

# SKILLS BASED ASSESSMENT OF CREDIBILITY

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One of the prime duties of a trial judge entails the evaluation of evidence to arrive at a determination between two rival pieces of evidence. Such evaluation quite often involves a determination of the credibility of witnesses and other pieces of evidence. This presentation seeks to highlight some important factors to be borne in mind in arriving at a determination of the truth or otherwise of a witness's testimony in accordance with law. Section 1 (i) of NRCD 323 provides that:

*"All questions of law including but not limited to the admissibility of evidence and the construction of this Decree, are to be decided by the Court". (Judge).*

Issues of law including admissibility are ascertained by following the most important procedural steps as laid down by the Decree. For instance who is the right person to begin advancing evidence in a trial situation? In a criminal trial the accused/suspect is presumed innocent until he is proved guilty of the crime charged. In a criminal trial therefore it is the prosecution that sets the trial in motion by beginning to call its witnesses in proof of the charges. There is an exception in strict liability cases where the accused is presumed liable upon being in possession of narcotic drugs and it is for him to show, for instance, that he held it under license or for research or any authorized usage. Even in such instance i.e. the strict liability case, it is the prosecution that sets the ball rolling by tendering evidence to show that the accused was in possession of narcotic drugs.

In a Civil action the right to begin is determined on the principle of *"he who asserts a proposition must attempt to prove it and he who denies need not attempt to disprove it"*. Sometimes the burden of proof and the right to begin

is put on the defendant by statute - e.g the case of GHPA vs. NOVA  
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Therefore any decision as to who should begin first depends on substantive law or the type of pleadings filed before the court.

### **ADMISSIBILITY OF EVIDENCE**

Quite often the admissibility of evidence is dependent upon the existence or non-existence of some preliminary facts. Preliminary facts refer to any facts upon which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness etc – See Section 3(1) of NRCD 323.

Preliminary facts refer to questions whether or not a person is qualified or not to give evidence - Whether he has appropriate knowledge about the subject matter - S.60. Whether he is insane to the extent of being unable to give evidence on the issue - See S.59.

2. If qualified to testify, whether the evidence to be given should be admitted or whether a confession is voluntary or not; or whether it is hearsay etc.

3. If a person is qualified to testify, whether there is some privilege which renders the testimony inadmissible, such as communication between a priest and communicant, - S104 lawyer/client or rule against self incrimination – S.96.

### **DISCHARGE OF EVIDENCE BURDEN**

It is the duty of the Judge/Magistrate to decide whether the plaintiff / prosecutor or party having the right to begin has adduced sufficient evidence to make it necessary for the defendant accused to be called upon to provide evidence in rebuttal/provide his defence. In essence it is the duty of the judge/magistrate to rule whether a prima facie case has been made or at the end of the trial whether the necessary burdens have been discharged. Section

2 (1) places upon the jury the burden of determining all questions of fact. Section 2(3) states that all questions of facts shall be decided by the court, where there is no jury.

In evaluating the evidential burdens it is important to state that proof of crime in any civil or criminal action requires proof beyond reasonable doubt (Section 13(1) of NRCD 323). In essence, the burden of the prosecution in a criminal trial is to lead evidence that proves the guilt of the accused beyond reasonable doubt. See S. 11(2) of NRCD 323. On the other hand, 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 provide sufficient evidence so that a reasonable mind could have a reasonable doubt – See S.11(3) of NRCD 323.

In civil action the required standard of proof is on preponderance of probabilities- See S.12 of NRCD 323.

### **WHAT IS REASONABLE DOUBT**

Reasonable doubt has been defined as the following:

- (i) It is not a doubt based upon sympathy or prejudice: it is rather based upon reason and common sense. It is logically connected to the evidence or absence of evidence.
- (ii) It does not involve proof of an absolute certainty; it is not proof beyond any doubt nor is it imaginary or frivolous.
- (iii) More is required than proof that the accused is *probably* guilty – a judge or jury who concludes only that the accused is probably guilty must acquit.
- (iv) Proof beyond reasonable doubt is closer to absolute certainty than it is to probable guilt.
- (v) Whether there is reasonable doubt must normally be decided on the basis of all the evidence.

- (vi) But if the accused chooses to testify, the principle of proof beyond reasonable doubt requires a special instruction as enunciated in the case of **Lutterodt vs. COP (1963) 2 GLR 429-440** as follows:
- (a) First if you believe the evidence of the accused you must acquit.
  - (b) Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
  - (c) Third, even if you are not left in doubt by the evidence of the accused you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

### **TOOLS FOR ASSESSING CREDIBILITY**

- (1) Relevancy – Acceptance of evidence on any group of facts to establish the facts in issue or any related fact depends essentially on its relevance to the facts in issue. S. 51 (3) of NRCD 323 "*No evidence is admissible except relevant evidence.*" S. 51 (1) defines relevant evidence.
- (2) Analysis of the testimonial factors (Sincerity, Opportunity to observe, ability to perceive, use of language etc).
- (3) Prior statements (consistent or inconsistent)
- (4) Independent evidence confirming or contradicting the witness – See S.7 of NRCD 323
- (5) Demeanour

### **CREDIBILITY CONTEST**

- The Complainant testifies
- The Complainant's Witnesses testify
- The accused testifies and denies the complainant's allegation.
- The accused's witnesses also testify.

## **THE STANDARD OF PROOF**

- The prosecution must prove its case – i.e. prove the elements of the offence and disprove any available defence – beyond a reasonable doubt.
- In general, the prosecution is not required to prove any particular fact (apart from the elements) beyond a reasonable doubt.

## **REASONS**

- Reasons for judgment show the judge's path from the evidence to the verdict.
- Similarly, the jury charge shows legally permissible paths from the evidence to a verdict.
- In credibility contest where the accused is found guilty the trial judge must provide reasons explaining why he or she found the complainant credible and the accused not credible such that guilt is established beyond a reasonable doubt.
- The reasons explain the outcome to the parties and to the public, and provide a basis for appellate review.

## **WHAT DO THE CASES TELL US?**

- Six "dos and don'ts" from the case law concerning the assessment of credibility and the application of the burden of proof in credibility contests.

### **1. Summarizing the evidence**

- Summarize the evidence accurately.
- Do not misapprehend the evidence.

### **2. Inconsistencies and weaknesses**

- Consider inconsistencies and weaknesses in the complainant's evidence, including:
  - **internal inconsistencies,**

- **prior inconsistent statements, and**
- **Inconsistencies between complainant’s testimony and testimony of other prosecution witnesses.**
- If the complainant’s testimony was accepted notwithstanding these inconsistencies and weaknesses, explain why.
- Do not ignore inconsistencies and weaknesses in the complainant’s evidence.

### **3. Independent evidence**

- Look for independent evidence that confirms or contradicts the complainant’s testimony – See S.7 of NRCDC 323.
- The independent evidence may in proper circumstances be from other independent evidence that requires corroboration- See S.7 of NRCDC 323; See also Banahene vs Adinkra & Ors (1976) 1 GLR 346
- Unless otherwise provided by the Evidence Decree or any other law, corroboration of admitted evidence is not necessary to sustain any finding of fact or any verdict.
- Do not ignore the absence of independent evidence.
- Do not overlook ways in which the prosecution’s evidence can support the accused’s case, or vice versa.

### **4. Inherent implausibility**

- Consider whether the complainant’s and the accused’s testimony is inherently probable or improbable, but...
- Do not rely on false or frail assumptions about human behaviour.

### **5. Demeanour**

- In making credibility determinations, it is still permissible to rely on the demeanour of a witness, (See S.80 (2) of NRCDC 323 - “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, etc.  
but...

- Do not rely exclusively or excessively on demeanour.
- Do not reverse the burden of proof by e.g. requiring the accused to raise a reasonable doubt or stating that the accused is guilty because the complainant is credible.
- . Do not provide "conclusory and generic" reasons for rejecting the accused's evidence