IN THE DISTRICT COURT

AGONA SWEDRU - A.D. 2022

BEFORE HIS HONOUR ISAAC APEATU

Court Case No 223/2022

30th November, 2022

THE REPUBLIC

Versus

ENOCK TEASE

ERIC ARMAH AKA KOBBY

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JUDGMENT

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The accused persons were arraigned before this court charged with a single count of stealing contrary to section 124 (1) of the Criminal Offences Act, 1960 (Act 29). He pleaded not guilty to the charge. It was the result of the plea leading to a full trial for evidence to be taken which has culminated in this judgment.

The facts of this case as contained in the charge sheet and as narrated by the prosecution was that complainant is a trader and a resident of Nsususooso, Agona Swedru whilst accused persons Enoch Tease and Eric Armah are all fitters and live at Nsususooso and Oda Kwano respectively. Complainant who is the landlord of the accused person's master has a car batteries' shop within the same vicinity. On 21/6/2021 in the morning, complainant went to his shop and detected that his shop had been broken into and twenty car batteries valued GH¢10,000 stolen away. Complainant started making underground investigation and later had information that Tawiah Ransford, a witness in this case, saw the two accused persons on

21/6/2021 dawn carrying two car batteries each but threw them on the ground the moment alarm was raised by the witness and they ran away. Complainant officially reported to the police on hearing this. Accused persons were arrested with the help of the witness who identified them to Police and were cautioned but they denied the offence in their cautioned statements. Police managed to lay hands on the witness and he gave a statement to corroborate the information that the complainant had earlier. The four car batteries abandoned by the accused persons were retrieved from a nearby house where the incident happened. After investigations, the accused persons were charged with the offence stated in the charge sheet.

In proof of these facts, the prosecution called the witness whose name he gave as Tawiah Ransford as PW1. They called the complainant as PW2 and lastly, the investigator who gave evidence as PW3. The case of the prosecution as evidenced from the witnesses they called is that on 21st day of June, 2021 at about 2.00 am, PW1 was driving his car heading towards Oda kwaanno traffic light. On reaching a spot closer to the total filling station, he saw the accused persons carrying four batteries to an unknown destination. Immediately he saw them, he knew very well that they were stolen items. So, as claimed by PW1, he raised alarm by calling out "thieves" "thieves". That when the accused heard his voice, they threw the batteries away and bolted. That on reaching the main lorry park, he informed drivers he met at the station and one of them informed the complainant. The complainant called him on his cell phone and asked him about what he witnessed that dawn. That he explained everything to him and pointed out the accused persons to him. That he was invited to the Police Station to help in investigations and he went and gave a statement.

After calling the above witnesses, the prosecution intimated that it was closing its case. Accused persons were then called to open their defenses. They gave evidence in their defenses. While the 1st accused called one witness in defence of the charge, the 2nd accused called no witnesses. I shall state the defenses given by the accused separately so as to give clarity to the details thereof. The nub of the defence put forward by the 1st accused is that somewhere on Sunday, 20th June, 2021, he went to

work and because it was Sunday, no work came to be attended to. So, he waited for about 5:00pm before going home. When he went to the house, one man popularly called Efo who is a tenant whom he live with and a driver at Swedru School of Business saw him entering the room to sleep. The day following, which was Monday 21st June, 2021, he left the house in the morning for work and Efo saw him going to his workplace. He denied stealing any car battery as has been alleged against him.

The nub of the defence put up by the 2nd accused on the other hand is that On the Sunday the 20th of June, 2021, he was invited to play football on the field among the mechanic boys in the evening at Police Quarters. In the evening, he did not go out again but slept with his girlfriend called Maame Esi in her room. On Monday, he did not go to work. He was at work on Friday when the Police came to arrest him at Police Quarters and later Enoch Tease at Liberty Junction. When they went to the Police Station, they were accused of having stolen car batteries at Kofi Abbrey's shop. He stated that he told the Police he was not around at the time the car batteries were lost and wrote same in the investigation statement.

In the caution statement taken down by the police on the 25th day of June 2021, the 1st accused stated that he is a fitter at Nsusosooso in Agona Swedru. That on the 20th day of June 2021, at about 5.00pm, he left the shop and went home. He then went to sleep in one room with one Ego, a teacher at SWESBUS. He concluded that he did not steal any batteries.

The 2nd accused also gave a statement to the police on the 25th June 2021. He stated therein that on 21st June 2021, he slept in his girlfriend's room. He mentioned the name of his girlfriend as Maame Esi. That when he was going to sleep, the landlady of his girlfriend called Nana saw him. He denied stealing any batteries.

It is settled Constitutional law that a person accused of having committed an offence is presumed innocent until proven guilty or he has voluntarily pleaded guilty. This is a constitutional injunction provided for by Article 19(2) (c) of the 1992 Constitution of

Ghana. The burden of proof in a criminal case therefore is on the prosecution at all material times to establish the guilt of the accused in respect of the charges levelled against him. It has been held that the failure to discharge that burden should lead to the acquittal of the accused. And this proof required of the prosecution is said to be proof beyond reasonable doubt. See **Oteng v The State [1966] GLR 352.** In the converse, the accused person is not required to prove anything. All that is required of him is to raise a reasonable doubt as to his guilt. See **Commissioner of Police v Antwi [1961] GLR 408.** It has also been held that it is not enough for the court to hold that it does not believe the defence of the accused and then proceed to convict him. Short of disbelieving the defence, the court has a duty to consider whether the defence is reasonably true or reasonably probable.

From the facts and evidence above, the issues that call for determination in this case are;

1. Whether or not the accused persons appropriated the twenty car batteries the property of PW2.
2. Whether or not the appropriation was dishonest.
3. Whether or not the prosecution proved the offences beyond reasonable doubt.

Having set down the above issues for determination, I shall presently evaluate the evidence led by the prosecution to determine the guilt or otherwise of the accused persons. I have stated in my opening statement above that the accused persons were charged with one count of stealing contrary to section 124 (1) of Act 29. Prosecution allege that the accused persons appropriated twenty batteries the properties of PW2. The charge of stealing was founded under Section 124(1) of Act 29. However, it is section 125 that sums up the requisites of the offence viz:

> 'A person steals if he dishonestly appropriates a thing of which he is not the owner.'

In the case of **Republic v. Halm and Another**, Court of Appeal, 7 August 1968, unreported; digested in (1969) C.C. 155, Amissah J.A. laid down the basic ingredients of the offence of stealing as follows:

> "Both in common parlance and in the contemplation of the law, a person is said to steal 'a thing'. Primarily the offence is committed in respect of 'a thing'. Whether such 'a thing' can properly be said to have been stolen or not depends on the existence of certain relations, the doing of a certain act to it, coupled with an intention… For the offence of stealing to be constituted, therefore the relations, act and intention to be proved in connection with 'the thing' are:
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> (i) that the person charged must not be the owner of it;
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> (ii) that he must have appropriated it; and
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> (iii) that the appropriation must have been dishonest."

These are the basic ingredients requiring proof by the prosecution beyond reasonable doubt in a charge of stealing.

The first element requiring proof is not in doubt. So I will not belabour the point. The alleged stolen twelve batteries are said to be the property of PW2. They do not belong to the accused. If the accused persons cannot claim ownership of the twelve batteries the properties of PW2, is there proof on the record that they appropriated them? Section 122(2) of Act 29 defines appropriation of a thing in these terms:

(2) An appropriation of a thing… means any moving, taking, obtaining, carrying away, or dealing with a thing, with 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 any part thereof.

The effect of the above section and definition is that for the offence of stealing to be proved, there must be proof of a positive act done by the accused person in respect of the thing alleged to have been stolen. So in this case, it must be shown that the accused persons appropriated the twelve batteries which are the properties of PW2 which are alleged to have been stolen by either moving, taking or carrying them away from the possession of PW2. And there must be the presence of the requisite intent too. In order to prove the requisite intent, the prosecution should be able to establish that the accused persons herein took the twelve batteries which are alleged to have been stolen from PW2's shop with intent to deprive him of his ownership in

the twelve batteries. In other words, there should be sufficient proof that the accused persons took or carried the twelve batteries away from PW2 without the intent of restoring them back to him.

The accepted facts in evidence in this case as stated above are that on 21st day of June, 2021 at about 2.00 am, PW1 was driving his car heading towards Oda 'kwan ano' traffic light. On reaching a spot closer to the total filling station, he saw the accused persons carrying four batteries to an unknown destination. Immediately he saw them, he knew very well that they were stolen items. So, as claimed by PW1, he raised alarm by calling out "thieves" "thieves". That when the accused heard his voice, they threw the batteries away and bolted. That on reaching the main lorry park, he informed drivers he met at the station and one of them informed the complainant (PW2).

It is important to note at this point that no one saw the accused persons enter the shop of PW2 to steal the twelve batteries. It was PW1 who claims to have seen them with two batteries each walking along the road at around 1.30 am to 2.00 am. Those four batteries were later identified by PW1 as those which were stolen from his shop. So, the evidence that prosecution relied on to prove the charge of stealing is solely that of PW1's. That is to say, the case of the prosecution stood to stand or fall based on the evidence of PW1 who claims to have seen the accused persons. I find that a determination of the issue whether or not the accused persons appropriated the twelve batteries rests so much on the answer to the question whether the prosecution proved that PW1 identified the accused as the ones carrying the batteries. Put differently, if it is found at the end of the trial that the persons PW1 claims to have seen were not or could not have been the accused, the whole case of the prosecution falls flat on its face. So, was the prosecution able to lead evidence to prove that it was the accused persons PW1 saw in the morning of the 21st day of June, 2021?

As I stated, since the trump card of the prosecution's case was based substantially on identification of the accused by PW1 but which the accused deny and maintain that it

was a case of mistaken identification, in the evaluation of the evidence to determine the case, the court is required to note the caution about convicting on evidence of identification stated in the case of **R. v. Turnbull [1976] 3 W.L.R. 445** which was restated in the Ghanaian Court of Appeal in the case of **Hanson v Republic [1978] GLR 477**. In that case, the Court of Appeal set aside a conviction based on identification of the appellant who pleaded alibi and in its judgment delivered by Archer JA ( as he then was ) at pages 486 to 487 he said as follows;

> 'In **R. v. Turnbull [1976] 3 W.L.R. 445** Lord Widgery C.J. delivering the judgment of the Court of Appeal (composed of five judges) laid down these rules of guidance which I have no hesitation in adopting. At p. 447 he stated as follows:
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> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."'

The issues in this case thus raise for consideration whether the prosecution by their evidence sufficiently and adequately identified the accused persons as the persons seen by PW1 and also whether the evidence met the evidential burden of proof beyond reasonable doubt on the issue of identity. It bears emphasizing that there are risks associated with visual identification of suspects. There have been a number of miscarriages of justice which have resulted from erroneous identification by apparently honest witnesses. See **R. v Bentley (1994) 99 Cr. App. R. 342, CA**. There is therefore the need for caution when dealing with visual identification to avoid risk of injustice. In fact, a witness who is honest and convinced in his own mind may be wrong. Caution must therefore be taken of the fact that a witness giving visual

identification evidence may be mistaken even if the witness is honest. It is possible that an honest witness may not be aware of the mistake. See **Reid v. R [1990] 1 A.C. 363, PC**.

The witness in this case (PW1), stated in his evidence that he knows the accused persons. That he had seen them at Master Mawuko's shop and knew them as the apprentices of Master Mawuko. He however, stated that he did not know their names. It bears stating that even though PW1 claims to know the accused persons as apprentices of Master Mawuko, what he claims to have seen that night may be mistaken. It bears emphasizing that the prosecution witness, i.e. PW1 claims to have seen the accused persons in the night. It is said that he saw the accused persons around 1.30 am to 2.00 am. The question is, did he at the time have a good opportunity to observe the accused? From the record of evidence, it appears that the place PW1 saw the accused persons was not very lighted. So, in his testimony, he said that when he saw them, he threw the beam of his car light on them. But how sure is he that the persons he claims to have seen were the accused persons herein. Was he facing them or did he approach them from the back? I think that he saw them from their back meaning that they were moving away from where he was. This is because otherwise, he would not have shouted at them but would have waited for them to come to him so he could arrest them. From the testimony given, is it totally out of the question that PW1 could have misapprehended what and who he thinks he saw? That he may not have seen the accused persons clearly is very possible. And that makes it unsafe to wholly accept his identification without reservation.

Moreover, it is important to observe that a witness who is able to recognize the suspect, even when that witness knows the suspect very well, may be wrong. The court therefore ought to be cautious in accepting without question what a witness purports to have seen. The caution in such situations has always been that even those purporting to recognise close friends or relatives can be mistaken. See **R. v. Wait [1998] Crim. L.R. 67, CA**. There are questions I ask myself regarding the distance that existed between him and the accused persons at the time he claims to have seen

them. The distance between them was not readily established in the evidence. However, supposing that the distance was not very close as to make it easier to see, that would also make it difficult to accept his identification of the accused persons. This is even more so when he stated that the accused persons took to their heels when he said he shouted at them. From what I gather from the record, it appears that the accused persons were not stationary. They ran and as he stated elsewhere, he chased them. If accused persons were running away, how could PW1 have seen their faces clearly or make them out as the apprentices of Master Mawuko? This also casts a dent on the identification of the accused persons by PW1.

The above doubt notwithstanding, is there any evidence capable of supporting the evidence of identification? The generally accepted practice is that the courts look to find from the record whether there are any evidence capable of supporting the visual identification. Such evidence when led serves as a sort of corroboration of the identification evidence and also to assure that there has been no mistaken identification. So in **R. v. Turnbull [supra]**, the court gave the example of a witness' identification of a particular person as the man who snatched the handbag, being supported by the fact that the house which the witness identified the perpetrated as having fled into turned out to belong to the identified person's father. In this case, PW1's evidence of identification was not supported by any other evidence to give the identification some credibility. For instance, if the item alleged to have been stolen was found with the accused, or a particular shirt alleged to have been worn by the accused when they were identified was later retrieved from his house, or that another person saw them after they had been identified by the witness etc. The instances can go on and on. Thus in the case of **R. v. Popat [1998] 2 Cr. App. R. 208**, the court found support in the fact that the appellant possessed cloths similar to those that the witness had described. In this case, this kind of evidence would have supported the evidence led by PW1 of identification of the accused persons. However, no such supporting evidence of identification was led by the prosecution.

Besides the above, I find that there was no independent identification by police after

PW1 claimed to have seen the accused in the night. One thing I find as a dent on the case of the prosecution is that they failed to organize an independent identification in order to afford the opportunity for PW1 to identify the accused once again. I have come across the case of **Adu Boahene v The Republic (1972) GLR 70** relying on Phipson on Evidence 10th edition, p. 170, para 1381 stated that the holding of an identification parade and proof of the personal characteristics of the accused are not the only modes by which the identity of a person accused of a crime can be established. The court pointed out that where the identifying witness had known the accused for some time prior to the commission of the crime and had led the police to the house, then it would be pointless to hold an identification parade. But where the identifying witness saw the accused only for the first time for a brief period at the commission of the offence then the failure to hold an identification parade or to prove his personal characteristics would detract from the weight to be attached to the evidence of identification.

But in this case, it is my view that considering that PW1 claims to have seen the accused in the night which creates doubts as to the quality of the identification of the accused, if the accused had been paraded and PW1 had been afforded the opportunity to identify them again, it would have dispersed any lingering doubts as to the quality of his vision during the night. However, the prosecution failed to do this. In the case of **Agyiri v Commissioner of Police (1963) 2 GLR 380**, the Supreme Court faced with a situation where the police failed to properly organize an identification parade to identify the accused persons, decried the situation in the following words:

> "It is undesirable for the police to do nothing about the question of identification until an accused is brought before the trial court and then for a witness for the prosecution to be called upon to identify him. We vehemently deplore this method of identification not only as unsatisfactory but also as being prejudicial to the case of the appellant."

This is exactly what the prosecution did in this case. It is my view that the prosecution ought to have organized an identification parade in compliance with

regulation 195 of the Ghana Police Service which guides the conduct of identification parades to properly identify the accused persons as the ones he saw in the night.

Another important factor in the defence of the accused persons that challenged the prosecution's case is that the 1st accused person gave an alibi as a defence and that 1st accused's alibi was corroborated. He was able to prove his alibi. 1st accused had denied that he was the person seen by PW1 on the night of the incident. That he slept in the same room with one Efo, a teacher at SWESBUS. The law is that where an accused person intends to plead the defence of alibi, he must give notice to the court with the time, names etc. he intends to prove that alibi. The court may then adjourn the case on the application of the prosecution so that the investigator may verify it. However, where an accused person fails to give the notice, then when the alibi is raised, the court shall call on the accused to give notice to the prosecution of the particulars of the alibi within the time allowed by the court.

The provisions on alibi is contained in **section 131 of the Criminal and other Offences (Procedure) Act, 1960 (Act 30)**. The instant provision reads:

131. Alibi

( 1) Where an accused intends to put forward as a defence a plea of alibi, the accused shall give notice of the alibi, to the prosecutor or counsel with particulars as to the time and place and of the witnesses by whom it is proposed to prove,

(a) prior, in the case of a summary trial, to the examination of the first witness for the prosecution, and

(b) prior, in the case of trial on indictment, to the sitting of the trial Court on the date to which the case of trial has been committed for trial.

2) Where the notice is given the Court may, on the application of the prosecution, grant a reasonable adjournment.

( 3) Where the accused puts forward a defence of alibi without having given notice, the Court shall call on the accused to give notice to the prosecution of the particulars mentioned in subsection 1 forthwith or within the time allowed by the Court and after the notice has been given shall, if the prosecution so desires, adjourn the case.

In this case, both accused persons failed to give the notice of alibi in court before the first witness of the prosecution was called. They did not give any subsequent notice in court either. However, that in itself, does not preclude the court from considering the substance of the alibi. Even though as I find from the record, the accused persons did not formally notify the prosecution as mandated, the court was mandated to consider their pleas of alibi do long as it formed part of their defences. The court could not ignore evidence led by them in proof of their alibis.

In the case of **Afwireng v The Republic [1972] 2 GLR 270**, the accused person failed to give notice of his alibi even though he led evidence in proof of it. The trial court refused to consider the evidence led in proof of his alibi and convicted him. On appeal, his conviction was set aside. The court held that where a magistrate does not call upon an accused person to give a notice of alibi when such defence is raised, and the prosecution also does not call the attention of the court to the requirement and does not apply for the particulars of the defence of alibi to be given, such failure does not make it impossible for the court to believe the accused person or exclude evidence of the alibi.

In this case, as I noted above, both accused persons failed to give notice of their alibis. They introduced it anyways. The prosecution, notwithstanding, failed to formally notify the court. The accused having led evidence in proof of their alibis, the court had no choice but to consider it. In anyway, I think the prosecution had notice of the alibis before the trial began and appear to have made efforts to investigate them. From the tenor of questions the prosecution asked during the cross examination of the accused persons, it appears the police had notice. For instance, during the cross examination of the investigator, when 1st accused put to her that he was not at the scene of the crime but that he was asleep with Efo, the investigator denied it saying that when they interviewed the said Efo, he had denied being with the 1st accused that night. There are several such instances which suggest that the prosecution had notice of the alibi. In their caution statements taken down which contents I have set out above, the accused persons maintained the alibis on which they relied even at the

trial. In the case of **Forkuo and Others v Republic [1997-98] 1 GLR 1** at page 12 of the Report, Forster, JA noted as follows;

> "The credibility of an alibi is greatly enhanced or strengthened if it is set up at the moment the accusation is first made and if it is consistently maintained throughout the subsequent proceedings. But if it is not resorted to at the very first opportunity and it is raised rather belatedly during the trial, then this is a potential circumstance to lessen the weight and force of the defence."

In this case the accused persons set up their defence of alibi right from their arrest and maintained it throughout the trial. And having led some evidence in proof, it ought to be accorded the needed weight deserving of it.

That being said, I think that the 1st accused's alibi stood corroborated. He was able to call the said Efo to testify to confirm that on the night of 21st June 2021, he slept with the 1st accused. Even though the prosecution denied his assertion, there was no evidence led on their part to rebut it. So, as things stand presently, 1st accused person's alibi stood proved.

Even though the 2nd accused had also mentioned that he slept with his girlfriend and mentioned one Nana to have seen him going to sleep, he did not call either his supposed girlfriend or the said Nana. So, I can say that his alibi stood uncorroborated. However, I think that that was not fatal under the circumstances of the case having held above that their identification was not credible to be relied on.

Indeed, the prosecution witness has claimed that he saw the accused carrying four batteries which belonged to PW2. That in law is a prima facie evidence of the theft of the 20 batteries by the accused persons. However, in such situations, the law demands that before deciding the fate of the accused persons, the court is required to consider the defence put up by them with care to see if it creates a reasonable doubt as to their guilt. In **Lutterodt v Commissioner of Police [1963] 2 GLR 429,** the Supreme Court through Ollennu JSC held at page 440 as follows;

Where the determination of a case depends upon facts and the court forms the

opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages:
(1) Firstly it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the court should acquit the defendant;
(2) If the court should find itself unable to accept, or if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and
(3) Finally quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e., prosecution and defence together, and be satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if not, it should acquit.'
See also **Darko v Republic [1968] 203**.

I think that notwithstanding the lackluster identification done by the prosecution, after reviewing the evidence and the defence set up by the accused persons, I am of the view that the prosecution failed to prove the guilt of the accused persons beyond reasonable doubt. The quality of the identification was questionable and raised doubts in the case of the prosecution.
I think that the prosecution did not do enough to show that it was the accused who carried away the 20 batteries belonging to PW2. The prosecution failed to successfully leap itself over the first hurdle to prove appropriation. Having failed in that endeavour, they failed to prove that it was accused who carried away the batteries from the shop of PW2. Having failed in that, I hold that prosecution failed to prove that accused appropriated the 20 batteries. Having determined that there was no appropriation, it is immaterial to determine whether there was dishonesty on the part of accused persons. There is no basis to finding dishonesty since there was no appropriation.

In the end, I find it unsafe to convict the accused on the charge of stealing. . Indeed, it is often said that an innocent man in the eyes of the law should not be convicted of a

crime. It is also said that it is better that ninety-nine (99) offenders shall escape than that one innocent man be condemned. I see this case as falling rightly into the category where the above stated principle of law should be applied. Accused persons are clearly innocent in the eyes of the law. It is my judgment therefore that the prosecution failed to prove the elements of the charge of Stealing against the accused persons. In the absence of any proof of the guilt of the accused persons, I hold that charge of Stealing fails. Accused persons are hereby declared not guilty of the offence of Stealing and are hereby acquitted and discharged.

(SGD)

HIS HONOUR ISAAC APEATU

DISTRICT MAGISTRATE