IN THE ASOFAN DISTRICT COURT HELD ON WEDNESDAY THE 26TH DAY OF JULY, 2023 BEFORE HER WORSHIP NANCY TEIKO SEARYOH (MRS.), MAGISTRATE

COURT CASE NO: CC07/02/23

THE REPUBLIC

VRS

SAFIAN IBRAHIM

JUDGEMENT

INTRODUCTION:

The accused person has been charged with One Count of Stealing; contrary to **Section 124(1) of the Criminal Offences Act, 1960 (Act 29).**

Stealing is defined in **Section 125 of the Criminal Offences Act, 1960 (Act 29)** thus:

"A person steals who dishonestly appropriates a thing of which that person is not the owner

Under Article 19(2) (d) of the Constitution, 1992, the law requires that a person charged with a criminal offence shall be informed immediately in a language he understands and in detail of the nature of the offence. Accused was arraigned before this court on 3rd March, 2023. After the charges had been read in English and translated in Twi language exactly as per the charge Sheet, Accused pleaded **GUILTY with explanation**

to the charge levelled against him. Upon listening to his explanation, the court entered a plea of **NOT GUILTY.**

It is a fundamental rule in all criminal trials that the accused person is presumed innocent until he has pleaded guilty or has been convicted. To that end, **Article 19(2) (c) of the 1992 Constitution** of the Republic of Ghana provides that:

19. Fair Trial

1. A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.

2. A person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty;"

FACTS OF THE CASE AS PRESENTED BY PROSECUTION:

The complainant Mark Tawiah Tetteh is a tiller resident at Asofan whilst the accused person Safian Ibrahim is also a resident of Asofan Accra. On the 25th of January 2023 at about 10:00 am, the complainant went to the house of Madam Fofo Oye Tetteh to tile her house, the complainant realized that he left his cutting machine at home so he sent his apprentice to go and pick it for him. When his apprentice returned with the cutting machine he placed it infront of the Madam Oye Tettehs main gate, since at the time the complainant and other apprentices were loading sand at the entrance of the house into the house. Few minutes later when they had finished loading the sand they all entered the house leaving the cutting machine infront of the gate. Complainant later sent his apprentice to bring the cutting machine for use but to his dismay the cutting machine was nowhere to be found a search was conducted around the house but to no avail. Madam Fofo Oye then prompted the complainant that she had a CCTV camera in her house so they should playback. The camera was played and in the footage accused person was captured picking complainants cutting machine in front of the gate.

Complainant confronted the accused person but he denied the offence. Complainant lodged a complaint at the Asofan police station on the 30th January 2023 and the accused was arrested. After investigations he was charged and arraigned before the court.

ISSUES FOR DETERMINATION:

At the end of the trial, the legal issues that fall for determination are as follows:

I. Whether or not Prosecution has discharged its duty of establishing a prima facie case of Stealing against the accused person.

ii. Whether or not the accused person did steal property belonging to the Complainant.

BURDEN OF PROOF:

The evidential burden and the burden of persuasion were thereby placed on Prosecution to prove the charge preferred against the accused person. Prosecution's duty therefore was to lead evidence satisfactorily to prove that Accused committed the offence he had been charged with. In order to establish its case, Prosecution is required by law to prove its case beyond reasonable doubt in accordance with **Sections 11(1) & (2) and Section 13(1) of the Evidence Act, 1975, (NRCD 323)**which stipulates that:

Burden of producing evidence defined:

11 (1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

(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 will find the existence of the facts beyond reasonable doubt."

Proof of crime

13(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.

Reasonable doubt was explained by Denning J (as he then was), in the case of **Miller v Minister of Pensions [1947] 2 All ER 372 @ 373 as:**

"...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.

Prosecution's evidence presented in proof of the offence of stealing can be gleaned from the testimonies of the witnesses of the alleged crime as under-listed PW1 and PW2 (the case investigator). I shall therefore consider these testimonies.

PW1 testified on oath that on 25th January 2023, he was employed by one Fofo Oye Tetteh of Asofan new station. At about 10:00am he realized that he had left his cutting machine in the house so he sent his apprentice home to bring the cutting machine. He came back with the cutting machine and placed it at the entrance of the house. He further stated that they were three in number loading sand into the house and immediately they all entered the house and came back the cutting machine was nowhere to be found. They searched everywhere but couldn't find the cutting machine. His employer prompted him that there is a CCTV camera in the house so the camera was played back and in the footage they saw a young man pushing a trolley believed to be a scrap dealer. From the video the young man was seen parking his trolley and walking to where the machine was just at the entrance of the house. The accused quickly doubled his steps after carrying the object and that they went to the accused

person's place of abode to ask calmly for him to hand over the object to them but the accused person denied knowledge of it.

PW2, C/Insp Chartey the station officer at the Asofan Police station was permitted by the court to testify on behalf of the investigator who was not in the jurisdiction because she had just delivered and was on maternity leave.it is the case of the prosecution that he signed the witness statement on behalf of the investigator and also conducted investigations together with the investigator. The court admitted the witness statement as a first hand hearsay which is an exception to the hearsay rule.

In the case of **REPUBLIC VRS HIGH COURT (CRIMINAL DIVISION 1), ACCRA EXPARTE: STEPHEN KWABENA OPUNI AND ATTORNEY-GENERAL (INTERESTED PARTY) CIVIL MOTION NO. J5/58/2021 28TH JULY, 2021** the Supreme Court defined first hand hearsay thus

"First-hand hearsay evidence is a statement or representation made outside the trial in which it is sought to be introduced which if it had been made by the declarant herself while testifying in the case, would have been admissible. It is obvious that if the makers of the statements in the exhibits in question in this case had made those statements while testifying in the case, the statements would be admissible since they concerned matters perceived by the declarants themselves. A close reading of section 118 would reveal that it makes first-hand hearsay evidence admissible under three different situations; (i) where the hearsay declarant is not available as a witness, or (ii) where the hearsay declarant is already a witness in the case or an intended witness, or (iii) where the hearsay declarant is available as a witness in that she is available to be called to be examined on the statement."

They further went ahead to state thus

Unavailable as a witness and available as a witness have been defined in section 116 of the Act as follows;

Section 116;

(e) Unavailable as a witness means that the declarant is

(i) exempted or precluded on the ground of privilege from testifying concerning the matter to which the statement of the witness is relevant; or

(ii) disqualified as a witness from testifying to the matter; or

(iii) dead or unable to attend or to testify at the trial because of a then existing

physical or mental condition; or

(iv) absent from the trial, and the Court is unable to compel the attendance of the declarant by its process; or

(v) absent from the trial and the proponent of the statement of the declarant has exercised reasonable diligence but has been unable to procure the attendance of the declarant by the court's process; or

(vi) in a position that the declarant cannot reasonably be expected in the circumstances (including the lapse of time since the statement was made) to have a recollection of matters relevant to determining the accuracy of the statement in question;

(f) "available as a witness" means that the declarant is available as a witness.

The combined effect of the provisions is that available as a witness means the declarant of the statement is within the jurisdiction of the court, she is not disqualified under any law from testifying in the case and can be compelled by the use of the processes of the court, e.g. subpoena, to appear to be examined on the statement. So, provided a party

satisfies the conditions under subsection (1)(b)(iii), she can put a statement containing first-hand hearsay into evidence and it would be admissible as an exception to section 117 without the party calling the declarant to give evidence-in-chief. For that reason, the Act in section 134 makes provision for a first-hand hearsay declarant to be called and cross-examined on her hearsay statement without first giving evidence-in-chief. It is as follows;

134. Examination of declarant

(1) The declarant of a hearsay statement admitted in evidence may be called and examined, as if under cross-examination concerning the statement, by a party adverse to the party who introduced the statement.

(2) Subsection (1) does not apply if the declarant is

(a) a witness who has testified in the action concerning the subject matter of the statement; or

(b) a party; or

(c) a person whose relationship to a party makes the interest of that person substantially the same as that of a party.

(3) Subsection (1) does not apply if the statement is hearsay evidence admissible only under section 119, 120, 121, or 127.

Section 118 is conspicuously left out of the exceptions in subsection (3) above. What it means is that, a first-hand hearsay declarant must not be called by the party who offers her statement before the statement will be admissible in evidence. Of course, the weight to be accorded such evidence by a first-hand hearsay declarant may be enhanced if she testifies and confirms what is stated therein and subjects herself to cross-examination, but that would be for purposes of weight of the evidence and not its admissibility as

implied by the court in Ekow Russell. However, every lawyer knows that the admissibility of evidence is a totally different question from the weight of that evidence."

With this explanation the witness statement tendered by the pw2 and its exhibits were admitted and weight added since he made himself available to be cross-examined.

PW2 corroborated all that the PW1 had said and tendered the charge and investigative caution statements, witness statements and the CCTV footage of the incident.

ANALYSIS

The accused person is charged with Stealing; contrary to Section **124(1) of the Criminal offences Act, 1960 (Act 29)** which stipulates that:

"A person who steals commits a second-degree felony."

Stealing is defined in **Section 125 of the Criminal Offences Act, 1960 (Act 29)** thus:

"A person steals who dishonestly appropriates a thing of which that person is not the owner."

Things in respect of which stealing, etc., can be committed is explained in **Section 123 of the Criminal Offences Act, 1960 (Act 29)** as follows:

123 Subject matter of stealing

(1) Any of the crimes of stealing, fraudulent breach of trust, robbery, extortion, or defrauding by false pretence can be committed in respect of anything

i. whether living or dead, and whether fixed to the soil or to any building or fixture, or not so fixed, and

ii. whether the thing be a mineral or water, or gas, or electricity, or of any other nature, and

iii. whether the value thereof be intrinsic or for the purpose of evidence, or be of value only for a particular purpose to a particular person, and

iv. whether the value thereof do or do not amount to the value of the lowest denomination of coin;

(2) For the purpose of subsection (1) a document is of value, whether it be complete or incomplete, and whether or not it satisfied, exhausted, or cancelled.

(3) In any proceedings in respect of any of the crimes mentioned in subsection (1) it shall not be necessary to prove ownership or value.

In the case of **Mensah and Others v The Republic [1978] GLR 404-427,** Taylor J. held that:

"For the offence of stealing to be constituted, therefore the relations, act and intention to be proved in connection with 'the thing' are:

(i) that the person charged must not be the owner of it;

(ii) that he must have appropriated it; and

(iii) that the appropriation must have been dishonest.

These are the basic ingredients requiring proof in a charge of stealing."

In the case of **The State v W.M.O Halm and Ayeh Kumi Crim. App No. 118/67 and 113/67 7 August, 1969; (1969) CC 155,** the court per Akuffo Addo, C. J. Ollenu, Apaloo, Amissah J.J. A. and Archer J. stated the three essential ingredients which proves a charge of stealing under our criminal law as;

"(i) That the person charged must not be the owner of the thing allegedly stolen.

(ii) That he must have appropriated the thing,

(iii) That the appropriation must have been dishonest".

From the evidence before this court, it has been successfully proven by Prosecution and even admitted by Accused that clearly the object that was in front of the house did not belong to the accused person. It is the case of the prosecution that the item that was left infront of the gate at the time the accused person got there was the cutting machine.

Next to be proven beyond reasonable doubt is that Accused appropriated the thing or item he has been charged with stealing. Prosecution is supposed to prove that Accused took, obtained, carried away or dealt with the items otherwise. Prosecution would also have to prove that Accused intended to deprive the owner of the benefit of his ownership or of the benefit of his rights or his interest in the items or in their value or proceeds or any part thereof. There is therefore clear evidence from the testimony of PW1 and the CCTV footage tendered by the PW2 that the item which was infront of the gate which the prosecution claim was the cutting machine was taken away by the accused person thus depriving the complainant of the benefit of his ownership. With this the second ingredient in the offence has therefore been proven by Prosecution.

Dishonest appropriation is defined in Section 120(1) of the Criminal Offences Act, 1960 (Act 29) as follows:

"An appropriation of a thing is dishonest if it is made with an intent to defraud or if it is made by a person without claim of right, and with a knowledge or belief that the appropriation is without the consent of some person for whom he is trustee or who is owner of the thing, as the case may be, or that the appropriation would, if known to any such person, be without his consent."

Proof of either an appropriation without claim of right or an appropriation without the consent of the owner would be sufficient evidence of dishonest appropriation. Prosecution has been able to prove that Accused did not have any claim of right to the item which he carried away without Complainants' consent. In my view, and from the CCTV footage tendered by the PW2, the way the accused person parked his trolley came forward, went back a little, scouted around before making a move to lift the item unto his trolley and he doubling his steps after he had picked the item is strong evidence from which dishonesty could well be inferred, it clearly goes to prove his intent and that what the accused person picked was just not any regular scrap or garbage as he wanted the court to believe. With this the Court found as a matter of law and fact that Prosecution had made a prima facie case against Accused.

The Accused Person is only ordered to open his defence after the prosecution has closed their case and they have been able to establish a prima-facie case against him. The accused person is then required to lead evidence to rebut the presumption of guilt raised by the case of the prosecution. In those circumstances, the burden of proof shifts to the accused person and he has to adduce sufficient evidence to avoid a ruling against him on a particular issue, as stipulated in **Section 11(1) of the Evidence Act, 1975 (N.R.C.D. 323).** This has been well captured in the case of **Woolmington v Director of Public Prosecutions (1935) AC 462 at 481** where H.L. Sankey L.C stated that:

"While the prosecution must prove the guilt of the prisoner, there is no burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."

In the wise words of Akainyah J. in the case of **Commissioner of Police v Osei Yaw Akoto [1964] GLR 231 – 233:**

"A person charged before a court has a duty to make it appear to the court that no charge has sufficiently been made against him to require an answer from him. This is a time-honoured practice, and he can do this himself or through his legal representative. It is a fundamental principle in criminal procedure and section 173 of the criminal procedure code has not taken it away".

In accordance with **Section 173 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30),** Accused was called upon to open his defence.

In his charge statement(exhibit 'D') accused stated that on the said date he chanced upon a white plastic bowl lying infront of Mrs. Fofo Oye Tettehs main entrance gate and the plastic bowl contained used deodorant container, hair pomade containers and body cream containers. He picked the bowl with the intention that the bowl was meant for the garbage and that the next day in the morning around 10:00am he was in the house when the complainant together with four others including the owner of the house came around alleging that he was captured in CCTV footage picking a cutting machine which belonged to the complainant. He stated that he was physically assaulted in the process. He therefore informed them that it was a white plastic bowl and not a cutting machine. They searched his house and could not find anything and they left. A few minutes later they brought the police to arrest him. He repeated the same statement in the exhibit 'E' which was his investigative witness statement.

Accused person again testified on oath that he did not see any machine infront of the gate. He picked a rubber from the front of the gate. He testified that he has a Master he buys the scraps for and that if anyone comes to enquire about anything sent to his master he freely releases it. On the same day when he got to his house those looking for the machine also came around a few minutes after he had gotten home and met him bringing his things out of the trolley. So they searched around and could not find it, they also asked his master but they could not find it from him and left after that.

It seems to the court that there are some in consistencies or discrepancies in the statement the accused person gave to the police, the testimony he gave in court during his defence and his explanation he gave to the court on the day his plea was taken. In his investigative caution statement and the charge statement the accused stated that the complainant and four others came to his house at 10:00am the next day to search for the machine but in his testimony he stated that they came the same day and even met his master.

During cross examination of the accused person, he admitted that he was the person who was seen in the CCTV footage picking an item in front of the gate.

These are some snippets of what ensued during cross examination of the accused.

Q: in your charge statement given to the police you said there was a plastic bowl in front of the house. There were some items in it. Can you tell this court what exactly was in the plastic bowl?

A: there was dry mortar in the plastic bowl

Q: I am putting it to you that you are not being truthful to this court because you made mention of some items contained in the said plastic bowl, deodorant container, hair pomade container and body cream container.

A: it is not true I said there was a plastic bowl infront of the house but I did not mention the items prosecution is referring to in my statement. Maybe prosecution did not hear me well when I spoke to them and it is also not part of my statements.

After the accused was made to refresh his memory with the (exhibit D) his caution statement this is what further ensued.

Q: would you agree with me that the burst bowl you claimed cannot contain the items you mentioned in your statement to the police

A: I will agree with you that the burst plastic bowls cannot contain those items but it cannot also contain the machine.

At this point of the cross examination, the court came to the realization that the accused person was not being truthful to the court since his statements to the police in connection to what item he actually picked from the front of the gate were inconsistent with his testimony in court and also the explanation he gave to court during plea taking.

During the cross examination of pw2 the accused person raised issues with the CCTV footage and asked thus

Q:According to the CCTV footage there was a voice on the background saying I was picking something why did they not bring the raw CCTV footage for them to determine whether I picked the object or not

A: the video footage is different from the voice the voice came in when we were extracting the video. We were watching while extracting the video.

Accused person went on to ask further questions in order to create doubt in the mind of the court that the CCTV footage has been tampered with by the prosecution but during the cross examination of the accused by the prosecution, accused was asked

Q: will you agree with me that you are not being truthful to the court because the CCTV footage has not been tampered with

A: I agree with you.

The accused person informed the court that he would be calling two witnesses but could not produce them. After giving the court stories, the court made an order that the witnesses be subpoenaed. The accused person came to court with one witness who did not bear any of the names mentioned by the accused person. He gave his name as

Benjamin Marmah a sheep rearer. The pith of his testimony was that three men came to him asking about the scrap dealer. He confirmed seeing him and told them that he was headed towards the park so they should go there and not long after another woman came asking him about the scrap dealer and he directed her to the park also. It was after they came back that they told him that the reason they were asking for the scrap dealer was that they could not find their tools they were working with. During cross examination he stated that where he was sitting to where the incident happened (tool was stolen) was far so he did not see what really went on. He further stated that the accused person had to come straight from where the tool was stolen and head to a curve before he saw him so he did not see what the accused person picked and that he did not check the items in the accused person's trolley. The accused only greeted him and passed. After the witness DW1 came to testify the accused was given the chance but could not produce his other witness. The case was closed for judgement.

In the view of this court the testimony of DW1 came to strengthen the case of the prosecution and to confirm that the complainant, the house owner and the workmen started looking for the lost machine almost immediately after the item had been picked by the accused person and he had left.

By this defence of Accused, the Court is not convinced enough to doubt the evidence adduced by Prosecution. It is consequently the opinion of the Court that Prosecution has led credible evidence to support all the ingredients of the offence charged Accused beyond reasonable doubt. The Court hereby rejects the defence of Accused as not being reasonably probable and therefore finds Accused guilty of the offence of Stealing; contrary to Section 124(1) of the Criminal Offences Act, 1960 (Act 29).

With the above findings of facts I rely on **Lutterodt v Commissioner of Police [1963] 2G.L.R 429-440,** where Ollenu JSC., delivering the judgment of the Supreme Court stated that:

"If quite apart from the defendant's explanation, the Court is satisfied on a consideration of the whole evidence that the accused is guilty, it must convict".

Accused is hereby convicted of Guilt.

SENTENCE:

In sentencing Accused, I have taken into consideration the accused's demeanour during trial, and his plea for mitigation. Also the item he stole has not been retrieved nor returned to its owner.

I have also taken into consideration the fact that every sentence is supposed to serve a five-fold purpose, namely to be punitive, calculated to deter others, to reform the offender, to appease the society and to be a safeguard to this country. There is nothing also before me to indicate that the accused person has ever had a brush with the law. I am also conscious of the fact that it is not in the interest of society to have a young person kept in prison for very long periods.

I hereby sentence Accused to a term of eight (8) months imprisonment.

H/W NANCY TEIKO SEARYOH (MRS.)

MAGISTRATE