IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 19TH OCTOBER 2023

CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B3/11/2023

THE REPUBLIC

VS

s

BISMARK APPIAH @ ASUBONTENG

ACCUSED PERSON PRESENT

DETECTIVE CHIEF INSPECTOR PETER SADAARI, PRESENT HOLDING THE BRIEF OF *SERGEANT PRINCE ADU AMOAKO,* FOR PROSECUTION

JUDGMENT

Crime is detestable to any well-meaning member of a society; it is a deviation from acceptable social behaviour. If some act is deemed in a written law to be a crime, then, it is punishable by law.

Article 19(11) of the Constitution, 1992 states:

> *No person shall be convicted of a criminal offence unless the offence is defined and the penalty for it is prescribed in a written law.*

If someone unlawfully enters any building with the intention of committing a crime therein, that person shall be guilty of second degree felony. That offence is known as unlawful entry as provided in section 152 of Act 29. If that person is convicted, he is liable for punishment up to ten(10) years imprisonment. See section 296(2) of the *Criminal and Other Offences(Procedure) Act*, 1960(Act 30).

Section 69 of Act 29 has the caption — "Causing Harm" and it states that:

> *Whoever intentionally and unlawfully causes harm to any person shall be guilty of second degree felony.* See also section 296(2) of Act 30.

Accused herein faced charges on the grounds that he had fallen foul of the above provisions of the law.

The key points from the document Prosecution attached to the charge sheet as containing the facts based on which they charged Accused for the above offences are as follow:

1. Complainant is a small scale miner and resident of Denkyira Dominase.
2. Accused is also a small scale miner and a resident of Abora.
3. On 23rd February 2023 at about 3:30am whilst Complainant was preparing to go to work, he heard some unusual noise in the house he lived in; he then saw Accused tampering with the doors of the rooms of Complainant's father and that of his brother-in-law.
4. Complainant upon seeing Accused do that hid himself in his porch.
5. Accused upon failing to open those two doors, proceeded to Complainant's porch and attempted to open Complainant's door.
6. Complainant then questioned Accused as to his mission in that house; Accused could not answer that question and so Complainant shouted:"thief, thief" and called for help.

7. Accused who was then armed with a pair of scissors at his side waist, used the scissors to stab Complainant's left lower abdomen and his forehead and tried to escape but with the intervention of the brother-in-law of Complainant, Complainant's wife and other people around, Accused was arrested and handed over to the police at Denkyira Dominase Police Station, together with the pair of scissors that had blood stain on it.

8. Thereafter, complainant who was then suffering from a deep cut with blood oozing from it was rushed to Dominase Clinic by his wife and complainant was referred to Dunkwa-On-Offin Government Hospital for further treatment.

Accused pleaded not guilty to Count one. On Count two, he pleaded guilty but said he had an explanation. He offered the following as his explanation on Count two:

> "I was going somewhere when Complainant accosted me and shouted: 'Thief, thief' and held me and so in trying to free myself from Complainant, a struggle ensued between us. I did not use any scissors to stab the complainant. I did not even stab the complainant."

Considering the explanation by Accused, the court entered a plea of not guilty for Accused on Count Two. See section 171 of Act 30.

Accused having joined issues with the prosecution on the facts as above, it was incumbent upon the prosecution to lead cogent evidence to seek to establish their case against Accused in an endeavour to secure his conviction on either count or on both counts. This task of the prosecution, acting on behalf of the State or Republic, requires them to prove their case by proper in legal means.

Ollennu J(as he then was) in *Majolagbe v. Larbi* [1959] GLR 190 made reference to a dictim he gave earlier in *Khoury and Anor v Richter* which judgment was delivered on 8th December, 1958, as regards proof in law. That dictum has been referred to with approval in

Klutse v. Nelson (1965)GLR 537 @ 542 and also *Baah Ltd v. Saleh Brothers* [1971] 1GLR 119 @ 122. It is:

> *"'Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'."*

Prosecution produced four persons in the witness box – one at a time. In the order they testified, They were referred to as PW1, PW2, PW3 and PW4. The complainant was the first to testify, followed by a brother of his, his wife and the investigator herein.

PW1, in his evidence-in-chief, stated that it was the doors of his brother and father that Accused was tampering with. PW1 also stated that he held Accused before shouting "thief, thief". He further stated that it was by the intervention of his brother's wife and other people around that Accused was arrested. PW1 stated in paragraph 12 of his witness statement that:

> "That on the same day, my brother Amponsah Isaac and others took the scissors and reported the case with Denkyira Dominase Police station on behalf of me and medical form was issued to them to be given to me to attend hospital."

PW1 further stated that he was discharged from Dunkwa Government Hospital the next day after the day of the incident i.e. he was discharged from the said hospital on 24th February 2023. He then proceeded to the police station at Diaso and a statement was taken from him.

According to PW2, PW1 was his brother and they lived in the same house but in different rooms. On 23rd February 2023 at about 3:30am, PW2 overheard a certain male voice in the house he lived in. He came outside only to see PW1 holding Accused and shouting "thief, thief" in PW1's porch with a pair of scissors on the floor. PW2 took the scissors and saw blood stain on it. PW2 then detected that PW1 was bleeding from his forehead and left lower abdomen.

PW2 stated further in his witness statement that:

> "8. That, with the assistance of people around, we arrested the accused person to Denkyira Dominase Police station and complain[sic] was lodged with the scissors kept with the police.
>
> 9. I reported the case on behalf of the complainant because he was rushed to the Dominase Clinic.
>
> …
>
> 12. I later had a phone call from Denkyira Dominase Clinic that complainant[sic] condition was very critical as such been referred to Denkyira-On-Offin[sic] Government Hospital for father[sic] treatment."

According to PW3, PW1 was her husband and they live together in the same room. On 23rd February 2023 at about 3:30am, Complainant got out of the room to prepare to go to work. She later heard complainant shouting: "thief, thief". She rushed to the scene and met complainant holding Accused person in their porch and Complainant and Accused were struggling with each other. PW3 then detected that blood was oozing from Complainant's forehead on his left lower abdomen. She accompanied Complainant to Dominase Clinic and Complainant was referred to Dunkwa-On-Offin Government Hospital for further treatment. Complainant was admitted at the Dunkwa-On-Offin hospital and his wound was stitched. Complainant was discharged from that hospital.

PW4 when he mounted the witness box stated the following, *inter alia*, as in his witness statement:

"...

4. On 23rd February 2022 at about 09:40am, I was the available investigator.

5. That, one Isaac Amponsah assisted by Police of Dominase arrested and brought to Dominase Police Station with[sic] the accused, Bismark Appiah @ Asubonteng together with a pair of scissors and the former reported a case of unlawful entry and causing harm on behalf of Complainant Isaac Nyarko.

...

6. That same day, the accused was brought from Dominase to Diaso Police District for further action.

…

8. Complainant statement was taken from Amponsah Isaac and same was filed for evidential purposes.

9. That, pair scissors was handed over to me by the complainant with blood stain on it.

10. That, the scene of crime was visited.

11. That, complainant[sic] house was not a public place which the accused could just get access to the house.

…"

PW4 tendered in evidence a document he stated that it contained the investigation cautioned statement of Accused. Accused did not raise any objection to the tendering of that document in evidence. The following is the statement that PW4 attributed to Accused in that document which was marked Exhibit B:

"I am a Galamsey Operator and a resident of Dominase. Formerly I was resident in the Town of Abora but about two month[sic] ago, I rented room at Dominase which I am was[sic] staying there before I was arrested. On that day of 23/02/2022[sic] at about 12 to 1am, I was monitering[sic] my girlfriend. The fact is that I was told by

my friend that my girlfriend was dating with[sic] another man at Dominasi. On that day I was standing with Akwasi Sekyi in his house at Dominase when I spotted my girlfriend and the man passing by. It was around 12 to 1am I saw them going but I did not call her just for security reasons. I trailed my girlfriend through the route of the complainant. There is a route passing through Complainant[sic] house. That because of my monitoring, I stopped frequently on the way. As soon as I reach[sic] a section of the road I am[sic] walking I stopped. Suddenly, complainant came to attacked[sic] me screaming thief, thief. I never stole anything or I did not enter any room of his house to be call[sic] thief. I also wanted to be free so I fought complainant. I fell down and complainant sat on me. It was not a house I was arrested but I was arrested on a road. I am not the one who stabbed complainant with scissors, forehead and his left libs[sic]. I never saw complainant gotten[sic] any enjuries[sic]. It was later I saw some blood oozing from complainant forehead. The name of my girlfriend is Naki. Infact[sic] I cannot mention the boy[sic] name because I don't know but I can identify him when seen. That I couldn't call my girlfriend and the boy. I was not holding any scissors but I was holding Torch light. Complainant screaming alerted people around. I was arrested and brought to Dominase Police station. Nobody beat me."

Earlier, PW2 had tendered in evidence the said pair of scissors. It was admitted in evidence and marked Exhibit A.

Marked Exhibit C is the document PW4 said contained the charged statement of Accused. Below is the statement in Exhibit C which PW4 attributed to Accused:

"I relied[sic] on my former statement submitted to police on 23/02/2023."

PW4 sought to tender in evidence two photographs that he said showed the complainant's house. Accused in objecting to the tendering in evidence of those photographs stated the following:

"I object. I do not know where the house is situated."

The photographs were admitted in evidence on the basis of section 51 of NRCD 323 and marked Exhibits D and D1.

Section 51 of NRCD 323 states:

(1) For the purpose of this Decree, "relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, which makes the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.
(2) All relevant evidence is admissible except as otherwise provided by any enactment.
(3) No evidence is admissible except relevant evidence.

PW4 also tendered in evidence photographs he said depicted the injuries of PW1. They were admitted in evidence and marked Exhibits E and E1. But before the said photographs were admitted in evidence, Accused stated the following:

"I saw that the complainant had got injured but I did not use scissors to injure him. I have nothing to say about these pictures."

PW4 identified Exhibit A as the pair of scissors, Accused used to stab PW1.

Section 62(1) of NRCD 323 states:

At the trial of an action, a witness can testify only if he is subject to the examination of all parties to the action, if they choose to attend and examine.

The following is the cross-examination Accused did of PW1:

Q. Did you see me taking anything from the house.

A. No.

Q. When you held me, was I holding anything.

A. You were not holding anything but you had a pair of scissors hidden at your waist towards your thigh.

Q. When people came there, did they take any scissors from my hands.

A. After you stabbed me, you put the scissors on the floor.

Q. I put it to you that there was no pair of scissors at my waist towards my thigh.

A. You had a pair of scissors on you as I stated earlier and that you put it on the floor after you had stabbed me with it and you saw people coming onto the scene.

Of PW2, Accused did the following cross-examination:

Q. When you came out and heard complainant shouting 'thief, thief', was I holding anything.

A. No.

Q. I put it to you that the scissors was not in the porch but it was outside.

A. It is not true. It was in the porch.

Q. I put it to you that there was no blood stain on the scissors.

A. It is not true; there was blood stain on the scissors.

Then of PW3, Accused did the following as cross-examination:

Q. Do you remember that when you detected that complainant was injured, you took him into a room.

A. I did not take him into a room.

Q. When you came to see me struggling with Complainant, did you see me holding anything that can injure a person.

A. I did not see you holding any such thing but there was a pair scissors on the floor of the porch.

Q. I put it to you that when you came out of the room, I and Complainant were not in the porch, we were outside the house.

A. You and Complainant were in the porch at that time.

The following came up during the cross-examination of PW4 by Accused:

> Q. When the complainants brought the scissors to you, did they say I used it to stab Complainant.
>
> A. That is so.

Section 173 of the *Criminal and Other Offences(Procedure)Act*, 1960(Act 30) states:

> *If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him.*

The Court held that a prima facie case had been made against Accused. The court therefore called on Accused to open his defence. The Court proceeded to explain section 174(1) of Act 30, section 63 of NRCD 323 and Article 19(10) of the *Constitution* 1992 to Accused. Accused chose to give a statement from the dock. The following is what Accused stated:

> "All that I have to say is what I stated at the police station. I have nothing more to say. I pray the Honourable Court to go ahead and determine the matter based on what has come before the court."

Section 10(1) of NRCD 323 defines 'Burden of Persuasion' and it states:

> *For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.*

Section 10(2) of the Evidence Act adds that: *The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

Section 11 of NRCD 323 defines 'Burden of Producing Evidence' and states further as follows:

> *(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*
> *(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 a reasonable doubt.*
> *(3) In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt.*
> *(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.*

In *Ackah v. Pergah Transport Limited and Others*[2010] SCGLR 728; Sophia Adinyira JSC stated at page 736 that:

> *"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable[sic] than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree[sic]."*

It is instructive to note that whereas it is stated in the facts that it was the brother-in-law of Complainant whose door was tampered with and also who was one of those who came to the rescue of Accused, it turned out from the evidence that it was rather the brother of Complainant ie PW2.

The one who reported the case is a complainant therefore I do not see how PW4 will refer to PW1 as complainant and also refer to PW2 as complainant. The prosecution must know that the facts attached to the charge sheet are akin to pleadings in civil cases. Therefore it is the facts that you lead evidence on.

In *Effisah v. Ansah*[2005-2006] SCGLR 943, it was held that:

> *"In the real world, evidence led at any trial which turned principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions and the like. In evaluating evidence led at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they relate. Thus, in any given case, minor, immaterial, insignificant, or non-critical inconsistencies must not be dwelt upon to deny justice to a party who had substantially discharged his or her burden of persuasion."*

In this case, the inconsistencies are as between the facts in support of the charge and the evidence produced to prove the facts. Therefore, due diligence would have made prosecution see this confusion and put their house in order.

In *Miller v. Minister of Pensions* [1947] 2 All ER 372 @ 373, Denning J (as he then was) stated, *inter alia*, in analyzing proof beyond reasonable doubt, that:

> *"… It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."*

It is however important that the prosecution ensures clarity in their presentation of evidence. The use of passive sentences in some situations can be misleading or can suffer kwashiorkor of clarity. If you say the scene was visited…, the question is who visited the scene? If you the investigator visited the scene then you must say so; if some other person say so.

In *Oteng v The State*[1966] GLR 352@ 354, SC, Ollennu JSC stated:

> *"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."*

This principle found space in the *Evidence Act* of 1975 i.e. NRCD 323 – in section 13(1), to wit:

> *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 a reasonable doubt.*

See also *Sasu Bamfo v Sintim* [2012] 1 SCGLR 136 at 138 and *Fenuku v John-Teye* [2001-2002] SCGLR 985

Accused person, at a point supra, stated that he did not even know where the house in question was situated. However, he argued that he was not inside that house but he was outside.

In *Commissioner of Police v. Isaac Antwi*[1961] GLR 408 SC, Korsah CJ stated:

> *"The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution and that the evidential burden rests on the accused where at the end of the case of the prosecution an explanation is required of him, are illustrated by a series of cases. Burden of proof in this context is used in two senses. It may mean the burden of establishing a case or it may mean the burden of introducing evidence. In the first sense it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt;*

but the burden of proof of introducing evidence rests on the prosecution in the first instance but may subsequently shift to the defence, especially where the subject-matter is peculiarly within the accused's knowledge and the circumstances are such as to call for some explanation."

Accused person when he was to open his defence to explain his side of the story simply stated that he would rely on the statement given to the police as in Exhibit B and called on the court to decide the matter based on the evidence available to the court. I find on the entirety of the evidence adduced at the trial that Accused does not come a cross as a credible witness in this case, though he did not testify on oath in this case case.

Section 80 of NRCD 323 states**:**

(1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the truthfulness of his testimony at the trial.
(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:(a) the demeanour of the witness;
(b) the substance of the testimony;
(c) the existence or non-existence of any fact testified to by the witness;
(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;
(e) the existence or non-existence of bias, interest or other motive;
(f) the character of the witness as to traits of honesty or truthfulness or their opposites;
(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;
(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

It was held in *Ntiri v. Essien* [2001-2002] SCGLR 451 that the trial judge has the duty to ascertain credibility of a witness.

No medical report was tendered. Only pictures to show the injuries. The court can therefore not know the extent and nature of the injuries simply by ocular observation of the said pictures.

I find on all the evidence that Accused caused harm to PW1 but Accused is not liable for the crime of unlawful entry. The evidence does not show that Accused entered the building and his intentions as to why he was on the premises at the said time as in the charge sheet is not clear.

Accused acquitted on count one but convicted on count two.

In sentencing Accused, I have considered the strength of the evidence – the fact that there was no ascertainment of the injuries suffered by PW1 by an expert as I referred to above. I have also considered the fact that Accused has been lawful custody since the inception of this case. In fact, at the elementary stage the trial, the prosecution stated to the court:

> "Accused is already facing robbery charges before this court and he has jumped bail. It is our view that if Accused is granted bail in respect of this case, he will jump bail. So, we humbly pray that Accused be remanded into police custody"

So the court did not grant Accused bail see section 96(5)(a) of Act 30.

Article 14(6) of the *Constitution* states:

> *Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment.*

The Court has taken into account the period Accused has been in lawful custody in respect of this case in sentencing Accused. Accused is sentenced to three(3) years imprisonment with hard labour on count two.

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

19/10/2023