IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HOHOE, HELD ON FRIDAY THE 3RD DAY OF NOVEMBER, 2022 BEFORE HIS LORDSHIP JUSTICE AYITEY ARMAH-TETTEH
NO. F17/02/2023

1. NTUMY FRANCIS @CJ
2. KWABENA BOAKYE @ A1 - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

APPELLANT ABSENT (IN LAWFUL CUSTODY)

COUNSEL MR. OSCAR VULOR FOR APPELLANT

MISS CELESTINE ARKU (ASA) WITH HER NANA KONADU FREMPONG FOR THE REPUBLIC

JUDGMENT

The 2nd Accused, now the appellant together with the 1st Accused, were arraigned before the District Court, Jasikan on 24 February 2022 on three charges of (a) Causing unlawful damage contrary to section 122 of Act 29/60 (b) unlawful entry contrary to section 152 of Act 29/60 and (c) Conspiracy to commit crime contrary to section 23(1) of Act 29/60.

The plea of both accused persons were taken. They both pleaded not guilty to counts one and two respectively. But on count three, i.e. the Charge of Conspiracy, whilst the 1st accused person pleaded not guilty, the appellant pleaded guilty with explanation.

The court gave the Appellant the opportunity to give his explanation. And this what he said:

> ***"My Worship, the implements were found in my room, in my grandmother's house."***

The trial Court upon consideration of the explanation that accompanied the plea of guilty by the appellant rejected same as being without substance and convicted and sentenced him to 24 months imprisonment without an option of a fine.

Dissatisfied with the conviction and sentence, the appellant has come to this Court for redress.

The facts upon which the 1st accused, and 2nd accused now appellant were charged are that, the complainant Joseph Yevuga is a cocoa buyer at Worawora Cocoa shed. The 1st accused is a commercial motor rider and 2nd accused/ appellant is unemployed and both are resident in Worawora. On the 22nd day of February 2022 at about 7:00 am, the complainant visited the cocoa shed and detected that the padlocks and the hinges to the main door of the office has been damaged and the door opened ajar. He found that some documents hidden in the drawers had been ransacked and the safe where monies are kept has also been tempered with, but nothing was stolen. After investigations, accused persons were arrested and charged with offences as stipulated on the charge sheet which.

The grounds of appeal as found in the petition filed on 14 July 2022 pursuant to order for extension of time are as follows:

1. *That the rejection of the Appellant's explanation of Guilty with explanation was wrong in law as to render the conviction invalid.*

2. *That the sentence of 24 months was excessive or too harsh.*

In his written submission Counsel for the appellant raised an issue which needs due consideration. Counsel contends that the charge for which the appeal is concerned with is "conspiracy". Counsel argues that since one person cannot conspire to commit a crime and that the co- accused person pleaded not guilty to the charge of conspiracy, and he is yet to be tried it was improper for the trial court to have convicted and sentenced the appellant. Counsel posits that, in the event that the 1st accused is acquitted, what then happens to the already convicted person (appellant) who has been sentenced.

The particulars of offence of the charge of conspiracy against the appellant reads as follows:

> *"KWABENA BOAKYE: Age 19 years, commercial motor rider and NTUMY FRANCIS @ C.J. commercial motor rider: Aged 23 years, for that you on 22nd day of February, 2022 at Worawora in the Oti Magisterial District and within the jurisdiction of this court, did agree to act together with common purpose to commit crime, to wit causing unlawful damage and unlawful entry."*

Per the Revised Law by the Law Review Commissioner, Section 23(1) of Act 29 (supra) defines conspiracy as follows:

> *"Where two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence."*

Marful-Sau JA (as he then was) in the case of **Republic v Augustine Abu And Others** at large Case Number ACC/15/2010 , of 23rd December 2009 unreported and referred to

in the case of **Republic** v. **Peter Kwame Gyasi** (2014) 72 GMJ 167 at 185 stated as follows:

> *'While the new Criminal Offences Act uses the words agree to act , the old criminal code used the words agree or act . The offence of conspiracy as newly defined by the Criminal Offences Act is that the persons must not only agree or act but must agree to act together for a common purpose.''*

Marful- Sau further said :-

> *''To succeed in securing conviction for conspiracy currently, with the Criminal Offences Act, 1960, Act 29 , the prosecution must establish that the accused persons agreed to act with a common purpose for committing or abetting a crime.''*

Conspiracy under the new law requires proof of prior agreement between the accused persons charged to act together for a common purpose. For the prosecution to succeed on a charge of conspiracy then, the prosecution must prove that the persons agreed to act together with the common purpose to commit the offence. From the definition and explanation of conspiracy, it is trite that one person cannot be deemed to have conspired to commit an offence. If one person cannot be deemed to have conspired to commit a crime, then in the instant case if the prosecution fails to prove the guilty of the 1st accused person of the offence of conspiracy the appellant must be acquitted and discharged on the charge of conspiracy since one person cannot conspire to commit a crime.

In the case of **Yaw Marfo v The Republic** [2018] 127 G.M.J. 156 at 181 the Court Appeal per Dzamefe JA held as follows:

> *"It is trite that when conspiracy against another person fails and is left with one person, he should be acquitted on the offence of conspiracy unless there is evidence to prove against him to the effect that they conspired with another person who was not mentioned*

on the charge sheet. In effect where there is evidence that the accused person conspired with other person(s) who was not mentioned on the charge sheet, he could be convicted. It is no doubt a fact that conspiracy, as an offence, does not lie against one person and at any point in time must be committed by two or more persons."

In the instant case, from the facts as presented by the prosecution, there were only two accused persons allegedly involved in the commission of the offences and the two were charged with the offences of unlawful entry, causing unlawful damage and conspiracy to commit those two offences. One (appellant) pleaded guilty with explanation which explanation was rejected by the trial court and a plea of guilty entered for him, the other (1st accused) pleaded not guilty and the prosecution is yet to prove his guilt beyond reasonable doubt. If the prosecution is unable to prove the guilt of the other accused person (1st accused) who pleaded not guilty to the charge of conspiracy beyond reasonable doubt, then it stands to reason the other accused person (appellant herein) cannot be said to have committed conspiracy by himself alone and he ought to be acquitted discharged of the charge of conspiracy. Consequently upon the conviction of the Appellant on his own plea on the charge of conspiracy contrary to section 23 of Act 29, the appropriate procedure was for the trial court to have suspended the sentencing of the Appellant for the prosecution to proof the guilt of the co-accused person.

In arguing the 1st ground of appeal Counsel for the appellant submitted that the trial Court did not make any analysis of the explanation given by the appellant. According to Counsel the facts of the case as presented by the prosecution did not state that any implements were found with the Appellant and that even if the implements were found in the room of the appellant, the explanation of the appellant does not lead irresistibly to one and only one conclusion that the appellant intended to plead guilty to the charge of conspiracy.

In response to this submission of Counsel for Appellant, Counsel for Respondent submitted that during investigations certain tools were found in the room of the appellant and according to Counsel per section 48 of the Evidence Act a person who possesses a thing is presumed to be the owner and in this case the appellant is presumed to be the owner of the implements found in his room. From the RoA there is no evidence that the police during their investigations discovered any implements allegedly used in the commission of the alleged crimes in the room of the appellant.

Section 171(3) of the Criminal Procedure Act 1960 (Act 30) provides as follows:

> *"A plea of guilty shall be recorded as nearly as possible in the words used, or if there is an admission of guilty by letter under Section 70(1), the letter shall be placed on the record and the Court shall convict the accused and pass sentence or make an order against the accused unless there appears to it sufficient course to the contrary."*

As required by section 171(3) the trail Magistrate rightly recorded the plea of the appellant as nearly as possible in the words used by the appellant. The appellant pleaded guilty with explanation and the said explanation was rightly recorded. The said explanation ought to be considered by the trial Magistrate which he did. In the words of the trial Magistrate the explanation of the appellant is not taken because it lacks substance. He then proceeded to enter a peal of guilty and accordingly convicted and sentenced him to 24 months imprisonment on the offence of conspiracy.

If the appellant in response to the plea says the implements were found in his room, was it safe for the trial magistrate to conclude that he owns the implements and he used the implements in the commission of the crime and thus guilty of the charge of conspiracy ? I do not think so.

Section 48 of the Evidence Act 1975 (NRCD 323) provides as follows:

"The things which a person possess are presumed to be owned by that person."

Section 30 also provides as follows:

"Rebuttable presumptions include, but not limited to, those provided in sections 31 to 49 and 151 to 162."

Section 20 also provides as follows:

" A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."

Under the Evidence Act, the presumption of ownership in respect of things possessed by a person is a rebuttable presumption. Unlike irrebuttable presumptions, in rebuttable presumptions the law allows it to be contradicted. And it imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion at to non-existence of the presumed fact. In my view a rebuttable presumption cannot be used against an accused of his conviction of a crime charged when he has not been given the opportunity to rebut or disprove the presumption. An accused person must be given every opportunity to defend himself and in defending himself in the instant case, the appellant could rebut it by factual evidence, and this could have only been done if the trial magistrate had entered a plea of not guilty for the case to proceed to trial. In his explanation Appellant did not say the implements are for him and he did also say they were used by him in commission of any crime. He said they were found in his room. The explanation was not unequivocal that he owns the implements. The appellant pleaded not guilty to the substantive charges so, is it possible that the implements he said were found in his room were planted there someone else who might have committed the offence of causing damage and unlawful

entry? In my view the explanation of the appellant does not lead irresistibly to one and only one conclusion and the explanation cannot be said to consistent with a plea of guilty. He should have been given the opportunity to rebut or contradict the presumption. Proof in criminal case is proof beyond reasonable doubt. In our criminal jurisprudence and practice it will be dangerous to convict accused persons on presumptions more especially on rebuttable presumption. The trial magistrate should have entered a plea of not guilty for the appellant and proceed to hear the case.

In the case of **Gundaa v. The Republic** [1989-90] GLR 50, it was held in holding 2 by Benin J (as he then was) 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."*

In the instant case, the explanation of the appellant that the implements were found in his room in his grandmother's house was equivocal capable of both an innocent and guilty interpretation and the trial court should not have accepted the guilty

interpretation as against the innocent interpretation. I will therefore allow the appeal and set aside the conviction and sentence of the Appellant.

Appeal is allowed the conviction and sentence of the Appellant to 24 months imprisonment is hereby set aside.

(sgd)

AYITEY ARMAH-TETTEH J.

JUSTICE OF THE HIGH COURT