IN THE CIRCUIT COURT "A", TEMA, HELD ON TUESDAY, THE 29TH DAY OF NOVEMBER, 2022 BEFORE HER HONOUR AGNES OPOKU-BARNIEH, CIRCUIT COURT JUDGE

SUIT NO: D10/45/20

THE REPUBLIC

VRS:

OTIBU TETTEH

ACCUSED PERSON **PRESENT**

A.S.P STELLA NASUMONG FOR PROSECUTION **PRESENT**

PRINCE KWEKU HODO ESQ. FOR THE ACCUSED PERSON PRESENT

JUDGMENT

FACTS

The accused person was arraigned before the court on a charge of defilement contrary to s**ection 101(1)** of the Criminal Offences Act 1960(Act 29).

The brief facts presented by the prosecution are that the complainant is the mother of the victim aged 14 years at the time of the alleged incident and an operator of a drinking bar. The accused person is also a driver and they all live at Taboo-line Ashaiman.

The prosecution alleged that on 1st August, 2020, at about 4:00pm, the complainant asked the victim to attend to the spot with her younger brother by name Isaac Mawulepke. According to the prosecution, the accused person

went to the drinking bar and requested to have sexual intercourse with the victim and promised to give her GH₵10, which the victim refused. The accused person then bought local gin *"Akpeteshie"* GH₵1 from the victim. Thereafter, the accused person pounced on the victim, pushed her unto a blanket on the floor, removed her pants, inserted his penis into her vagina and had sexual intercourse with her in the full glare of her younger.

The prosecution further claims that the victim and her brother shouted for help but no one came to her rescue. After the act, the accused person left the victim to her fate and the victim came out to raise an alarm but the accused person took to his heels. She called the complainant on phone and narrated her ordeal to her. The same day, the accused person was arrested and handed over to the Ashaiman District Police where a report was made on 5th August, 2020 and the case was transferred to the Domestic Violence and Victim Support Unit. A police medical form was issued for the victim to attend hospital, which was returned duly endorsed. After investigations, the accused person was charged and arraigned before the court.

THE PLEA

The accused person who was self-represented at the time his plea was taken pleaded not guilty to the charge after it had been read and explained to him in the Ewe language. The accused person having pleaded not guilty put the entire facts of the prosecution in issue and thereafter the prosecution assumed the burden to prove the guilt of the accused person beyond reasonable doubt.

BURDEN OF PROOF

A fundamental principle of our criminal justice system is that a person accused of a crime is presumed innocent until he has pleaded guilty or proven guilty. It is trite learning that in criminal cases, the prosecution bears the burden to prove the guilt of the accused person beyond reasonable doubt. See **sections 11(2), 13(1) and 15** of the Evidence Act, 1975, (NRCD 323). In the case of **Gligah & Attiso v. The Republic** [2010] SCGLR 870, the Supreme Court held in its holding 1 that:

"Under article 19 (2) (c) of the 1992 constitution, everyone charged with a criminal offence was presumed innocent until the contrary is proved. In other words, whenever an accused person was arraigned before any court in any criminal trial, it was the duty of the prosecution to prove the essential ingredients of the offence charged against the accused person beyond reasonable doubt. The burden of proof was therefore on the prosecution and it was only after a prima facie case had been established by the prosecution that the accused person would be called upon to give his side of the story."

The burden on the accused person, when called upon to enter his defence, is to raise a reasonable doubt in the case of the prosecution. The standard of proof for the defence is proof on a balance of probabilities. In the case of **Osae v. The Republic** [1980] GLR, 446, the court held in its holding 2 that: *"although it was settled law that where the law cast the onus of proof on the accused, the burden on him was lighter than on the prosecutor, and the standard of proof required was the balance of probability, if at any time of the trial, the accused voluntarily assumed the onus of proving his defence or some facts as happened in this case, the standard he had to discharge was on a balance of probabilities."*

ANALYSIS

Here, the accused person is charged with defilement of a child under 16 years of age contrary to **section 101** of Act 29. The section provides as follows;

"(1) For the purposes of this Act, defilement is the natural or unnatural carnal knowledge of a child under sixteen years of age.

(2) A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without the consent of the child, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less that seven years and not more than twenty-five years."

Further, under **section 14 of Act 29**, a child under 16 years of age lacks the capacity to consent to sex. Thus, any consent to carnal or unnatural carnal knowledge is void and immaterial for purposes of proving a charge of defilement.

In the case of **Robert Gyamfi v. The Republic** (unreported), [Suit No. H2/02/19] delivered on 27th February, 2019, the Court of Appeal, Kumasi, per Dzamefe JA, stated the essential ingredients of the offence of defilement which the prosecution must prove to secure conviction as follows;

1. The alleged victim is less than sixteen years of age.

2. That a person has had natural or unnatural carnal knowledge of the victim.

3. That person is the appellant (accused person).

On the first ingredient of the charge, **the prosecution must prove that the victim is a child below the age 16 years.** The defence did not seriously challenge the age of the victim. To prove that the victim was aged below 16

years at the time of the incident, the prosecution tendered in evidence the Health Record Book of the victim issued by a government institution with birth registration *No. 654/06 06 30/6/06* showing that the victim was born on 11th December, 2005 meaning at the time of the alleged sexual assault on 1st July, 2020, she was 15 years. Thus, the prosecution proved the age of the alleged victim beyond reasonable doubt.

Secondly, **the prosecution ought to prove that someone had sexual intercourse with the child.** Section 99 of Act 29 states that "*where on a trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal or unnatural carnal knowledge is complete on proof of the least degree of penetration.*" In the case of **Gligah & Attiso v. The Republic** [2010] SCGLR 870, SC@ page 879, Dotse JSC defined carnal knowledge as:

"The penetration of a woman's vagina by a man's penis. It does not really matter how deep or however little the penis went into the vagina. So long as there was some penetration beyond what is known as brush work, penetration would be deemed to have occurred and carnal knowledge taken to have been completed."

It is instructive to note that the prosecution need not prove a discharge of spermatozoa into the vagina and the penetration need not necessarily lead to the tearing of the hymen to constitute carnal knowledge since the least degree of penetration suffices. To discharge their legal burden on this issue, the prosecution called four witnesses and tendered in evidence the endorsed police medical form as **Exhibit B.** The first prosecution witness the victim testified that she is 15 years old and lives at Odumasi with her sister and visited her mother at Ashaiman during the lockdown when schools were not

in session. According to her testimony, on 1st August, 2020 around 4:00pm, she was in the house when her mother sent for her to come and take care of her drinking spot whilst she goes home to bath. The victim testified that she was in the spot with her younger brother who was sick and was sleeping behind the counter when the accused person came to the bar and offered her GH₵10 to have sex with her, which she refused. According to her testimony, the accused person proceeded to buy akpeteshie worth One Ghana Cedi (GH₵1) and after taking the alcoholic drink, he rushed on her, pushed her down on a blanket, removed her pant and inserted his penis into her vagina and had sexual intercourse with her.

She and her brother shouted for help but no one came to her rescue. Based on that her younger brother who witnessed the incident ran out to seek help and the accused person bolted. She went to a nearby mobile money vendor to call her mother and narrated the incident to her. When her mother came and heard her ordeal, she informed the stationmaster at where the accused person worked and the accused person was brought to the bar. When her mother confronted the accused person he denied and threatened to curse her. The accused person was arrested and sent to the police station and a police medical form and she was sent to the Tema General Hospital where she was examined and treated.

PW2, the brother of the victim aged four years at the time corroborated the testimony of the victim that on the day of the alleged incident that he was sick and lying down in his mother's drinking bar when the accused person came to buy drink from his sister and pushed her on the blanket where he was sleeping. The accused person removed his sister's pant and laid on her and tweaked his waist on his sister. The accused person then told him he was going to buy biscuit for him but he ran away.

The third prosecution witness, the mother of the victim confirmed the account of PW1 and PW2 that PW1 called her with someone's phone and recounted her ordeal to her. According to her, the stationmaster and two other men brought the accused person to bar and when confronted, he denied having sexual intercourse with her and threatened to curse the victim. When she indicated her resolve to report the matter to the police, the accused person confessed to the commission of the offence. The accused person was then arrested and sent to the police station where a complaint was lodged. Subsequent to that, a police medical form was issued for her to send the victim to the Tema General Hospital where she was treated and discharged.

The fourth prosecution witness (PW4), the investigator also testified and tendered in evidence the police medical form admitted and marked as **Exhibit "B"**. From the medical form, the victim was seen a day after the alleged incident on 2nd August, 2020. The report further states:

"on vaginal examination there was a whitish offensive discharge. There was a breech in the hymen, which was bleeding, and a 1cm tear in the posterior vaginal wall, which was bleeding. The HIV and pregnancy test was negative. There was no spermatozoa seen on the high vaginal swap. The History and examination findings confirmed defilement."

On record, the medical officer was available in court on two occasions to be cross-examined on the report but the matter was adjourned at the instance of Counsel for the accused person. Several attempts by the prosecution to get the medical doctor to speak to the report proved futile due to transfer of the medical officer who examined the victim. In the case of **Godfred Ocansey v.**

The Republic (unreported), [Suit No. 26/200] delivered on 4th March, 2004, the Court of Appeal per Apaloo JA held that:

"The question of medical evidence and its "conclusiveness or inconclusiveness" ought not attract any arguments in this appeal. There are authorities and these are legion that say that expert opinion cannot determine the ultimate issue to be decided by the Court. Expert opinion only assists the Court and the Court is not at all bound by such opinion. "

From the evidence led by the prosecution witnesses, particularly the vivid account of the first and second prosecution witnesses, the findings in the medical report which corroborates the account of the prosecution witnesses that someone had sexual intercourse with the victim , I hold that the prosecution proved this ingredient of the charge beyond reasonable doubt.

Lastly, **the prosecution must prove that the accused person and no other person had sexual intercourse with the victim.** Here, the victim, the first prosecution was emphatic that the accused person after taking his alcohol had sexual intercourse with her. This is corroborated by PW2, the brother of the victim who at the time was four years old and saw the accused person on the victim having sexual intercourse with her. The accused person on his part testified that the complainant engaged him and his colleague drivers to offload akpeteshie on the date of the alleged incident. After offloading the akpeteshie, the other drivers left and he was there with the children of the complainant. The complainant gave them some of the akpeteshie and in addition he bought GH₵5 worth of akpeteshie. The complainant informed them that she was going to the house to bath.

The accused person further testified that later, the complainant confronted him that the younger brother of the victim had told her that he attempted to have sexual intercourse with the victim. He denied because he connected his friend to the complainant and they are currently in a relationship and the complainant knows very well that he has a girlfriend. According to him, prior to the incident, he was a bit drunk and could not drive his vehicle so he gave it to a friend to drive and later some men in the neighbourhood pounced on him that he had had sexual intercourse with the victim. He denied having sexual intercourse with the victim and stated that at the police station when his statement was taken, he denied the offence. According to him, his statement was not read over and explained to him.

Under cross-examination by the prosecution, the accused person admitted that he knows the complainant and the victim who live in the same vicinity. The accused person also admitted that on the day of the alleged incident; it was the victim who sold the drink to him and the younger brother of the victim was also present and was not sleeping but was sitting indicating that the child would have observed all that was happening. However, the accused person maintained that he did not have sexual intercourse with the victim.

The accused person in his caution statement *Exhibit "C"* given on 6th August, 2020, stated that he usually buys drinks from PW3's spot and on Saturday 1st August, 2020, he visited the said spot to buy akpeteshie. After drinking, he sat on one of their chairs and the victim came and sat on his lap. According to him, he was so drunk that all he could remember is that he held the victim's breast and left her after few minutes. He stated that he does not remember inserting his penis into the victim's vagina. The accused person in **Exhibit "E"**

given on 10th August, 2020, stated in the presence of an independent witness that it is true that he had sexual intercourse with the victim.

The caution statement of the accused person appears to raise the defence of intoxication though he stated that after taking the alcoholic drink, he held the breast of the victim but does not remember inserting his penis into her vagina. In **Ketsiawah v. The Republic** [1965] GLR 483, the court held that:

"The plea of intoxication, i.e. of insanity, being a defence, the onus of establishing it rests upon the defendant. That onus however is not a high one, evidence which shows reasonable probability is enough to discharge it. But bare evidence, without anything more, that intoxicating liquor was consumed, falls short of the standard of proof required, for consumption of intoxicating drink by itself need not result in the intoxication approximating to madness which the law requires to be established to sustain the defence."

From the evidence led by the prosecution witness and the fact that the victim's brother witnessed the accused person having sexual intercourse with the victim and gave a vivid account to corroborate the testimony of the victim. The fact that when the incident happened the accused person had consumed intoxicating liquor is not a defence. I find that it was the accused person and no other person who had sexual intercourse with the victim.

On the totality of the evidence led and the defence put up by the accused person, I hold that the accused person failed to raise a reasonable doubt in the case of the prosecution and that the prosecution proved its case beyond reasonable doubt that it was the accused person and no other person who had

sexual intercourse with the victim. Accordingly, I pronounce the accused person guilty of the offence and I accordingly convict him of same.

Sentencing

In view of the fact that the accused person had medical emergency in open court, sentencing deferred to enable the accused person to seek immediate medical attention.

(SGD)

H/H AGNES OPOKU-BARNIEH

(CIRCUIT COURT JUDGE)