

IN THE CIRCUIT COURT "A", TEMA, HELD ON TUESDAY, THE 14TH
DAY OF FEBRUARY, 2023, BEFORE HER HONOUR AGNES OPOKU-
BARNIEH, CIRCUIT COURT JUDGE

SUIT NO: D10/38/20

THE REPUBLIC

VRS:

DESMOND HAMILTON TAWIAH ALHASSAN

ACCUSED PERSON

PRESENT

C/INSP. BARNABAS NIFAANITENG HOLDING THE BRIEF OF C/INSP.

SUSANA AKPEERE FOR PROSECUTION

PRESENT

PRINCE KWEKU HODO, ESQ. FOR THE ACCUSED PERSON

ABSENT

JUDGMENT

FACTS:

The accused person was charged and arraigned before this court on a charge of defilement contrary to **section 101(2)** of the Criminal Offences Act, 1960 (Act 29).

The brief facts presented by the prosecution are that the Complainant Esther Chartey, is the mother of the alleged victim by name Princess Teikoko Dede Agbo aged 8 years at the time of the alleged incident. The prosecution alleges that the accused person aged 19 years at the time of the alleged incident, lives in the same house with the victim and her mother at Kordiabe, a suburb of

Dodowa. According to the prosecution, on 3rd July, 2020 at about 8:30am, the accused person sent the victim on an errand and thereafter took her into his room and forcibly had sexual intercourse with her. The victim's aunt, one Rebecca Mensah went in search of the victim and when she entered the accused person's room, she found the victim sitting beside the bed of the accused person crying. She brought her out of the room and handed her over to the complainant.

The prosecution further claims that on 4th July, 2020, the complainant detected changes in the victim and when she questioned her, the victim told her that the accused person lured her into his room, undressed her and forcibly had sexual intercourse with her. Armed with this information, the complainant lodged a complaint at the Doryumu Police Station on 5th July, 2020. Based on the complaint, the accused person was arrested by the Police and sent to the Dodowa Domestic Violence and Victim Support Unit (DOVVSU). The prosecution further states that during investigations, the accused person denied the offence in his caution statement. After investigation, he was charged with the offence of defilement and was arraigned before court.

THE PLEA

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

BURDEN OF PROOF

It is trite learning that in criminal cases, the burden is on the prosecution to prove the guilt of the accused person beyond reasonable doubt. See **Sections 11, 13, and 15** of the Evidence Act, 1975, (N.R.C.D. 323). In the case of **Banousin v. The Republic** [2015-2016] 2 SCGLR 1232 at page 1241, the Supreme Court held that:

“The burden the prosecution has to prove is the accused person’s guilt, and this is beyond reasonable doubt. This is the highest burden the law can impose; and it is in contra distinction to the burden a plaintiff has in a civil case, which is proof on a preponderance of probability of the evidence. What “beyond reasonable doubt” means is that, the prosecution must overcome all reasonable inferences favouring the innocence of the accused. Discharging this burden is a serious business and should not be taken lightly. The doubts that must be resolved in favour of the accused must be based on the evidence; in other words, the prosecution should not be called upon to disprove all imaginary explanations that established the innocence of the accused person.”

Thus, the burden is on the prosecution to prove the essential ingredients of the charge of defilement against the accused person beyond reasonable doubt. When the accused person is called to open his defence, all that is required of him is to raise a reasonable doubt in the case of the prosecution. The standard of proof for the defence of the accused person is on a preponderance of probabilities only, which is a lighter burden than what the law imposes on the prosecution. See the case of **Osae v. The Republic** [1980] GLR, 446.

ANALYSIS

Here, the accused person is charged with defilement contrary to **section 101(2)** of Act 29. **Section 101(2)** of Act 29, states as follows;

“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 than seven years and not more than twenty-five years.”

Defilement is defined under **section 101(1)** of Act 29 as *“the natural or unnatural carnal knowledge of a child under sixteen years of age.”*

In the case of **Asante (No.1) v. The Republic (No.1)** [2017-2020] I SCGLR 132, the Supreme Court, per Pwamang JSC, at page 143, identified the following ingredients of the charge of defilement which the prosecution must prove to secure conviction;

1. That the victim is under the age of sixteen;
2. Someone had sexual intercourse with her; and
3. That person is the accused;

It is noteworthy that **section 101(2)** does not make consent of the child an essential element of the offence of defilement. This is particularly so because under **section 14 of Act 29**, a child under 16 years of age lacks the capacity to consent to sex. Thus, any consent to natural or unnatural carnal knowledge is void and such a defence is not open to an accused person on a charge of defilement.

On the first ingredient of the offence, **the prosecution must prove the age of the victim as a person below the age of 16 years.** To support the case of the prosecution that the victim was aged below 16 years at the time of the alleged incident, the prosecution tendered in evidence **Exhibit "B"**, a copy of the Child Health Records of the victim which shows that she was born on 12th March, 2012. Meaning, at the time of the alleged incident on 3rd July, 2020, the victim was aged 8 years old. Throughout the proceedings, the age of the child was not seriously controverted. The court also observed the physical appearance of the child who was a class 1 pupil at the time of testifying in court and is satisfied as to her age as a person below the age of 16 years. I therefore hold that the prosecution proved the age of the victim as below 16 years beyond reasonable doubt.

On the second ingredient of the offence, **the prosecution must prove that someone carnally knew the victim.** 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."

To prove that someone had sexual intercourse with the victim, the prosecution called five witnesses. The first prosecution witness, the mother of

the victim testified that on 3rd July, 2020, at about 8:00am, the accused person who is a tenant in her house sent the victim on an errand and for three hours, the child had not returned. At about 11:30am, she sent one Rebecca Mensah(PW3) to search for the child in the accused person's room. Later, (PW3) returned with the victim with tears in the victim's eyes. When she enquired from her what the issue was, she refused to tell her. The following day, in the evening, she noticed that the victim could not walk properly. She and her sister sent the victim to Kordiabe Roman Hospital but it was late in the evening so they were asked to go home and return the following day. That same night, when the victim was further interrogated, she stated that the accused person lured her into his room and had sexual intercourse with her. The victim also told them that the accused person warned her not to tell anyone else she would die. Based on that, she went to Doryumu Police Station with the victim, reported the case and was issued with a police medical form to send the victim to the hospital for examination. She thereafter sent the victim to the Shai Osudoku District Hospital at Dodowa. The first prosecution witness, under cross-examination by the accused person, the following ensued;

Q: I put it to you that your daughter came to sleep in my room in the afternoon.

A: I am not aware. Maybe that time I was at work.

Q: Did you notice any sign of semen in her underwear or blood.

A: My Lord, we did not notice anything on the 1st day. The first day when we asked the victim, she said the accused used a wet towel to clean herself.

Q: I am putting it to you that per the doctor's report, the victim had laceration in her private part. To be honest to the court I have a big penis so even if I should use a wet towel to clean the child, there will be cuts as stated by the doctor.

A: My Lord, that day we did not notice but the following day.

Q: Tell the court whether you inspected the dress the victim wore on the day of the incident to find the semen or blood stains.

A: My Lord, the very day she came she had her bath and the victim always washes her underwear whenever she is going to bath. The next day after the doctor's examination, I also checked and there was a big opening near the vagina.

The second prosecution witness (PW2), the victim testified that the accused person is a tenant in her grandmother's house where they all live. According to the victim, on 3rd July, 2020 when she woke up in the morning, her grandmother told her to run errands for the accused person. When she went to the accused person, he asked her to fetch water into two gallons he had kept in his porch. She quickly did that and went back to her room to continue her household chores. Thereafter, the accused person asked her if she had eaten and she responded that she had not eaten. The accused person then forced her to drink tea he had prepared for her and further threatened to lock her up in the room if she refused to drink it and out of fear, she drank it.

Subsequently, the accused person asked her to remove her shorts which she refused. He then removed his pants and subsequently removed her shorts leaving them naked. He pushed her unto his bed and forcibly inserted his penis into her vagina. Whilst in pains, the accused person covered her mouth with his hands to prevent her from shouting. After the accused person had finished having sexual intercourse with her, she detected something like liquid coming out of her vagina which the accused person used a wet towel to clean her vagina and asked her to sit for the pains to subside. Within some

minutes, she overheard her aunt, PW3, calling out her name. The accused person quickly asked her to wear her shorts which she did and he further threatened her not to disclose it to anyone else she would die.

The second prosecution witness further testified that the third prosecution witness (PW3) entered the room, held her ear, and took her to her mother. After that, her mother gave her a knock on the forehead and warned her not to enter anybody's room again. In the evening of the same day, her mother took her to the hospital and also asked her about what happened to her and she told her that the accused person had sex with her and warned her not to tell anybody else she would die.

PW2 maintained under intense cross-examination that the accused person had sexual intercourse with her. Under cross-examination by the accused person, the following discourse took place.

Q: So at the time your aunt came, had you drunk the tea or you had not drunk it.

A: At the time my aunt came I had finished drinking the tea and you had finished putting your penis inside my vagina.

Q: Are you telling the court that when I asked you to remove your underwear you did not shout.

A: When I was shouting you covered my mouth with your palm.

Q: Are you telling the court at the time of the sexual intercourse, I covered your mouth?

A: You covered my mouth and put your penis in my vagina.

Q: Did you see blood when I was having sexual intercourse and did you feel pains.

A: I felt pains. I saw blood and when I was going home to tell my parents he refused that I should not go.

Q: Where did you see the blood? Was it in your pant or bed?

A: I saw the blood on the bed.

The third prosecution witness (PW3), the aunt of the alleged victim, testified that on 3rd July, 2020 at about 9am, whilst PW1 was searching for PW2, she asked her to check from the accused person's room if she was with him because the accused person had earlier sent the victim on an errand. When she entered the accused person's room, she met the victim in the room seated on the floor crying with the television on. She ordered the victim to come out of the room and held her ear and warned her not to enter anybody's room again to watch television. She quickly rushed her to the mother who also gave her a knock on the head and sounded a warning to her not to repeat that act. On the same day at about 8:30pm, the victim was served with supper but she refused to eat. Upon interrogation, the victim revealed that the accused person forcibly inserted his penis into her vagina and threatened her not to tell anyone or else she would die. The complainant then sent the victim to the Doryumu Police Station to lodge a formal complaint.

Under cross-examination by the accused person, the third prosecution witness confirmed the account of PW2 that when she entered the room of the accused person, he was alone with the victim in the room and the girlfriend of the accused person was not there. She further testified that the accused person sends the child on errands and refers to the child as his "*wife*".

The fourth prosecution witness, the investigator, testified that a case of defilement of an 8-year-old child was reported against the accused person which was referred to her for investigations. As part of her investigations, she

issued the complainant with a police medical form to send the victim to the hospital for examination which was returned duly endorsed stating among other things that *"the hymen was torn and eroded, inflamed, Violent Vaginal Penetrative Sexual Intercourse"*. She tendered in evidence the investigation caution statement of the accused person admitted and marked as **Exhibit "A"**, the charge statement of the accused person as **Exhibit "C"** and the medical report as **Exhibit "D"**. According to PW4, she visited the scene of the alleged crime with the accused person, PW1, PW2 and one PW/Inspector Hellen Ofosuhene where both the victim and the accused person pointed to the room of the accused person. According to her, the accused person's room is about 20 meters away from where PW1 lives with PW2. The scene was inspected and she observed a double bed mattress covered with bed sheet on the floor, a laptop and cooking utensils packed in one corner of the room and two big bags loaded with accused person's personal effect. The victim pointed to the mattress on the floor covered with bedsheet as where the accused person had sexual intercourse with her.

The 5th prosecution witness, Dr. Kennedy Brightson of the Shai-Osudoku District Hospital gave evidence and tendered in evidence the medical report admitted and marked as **Exhibit "D"**. PW5 in the medical report of the child stated that *"The hymen is torn and eroded, inflamed. There are tender bruises around the introitus. The introitus is widely opened and the vagina admits examining finger with pain"*. The report further concludes that *"violent vaginal penetrative sexual intercourse"*. The fifth prosecution witness under cross-examination by counsel for the accused person stated that although his examination and findings are suggestive of violent penetrative sex, he cannot emphatically state that it was the penis of the accused person that penetrated the vagina of the victim.

On the totality of the evidence led by the prosecution witnesses particularly the account of the second prosecution witness corroborated by the medical report, I find that someone had sexual intercourse with the victim within the intendment of section 99 of Act 29.

Lastly, **the prosecution ought to prove that it is the accused person and no other person who had sexual intercourse with the victim.** This is the most contentious issue. Whereas the prosecution maintains that it is the accused person and no other person who had sexual intercourse with the victim, the accused person from the day of his arrest and throughout the trial vehemently denied having sexual intercourse with the victim. From the evidence led by the prosecution, there is evidence of the accused person having sent the child on errands on the day in issue. It is also not denied that the accused person took the child to his room and prepared tea for her to drink. The third prosecution witness gave evidence on how she met the victim in the accused person's room with the accused person in shorts.

The accused person in his defence denied having sexual intercourse with the victim. According to him, the victim is someone he likes and his girlfriend has taken the victim as her own daughter. Further he states that the victim sometimes spends time with them in the house and spends the night with them. As a result, the victim's mother and their co-tenants all refer to the victim as his wife. On the day of the alleged incident, he took his girlfriend to her place of work and instructed the victim to fetch water for them. He returned home around 9:00am and the victim came to inform him that she had finished fetching the water. She thanked her and also asked her if she had

eaten but she responded that she had not eaten. He prepared tea for her to drink whilst he also ate kenkey. According to the accused person, whilst in the room alone with the victim, a co-tenant called Auntie came to the room with her laptop and was watching a movie on the laptop. The lady who is his next-door neighbour left to her room to get stew and PW3 came to call the victim out of the room. He waited with the said Auntie for the victim to come back to the room to take the tea but she never came back. The next day, the victim's mother informed him that "*my wife*", referring to the victim had refused to eat and when he asked her, she said she wanted to eat indomie and gave her GH¢20 in the presence of her mother. Later, the victim's grandmother accosted him with the allegation of defilement which he denied but was subsequently arrested.

Under cross-examination by the prosecution, the accused person testified that the allegation levelled against him is actuated by malice since the grandmother of the victim told him to leave his girlfriend for her to give him one of her daughters to marry. Also, the complaint is a ploy to extort an amount of GH¢8,000 which he had saved to purchase land which he made the grandmother of the child aware. According to him, after the complaint, the grandmother of the alleged victim called him to demand the amount of GH¢8,000 he had saved for the purchase of land.

The accused person in his investigation caution statement admitted and marked as **Exhibit "A"** and his charge statement admitted and marked as **Exhibit "C"**, stated that on the day of the alleged incident when he got home around 9:00am, he saw the victim and enquired from her if she was able to fetch the water as he had requested. He again stated that he prepared tea for

her to drink and whilst they were both taking their breakfast, the victim's aunt knocked at the door and called out the name of the victim who hurriedly went out. He denied having sexual intercourse with the victim.

The wife of the accused person testified as DW1 and maintained that the accused person is innocent of the charge against him. According to her testimony, the accused person has been picking and dropping her at work on his motorbike. On the day of the alleged incident, the accused person took her to work and returned home. When she got home in the evening with the accused person, everything looked normal in their bedroom. Subsequently, she was in the shop when she had information that the accused person had been arrested. She further testified to information her mother-in-law gave her concerning money the grandmother of the alleged victim demanded from the accused person to settle the case. This piece of evidence is clearly hearsay and the court will not rely on same since the mother-in-law was not called as a witness. Also, evidence of attempted settlement is inadmissible. In the case of **Logs & Lumber Ltd. v. Oppon** [1977] 2 GLR 263 CA holding 3 held that:

“Hearsay evidence was inadmissible per se and could not form the basis of a judgment, and if such inadmissible evidence was received with or without objection, it was the duty of the judge to reject it when giving judgement and if he had not done so, it would be rejected on appeal as it was the duty of the courts to arrive at their decision upon legal evidence only”

The accused person who states that he was not in the room alone with the alleged victim but was there too with a co-tenant failed to call this material witness in his defence to corroborate the account of the accused person that someone was in the room with them and to rule out the possibility of he

having had sexual intercourse with the child in the presence of that person. The accused person in his investigation caution statement and the charge statement which were made contemporaneous to the incident, did not disclose that he was in the room with the said co-tenant for the entire period that he was with the child.

Additionally, the evidence led by the prosecution proves the identity of the accused person beyond doubt since he lives in the same house with PW1 and PW2 and is well known to the child. In fact, from the evidence on record, the accused person and co-tenants unashamedly refer to this minor as the "*wife*" of the accused person. On the day in issue, the child was called to fetch water for the accused person and his girlfriend which she did. The evidence of the accused person that he was in the room with one co-tenant and the victim is unsubstantiated. It was in the room of the accused person that PW3 found the alleged victim watching television and crying. The child was consistent in her account of events of the day leading to the arrest of the accused person and stood firm under intense cross-examination by the accused person.

On the totality of the evidence led, I find that the accused person failed to raise a reasonable doubt in the case of the prosecution that it was some other person other than himself who had sexual intercourse with the victim. I therefore hold that the prosecution proved its case beyond reasonable doubt that the accused person had sexual intercourse with the victim aged 8 years at the time of the incident. I accordingly pronounce the accused person guilty of the charge of defilement and convict him of same.

Sentencing

In sentencing the accused person, the court takes into consideration his plea in mitigation, the fact that he is a first-time offender, the youthful age of the accused person and the fact that he is married with dependents. In accordance with **Article 14(6)** of the 1992 Constitution, time spent in custody is considered. The court also considers the age of the child at the time of the incident, that is 8 years and the likely impact on the general well-being of the child.

I therefore sentence the accused person to serve a term of imprisonment of ten (10) years in hard labour.

**H/H AGNES OPOKU-BARNIEH
(CIRCUIT COURT JUDGE)**