IN THE HIGH COURT OF JUSTICE, HELD IN SOGAKOPE ON MONDAY THE 19TH DAY OF DECEMBER, 2022 BEFORE HER LADYSHIP JUSTICE DOREEN G. BOAKYE-AGYEI (MRS.) JUSTICE OF THE HIGH COURT

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SUIT NO: F22/01/2023

1. **FRANCIS AFEDO** - **APPELLANTS**
2. **ZAKARIA MUSAH**
3. **IKENNA OJINNAK**

VS.

REPUBLIC - **RESPONDENT**

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PARTIES:

APPELLANT IN LAWFUL CUSTODY

COUNSEL:

MS. ELORM FUGAH, ESQ., COUNSEL RESPONDENT/ RESPONDENT WITH ANTHONY ATTAKUMAH GHATTI -PRESENT

MR. SAMUEL KISSIEDU, ESQ., COUNSEL FOR APPELLANT - PRESENT

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JUDGMENT

INTRODUCTION

The Convict/Appellant (hereinafter referred to as "Appellant') was arrested and charged with the offence of Dishonestly Receiving a Tecno mobile phone contrary to section 147(1) of The Criminal and Other Offences Act, 1960 (Act 29). He pleaded Guilty with explanation and the Court after examining his explanation found him guilty of the offence, convicted and sentenced him to prison for 24 months.

BRIEF FACTS

According to the facts presented by Prosecution, Complainant, Charles Dorbordoe is a teacher. Al, Francis Afedo @Capo is a farmer, A2, Zakaria Musah is a scrap dealer and A3, Ikenna Ojinnak is a phone repairer. The complainant is a resident of Tsito near Ho and a native of Battor. Al, A2 and A3 reside in Battor and Mepe respectively. On 23/09/2022, the complainant had arrived at his hometown Battor to attend a meeting over his deceased father. That on 27/09/2022 about 17.50 hours, the complainant left his Tecno Spark 7 mobile phone valued GH¢1,000.00 on charge in his verandah on a table and left for his father's house to attend the funeral meeting. The complainant returned around 1840 hours but his said mobile phone was nowhere to be found. That during that period, witnesses in the case who spotted Al unplugging the said mobile phone described him and his residence to the complainant. On 28/09/2022, the complainant with the assistance of other witnesses handed him over to the Aveyime police and made a formal report. In the course of investigations, the Police rearrested Al who was cautioned. Al in his cautioned statement mentioned A2 as his accomplice. That crime scene was visited together with Al and the complainant. A1, further led police to the residence of A2. In the house, A1, who intended to escape from lawful custody took to his heels into a nearby bush in the pair of hand cuffs. With the assistance of Constable Jonas Bacha Bunboani the accused was rearrested. In the course of further investigations, the exhibit mobile phone was retrieved from A2 and same retained for evidential purposes. A2, in his cautioned statement mentioned A3 as the one who flashed out the phone locks and the password of the phone. A3 was also arrested and cautioned. After careful investigations A1, A2 and A3 were charged with the offences as stated on the charge sheet and arraigned before this Honourable Court.

Thus the Appellant, a mobile phone repairer residing in Mepe was arrested together with two (2) others and charged with various counts of stealing, dishonestly receiving among

others. According to his Counsel, Convict/Appellant was earlier charged with Abetment of Stealing contrary to section 20(1) and section 124(1) of the Criminal and other Offences Act, 1960 Act 29 and arraigned before the Circuit Court, Sogakope on 3rd October, 2022. Appellant pleaded Not Guilty to the charge, however his plea was not recorded that day as the other accused persons appeared confused and not sound to respond to the charges. He was then remanded into Police custody to reappear on 17th day of October, 2022. When Appellant appeared in Court on the return date, Appellant's charge had been amended and he had been charged with Dishonestly Receiving contrary to section 147(1) of Act 29 to which he pleaded Guilty with explanation. The Trial Court after hearing Appellant's explanation given to the Court, found him guilty and sentenced him to 24 months imprisonment IHL without the option of a fine.

By the provisions of the 1992 Constitution, this Court is constitutionally and conventionally bound by the previous decisions on points of law given by the superior courts. The holding by Atuguba JSC in the case of **TANKO SALIFU VRS THE REPUBLIC (CRIMINAL APPEAL H2/02/2014)** when it noted that **Section 406 of Act 30** provides that no judgment or order or sentence of a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error or irregularity in the judgment, order or other proceeding unless such an error or irregularity or misdirection has occasioned a substantial miscarriage of justice. The law generally is that conviction should not be set aside where there is evidence to support it. In the case of **HODGSON V. THE REPUBLIC [2009] SCGLR 642**, the Supreme Court held that an Appellate Court will not set aside conviction where there was sufficient evidence on record to support it.

BURDEN OF PROOF

In all criminal trials, it is the duty of the prosecution to adduce sufficient evidence to establish beyond reasonable doubt all the essential elements in the offence with which the Accused is charged. This burden is provided for under sections 11(2) and 13(1) of the Evidence Act (NRCD 323), hereinafter referred to as NRCD 323.

Section 11(2) states:

"(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.***"

Section 13(1) also states:

"(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 reasonable doubt***.

In the case of ***MILLER*** *V. MINISTER* ***OF PENSIONS [1947] 2*** *ALL* ***ER 372,*** **Lord Denning**, in explaining the concept of reasonable doubt stated:

"Proof beyond reasonable doubt ***does not mean proof beyond the shadow of doubt***. *The law will* fail *to protect the community if it admitted fanciful probabilities* to *deflect the course of justice*. *If the evidence is so strong against the man as to lead* to *only* a *remote possibility in his favour, which can be dismissed with the sentence '****of*** *course* ***possible but not the least probable***' *the case is proved beyond reasonable doubt but nothing short is required.*"

This assertion by Lord Denning flows from the common knowledge that everything is

possible. However, for a thing to be probable, a certain degree of certainty of its existence is needed. To this end, section 11(3) of The Evidence Act, 1975 NRCD 323 provides that; "*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"*.

In this appeal however, the situation which Appellant is calling on this Honorable Court to evaluate is not whether or not the Prosecution discharged their burden of proving Appellant's guilt beyond reasonable doubt. This is because Appellant was convicted based on his own plea and not based on the evidence adduced at trial by the Prosecution.

GROUNDS OF APPEAL

a. The court erred in convicting 3rd Accused on his own plea when his explanation was inconsistent with his guilt.

b. The sentence is harsh and excessive.

c. Further grounds will be filed upon receipt of the record of appeal.

GROUND A

EFFECT OF PLEA of GUILTY WITH EXPLANATION

The foundation of our criminal jurisprudence is presumption of innocence until proven otherwise or until Accused has pleaded guilty to the crime charged. This is enshrined in Article 19(2)(c) of the Constitution, 1992. When the law presumes the Accused innocent, it is the Prosecution that is required to establish his guilt. The law on proof by the prosecution in criminal matters requires no more authority since 1935 when Lord Viscount Sankey laid down the principle in the case of ***WOOLMINGTON* V *DPP (1935) UKHL** 1*, that the golden thread running through all common law jurisdictions on criminal trial is presumption of

innocence, and it is the prosecution who must prove the prisoner's guilt beyond reasonable doubt. This is sanctioned by the combined effect of sections 15, 17 and 11(2) of the Evidence Act, 1975 (NRCD 323).

The law is that an Accused person appearing before a court of criminal jurisdiction has options, namely; to either remain silent or plead to his guilt. The semblance of these options are contained in Article 19(10) of the Constitution and section 96(1) of the Evidence Act to the effect that an Accused shall not be compelled to give evidence. However, section 171(4) of Act 30 provides that where the Accused's plea is not one of guilt, the Court is obliged to proceed to try the case. This has become a convention christened as, "*guilty with explanation*". Where an Accused gives an explanation, the Court is duty bound to listen to the explanation, record same and to determine whether the explanation amounts to a defence or is consistent with the guilt of the Accused. Where the Accused person's explanation on record amounts to a defence or is inconsistent with his guilt, the Court is obliged to enter a plea of Not Guilty for the Accused and to proceed to try the matter as required by law.

In the case of ***GUNDAA VS REPUBLIC (1989-90) 2 GLR 50-57***, the Appellant was charged before a District Court with the offence of Threat of Death under section 75 of the Criminal Code, 1960 (Act 29). The record of proceedings showed that the Appellant pleaded guilty with explanation and subsequently gave a brief explanation which was also recorded. Thereafter he was convicted on his own plea and sentenced to a term of two years' imprisonment. The Appellant appealed against the conviction and sentence and applied for bail pending the appeal. His Counsel argued, inter alia, that the Trial District Court had erred in failing to give reasons for imposing a harsh sentence. In holding 2 of the headnotes, the Court held as follows;

"Under Act 30 there was nothing like guilty with explanation. It was wrong for a court to convict on such a plea without altering it to a plea of guilty if the explanation given was consistent with guilt. If

it were and the accused maintained his guilt, the court could convict him on his own plea after explaining to him the consequences of such a plea. If ***the explanation was not consistent with guilt***, a ***plea of not guilty must be entered by the trial court for normal trial*** to ***take place***. *If at the end of the day the only plea on record was one of guilty with explanation, the court should necessarily record a plea of not guilty under section* 199(4) *of Act* 30. In *the instant case, the appellant's explanation was equivocal, capable of both an innocent and a guilty interpretation. The court therefore ought not to have accepted the guilty interpretation as against the innocent interpretation since the burden* to *establish* his *guilt beyond* all *reasonable doubt rested* on *the prosecution. The accused by his explanation did not unequivocally plead guilty therefore the conviction could not stand*."

Again, in the case of ***OFEI*** **VS** ***THE STATE (1965) GLR 680 AT 686,*** the Supreme Court stated emphatically that "the law is that a court must not take a defendant to have admitted his guilt unless he does so in unmistakable terms".

In **NOKWE VRS THE REPUBLIC (1999-2000) 1 GLR 49**, it was held that a plea should be quite clear and unambiguous and therefore when an accused pleads guilty to a charge but adds by way of explanation words which negatives the plea of guilty by rendering the said plea equivocal then in the words of Section 171 (2) of Act 30, the said person has given "sufficient cause to the contrary"; in which case the trial judge is disabled from proceeding to convict by entering a plea of not guilty on his behalf: See **ALPHA ZABRAMA V. THE REPUBLIC [1976] 1 GLR 291; R V. TOTTENHAM JUSTICES [1970] 1 ALL ER 879 AT 883** per Bridge J; and **R V. DURHAM QUARTER SESSIONS EX PARTE VIRGO [1952] 2 ALL ER 466.**

Justice Sir Dennis Adjei in his book, *Criminal Procedure and Practice in Ghana,* third edition on page 270 states as follows; *"A practice has developed where a person who may not be guilty may plead "guilty with explanation". The court shall proceed* to *take the explanation of the accused as nearly as possible as was given and where the explanation negates the commission of the offence, the court*

shall enter a plea of "not *guilty" for the accused and proceed with the matter. The test for the trial court is whether or not the explanation given by the accused if proved by the end of the trial will constitute a defence. The court does not have power* to *reject the explanation offered by the accused on any ground except where it is clear that if the said explanation is proved at the end of the trial, it will not constitute a defence*".

ANALYSIS OF THE LAW AND FACTS

It is trite law that an Appeal is by way of re-hearing and this Honourable Court ought to look at and evaluate the evidence adduced at the Trial Court, so as to satisfy itself that the conclusions reached by the Learned Judge are well founded. This trite rule of law has received ample judicial interpretation in a legion of cases to mean that the Appellate Court is enjoined by law to review the evidence led on record and come to its own conclusion and make a determination as to whether on both the facts and law, the findings of the Lower Court were properly made and were supported. On the duty of the Appellate Court, it is commonplace that the Appellate Court has the duty to re-hear the case and re-consider the materials before the Circuit Judge with such other materials as it may have decided to admit. The Appellate Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. In the case of **TUAKWA VRS. BOSOM [2001-2002] SCGLR 61**, Sophia Akuffo JSC (as she then was) defined the scope of the duty of the Appellate Court when she said: "An appeal is by way of rehearing."

In the case of **KINGSLEY AMANKWAH (A.K.A SPIDER) VRS THE REPUBLIC L 2021) DLSC 10793**, the Supreme Court per Dotse JSC has laid down some guidelines or criteria that an Appellate Court will embark upon when it is re-hearing a criminal appeal as follows;

i. In considering an appeal as one of re-hearing, the appellate court must undertake a holistic evaluation of the entire record of appeal.

ii. This evaluation must commence with a consideration of the charge sheet with which the Appellant was charged and prosecuted at the trial court, this must involve an evaluation of the facts of the case relative to the charges preferred against the Appellant.

iii. This also involves an assessment of the statutes under which the charges have been laid against the appellant(s) and an evaluation of whether these are appropriate vis-å-vis the facts of the case.

iv. An evaluation of the various ingredients of the offences preferred against the Appellant(s) and the evidence led at the trial court. This is to ensure that the evidence led at the trial court has established the key ingredients of the offence or offences preferred against the Appellant.

v. There must be an assessment of the entire trial to ensure that all the witnesses called by the prosecution led evidence according to the tenets of the Evidence Act, 1975, NRCD 323,

vi. Ensure that the entire trial conforms to the rules of natural justice.

vii. An evaluation of all exhibits tendered during the trial, documentary or otherwise to ensure their relevance to the trial and in support of the substance of the offence charged and applicable evidence.

viii. A duty to evaluate the application of the facts of the case, the law and the evidence led at the trial vis-å-vis the decision that the court has given,

ix. Ensure that the basic principles inherent in criminal prosecution, that is to ensure that the prosecution had proved or established the ingredients of the offences charged beyond reasonable doubt, against the Appellant.

x. In other words, the Appellate court, and a final one like this Supreme Court, must ensure that even if the Appellant's defence was not believed, it must go further to consider whether his story did not create a reasonable doubt either. See cases of

AMARTEY V THE STATE 1964 1 GLR 256 SC which was applied in **DARKO V THE REPUBLIC 1968 1 GLR 203**, per Amissah JA sitting as an additional High Court judge

xi. Finally, the burden on an appellate court such as this court, is generally to go through the entire record of appeal and ensure that in terms of substantive law and procedural rules, the judgment appealed against can stand the test of time, In other words, that the judgment appealed against can be supported having regard to the record of appeal and that

xii. there is no substantial miscarriage of justice that results from the trial court.

BURDEN OF PROOF

The Appellate Court has the role of examining all the evidence and arguments before the Lower Court and evaluates the evidence as contained in the record of proceedings. This is done with the object of determining the correctness of the decision of the Lower Court based upon the facts and the applicable law. 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.

Section 15(1) (a) of the Evidence Act 1975, (NRCD 323) reiterates the point above when it posits thus; "Unless it is shifted, the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion on that issue."

In light of the above paragraphs, the onus would rest on the prosecution to prove the guilt

of the Appellant had the case gone its full course. Thus had the Accused pleaded Not Guilty at trial, the Prosecution would be tasked to prove their case. The 2020 appeal case of **THOMAS BAKER & MICHAEL SACKEY V THE REPUBLIC** provides that the immutable law in criminal cases is that the burden of proof is on the prosecution and they have to discharge that burden by establishing the guilt of the accused person beyond reasonable doubt.

This is the import of Section 11(2) of the Evidence Act which provides that: "In a criminal action the burden of producing evidence, when it is on the prosecution as to any fact which is essential to the 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."

In essence the Prosecution would have to prove the elements of the charge that is dishonestly receiving, vis-à-vis the material facts and the evidence adduced. This would require that the prosecution will have to discharge their burden of proving the Appellant's guilt beyond reasonable doubt. The Accused person was charged with Dishonestly Receiving contrary to section 147(1) of Act 29. It must be stated at this juncture that the offence criminalizing section for Dishonestly Receiving is section 146 and not section 147(1).

Section 146 of Act 29 provides that "*A person who dishonestly receives property which that person knows has been obtained or appropriated by* a *criminal offence punishable under this Chapter, commits a criminal offence and is liable to the same punishment as if that person had committed that criminal offence"*.

Then section 147(1) of Act 29 which is the offence defining section for Dishonestly Receiving states as follows; "A *person commits the criminal offence of dishonestly receiving property which that person knows* to *have been obtained* or *appropriated by a criminal offence, if that person receives, buys, or assists* in *the disposal of the property otherwise than with a purpose to restore it to the owner"*.

It is the submission of Appellant per his Counsel that the charge upon which the Accused person was convicted is defective since the prosecution failed to state the correct section which criminalizes the offence of Dishonestly Receiving and provides the punishment accordingly. That the Prosecution rather stated in the Charge Sheet particularly Count 5, the section which defines the offence of Dishonestly Receiving clearly in breach of Article 19(11) of the Constitution, 1992.

That flowing from the definition stated in section 147(1) supra, the ingredients for the offence of dishonestly receiving are namely;

i. The Accused must have known that the property had been obtained or appropriated by a criminal offense.

ii. Accused person receives, buys or assists in the disposal of the property otherwise than with the purpose to restore it to the owner.

P.K Twumasi in his book "*Criminal law in Ghana,* 1996", on page 353 stated as follows;

"When a *person* is *charged with dishonestly receiving the prosecution must prove the following essential ingredients, namely,* (1*) that the accused person received property which he knew* to *have been obtained or appropriated by crime, and* (2*) that the receipt of the property was dishonest. These two (2) essential elements constitute the actus reus and the mens rea of the offence of dishonestly receiving*".

In the case of ***SALIFU & ANOR V THE REPUBLIC (1974) 2 GLR 291*** the Court explained that 'knowledge' refers to knowing that the goods have been stolen at the time the goods are received and not subsequent to that date.

The explanation given by the Appellant which was recorded and can be found on page 6 of the Record of Appeal reads; "I *was doing my business. I knew anything about it. (sic) I*

was arrested. These was a password on the phone so I unlocked it by flashing it without asking who the phone belongs to. (sic) I will not do that again. I am sorry".

Appellant's Counsel who has not stated that he was representing Appellant and was present in Court on the days in question, states that he wishes to draw the Court's attention to the typographical errors contained in the explanation as contained in the record of appeal. In the second sentence supra, it has been captured as "I knew anything about it" but Counsel says 'when in fact the Accused person stated "I knew nothing about it". They submit that the sentence as it stands now is meaningless and does not convey any clear message. That in the subsequent sentence Accused person stated that he only took the phone and unlocked it without asking who the owner was. That Accused person could not have said he knew anything about it and later say that he only did his work by flashing the phone and did not ask who the phone belonged to. Their case is also that the word 'these' used in the third sentence supra instead of the word 'there' is an error which errors should be considered by this Court as mere typographical errors and the proper words inserted accordingly.

Again their contention is that the Accused person gave an explanation which clearly showed that he had a defense to the charge preferred against him because in proving the offence of dishonestly receiving, the Prosecution must prove that the Accused person knew that the property had been obtained or appropriated by a criminal offense. That the explanation given by Appellant unequivocally states that he did not know that the Tekno Spark 7 mobile phone had been stolen or procured by any criminal offense, the Appellant having stated categorically that he was only doing his job and so he charged the customer who brought the phone to his shop for his services and flashed the phone.

Appellant according to his Counsel is not known for engaging in any illegality or criminality and has never had any encounter with our Law Enforcement Officers be it the Police or even the Courts. That Appellant's explanation that he did not know the phone was stolen clearly

amounted to a defence and the Trial Court ought to have entered a plea of Not Guilty for Appellant. Their submission is therefore that to the extent that the Court found Appellant guilty and convicted him on his own plea, the conviction is wrong in law and same ought to be set aside by this Court exercising its appellate jurisdiction. That the Court under the circumstances ought to have dealt leniently with Appellant who was only a victim of circumstances and who has been erroneously convicted on his own plea. On the basis of the foregoing, they pray for a declaration that the erroneous conviction and sentence of Appellant has resulted in a substantial miscarriage of justice and same is a nullity. They pray this Honorable Court to set aside the conviction and sentence of Appellant and order him to be discharged forthwith on grounds that his explanation amounted to a defence and was obviously inconsistent with his guilt.

The Appellant per his Counsel also submits that he was operating in an open market and from an established place of business open to the general public. There is no compelling reason in the brief facts that suggested the Accused/Appellant had any fore knowledge of both the 1st and 2nd Accused persons before flushing the phone in issue. That it was indeed the 2nd Accused person who mentioned 3rd Accused then, now the Appellant as the one who broke the password to enable him access the stolen phone which value was GHC1000 but which he bought for GHC300. That it is most probable that the Prosecution could have led any evidence to that effect and this matter could have been dealt with by the Trial Judge if a plea of Not Guilty had been entered for the Accused.

The rule in **SALIFU & ANOR VRS THE REPUBLIC 1974 2GLR 291** provides that where stolen goods have been found in the possession of an accused person, the inference of guilty knowledge is warranted by his possession together with the absence of an explanation of that possession. The Appellant's claim is that the explanation to his

defence is not consistent with guilt and this raises sufficient doubt to entitle the Appellant to a conviction.

The Respondent/Republic per their submission also states that in considering the case for the defence put forward by the accused person, the law requires that the Court shall apply the principles laid down in the classic case of **R V. ABISA GRUNSHIE (1956) 1 WALR 36** and echoed in **R V. ANSERE (1958) 3 WALR 385**, down the years. The principle is that a court is not entitled to reject the defence of an accused person simply because it does not believe it. Even if the court does not believe the defence the court must still go further and consider whether the explanation being offered by the accused person is reasonably probable. It is only when the defence has been considered in this light, that the court could come to a conclusion as to the guilt or otherwise of the accused person.

The brief facts concede that Appellant is a mobile phone repairer and has been working in Mepe Township for over 4 years now. The Court considered whether Appellant even if he was working in the normal course of his business and not outside business hours, could he have demonstrated that it was not incumbent on him to find out if the phone belonged to the one who brought it or should he have asked questions?

I have looked at the Plea of Appellant, the guilty with explanation, the explanation and the language on the record which as it stands points to a certain knowledge but if corrections are made to what Appellant's Counsel said are typos, it will also tend to point to lack of knowledge. The Court has to deal with the record before it and not to make corrections so as to enable Appellant fit into a certain narrative. From the record before me, the Court is of the considered opinion that per the explanation given by the Appellant at the Lower Court, the Court put a correct interpretation on the explanation of Appellant. Section 146 of Act 29 provides that "*A person who dishonestly receives property which that person knows has been obtained or appropriated by* a *criminal offence punishable under this Chapter, commits a criminal offence and*

is liable to the same punishment as if that person had committed that criminal offence".

Then section 147(1) of Act 29 which is the offence defining section for Dishonestly Receiving states as follows; "**A *person commits the criminal offence of dishonestly receiving property which that person knows* to *have been obtained* or *appropriated by a criminal offence, if that person receives, buys, or assists* in *the disposal of the property otherwise than with a purpose to restore it to the owner*".**

The learned Bayley J in **R VRS TURNER (1816) 5 M&S 206 @ 211** opined that, "if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it, and not he who avers the negative."

The law, in cases where knowledge of a fact in issue is peculiarly within the knowledge of the accused is that the negative is not to be proved by the prosecution but on the contrary, the affirmative must be proved by the accused as a matter of defence **REPUBLIC VRS BONSU & ORS EX PARTE FOLSON (1999-2000) 1 GLR 523.**

Determining whether the accused person dishonestly received is a subjective one. In the case of **RAHIM IBRAHIM & 3 ORS VRS THE REPUBLIC 2017 CA H2/2/2017,** the Court noted that, **"**In determining whether the accused person at the time of buying the television knew that the 1st accused had dishonestly appropriated the television, the courts take into consideration the circumstances under which the property was sold by the 1st accused and bought by the 2nd accused and the price at which it was bought. Where the price at which the property was bought was disproportionately to the value of the television, the 2nd accused will be presumed to know that the property was a stolen property. In the case of **LEE V. TAYLOR & GILL (1912) 77 J.P. 66**, it was held that in proving the offence of dishonestly receiving the prosecution shall prove intent or

knowledge or malice that the accused person knew that the property in question was acquired through proceeds of crime."

In proving dishonestly receiving, on whether just being found in possession of stolen property is a ground for conviction for the offence of dishonestly receiving, the criminal appeal case of **AUGUSTINE OSEI V THE REPUBLIC 2017** provides:

"Just being found in possession of stolen property cannot be a ground for conviction for the offence of dishonestly receiving if guilty knowledge or knowledge that the property was obtained by crime is absent or was not proved."

In **SANTUOH V THE REPUBLIC 1976 1 GLR** the court opined that what is important here is the survival of the dishonestly receiving charge. It did not depend on the conviction of the stealing charge in that case. It did not matter that A1 had been convicted of the charge of stealing. The charge of dishonestly receiving is independent of the substantive charge and it is important in proving the elements of that offence. **Section 148 (1) of the Criminal Code, 1960 (Act 29)** reads: "Where a person is charged with dishonestly receiving and is proved to have had in his possession or under his control anything which is reasonably suspected of having been stolen or unlawfully obtained and he does not give an account to the satisfaction of the Court as to how he came by it the property, he may be presumed to have been stolen or unlawfully obtained and the accused may be presumed guilty of dishonestly receiving in the absence of evidence to the contrary."

I carefully considered the submissions of the Republic/Respondent to wit 'What the law does not seek to do however, is to promote chaos and a stall to trade and commerce, where those who engage in trade and commerce are expected to demand receipts and proof of ownership of every property they deal with. In this instant appeal, beyond the

usual protocols laid down by the law, this is utterly impossible and unfair to assume that the buyer (in this case, A3, the mobile phone repairer) has knowledge that the said item was stolen. My Lord, the argument points out that, it will be a long stretch to prove that unlocking a phone with passwords constitutes knowledge that the phone was stolen or dishonestly received'.

After ponderous consideration however, the Court still had the position that why would the owner of a phone who put a password on it need the services of Appellant to have it flushed? It was not taken to him for repairs but to crack the code to enable access. The least Appellant should have in the candid and considered opinion of this Court done, was to ask questions and make sure it belonged to the one who brought it. Unless he regularly does that kind of business to allow people access phones that way, his suspicions should have been raised and he ought to have ascertained or asked questions. The Court finds that ground one of the appeal fails accordingly.

GROUND B

Appellant's second ground of appeal is that the sentence is harsh and excessive especially having regard to the fact that Appellant is a first time offender and also Appellant was not represented by Counsel.

Appellant's Counsel submits on his behalf that the Appellant is a law abiding person who has been carrying on his work diligently within Mepe Township for 4 years now without having any difficulties with the law enforcement agencies. That Appellant is gainfully employed as a mobile phone repairer and also fixes DSTV and Gotv as side job for a living. That currently, Appellant has in his custody over 100 mobile phones which were brought to his shop for repairs but which respective owners have not received by virtue of his incarceration. That Appellant is married and has three (3) children whom he has been taking

care of. Also that Appellant is suffering deep prejudice by his imprisonment in that he has lost contact with his wife, 3 children and his widowed mother who all depend on Appellant for livelihood. That presently there is no one to cater for Appellant's wife and 3 children as well as his widowed mother who has been in a critical condition since Appellant's conviction.

Appellant's Counsel submits again that from the record of appeal, Appellant is a first time offender and the instant case was his first brush with the law. Moreover, there were no aggravating factors on record that necessitated the imposition of custodial sentence necessarily on Appellant without the option of a fine. That on page 7 of the record of appeal, the Tekno mobile phone in question was retrieved and the Court made a consequential order that the retrieved mobile phone should be released to the complainant. Also that the sentence of 24 months' imprisonment without the option of a fine was harsh, onerous and excessive under the circumstances. Alternatively, they pray that the Court substitutes the sentence of 24 months' imprisonment with a fine as the custodial sentence is harsh and unconscionable having regard to the peculiar facts of this case.

According to Benjamin Franklin *"it is better that ten (10) guilty persons escape than that one innocent person should suffer".*

In **KWEKU FRIMPONG @ IBOMAN VRS. THE REPUBLIC (2012) 1 SCGLR 297,** Dotse JSC held, "It is also generally accepted that a first offender must normally be given a second opportunity to reform and play his or her role in society as a useful and law abiding citizen".

In the case of ***FORSON* V *THE REPUBLIC (1976) 1 GLR 138-151,*** the court held in holding 1 as follows; "...the sentence in the case of a young man who was a first offender was clearly very harsh and should be substituted by a fine of GHS50.0 or three months' imprisonment. Since the sentence had been served the appellant was entitled to immediate discharge".

Whilst the rules offer the Appellate Court the duty it bears, it prohibits it from overturning a judgment unless that judgment has occasioned a substantial miscarriage of justice. Section 31(1) of the Courts Act, 1993, (Act 459) which is subject to subsection (2), provides that no verdict or conviction or acquittal shall be set aside on appeal on the ground that such verdict or conviction or acquittal cannot be supported having regard to the evidence or that it is unreasonable or that the judgment is wrong on a question of law or fact unless the verdict, conviction or acquittal occasioned substantial miscarriage of justice and in any other case the appeal should be dismissed. That said, the grounds upon which an appellate court can interfere with the sentence given by the court below was adequately discussed in the case of **APALOO VRS THE REPUBLIC (1975) 1 GLR 156, CA** and reiterated in **ASAAH ALIAS ASI V. THE REPUBLIC (1978) GLR 1**. In **KAMIL V THE REPUBLIC (2011) 1 SCGLR 302,** the Court held that:-

"where an appellant complains about the harshness of a sentence he ought to appreciate 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."

The appeal on ground one fails.The Court having considered the whole case as before me will allow the appeal on the second ground however, as the phone was recovered and the same sentence as the 2nd Accused who sent the phone to be flushed albeit under doubtful suspicious circumstances was harsh. The Court will set aside the sentence of 24 months and substitute it for 3 months from the date of conviction and sentence.

H/L JUSTICE DOREEN G. BOAKYE-AGYEI MRS. ESQ.

JUSTICE OF THE HIGH COURT

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