

GHANA / JUDGMENT

Republic Vrs Kukubor [2023]

GHACC 186 (17 January 2023)

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IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 17TH JANUARY 2023

CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B7/03/2023

THE REPUBLIC

VS

FRANCIS KUKUBOR alias O.B.

Accused person present

Sergeant Prince Adu Amoako for the Republic, present

Article 88(3) and (4) of the Constitution 1992 state:

JUDGMENT

- (3) The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences. 1
- (4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law. The police holding the fort for the Attorney-General charged Accused person herein as follows: COUNT ONE STATEMENT OF OFFENCE DISHONESTLY RECEIVING CONTRARY TO SECTION 146 OF THE CRIMINAL OFFENCES ACT, 1960(ACT 29) PARTICULARS OF OFFENCE FRANCIS KUKUBOR @ O.B., AGED 24YEARS, MASON: For that you on 17th day of August 2022 at about 11:45am at Dwekesiem a suburb of Dunkwa-On-Offin in the Central Circuit and within the jurisdiction of this Court did dishonestly receive a Samsun[sic] mobile phone valued GH¢800.00, the property of one Joyce Arhin, which you well knew to have been obtained or appropriated by means of crime, to wit robbery. COUNT TWO STATEMENT OF OFFENCE UNLAWFUL POSSESSION OR CONTROL OF NARCOTIC DRUGS; CONTRARY TO SECTION 37(1)(a) OF NARCOTIC CONTROL COMMISSION ACT, 2020(ACT 1019) PARTICULARS OF OFFENCE FRANCIS KUKUBOR @ O.B., AGED 24YEARS, MASON: For that you on 17th day of August 2022 at about 11:45am at Dwekesiem a suburb of Dunkwa-On-

Offin in the 2 Central Circuit and within the jurisdiction of this Court, without lawful authority did have in your possession and control thirty-seven wraps of dried plant material suspected to be narcotic drugs – cannabis. COUNT THREE STATEMENT OF OFFENCE DOING BUSINESS IN RELATION TO NARCOTIC DRUGS; CONTRARY TO SECTION 38(1) OF NARCOTIC CONTROL COMMISSION ACT, 2020(ACT 1019) PARTICULARS OF OFFENCE FRANCIS KUKUBOR @ O.B., AGED 24 YEARS. MASON: For that you on the 17th day of August 2022 at Dwakesiem a suburb of Dunkwa-On-Offin in the Central Circuit and within the jurisdiction of this Court, without lawful authority did engage in business in relation to narcotic by selling and distributing dried plant materials suspected to be narcotic drugs – cannabis. COUNT FOUR STATEMENT OF OFFENCE SALE OF DRUGS WITHOUT AUTHORITY, CONTRARY TO SECTIONS 11 AND 26 OF FOOD AND DRUGS LAW, 1993(PNDC LAW 305B) PARTICULARS OF OFFENCE FRANCIS KUKUBOR @ O.B., AGED 24 YEARS. MASON: For that you on the 17th day of August 2022 at Dwakesiem a suburb of Dunkwa-On-Offin in the Central Circuit and within the jurisdiction of this Court, did sell assorted brands of tramadol without lawful authority. 3 Section 146 of Act 29 states: Whoever dishonestly receives any property which he knows to have been obtained or appropriated by any offence punishable under this Chapter shall be liable to the same punishment as if he had committed that offence. Section 37(1) of Act 1019 states: A person who, without lawful authority, proof of which lies on that person, has possession or control of a narcotic drug for use or for trafficking commits an offence. Section 38(1) of Act 1019 states: A person who without lawfull authority, produces, processes, manufactures or distributes narcotic drugs commits an offence. Section 11 of PNDC LAW 305B states: A person commits an offence if that person sells a drug, cosmetic, device or chemical substance which

- (a) has in or on it a substance that may cause injury to the health of the user when the article is used
- (i) according to the directions on the label accompanying the article, or (ii) for a purpose and by a method of use that is customary or usual,
- (b) consists in whole or in part of a filthy, rotten, decomposed or diseased substance or of a foreign matter likely to cause injury,
- (c) is adulterated, or 4
- (d) is prepared, preserved, packed or stored under unsanitary conditions. Section 26 of PNDC LAW 305B states: A person who is found guilty of an offence under a provision of sections 11 to 25 for which a penalty has not been specified is liable on conviction to a fine not exceeding five hundred penalty units or to a term of imprisonment not exceeding two years or to both the fine and the imprisonment. Based on the following facts[salient facts extracted] did the police decide to charge Accused person: “The complainant...is a student...whilst the accused is a mason...On 15th August 2022 at about 11:45pm, the complainant went ... to buy porridge and whilst buying the porridge, she decided to go ... to urinate. ...Whilst urinating, a certain man with a cutlass ordered the complainant to give her

Samsung mobile phone value[d] GH¢800.00 to him or got[sic] stabbed. The complainant surrendered her phone to the man and shouted for help[.] The people around ran to the rescue of the complainant and the man upon seeing them escaped. On 17th August 2022, at about 11:35am, ...[one] Matilda Coleman the porridge seller saw the accused person at a phone repairer[sic] shop... and found the complainant's Samsung mobile phone with the accused. ... when she questioned the accused about the owner of the phone, the accused person claimed to have bought it from one Antwi @ Two Things at a price of GH¢250.00. The accused was arrested to the police station together with the mobile phone and a hang[sic] bag. At the station a search conducted in his black hang[sic] bag revealed thirty-seven(37) wraps of dried leaves suspected to be narcotic drugs – cannabis, quantity of tramadol, nineteen(19) boxes of matches, thirteen(13) sticks of cigarettes, voter ID card, Ghana card, Health Insurance card and various denomination[sic] of 5 money totalling GH¢440.00 believed to be proceeds of illicit business the accused engaged[in]...” Accused pleaded GUILTY to Count Two(2) and he was convicted accordingly. The court considering the charge sheet in general deferred sentence of Accused on count two, so that the court would hear the matter as regards the other counts for a considered opinion on all the counts. To prove the charges on the other counts, Prosecution called three witnesses. The person mentioned in count one as being the owner of the mobile phone mentioned in that count testified second and so she will be referred to hereinafter as PW2. The investigator herein testified as the first prosecution witness(PW1). Another police officer said to have arrested Accused testified as the third prosecution witness(PW3). With the advent of witness statements, sometimes paraphrasing what a person has presented in the witness statement may end up changing the import of the evidence-in-chief. I find it expedient in the circumstances, to produce verbatim the salient parts of the witness statement of PW1: “...

3. On 17th August 2022 at about 12:20pm the accused and suspect Justice Anarfi were arrested and brought to the station by General Constable Fredrick Nyantakyi and Matilda Coleman together with a samsung mobile phone and a black hang[sic] bag belonging to the accused person and reported a case of robbery against the accused person.
4. Search conducted on the accused person's bag at the charge office by the police revealed thirty-seven(37) wraps of dried leaves suspected to be indian hemp – cannabis, quantity of tramadol, nineteen(19) boxes of matches, thirteen(13) sticks of 6 cigarettes, voter ID card, Health Insurance card and various denomination[sic] of money totalling GH¢440.00.
5. The case was referred to me for investigation.
6. I took photographs of the exhibits and retained same at the station for evidential purposes.
7. I obtained statement from the complainant.
8. I visited the crime scene at Dunkwasoro.

9. Investigation cautioned statement was obtained from Accused and he denied robbing the phone[sic] and alleged having bought the said mobile phone from one Antwi @ Two things at Kalakuta near the railway for a price at GH¢250.00.
10. The accused person identified the dried leaves to police as cannabis and intimated that the said cannabis was given to him by one Latif to sell at Kalakuta.
11. The accused described Latif to police as a friend who does business with narcotics and gave same for him to also sell.
12. The accused however told police that suspect Justice Anarfi had no knowledge about the items found in his bag and that Anarfi only accompanied him to Dwekesiem market for him to remove settings on the phone.
13. I obtained investigation caution[sic] statement from Justice Anarfi and he admitted going to a phone repairer[sic] shop at Dwekesiem with the accused person but denied knowledge of robbing of the phone[sic] and the narcotic drugs.
14. I later had instructions to charge the accused person for court and released suspect Justice Anarfi on police enquiries bail.” The cautioned statement Accused gave for investigations is as follows: “I am a mason and lives[sic] at Sisala line – a suburb of Dunkwa-On-Offin. I don’t know the complainant in this case. On 13th August 2022, I bought a samsung smart mobile phone from @two things[sic] at Kalakuta, near the railway lines for GH¢250.00 7 which I paid. The phone was however connected on Wi-Fi and I wanted to change the settings. On 17/08/22 at about 10:30am I took the faulty Samsung mobile phone for maintenance at Dwakesiem Market. I went and met the complainant there seated and I removed my phone and started explaining the phone’s problem to the repairer. Whiles[sic] explaining things to the phone repairer, the complainant called me and asked me to give the phone to her to check something on the phone. I gave the phone to the complainant and she told me the phone resembles[sic] her phone. She accused me of stealing the phone which I denied. I told the complainant that I bought the phone from someone and that I was not a thief. Certain boys joined and started beating me. I told them to take me to the police because I haven’t[sic] done anything. Another boy which I later identified as a policeman intervened and brought me to the police together-with the phone. On the dried leaves found in my bag, I want to plead with police to forgive me. The substances were given to me by one Latif to sell at Kalakuta. It was suspect Justice who led me to the phone repairer and he too was arrested to the police and we were detained. Latif is my friend and I know he has been into narcotics business. I do smoke wee. The substance were in wraps and I cannot mention the exact quantity. I kept my Iphone 6 in my bag but could not found[sic] it after handing the said bag to the complainant.” PW2, in her evidence-in-chief confirmed the aspect of the facts about the attack on her to when the phone was retrieved and Accused taken to the police station whereupon she gave her statement to the police. PW3 stated in his witness statement which got metamorphosed into his evidence-in-chief as follows, inter alia: “... 8

4. On 17/08/22 at about 10:30am I had a phone call from the complainant's friend to the effect that he has[sic] seen the complainant's robbed mobile phone with someone at Dunkwa Central Market.
5. The caller pleaded with me to come and assist to arrest the suspects to the police station.
6. I took car to the market and met witness Matilda Coleman and two others struggling at sky phone shop. 7.The complainant pointed out the accused person and one other as her culprits.
8. The two initially resisted arrest but with the support of others I was able to arrest them to the police station.
9. The accused person and the other suspect were brought to the station together with the mobile phone and a bag containing substances suspected to be Indian hemp.
10. At the police station the wrapped dried leaves suspected to be Indian hemp were inspected and counted in the presence of the accused person and other witnesses.
11. The accused person and the other suspect were detained in custody to assist investigation. ..." There appears to be contradiction in the prosecution's case as the person referred to as complainant in the facts was nowhere in the picture at the said shop as by the PW2's evidence but PW3 appear to be saying that the said Matilda Coleman is the complainant. In *Effisah v. Ansah*[2005-2006] SCGLR 943, the Supreme Court held that: 9 "In the real world, evidence led at any trial which turned principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions and the like. In evaluating evidence led at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they relate. Thus, in any given case, minor, immaterial, insignificant, or non-critical inconsistencies must not be dwelt upon to deny justice to a party who had substantially discharged his or her burden of persuasion." Also in *Ghana Ports and Harbours Authority v. Issoufou* [1993-94] 1GLR 24 SC, the Supreme Court held that: "...the courts had a duty to ensure that justice was done in cases before them and should not let that duty be circumvented by mere technicalities..." The prosecution raised prima facie case against Accused, calling for him to explain himself away. In *Commissioner of Police v. Isaac Antwi*[1961] GLR 408 SC, Korsah CJ stated: "The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution and that the evidential burden rests on the accused where at the end of the case of the prosecution an explanation is required of him, are illustrated by a series of cases. 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." 10 The learned

judge continued, referring to Archbold's Criminal Pleading, (34th ed.) at p. 371, para. 1001, that: "Where the prosecution gives prima facie evidence from which the guilt of the prisoner might be presumed and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of 'guilty'. But if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted, because if upon the whole of the evidence in the case the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them." The court called on Accused to open his defence. The court explained section 174(1) of Act 30/section 63 of NRCDC 323 vis-a-vis Article 19(10) of the Constitution. Section 174(1) of Act 30 states: At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require him to make a defence, the Court shall call upon him to enter into his defence and shall remind him of the charge and inform him that, if he so desires, he may give evidence himself on oath or may make a statement. The Court shall then hear the accused if he desires to be heard and any evidence he may adduce in his defence. Section 63 of NRCDC 323 states: (1) An accused in a criminal action may make a statement in his own defence without first taking an oath or affirmation that he will testify truthfully and without being subject to the examination of all parties to the action.

- (2) Such a statement by an accused is admissible to the same extent as if it had been made under oath or affirmation and subject to examination in accordance with sections 61 and 62.
- (3) The fact that the evidence was given without oath or affirmation, or that there was no possibility of examination, may be considered in ascertaining the weight and credibility of the statement, and may be the subject of comment by the court, the prosecution or the defence. Article 19(10) of the Constitution, 1992 states: No person who is tried for a criminal offence shall be compelled to give evidence. Accused chose to give a statement from the dock: Here is what Accused stated: "I am not the one who took the phone from the owner. The said phone came into my possession when a friend brought it and told me he was in financial difficulty and so I should keep the said phone so that I gave him money to attend to his financial problem. That friend of mine told me that in due course, he would come and pay the money to me and take back his phone. Indeed, the said friend of mine never indicated to me that he stole the phone neither did I know that the phone was a stolen phone. The phone was with me for four days and that friend of mine had still not come to pay my money and collect his phone. So, I took the phone to a phone repairer to flash the said phone so that I could use it. Whilst at the repairer's shop, a certain woman came there and asked me to give her the phone to check something. I gave the phone to that woman as I did not have any bad intentions. The said woman after having a look at the phone looked visibly worried and I asked her the matter and she told me to keep my cool. As I did not have any bad intentions, I sat in the shop waiting for the repairer to flash the phone. All of a sudden some young men came to the shop and rushed on me and asked where I got the phone from and I told them that I bought it from a friend and if they had any doubts, I would

lead them to that friend. The people then started beating me and a certain young who was with me at the shop. Whilst those people were beating me and that young man, PW3 came onto the scene and handcuffed me and that youngman. PW3 put me and that youngman in a taxi. Even whilst we were in the 12 taxi, those youngmen wanted to open the doors of the taxi and continue to beat us. PW3 took us to Atechem Police Station. Whilst I and that youngman were being beaten at the phone repairer's shop, the woman who came to inspect the phone urged the people who were beating us to stop and so I thought she had sympathy for us and so I gave a bag which I had on me to her. So whilst we were at the police station that woman brought the said bag there. I told the woman to take the bag back but she didn't. The police searched the bag and it contained the said narcotic drugs which were in wraps and also tramadol. Upon the search, the police also found king size cigarettes amd boxes of matches and they asked who owned those things and I told them that they belonged to a friend of mine called Latif who was a galamsayer at Badoa No. 2 and that the said Latif bought the items and asked me to keep them in my bag so that when we got the galamsay site he would take them from me. When I gave the bag to that woman at the phone repairer's shop, the bag contained my personal iphone. In fact, I accepted to take the bag from that woman at the police station because I knew that the bag contained my said iphone and my cards. But when the police searched the bag, my said card together with the other items I mentioned were in the bag but not my iphone. After the police had searched my bag, they detained me. The police did not let me lead them to look for the said friend of mine who gave the samsung mobile phone to me who is called Antwi alias Two things as well as the friend of mine called Latif." Section 80 of NRCD 323 states:

- (1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the truthfulness of his testimony at the trial. 13
- (2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:
 - (a) the demeanour of the witness;
 - (b) the substance of the testimony;
 - (c) the existence or non-existence of any fact testified to by the witness;
 - (d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;
 - (e) the existence or non-existence of bias, interest or other motive;
 - (f) the character of the witness as to traits of honesty or truthfulness or their opposites;
 - (g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

- (h) the statement of the witness admitting untruthfulness or asserting truthfulness. In *Ntiri v. Essien* [2001-2002] SCGLR 451, it was held that the trial judge has the duty to ascertain credibility of a witness. Section 10(1) of NRCD 323 defines “Burden of Persuasion” and it states: For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court. Section 10(2) of the Evidence Act adds that: The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non- existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt. Section 11 of NRCD 323 defines “Burden of Producing Evidence” and states further as follows: (1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce 14 sufficient evidence to avoid a ruling against him on the issue.
- (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.
- (3) 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.
- (4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence. In *Ackah v. Pergah Transport Limited and Others*[2010] SCGLR 728; *Sophia Adinyira JSC* stated at page 736 that: “It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable[sic] than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree[sic].” 15 I find that Accused is not being consistent as regards his statement to the police as in Exhibit A and his statement to the Court from the dock. I therefore do not find him credible. See *Ntiri*
- v. *Essien supra*. As Accused pleaded Guilty to Count Two(2), he has admitted wrongdoing as regards possessing substance that he needed lawful authority to possess, but for which he did not have such authority to possess. In *R v Shivpuri* [1986] 2 All ER 334, Shivpuri was

persuaded to act as a drugs courier. He collected a suitcase which contained several packages of white powder which he admitted in police interview that he believed to be either heroin or cannabis but was in fact legal snuff. He was charged with attempting to be knowingly concerned in dealing with and harbouring the controlled drug of heroin, despite the fact that the white powder was not in fact drugs. He was convicted. He subsequently appealed. He argued that he could not be found guilty in law of an impossible offence because the substance was not a drug. It was held that it was immaterial that Shivpuri did not know the exact nature of the substance in his possession, but nevertheless believed he was dealing with controlled drugs the importation of which was prohibited. The court further held, inter alia, that the accused intended to commit an offence and it was no defence that on the true facts, it would have been impossible to commit the actual offence. The Court of Appeal and House of Lords dismissed the appeal and upheld the conviction. In the instant case, the evidence suggests that Accused was doing business in narcotic drugs - cannabis. The evidence also suggests that Accused was selling some drugs and he did not have authority to do so. 16 A criminal case cannot be proved on a balance of the probabilities as stated by Ollennu JSC in the Supreme Court judgment in the case of Oteng v. The State [1966] GLR 352 @ 354, SC as: "One significant respect in which our criminal law differs from our civil law is that, while in civil law a plaintiff may win on a balance of probabilities, in a criminal case the prosecution cannot obtain conviction upon mere probabilities." Section 13(1) of NRCDC 323 states: 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 a reasonable doubt. See also Fenuku v John - Teye [2001-2002] SCGLR 985 As regards Count One(1), section 147 of Act 29 has the caption: "Explanation as to Dishonest Receiving." Section 147(1) states: A person is guilty of dishonestly receiving any property which he knows to have been obtained or appropriated by any crime, if he receives, buys, or in any manner assists in the disposal of such property otherwise than with a purpose to restore it to the owner. Section 148(1) of Act 29 states: Where a person is charged with dishonest 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 may be presumed to have been stolen or unlawfully obtained and the accused may be presumed guilty of dishonest receiving in the absence of evidence to the contrary. From the explanation of Accused as regards the phone, from the dock, I hold that he is guilty of dishonest receiving in accordance with section 148 of Act 29 supra. I also pronounce 17 Accused guilty on Counts Three(3) and Four(4) as well. I hereby convict him on Counts One(1), Three(3) and Four(4) as well. In sentencing Accused, I consider that he appeared remorseful for his action on Count Two(2). Also he did not stretch the matter for state resources to be used to test a substance when he very well knew that it was that substance he was in possession of, though he sought to put prosecution to strict proof as to whether he was doing such businesses as referred to in Counts Three(4) and Four(4). I have decided to give him a sentence a little more than the minimum as regards Count Three(3). However, considering the period Accused has been in lawful custody, I will give him the minimum

sentence on Count Three. Article 14(6) of the Constitution states: Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment. Accused is hereby sentenced to ten(10)years imprisonment on Count Three(3) in hard labour. Accused is sentenced to one(1) year imprisonment on Count Four(4) in hard labour. Accused is sentenced to six(6) months imprisonment on Count One(1) in hard labour. As regards Count Two(2), the law talks about use or trafficking. Though Accused was in possession for business purposes for which he has been convicted and sentenced supra, the evidence shows that he used the substance. Therefore, I convict him for use of the substance and sentence him accordingly. Accused is sentenced to pay a fine of two hundred(200) penalty units on Count Two(2) and in default serve three(3) months imprisonment. The sentences are to run concurrently which means Accused is to serve ten(10)years imprisonment. 18 HH YAW POKU ACHAMPONG (SGD)
CIRCUIT COURT JUDGE 17/01/2023 19

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