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IN THE HIGH COURT OF JUSTICE HELD AT SOGAKOPE ON 6TH JUNE, 2023
BEFORE HER LADYSHIP JUSTICE DOREEN G. BOAKYE – AGYEI MRS. ESQ.,
JUSTICE OF THE HIGH COURT.

SUIT NO. F22/03/2023

ISAAC BRAIMAH

-- APPELLANT

-VRS-

THE REPUBLIC

-- RESPONDENT

PARTIES: - APPELLANT IN LAWFUL CUSTODY

MR. BUSBY DERRICK MANTE (ADMINISTRATOR AT ATTORNEY GENERAL'S
DEPARTMENT, HO).

COUNSEL: - MR. MARK ADZANU ESQ., FOR APPELLANT PRESENT.

MR. JOSEPH OPOSUMAH ESQ., (A.S.A.) FOR THE REPUBLIC ABSENT.

JUDGMENT

The offence for which Appellant was convicted and sentenced giving rise to this
Appeal is as follows:

STATEMENT OF OFFENCE

STEALING CONTRARY TO SECTION 124(1) OF THE CRIMINAL OFFENCE ACT
29/60 AS AMENDED BY NLCD 398/69 OF PARA 4.

PARTICULARS OF OFFENCE

ISAAC BRAIMAH; Aged 42; Auto Mechanic: somewhere 2019 at Sogakope in the

Sogakope Circuit and within the Jurisdiction of this Court, did steal a Zetor tractor with the registration number GR4246 Y value 22,200 US Dollars with Cedi equivalent GH¢133,200.00 the property of one William Aveh.

FACTS

Per the facts, the Complainant, William Kwabla Aveh, is a retired educationist and a proprietor of Modal College, Sogakope. The Appellant, Isaac Braimah is an auto mechanic, resident at Sogakope. According to two different statements given by the Complainant both dated 1st June 2021 at pages 46 and 50 respectively of the record of appeal, the following are the brief facts of the case. Sometime in September 2007, the Complainant purchased a Zetor tractor with registration number GR 4246 Y valued at about 22,200 US dollars. The tractor was purposely bought by the complainant to be used by his uncle Mawu Nekpeta Aveh - now deceased, for his farming work. After the death of his uncle, Mawu Nekpeta Aveh, the Complainant, went for the said tractor and parked it on the compound of Modal College, Sogakope. While the tractor was parked on the compound of the school, the Complainant assigned it to the College (Modal College) and strictly under the supervision of the College Registrar known as Mr. Eugene Martinson.

The tractor developed some mechanical fault while parked and the Appellant, a mechanic by profession, who was at the time working with Bakpe, Fievie rice farm was called to work on it. At the time, National Accreditation Board had also scheduled an inspection of the school and because the tractor was occupying space in the compound, the Appellant was asked to take it home for safe keeping while working on it. The Appellant was also asked to take home for safe keeping of the trailer and the plough and return same the next day when the National Accreditation Board would have been done with their inspection. The plough was neither attached to the tractor nor blocking the entry. Rather, the Registrar Eugene

Martinson and his colleagues assisted the Appellant to put the plough in the tractor. The Appellant however failed to return either the tractor, the trailer or the plough on the scheduled date.

Accused Person after maintenance of the tractor, relocated it to unknown destination and all efforts made to reach accused person yielded no result. On 3/06/21, a Motion ex - parte was put before the Honorable Court which granted the motion. The Court ordered for the itemized bill to enable MTN Ghana locate the whereabouts of Accused person. MTN Ghana furnished Police with the necessary document. After thorough analysis of the itemized bill, Accused person was fished out from his hideout at Forifori in the Afram Plains in the Eastern Region where he was arrested and handed over to Tongu Divisional Police. During investigation, Accused person led police to Gornikope where he pointed out an abandoned tractor but could not tell police where the trailer and the plough were placed. During search, police retained tractor head, the plough and trailer impounded at the police station to wit exhibit. Efforts are still underway to retrieve the remaining parts. In the course of the search of the tractor and its equipment, complainant spent an amount of GH¢25,200.00. After careful investigation, accused person was charged with the offences and arraigned before this Honorable Court.

The case of the Appellant has been that the said tractor was gifted to him by the Complainant to work with and he was not required to return it the next day as suggested. That it could not have been true that he was allowed to take the tractor to his own house for safe keeping when the school and the Complainant (the Principal of the school) had a bigger compound than he did. Unfortunately, during the trial, the Principal, Mr. William Kwabla Aveh, was unable to attend trial himself for the trial court to observe his demeanour to ascertain which of the rival stories was true. A power of attorney was rather given to Eugene Martinson, Registrar of Modal College, to testify on behalf of the Principal.

PLEA/BURDEN OF PROOF

When called upon to plead to the charge, the Appellant pleaded **Not Guilty**. The Not Guilty plea of the Appellant threw the case into a full blown trial where the burden of proof lay on Prosecution to produce evidence in support of the charge or to lose its case and the Appellant would be acquitted and discharged.

Section 15 of the Evidence Act, NRCD 323 provides as follows:

"Unless it is shifted, the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion on the issue"

Section 125 of Act 29, provides that:

"a person steals if he dishonestly appropriates a thing of which he is not the owner".

For the charge of Stealing to be said to be proven, it must first be established that there was appropriation of a thing by the accused person. Appropriation is defined in **Section 122 (2) of Act 29, as:**

".....any moving, taking, obtaining, carrying away, or dealing with a thing with the intent that some person may be deprived of the benefit of his ownership, or of the benefit of his right or interest in the thing, or in its value or proceeds, or any part thereof".

Section 120 (1) of the Criminal Offences Act 1960, Act 29 defines **dishonest appropriation** in the following words;

(1) An appropriation of a thing is dishonest

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

(b) If it is made by a person without a claim of right, and with a knowledge or belief that the appropriation is without the consent of a person for whom that person is a 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.

Secondly, it must be established that the appropriation of the thing by the accused person was done dishonestly.

The fact of the Appellant appropriating the tractor and its accessories were not in dispute as the records will show. What is in dispute is whether the Principal consented to the Appellant keeping the said tractor and its accessories for that period as alleged by the Appellant. That is because once the principal consented, the appropriation would not have been a dishonest appropriation to qualify for stealing. However, if he did not consent to the Appellant's appropriation of the items for such period, then the Appellant would have been deemed to have dishonestly appropriated the tractor and its accessories.

ISSUE FOR DETERMINATION

The issue for determination at the trial in this case was well set out in the Judgment of the trial Court which can be found at page 81 of the Record of Appeal as follows:

"Whether or not the Accused person dishonestly appropriated the Zetor tractor belonging to the complainant."

Prosecution must thus lead evidence to establish that the Appellant dishonestly moved the Zetor tractor away with intent that Complainant may be deprived of its ownership or benefit. The burden of persuasion on Prosecution in criminal cases must be discharged in a manner that a reasonable person will accept that the existence of a fact is beyond reasonable doubt. This finds expression in **Section 11 (2) of NRCD 323,**

the Evidence Act which provides as follows:

"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 reasonable doubt".

PROSECUTION'S CASE

At the trial, Prosecution called Three (3) Witnesses. Per Exhibit E, found at page 39 of the Record of Appeal, one Eugene Martinson was to represent William K. Avedzi as the Complainant. **PW1 (Eugene Martinson)** filed a Witness Statement on the 27th of April, 2022. Per page 3 of the Record of Appeal", **PW1** gave oral testimony on the 18th of October, 2022, per pages 66 to 68 of the Record of Appeal. Though there is no indication on the Witness Statement of PW1 as well as his oral testimony that he testified in his capacity as Complainant's Agent, Exhibit E, is explicit on that. Technically therefore, Complainant gave evidence through PW1 thus Eugene Martinson did not give evidence of his own as a witness. PW1's evidence is that his Principal Mr. William K. Aveh instructed him to call Appellant to come and remove the tractor and the long heavy trailer and sent it to his house for a day and return it the following day Saturday, 30th March, 2019.

Counsel for Appellant submits that PW1 did not state whether he carried out the instruction and specifically told Appellant to return the tractor the following day and that Prosecution did not therefore provide any evidence that Appellant was told to return the tractor the following day thus it is difficult to conclude from PW1's evidence that Appellant stole the tractor. Counsel contends that the evidence of both PW2 and PW3 did not speak to the issue whether or not Appellant dishonestly appropriated the tractor. That in effect, the evidence of PW1 stood alone without any corroboration and

this cannot ground the conviction of the Appellant.

APPELLANT'S DEFENCE

On the part of the Appellant, he stated in his defense that the tractor was given to him by the Complainant for his use for the works Appellant did for Complainant. The case of the Appellant has always been that the principal consented to he moving the tractor and its accessories from the school's compound to his own house. This assertion is not in dispute. The subject of dispute is whether the principal consented to the Appellant keeping the tractor for such period.

JUDGMENT

The trial Judge held that "the Court finds the Accused person herein guilty of the offence of Stealing and he is accordingly convicted".

SENTENCE

The Learned trial Judge in sentencing Appellant stated as follows: "I **hereby sentence the Accused person to a prison term of six (6) HIL."**

APPEAL

The Appellant appealed against both conviction and sentence as follows:

1. The Judgment is against the weight of evidence led at the trial.
2. The Learned trial Judge erred when he held that "Accused person dishonestly appropriated the Zetor tractor".
3. The Learned trial Judge erred when he stated that "I hereby sentence the Accused person to serve a prison term of six (6) IHL"

Both grounds one and two are based on the argument that Prosecution failed to discharge the burden of proof.

The evidence at pages 46 and 50 of the record of appeal will show that the said Principal, William Kwabla Aveh lodged a complaint with the police over the tractor and its accessories. The presumption is that if the Complainant had consented to the Appellant's appropriation of the tractor and its accessories he would not have reported. This is however only a presumption from subsequent events after the Principal consented to the Appellant moving the tractor and its accessories from the compound of the school.

Complainant's Complaint on page 46 of the Record of Appeal reads: **"On the 29th of March, 2019, Mr. Isaac Braimah was asked by the Registrar Mr. Eugene Martinson to move the tractor which was parked in front of the school visitors' car garage. I instructed the Registrar - Mr. Eugene Martinson to call Mr. Isaac Braimah to help with the relocation of the tractor with the long and heavy trailer. I also specifically instructed that Isaac Braimah could send the tractor and the trailer to his house because of lack of space on the small compound. The tractor and the trailer should be returned to the college compound on Sunday, 30th March 2019".**

Clearly, from the Complaint therefore, PW1 was instructed to also instruct Appellant to relocate the tractor and bring it back the following day. However, there is no evidence on record that this instruction was carried out to the effect that PW1 told Appellant to move the tractor to his house and bring it back the following day. Meanwhile, PW1 put it on record that he Eugene Martinson gave out the Keys of the Zetor tractor to Appellant and added the plough to it. The unquestionable evidence on record is that the keys to the tractor was voluntarily given out by Complainant's Agent Eugene Martinson. However, can there be any issue of appropriation in the sense of the crime charged? In other words did Appellant dishonestly appropriate the tractor?

Even though there is no evidence on record to the effect that Appellant was informed by Complainant/PW1 to return the tractor, let alone to return it on the following day, the 30th of March, 2019 can there be proof of dishonesty on the part of the Appellant when he did not return the tractor? It is for this reason that the presence of the Principal would have assisted the Court to have the opportunity to assess among others the demeanour of the Principal to ascertain whether or not the assertion of the Appellant is true. Unfortunately, the Principal could not attend trial due to alleged ill health with evidence of the said ill health not exhibited. Instead, a power of attorney was given to the Registrar, Mr. Eugene Martinson who was not present when the alleged consent was given. All he had to rely on was what he was told by the Principal which he could not verify.

In the case of **MALI V THE STATE [1965] GLR 710, SC it was held that:**
"where by the end of the prosecution the court requires further evidence to be able to decide on the issues raised, the irresistible inference is that the prosecution has failed to make a case against the accused and so he should be acquitted and discharged."

In his defense, the Appellant stated that he had worked for the Complainant and he promised to reward him. He said Complainant told him that since he was not doing any work now the tractor is at the site and Appellant should go for it from PW1. PW1 whose personal evidence is crucial to discharge the burden on prosecution that Appellant was to relocate the tractor to his house and return it the following day, did not help matters in his testimony. It must be noted that in his testimony, PW1 also gave evidence of his personal encounter with Appellant. In fact, PW1's testimony rather points to the conclusion that the tractor was given to Appellant to work with to get some income for himself. This is so because PW1 admitted under cross examination by Appellant that when he gave the tractor to the Appellant he also added the **plough** as well. PW1 admitted that the plough was not an obstacle on the compound and was not attached to

the tractor. In fact PW1 said he had to engage more hands to get the plough onto the tractor for Appellant to drive away.

The following is what transpired during cross examination of PW1 by Appellant as can be found at page 67 of the Record of Appeal:

'Q. The day Director called me to come and pack the tractor, did you and I have any conversation about it?

A. Yes, My Lord. We had a conversation. I was the one in charge of Modern College and Director was not there at that moment. Prior to National Accreditation Board visit, I called Director to inform him that where the tractor is parked was very narrow. So Director called you because you are the only one who can reverse the tractor.

Q. When I came for the tractor did you tell me I was supposed to move the tractor because some inspectors were coming or you just asked of my name if I was Isaac and when I responded in the affirmative you just handed the keys to the tractor to me.

A. I knew you as Isaac Braimah. I had seen you on the compound a couple of times.

Q. The plough, was it in a store room covered up before I picked it or it was attached to the tractor before I took it?

A. The plough was not attached to the tractor. I and my colleagues helped you put the plough on the tractor.

Q. Was the plough also blocking the entry of the inspectors before you asked me to put that as well?

A. No, My Lord.'

Q. I put it to you that the Director has promised to help me when I lost my job which you were not privy to and that was why he asked me to come for the tractor to use for work and when I came you also handed over same to me?

A. That is not the case.

Q. I put it to you that you never sat in any conversation with myself and the Director so why won't you accept that my coming for the tractor was in honour of a promise he made to help me.

A. I am the Registrar of Modal College. I have records of everything on the compound. If Director asked someone to come for the tractor without my knowledge, I don't think it will be possible.

PW1 having admitted that the plough was not an obstacle for the inspectors, stated that Appellant was just to remove the tractor and the trailer to pave the way for the inspectors, after which Appellant will return it the following day. A legitimate question asked by Appellant's Counsel is why then did PW1 add the plough. That if the tractor was not given to the Appellant for his use, why would PW1 go to the extent of engaging more hands to lift the plough kept elsewhere and put on board the tractor for Appellant to drive away? In Counsel's submission, which the Court agrees with, there are doubts raised in Prosecution's case whether it was actually made known to Appellant to bring back the tractor the following day. Appellant's statement that Complainant gave him the tractor for his use was not controverted by any piece of evidence by the Prosecution.

From the cross examination, it is evident that the plough for instance was not blocking the entrance, there was therefore no reason for it to be given to the Appellant. Of significant note for this Court is that neither was the Registrar physically present when the alleged

prior discussion was held. He only relied on information given him by the Complainant. After conclusion of the case, there was still a lingering doubt on whether indeed the Principal consented to the appropriation of the tractor and its accessories or not. This doubt includes why a school will ask another person who is not an employee of the school to take the tractor and its accessories from the compound of the school for safe keeping in his house because the National Accreditation Board was coming for inspection of the school. Further, evidence also showed that the plough was not blocking nor a distraction to movement. It therefore baffles the mind of a reasonable person why it will also be put in the tractor for the Appellant to also take home if not for use.

All these are doubts ought to have inured to the benefit of the Appellant as his duty was only to cast reasonable doubt on the case of the Prosecution as required by section 11 of NRCD 323. Section 11 of the Evidence Act 1975, NRCD 323 provides; 1....

2. In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

3. In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence which on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.

4....

This was an Accused person who was unrepresented at the trial court. Did the Prosecution discharge the burden placed on it to prove the ingredients of stealing against the Appellant? With the benefit of hindsight that Inspectors were coming to the school, it is easy to comprehend why both the tractor and the plough had to not be on the premises of a school as their presence could be problematic whether the plough was in the way or

not. However, it did not come out clearly that it was actually made known to Appellant to bring back the tractor the following day. Appellant's statement that Complainant gave him the tractor for his use was also not controverted by any piece of evidence by the Prosecution.

The Court had to agree with Counsel for Appellant and which was also the same view of the Republic Respondent per their submissions by the Attorney-General's Department, that there were inconsistencies in the case of the Prosecution right from the complaints given by Complainant, through the Facts of the case, to PW1's Witness Statement. In Complainant's typed complaint on page 46 of the Record of Appeal he stated that Appellant was to relocate the tractor and return it on the 30th of March, 2019. In another statement by the Complainant on page 50 of the Record of Appeal, he stated that **'I called a mechanics by name Isaac Braimah who was by then working with Bakpa, Fievie rice farm, to come and work on the said machine'**.

It is trite that where Prosecution's case is inconsistent and contradictory, it cannot ground the conviction of an Accused Person.

The third ground of appeal is that the Learned trial Judge erred when he stated that "I hereby sentence the Accused person to a prison term of six (6) HIL.", which is very unclear. There is clearly not stated whether Accused was to serve six days, six months or six years and this Court agrees that this is a clear error.

It is on record that the Complainant was seriously sick and did not appear at all at the trial. For this reason Appellant's Counsel submits that it is not clear whether Complainant was in his right frame of mind at the time the issues were ongoing even up to the time he gave statements to the Police. It was submitted on behalf of Appellant that since the prosecution failed to discharge the onus on it, it is erroneous to convict Appellant for any duration of prison term. This Court has also stated supra that the

absence of Complainant denied the Court the opportunity to observe him and his testimony so as to make a proper determination of which version was preferable of the two rival accounts put before the Court. This Court is convinced based on the record before it, an appeal being also by way of re-hearing that the judgment is against the weight of evidence and the trial Judge erred when he held that the Accused person dishonestly appropriated the Zetor tractor. The Court upholds all the grounds of appeal and holds that the judgment of the Circuit Court, Sogakope, dated the 8th of December, 2022, be set aside and Appellant acquitted and discharged accordingly.

(SGD.)

**H/L JUSTICE DOREEN G. BOAKYE-AGYEI MRS. ESQ.
JUSTICE OF THE HIGH COURT**

CASE CITED

MALI V THE STATE [1965] GLR 710, SC