CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON MONDAY, 19TH JUNE, 2023

SUIT NO. D7/04/21

THE REPUBLIC

VRS

MOHAMMED FATIMA NUHU

@ HAJIA FATI SHARABUTU

JUDGMENT

The Accused Person is before this court on one count of ***stealing contrary to section 124(1) of the Criminal Offences Act, 1960 (Act 29)***.

The Particulars of Offence are that on the 19th day of August, 2020 at about 5:00pm near Tema timber market in the Tema Circuit and within the jurisdiction of this Court, she collected an amount of thirty three thousand, two hundred Ghana cedis (GH¢33,200.00), the property of Sulemana Zakari, from Kerbo Laurent under the pretext of handing same money to Sulemana Zakaria and has since refused to hand over the said money to him with intent to disposes him of the ownership of the said money without his consent and without justification.

After the charges were read and explained to Accused Person in Fante, she pleaded not guilty to same. By her plea, she cast upon Prosecution the singular duty of leading cogent, reliable and credible evidence to establish her guilt beyond reasonable doubt. The

veritable Dotse JSC in reading the decision of the Supreme Court in the case of ***Amaning v.The Republic [2020) GHASC 47***, had this to say by way of a prologue;

"William Blackstone, an 18th century English jurist in a statement on the hallowed principle of 'Innocent until proven guilty:-rights of an Accused Person' upon which our criminal justice administration has been founded in ***Article 19(2) (c) of the Constitution, 1992*** stated as follows: 'better that ten guilty persons escape than that one innocent suffer'. The above constitutes the fulcrum of our criminal justice jurisprudence''.

In the case of ***Domena v. Commissioner of Police [1964] GLR 563 the Supreme Court per Ollenu JSC*** (as he then was) commented on the burden and standard of proof as such: "Our law is that by bringing a person before the court on a criminal charge, the prosecution takes upon themselves the onus of proving all the elements which constitutes the offence to establish the guilt of the defendant beyond reasonable doubt, and that onus never shifts. There is no onus upon an accused person, except in special cases where the statute creating the offence so provides…"

In the case of ***Richard Banousin v. The Republic, Criminal Appeal NO. J3/2/2014 delivered on 18TH March, 2014,*** The Supreme Court per Dotse JSC noted that "the prosecution has the burden to provide evidence to satisfy all the elements of the offence charged".

That being so, prosecution may lead credible and positive evidence to upset that presumption. A court thus commences a criminal trial where an accused has pleaded not guilty on the rebuttable presumption that the accused person is innocent until proven guilty.

The onus lies on prosecution to lead evidence to establish a prima facie case against the accused persons by the close of their case. It is only then, that prosecution would be deemed, prima facie to have upset the presumption of innocence in favour of the accused and he would in turn be called upon not to prove his innocence, but to raise a reasonable doubt as to his guilt.

Prosecution in proof of its case called three witnesses. PW1 is the complainant, PW2 is Kerbo Laurent and PW3 is the investigator. The facts of Prosecution's case are not disputed by the Accused Person. What she disputes is the claim that she has stolen the money.

From the evidence on record, the Accused Person introduced PW1 to PW2. PW1 and PW2 transacted over a jute sack business. PW1 paid the sum of GH¢33,200.00 as customs duty for the clearing of the jute sacks. PW2 had to pay PW1 that money back and he did so through the Accused Person. He gave her GH¢33,200.00 as the basic sum with an interest of GH¢8,000.00 to be handed to PW1. It was the Accused Person who requested PW2 to hand her the money so she would give it to PW1. Accused Person has refused to hand over the money to PW1 on the basis that PW1 owes her and she is making a set off.

PW3 tendered in evidence the investigation caution and charge statement of Accused Person. PW3 was not the investigator who investigated the case and was emphatic that he knows nothing about the case as the substantive investigator did not hand over to him. He maintained that he was only in court to tender in evidence the investigation caution statement and charge statement of the Accused Person and also to identify the signature of the substantive prosecutor on his witness statement. Prosecution closed its case after this.

CONSIDERATION BY COURT

Per ***Section 173 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30),*** I am enjoined at the close of prosecution's case, to determine whether prosecution has made out a case against the accused person sufficiently to require him to make a defence. The generally accepted meaning of this section is that prosecution must at the close of their case establish a prima facie case against the accused person. It is only then that the accused person would be called upon to open his defence.

See the dictum of Denning J (as he then was) in the celebrated case of ***Miller v. Minister of Pensions [1947] 1 All ER 372 at 373*** where he held that. "The constitutional presumption of innocence of an Accused Person is that an accused is presumed to be innocent unless he pleads guilty or is convicted by a court. The presumption is rebutted when the prosecution establishes a prima facie case against the accused person and the accused shall be called upon to raise a reasonable doubt as to his guilt." See also the dictum of Dennis Adjei JA in the Court of Appeal case of ***Philip Assibit Akpeena v. The Republic (2020) 163 G.M.J. 32***

The prosecution would be deemed to have failed to establish a prima facie case against the accused where at the close of its case it fails to prove an essential element of the offence charged, where the evidence led has been so discredited by cross-examination, where the evidence led is so manifestly unreliable such that no court of law can safely convict on it (see **Apaloo & Others v The Republic [1975] 1 GLR 156**) and finally where the evidence adduced by the prosecution is evenly balanced and is susceptible to two likely explanations; one being consistent with the guilt of the accused whilst the other is consistent with the innocence of the accused (see ***Tsatsu Tsikata v. The Republic [2003-2004] SCGLR 1068***).

In the case of ***The Republic v. Eugene Baffoe Bonnie & 4 ORS delivered by the Court of Appeal on 25th day of March, 2020 (Crim. Appeal No 82/2/2019),*** the Court of Appeal held that "It is true that at the close of the case for the prosecution, the guilt of the accused is not supposed to have been proved beyond reasonable doubt. As the authorities however show, and having regard to the provisions of Section 11 (2) of the Evidence Decree, 1975 (NRDC 323), the evidence led at this stage should however be such that it should be capable of convicting the accused if he/she offers no explanation. Not only should all the elements of the offence have been proved, but also that the evidence adduced should be reliable and should not have been so discredited through cross-examination that no reasonable tribunal can safely convict on it. The evidence at this stage should also not be so equally balanced as to be susceptible to two likely explanations or consistent to both guilt and innocence''.

The definition section of the offence of stealing is ***Section 125*** and it provides that a person steals if he dishonestly appropriates a thing of which he is not the owner. The essential elements that prosecution has to prove to establish their case are;

1. that the accused person is not the owner of the cash sum of GH¢33,200.00
2. that the accused person appropriated the said sum
3. that her appropriation was dishonest.

The first two elements are not in dispute. Accused Person through her learned counsel does not challenge the fact that PW1 paid GH¢33,200.00 to PW2 for the purpose of clearing jute sacks. Neither does the Accused Person deny receiving the sum of GH¢33,200.00 from PW2 knowing very well that the said money was meant for PW1. She also does not deny that she took that money knowing fully well that she would not hand it over to PW1.

Per ***Section 122 (2) of Act 29***;

"An appropriation of a thing in any other case means any moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that some person may be deprived of the benefit of his ownership, or of the benefit of his right or interest in the thing, or in its value or proceeds, or any part thereof''.

The Accused Person having taken the sum of GH¢33,200.00 from PW2 with the intention of depriving Pw1 of the benefit of his right in the said money, the second element of the offence of stealing has been proved.

What the Accused Person denies is that her appropriation was dishonest. Prosecution's duty was thus to lead evidence to establish that the Accused Person had dishonestly appropriated the sum of GH¢33,200.00 belonging to PW1.

It is explained in section ***120 (1) of Act 29*** that an appropriation of a thing could be deemed to be dishonest if it is proved that the appropriation was made:

(i) with intent to defraud; or

(ii) by a person without any claim of right; and

(iii) with a knowledge or belief that the appropriation was without the consent of some person for whom he was a trustee or who was the owner of the property appropriated.

Prosecution in order to prove the last element must establish only one of the definitions of dishonest appropriation.

The evidence of prosecution on this, particularly PW1 is that the Accused Person had no right to claim the said GH¢33,200.00 as it was money that belonged to him. Accused Person by way of cross-examination disputed this claim vehemently and put across the case that she had a claim of right to that money by means of a set off.

PW1 under vigorous cross-examination by learned counsel for the Accused Person admitted that he had had various transactions with the Accused Person. At page 3 of the record of proceedings, he answered;

Q: I suggest to you that you also know her as someone whom the two of you have been doing business together.

A: Yes, my lord.

Q: And in fact you have done several business transactions together.

A: Yes, my lord

Q: And as a result of these business transactions, you are indebted to the Accused Person.

A: No my lord.

He further answered at page 5 of the record of proceedings while under cross examination that

Q: And the fourth transaction?

A: No my lord. Whatever transactions that I had with the Accused Person was for her to run errands for me but not for any monetary benefits.

Q: Out of all these transactions, were there verbal agreements?

A: My lord, there was no verbal agreement as to whether there was going to be a monetary benefit.

Q: So now, describe the nature of the first, second. third and fourth transactions.

A: It was to submit documents for me and nothing else. The first transaction was to submit a letter for me, the second was to submit a letter and the third was to submit a letter for me

at the Commissioner's end which I gave her GH₵5,000 (Commissioner of Customs) of which she failed to do so and the fourth transaction was an introduction. She introduced me to Laurent Kerbo who was the owner of the jute sacks that I paid monies to and then she went behind me and took the said money without my notice and then she disappeared.

Also at page 16 of the record of proceedings, PW1 answered;

Q: *You would agree with me that at the time Accused Person introduced you to Laurent, she told you and you are aware that it is about making some few margins on the jute sack. Is it not?*

A: *Yes.*

Also at page 25 of the record of proceedings, he answered under cross-examination by learned counsel for the Accused Person

Q: *Kerbo Laurent was aware that the margins on the transactions would be split among the group.*

A: *The margin, yes my lord but not the capital.*

Q: *How much was your margin to be received?*

A: *That was not certain because the transaction was not complete by then.*

PW2 on his part at pages 36 and 37 of the record of proceedings under cross examination, answered;

Q: *And before the payment of the duty, what was the agreement amongst the four (4) of you; yourself, Accused Person, P.W.1 and Abass.*

A: *It has been three or four years and so I do not remember what agreement we had before the duty was paid.*

Q: Though you do not remember the detailed agreement, you still remember that there was agreement amongst the four of you.

A: I cannot remember anything seriously.

Q: You were to benefit from the transaction.

A: Yes please.

Q: Abass was to benefit from the transaction.

A: *Yes please.*

Q: Accused Person was to benefit from the transaction.

A: Yes please.

Q: And indeed P.W.1 was supposed to also benefit from same.

A: Yes please.

Q: Can you tell the court the apportionment of interest so far as the pecuniary benefit was concerned?

A: I do not remember.

Clearly, both PW1 and PW2 agree that there was a transaction involving all of them and one Abass and they were all supposed to make some profit on the said transaction.

Again, contrary to the claims of PW1 that it was the Accused Person who induced PW2 to give her his money to be given to him, PW2 testified to the contrary.

At pages 8,9, 18 and 20 of the record of proceedings, Accused Person answered under cross-examination by learned counsel for the Accused Person;

Q: How did the money arrive in the hands of Hajia?

A: My lord, it was over three months that my money got stuck in that transaction. I was constantly calling Lauren Kerbo who was the owner of the sacks as he promised me but he

kept telling me I should be patient and that he has gotten buyers who have shown interest and would soon come and purchase them. One afternoon, Laurent told me that the jute sacks had been bought and he wanted to bring me the money but the Accused Person stopped him and told him that he should give her the money and she would bring it directly to me. All this happened without my consent and the Accused Person went into hiding with my money.

Q: *You see, the day the small jute sacks business was closed, Accused Person was not even there. It was Abass and Laurent who were there and so they asked Accused Person to come after they called you and you were not picking.*

A: *My lord, that is not true. I had a strange feeling that the goods were sold and so I called Laurent and he said yes, they had been sold in the presence of Accused Person and Abass. So he asked of me and wanted to call me but Abass and Accused Person told him that they had already contacted me and they would deliver that money to me.*

Q: *So when Hajia went to him, assuming without admitting that it is so, did he call you at that instant?*

A: *My lord, Kerbo Laurent did not call me but he told me later that he wanted to call me but the Accused Person told him that she had already spoken to me and I told her to come for the money which I never did.*

At page 32 of the record of proceedings, PW2 answered under cross-examination by the Accused Person

Q: *Do you recall that it was Abass who called to tell me that you had sold some of the goods and so I should come and I drove and came?*

A: That is so. I called Abass and he in turn called you to come. I had told Abass to inform Sulley and you.

Q: When I got there and you gave me the money through Abass, do you recall that I asked Abass to call Sulemana to come.

A: Yes my lord.

PW2's answers paint a different picture than the one PW1 had earlier painted to the court about how Accused Person came to receive the money. As they were both prosecution witnesses, their conflicting evidence on the same issue did not enure to the benefit of prosecution.

Learned counsel for Accused Person had also tendered in evidence EXHIBITS 1, 2 and 3 through PW1. PW1 acknowledged his signature on EXHIBIT 1 and 3. He however disputed his signature on EXHIBIT 2. A simple glance with ordinary eyes at all the signatures on the three exhibits shows that they appear to be the same.

EXHIBIT 2 is an acknowledgment by PW1 that he would pay the Accused Person some money within one week for two boxes worked on in Tema. That was in July, 2020. To the naked eye, the signature of the Accused Person in EXHIBIT 2 appears to be the same as that in EXHIBIT 1 and 3. His denial of the obvious does not enure to Prosecution's favour. Throughout his cross-examination, PW1's demeanour and answers gave the impression that he was telling the court half-truths rather than the whole truth. The half-truths were the ones that favoured him and the ones he was not willing to disclose were the ones that were not in his favour.

From the evidence on record, I am in two minds as to whether or not the Accused Person dishonestly appropriated PW1's money or this was a purely business transaction. This is particularly so as set off is a legal defence and a person is entitled to rely on it if the facts support same.

I find at the close of Prosecution's case that the evidence on record fails to meet the considerations for determining that a prima facie case has been established. The evidence at this stage is susceptible to two constructions; one consistent with a prima facie case of guilt and one consistent with the innocence of the Accused Person.

Consequently, at the close of Prosecution's case, I find that they have failed to establish a prima facie case in my mind against the Accused Person. She is hereby acquitted and discharged.

(SGD)

H/H BERTHA ANIAGYEI (MS)
(CIRCUIT COURT JUDGE)

A.S.P. STELLA ODAME FOR THE REPUBLIC

PRINCE KWAKU HODO FOR THE ACCUSED PERSON