstantial evidence the participation of A1 in the attack on complainant in the absence of eyewitness account. The records however do not mention any of these items of the robbery found on the person of A1 or around the scene of the accident. Exhibit D, D1 is also only attributable to A2. Apart form the uncross-examined statement of Dennis Amuzu, the is no cogent and or circumstantial evidence on record establishing that A1 was part of the duo that committed the robbery.

The evidence on PW1 alone and the content of exhibit A, an uncross-examined evidence in the absence of cogent evidence be it oral eye witness account, documentary or circumstantial makes defence of A1 that he was run down vehicle on his way to see a customer reasonably probable. An accused person is not obliged to prove his innocence. All that an accused is required to do when invited to open his defence is to raise reasonable doubt regarding his guilt. The Supreme Court has held in the case of **MALLAM ALI YUSIF v THE REPUBLIC** [2003-2004] SCGLR 174 that:

> *"the burden of producing evidence and the burden of persuasion are the components of 'the burden of proof.' Thus, although an accused person is not required to prove his innocence, during the course of his trial, he may run a risk of non-production of evidence and/or non-persuasion to the required degree of belief, particularly when he is called upon to mount a defence"*

CONCLUSION

At the close of the entire case, prosecution fails to establish beyond reasonable doubt the guilt of A1 in respect of the offence of conspiracy to commit crime to wit robbery and robbery.

Accordingly, A1 is acquitted and discharged forthwith on both counts one and two.

A1 PRESENT
C/INSP. G. TENKORANG FOR REPUBLIC PRESENT
MR. Y. A. AFFRAM FOR ACCUSED PRESENT

H/H AFIA OWUSUAA APPIAH (MRS)
(CIRCUIT COURT JUDGE)