

GHANA / JUDGMENT

The Republic Vrs Atimbonu & Another [2023] GHADC 433 (13 February 2023)

[2023] GHADC 433

COURT

District Court

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IN THE DISTRICT COURT SITTING AT WALEWALE ON MONDAY THE 13TH OF FEBRUARY 2023
BEFORE H/W SIMON KOFI BEDIAKO ESQ – MAGISTRATE SUIT NO. NE/DC/WW/20/2023 THE
REPUBLIC VRS

1. KOFI ATIMBONU
2. WAHIDU SULEMANA

JUDGEMENT

INTRODUCTION

The accused persons Kofi Atimbonu (A1) and Wahidu Sulemana (A2) were arraigned before this Court on the 28th of October 2022 charged with two counts of Conspiracy to commit a crime to wit Stealing: contrary to Section 23(1) and 124(1) of the Criminal Offences Act, 1960 (Act 29) and Stealing: contrary to section 124(1) of the Criminal Offences Act, 1960 (Act 29). PLEA OF THE ACCUSED PERSONS The charges as stated in the charge sheet were read to A1 and A2 in the Mampruli language after which they pleaded Not Guilty to all the charges. BURDEN OF PROOF The Accused persons pleaded not guilty to the charges. It is settled in law that the burden of proof, therefore, is heavily on the prosecution to prove its case beyond a reasonable doubt in accordance with Article 19(1) and (2) (c) of the 1992 Constitution of the Republic of Ghana which stipulates that:

19. Fair Trial “1. A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.
2. A person charged with a criminal offence shall c. be presumed to be innocent until he is proved or has pleaded guilty;” Sections 11(1), (2) and (3), 13(1) and (2) and 15 (1) of the Evidence Act, 1975 (N. R. C. D. 323) have well settled the evidential and the persuasive burden that the law casts on Prosecution in a criminal matter. It provides as follows: Burden of producing evidence

11. (1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.
 - (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. Proof of a crime
 13. (1) 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.
 - (2) Except as provided in section 15 (c), in a criminal action, the burden of persuasion, when it is on the accused as to a fact the converse of which is essential to guilt, requires only that the accused raise a reasonable doubt as to guilt. Burden of persuasion in particular cases
 15. Unless it is shifted,
 - (a) the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion on that issue; In the case of *Woolmington v DPP* [1935] UKHL, stating the judgement for a unanimous Court, Viscount Sankey made his famous “Golden Thread” speech that: “throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exceptions... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.” Lord Denning J (as he then was) in the case of *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 in respect of proof beyond reasonable doubt stated that “It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice”. He further stated in the same case that “If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt’.
- DEFINITION AND ELEMENTS OF OFFENCE Below are the definitions and elements of the offences that the accused persons have been charged with. The prosecution is required to prove beyond a reasonable doubt all the elements of the offence stated below to get a conviction against the accused persons. CONSPIRACY Section 23(1) of Act 29 which provides for the offence of conspiracy to commit a crime stipulates that “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.” The punishment for the offence of conspiracy to commit a crime contrary to section 23(1) of Act 29 is provided by section 24 of Act 29 which states as follows:

1. “Where two or more persons are convicted of conspiracy for the commission or abetment of a criminal offence, each of them shall, where the criminal offence is committed, be punished for that criminal offence, or shall, where the criminal offence is not committed, be punished as if each had abetted that criminal offence.
2. A Court having jurisdiction to try a person for a criminal offence shall have jurisdiction to try a person charged with conspiracy to commit or abet that criminal offence.” STEALING Section 124(1) of the Criminal Offences Act 1960 (Act 29) states that “A person who steals commits a second-degree felony.” Section 125 of the Criminal Offences Act 1960 (Act 29) defines stealing as follows: “A person steals who dishonestly appropriates a thing of which that person is not the owner.” From the definition of stealing as provided above, there are three essential elements that must be proved by the prosecution to successfully establish a charge of stealing against the accused person. The essential elements of the offence of stealing were enumerated in the case of *Lucien v Republic*
[1977] 1GLR 351 as follows: (i) (ii) (iii) the person charged must not be the owner of the thing stolen he must have appropriated it and the appropriation must have been dishonest. Section 122 of the Criminal Offences Act, 1960 (Act 29) provides the acts which amount to the appropriation of a thing as follows: Section 122. “Acts which amount to an appropriation
 1. An appropriation of a thing by a trustee means a dealing with the thing by the trustee, with the intent of depriving a beneficiary of the benefit of the right or interest in the thing, or in its value or proceeds, or a part of that thing.
 2. An appropriation of a thing in any other case means any moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that a person may be deprived of the benefit of the ownership of that thing, or of the benefit of the right or interest in the thing, or in its value or proceeds, or part of that thing.
 3. An intent to deprive can be constituted by an intent to appropriate the thing temporarily or for a particular use, if the intent is so to use or deal with the thing that it probably will be destroyed, or become useless or greatly injured or depreciated, or to restore it to the owner only by way of sale or exchange, or for reward, or in substitution for another thing to which that owner is otherwise entitled, or if it is pledged or pawned.
 4. It is immaterial whether the act by which a thing is taken, obtained or dealt with (a) is or is not a trespass or a conversion,
 - (b) is or is not in any manner unlawful other than by reason of it being done with a purpose of dishonest appropriation, and it is immaterial whether, before or at the time of doing the act, the accused person had or did not have possession, custody, or control of the thing.” Section 120 of the Criminal Offences Act, 1960 (Act 29) makes provision for what amounts to dishonest appropriation: Section 120. Dishonest appropriation

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 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.
2. It is not necessary, in order to constitute a dishonest appropriation of a thing, that the accused person should know who the owner of the thing is, but it suffices if the accused person has reason to know or believe that any other person, whether certain or uncertain, is interested in or entitled to, that thing whether as owner in that person's right or by operation of law, or in any other manner; and a person so interested in or entitled to a thing is an owner of that thing for the purposes of the provisions of this Act relating to criminal misappropriations and frauds.
3. The general provisions of Part One with respect to consent, and with respect to the avoidance of consent by force, duress, incapacity, and otherwise, apply for the purposes of this section, except as is otherwise provided in this Chapter with respect to deceit. THE CASE OF PROSECUTION The brief facts of the case as presented by the prosecution is that the complainants, in this case, are Rashid Abdul Baki (PW1) who is a 35-year-old Driver and Sadat Jabar (PW2) who is also a 33-year- old tricycle motor rider. Both complainants are residents of Walewale. The accused persons are Kofi Atimbonu (A1) who is a 21-year-old tricycle motor rider while Wahidu Sulemana (A2), is a 23 -year-old farmer. Both accused persons are residents of Walewale. On 7/10/2022 at about 6:00 am, PW1 woke up and to his dismay detected that his haojue unregistered motorbike valued GHc4,400.00, which he parked in his corridor before going to bed was stolen. A report was made to the police by PW1, and investigations commenced to look out for the perpetrators. On 18/10/2022 at 4:20 pm, PW2 together with some young men arrested and brought to the charge office the accused persons on the basis that on 2/10/2022 at 2:00 pm, he parked his unregistered savvy motorbike valued GHC2,800.00 in his compound and went to a friend's naming ceremony. That he returned the same day at about 5:00 pm and detected that, the said motorbike was stolen and that the accused persons are the culprits. PW2 also made an official report to the police. The accused persons were re-arrested and in their voluntary caution statement admitted having conspired to steal both PW1 and PW2 motorbikes. The prosecution called three (3) witnesses to testify in support of its case against the accused persons. A summary of the testimony of the prosecution witnesses is as follows: Rashid Abdul Baki (PW1) was the first witness called by the prosecution during the trial. PW1 testified that he is a driver and resident in Walewale. He stated that he woke up at about 6:00 am on 7th October 2022 and discovered that his unregistered Haojue motorbike which he parked in the corridor of his house had been stolen. He added that the motorbike is valued at GHS 4,400. According to PW1, he reported this matter to the police. He avers that on 18th October 2022, at about 11:30 am he heard that the accused persons had been caught in respect of a stolen fowl

around his area. According to PW1, he went to the scene where the accused persons had been caught and when he got there the accused persons confessed to him that they stole his motorbike. PW1 continued that the accused persons were handed over to the police with the help of some young men. The prosecution called Sadat Jabar (PW2) as its second witness. According to PW2 he resides in Walewale and is a tricycle motor rider. He testified that on 2nd October 2022 at about 2:00 pm he parked his unregistered Savvy motorbike valued at GHS 2,800 in his house and went to a naming ceremony event of a friend. According to PW2, he returned home on the same day at about 5:00 pm and realised that his motorbike had been stolen. He stated further that on 18th October 2022, he was at home around 7:00 am when he heard that the accused persons had been apprehended in respect of a stolen fowl around where he lives. He stated that he proceeded to where the accused persons were and when he got there the accused persons confessed to him that they stole his motorbike. PW2 concluded that together with some young men accused persons were sent to the police station and handed over to the police. The third and final witness of the prosecution is No. 46379 G/CPL. Nicholas Sarfo (PW3). He testified that he is a police corporal stationed at Walewale District Criminal Investigation Department. According to PW3, PW1 and PW2 reported cases of their stolen motorbikes to the police on 7th October 2022 and 18th October 2022 respectively. He stated that these cases were referred to him for investigation. PW3 avers that on 18th October 2022 at about 4:20 pm PW1 and PW2 with the assistance of some young man arrested and brought to the police the accused persons on the basis that the accused persons were the ones who stole their motorbikes. He stated that the accused persons were re-arrested by the police and investigation caution statements were taken from each accused person. PW3 avers that during the interrogation of the accused persons, they told the police that they stole the motorbikes of PW1 and PW2 and sold them to one Abuba in Langbinsi for an amount of GHS 2,000.00 and GHS 1,500.00 respectively. He stated that the police investigation was extended to Langbinsi to arrest Abuba but that proved futile as the police could not trace him. PW3 tendered in evidence the following exhibits in support of his testimony: Exhibit A – Investigation Caution Statement of A1. Exhibit B – Charged Caution Statement of A1. Exhibit C – Investigation Caution Statement of A2. Exhibit D – Charged Caution Statement of A2. At the close of the prosecution's case, the court in accordance with section 173 of the Criminal and Other Offence (Procedure) Act, 1960 (Act 30) ruled that the prosecution had made a prima facie case against the accused persons and the accused persons were duly called upon to answer the case. The court in considering whether the prosecution has made a prima facie case against the accused persons after the close of its case is not required to determine whether the prosecution has proved its case beyond a reasonable doubt. It is at the end of the trial that the court is required to determine whether the prosecution has proved its case beyond a reasonable doubt. See *Tsatsu Tsikata v The Republic* [2003-2005] 2 GLR 294, SC. CASE OF A1 A1 testified by himself and called no witnesses. He stated that he is a tricycle rider and lives in Kperiga. According to A1, he was arrested by some people for allegedly stealing a fowl and wires. He testified that when the people arrested him, they tortured him. He stated that they put a knife on fire and put it on his back. They also used a rope to tie his ribs and asked him to mention those he committed

the crime with. A1 testified that he mentioned the names of five (5) persons which included A2, and these persons were also arrested. According to A1 the police discharged three (3) of the persons whose names he mentioned and detained A1 and A2. He concluded by saying that it was on this basis that PW1 and PW2 accused him and A2 of stealing their motorbikes.

CASE OF A2 A2 told the court that he lives in Zangu a suburb of Walewale. He added that he is a farmer. A2 testified by himself and called no witnesses to testify in support of his defence. He testified that he does not know anything about the stolen motorbikes. He stated that on the day he was arrested, he went to buy mobile phone credit when he was arrested. According to A2, he was arrested with some other people, and they were taken to the police station where they were detained. He avers that he was subsequently interrogated by the police, and he told them he knows nothing about the stolen motorbikes. He stated that he told them he does not even know the complainants. According to him, he was detained in a cell and subsequently arraigned before the court.

ANALYSIS OF FACT & LAW: The testimony of PW1 and PW2 indicates that the two accused persons were arrested at the same time within the area they live by some local folks for stealing a fowl and the accused persons were subsequently sent to the police station. According to PW1 and PW2, when they heard that the accused persons had been arrested in their neighbourhood, they each went there, and the accused persons confessed that they stole their motorbikes. PW3 also stated in his evidence-in-chief that on 18th October 2022, PW1 and PW2 with the assistance of some young men arrested and brought the accused persons to the police station where they were re-arrested. There is, however, evidence on record which contradicts these averments made by the prosecution witnesses. In fact, PW1 when he was cross-examined by A2 stated that he was not there when A2 was arrested. Below is the question and answer: Q – I put it to you that I was not arrested for a matter of a stolen motorbike A – I was not around when A2 was arrested. It was A1 who said you are his accomplice in the motorbike theft. PW2 also stated in answer to a question posed to him by A2 that he was not there when A2 was arrested. Below is the question and answer: Q – The time you arrested me, it was about a matter of fowls and iron rods. A – I was not there when you were arrested. Considering these answers provided by PW1 and PW2 and the evidence-in-chief of A1 and A2, the accused persons were not arrested together and therefore they could not have confessed together to both PW1 and PW2 that they stole their motorbikes. The only piece of evidence that the prosecution has that may point to A1 and A2 conspiring to steal the motorbikes of PW1 and PW2 is Exhibit A, B and C and D in which A1 and A2 allegedly confess that they stole the motorbikes of PW1 and PW2 and they sold them for GHS 2,000 and GHS 1,500 respectively. Exhibit A, B, C, and D were admitted into evidence without any objection from A1 and A2. A1 in his evidence-in-chief told the court that he confessed that he stole the motorbikes and mentioned the names of his accomplices which includes A2 because when he was arrested by the local folks, they tortured him and asked him to mention the names of his accomplices. If that is the case, then the alleged confession by A1 when he was arrested by the local folks is not proper as it was given under duress and certainly not admissible. The alleged confessions of A1 and A2 which is relevant to the court is contained in Exhibit A, B and C and D. Exhibit A and B are statements given by A1 at the police station when A1 was sent to the police station by PW1

and PW2 with the assistance of some young men. In both statements, A1 confessed that he stole the motorbikes of PW1 and PW2 with A2. There is no evidence that when A1 got to the police station he was further tortured and forced to make the statements in Exhibit A and B. Any doubts that the court had as to whether A1's confession in Exhibit A was not given voluntarily were erased when A1 admitted that he stole the motorbikes. This admission was made by A1 when he was cross-examined by the prosecution. Below are the questions and answers given by A1 as referred to supra: Q - Today on the 12/12/2022 you admitted Exhibit A, is that right? A - Yes, I did. Q - How many times did you lead the police to Langbinsi to retrieve the motor you stole? A - Once Q - Can you tell this court how many motorbikes you stole? A - Two motors Q - How much was your share after selling the motorbike? A - GHC1000 Q - How much was A2 share? A - GHC1000 In respect of the alleged confession made by A2 in Exhibit C, the court has doubts as to whether it was voluntarily given by A2. Exhibit C contains two conflicting investigation caution statements allegedly made by A2. These statements were allegedly given on the same day by A2, specifically on 19th October 2022. In one of the statements contained in Exhibit C, A2 states that he never conspired with A1 to steal the motorbikes. He stated further that A1 is falsely accusing him. In the second statement contained in Exhibit C, A2 states that the allegation against him is true. He continued that he and A1 stole two motorbikes at Moshiefong and sold them to one Abuba at Langbinsi for GHS 2,000 and GHS 1,500 respectively. Despite this A2 pleaded not guilty to the charges and in his evidence-in-chief stated that he knew nothing about the stolen motorbikes. Considering that there are two investigation caution statements of A2 which conflict with each other, and the content of A2's evidence-in-chief, the court cannot and will not take Exhibits C and D into consideration in determining the guilt or otherwise of A2. The alleged confession of A2 is therefore rejected. A1 named A2 as his accomplice in the stealing of the motorbikes of PW1 and PW2. This is the main piece of evidence that the prosecution has against A2. A1 was quite adamant in his assertion that A2 is his accomplice. The burden of proof shifted onto A2 to adduce evidence to make the evidence of the prosecution that he is the accomplice of A1 in the theft of PW1 and PW2 motorbikes doubtful. See sections 11(2) and 13(2) of N. R. C. D 323. A2 could not discharge the burden of proof when it shifted onto him. He could not refute the assertion by A1 that he was his accomplice when he got the opportunity to cross-examine A1. Apart from mere denial that he is not the accomplice of A1 in the theft of PW1 and PW2's motorbikes, A2 could not adduce any evidence to cause doubt in the mind of the court as to his guilt. PW3 in his evidence-in-chief stated that the accused persons during interrogation at the police station admitted that they stole PW1 and PW2 motorbikes and sold same to one Abuba at Langbinsi. A1 and A2 both admitted that they led the police to Abuba's house in Langbinsi on one occasion. A2 however stated that he did not lead the police to Abuba's house to retrieve the stolen motorbikes, but he took the police to Abuba's house because the police asked him about a motorbike that he has been using and he told the police it belongs to his uncle Abuba so he took them there to show the police that motorbike. A2 stated that he has not seen Abuba for about three (3) months now and he has not communicated with him for about four (4) months. Granted what A2 stated is true, when did he receive the motorbike that he refers to from Abuba? How long did he use the same

and when did he return the said motorbike to Abuba? If he returned the said motorbike to Abuba, about three months prior to 16th December 2022 which is the day A2 gave his evidence-in-chief and was cross-examined then it means he returned it sometime in September 2022 when the motorbikes of PW1 and PW2 had not been stolen. Why then would that motorbike be of interest to the investigation of the police to prompt them to take the A2 and A1 to Langbinsi to verify the same? The reason A2 has given as to why he led the police to the house of Abuba does not seem plausible. It is very probable from all the evidence on record that A2 led the police to Abuba's house to retrieve or find the stolen motorbikes and not to verify Abuba's motorbike as averred by A2. This conclusion is buttressed by a statement in PW3's evidence-in-chief that the police extended investigations to Langbinsi to arrest Abuba. Why would the police try to arrest Abuba if A2 only took the police to his house for the purpose of showing them a motorbike which belongs to Abuba? A2 could not produce the said Abuba to testify in support of his defence. In holding 3 of the case of *Lutterodt v. Commissioner Of Police* [1963] LR 429-440 the supreme court per Ollenu JSC set out three stages that a court must use to examine the case of the defence in criminal cases as follows: "In all criminal cases where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages:

- (a) if the explanation of the defence is acceptable, then the accused should be acquitted;
- (b) if the explanation is not acceptable, but is reasonably probable, the accused should be acquitted;
- (c) if quite apart from the defence's explanation, the court is satisfied on a consideration of the whole evidence that the accused is guilty, it must convict." After careful evaluation of the whole evidence on record, the court believes that the admission made by A1 that he stole the motorbikes of PW1 and PW2 with A2 as his accomplice is true. COUNT ONE To get a conviction of A1 and A2 in respect of the offence they have been charged with in count one, the prosecution has the burden to prove beyond a reasonable doubt that A1 and A2 agreed to act together with a common purpose to steal the motorbikes of PW1 and PW2 whether with or without a previous concert or deliberation. After consideration of all the evidence on record, I find that the prosecution has proved beyond a reasonable doubt that A1 and A2 agreed together with a common purpose to steal the motorbikes of PW1 and PW2, which they succeeded in doing. I find A1 and A2 guilty of the offence of Conspiracy to commit a crime to wit Stealing: contrary to Section 23(1) and 124(1) of the Criminal Offences Act, 1960 (Act 29) and I accordingly convict A1 and A2 of the same. COUNT TWO In respect of count two, the prosecution is required to prove beyond a reasonable doubt that A1 and A2 dishonestly appropriated the motorbikes of PW1 and PW2. A1 despite pleading not guilty to the charge of stealing in count two confessed to stealing the motorbikes of PW1 and PW2 with A2 in Exhibit A. A1 also admitted during trial that he and A2 stole the motorbikes of PW1 and PW2 and sold them. He admitted further that he received GHS 1,000 from the sale of the motorbikes and A2 also received GHS 1,000 as his share from the sale of the

motorbikes. A1 clearly admitted that he dishonestly appropriated the properties of PW1 and PW2 without their consent and with the intention to deprive them of the properties as the motorbikes were sold. A2 is implicated in the admission of A1 as stated supra. A2 failed in his defence to raise doubt in the mind of the court as to his guilt. The court found A1's admission credible and on that basis finds that the prosecution has proved all the elements of the offence of stealing against A1 and A2 beyond a reasonable doubt. I find A1 and A2 guilty of the offence of Stealing: contrary to Section 124(1) of the Criminal Offences Act, 1960 (Act 29) and I accordingly convict A1 and A2 of the same.

DISPOSITION

The court in passing the sentence took into consideration the pleas for mitigation of the accused persons, the period they had spent in custody as well as their conduct during the whole trial. COUNT ONE I hereby sentence A1 and A2 to pay a fine of 300 penalty units each or in default, each of them to serve a prison sentence of twelve (12) months in hard labour. COUNT TWO I hereby sentence A1 and A2 to pay a fine of 300 penalty units each or in default, each of them to serve a prison sentence of twelve (12) months in hard labour. The sentences in counts one and two shall be served by A1 and A2 concurrently. SGD H/W SIMON KOFI BEDIAKO MAGISTRATE 13/02/2023 15

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