IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 28TH OCTOBER 2022

CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B6/11/2021

THE REPUBLIC

VS

SAMPSON ARMAH alias FIIFI

ACCUSED PERSON PRESENT

SERGEANT PRINCE ADU AMOAKO FOR PROSECUTION, PRESENT

JUDGMENT

Defilement is defined as the natural or unnatural carnal knowledge of any child under sixteen years of age. See section 101(1) the *Criminal Offences Act*, 1960(Act 29).

Such a law has been enacted to keep in check people who are not *doli incapax* and who misled by the concupiscent desire in them cannot be abstentious sexually in relation to children who are less than sixteen (16) years old.

The man Sampson Armah herein who is also known as Fiifi was accused in that respect and he was charged as follows:

> STATEMENT OF OFFENCE
>
> DEFILEMENT OF A CHILD UNDER SIXTEEN (16) YEARS OF AGE; CONTRARY TO SECTION 101(2) OF THE CRIMINAL OFFENCES ACT, 1960(ACT 29)
>
> PARTICULARS OF OFFENCE
>
> SAMPSON ARMAH a.k.a. FIIFI; GALAMSEYER: For that you on the 28th day of January 2021 at about 03:00pm at a galamsey site near Denkyira Gyaman in the Central Circuit and within the jurisdiction of this Court, did unlawfully carnally know Sarah Manu a.k.a. Yaa Akyaa, aged ten (10) years.

Section 101(2) of Act 29 states:

> *Whoever naturally or unnaturally carnally knows any child under sixteen years of age, whether with or without his or her consent commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than seven years and not more than twenty-five years.*

In *Commissioner of Police v. Isaac Antwi* [1961] GLR 408 SC, Korsah CJ stated that:

> *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.

Section 10(1) of the *Evidence Act*, 1975(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 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].

The prosecution called six (6) witnesses. The said victim testified as the second prosecution witness (PW2) and her mother testified as the first prosecution witness (PW1). Two brothers of the victim testified as third prosecution witness (PW3) and fourth prosecution witness (PW4). A sister of PW2 testified as the fifth prosecution witness (PW5) and the investigator testified as the sixth prosecution witness (PW6).

For the sake of clarity, I produce verbatim the witness statement of PW2. Here it is:

“

1. My name is Sarah Manu aka Yaa Achia.
2. I am a pupil and live at Denkyira Gyaman with my mother Adwoa Fordwour and my siblings. I am 10years old.
3. I know the accused person.
4. On the 28th day of January 2021 after the close of school, Jehovah Mensah, Kwaku Mensah and I went to a galamsey (small scale mining) site to look for metal scraps.
5. At the site, we came across the accused person and he questioned us as to what we wanted and we told him that we were looking for metal scraps. Then he directed Jehovah Mensah and Kwaku Mensah to an area where they could get some of the metal scraps but he asked me to stay with him.
6. Some few minutes later after their departure, I called them and they responded and I decided to go and join them.
7. At that moment, the accused held me, and covered my mouth with his hand and placed me on the ground and flirted me.
8. Because he held onto my mouth, I could not shout for help. He later left me and I saw some whitish fluid coming from my vagina.
9. The accused gave me GH₵5.00 and opted to flirt me again and I returned the money to him. Then he warned me not to tell my mother or any other person about what he had done to me.
10. I later joined Jehovah Mensah and Kwaku Mensah crying. They questioned me as to what had happened to me but I did not tell them.
11. When we returned home, Jehovah Mensah narrated to my elder sister Aku that I cried when we went to search for metal scraps.

12. Aku asked me of what happened to me and I told her that the accused had sexual intercourse with me.
13. Aku informed my mother about it when she returned home.
14. I experienced some pains when he was flirting me and after, but I am not feeling any pains in my vagina now."

The word "flirt" is defined in *Oxford Advanced Learner's Dictionary*, Ninth edition 2015, as:

> "to behave towards somebody as if you find them sexually attractive without seriously wanting to have a relationship with them"

Google gives the following as the meaning of the word "flirt":

> "behave as though sexually attracted to someone, but playfully rather than with serious intentions."

Also, on Google one may find the following as definition of "flirt" in *Cambridge Dictionary*:

> "to behave as if sexually attracted to someone, although not seriously"

Collins Dictionary on google gives the following as meaning of the said word:"

> "If you flirt with someone, you behave as if you are sexually attracted to them, in a playful or not very serious way."

The following is the set of facts prosecution attached to charge sheet in support of the charge herein:

> "The complainant Adwoa Fordwour is a farmer and lives at Denkyira Gyaman. The accused Sampson Armah a.k.a. Fiifi is a galamseyer(small-scale miner) and also lives at Denkira Gyaman. The victim Sarah Manu a.k.a Yaa Akyaa aged 10years is School Pupil and lives with the complainant who is her biological mother at Denkyira Gyaman. On

28th day of January 2021 during the afternoon section[sic] and after the close of school, the victim accompanied by 2 of her siblings by names: Thomas Kwaku Mensah aged 13years and Jehovah Mensah aged 12years went to a galamsey site located near Denkyira Gyaman to search for metal scraps. At about 3:00pm on same day, the accused appeared on them and questioned them as to what they wanted at the site and they replied that they were searching for metal scraps. The accused then directed the 2 boys to a far location measuring about 150meters away, where they could allegedly find some of the metal scraps and asked the victim to stay back with him. Few minutes after their departure, the accused held and covered the mouth of the victim with his hand placed her on the ground and forcibly had sexual intercourse with her. After the act, he gave her GH¢5.00 and warned her not to tell her mother or anybody about what had happened. He later wanted to again have sexual intercourse with her. She refused and returned the money to him and ran towards the direction of his[sic] brothers while crying. She met the brothers who did not find a single metal scrap at that location and were returning to where they left her. The brothers questioned her as to why she was crying but she could not readily tell them the reason. Therefore, they returned home and the brothers informed their elder sister called Aku Joyce about what transpired. Through the persuasions of Aku Joyce, the victim revealed that the accused had sexual intercourse with her at the site. The sister rang and informed the complainant who had then travelled about the incident on phone. The complainant returned home and together with the victim called at the Ayanfuri Police station on 30/01/21 and lodged a case with the Police. Police medical report form issued in respect of the victim was given to the complainant to send her to hospital for medical examination, treatment and endorsement of the medical form. She returned the medical report form duly endorsed by a medical officer. On 02/02/21 the accused was arrested and after thorough investigations into the case, he was charged with the offence as stated in the charge sheet."

PW1, PW3, PW4, PW5 and of course PW6 did not testify to seeing the supposed sexual intercourse.

The report on the medical examination Prosecution say was conducted on PW2 as tendered in evidence by PW6 and marked Exhibit C is as follows:

> "The aforementioned patient was sexually assaulted {Defiled}[sic] sustaining visible erythematous lesion around the vulva and anterior vaginal wall with loss of hymenal integrity. Absence of fresh blood and seminal fluid on vaginal inspection.
> Vitals are stable with satisfactory general conditions..."

It has been signed by Dr Opoku Agyemang of Pentecost Hospital, Ayanfuri.

PW6 also gave the following evidence as captured in paragraphs 10, 11, 12 and 13 of his witness statement:

> "10. In the course of investigations, I obtained the child health records of the victim which has her date of birth as 17th June 2010. Therefore, the victim was 10 years old when she was defiled.
> 11. On 5th day of February 2021, I visited the scene of crime together with complainant, the victim and the accused person.
> 12. The crime scene is a galamsey(small-scale mining) site located near Denkyira Gyaman.
> 13. It was revealed at the scene that the accused met the victim, witnesses Jehovah Mensah and Thomas Kwaku Mensah at a particular location at the site. He then directed the two witnesses to a different location measuring about 160meters[emphasis supplied] from where they were. After their departure, the accused had sexual

intercourse with the victim. It was observed that the distance between the two locations was busy. Photographs of the scene were taken."

It must be said that no photograph of the scene was tendered in evidence. For PW6 to say that the place between where the alleged sexual intercourse took place and where Accused allegedly directed the said siblings of PW2 to, was busy – does that suggest that there were people around who could have or might have seen or heard anything about any sexual intercourse of that sort? It is interesting to note that the police stated in the facts attached to the charge sheet that the distance between the said two places was 150metres but in the evidence-in-chief of PW6, he stated that the said distance was 160metres. Why the difference? - PW6 did not tell the court. We may take the latter distance as it came later and also it was stated on oath. But criminal cases are proved beyond reasonable doubt and so such issues such as as regards distance should be straight forward and clear, without contradictions.

PW6 tendered in evidence what he said was the child health records of PW2 – Exhibit D. On Exhibit D, the name for the child as regards the said health records is Sarah Achia. But the name given of the victim herein in the charge sheet and the facts attached to it is Sarah Manu a.k.a Yaa Akyaa and in the witness statement of PW2, the name given is Sarah Manu a.k.a. Yaa Achia. This brings about an avalanche of confusion about the name of the victim. Granted that "Achia" is the proper name, the court cannot simply assume that because the name of PW2 has been given in her evidence-in-chief as Sarah Manu a.k.a. Yaa Achia, therefore the "Sarah Achia" stated on Exhibit D refers to PW2; it is incumbent upon Prosecution to establish that.

Accused, when he testified, stated that he was into small-scale mining sometime past and got to know PW2 through her brother who he did the small-scale mining with. According to Accused, on or about 28th January 2021 at about 03:00pm, he was at a galamsey site. His

machine called c*hanfa* had developed a fault and he was attending to it and PW2, PW3 and PW4 came there with sacs in their hands. Accused asked them what they were doing there and they said they were looking for scraps. Accused then told them not to pick any of the metals at the place were he was because someone had dismantled the engine of the *chanfa* and that that person would come back and reassemble the said engine and that if that person returned and did not find the parts of the engine he had left at the site that person would accuse him(Accused) of having taken them away. Accused further told PW2 and her said brothers to go a little further way from where he(Accused) was then and that there were some loose metals on the ground which the owners had abandoned and had no use of them upon vacating that site. There and then, the two brothers of PW2 quickly ran ahead of PW2 and in less than five(5) minutes, PW2 also joined them at that place.

The following is all the cross-examination that Prosecution did of Accused:

Q. I am putting it to you that you had sexual intercourse with PW2.

A. It is not true.

Q. I put it to you that you intentionally directed the siblings of PW2 to go some other direction so that you could have sexual intercourse with PW2.

A. It is not true. I directed all three i.e. PW2 and her brothers to a particular place where they could find some scraps. But they were competing with each other picking the scraps and so PW2's brothers ran faster and went ahead of PW2 towards the place I directed them to, to pick more scraps than the other.

Q. I am putting it to you that PW2 did not join her brothers as you want the court to believe.

A. PW2 left where I was after I had directed them and followed her siblings but as to whether PW2 joined her siblings at where I directed them or met them on her way, I cannot tell because there was a bush between where I was and where I directed them and so I could not see them at where I directed them.

Prosecution left it at that and did not probe further.

In *Zabrama v. Segbedzi* [1991] 2 GLR 221 @ 246, Kpegah J.A. (as he then was) made the following statement:

> *… a person who makes an averment or assertion, which is denied by his opponent, has a burden to establish that his averment or assertion is true, and he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden.*

In the evidence-in-chief of Accused person, he stated that PW2 joined her brothers at where he directed them but under cross-examination, he stated that there was some bush and so he could not tell whether or not PW2 joined her brothers at that place or she met them on her way to that place. That creates some contradiction in Accused person's evidence. Be that as it may, that does not go to the root of the matter as regards determination as to whether Accused had sexual intercourse with PW2 and whether PW2 was less than sixteen(16) years of age at the time of the sexual intercourse.

In the investigation cautioned statement of Accused as tendered in evidence by PW6 and marked Exhibit A, Accused stated:

> "I am a Galamseyer and live at Denkyira Gyaman. I know Baafi who is related to Sarah Manu very well. We used to undertake galamsey together. It was through him I got to know Sarah Manu and her siblings but they are not close to me. On 27/01/21 at about 3:00pm, I was at a galamsey site called face 4 together with Atta and one other. At a point, I went to where our machine was located while Atta and the other were pulling an outer (rubber hoes[sic]) while there Sarah Manu and two young boys came there.

Sarah Manu was holding a sack in which they kept some metal scraps. I asked them why they were not in school but rather at the site. They replied that they were looking for metal scraps. I told them that there were no metal scraps at where I was and so I directed them to a location where they could find some. The two boys quickly run[sic] towards that location and Sarah Manu followed them but the boys outrun[sic] her. Later, l heard Sarah Manu shouted[sic] and called[sic] them. They waited for her and she joined them. About 40 minutes later, I decided to pass through another galamsey site called face 2 to my home. When I got to face 2 the 3 of them were there still looking for the scraps. I said to them that, "have you not gone home yet?" and they laughed. When I met them the first time I touched the heads of the 2 boys but I never touched Sarah Manu. I did not have sexual intercourse with her as alleged."

It appears that Accused was generally consistent with his testimony both at the investigation stage and at the trial stage. In *Ntiri* v. *Essien* [2001-2002] SCGLR 451, it was held that the trial judge has the duty to ascertain credibility of a witness. The trial court in discharging that duty may be guided by section 80 of the *Evidence Act* which 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.

(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 *Commissioner of Police v. Isaac Antwi*[supra] Korsah CJ stated, whilst 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.*

In *Oteng v The State*[1966] GLR 352@ 354, SC, Ollennu JSC stated:

> *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 criminal case the prosecution cannot obtain conviction upon mere probabilities.*

This principle found space in the *Evidence Act* of 1975 i.e. NRCD 323 in section 13(1), to wit:

> *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

PW3. in concluding his evidence-in-chief stated the following as in paragraph 7 through paragraph 10 of his witness statement:

"7. The accused directed Thomas Kwaku Mensah and I to a different location where he alleged we could find some of the metal scraps while he stayed with Sarah Manu.

8. When we got there we could not find any metal scrap. So, we decided to return.

9. On our way, we met Sarah Manu running towards us crying. She did not mind us when we demanded to know why she was crying.

10. The three of us returned home and we informed our sister Aku Joyce about her cry[sic]. She asked Sarah Manu in our presence why she cried and she said that accused flirted her."

A question arises as to what is meant by "flirt" in that context. See the meaning of "flirt" supra.

PW4 on his part stated the following in concluding his evidence-in-chief:

"8. Then the accused directed us to a location where we could get some of the metal scraps. However, he made Sarah Manu to stay back with him.

9. Jehovah Mensah and I went but we could not find a single metal scrap at where he directed us to after a thorough search. So, we decided to return.

10. While returning, we met Sarah Manu crying. We questioned her as to why she was crying but she did not tell us.

11. We returned home and I told my sister Aku about her cry[sic]. Aku questioned her in our presence as to why she cried and she said that the accused had sexual intercourse with her."

PW5 claimed that PW2 told her that Accused had sexual intercourse with her(PW2). PW5 then informed PW1 about that and PW1 asked PW5 to examine PW2's vagina. PW5 did so and saw whitish fluid in PW2's vagina. PW2 also stated that after Accused had "flirted" her, she saw whitish fluid in her vagina.

Another question is: what is that whitish fluid? It is worth knowing the answer in making a determination of this case. Yet another question is: does PW2 appreciate what sexual

intercourse is? At least a description of what happened between her and Accused when she and Accused were allegedly alone might have suggested what culminated in that whitish fluid in PW2's vagina.

As I indicated supra, in a case of defilement, the key issues are whether there was sexual intercourse between accused and the victim and whether the victim was less than sixteen(16) years of age at the time of the sexual intercourse. When it comes to proof of sexual intercourse reference should be made to section 99 of Act 29 which has the caption "Evidence of Carnal Knowledge" and it states:

> *Whenever, upon the trial of any person for an offence punishable under this Code, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge shall be deemed complete upon proof of the least degree of penetration.*

It took about three days before the victim was examined by a doctor. Therefore, it is not clear as to whatever findings upon vaginal examination is linked to whatever sexual activity that might have occurred on 27th January 2021, as the report is silent on that. See the medical report supra. Could it also be said that some events as regards PW2's vagina might have caused that. The name of the game is evidence and the said whitish fluid would have provided some material clue as to claim of prosecution, if it was tested and it was proved to be linked to Accused. Even with that there will still be the need to establish that it came about as a result of sexual intercourse or carnal knowledge within the context of the law – that the vagina of PW2 was penetrated at least by the least degree by a penis and that it was the penis of Accused that did the penetration.

Section 14 of NRCD 323 allocates the Burden of Persuasion as:

> *Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.*

Section 15(1) of NRCD 323 states:

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

Section 17 of NRCD 323 allocates the Burden of Producing Evidence as:

> *(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof.*
> *(2) Except as otherwise provided by law, the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.*

Section 22 of NRCD 323 states:

> *In a criminal action a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond a reasonable doubt, and thereupon, in the case of a rebuttable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact.*

In Woolmington v. Director of Public Prosecutions, Lord Sankey stated:

> *Throughout the web of the English Criminal law, the golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt…if at the end of, and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner… the prosecution has not made out the case and the prisoner is entitled to an acquittal. 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.*

This position of Lord Sankey was referred to by Dotse JSC in *Dexter Johnson v. The Republic* [2011] 2 SCGLR 601 @ 663. I also find that legal postulation key in criminal cases such as this.

I hold that Prosecution has failed to establish the guilt of Accused person.
Accused person is hereby acquitted and discharged.

(SGD)
H/H YAW POKU ACHAMPONG
CIRCUIT COURT JUDGE
28/10/2022