

IN THE DISTRICT COURT HELD AT ADIDOME ON FRIDAY THE 21<sup>ST</sup> DAY  
JULY, 2023. BEFORE HER WORSHIP MOLLY PORTIA ANAFO-SALIA (MRS)  
(DISTRICT MAGISTRATE)

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CC7/04/2023

THE REPUBLIC

VRS.

ALBERT FIAGBENU

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J U D G M E N T

The accused person was arraigned in this court on the 12<sup>th</sup> of December, 2022, charged with; Stealing Contrary to Section 124 (1) of the Criminal Offences Act, 1960 (Act 29).

The Accused Person pleaded NOT GUILTY and thereafter admitted to bail.

The brief facts of the case as recounted by Prosecution are that the Complainant Okudzeto Agbotadua is a retired businessman whilst Accused Person, Albert Fiagbenu is a driver and they both reside at Adidome. On the 5<sup>th</sup> of October, 2022 during the early hours of the day, Complainant woke up from sleep and noticed that his Samsung Galaxy phone, worth One Thousand Four Hundred Ghana Cedis (GH¢1,400.00) was nowhere to be found. This prompted the Complainant to inspect the house. Upon inspection, Complainant detected that his electric fan, electric kettle, a sony sound system, valued Nine Hundred and Fifty Ghana Cedis (GH¢950.00), a cash more than Twenty Five Ghana Cedis (GH¢25,000.00) and shoes were also missing.

After few days, Complainant saw Accused Person's father by name Yaw Fiagbenu wearing one of his missing shoes which was retrieved from him by the Complainant and he made a report to the Police. A search in the Accused Person's abode also revealed an electric fan which Complainant identified to be his and also produced a receipt to that effect. A witness in this case on hearing of Complainant's missing items approached him with a Samsung Galaxy phone and stated that it was sold to him by the Accused Person at a cost of Three Hundred Ghana Cedis (GH¢300.00). Accused Person was subsequently arrested and detained. Exhibit mentioned supra also retained for evidential purpose. Accused Person in his Investigation Cautioned Statement denied the Offence and also claimed ownership of the Exhibits but failed to produce proof. He was charged after investigations and arraigned in court.

It is trite that the burden of proof remains on the Prosecution throughout the trial and it is only after a prima facie case has been established, that is a story sufficient enough to link the accused to the commission of the offences that accused would be called upon to give their side of the story. This principle was stated in the following cases:

1. Amartey v. The State [1964] GLR 256 at 298
2. Gligah & Atiso v. The Republic [2010] 25 GMJ 1 SC
3. Dextor Johnson v. The Republic [2011] 33 GMJ 68 SC

In criminal action, the standard of proof is proof beyond reasonable doubt, whilst the accused person is only required to raise a reasonable doubt as to his guilt as in the case of Woolmington v. D.D.P. [1935] AC 462.

The standard of proof is codified in the Evidence Act, 1975 (NRCD 323), Section 11 (2) and 13 (1)

Section 11 (2): "In 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 on all the evidence so that a reasonable mind could find the existence of facts beyond reasonable doubt".

Section 13 (1): "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."

The authorities have held that where statute creates an offence, it is the duty of the prosecution to prove each element of the offence, which is a precondition to secure conviction; unless the same statute places a particular burden on the accused.

The fundamental and cardinal principle as to the criminal burden of proof on the prosecution should not be shifted.

See: *Tamakloe v. The Republic* [2011] 1 SC GLR 19.

The prosecution assumed this burden to prove the guilt of the Accused Person beyond reasonable doubt to secure his conviction, called four (4) witnesses, Togbe Okudzeto Agbotadua, Raymond Agbodeka, Christiana Fiagbenu and General Constable Aaku Emmanuel Kofi. They tendered in evidence some Exhibits which included Receipt of the stolen fan, photograph of a standing fan, photograph of the Samsung Galaxy phone, Investigation Cautioned Statement of the Accused Person, Charged statement of the Accused Person, A further cautioned statement of the Accused Person. They were all admitted and marked, as Exhibit 'A', 'B' 'C' 'D' 'E' and 'F'.

The Accused Person opened his defence and called two (2) witnesses, Boti Dersiadenyo, his wife and Daniel Yao Fiagbenu, his father. He also tendered in evidence recordings

of the Fan in a diary and a receipt of the fan. They were admitted and marked as Exhibits '1' and '2'.

PW1, Togbe Okudzeto Agbotadua stated in his evidence that, on the 25<sup>th</sup> of October, 2022 during the early hours of the day, he woke up to check his missed calls on his Samsung Galaxy cell phone valued GHC1,400.00 and noticed that the phone was nowhere to be found. This prompted him to walk around his house for inspection and realized that his electric kettle, electric fan, a cash amount of more than GHC25,000.00, and some shoes were not found. That he saw accused person's father wearing one of the missing sandals and highly suspected the accused person and caused his arrest after he lodged a complainant.

PW2, Raymond Agbodeka, a phone repairer in his evidence stated that, about a month ago, the accused person approached him with a Samsung Galaxy A20 mobile phone and he bought it at GHC300.00. Later, he heard of PW1's missing items and he approached him with the phone which PW1 identified as his.

PW3, Christiana Fiagbenu stated that, PW1 showed her a photograph of a brown sandals which had been stolen from his house, this was on the 25<sup>th</sup> of November, 2022. That on the 26<sup>th</sup> of November, 2022 her sister called Happy Fiagbenu informed her to search accused person's room since PW1 suspected him.

A search was conducted and a pair of sandals which matched. PW1's stolen sandals were retrieved but Happy Fiagbenu took possession and refused to hand same over to PW1.

PW4, the Investigator General Constable Aaku Emmanuel Kofi evidence was to the effect that a case of unlawful entry and stealing was referred to him for investigation. This was after same had been lodged against the accused by PW1.

On the 14<sup>th</sup> of November, 2022. That he obtained a Complainant statement from PW1 and obtained a search warrant at the District Court, Adidome. A search conducted in accused person's premises retrieved a black Suzika standing fan which PW1 claimed ownership. He obtained cautioned statement from accused person. A Samsung A20 Galaxy mobile phone was retrieved from Raymond Agbodeka, PW2 and witness statements obtained from him and Christiana Fiagbenu, PW3.

That a further cautioned statement was obtained from accused person, subsequently, he was charged with the offence of stealing. PW4 tendered all Exhibits in his possession.

The accused person cross examined them and this closed prosecution's case. The accused person opened his defence in accordance with Section 17 4 (1) of the Criminal and Other Offences (Procedure) Act, 1960, (Act 30). It states: "At the close of the evidence in support of the charge, if it appears to the court that a case made out against the accused sufficiently to require the accused to make a defence, the court shall call on the accused to make the defence and shall remind the accused of the charge and inform the accused of the right of the accused to give evidence personally on oath or to make a statement".

The well settled Law is that at the end of the case for the prosecution, only a prima facie case can be made against the accused. This principle

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was well articulated in the case of the State v. Sowah and Essel [1961] GLR (Pt 11) 743, SC where it was held at P.745 that:

"It is wrong therefore to presume the guilt of an accused merely from the facts proved by the prosecution. The case for the prosecution provides prima facie evidence from

which the guilt of the accused may be presumed, and which therefore calls for an explanation by the accused”.

It is his case that in the month of November, 2022 a radio announcement was made on Dela Radio 105.7 at Adidome that one Togbe Okudzeto Agbotadua made it known to the general public that eventually the one who over the years have been stealing his items has been apprehended, one Albert Fiagbenu. Some days after the announcement the said Togbe Agbotadua Okudzeto together with some Policemen came for a search in his room and that of his father. They took from his room his electric Suzika fan and his father’s black sandals which the said Torgbe Agbotadua Okudzeto claimed ownership.

According to the accused person, a day after the search, he was invited by the Police and same honoured on the 29<sup>th</sup> November, 2022. That he was accused of standing Togbe Agbotadua Okudzeto’s things which included a standing fan, an electric kettle, a total number of sixteen phones, a Mercedes Benz gear box and a cash the sum of GHC25,000.00 but he denied any knowledge of same. Later he was charged of stealing and arraigned in court.

DW1, Boti Dersiadenyo in her evidence in court limited her evidence to the standing fan which she stated accused person purchased when he went to Nkawkaw.

DW2, Daniel Yao Fiagbenu stated in his evidence, that he was at his sister’s shop when accused person came in the company of the Police to search his room. That he hurriedly and without any apprehension complied. All his sandals in a sack were emptied but nothing incriminating found.

According to DW2, about four (4) to five (5) days later, they sent for the sandals though he was not sure which of the sandals but gave the one he uses to church and never heard anything until his son, the accused person was arrested.

After their evidence, the prosecution cross examined and accused person closed his case.

The legal issue to be determined is whether or not the accused person appropriated the standing fan and the Samsung A20 Galaxy mobile phone which ownership is known to be for PW1, Togbe Okudzeto Agbotadua.

The Prosecution proffered the charge of stealing against the accused person.

Stealing Contrary to Section 124 (1) of the Criminal Offences Act, 1960 (Act 29) states: A person who steals commits a second degree felony."

Under Section 125 of the same Act defines stealing as: "A person who steals dishonestly appropriates a thing of which that person is not the owner."

Looking at stealing in *Lucen v. The Republic* [1977] 1 GLR 351, the court established the ingredients that would make a charge of stealing effective:

- (i) the person charged must not be the owner of the thing stolen,
- (ii) he must have appropriated it, and
- (iii) the appropriation must have been dishonest.

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In the light of this, the actus reus is the appropriation of the thing and the mens rea is the dishonestly with which the thing was appropriated, hence the dishonest appropriation of the object stolen for a charge of stealing to succeed, these elements must be present."

See also *Ampah v. The Republic* [1977] 2 GLR 175, CA and *Republic v. Nana Kwadwo* 11 [2008] 1 GMJ 42, SC.

On the issue of ownership Section 123 (3) of Act 29 posits:

“(3) in proceedings in respect of a criminal offence mentioned in subsection (1), it is not necessary to prove ownership or value. Subsection 1 states: The criminal offence of stealing, fraudulent breach of trust, robbery extortion, or defrauding by false pretense can be committing in respect of a thing”.

The prosecution only has to prove that the accused does not own the thing which is the object of the theft. Section 122(2) of Act 29 prescribes the meaning of an appropriation of a thing:

“(2) An appropriation of a thing in any other case means any moving, obtaining, carrying away, or dealing with a thing with the intent that a person may be deprived of the benefit of the ownership of that thing, or of the benefit of the right or interest in the thing, or in its value or proceeds, or part of that thing.”

The law does not require that a particular item is carried away up to a certain distance before appropriation occurs so that even when the item is not moved but is dealt with in a way that is intended to deprive the owner of its, it is termed an appropriation.

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This appropriation is dishonest when, according to section 120 of Act 29:

(a) if it made with an intent to defraud, or

(b) 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 a person for whom that person is trustee or who is owner of the thing or that the appropriation would, if known to the other person, be without the consent of the other person.”



In *Brempong II v. The Republic* [1996-97], SC GLR 626, SC: it was determined that where there is a claim of right made by the accused based on good faith and supported by evidence a dishonest intention would not have been established. On the other hand, a claim of right made without good faith but is tendered on bad faith will render the appropriation dishonest. In this case, where there is sufficient information to show that a person cannot make a claim of a right, then it follows that any claim of right made under such circumstance, it tainted with bad faith”.

The accused person has challenged ownership of the standing fan and tendered a receipt Exhibit '2' to that effect. Earlier on he had stated during cross examination that he could not trace the receipt. He then sought leave to obtain same from where he purchased the standing fan. Meanwhile, this assertion was never part of his evidence in court, until same was stated during cross examination. The accused person was not caught directly in the act and this makes it extremely difficult for prosecution to prove the offence of stealing. What the court in circumstances of this nature is to infer from surrounding circumstances to establish the guilt of the accused person.

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The question remains whether, the accused person actually appropriated the standing fan which was found in his room during the search and the Samsung A20 Galaxy mobile phone which he sold to PW2 Raymond Agbodeka, a phone repairer at a cost of GHC300.00. The accused person still denied ever selling the Samsung A20 Galaxy mobile phone to PW2. Also that the standing fan was purchased from Nkawkaw when he visited his friend called Ofori in July 2020. This was stated in his cautioned statement dated 24<sup>th</sup> day of November 2022, Exhibit 'D'. 'I' quote “In July 2020, I left the Adidome Township to my friend by name Ofori at Nkawkaw. During my stay at Nkawkaw, I worked with a wood processing firm. After six 6 months, that is January 2021, I returned from Nkawkaw to Adidome with a Suzika standing fan which I

purchased for GHC160.00. On my return, I met my wife, Nice Boti at home who can bear me witness that, I bought the said standing fan from Nkawkaw”.

The accused person’s evidence on oath in court contradicted his statement to the police. His Exhibits ‘1’ and ‘2’ did not conform to the dates stated in Exhibit ‘D’ his cautioned statement. The recordings made by DW1, accused person’s wife was 15<sup>th</sup> January 2022 as the date he returned from Nkawkaw with the purchased standing fan. Meanwhile same was purchased on the 10<sup>th</sup> of January 2022, five (5) clear days before his return journey to Adidome. In Exhibit ‘D’ he dated January 2021 as the date he returned to Adidome. Even during cross examination, different date was stated by accused person’s wife DW1 whom they have lived for five (5) years. This is what ensued.

Q: In which year did he go Nkawkaw?

A: 20<sup>th</sup> September, 2021.

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Q: And he returned in which year?

A: January, 2022.

Q: And how many months did he spend there?

A: 5 months.

Q: I am putting it to you that you are not being truthful to the court?

A: I am being truthful.

Q: Again he returned from Nkawkaw in 2021 January but not 2022 January?

A: He came in January 2022.

Again, accused person in his evidence in court denied any knowledge of the Samsung A20 Galaxy mobile phone, Exhibit 'C'.

Meanwhile, accused person gave a further cautioned statement, Exhibit 'F' where he confessed to the crime. I wish to quote same: "One Wednesday night in the month of October which I cannot recollect the exact date. I unlawfully broke into Complainant's abode and made away with an electric fan, 2 Samsung galaxy mobile phones as well as a pair of shoes. My untie by name Ama Fiagbenu contracted me with an amount of GHC100.00 to steal the phones from complainant because complainant had saved videos of both of them making love. I have handed over one of the Samsung Galaxy phones which contained the saved videos to my auntie Ama Fiagbenu. The said phone is in possession of Ama Fiagbenu at the moment. Ama Fiagbenu also promised to add an amount of GHC1,000.00 to the contract money which she failed to give me". This was given on the 7<sup>th</sup> of December, 2022. However, accused person denied this statement and that he was under duress as he was subjected to severe beatings. A statement he

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willingly gave to the Police and same having been satisfied by the condition in Section 120 (5) of the Evidence Act, 1975 (NRCD 323).

This makes the court not believe the accused person. It is not convincing and lack substance and merit. It is inconsistent with normal acceptable behaviour and conduct and same is rejected. Of course, the law is that where a case boils down to facts and credibility of a witness, if the court takes the view that one side or the other side is the truth then the accounts are mutually exclusive of each other. Once the court decides to believe one side, of the story it means the other side is a fabrication.

See Ansah – Sasraku v. The State [1966] GLR 294 at 298 SC.

Similarly, the law is well settled that, a party or witness whose evidence on oath contradicts a previous statement is not worthy of credit and his evidence should not be regarded. Unless he is able to explain the contradictions between the statement and the evidence, the case of Gyabaah v. The Republic [1984-86] 2 GLR 461, CA.

Unfortunately, the accused person was not able to explain to the court the contradictions between his evidence on oath, statements to police, thus Exhibit 'E' and 'F'.

In Republic v. Francis Ike Uyanwune [2013] 58 GMJ 162 at 177-181 Dennis Adjei J.A held as follows: "The law is that the prosecution must prove all the ingredients of the offence charged in accordance with the standard burden of proof, that is to say the prosecution must establish a prima facie case and the burden of proof would be shifted to the accused person to open his defence and in so doing he may run a risk of non-production of evidence and or non-persuasion to the required

degree of belief else he may be convicted of the offence. The accused person must give evidence if prima facie case is established else he may be convicted and if he opens his defence the court is required to satisfy itself that the explanations of the accused person is either acceptable not. If it is acceptable the accused person should be acquitted and it if is not acceptable the court should probe further to see if it is reasonably probable. If it is reasonably probable, the accused person should be acquitted but if it is not and the court is satisfied that in considering the entire evidence on record the accused person is guilty of the offence the court must convict him".

On the strength of the above case, the Samsung A20 Galaxy mobile phone, Exhibit 'C' having been established that accused person sold same to Raymond Agbodeka, PW2 at

a cost of Three Hundred Ghana Cedis as well as Exhibit 'B' , the standing fan having been retrieved from his room during a search conducted by the Police , he was to give evidence reasonably probable for acquittal. The accused person rather gave evidence contradicting his earlier two (2) statements to the police thereby creating doubts in the mind of the court. The court cannot lean on such conflicting statements rather it will examine the evidence of the Prosecution and may rule in their favour.

The accused person could not produce enough evidence or explanation to cast a reasonable doubt on the case of prosecution thereby inviting the court to rule in their favour as stated in Ampah v. The Republic [1970] 1 GLR 403 at page 42 and Republic v. Francis Ike Uyanwune supra.

In the prevailing circumstances, the court finds as a fact that prosecution has been able to discharge the standard burden of proof to prove the guilt of the accused person.

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Accused person is hereby GUILTY of the offence charged, stealing contrary to section 124 (1) of the Criminal Offences Act, 1960 (Act 29). Accordingly, accused person is convicted.

### **MITIGATION**

Accused person pleaded for leniency.

### **SENTENCE**

The court considered the accused person's plea in mitigation, the fact that accused person is not known in the Law, the retrieved standing fan and the Samsung A20 Galaxy mobile phone in good condition though.

Accused person deserves a deterrent sentence to serve as a lesson to those who may want to follow that path.

Accused person is sentenced to 12 months imprisonment.

**RESTITUTION ORDER**

The retrieved items be given to PW1, Togbe Okudzeto Agbotadua as the true owner.

(SGD)

**H/W MOLLY PORTIA ANAFO-SALIA (MRS)**

**(DISTRICT MAGISTRATE)**

**21<sup>ST</sup> JULY, 2023**

Detective Inspector Bright Quarshie for the Republic present.

Accused person present.