IN THE HIGH COURT OF JUSTICE, WESTERN REGION, HELD AT SEKONDI, ON THE 4TH DAY OF MAY, 2023, BEFORE HER LADYSHIP AFIA N. ADU-AMANKWA (MRS.) J.

SUIT NO: F23/5/22

THE REPUBLIC

VRS

1. **FRANCIS AIDOO @ YAW TARKWA**
2. **ALBERT ARHIN @ YAW**
3. **BENJAMIN ODOOM @ TAPEE**

JUDGMENT

The accused persons were arraigned before this court charged with the following offences:

i. Conspiracy to commit crime, to wit; undertaking small-scale mining operation without a licence contrary to sections 23(1) of the Criminal Offences Act, 1960, Act 29 and 99(2) of the Minerals and Mining Act, 2006, Act 703 as amended by section 3 of Act 995 of 2019.

ii. Undertaking small-scale mining operation without a licence contrary to section 99(2) of the Minerals and Mining Act, 2006, Act 703 as amended by section 3 of Act 995 of 2019.

The accused persons pleaded not guilty to the charges. The relevant facts as presented by the prosecution are that on 27th May, 2021, a team of policemen and the complainant, together with the Western Regional Security Council, embarked on an operation and visited Asuogya near Nsuaem, an illegal mining site where the accused persons and others were met mining illegally on the Subiri

River. Prior to this incident, the complainant, Ignatius Asaah Mensah, who is the District Chief Executive of Mpohor District Assembly, had received information that the accused persons and others who are currently at large had invaded the Subiri River and were using dangerous chemicals to process their gold which had caused extensive pollution to the river. Even though the accused persons were arrested, others at the mining site escaped arrest. They retrieved one pickaxe, two pumping machines, a sledgehammer, three shovels and a Navara pickup with registration No. GG 1131-17. An excavator used by the accused persons for the illegal mining was also set ablaze by the complainant and the team.

BURDEN OF PROOF

It is trite learning that in all criminal cases, the prosecution has a duty to prove the essential ingredients of the offence with which the accused person has been charged beyond a reasonable doubt. The burden of persuasion requires the prosecution to prove the existence or non-existence of a fact beyond a reasonable doubt. This burden of proof remains with the prosecution throughout the trial. This duty is set down by law through statutes and case laws. In this judgement, I will cite a few of them. **Section 10(2)(b) of the Evidence Act, NRCD 323,** states that:

> *"The burden of persuasion may require a party to establish the existence or non-existence of a fact by a preponderance of probabilities or by proof beyond a reasonable doubt".*

Section 11(2) of the Evidence Act, supra, provides as follows:

> *In a criminal action, the burden of producing evidence, when it is on the prosecution as to any fact that 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.*

Section 13(1) of the Evidence Act, supra, also provides:

> *In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt.*

The combined effect of the above provisions puts the burden of proof in criminal cases on the prosecution. However, the accused person is under no burden to prove his innocence. As per section 11(3) of the **Evidence Act supra**, he is only required to raise a reasonable doubt regarding his guilt. See the case of **Asare vrs. The Republic [1978] GLR 193.**

Therefore, it is trite that where a statute creates an offence, the prosecution must prove every element of the offence, which is sine qua non, to secure a conviction (unless the same statute places a burden on the accused person). The fundamental and cardinal principle regarding the criminal burden of proof on the prosecution should not be shifted even slightly. And this burden is on the prosecution throughout the trial. See the cases of **Kwaku Frimpong vrs. The Republic [2012] 45 G.M.J. 1** and **Amartey vrs. The State [1964] GLR 256.**

EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW

COUNT TWO

The prosecution alleges that the accused persons undertook small-scale mining operations without a licence, contrary to section 99(2) of Act 703 as amended by section 3 of Act 995. Section 99(2) of Act 703, as amended by section 3 of Act 995, states:

> *"A person who without a licence granted by the Minister, undertakes mining operation contrary to a provision of this Act commits an offence and is liable on summary conviction to a fine of not less than ten thousand penalty units and not more than fifteen thousand penalty units and to a*

term of imprisonment of not less than fifteen years and not more than twenty-five years".

To secure a conviction against the accused persons, the prosecution is required to prove:

i. That the accused persons were engaged in a mining operation.
ii. That they did so without a licence granted by the Minister.

Under the Act, "mining operations" has been defined as "the mining of minerals under a mining lease or restricted mining lease". The prosecution ought to show that the accused persons were engaged in a mining activity. The prosecution sought to prove this by the evidence of four witnesses and the accused persons' charge statements.

PW1, Ignatious Assah Mensah, testified that he was the District Chief Executive of Mpohor District Assembly. On 27th May, 2021, at about 11:20 am, he had a call from a unit committee member from Ayiem, called Innusah, that river Subiri was dirty and that he suspected some people were mining on the river, particularly at the top part. He asked Innusah to verify this fact which he did. He reported to him that the miners were on the river at Asuogya. He reported to the regional minister, who ordered him to arrest them. He was accompanied to the site by police officers, where they arrested three young men. They burnt an excavator and took some of their tools, including a pickaxe, pumping machines and some rubbers, to the regional police headquarters and handed them to the CID unit for further action. They also confiscated one Navara pickup, two pumping machines, one pickaxe and Wellington boots, which were handed over to the western regional police CID.

Fiifi Mensah testified as the 2nd prosecution witness. He testified that about three weeks prior to the incident in May 2021, one Issaka came to him to rent a pickup. He told him his pickup was unavailable but could get one from his friend, Amoah,

in Takoradi. He called Amoah to tell him about Issaka's interest in renting his pickup. Amoah told him to negotiate with Issaka and get back to him. After negotiating with Issaka, he called Amoah to send over the car. Amoah instructed his driver, Lomotey, to bring the car to Tarkwa, which he handed to Issaka. Issaka told him he wanted to use the car for some errands in town. On receipt of the car, Issaka sent him an amount of GHc3,000.00 as part payment and promised to pay the rest. In the first week of June 2021, he heard on the media that a pickup had been impounded at the Sekondi police station. That was when he realized that the vehicle had been used for galamsey. He called Issaka, but he never picked up his call. He came to Sekondi and saw the vehicle parked at the police headquarters. On 15th June, 2021, he and Amoah reported at the police station concerning the pickup.

Michael Amankwa, the third prosecution witness, testified that he was a member of the party security in the Western Region. On 27th May, 2021, the head of security of their office detailed them to accompany the Mpohor District Chief Executive to arrest illegal miners operating in an area near Nsuaem. They proceeded to Asuogya, near Mile 5, between 12 pm and 1 pm. They spotted the accused persons working there when they got to the site. They were working in a river. They had diverted the river and mounted their water-pumping machines. They pounced on them and arrested the three accused persons. Some of them managed to escape. They retrieved two pumping machines, shovels and other items. The miners left their Navara pickup, which they seized to the police station. The accused persons admitted the offences and pleaded for forgiveness. They later handed them over to the police.

The investigator, Cpl. Erica Annan, testified and tendered the charge statements of the accused persons in evidence as exhibits "A", "B" and "C", respectively. She also tendered pictures of the washing plant, Nissan Navara and the burnt excavator as exhibits "D" series. According to the witness, on 28th May, 2021, the

accused persons and some exhibits were handed over to her for investigation. On 3rd June, 2021, she, together with ASP Emmanuel Oduro, Insp. Frank Owusu, Cpl. Francis Osei Bonsu, the accused persons and the complainant visited the crime scene. On arrival at the scene, they were led to a mining site situate at Asuogya. At the mining site, they found various pits dug at the site, a burnt excavator stuck in one of the pits, a washing plant and a shed. The accused persons told her they rested at the shed after a day's work. Photographs were taken of the site. On arrival at the headquarters, the police took photographs of the exhibits that were brought in, which included a Nissan Navara pickup, a sledgehammer, two pumping machines, a pickaxe and shovels. Subsequently, she forwarded the docket to the office of the Attorney-General, who advised that the accused persons be charged with conspiracy to commit crime, to wit, undertaking small-scale mining without a licence and undertaking small-scale mining without a licence. The accused persons volunteered charge statements to that effect.

The evidence of PW1, PW2, and PW3 point to the fact that the accused persons were engaged in small-scale mining, otherwise known as galamsey. These persons saw the accused persons at the scene engaged in the mining activity and arrested them to the police. In particular, PW3's testimony stated that the accused persons were found working in the river. The accused persons had diverted the river and mounted their water-pumping machines. PW4 corroborated the evidence of the other prosecution witnesses when she testified that at the scene, she found various pits dug at the site and one burnt excavator stuck in one of the pits, all pointing to the fact that the accused persons were engaged in a mining activity. Exhibit "D2" is a picture of the burnt excavator showing the area as a typical mining site. PW4 testified that the police took photographs of the exhibits handed over to them, including exhibit "D" series showing the pictures of the incident scene and items seized. The items included a pickaxe, shovels, pumping machines etc. The shovels, pickaxe and pumping

machines which were all muddy, are tools ordinarily used in the mining trade. Further, the fact that they were muddy confirms the testimony of the prosecution witnesses that they were items seized at the mining site.

The accused persons have denied their engagement in small-scale mining. The thrust of their defence is that they were engaged in farming when the prosecution witnesses arrested them. According to them, on 27th May, 2021, the three of them went to the cocoa farm of one Mr. Mensah to prune and weed it. They worked from morning, and after some time, they decided to eat. They gathered at a place under the cocoa trees to eat. As they were eating, they saw a group of people coming. The people grabbed them for engaging in galamsey. They denied it and told them they were weeding and pruning the cocoa trees. The people insisted they were engaged in galamsey, so they beat them and asked them to confess, but they denied their engagement in galamsey. They were taken to the Sekondi Regional Police station, where they informed the police that they went to work on a cocoa farm and not to engage in galamsey. Subsequently, they were arraigned before the court.

The prosecution failed to tender their investigation caution statements. As a matter of fact, the investigation caution statement of the 1st accused was rejected as it did not comply with the requirements of sections 120(2) and (3) of the Evidence Act, supra. The independent witness (if there was one) failed to certify the statement as required of him under section 120 of the Evidence Act, supra. In their charge statements, the accused persons refused to say anything without their lawyer. Even though it is not the duty of an accused person to aid the police in its investigations, it is always expedient for an accused to tell the police anything that might exculpate him from the offence. The accused persons claimed they were working on Mr. Mensah's farm when they were arrested. Yet they refused to tell the police this upon their arrest. They first said this when they mounted the witness box to testify. The police would have been in the position

then to verify their statements. Under cross-examination, PW4 testified that they found a cocoa farm near the galamsey site. The 1st accused led her and the team to the farm and pointed out the shed where they came to rest. I have no reason to doubt PW4's evidence. She appeared credible to me. The accused persons could have called Mr. Mensah to confirm their story that they worked on his farm that day, yet they failed to. The implements retrieved at the scene are not tools used for farming. The accused persons claim they wielded cutlasses, but nothing of the sort was retrieved from them. Thus, I find as a fact that the accused persons were engaged in a mining activity at the time of their arrest.

It is not enough that the accused persons were engaged in a mining activity. To constitute the offence charged, they must have been engaged in the mining activity without a licence from the Minister. After all, the mere engagement in a mining activity is not an offence as long as one is licenced by the Minister to do so. Thus, the second leg or element of the offence would require the prosecution to prove that the accused persons were engaged in the mining activity without a licence from the Minister. Here, the Minister is the Minister for Lands and Natural Resources. As I have already stated, in criminal trials, the burden of proof, in the sense of the burden of establishing the guilt of an accused person, is generally on the prosecution. As stated in **section 15(a) of NRCD 323**,

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

This burden requires the prosecution to establish the existence or non-existence of a fact by proof beyond a reasonable doubt. It would require the prosecution to prove all the elements of the offence, even if it involves negative averments. Thus, in a rape case, the prosecution bears the burden of proving that the complainant did not consent. Therefore, it behoves the prosecution to prove the non-existence of a licence on the part of the accused persons in undertaking the mining activity.

None of the prosecution witnesses uttered a single word to assert and show that the accused persons were unlicensed to engage in that mining activity. It appeared that the prosecution had completely forgotten that the offence was two-pronged; to prove the activity and the absence of a licence. Playing the devil's advocate, it can be argued on the prosecution's behalf that since it asserts the negative that the accused persons mined without a licence, it was for the accused persons who asserted the positive to prove that they had a licence to undertake the mining activity. I am aware of the principle that if a negative averment is 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 asserts the negative. This was the ratio in the cases of **R vrs. Turner (1816) 5 M & S 206 at 211** and **R vrs. Oliver [1944] KB 68** and which has been followed in the cases of **Salifu vrs. The Republic [1974] 2 GLR 291** and **Abodakpi vrs the Republic**, **CA, Criminal Appeal No. H2/6/07, 20th June, 2008.**

The presumption of the innocence of an accused person is guaranteed under the Constitution. For this reason, the prosecution bears the burden of proving his innocence and, for that matter, the elements of the offence charged beyond a reasonable doubt. The only exception to this general rule are statutory exceptions. A statute may expressly cast the burden of proving a particular issue or issues on the accused person. The burden of proof concerning all other issues in such cases will remain on the prosecution per the rule as laid out in section 14 of NRCD 323. Where an accused person raises the defence of insanity, the Evidence Act, per section 15(c) places the burden of persuasion of that issue on him. Thus, he will bear the burden of proving his insanity by a preponderance of the probabilities. Again, under section 37 of the Narcotics Control Commission Act, 2020, Act 1019, the accused person bears the burden of proving that he had lawful authority to possess the narcotic drug following the prosecution's proof that he had possession or control of a narcotic drug. Here, the law emphatically places the burden on the accused person to prove such lawful authority to

possess the narcotic drug. In all other cases, the prosecution bears the burden to prove all the elements of the offence beyond a reasonable doubt. Thus, the burden to show that the accused persons did not possess a licence to undertake the mining activity does not lie on the accused persons simply because the prosecution asserts a negative given the tenor of the Evidence Act, per section 10(2) (b) that the prosecution bears the burden of proving negative averments, that is, the non-existence of facts.

Salifu vrs the Republic, supra, which followed **R v. Turner, supra**, was decided in 1974, when the Evidence Act, supra, had yet to be enacted. And in any case, these aforementioned cases were not only concerned with negative averments but also negative averments peculiarly within the accused person's knowledge. These were facts that the accused person could best prove without the least inconvenience since only he knew the facts. It would be a greater burden on the prosecution's part to prove such facts. That the accused persons possessed a licenced to undertake a mining activity does not lie within their peculiar knowledge. Yes, if they have been licensed, it would be easy on their part to prove it. But it should not be forgotten that the accused persons are under no obligation to testify as the Constitution guarantees that they are not compelled to give evidence at their trial. Yet, it would also not be an onerous burden on the prosecution's part to prove it. The ministry mandated to issue such licenses to registered small-scale mining is the Ministry of Lands and Natural Resources. Records of the grants of licences to registered small scale miners would be in the custody of the ministry. These are public records that are accessible to anyone, including the law enforcement agencies as well as the accused persons. No rule provides that the accused persons alone are the custodians of facts that are made public archives or records. Nor is there any such rule that would hold such knowledge peculiarly within the keeping of the accused persons. Nor is it readily comprehended how they should be any better informed of the public records that can be the specified officers of the Ministry. It should not be a burdensome

task for the prosecution to discharge this burden by showing that the accused persons did not have licenses. Thus, the fact that they were unlicensed is not a negative averment within the accused persons' knowledge, for which they should prove the affirmative. These facts are within the public domain. If the statute is interpreted to place a burden on the accused to prove that he had a licence, it would be incompatible with the provisions of the Constitution, which presumes his innocence until he is proven guilty. If the accused persons are to be convicted because they have knowledge of things of which the prosecution is either ignorant or uninformed, and the accused persons decline to give information of their knowledge to the state, then every person accused of a crime can be convicted because he has knowledge of his sins and omissions. Not only is the burden shifted, but guilt is made certain if he fails to produce evidence within his knowledge. This eliminates the presumption of innocence and changes the burden of proof.

In sum, a clear reading of the Act shows that the prosecution bears the burden of proving that the accused persons were unlicensed when they undertook the mining activity. This fact it must prove beyond a reasonable doubt. The statute makes no exception for the accused persons to prove that they were licensed to undertake the mining activity. Only upon proof by the prosecution that they were unlicensed would the burden shift to the accused persons to raise a reasonable doubt in the prosecution's case.

As I have already stated, the prosecution was silent on this element of the offence. Nothing was asserted, and for that matter, no evidence was led in support of that assertion. It appears that the police failed to extend their investigations to the ministry to determine if the accused persons were licensed or not, given the prosecution's complete silence on the issue. The prosecution could have tendered a letter from the ministry confirming their assertion that the accused persons had not been licensed or could have called an officer from the

ministry to testify to this fact. The failure to prove this element means that the prosecution has failed to prove its case against the accused persons beyond a reasonable doubt. The accused persons are acquitted and discharged on this count.

COUNT ONE

On this count, the accused persons on the 27th May, 2021, at Asuogya, near Nsuaem, are alleged to have acted together to commit an offence to wit undertaking small scale mining operation without a licence contrary to section 23(1) of Act 29 and section 992(2) of Act 703 as amended by section 3 of Act 995

Section 23 (1) of the Criminal Offences Act, 1960, Act 29 states:

> *If two or more persons agree to act together with a common purpose for or in committing or abetting a crime, whether with or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime, as the case may be.*

The offence of conspiracy requires the establishment of the involvement of at least two people in the offence. These persons must have agreed to act together and not simply to have acted together as the prosecution has stated to commit an offence. They must have done so for a common purpose: committing the offence of undertaking small-scale mining operation without a licence. In the case of **State vrs. Yao Boahene [1963] 2 GLR 555,** it was held in holding 2 that:

> *Conspiracy consists not merely in the intention of two or more persons but also in the agreement of two or more to do an unlawful act or to do a lawful act by an unlawful means. To constitute an indictable conspiracy, there must be an agreement between the conspirators to do some common thing.*

Proof of prior agreement by direct evidence is quite difficult in conspiracy cases. The agreement to commit a crime may be proved by inferring the agreement from the actions of the accused persons performed to further the ends of that criminal enterprise.

The case of **Lartey and Another vrs. The Republic [1968] GLR 986-990** recognizes that conspiracy imports an agreement to commit a crime, and where there is no direct evidence of any such agreement, the circumstances establishing facts from which conspiracy is to be inferred must lead uniquely to an inference of the existence of an agreement, that is, to nothing else.

Overt acts undertaken in furtherance of that agreement may be used to establish a criminal agreement. Although such overt acts may merge into the substantive case, the essence of a conspiracy conviction is to punish the agreement, which, even without anything further, is criminal under our laws.

The thrust of the prosecution's case is that the accused persons were found undertaking small-scale mining without a licence. The evidence shows that they were arrested whilst engaged in the mining activity. There is no proof that they were unlicenced to carry out that activity. Be that as it may, the conspiracy charge is not concerned with the substantive act but with the agreement to commit the crime. However, there is not much evidence from the prosecution from which an inference can be made that the accused persons conspired to engage in small-scale mining. They may have been at the site each prospecting and mining for his gold and not necessarily working in agreement together.

The prosecution has failed to lead sufficient evidence to support this charge. In the circumstances, the accused persons are acquitted and discharged on this count.

(SGD.)
H/L AFIA N. ADU-AMANKWA (MRS.)
JUSTICE OF THE HIGH COURT.

COUNSELS
Adeline Owusu-Asante (ASA) for the Republic.
Ben Samson Ephraim for the Accused Persons.