IN THE CIRCUIT COURT '5' HELD IN ACCRA ON MONDAY THE 6TH DAY OF NOVEMBER 2023 BEFORE HER HONOUR CHRISTINA EYIAH-DONKOR CANN (MRS.) CIRCUIT COURT JUDGE

CASE NO: D12/51/2022

THE REPUBLIC

VRS

FEDELIX KOGBE

JUDGMENT

INTRODUCTION

"The complainant Kwasi Addae is the father of the victim and the victim is a female child. They live together at Dome. The accused person is 31 years old Fedelix Kogbe, a former teacher of the victim.

On Saturday 7th December, 2019 at about 8 a.m., the complainant left the victim at home and went to town. The victim invited the accused person to her house to install a software on her laptop. The victim was home alone when the accused person visited her and they sat in her bedroom. After the accused person was done installing the software and some songs on her laptop, he kissed the victim and had sexual intercourse with her. The complainant returned home at about 11 a.m., and heard a male voice coming from the victim's room. He knocked on the door and when she opened, he realized that the victim was in a dress different from that which she was wearing when he left the house and this made him suspicious. He entered the victim's bedroom and saw a piece of tissue paper on the floor. He picked it up and sniffed it. It smelled like sperms. He searched the bedroom and found the accused person hiding in the victim's wardrobe naked. The complainant locked the accused person and the victim in the house and reported the incident to the police. The accused person was arrested and in his cautioned statement to the police, he claimed that he took off his shirt because the victim's bedroom was warm and that he only kissed the victim.

Investigations conducted revealed that the accused person had sexual intercourse with the victim who was 15 years at the time of the incident. It is based on these facts that the accused person has been arraigned for trial." It is upon the above facts as narrated by the prosecution that the accused person was on the 29th March, 2022 arraigned before this court and charged with the offence of defilement contrary to section 101 (2) of the Criminal Offences Act, 1960 (Act 29).

The accused person pleaded not guilty to the charge preferred against him. Therefore, the prosecution assumed the burden of proving the guilt of the accused person.

THE CHARGE

The charge preferred against the accused person and on the basis of which he stands trial in this instant case is as follow:

"***STATEMENT OF OFFENCE***

DEFILEMENT, *contrary to Section 101 (2) of the Criminal Offences Act, 1960 (Act 29)*

PARTICULARS OF OFFENCE

FEDELIX KOGBE*, on or about 7th December, 2019 at Accra in the Greater Accra region and within the jurisdiction of this Court, you had carnal knowledge of a female child aged 15 years."*

THE BURDEN ON THE PROSECUTION AND THE DEFENCE

In our criminal jurisprudence, it has always been the duty and obligation of the prosecution, from the outset of the trial, to prove and substantiate the charge preferred against the accused person to the satisfaction of the Court unless in a few exceptions. Under the Evidence Act, 1975 (NRCD 323), the burden of proof is divided into two parts: burden of persuasion or the legal burden and the evidential burden or the burden to produce evidence.

The burden of persuasion is provided for under section 10 (1) of the Evidence Act, 1975 (NRCD 323) as follow:

"10 (1) 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".

The burden of producing evidence is also provided under section 11(1) of the Evidence Act, 1975 (NRCD 323) thus:

"11 (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 in the issue".

Again, in criminal proceedings, what constitutes the facts in issue depends on any relevant presumptions and the allegations involved. In the present case for example, where the accused person has been charged with one count of defilement, the allegation may be that the accused person has naturally had carnal knowledge of the victim who is a child under sixteen years of age.

The ingredients of such a charge are that: the victim must be a child under sixteen years old, the victim must have been naturally or unnaturally carnally known and it must be the accused person who naturally or unnaturally carnally knew the victim.

Since the prosecution is asserting the above-mentioned facts constituting the ingredients of the offence of defilement, it is incumbent on it to establish that belief of the accused person's guilt in the mind of this Court to the requisite degree prescribed by law. In other words, the prosecution has the burden of persuasion to establish the guilt of the accused person.

When the prosecution has adduced the evidence to establish the essential ingredients of the offence of defilement which will cumulatively prove the guilt of the accused person of the charge of defilement preferred against him, the court at the end of the case of the prosecution will have to decide whether the prosecution has discharged the obligation on it to establish the requisite degree of belief in the mind of the court that the accused person is in fact and indeed guilty of the offence of defilement. Except in few instances, the measuring rod or the standard of proof for determining that the

evidence adduced by the prosecution has attained the requisite degree is provided under sections 10 (2) and 22 of the Evidence Act, 1975 (NRCD 232).

Sections 10 (2) and 22 of the Evidence Act, 1975 (NRCD 323) provide as follows:

"10 (2). 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 the preponderance of the probabilities or by proof beyond reasonable doubt".

22. 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".

If this Court decides that the prosecution has failed to prove each essential ingredient of the offence of defilement beyond reasonable doubt at the end of the prosecution's case, the accused person will have to be acquitted for he will be deemed to have "no case to answer". But if this Court decides that each essential ingredient has been proved beyond reasonable doubt, then the accused person will have to be called upon to put up his defence, because there will be an established presumption of guilt (*a prima facie* case) which he must rebut, if he does not want the presumption to stay, thus rendering him liable for a conviction. To use the language of section 11 (1) of the Evidence Act, 1975 (NRCD 323), the accused person will have on him, the burden of introducing sufficient evidence to avoid a ruling against him that he is guilty of the offence charged. In other words, he has the burden of producing evidence.

The apex court in the case of **Asante No (1) v The Republic [2017-2020] I SCGLR 143-144** explained the burden on the prosecution as follows: *"Our law is that when a person is charged with a criminal offence it shall be the duty of the prosecution to prove his guilt beyond reasonable doubt, meaning the prosecution has the burden to lead sufficient admissible evidence such that on an assessment of the totality of the evidence adduced in court, including that led by the accused person, the court would believe beyond a reasonable doubt that the*

offence has been committed and that it is the accused who committed it. Apart from specific cases of strict liability offences, the general rule is that throughout a criminal trial the burden of proving the guilt of the accused person remains with the prosecution. Therefore, though the accused person may testify and call witnesses to explain his side of the case where at the close of the case of the prosecution a prima facie case is made against him, he is generally not required by the law to prove anything. He is only to raise a reasonable doubt in the mind of the court as to the commission of the offence and his complicity in it except where he relies on a statutory or special defence. See ***Sections***

11(2) 13(1), 15(1) of the Evidence Act, 1975 (NRCD 323) *and* ***COP v Antwi***

[1961] GLR 408."

However, proof beyond a reasonable doubt does not mean beyond a shadow of doubt as was stated by Lord Denning in the case of **Miller vs. Minister of Pensions (1974) 2 ALL ER 372 AT 373** thus:

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice."

This dictum emphasizes that proof beyond reasonable doubt does not mean proof beyond every shadow of doubt or proof beyond every possibility.

Lord Justice of the King's Bench from 1822-1841, Charles Kendal Bushe also explained reasonable doubt thus:

"…the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as upon a calm view of all the whole evidence a rational understanding will suggest to an honest heart the conscientious hesitation of minds that are not influenced by party; preoccupied by prejudice or subdued by fear."

See also: **Osei v. The Republic [2002] 24 MLRG 203, CA**

Abodakpi v. The Republic [2008] 2 GMJ33

Republic v. Uyanwune [2001-2002] SCGLR 854

Dexter Johnson v. The Republic [2011] 2 SCGLR 601

Frimpong @ Iboman v. Republic [2012] 1 SCGLR 297

Again, it must be emphasized that the proof by the prosecution can be direct or indirect. It is direct when the accused person is caught in the act or have confessed to the commission of the crime. Thus, where the accused person was not seen committing the offence, his guilt can still be proved by inference from surrounding circumstances that indeed, he committed the said offence.

The above is the general law on the burden of proof on the prosecution as provided for in the Evidence Act, 1975 (NRCD 323).

When the prosecution has established a *prima facie* case against the accused person, the accused person assumes the burden of producing evidence. This burden as indicated is different from the burden of proving the issue, which is on the prosecution. The difference between the burden on the prosecution and the burden on the accused is mainly in the standard of proof. Whereas the prosecution has to prove the essentials of the crime to a standard beyond reasonable doubt, the accused only has the burden of adducing evidence to create a reasonable doubt in the mind of the court regarding the prosecution's case which is deemed *prima facie* to have been established beyond reasonable doubt. Once this doubt had been created, the accused will be considered as having discharged his burden of producing evidence to the appropriate standard of proof.

Having established the requisite burden that the prosecution ought to discharge and the burden on the accused person, it is very important to note that one fundamental legal principle pertaining to criminal trials in our jurisdiction as contained in Article 19 (2) (c) of the 1992 Constitution is that:

"19 (2) A person charged with a criminal offence shall-

(c) be presumed to be innocent until he is proven or has pleaded guilty."

The Supreme Court also held on the presumption of innocence in the case of **Okeke vs The Republic [2012] 2 SCGLR 1105 at 1122** *per Akuffo JSC* as follows:

"…the citizen too is entitled to protection against the state and our law is that a person accused of a crime is presumed innocent until his guilt is proved beyond reasonable doubt as distinct from fanciful doubt.''

An accused person therefore in a criminal trial or action, is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt, he is entitled to a verdict of not guilty.

Bosso vs The Republic (2009) SCGLR 470

SUMMARY OF EVIDENCE BY THE PROSECUTION

The prosecution called six (6) witnesses in support of its case. The case for the prosecution was presented mainly by the victim, Gertrude Addei as the second prosecution witness (PW2) and supported largely by the father of the victim Mr. Kwasi Addae as the first prosecution witness (PW1), Dr. Mrs. Klenam Dzefi-Tettey who conducted the age assessment of the victim as the third prosecution witness (PW3), Detective Inspector Edmund Mensah as the fourth prosecution witness (PW4), Dr. Fidelis Gligui, a Medical Practitioner at the Ghana Atomic Energy Commission Hospital who examined the victim shortly after the incident as the fifth prosecution witness (PW5) and Detective Police Woman Chief Inspector Faustina Muonah as the sixth prosecution witness (PW6).

The prosecution also tendered in evidence fifteen (15) exhibits.

PW1, KWASI ADDAE

PW1 stated that the victim Gertrude Addei is his daughter. He knows the accused person. The accused person is a former teacher of his daughter, the victim. According to PW1, one evening, in 2018, at about 4 p.m., he saw a Toyota Corolla behind his

former house. The victim came out of same and he asked her who dropped her off and she said that it was the accused person. He got the accused person's number and he warned him to stay away from his daughter and not to bring her home again. About two months later, his wife Ama Anokyewaa informed him that she saw the accused person walking by the road side with the victim around Dome old station and she suspected that the accused person saw her. His wife also informed him that she held the victim's hand and pulled her home but the accused person did not turn to look at her (Ama). He informed his wife to report the incident to the victim's school, Start Rite, which she did and the school conducted their investigations and dismissed the accused person. On Saturday, the 7th December, 2019 at about 8:00 a.m., he left the victim in the house alone and went to town for business. Upon his return at about 11:00 a.m., he heard a male voice coming from the victim's room. He stood behind the victim's bedroom window but he did not hear any voice. He knocked on the main door and the victim opened the door and went straight to the kitchen. He went to the victim's room but he did not see anyone in there. He went to his room and dropped his keys and went back to the living room. He was still not satisfied so he went back to the victim's room and stood there for some time and saw a mobile phone which did not belong to the victim. He questioned her and she insisted it was hers. He saw a tissue paper on the victim's bed and touched it. It was wet. He smelled it and it smelled like sperms. He then opened the victim's wardrobe and was dismayed to find the accused person naked and squatting in the wardrobe. He closed the wardrobe and went into the kitchen to confront the victim. The victim was then wearing a long dress. He asked her to lift the dress up for him to see. The victim was also naked beneath the dress. He then locked the victim's room with the accused person inside and went to the police station to lodge a complaint.

PW2, GERTRUDE ADDEI

She is a student. She and her family moved to reside at Oko, Dome. She is18 years old and was born on the 14th January, 2004. She was 15 years old at the time of the incident.

She knows the accused person. The accused person was her class teacher. On Saturday 7th December, 2019, her father, Kwasi Addae stepped out of the house and she thought he would stay out for a while. She did her house chores and afterwards, she called the accused person to visit her at their new house and install a software and copy songs unto her laptop. When the accused person came to their house, they sat in her bedroom and he installed the software and copied songs onto her laptop. After the accused person was done, he asked her to increase the fan's velocity because he was feeling hot but the fan was at its highest, so she offered him water instead. Shortly afterwards, they kissed and had sexual intercourse. Not long after they were done, he heard a knock on the door. She was not expecting anyone to come to the house, so she pepped through the window and saw her father behind the door. Her father called out her name. She was afraid and she saw the accused person entering her wardrobe. She thought it was safe, so she opened the door for her father, who entered her bedroom. She was nervous, so she entered the kitchen. Whilst in the kitchen, her father joined her and told her what he had seen. Her father left the house and she realized that both the main and her bedroom doors were locked. Her father returned about 20 minutes later with a police officer and they all together with the accused person went to the Madina police station.

PW3, DR. MRS. KLENAM DZEFI-TETTEY

She is a Consultant Radiologist at the Korle-Bu Teaching Hospital. She has been practicing Radiologist since 2005. She has not seen the victim physically before. A court order was placed on her table to conduct an age assessment to determine the age of the victim. She used the Greulich and Pyle method to determine the age of the victim. According to PW3, the approximate bone age of the victim is 17 years 6 months as at the 21st December, 2021.

PW4, DETECTIVE INSPECTOR EDMUND MENSAH

He is an investigator stationed at Madina DOVVSU. He knows the accused person and the victim. On the 7th December, 2019, the complainant, Kwasi Addae, reported to

the station that he caught the accused person in the victim's bedroom and when he enquired from her, she stated that the accused person had sexual intercourse with her. The complainant led the police to his house and the accused person was arrested and brought to the station together with the victim. At the station, the victim confirmed what the complainant reported, that the accused person had sexual intercourse with her and that she was 15 years old. He took a statement from the victim and gave her a medical form to send to the hospital for examination. He visited the scene of crime. He asked the complainant to bring the weighing card or birth certificate of the victim as proof of her age. The complainant insisted that he had no document but insisted that the victim was 15 years old. On the 11th December, 2019, he took the victim to the Ghana Police Hospital for an age assessment and the report stated that the victim was between the ages of 17 and 18 years old. The complainant disagreed with the age assessment report and insisted that the victim was 15 years old. He took a statement from the complainant. The complainant later brought the weighing card of the victim to the police station bearing the name Gertrude Addei Fokuo. The complainant informed him that the victim was born in the house of a midwife, who used the place as a birth center. He therefore visited the birth center and met one Elizabeth, the daughter of the midwife who informed him that the midwife died about eight (8) years ago and that the place was no longer functioning. Elizabeth gave him a book her mother used for record keeping at the birth center. When the book was examined by himself and his unit commander, they saw that there were a lot of cancellations. He made a copy of the page containing the name of the victim's mother Ama Anokyewaa dated the 14th January, 2004, the victim's date of birth. The accused person denied having sexual intercourse with the victim and stated that they only kissed. He took an investigation cautioned statement from the accused person. He was instructed to hand over the case to Detective Chief Inspector Faustina
Muonah to continue with the investigations.

PW5, DR. FIDELIS GLIGUI

He has been a Medical Practitioner for over ten years. He works at the Ghana Atomic Energy Commission Hospital. He knows the victim in this case. The victim first visited their facility on the 7th December, 2019 and one doctor on duty took her history. He personally examined the victim on the 9th December, 2019. The victim who at the time was 15 years old presented with complaints of an alleged defilement. On examination, her general condition was stable. Her abdomen was non-tender. On vagina examination, her vulva looked normal and clean, no abrasions, bruises or lacerations were seen. The victim's hymen was absent. HIV 1 and 2 done were non-reactive. Hepatitis B and urine test were all negative. His findings were in keeping with defilement. He reached a conclusion that his findings were in keeping with defilement because when he took history from the victim, she informed him that she invited her former male class teacher to her room and he was seen by her father after the alleged sexual intercourse.

PW6, CHIEF INSPECTOR FAUSTINA MUONAH

She is an investigator at the Madina Divisional CID. She knows the accused person and also the victim in this case. On the 11th September, 2020, she was instructed by her Unit Commander to continue with the investigation of this case. She was instructed to visit the victim's school, Start Rite School and her place of birth to make further enquiries. When she visited the victim's school, located at Dome, she met the headmaster Mr. Joseph Appiah who provided the school's register for her perusal. The register indicated that the victim was born in January, 2004. In the victim's Junior High School register, she was using the name Gertrude Addei. However, from J.H.S 2 to J.H.S 3 she changed her name to Addei Gertrude Akua Boatemaa F. The headmaster explained that at J.H.S 2, all the students were asked to provide their birth certificate to enable them carry out their B.E.C.E registration. According to the headmaster, all the students provided theirs, except for the victim and added that it was at that point

that the victim added Akua Boatemaa Fokuo to her name. The victim's mother led them to a traditional birth attendant's house at Dome where she delivered the victim. Upon her enquiries, she found out that there was an old woman who used to operate the center but had died three (3) years ago. She was further instructed to send the victim to the KorleBu Teaching Hospital for an age assessment since the complainant protested the outcome of a previous age assessment report by the Ghana Police Hospital. She wrote a letter to the 37 Military Hospital to conduct age assessment on the 28th January, 2021 but the complainant refused to bring the victim to the 37 Military Hospital and he insisted that he wanted the age assessment to be conducted at either the Komfo Anokye Teaching Hospital or the Korle-Bu Teaching Hospital. She forwarded the docket to the office of the Attorney General for advice. The office of the Attorney- General obtained a court order issued to the Korle-Bu Teaching Hospital to conduct the age assessment on the victim on the 8th September, 2021. On the 21st December, 2021, she sent the victim to the Korle-Bu Teaching Hospital where an age assessment was conducted and the report stated that the victim has a bone age of 17 years 6 months. Upon receipt of the advice from the office of the Attorney General, she was instructed to charge the accused person with the offence of defilement contrary to section 101 (2) of the Criminal Offences Act, 1960 (Act 29). She was further instructed by the office of the Attorney General to take a further police statement from the complainant because the initial statement he gave to the police was incomplete.

SUMMARY OF EVIDENCE BY THE DEFENCE

The accused person testified and called two (2) witnesses namely: Frederick Kwabena Agyare Asare, an Obstetrian Gynecologist at the 27 Military Hospital as DW1 and Chief Superintendent of Police Dr. Francis Ofei, the author of

Exhibit "2" as DW2. The defence also tendered in evidence several exhibits.

THE ACCUSED PERSON'S EVIDENCE-IN-CHIEF

He knows Gertrude Addei (the victim). It is not true that he defiled the victim. On the 7th December, 2019, the victim had previously called him for the installation of

softwares on her new laptop and the unlocking of her new phone. He woke up early in the morning, took his laptop and went to the gym first. After the gym, he called the number the victim used in calling him but a woman answered and gave him the direction to the victim's house. Upon reaching the victim's house, the said woman went and called the victim for him and the victim told him that the laptop was inside her room. He went to the victim's room and the laptop had already been plugged in. He asked the victim where everyone was and she told him that they had gone out. Knowing that the installation of the software on the victim's laptop will not take long, he started the installation. Due to the heat in the victim's room, he asked the victim to increase the speed of the fan and she said it was at its highest. The victim offered him ice in the cup, which she had placed on a tissue on the floor. Whilst he was doing the installation, the victim kept going in and out of the room.

Later, he heard a knock at the door and a male voice shouting "baby baby". At the time, the victim was not in the room where he was doing the installation. He called the victim to open the door, but she didn't open the door immediately but came to him and pleaded with him to hide because it was her father (PW1). He told the victim that he already knew the rest of her family members and he had met her father once so there was nothing wrong with PW1 seeing him there. The victim told him that her father is not like her mother. The victim was almost in tears so he hid behind the curtains in the room and the victim went to open the door for PW1. PW1 saw two laptops in the room and asked the victim who the second laptop belonged to and the victim said it was hers. The victim left the room and PW1 followed her. The victim and PW1 started arguing outside. He came from behind the curtain and started packing his laptop. His laptop was playing music and the moment he put it off, PW1 came back to the room and asked him whether he was the victim's former teacher and he answered in the affirmative. PW1 asked him to wait and so he did although, the victim asked him to leave. When the victim tried to open the door for him to go out,

she discovered that it was locked. The victim went for two knives and a hammer from the kitchen to try to open the door but he told her not to damage same because it was new.

PW1 brought two men, to the room where he was locked in. One of the men started assaulting him physically. Together, they went in a taxi to the Madina Police Station. When they got to the Madina Police Station, PW1 told the police that he saw him (the accused person) having sexual intercourse with the victim and he rescued her but the victim retorted that it was not true. PW1 got angry and shouted at the victim. One of the police officers asked the victim of her age and she said that she was 17 years old. PW1 got angry again and shouted that he gave birth to victim and so she could not tell him how old she was. The victim was taken to one of the offices of the police station and the victim's father was taken to one of the desks around and he was handcuffed.
PW4 introduced himself to him and said they were going to the Police Hospital.
He waited there until they came back about 3 to 4 hours later.

PW4 asked him to write his statement. He didn't know what to write and PW4 said since it was getting late, he also had to go and that was when he was locked up. He was eventually admitted to bail. PW1 demanded for an amount of Thirty-Four Thousand Ghana cedis (GH¢34,000.00) for him to withdraw the case but he was not willing to pay and PW4 also told him that no payment should be made.

DW1, FREDERICK KWABENA AGYARE ASARE

He is an Army Officer and an Obstetrician Gynaecologist at the 37 Military Hospital. Upon reading Exhibit "F" and as an expert, he would not be able to come to a conclusion that there was sexual intercourse or defilement because the examination

findings seems to suggest that everything was normal except for the absence of the hymen. He stated further that to arrive at a conclusion that there was sexual intercourse or defilement, there should be some evidence of either forceful entry of the victim's vagina or any seminal fluid from the alleged perpetrator.

According to DW1, Exhibit "F" particularly page 111 is a pro forma form for which physicians are required to capture details of alleged sexual assault or accident, the state of the alleged victim at the time of examination, when the alleged incident occurred, when the patient was examined, the nature of the alleged assault whether by the vagina, the mouth or the anus and whether the assailant used foreign objects, lubricants or condoms.

DW1 stated further that if the perpetrator used lubricant, it might possibly indicate that the alleged incident was consensual, there is no abrasions or lacerations, it might suggest that a lubricant was used, if a condom was used, the possibility of the victim acquiring a sexually transmitted infection or getting pregnant will be minimized, injuries to the victim can be picked up and if these injuries will complicate the sexual functioning or the health of the victim, these can be identified.

DW1 continued that Exhibit "F" also seeks to find out from the victim if the victim was menstruating at the time of the alleged assault. If the victim has had any consensual sex within 72 hours of the alleged incident, if any condom was used for that sexual activity within the 72 hour of the incident, the emotional state of the victim would indicate how the event that is under investigation has affected her, and if she is traumatized, exhibit any of these emotions and to support the findings from the examination.

He posited further that if the page III, Exhibit 'F' had been completed, it would have provided a complete picture of the victim, circumstances surrounding the incident that took place, provide details of how the alleged perpetrator assaulted the victim, the health state of the victim before this alleged incident and provide details of how the victim must be managed, if there is any possibility of sexually transmitted disease or pregnancy, infections and any psychological trauma , whether there was a penetration of the vagina, mouth or anus, whether there was attempted or successful penetration, and if there was an ejaculate and the testing of seminal fluid to confirm that it is seminal fluid and from whom it is from.

It is further the evidence of DW1 that the phrase "vulva looks healthy and clean" does that suggest the presence of any such seminal fluid upon examination and as such it will not be safe for anybody to conclude that the said patient had had sexual intercourse?

DW2, CHIEF SUPERINTENDENT OF POLICE DOCTOR FRANCIS OFEI.

He is a Radiologist by training and specialization and he works at the Police Hospital as a Senior Specialist Radiologist, and the author of Exhibit "2". He knows Gertrude Addei personally. Exhibit '2' is a radiology report that assessed the age of Gertrude Addei as between of 17 years and 18 years at the time.

According to DW2, there are two categories of ages. One is what is referred to as a chronological age which is estimated generally from the date of birth. Beyond the chronological age, there are other methods of assessing or estimating one's age and one of the methods is what is described as the bone age assessment. The bone age assessment also has a number of methods but the commonest and widely used method is what is referred to as the standard of Greulich and Pyle. The standard of Greulich and Pyle is basically a research that was done by these two gentlemen Greulich and Pyle using x-rays of the left hand and wrist of individuals involved. So they developed

an atlas so to speak which takes into consideration how the bones of the hands and wrists will look like at various ages of individuals. The method has its own limitations.

When the victim presented at the facility on the 11th December, 2019 her left hand and wrist was radiographed or x-rayed and after the x-ray was taken, the findings on the x-ray were analyzed with the Gruelich and Pyle standards and based on that the age of the victim was estimated and he arrived at the age, between 17 years to 18 years.

According to DW2, the Greulich and Pyle estimates the bone age of the individual but the context and the limitations involved would give a much appreciation of the report especially when the bone age is at the tail end of the individual's bone growth and by tail end, what he meant is that for females, the bone growth in the hand which they use is at 17 and 18 years and then for males 18 to 19 years. According to DW2 if a female's bone age is estimated at the end of the growth, it means that subsequent x-rays of the same individual will not show any changes and same for males around 19 years, the bone age is ending for the hand. So ages estimated years after will still give the same outlook. If his bone age is determined with the x-ray of the left hand because he is a male, it will show as though he is 19 years so the upper limits is about 19 years for males and for females 17 to 18 years and beyond that the Greulich and Pyle will not be able to determine your age.

ANALYSIS OF THE CHARGE OF DEFILEMENT

Section 101 of the Criminal Offences Act, 1960, (Act 29) creates and defines defilement 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, 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."

From the above definition of defilement, it is a neutral offence which may be committed against a boy or a girl under sixteen years of age when that child is naturally or unnaturally carnally known with or without the consent of the child.

To succeed in its case, the prosecution must establish beyond reasonable doubt each of the following three (3) essential elements:

1. *That the victim is a child under sixteen years of age.*
2. *That someone had naturally carnally known the victim.*
3. *That it was the accused person who naturally carnally knew the victim.*

See: **Asante No (1) v The Republic [2017-2020] I SCGLR 143.**

Charles Twumasi vs The Republic Criminal Appeal No. H2/24/2018

(Unreported) delivered on the 13th February, 2020.

Republic vs Yeboah [1968] GLR 248

ANALYSIS OF THE EVIDENCE ON RECORD TO PROVE THE CHARGE OF DEFILEMENT

At this juncture, I wish to deal with the issue of whether or not the victim is a child under sixteen years of age. To sustain this charge, the prosecution is required to provide evidence beyond all reasonable doubt that the victim, of the offence, Gertrude Addei was under sixteen years of age at the material time that she was defiled. It is instructive to note that a person under sixteen years of age lacks the capacity to give consent with respect to carnal or unnatural carnal knowledge and any such consent given by a child is void.

See: *Dennis Dominic Adjei:* **Contemporary Criminal Law in Ghana, Second Edition, Pages 235 to 236**

In the case of **Kwesi Donkor v The Republic, Case No. 42/2017 dated the 10th May, 2019 (unreported)**, the court held that the legal proposition of establishing the age of a prosecutrix beyond reasonable doubt does not presuppose proof only by documents such as birth or baptismal certificates.

The age of the prosecutrix in a rape or defilement case can be established by (oral) testimony, documents in the form of birth certificate, weighing card, school records or by medical examination (ossification).

In the case of **Robert Gyamfi (alias Appiah) v The Republic, Criminal Appeal No. H2/02/2019 (unreported)**, the court held when the prosecution tendered the National Health Insurance card in evidence to prove the victim's age as follows:

"*the three-certifications mentioned there are not the only means of identifying one's age in our jurisdiction. Yes I know the statute is specific for children below 18 years. Aside those certificates mentioned, the National Health Insurance care for now is one of the official documents for the identification and age of all Ghanaians, either young or old. The class or school register is also one of the official records accepted as indicating the identity and age of school children. Section 37 (1) says that there is a presumption that official duty has been regularly performed and it is regular until any credible evidence to the contrary is given.*"

The above means that although a birth certificate and a weighing card are *prima facie* evidence of a person's age, they are however, not the only means of proving one's age.

The age of a victim in a rape or defilement case can be established by (oral) testimony, documents in the form of birth certificate, weighing card, school records or class register, National Health Insurance card or by medical examination (ossification).

PW1, the biological father of the victim in spite of the two age assessments and tests, insisted from the day of the incident at the police station, in his evidence-in-chief that his daughter (PW2) was 15 years at the material time that the incident occurred. This piece of evidence was corroborated by PW4.

PW4 in his evidence-in-chief stated in part:

"4. On the 7th December, 2019, the complainant Kwasi Addae reported to the station that he caught the accused person in the victim's bedroom and when he enquired from her, she stated that he (the accused person) had sexual intercourse with her and that the victim was 15 years old.

9. I asked the complainant to bring the Child Welfare Clinic Card (weighing card) or birth certificate of the victim as proof of her age. He stated that he had no document but insisted that the victim was 15 years old.

10. On 11 December 2019, I took the victim to the Police Hospital for an age assessment and the report stated that the victim was between the ages of 17 and 18 years of age. The complainant disagreed with the age assessment report and insisted that the victim was 15 years old."

PW2, the victim in this case testified and she corroborated the evidence of PW1 that she was 15 years at the time the incident occurred on the 7th
December, 2019. She stated further that she was born on the 14th January, 2004.

The prosecution in its bid to prove that the victim was a child under sixteen years at the material time that the offence was committed tendered in evidence as documentary evidence the Bone Age Determination Report of the victim, the weighing card of the victim, a photocopy of a page from the traditional birth attendance record book, photocopies of class attendance registers of the victim and the entire traditional birth attendance record book as Exhibit's "B", "C", "D", "G", "H", "J" and "Q" respectively.

It is instructive to note that evidence was led by the prosecution to show that initially when PW1 lodged the compliant at the police station, PW4 asked him to produce the weighing card or birth certificate of the victim to prove her age, but he could not produce any of them because according to him, he could not find them. The police therefore took the victim to the Radiology Department of the Ghana Police Hospital on the 11th December, 2019 where her age was estimated to be between 17 years and 18 years. PW1 protested the outcome of the age assessment report by the Ghana Police

Hospital and on the 21st December, 2021, PW6 sent the victim to the Korle-Bu Teaching Hospital where a second age assessment was conducted.
The second age assessment at the Korle-Bu Teaching Hospital which was conducted by PW3 estimated the age of the victim as between 17 years and 6 months as at the 21st December, 2021 as per Exhibit "C". The second age assessment was conducted on the 21st December, 2021 meaning the victim was 15 years on the 7th December, 2019 when the incident occurred.

DW2, the radiologist who conducted the first age assessment of the victim and the author of Exhibit "2" testified to the effect that he used the Greulich and
Pyle method and the digital atlas of the victim to assess her age as between 17 and 18 years as at the 11th December, 2019. DW2 further admitted in his evidence-in-chief that using the same method, any radiologist with the same x-ray of a particular person should arrive at the same age range, but then there are limitations to the study that one must be cognizance of.

Furthermore, DW2 testified to the effect that with the methods used, they select the age nearest to the x-ray of the patient and that the digital atlas method was developed using the physiology of European children and not Africans. DW2 confirmed how limited the methods he used in estimating the age of the victim as between 17 and 18 years is in the following words:

"*Q. Speaking of the bone age, it has to do with the skeletal maturation of a person, is that correct?*

A. Yes, in this case the left hand and wrist.

Q. You would agree with me that no two individuals develop at the same pace?

A. I agree with you.

Q. You also mentioned that there were certain limitations. The skeletal maturation can be affected by several factors including ethnicity, environment, race, gender and even the expertise of the radiologist, is that correct?

A. That is correct. The gender, I explained with the research that was done and also tied it in with the race. The bit about the radiologist is where I need to clarify. The clarification is that the bone age as I have given for instance gave a range and not a specific age so it is expected that other radiologists looking at the same radiograph will fall within the range but bearing in mind the limitations I gave earlier about the ceiling or the end of maturation at that level. You don't see any much difference going forward.

Q. By your explanation, are you saying that the bone age can be overestimated or under estimated?

A. So if the range is given, that range is expected to take care of the variations so long as a specific age is not quoted as a figure. The over estimation or under estimated is expected to be within the range.

Q. So you would agree with me that the age range is an estimate and not exactly accurate or precise?

A. I agree with you."

It is important to note that although, Exhibit "B" was tendered without any objection from the defence, it is of no probative value to the court due to the demeanour and conduct of PW3 and her inability and unwillingness to explain questions with regards to Exhibit "B". It must also be noted that Exhibit "B" is not conclusive of the age of the victim, it only provided an estimated age. Again, this court will equally place no probative value on Exhibit "2", although, it was tendered in evidence without any objection from the prosecution because DW2 stated that he does not agree that any radiologist using the same x-ray of the victim would come to the same conclusion that he arrived at because there are limitations to the study. He stated further that the method only gave an estimated age of the victim.

It is worth noting that PW3 and DW2 used the same Greulich and Pyle method and the digital atlas of the victim to assess her age but they arrived at different conclusions. It is also instructive to note that PW3 and DW2 are expert witnesses. They give evidence but do not determine the issues before the court. Their testimonies are not binding on the court. They are to be considered as a guide which is to assist the judge in deciding on the issues before him or her. Again being an expert witnesses, their duty is not to state the ultimate. They can also not touch on the conclusions.

In the case of **Fenuku v John Teye [2001-2002] SCGLR 985** it was held

that:

"The principle of law regarding expert evidence was that the judge need not accept any of the evidence offered. The judge was only to be assisted by such expert evidence to arrive at a conclusion of his own after the examining the whole of the evidence before him. The expert evidence was only a guide to arrive at the conclusions."

A similar decision was reached in **In Re Agyekum (Dec'd) [2005-2006]**

SCGLR 851 (holding 2) and **Tetteh Hayford** [2012] 1 SCGLR 417 at 423 to 424.

The medical assessments of the age of the victim by PW3 and DW2 and Exhibits "B" and "2" are therefore not conclusive of the age of the victim, it only provided an estimated age which are only to assist the court to arrive at a conclusion of its own after the examining the whole of the evidence before

it.

Furthermore, it is worth noting that DW2 also said nothing in his testimony before this court to counter the evidence adduced by the prosecution that the victim was indeed 15 years at the material time that the offence was committed.

It is also instructive to note that the fact that Exhibits "B" and "2" are of no probative value to the court does not in any way suggest that the prosecution failed to prove beyond all reasonable doubt that the victim was 15 years at the material time of the offence. There are other exhibits tendered in evidence by the prosecution which are conclusive of the age of the victim.

PW1 gave the police the weighing card of the victim which was marked as Exhibit "C". Exhibit "C" is the old type of the weighing card which was used during the period that PW2 was born and could not have recently been acquired by PW1 after the complaint was lodged. The weighing card of the victim was tendered in evidence as Exhibit "C" without any objection from the defence and the date of birth disclosed on same is the 14th January, 2004. The incident occurred on the 7th December, 2019; it therefore means that the victim was 15 years old at the material time that the offence was committed.

A photocopy of the relevant page from the traditional birth attendance record book, which was tendered in evidence as Exhibit "D" by PW4 without any objection from the defence after he visited the home of the traditional birth attendant who delivered PW2 showed that the victim's mother Ama Anokyewaa gave birth to her at the traditional birth attendant's center on the 14th January, 2004. The prosecution also tendered the entire record book of the traditional birth attendant record in evidence as Exhibit "Q".

The date of birth of PW2 disclosed on the Registers of Attendance from the victim's school Start Rite for the 2016-2017, 2017-2018 and 2018-2019 academic years as tendered in evidence by PW6 as Exhibits "G" "H" "J" who visited the former school of PW2 which is Start Rite School and investigated the school records of the victim all showed that PW2 was born in January, 2004. The incident is said to have occurred on the 7th December, 2019 and by necessary computation, the victim was 15 years old at the material time that the offence was committed.

As stated supra, the position of the law is that the age of a victim in a rape or defilement case can be established by (oral) testimony, documents in the form of birth certificate, weighing card, school records or class register, National Health Insurance card or by

medical examination (ossification) and from the evidence on record the prosecution provided sufficient evidence to prove that PW2 was born on the 14th January, 2004 and as such was 15 years at the material time that the offence was committed including the testimonies of PW1 and PW2, the weighing card of PW2 (Exhibit "C"), the traditional birth attendant record (Exhibit "D"), the class attendance records of PW2 (Exhibits "G" "H" and "J") and the entire book of the traditional birth attendant record (Exhibit "Q"). Exhibits "C", "D", "G" "H", "J" and "Q" all bear PW2's first name and surname.

On the totality of the evidence led together with Exhibits "C", "D", "G" "H", "J" and "Q", this court therefore finds as a fact that the victim was 15 years old at the time of the offence and she is a child under sixteen years of age and it holds same. This court is therefore convinced that the prosecution has proved beyond all reasonable doubt that the victim was a child under sixteen years at the material time that the offence was committed.

I will now deal with the second issue of whether or not someone had naturally carnally known PW2. To prove that the second prosecution witness has been carnally known, it is sufficient as provided under section 99 of the Criminal Offences Act, 1960 (Act 29) if there is evidence proving the least degree of penetration of the second prosecution witness's female organ by a male organ. In the case of **Gligah & Atiso v The Republic [2010] SCGLR 870 at 879** the court speaking through *Dotse JSC* defined carnal knowledge as follows:

"Carnal knowledge is the penetration of a woman's vagina by a man's penis. It does not 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."

The Supreme Court in the case of **Banousin v The Republic [2015] 1N.N.S.C.L.R 439 SC at 471** also explained carnal knowledge as thus:

"It is the female sex organs called the vulva and the vagina that are normally penetrated into during sexual act which can qualify to be carnal knowledge under sections 98 and 99 of Act 29… It is noted that, it is 'the vulva that consist of the external genital organ area and includes the clitoris and other vital sensitive nerve receptors.' The vagina on the other hand, is a soft tissue tube, which extends downwards and forward from the cervix of the uterus to its external opening at the vulva. Reference 'You and Your Health' Volume 2 New Edition, Shryock Hardinge, page 433."

It stands to reason that an action for defilement will not suffice where the prosecution fails to prove the least degree of penetration of the victim's vagina by a man's penis. The male organ called the penis must at least penetrate the female sex organ known as vulva and vagina before it can qualify as carnal knowledge under sections 99 of the Criminal Offences Act, 1960 (Act 29).

PW2, the victim in this case led evidence on how she was carnally known. She testified that the accused person had sexual intercourse with her on the 7th December, 2019 in her bedroom.

Excerpts are as follows:

6. *On Saturday 7th December, 2019, my father, Kwasi Addae stepped out of the house and I thought he would stay out for a while.*
8. *I did my house chores and afterwards, I called the accused person to visit me at my new house and install a software and copy songs unto my laptop.*
9. *When he came to the house, we sat in my bedroom and he installed the software and copied songs onto my laptop.*
10. *After Fedelix was done, he asked me to increase the fan's velocity because he was feeling hot but the fan was at its highest, so I offered him water instead.* ***Shortly afterwards, we kissed and had sexual intercourse."***

PW1 also testified to the effect that when he went into the victim's room, he saw a tissue paper on the victim's bed and when he touched it, it was wet. He also smelled it and it smelled like sperms. He then opened the victim's wardrobe and was dismayed to find the accused person naked and squatting in the wardrobe. He closed the wardrobe and went into the kitchen to confront the victim. The victim was then wearing a long dress. He asked her to lift her dress up for him to see. The victim was also naked beneath the dress. He then locked the victim's room with the accused person inside and went to the police station to lodge a complaint.

Under cross-examination PW2 stated that the tissue was used to clean off the sperms. Excerpts are as follows:

"*Q. What happened to that tissue?*

A. We used it to clean sperms."

In defilement cases, the medical report and the doctor's evidence corroborate the victim's story. It establishes the fact whether or not there was sexual intercourse or in this particular case whether or not there was a penetration of the vagina of the victim. The question to ask is whether or not the medical evidence corroborated the story of the victim in the instant case.

A medical report is prima facie of the evidence contained in it and not conclusive evidence so, the law requires that where the accuracy of the report is disputed in proceedings then the person who undertook the investigation or examination and produced the report should testify and subject himself to cross examination.

See: **Nyameneba & Ors v The State [1965] GLR 723**

The relevant portions of the medical report, Exhibit 'F', read as follows: "*On examination, general condition was stable. Abdomen was non-tender. On vaginal examination*

vulva looks healthy and clean, no abrasions, bruises or lacerations seen. Hymen was absent… Findings above are in keeping with

Defilement."

In accepting the evidence of the medical officer into account, this court is mindful of the caution by the Supreme Court in the case of **Sasu vrs White Cross Insurance Company limited [1960] GLR 4 at pages 5 and 6** where the Supreme Court stated thus:

"*Expert evidence is to be received with reserve and does not absolve a judge from forming his own opinion of the evidence as a whole."*

In this instant case, the medical doctor who undertook the examination testified as the fifth prosecution witness (PW5) and subjected himself to crossexamination.

PW5, in explaining the medical report stated that upon an examination of the victim's vagina, her vulva looked normal and clean, no abrasions, bruises or lacerations were seen. However, the victim's hymen was absent. And he reached a conclusion that his findings were in keeping with defilement because when he took the history from the victim, she informed him that she invited her former male class teacher to her room and he was seen by her father after the alleged sexual intercourse.

Concluding his testimony, PW5 stated his findings as follows:

"*Findings are in keeping with defilement*."

The defence called Frederick Kwabena Agyare Asare, an Obstetrician Gynaecologist at the 37 Military Hospital as DW1. His evidence was to the effect that after reading Exhibit "F" and as an expert, he would not be able to come to a conclusion that there was sexual intercourse or defilement because the examination findings seem to suggest that everything was normal with the victim except for the absence of the hymen. He posited further that the failure of PW5 to fill in the part 111 of Exhibit "F" affected the validity of the conclusions drawn by PW5.

Firstly, as posited by the State Attorney in her written address filed on the 30th October, 2023, proof of sexual intercourse is a question of fact for the court and so no medical examination is conclusive enough to compel the fact on the court. The court concludes based on all the pieces of evidence adduced at the trial.

Secondly, it is instructive to note that the victim was presented at the hospital for vaginal examination on the 9th December, 2019, after having sexual intercourse on the 7th December, 2019 and after the last sexual intercourse, she had been bathed, cleaned her vagina, douched the vagina and naturally one should not expect to see fresh vagina bleeding, bruises, discharges, lacerations, fresh injury to her vagina wall and hymen and semen in her vagina.

Thirdly, DW1 did not examine the victim. Therefore his testimony about the possible condition of the victim as well as possible conclusions he could have drawn are of no consequence.

Furthermore, DW1 in his testimony before this court introduced some "markers" which in his expert opinion were indicative of sexual intercourse including the presence of semen, abrasions and bruises, however whilst answering questions under cross-examination, he admitted that there would be no evidence of forceful entry (evidence of bruises and abrasions) where there was consensual sex. It is instructive to note that the prosecution's case has been that the accused person was in an amorous relationship with the victim and so the sex was consensual.

PW2 testified to the effect that she had had sexual intercourse prior to this incident and she informed PW5, the doctor who examined her that she was dating the accused person. PW5 answered the following questions under cross-examination:

"Q. *You were required per question 5 on page 3 to examine whether there was any consensual sex prior to the incident which led to the investigation and the medical examination?*

A. Yes my Lord, I am required. And the history I took from the victim that was not the first episode with the man. She said they have been dating for two years.

Q. So you equate dating to sex?

A. Yes my lord in this context."

PW1 also told the court that PW2 informed him that the day of the incident was not the first time the accused person had had sex with her.

The following dialogue ensued between counsel for the accused person and PW1:

"Q. You remember that your daughter denied that the accused person had sex with her?

A. My lord, it is not true that the victim told me that. It was when I interviewed her that the victim told me that that was not the first time that the accused person had had sex with her."

PW1 indicated further that PW2 informed the Madina Police that the accused person was her boyfriend.

Again, DW1 admitted that there would be no seminal fluid in a person's vagina after sexual intercourse where there was no ejaculate. It is worth noting that the prosecution led evidence through PW1 to the effect that there was piece of tissue on the floor of PW2's room which smelled like sperms. PW2 also confirmed that she used the tissue to clean off the sperms.

Finally, DW1 admitted whilst answering questions under cross-examination that some questions to be filled on part 111 of Exhibit "F" were duly provided by the victim and recorded by PW5 on page 2 of the same Exhibit "F". From the totality of the evidence on record, the evidence of DW1 is of no probative value to this court because he did not adduce any medical evidence to contradict the conclusions drawn by PW5 the author of Exhibit "F".

In the opinion of this court, the evidence of PW2 that she has been carnally known was materially corroborated by PW5, Dr. Fidelis Gluigui who examined the victim shortly after the incident and concluded that the hymen of the victim was absent and also stated that his findings were in keeping with defilement, thereby confirming that there had been a penetration of the victim's vagina. The fact that the hymen of the victim was absent confirms that sexual acts had taken place and that fact by itself beyond reasonable doubt discharged the burden of proof required from the prosecution. It is therefore not disputed that apart from the victim saying that she had sexual intercourse on the 7th December, 2019, the medical doctor who did examine her shortly after the incident concluded that her hymen was absent indicating a penetration of her vagina. The medical evidence corroborated the evidence of the victim that someone naturally carnally knew her on the 7th December,
2019.

The totality of the evidence adduced by prosecution witnesses at this trial together with Exhibit 'F', points to one and only one fact that the victim has been carnally known. In the present case, I therefore find as a fact that the victim who was only 15 years old at the time has been carnally known. The prosecution thus succeeded in leading evidence to establish beyond all reasonable doubt that the victim has been carnally known on the 7th
December, 2019. The second element was also proved to the hilt.

I will now consider the third essential element that the prosecution must establish, that it, whether it was the accused person and no other person who carnally knew PW2 on the 7th December, 2019. The prosecution ought to prove that it was the accused person and no other person who carnally knew
PW2 on the 7th December, 2019.

Furthermore, offences of this nature usually take place between the parties alone. Hardly are there third parties who usually witness such acts except in few cases where a third party by chance sees the parties in the act, or immediately after the act. On this point there is the direct eyewitness account of only one person, the victim herself, as is usual in these cases. The evidence of the first, third, fourth, fifth and sixth prosecution witnesses were about the complaints made to them by the second prosecution witness. Such evidence, merely establishes the consistency of the second prosecution witness's evidence. It does not amount to corroboration of the evidence of the second prosecution witness. It is therefore a prudent rule of practice to look for corroboration from some extraneous evidence which confirms the victim's evidence in some material particular implicating the accused person as it was advised in the case of **Republic v. Yeboah** (supra).

The Supreme Court **Asante No (1) v The Republic** (supra) at 132 the Supreme Court held that in the trial of sexual offences, there is the need for corroboration of the testimony of alleged victim in order to secure a conviction. At page 149 of the said report, *Pwamang JSC* reiterated the above position of the law thus:

However, before NRCD 323 came into force in 1979, the English rules of evidence which were applicable in Ghana required that in trials for sexual offences the judge must direct himself and the jury that corroboration of the victim's evidence was eminently desirable in order to convict an accused person."

On the same page 149 of the above-cited law report, *Pwamang JSC* continued as follows:

"If the caution on the need for corroboration was not noted by the judge or properly given to the jury in the judge's summing up, a conviction could be set aside on an appeal on that ground."

On page 150 of the law report, *Pwamang JSC* analyzed the current law in Ghana on the need for corroboration of the evidence of an alleged victim of a sexual offence and he concluded as follows:

"*This implies that the good sense in the policy that it is dangerous to convict an accused person on uncorroborated evidence is given recognition in NRCD 323."*

Therefore, per the unanimous decision of the Supreme Court as delivered by Pwamang JSC in the recent case of **Asante (No 1) v The Republic** (supra) the law in Ghana still remains the same as what we inherited from England to the effect that in the trial of an accused person for a sexual offence, the prosecution can hardly secure a conviction unless the prosecution can produce evidence to corroborate the evidence of the alleged victim of the sexual offence.

Thus, the law is that a person ought not to be convicted of a charge if in respect of that charge the trial has ended in a situation where the word of the accuser is the only thing standing against the word of the accused person, more so if the accused person is charged with a sexual offence as such matters usually happen in private. Where it is one person's word against another person's word as is the case here, there is the need for corroboration of the accuser's word.

PW2 stated in her evidence-in-chief and answers given under cross- examination that it was the accused person and no other person who had sexual intercourse with her on the 7th December, 2019 in her bedroom after she invited him to their house to install a software and copy songs unto her laptop. She further stated that she saw the accused person entering her wardrobe when her father knocked at her door.

PW1 also testified that he caught the accused person squatting in the victim's wardrobe naked and with his two hands covering his face and also found a tissue paper on the floor in the victim's room which was wet and smelt like sperms.

In this case, after the court had ruled that, a *prima facie* case has been made against the accused person, he exercised his option to open his defence. Indeed, the accused person had the burden of producing evidence, sufficient enough in the light of the totality of the evidence to raise a reasonable doubt as to whether he was the one who carnally knew PW2 on 7th December, 2019 although, he is not required to prove his innocence.

See: **sections 10 (1), 11 (2) and 3 of the Evidence Act, NRCD 323**

See also: **Ali Yusif (No.2) v The Republic [2003-2004] SCGLR 174 holding (2)**

The accused person flatly denied having ever had any sexual connection with the second prosecution witness. In his defence, he stated that on the 7th December, 2019, the victim had previously called him for the installation of softwares on her new laptop and the unlocking of her new phone. He woke up early in the morning, took his laptop and went to the gym first. After the gym, he called the number the victim used in calling him but a woman answered and gave him the direction to the victim's house. Upon reaching the victim's house, the said woman went and called the victim for him and the victim told him that the laptop was inside her room. He went to the victim's room and the laptop had already been plugged in. He asked the victim where everyone was and she told him that they had gone out. Knowing that the installation of the software on the victim's laptop will not take long, he started the installation. Due to the heat in the victim's room, he asked the victim to increase the speed of the fan and she said it was at its highest. The victim offered him ice in the cup, which she had placed on a tissue on the floor. Whilst he was doing the installation, the victim kept going in and out of the room.

Later, he heard a knock at the door and a male voice shouting "baby baby". At the time, the victim was not in the room where he was doing the installation. He called the victim to open the door, but she didn't open the door immediately but came to him and pleaded with him to hide because it was her father (PW1). He told the victim that he already knew the rest of her family and he had met her father once so there was nothing wrong with PW1 seeing him there. The victim told him that her father is not like her mother. The victim was almost in tears so he hid behind the curtains in the room and the victim went to open the door for PW1. PW1 saw two laptops in the room and asked the victim who the second laptop belonged to and the victim said it was hers. The victim left the room and PW1 followed her. The victim and PW1 started arguing outside. He came from behind the curtain and started packing his laptop. His laptop was playing music and the moment he put it off, PW1 came back to the room and asked him whether he was the victim's former teacher and he answered in the affirmative. PW1 asked him to wait and so he did although, the victim asked him to leave. When the victim tried to open the door for him to go out, she discovered that it was locked. The victim went for two knives and a hammer from the kitchen to try to open the door but he told her not to damage same because it was new.

PW1 brought two men, to the room where he was locked in. One of the men started assaulting him physically. Together, they went in a taxi to the Madina Police Station. When they got to the Madina Police Station, PW1 told the police that he saw him (the accused person) having sexual intercourse with the victim and he rescued her but the victim retorted that it was not true. PW1 got angry and shouted at the victim. One of the police officers asked the victim of her age and she said that she was 17 years old. PW1 got angry again and shouted that he gave birth to victim and so she could not tell him how old she was. The victim was taken to one of the offices of the police station and the victim's father was taken to one of the desks around and he was handcuffed.

PW4 introduced himself to him and said they were going to the Police Hospital. He waited there until they came back about 3 to 4 hours later.

PW4 asked him to write his statement. He didn't know what to write and PW4 said since it was getting late, he also had to go and that was when he was locked up. He was eventually admitted to bail. PW1 demanded for an amount of Thirty-Four Thousand Ghana cedis (GH¢34,000.00) for him to withdraw the case but he was not willing to pay and PW4 also told him that no payment should be made.

I am now enjoined by holding (3) in the case of **Lutterodt v the Commissioner of Police [1964] 2 GLR 429 SC at 480** to examine the defence of the accused person as follows:

"Where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for the defence in three stages:

(1) Firstly, it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the court should acquit the defendant;

(2) If the court should find itself unable to accept, or if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and

(3) Finally, quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e., prosecution and defence together, and be satisfied of the guilt of the defendant beyond reasonable doubt before it should

convict, if not, it should acquit."

I now wish to determine whether the accused person is innocent or liable. I have already indicated that, it is the prosecution that is to prove his guilt.

Firstly, under cross-examination, the accused person denied ever kissing the victim whilst he was in her room. Interestingly, in his caution statement (Exhibit "E") which was obtained on the 9th December, 2019, that is two (2) days after the incident occurred when the matter was fresh in his mind, he stated that after the victim offered him ice cubes, he took off his shirt and they kissed.

The following dialogue ensued between the prosecutor and the accused person:

"Q. You also kissed the victim, I am putting it to you? A. That is not correct.

Q. From your caution statement Exhibit "E", you indicated that you kissed the victim?

A. No, that is not correct but it is written therein."

The accused person in his caution statement (Exhibit "E") stated in part: "*On the 7th December, 2019 at about noon, a former student of mine called me on phone to come along with my laptop to install some software on a new laptop her father had bought for her. After I had installed some players, I put some songs on to play.* ***I later asked her to increase the velocity of the fan but she offered me cold ice water and ice cubes instead. I took off my shirt and we kissed.***"

Secondly, the accused person sought to create the impression in his evidencein-chief and answers given under cross-examination that the victim only offered him ice cubes and nothing more. However, in his caution statement, he stated that the victim offered him cold water and ice cubes.

The accused person answered the following questions under crossexamination:

"*Q. And you indicated that you were given ice, is that correct?*

A. Yes my lord.

Q. Was it only ice cubes you were offered?

A. Yes my lord.

Q. From your investigation caution statement given to the police (Exhibit "E"), you indicated that the victim offered you cold water and ice cubes, is that correct?

A. I did not write the statement. Two investigators, a man and a woman wrote it and I was asked to sign it."

An excerpt from the accused person's caution statement is as follows: *"**I later asked her to increase the velocity of the fan but she offered me cold ice water and ice cubes instead.**"*

Thirdly, the accused person sought to create the impression in his evidencein-chief that he only hid behind the curtains in the victim's room upon the victim's plea to hide when the victim's father came to knock at the victim's door. Surprisingly, in his caution statement (Exhibit "E"), he admitted that he hid by the wardrobe behind the curtains when the victim's father entered the victim's room and asked her why she took so long in opening the door. He admitted further that when the victim's father left the room after checking the wardrobe, he came out from behind the curtains and entered the wardrobe.

Excerpts are as follows:

"*She asked me to hide because her father is not like the mother. **I hid by the wardrobe behind the curtains when her father entered to ask why she took long in opening the door.** He then saw my phone and laptop on the bed and asked her about it. He proceeded to check the wardrobe and left the room.*

***I came out from behind the curtains and entered the wardrobe**."* Furthermore, the accused person in his evidence-in-chief stated that when PW1 entered the victim's bedroom and saw two laptops in the bedroom and asked the victim who the second laptop belonged to and the victim said it was hers, the victim left the bedroom and PW1 followed her. He then came from behind the curtains and started packing his laptop. His laptop was playing music and the moment he put it off, PW1 came back to the room and asked him whether he was the victim's former teacher and he answered in the affirmative. In fact, he denied moving into the wardrobe after hiding behind the curtains whilst answering questions under cross-examination. Miraculously in his caution statement (Exhibit "E"), the accused person admitted that

PW1 found him hiding in the wardrobe in the victim's bedroom. The following transpired between the prosecutor and the accused person:

"Q. So after hiding behind the curtains, you later moved into the wardrobe. I am putting it to you? A. That is not correct.

Q. PW1, the victim's father caught you naked squatting in the wardrobe. I am putting it to you?

A. That is not correct."

The accused person in his caution statement (Exhibit "E") stated in part:

"***Her father came back to the room to open the wardrobe again. On seeing me, he only asked me to wait and he left****. I waited till he arrived with the police to effect my arrest in the presence of two other men*."

Again, the accused person in his caution statement (Exhibit "E") given to the police on the 9th December, 2019 stated that PW1 found him in the wardrobe in the victim's room. Strangely, in his charged statement Exhibit "P" which was obtained on the 31st January, 2022, the accused person stated that PW1 came to the room the second time and saw him sitting on the victim's bed and packing his laptop into his laptop bag.

Excerpts from Exhibit "P" are as follows:

"*The Dad came in and inspected the room and left but did not see me. The Dad came the second time and saw me sitting on the victim's bed and packing my laptop into my laptop bag..."*

It is obvious from the above that the accused person has contradicted his sworn evidence as against his unsworn statements that is Exhibits 'E' and 'P'. The law is that a witness whose evidence on oath was contradictory of his previous statement made but him, whether sworn or unsworn was not worthy of credit unless he gave a reasonable explanation.

See: section 76 of the Evidence Act, 1975 (NRCD 323).

Yaro vrs The Republic [1979] GLR 10 where it was stated by the court thus:

"A previous statement which was in distinct conflict with the evidence on oath was always admissible to discredit or contradict him and it would be presumed that the evidence on oath

was false unless he gave a satisfactory explanation of his prior inconsistent statement. A witness could not avoid the effect of a prior inconsistent statement by the simple expedient of denial." **See: Bour v The Republic [1965] GLR 1 SC.**

Gyabaah vrs The Republic [1984-86] 2 GLR 461 CA.

State vrs Otchere (supra).

In the case of **Poku vrs The State [1966] GLR 262,** the Supreme Court stated that:

"The principle in the must cited case **R v Harris [1927] 20 Cr. App. R, 144***, is strict but not absolute. In this country it would expose the administration of criminal justice to ridicule if the testimony of the witness on oath were rejected outright because he is alleged to have made a previous unsworn statement which is in conflict with his evidence without carefully considering his account of the circumstances under which any such statement was made."* The court stated further that:

"Since the witness in this case was not cross examined by the prosecution to explain why the two statements differed, his sworn statement should not have been ignored, but should have been accepted."

It is to be noted from the above dialogue that the accused person was crossexamined on the contradictions between his evidence-in-chief, answers given under cross-examination, caution and charged statements given to the police on the 9th December, 2019 and the 31st January, 2022 respectively and yet he could not give this court any satisfactory and reasonable explanation. On one leg, he did not kiss the victim whilst in her bedroom. On another leg, he took off his shirt and kissed the victim. In one vein, the victim only offered him ice cubes and nothing more. In another vein, the victim offered him cold water and ice cubes. On one hand, he hid behind the curtains in the victim's room. On another hand, he hid by the wardrobe behind the curtains in the victim's room. In one breath, PW1 found him hiding in the wardrobe in the victim's room. In another breath, PW1 saw him sitting on the victim's bed and packing his laptop into his laptop bag.

Under the Evidence Act, 1975 (NRCD 323) section 80 (2), the court is entitled to consider statements or conducts consistent or inconsistent with the testimony of the witnesses at the trial to prove the credibility of witnesses.

See: **In State v Otchere [1963]2 GLR 463.**

Bour v The State [1965] GLR 1

Egbetorwokpor v The Republic [1975] 1 GLR 585, CA.

In the case of **Kyiafi v Wono [1967] GLR 463 at 467 C.A** the court per Ollennu J.A. said that:

"It must be observed that the questions of impressiveness or convincingness are products of credibility and veracity; a court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinion it forms of the veracity of witnesses."

This court finds as a fact that the testimony of the accused person is unworthy of credit; much weight will not be attached to it and it is also negligible.

The accused person's assertion that two investigators, a man and a woman wrote his caution statement and asked him to sign same is an afterthought and same will be taken with a pinch of salt. The accused person was represented by a lawyer who is well versed with all criminal law procedures and their intricacies. If indeed, two investigators wrote his caution statement and asked him to sign same, his lawyer would have objected to it going in evidence and thereby inviting an adjudication by the court on the issue of admissibility, or cross-examined the fourth and fifth prosecution witnesses (PW4 and PW5) or to lead evidence to establish circumstances which violated the fundamental requirements of the admissibility of the caution statement as stated in the case of **State v Otchere and Others (1963) 2 GLR 463** thus:

"Where counsel for the accused person is instructed that a confession has been obtained in circumstances which violate the fundamental requirements of admissibility, it is the duty of the counsel to object to the confession going in evidence and thereby invite an adjudication by the court on the issue of admissibility. If he fails to object to its reception, he may nevertheless crossexamine prosecution witness in respect of the confession statement or lead evidence to

establish circumstances which violate the fundamental requirements and if he succeeds in establishing such circumstances, the evidential value or weight of the confessions although already admitted in evidence, will be negligible…"

It is now too late for the accused person to say that two investigators wrote his caution statement for him and asked him to sign same.

The accused person's evidence is therefore not credit worthy to be relied on and therefore he is not a credible witness of belief. The accused person's defence is not satisfactory and not reasonable probable.

The demeanour of the victim and the way she answered questions put to her by the counsel for the accused person, under cross examination shows that she was a witness of the truth who, far from being a teenager had sufficient recollection powers to be able to recount factual incidents she experienced when the accused debauched her when she was only fifteen years old. She demonstrated to the court how the accused person had sexual intercourse with her in her bedroom when she invited him to their house to install softwares and copy songs onto her laptop.

Furthermore, from the evidence led by the young prosecutrix, it is quite clear that it is the accused person who carnally knew her. I therefore find as a fact it is the accused person and nobody else, who had sex with PW2 on the 7th December 2019. The prosecution thus succeeded in leading sufficient evidence in proving that it was the accused person and nobody else who had sex with PW2 on the 7th December, 2019.

In this particular case, there are also pieces of evidence which if put together make a very strong case against the accused person. They are like series of small threads and when they are put together, they make a very strong case against the accused person that he was the one who carnally knew PW2 on the 7th December, 2019 as it was reiterated by the apex court in the case of

Gligah & Atiso v The Republic [2010] SCGLR 870 at 879 speaking through Dotse JSC as follows:

"… It is generally accepted that when direct evidence is unavailable, but there are bits and pieces of circumstantial evidence available, and when these are put together, they make stronger corroborative and convincing evidences than direct evidence…"

In this instant case, the following pieces of evidence abounds in making a very strong circumstantial evidence against the accused person and also corroborating the young prosecutrix's story that it was the accused person who naturally carnally knew her on the 7th December, 2019.

They are:

1. The accused person's admission in his evidence-in-chief, answers given under cross-examination, caution and charge statements (Exhibits "E" and "P") that on the 7th December, 2017 he was in the bedroom of the victim.
2. The accused person's admission in his caution statement (Exhibit "E") that whilst in the victim's bedroom, he kissed the victim after taking off his shirt.
3. The accused person's admission in his caution statement (Exhibit "E") that he hid by the wardrobe behind the curtains in the victim's room when her father entered to ask why she took long in opening the door.
4. The accused person's admission in his caution statement (Exhibit "E") that when PW1 left the room after checking the wardrobe, he came out from behind the curtains and entered the wardrobe.
5. The accused person's admission in his caution statement (Exhibit "E") that PW1 found him in the victim's wardrobe.
6. PW1's testimony that he found the accused person squatting in the victim's wardrobe naked.
7. The accused person's admission in his testimonies and statements given to the police that PW1 locked him in the victim's room until the police came to arrest him.
8. PW2's evidence that the accused person is her boyfriend and the one who had sex with her.

9. PW1's evidence that he caught the accused person in the victim's wardrobe naked.
10. PW1's testimony that he also found a wet tissue paper on the floor in the victim's room which smelt like sperms.
11. PW2's evidence that the tissue found in her room was used to clean the sperms after she had sexual intercourse with the accused person.
12. PW5's evidence that the victim's hymen was absent thereby confirming that there had been a penetration of the PW2's vagina.

The above pieces of evidence confirm the story of the second prosecution witness that it was when the accused person entered her bedroom that he ravished her.

From the totality of the evidence led by the prosecution and the defence witnesses together with the exhibits, this court finds as a fact it was the accused person and nobody else, who naturally carnally knew PW2 on the 7th December, 2019. The prosecution thus succeeded in leading sufficient evidence in proving that it was the accused person and nobody else who naturally carnally knew PW2 on the 7th December, 2019.

On a thorough perusal of the evidence on record together and on a full and careful consideration of the charge, the facts, the exhibits, the analysis and the applicable laws, this Court finds the accused person guilty of the offence of defilement contrary to section 101 (2) of the Criminal Offences Act, 1960

(Act 29) and convicts him accordingly.

In imposing the appropriate sentence, this court considered the following aggravating factors:

i. the fact that the accused person was dismissed from Start Rite School because of his sexual connection with the victim when he was her teacher; ii. the fact that the accused person continued his sexual connections with the victim even after the teacher-student relationship ended; iii. the age of the victim and the trauma she has gone through in the hands of the accused person in a society where counseling for

victims of such criminal act is almost non-existent; iv. the lack of show of remorse by the accused person for his action;

v. the intrinsic seriousness of the offence charged; vi. the gravity of the offence charged; vii. the degree of revulsion felt by the law-abiding citizens of this country for the crime committed; viii. the premeditation with which the criminal plan was executed; ix. the prevalence of the offence within the Accra Metropolitan Assembly and the country generally and

x. the sudden increase in the incidence of this crime.

This court also took into consideration in imposing the appropriate sentence, the following mitigating factors:

i. the fact that the accused person has had no brush with the law; and ii. Counsel for the accused person's plea for leniency.

iii. The one (1) month and thirteen (13) days that the accused person spent in lawful custody due to his inability to meet his bail conditions in accordance with clause (6) of article 14 of the Constitution of Ghana, 1992.

See the following cases:

Frimpong @ Iboman v The Republic [2012] 1 SCGLR 297

Kamil v The Republic [2011] 1 SCGLR 300

Gligah & Atiso v The Republic [2010] SCGLR 870

Kwashie and Another v The Republic (1971)1 GLR 488 CA

Asaah Alias Asi vrs The Republic (1978) GLR 1

Be that as it may, there is no doubt that as a nation, apart from the canker of narcotics and armed robbery, rape and defilement are on the increase. Undoubtedly, there is the need for a concerted effort to remove and destroy these dangerous menaces from our society and the country as a whole. The deterioration or the collapse in upholding our societal values, beliefs, norms, morals and ethical standards in this country makes it imperative for all and sundry, especially the law enforcement agencies like the courts to be at the forefront of this crusade.

This Court is of the opinion that the time has come for the courts of law to take into consideration the status or the social or official position of the accused person before sentence is imposed. For example, if a father whose duty it is to protect the chastity, sanctity and dignity, of his daughter defiles her, one will expect the father to be drastically dealt with. Similarly, in the present case where the accused person, a former teacher of the victim becomes the perpetrator of such a crime against his former innocent pupil whom he is to protect, he must obviously be met with the highest degree of revulsion and antipathy.

This court is saddened by the current development of rape, defilement, incest, indecent assault and wonder what has become of our values as a country. Our morality has degenerated to such bestial levels that the accused person could do what he did to his own student. The law will take its full course in this matter today so that others teachers who harbour such traits would be deterred.

Since the offence levelled against the accused person are of a very grave nature, the sentence must not only be punitive but it must also be a deterrent or exemplary in order to mark the disapproval of society and this country of such conduct by teachers. This Court has the responsibility to protect the chastity, sanctity and dignity of the of our young girls and shows its zeal to protect the chastity, sanctity and dignity of our young girls and women and to prevent the menace of young and old men defiling our young girls and its revulsion for such animal instincts by imposing a harsh sentence to serve as a deterrent to like-minded persons and to help manage a reduction of the high number of cases in this regard.

The accused person is an animal and a threat to the society and he needs to be put away from our young girls.

On this note, this court hereby sentences the accused person to twelve (12) years imprisonment with hard labour (I.H.L).

CONCLUSION

On a thorough perusal of the evidence on record together and on a full and careful consideration of the charge, the facts, the exhibits, the analysis and the applicable laws, this Court finds the accused person guilty of the offence of defilement contrary to section 101 (2) of the Criminal Offences Act, 1960 (Act 29) and convicts him accordingly.

The court sentences the accused person to twelve years (12) years imprisonment with hard labour (I.H.L).

SELASI KORWUNU FOR RITA OFOSUA APPIAH, ASSISTANT STATE ATTORNEY FOR THE REPUBLIC PRESENT

BERNARD N. AGORTEY WITH ERNEST HARDI NATOMAH–SILAS FOR THE ACCUSED PERSON PRESENT

(SGD)

H/H CHRISTINA EYIAH- DONKOR CANN (MRS.)

(CIRCUIT COURT JUDGE)