IN THE CIRCUIT COURT '5' HELD IN ACCRA ON TUESDAY THE 15TH DAY OF AUGUST, 2023 BEFORE HER HONOUR CHRISTINA EYIAH-DONKOR CANN (MRS.) CIRCUIT COURT JUDGE

CASE NO: D12/38/2023

THE REPUBLIC

VRS

OKO QUARTEY

JUDGMENT

INTRODUCTION

"*Complainant Sandra Ofori Bonsu aged 25, is a student and resides at Anyaa Palastown, a suburb of Accra, is a guardian to the victim Jacklyn Osei age estimated to be between 12 years and 13 years per bone age determination report. Accused Oko Quartey @ Oko aged 52, is a porter at Lapaz Kaneshie*

Lorry Station near the Total Filling Station. In the month of February and March

2023, at about 7:00 a.m., victim was going to pick her school bag from her Auntie's house at Lapaz Tema Lorry Station when accused saw the victim and lured her into a certain lotto kiosk at the Lapaz Kaneshie station. Accused for his first and second time in the month of February he lured the victim into the kiosk, touched her breast, kissed her and inserted his finger into her vagina. After the act, accused gave victim GH¢5.00 and warned her not to disclose the ordeal to anyone else he will kill her. Then the third and fourth time in the month of March, accused

lured the victim into the same kiosk, inserted his fingers into her vagina, touched her breast and finally asked the victim to stand and open her legs while accused removed victim's underwear, pant and managed to insert his penis into her vagina and had sexual intercourse with her. Accused again gave the victim GH¢5.00 and warned her again not to inform anyone. Since then, out of fear victim could not tell anyone until in the month of March, 2023 she started bleeding profusely and complainant decided to take her to hospital for examination and treatment, before victim disclosed to complainant all what happened and pointed out the accused as the culprit. Accused was subsequently arrested and brought to the Tesano DOVVSU for investigation. Police medical form was issued to complainant to send victim to hospital for treatment and examination. After investigation, accused was charged with the offences to appear before this honourable court."

It is upon the above facts as recounted by the prosecution that the accused person, Oko Quartey was arraigned before this court on the 21st April, 2023 and charged with the following offences:

1. One (1) count of defilement contrary to section 101 (2) of the Criminal Offences Act, 1960 (Act 29);

2. Two (2) counts of threat of death contrary to section 75 of the Criminal Offences Act, 1960 (Act 29) and

3. Two (2) counts of Indecent assault contrary to section 103 (1) of the Criminal Offences Act, 1960 (Act 29).

The accused person pleaded not guilty to the charges preferred against him. Therefore, the prosecution assumed the burden of proving the guilt of the accused person. The prosecution called four (4) witnesses and tendered in evidence four (4) exhibits. The accused person testified under oath but called no witness.

THE CHARGES

The charges preferred against the accused person and on the basis of which he stands trial in this instant case are as follows:

"COUNT ONE

STATEMENT OF OFFENCE

***DEFILEMENT**: Contrary to Section 101 (2) of the Criminal Offences Act, 1960*

(Act 29).

PARTICULARS OF OFFENCE

***OKO QUARTEY: 52 YEARS; A POTTER:** In the month of March 2023 at Lapaz near Total filling station in the Greater Accra Metropolis and within the jurisdiction of this court, you carnally knew Jacklyn Osei aged estimated to be between 12 years and 13 years per bone determination report.*

COUNT TWO

STATEMENT OF OFFENCE

***THREAT OF DEATH**: Contrary to Section 75 of the Criminal Offences Act, 1960*

(Act 29).

PARTICULARS OF OFFENCE

***OKO QUARTEY: 52 YEARS; A POTTER:** In the month of March 2023 at Lapaz near Total filling station in the Greater Accra Metropolis and within the jurisdiction of this court, you threatened to kill Jacklyn Osei with intent to put her into fear of death, if she discloses to anyone*

that you put your finger into her vagina, touched her breast, kissed her and had sexual intercourse with her.

COUNT THREE

STATEMENT OF OFFENCE

***INDECENT ASSAULT**: Contrary to Section 103 (1) of the Criminal Offences Act,*

1960 (Act 29).

PARTICULARS OF OFFENCE

***OKO QUARTEY: 52 YEARS; A POTTER:** In the month of February 2023 at Lapaz near Total filling station in the Greater Accra Metropolis and within the jurisdiction of this court, you indecently assaulted Jacklyn Osei by putting your finger into her vagina touching her breast and kissing her.*

COUNT FOUR

STATEMENT OF OFFENCE

***THREAT OF DEATH**: Contrary to Section 75 of the Criminal Offences Act, 1960*

(Act 29).

PARTICULARS OF OFFENCE

OKO QUARTEY: 52 YEARS; A POTTER: *In the month of February 2023 at Lapaz near Total filling station in the Greater Accra Metropolis and within the jurisdiction of this court, you threatened to kill Jacklyn Osei with intent to put her into fear of death, if she discloses to anyone that you put your finger into her vagina, touched her breast, and kissed her.*

COUNT FIVE

STATEMENT OF OFFENCE

INDECENT ASSAULT*: Contrary to Section 103 (1) of the Criminal Offences Act,*

1960 (Act 29).

PARTICULARS OF OFFENCE

OKO QUARTEY: 52 YEARS; A POTTER: *In the month of March 2023 at Lapaz near Total filling station in the Greater Accra Metropolis and within the jurisdiction of this court, you indecently assaulted Jacklyn Osei by putting your finger into her vagina, touching her breast and kissing her."*

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 levelled 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, that is the 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. Since the prosecution is asserting the above-mentioned facts constituting the ingredients of the offences charged, 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 offences charged which will cumulatively prove the guilt of the accused person, 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 in fact and indeed is guilty of the offences charged. 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 323). 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 offences charged 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 A.K.A. 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 has confessed to the commission of the offences. Thus, where the accused person was not seen committing the offences, his guilt can still be proved by inference from surrounding circumstances that indeed the accused person committed the said offences.

See: **Logan vs Lavericke [2007-2008] SCGLR 76 Headnote 4**

Dexter Johnson vs The Republic [2011] 2 SCGLR 601 at 605

State vs Anani Fiadzo (1961) GLR 416 SC

Kamil vs The Republic (2010) 30 GMJ 1 CA

Tamakloe vs The Republic (2000) SCGLR 1 SC

The guilt of the accused person is sufficiently proved if the tribunal of fact is convinced that he committed the offences though there remains a lingering possibility that he is not guilty.

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 four (4) witnesses in support of its case. The case for the prosecution was presented mainly by the victim, Jacklyn Osei as the second prosecution witness (PW2) and supported largely by the guardian of the victim Sandra Ofori Bonsu as the first prosecution witness (PW1), Detective Chief Inspector Eric Kofi Fosu, the investigator in this case as the third prosecution witness (PW3), and Dr. Victor Akuoko of the Achimota Government Hospital who examined the victim as the fourth prosecution witness (PW4).

The prosecution also tendered in evidence four (4) exhibits namely: the caution statement of the accused person, Radiology Report of the victim, the charged statement of the accused person and the Police Medical Report Form of the victim, as Exhibits "A", "B", "C" and "D" respectively.

PW1, SANDRA OFORI BONSO

She is a guardian to the victim Jacklyn Osei. On the 24th March, 2023 she received a call from the victim from school telling her that when she went to urinate, she saw blood in her pants. She thought it was the victim's menstruation period, so she told the victim to inform her head teacher so that she comes home. She gave the victim pads to use over the weekend from Monday, March 27, 2023 and it was the fourth day since the menstrual period started flowing, so she gave the victim six (6) pads to use. When the victim returned home in the evening, she was bleeding profusely and she had

already used the six pads she gave to her in the morning. Looking at the way the victim was bleeding, she told her that she will send her to the hospital. On the 1st April, 2023, the victim came to her room crying that she wanted to tell her something. Then it was the ninth day since she started bleeding and she was worried. The victim told her that there is a certain book man at Lapaz

Kaneshie lorry station who has been luring her into a certain kiosk to fondle her breast and also insert his finger into her vagina. She asked the victim how many times the said bookman had done that to her and she said four times but she was not certain on the dates they happened. She therefore asked the victim the last time the said book man did that to her and she told her that the last time was the day she saw blood in her pant and from her own calculation she noticed that it was on the 24th March, 2023. The victim also told her that the accused person gave her GH¢5.00 after the act. She asked the victim why she did not tell her or her grandmother and she told her that the accused person threatened to kill her if she disclosed it to anyone. She informed the police at the Lapaz Police Container, after the victim had identified the accused person as the culprit to her. The accused person was arrested. She was issued with a police medical form to send the victim to the hospital for treatment, examination and report which she did. She gave her statement to the police.

PW2, JACKLYN OSEI

She is twelve years old and a pupil of Jacob Preparatory School and she is in class five. She stays with PW1 and her mother Aunty Julie as her guardian at Anyaa Palast town. During the month of February, 2023 and March, 2023, which she cannot recollect the exact date, at about 7:00 a.m., at Lapaz Kaneshie station, she was going for her school bag at her Auntie's place at Lapaz Tema station, already wearing her uniform. Upon reaching a section of the road at Lapaz Kaneshie Station, the accused person saw her

and called her to come, put his hand around her neck and lured her into a certain lotto kiosk and started touching her breast by putting his hands into her uniform.

According to PW2, the accused person after touching her breast and kissing her chin inserted his finger into her vagina, gave her give Ghana cedis (GH¢5.00) and warned her not to tell anyone else he will kill her. The accused person only touched her breast, kissed her cheeks and inserted his finger into her vagina on the first and second time that he took her into the lotto kiosk. For the third and fourth time, the accused person touched her breast, kissed her cheeks, inserted his finger into her vagina and also inserted his penis into her vagina after he had removed it from his trouser, removed her underwear and pant and asked her to open her legs whilst standing and holding the kiosk. The accused person gave her another five Ghana cedis (GH¢5.00) after the act and warned her never to tell anyone else he will kill her. She therefore did not tell anyone because she was afraid that the accused person will kill her. Later, when she started bleeding and PW1 promised to take her to the hospital, she then told her that the accused person inserted his finger and penis into her vagina. PW1 quickly informed the police and she lead them to where the incident happened and she pointed the accused person out to the police. The accused person was arrested and the police gave PW1 a police medical form to send her to the hospital. She gave her statement to the police.

PW3, DETECTIVE CHIEF INSPECTOR ERIC KOFI FOSU

He is an investigator stationed at the Tesano Divisional DOVVSU, Accra. On the 1st April, 2023, he was on morning duty when one Inspector Antwi from

Lapaz Police- Container arrested and brought to the unit the accused person. PW1 and PW2 reported a case of threat of death and indecent assault against the accused person and same was referred to him for investigation. He obtained statements from PW1 and PW2 and he also obtained an investigation caution statement from the accused

person in which he only admitted indecently assaulting PW2 by touching her breast. The accused person was subsequently detained. He issued a police medical form to PW1 to send PW2 to any government hospital for treatment and report for further investigation. PW1 submitted the police medical form dully endorsed. He sent the accused person to the scene of crime where he admitted that the kiosk in which the incident occurred was true as PW2 told the police. The accused also told police that he has sent PW2 to the kiosk twice and he touched her breast and gave her five Ghana cedis (GH¢5.00) afterwards. He saw only a chair and a board which serves as a table for the lotto agent. The accused person also told police that he normally sits on the chair and asks PW2 to stand in front of him whilst he touched her breast. The police also sent PW2 to the scene of crime without the accused person and she disclosed further that it was the same kiosk as confirmed by the accused person that the incident took place. PW2 demonstrated to police what the accused person has been doing to her. According to PW3, PW2 stated further that on the several occasions that she was going to pick her school bag from her Auntie's place at Lapaz Tema station in the kiosk, the accused person will put his hand through her uniform, touch her breast, kiss her chin, put his finger into her vagina through her underwear and pant and insert his finger into her vagina. PW3 stated further that initially, PW2 did not disclose the sexual intercourse that the accused person had with her but only the indecent assault and threat of death but when she returned from the hospital she further told police at the scene that she disclosed to the doctor at the Achimota Hospital who examined her that the accused person also inserted his penis into her vagina. The police asked PW2 to demonstrate how the accused person had sexual intercourse with her and she stood in a standing position as if she was squirting small, opened her legs whilst the accused person also stood in front of her, went down small and inserted his penis into her vagina but she failed to disclose her ordeal to anyone because the accused person threatened her. On the 5th April, 2023 he charged the accused person with the offences

as stated on the charge sheet. He also obtained a charge statement from the accused person.

PW4, DR. VICTOR AKUOKO

He is a Medical Doctor at the Achimota Hospital and also the author of the Police Medical Report Form, Exhibit "D". On the 3rd April, 2023, at about 12:

55 p.m., the victim came to the Achimota hospital in the company of a relative. He attended to the victim in the Specialist Consulting Room 6. The victim told him that a man forcefully had peno-vagina sexual intercourse with her and occasionally inserted his finger into her vagina and that the last episode occurred on the 20th March, 2023. He proceeded to examine her after taking her history. On examination, he did not see any bruises on her body. Her pulse, everything was fine. He moved on to the vulvo-vagina examination. He positioned the victim in a lithotomy position. On examination of the victim's vagina, there was no fluid, blood or discharge coming out of her vagina. There was no bruises seen at the entrance of her vagina. Her hymen was not intact, it was broken. There was no bruises around the victim's anus. He counseled and re-assured the victim. He requested for some laboratory investigations including blood count, pregnancy test, HIV and high vagina swab. PW4 concluded his evidence by stating that from his examination, there was a penetration of the victim's vagina.

SUMMARY OF EVIDENCE BY THE DEFENCE

The accused person testified under oath but he did not call any witness.

ACCUSED PERSON'S DEFENCE

He is a 52 years old man working as a book man at Lapaz. He knows the victim in this case as his place of work is closer to where her guardian works at Lapaz, Accra. The

victim passes through his place of work almost daily and had on a number of times asked him for money as her guardian was not available to provide for her need for the day. He has on few occasions given the victim money to enable her go to school as and when she asked. On one occasion when he gave the victim money on her request, she stretched to hug him, which he understood it to mean she appreciated his kind gestures towards her and previous deeds of his. In responding to the hug from the victim, his hands unintentionally touched her breast area when they were parting from the close hug in the open. According to the accused person, there are times when the victim pleads for assistance by way of money and he will go to the kiosk where he works if he happens to be outside of it at the time to access the little he has to help her out with as transportation to school. It is totally false and unimaginable that he has been accused of having sexual relations with a young girl he had often helped without any consideration. He has not at any point in his interaction with the victim inserted his fingers into her vagina as alleged. Neither has he attempted to have nor had any sexual intercourse with the victim. He has also not threatened to kill the victim. It is rather the victim who usually comes to him to seek for assistance for transportation either to school or from school. All the charges levelled against him are a total fabrication calculated to tarnish his image and wrongfully accuse him of acts not done. Neither has he imagined doing such acts to a

little girl.

FINDINGS OF PRIMARY FACTS

From the evidence on the record, together with the Exhibits, this court finds as a fact the following:

i. That the accused person knows the victim and her guardian.

ii. That the accused person's place of work is closer to where the victim's guardian works at Lapaz, Accra.

iii. That the victim passes through the accused person's place of work almost daily.

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 carnally known the victim.*

3. *That it is the accused person who carnally knew the victim.*

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

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

(Unreported) delivered on the 13th February, 2020

Republic vs Yeboah [1968] GLR 248

ANALYSIS OF THE CHARGE OF INDECENT ASSAULT

Section 103 (1) of the Criminal Offences Act, 1960 (Act 29) provides as follow:

"*(1) A person who indecently assaults another person commits a misdemeanour and is liable on conviction to a term of imprisonment of not less than six months."*

There are two forms of indecent assault. The first form is where a person without the consent of the other person forcibly makes a sexual bodily contact with the other person but not amounting to carnal or unnatural carnal knowledge.

See: Section 103 (2) (a) of the Criminal and Other Offences Act, 1960 (Act 29)

The second form of indecent assault is where a person sexually violates the body of another person, in a manner not amounting to carnal knowledge or unnatural carnal knowledge.

See: Section 103 (2) (b) of the Criminal and Other Offences Act, 1960

(Act 29)

From the facts of the case as given by the prosecution, the charge of indecent assault levelled against the accused person falls under the first form.

In order to secure a conviction against the accused person, the prosecution would have to prove beyond reasonable doubt the following four (4) essential ingredients:

1. *That someone forcibly made a sexual bodily contact with the victim by inserting his finger into her vagina, touching her breast and kissing her;*

2. *That someone who forcibly made a sexual bodily contact with the victim by inserting his finger into her vagina, touching her breast and kissing her is the accused person;*

3. *That the victim did not give consent to the accused person to forcibly make any sexual bodily contact with her and*

4. *That the conduct of the accused person in inserting his finger into the victim's vagina, touching her breast and kissing her did not amount to carnal knowledge or unnatural carnal knowledge.*

The State vrs Gyimah [1963] 2 GLR 446

Contemporary Criminal Law in Ghana, Second Edition by Sir Dennis

Dominic Adjei

ANALYSIS OF THE CHARGE OF THREAT OF DEATH

Under section 75 of the Criminal and Other Offences Act, 1960 (Act 29):

"*A person who threatens any other person with death, with intent to put that person in fear of death, commits a second degree felony.*"

In the case of **Behome v. The Republic [1979] GLR 112** the Court held that:

"In the offence of threat of death the actus reus would consist in the expectation of death which the offender creates in the mind of the person threatened whilst the mens rea would also consist in the realization by the offender that his threats will produce that expectation."

The prosecution is required by law to prove that:

i. The accused person threatened PW2 with death; and ii. That at the time of the threat the accused person had the intent to put

PW2 in fear of death.

To determine whether the words uttered constitute a threat of death, the court is required to look at the plain and ordinary meaning of the words uttered. Where the ordinary meaning of the words uttered constitute threat of death, the court is not required to look for the secondary meaning. And the test to be used in determine whether the words spoken or written by the accused person constitute threat of death is how a reasonable person will perceive it within the context and the circumstances in which they were uttered. The test is an objective one.

ANALYSIS OF THE EVIDENCE TO PROVE THE CHARGES OF

DEFILEMENT AND INDECENT ASSAULT

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, Jacklyn Osei 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**

It is trite learning that a birth certificate and a weighing card are prima facie evidence of a person's age. These are however, not the only means of proving a person's age. 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).

PW2 the victim in this case testified that at the time the incident occurred, she was twelve years old. The Radiology Report of the victim was tendered in evidence as Exhibit "B" without any objection from counsel for the accused person to corroborate the age of the victim and the report estimates the victim's age as between 12 years and 13 years. The incident occurred in the months of February and March, 2023. It therefore means that the victim was between 12 years and 13 years at the material time that the incident occurred. My own observation having seen the victim is that she is certainly under sixteen years of age. On the totality of the evidence led together with Exhibit "B", this court therefore finds as a fact that the victim was between 12 years and 13 years at the time of the offence and she is a child under sixteen years of age and it holds same. I am therefore convinced that the prosecution has proved beyond

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 issues of whether or not someone carnally known PW2, and whether or not someone forcibly made a sexual bodily contact with the victim by inserting his finger into her vagina, touching her breast and kissing her.

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.

The case of **State v Gyimah [1963] 2 GLR 446** explained sexual intercourse as follows:

"Sexual intercourse means that the man should have used his penis to penetrate the woman's vagina and not by any means such as fingers, tongue or stick. The Republic v Yeboah supra provides that the least degree of penetration of the penis into the vagina is enough to have proved beyond a reasonable doubt that there was a sexual intercourse between the man and the woman. The test is whether or not there was the least degree of penetration into the vagina by the man's penis."

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 this instant 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 section 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 during the months of February and March, 2023 respectively, which she cannot recollect the exact date, at about 7:00 a.m., at Lapaz

Kaneshie station, she was going for her school bag at her Auntie's place at Lapaz Tema station, already wearing her uniform. Upon reaching a section of the road at Lapaz road at Lapaz Kaneshie Station, the accused person saw her and called her to come, put his hand around her neck and lured her into a certain lotto kiosk and started touching her breast by putting his hands into her uniform. According to PW2, the accused person after touching her breast and kissing her chin inserted his finger into her vagina, gave her five Ghana cedis (GH¢5.00) and warned her not to tell anyone else he will kill her. The accused person only touched her breast, kissed her cheeks and inserted his finger into her vagina on the first and second time that he took her

into the lotto kiosk. For the third and fourth time, the accused person touched her breast, kissed her cheeks, inserted his finger into her vagina and also inserted his penis into her vagina after he had removed it from his trouser, removed her underwear and pant and asked her to open her legs whilst standing and holding the kiosk. The accused person gave her another five Ghana cedis (*GH¢5.00*) after the act and warned her never to tell anyone else he will kill her.

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 portion of the medical report, Exhibit 'D', read as follow:

"VULVO-VAGINAL EXAMINATION

-Hymen is not intact (Broken)"

In accepting the evidence of the medical doctor 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 of the victim testified as the fourth prosecution witness (PW4) and subjected himself to cross-examination.

PW4, in explaining the medical report stated that on examination of the victim's vagina, her hymen was not intact, it was broken. PW4 concluded his evidence by stating that from his examination, there was a penetration of the victim's vagina.

Concluding his testimony, PW4 stated his opinion as follow:

"*Q. From your examination was there a penetration of the victim's vagina?*

A. I can confirm that there was a penetration of the victim's vagina."

With regard to proof of the second element that PW2 has been carnally known, and also that someone forcibly made a sexual bodily contact with PW2 by inserting his finger into her vagina, the evidence on this point is so overwhelming. In the opinion of this court, the evidence of PW2 that someone inserted his finger into her vagina and carnally knew her was materially corroborated by PW4 who examined her shortly after the incident and stated that upon an examination of the victim's vagina, her hymen was broken thereby confirming a penetration of her vagina.

The fact that PW2's hymen was broken confirms that someone has inserted his finger into her vagina and also that sexual intercourse had taken place through PW2's vagina these facts by themselves beyond reasonable doubt discharged the burden of proof required from the prosecution. It is therefore not disputed that apart from PW2 saying that someone inserted his finger into her vagina and that she had sexual intercourse in the months of February and March, 2023 respectively, the medical doctor who did

examine her shortly after the incident confirmed a penetration of her vagina thereby corroborating her evidence.

There is no doubt the hard but painful veracity that PW2 who is only twelve years of age has been carnally know. The totality of the evidence adduced by prosecution witnesses at this trial together with Exhibit 'D', point to one and only one fact that someone inserted his finger into PW2's vagina and also carnally knew her. The prosecution thus succeeded in leading sufficient evidence to establish that PW2 was carnally known in the month of March,

2023. The prosecution also succeeded in leading sufficient evidence to establish that someone forcibly made a sexual bodily contact with PW2 in the months of February and March, 2023 by inserting his finger into her vagina.

I will now consider the third essential element of the offence of defilement that the prosecution must establish, that it, whether it was the accused person and no other person who carnally knew PW2 in the month of March, 2023 and the second element of the offence of indecent assault that the prosecution must establish, that is, whether or not that someone who forcibly made a sexual bodily contact with the victim by inserting his finger into her vagina, touching her breast and kissing her is the accused person.

Again, 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 and fourth 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 in the case of **Asante No (1) v The Republic** (supra) at

132 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. 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.

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 inserted his fingers into her vagina, touched her breast, kissed her and had sexual intercourse with her in the months of

February and March, 2023 respectively in his lotto kiosk and threatened to kill her should she reveal same to anyone.

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 inserted his fingers into her vagina, touched her breast, kissed her and had sexual intercourse with her in the months of February and March, 2023 respectively in his lotto kiosk, 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 in his defence denied ever having had any sexual connection with PW2 in the months of February and March, 2023. He testified that the victim passes through his place of work almost daily and had on a number of times asked him for money as her guardian was not available to provide for her need for the day. He has on few occasions given the victim money to enable her go to school as and when she asked. On one occasion when he gave the victim money on her request, she stretched to hug him, which he understood it to mean she appreciated his kind gestures towards her and previous deeds of his. In responding to the hug from the victim, his hands unintentionally touched her breast area when they were parting from the close hug in the open. According to the accused person, there are times when the victim pleads for assistance by way of money and he will go to the kiosk where he works if he happens to be outside of it at the time to access the little he has to help her out with as

transportation to school. It is totally false and unimaginable that he has been accused of having sexual relations with a young girl he had often helped without any consideration. He has not at any point in his interaction with the victim inserted his fingers into her vagina as alleged. Neither has he attempted to have nor had any sexual intercourse with the victim. He has also not threatened to kill the victim. It is rather the victim who usually comes to him to seek for assistance for transportation either to school or from school. All the charges levelled against him are a total fabrication calculated to tarnish his image and wrongfully accuse him of acts not done. Neither has he imagined doing such acts to a

little girl.

From the above, this case seems to boil down to one of oath against oath. The Supreme Court in the case of **Gligah & Atiso v. The Republic [2010] SCGLR 870 at 878** per *Dotse JSC* stated thus:

"The Supreme Court in Amartey v The State (as stated in holding (1) of the headnote to the case) laid down the following test for general application in all criminal cases namely:

Where a question boils down to oath against oath, especially in a criminal case, the trial Judge should first consider the version of the prosecution, applying to it all the test and principles governing credibility of witnesses, when satisfied that the prosecution's witnesses are worthy of belief, consideration should then be given to the credibility of the accused's story, and if the accused's case is disbelieved, [page 879] the judge should consider whether, short of believing it, the accused's story is reasonably probable."

I am further 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.
I will at this juncture point out some contradictions between the accused person's evidence-in-chief, caution and charge statements (Exhibits "A" and "C") and answers given under cross-examination.

Firstly, the accused person in his caution and charge statement given to the police on the 1st April and 5th April, 2023 respectively admitted unequivocally that the first time he took the victim into the lotto kiosk after touching her breast in the morning at about 1700 hours whiles the victim was in her school uniform going to school and he gave her GH¢5.00. However, in his evidencein-chief, he sought justify same by stating that in responding to the hug from the victim, his hands unintentionally touched her breast

area when they were parting from the close hug in the open when on one occasion when he gave the victim money on her request, she stretched to hug him, which he understood it to mean she appreciated his kind gestures towards her and previous deeds of his.

Excerpts from Exhibit "A" are as follows:

*"**It was true I touched victim's breast. It was true I lured the victim into the lotto kiosk at Lapaz Kaneshie lorry station**. It was not true I inserted my fingers into her vagina. It was not true I threatened to kill her if she reveals the ordeal to her parent or guardian. I remember this happened somewhere in December, 2022. When the first incident occurred. And somewhere in weeks the second incident happened. **The first time I took her into the lotto kiosk after touching her breast in the morning at about 1700 hours whiles the victim was in her school uniform going to school. I gave her GH¢5.00. The second time, victim herself came to me and asked me to give her GH¢5.00 for her transport. So I took her to the lotto kiosk again and this time just in front of the kiosk I gave her GH¢5.00 and she left**…"*

The accused person in his evidence-in-chief stated in part:

"6. That I say in all honesty that on one such time when I gave her money on her request, she stretched to hug me, which I understood it to mean she appreciated my kind gestures to her and previous deeds of mine.

*7. **Further I say that in responding to the hug from the alleged victim, my hands unintentionally touched her breast area when we were parting from the hug in the open**."*

Secondly, in his caution and charge statements, the accused person stated that he gave the victim GH¢5.00 after he lured her into his lotto kiosk and touched her breast.

Interestingly, he shifted the goal post and stated whilst answering questions under cross-examination that he only gave the victim GH¢5.00 when he told him that she had misplaced her money on one hand, she didn't have money on another hand and that the money her mother gave her to go to school with was missing on another leg.

The accused person in his caution statement stated in part:

"***The first time I took her into the lotto kiosk after touching her breast in the morning at about 1700 hours whiles the victim was in her school uniform going to school. I gave her GH¢5.00. The second time, victim herself came to me and asked me to give her GH¢5.00 for her transport. So I took her to the lotto kiosk again and this time just in front of the kiosk I gave her GH¢5.00 and she left****…"*

The accused person answered the following questions under crossexamination:

"Q. And within this one year frame that you have known the victim, when did you start giving her money?

A. In December, 2020, the victim came to me to tell me that she had misplaced her money so I gave her five Ghana cedis (GH¢5.00). she came back again saying that she didn't have money and I gave her five Ghana cedis (GH¢5.00) and she came back another day saying that the money her mother gave her to go to school with is missing and also gave her five Ghana cedis (*GH¢5.00)."*

Thirdly, the accused person in his evidence-in-chief stated that the victim passes through his place of work almost daily and had on a number of occasions asked him for money as her guardian was not available to provide for her need for the day. Surprisingly whilst answering questions under crossexamination, he denied ever testifying to the effect that the victim passes through his place of work almost daily

and had on a number of occasions asked him for money as her guardian was not available to provide for her need for the day.

An excerpt from the accused person's evidence-in-chief is as follow: *"4. That I say further that the young girl passes through my place of work almost daily and had on a number of times asked me for money as her guardian was not available to provide for her need for the day*."

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

"Q. In your witness statement, you said you gave her money to go to school because her guardian was not available to provide for her need for the day and that is not true?

A. My lord I did not say that."

Furthermore, the accused person in his caution and charged statements stated that it was when he put his hand around the victim's neck that his hand touched his breast. Interestingly, in his evidence-in-chief, he sought to create the impression that in responding to the hug from the victim, his hands unintentionally touched her breast area when they were parting from the close hug in the open when on one occasion when he gave the victim money on her request, she stretched to hug him, which he understood it to mean she appreciated his kind gestures towards her and previous deeds of his. Again, on the 21st April, 2023 the accused person's pleaded guilty with explanation in respect of the offence of indecent assault and in his explanation, he admitted that he touched the victim's breast.

Excerpts are as follows:

"**Explanation of the accused person to Count Three**: *My lord indeed I touched the victim's breast but I did not put my finger into her vagina and kiss her."*

It is obvious from the above dialogue that the accused person has contradicted his sworn evidence as against his unsworn statement in Exhibits "A" and "C" and the law is that, where a case boils down to facts and credibility of witnesses, if the court takes the view that one side or the other is the truth then the accounts are mutually exclusive of each other. Once the court decides to believe with one side of the story it means the other side is a fabrication.

See: Ansah-Sasraku v. The State (1966) GLR 294 at 298 SC.

In the case of **Kuo Den alias Sobti vrs The Republic (1989-90) GLR 203 at 213** it was held by the Supreme Court that material inconsistencies in defence put up by the accused person have been held to provide sufficient justification for the defence to be rejected.

The law is also that a witness whose evidence on oath was contradictory of a 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 instructive to note that the accused person was cross-examined on the contradictions between his evidence-in-chief, answer given under crossexamination, caution and charge statements (Exhibits "A" and "C") yet, he could not give this court any satisfactory explanation. In one breath, he took the victim into the lotto kiosk after touching her breast in the morning at about 7: 00 a.m. whiles the victim was in her school uniform going to school and he gave her GH¢5.00. In another breath, it was responding to the hug from the victim, that his hands unintentionally touched her breast area. On one hand, he gave the victim GH¢5.00 after he lured her into his lotto kiosk and touched her breast. On another hand, he only gave the victim GH¢5.00 when he told him that she had misplaced her money on one hand, she didn't have money on one leg and that the money her mother gave her to go to school with was missing on another leg. In one vein, the victim had on a number of occasions asked him for

money as her guardian was not available to provide for her need for the day. In another vein, he did not say that the victim on a number of occasions asked him for money as her guardian was not available to provide for her need for the day. On one leg, it was when he put his hand around the victim's neck that his hand touched her breast. In another leg, in responding to the hug from the victim, his hands unintentionally touched her breast area.

The accused person's assertion that in responding to the hug from the victim, his hands unintentionally touched her breast area when they were parting from the close hug in the open when on one occasion when he gave the victim money on her request, she stretched to hug him, which he understood it to mean she appreciated his kind gestures towards her and previous deeds of his and that he did not insert his finger into the victim's vagina, kiss her, have sexual intercourse with her and threatened her with death are all

afterthoughts calculated to throw dust into the eyes of this court and to avoid the axe of justice upon him and same are rejected by this court.

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 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."

A court has to test its impression as to the veracity or truthfulness of oral testimony of a witness against the whole of the evidence of that witness and other evidence on record.

See: **Ackom v Republic [1975] GLR 419**

This court also formed an impression of the behaviour of the accused person in the witness box. From the way the accused person reacted to questions and how he answered questions showed that he was not a witness of truth. He pretended not to hear and understand questions for the purpose of gaining time to consider the effect of his answers. Forgetting facts which he knew will implicate him or would be open to contradictions, minutely remembering others which he knew cannot be disputed and replying evasively. The accused person was very economical with the truth. He is therefore not a credible witness. It would be madness to rely on his evidence.

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.

From the totality of the evidence led by the prosecution witnesses and the defence witnesses together with the exhibits, the applicable laws as enunciated above and the analysis, this court finds as a fact the following:

i. That in the months of February and March 2023, at about 7:00 a.m., whilst the victim was going to pick her school bag from her Auntie's house at Lapaz Tema Lorry Station, the accused person lured her into a certain lotto kiosk at the Lapaz Kaneshie station touched her breast, kissed her and inserted his finger into her vagina and gave victim GH¢5.00 and threatened to kill her if she reveals her ordeal to anyone.

ii. That in the month of March, the accused person lured the victim into the same kiosk, inserted his fingers into her vagina, touched her breast and finally inserted his penis into her vagina and had sexual intercourse with her gave victim GH¢5.00 and threatened to kill her if she reveals her ordeal to anyone.

Furthermore, the excerpt from Exhibit 'A' is a confession statement admissible against the accused person in respect of the offence of indecent assault because it was voluntary, direct, positive and satisfactorily proved and it suffices to warrant a conviction without corroborative evidence.

The accused person confessed to the commission of the offence of indecent assault. And the law is that, once the said confession was voluntarily made, direct, positive and satisfactorily proved, it is sufficient to warrant conviction without corroborative evidence

See: Ayobi vs The Republic (1992 -93) PT 2GBR 769 CA
Billah Moshie vs The Republic (1972) 2 GLR 318 CA Ofori vs The Republic (1963) 2 GLR 452 SC.

The accused person's denial of the offences in the witness box is therefore an afterthought and same will be taken with a pinch of salt.

The demeanour of the victim and the way she answered questions put to her by counsel for the accused person, under cross examination shows she was a witness of truth who, far from being teenager, has sufficient recollection powers to be able to recount factual incidents she experienced when the accused debauched her. She demonstrated to the court how the accused person during the months of February, 2023 and March, 2023 respectively, at about 7:00 a.m., at Lapaz Kaneshie Teshie, when she was going for her school bag at her Auntie's place at Lapaz Tema station, called her to come, put his hand around her neck, lured her into a certain lotto kiosk, started touching her breast by putting his hands into her uniform, kissed her chin, inserted his finger into her vagina, gave her give Ghana cedis (GH¢5.00) and warned her not to tell anyone else he will kill her. The victim further demonstrated to the court how the accused person for the third and fourth time, lured her into his kiosk, touched her breast, kissed her cheeks, inserted his finger into her vagina and also inserted his penis into her vagina, had sexual intercourse with her and gave her five Ghana cedis (GH¢5.00) and warned her not to disclose her ordeal to another lest he will kill her.

Again, from the evidence led by the young prosecutrix, it is quite clear that it is the accused person and no other person who touched her breast, inserted his finger into her vagina, kissed her and had sexual intercourse with her in the months of February and March, 2023 and threatened to kill her should she disclose same to anyone.

With regard to the third and fourth issues of the offence of indecent assault, which are that PW2 did not give consent to the accused person to forcibly make any sexual bodily contact with her by inserting his finger into her vagina, touching her breast and kissing her and that the conduct of the accused person did not amount to carnal knowledge or unnatural carnal knowledge, there is no way that a twelve years old girl will consent to a forcible sexual bodily contact and from the manner in which the accused person lured her into his lotto kiosk, touched her breast, kissed her and

inserted his finger into her vagina, she could have given her consent to the accused person to forcibly make any sexual bodily contact with and the conduct of the accused person in inserting his finger into PW2's vagina without any doubt did not amount to carnal or unnatural carnal knowledge of PW2 .

This court further finds as a fact that PW2 did not give consent to the accused person to forcibly make any sexual bodily contact with her by inserting his finger into her vagina, touching her breast and kissing her and that the conduct of the accused person did not amount to carnal knowledge or unnatural carnal knowledge.

The prosecution again succeeded in leading sufficient evidence in proving that PW2 did not give consent to the accused person to forcibly make any sexual bodily contact with her and that the conduct of the accused person in inserting his finger into PW2's vagina, touching her breast and kissing her in the months of February and March, 2023 respectively did not amount to carnal knowledge or unnatural carnal knowledge.

Again, in this particular case, there are pieces of evidence which if put together make a very strong case against the accused person. They are like series of small threads 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 indecently assaulted her by touching her breast, inserting his finger into her vagina, kissing her in the months of February and March, 2023 respectively and also carnally knew her in the month of March, 2023.

They are:

i. The accused person's admission in his caution and charged statements that he lured the victim into his lotto kiosk at Lapaz Kaneshie lorry station.

ii. The accused person's admission in his caution and charged statements that he indeed touched the victim's breast.

iii. The accused person's admission in his caution and charged statements that he gave the victim GH¢5.00 after taking her into his lotto kiosk and touching her breast in the morning at about 7:00 a.m.

iv. The accused person's admission in his caution and charged statements that he took the victim into his lotto kiosk the second time.

v. The accused person's admission in his explanation to the charge of indecent assault that he indeed touched the victim's breast.

vi. PW4's evidence that there has been a penetration of the victims' vagina.

The above pieces of evidence confirm the story of the second prosecution witness that it was when the accused person lured her into his lotto kiosk for the first, second, third and fourth times that he touched her breast, kissed her, inserted his finger into her

vagina and had sexual intercourse with her and threatened to kill her should she disclose same to anyone.

On the totality of the evidence on record together and on a full and careful consideration of the charge, the exhibits, the applicable laws and the above analysis, this court therefore finds as a fact it is the accused person and nobody else, who had touched the victim's breast, kissed her, inserted his finger into her vagina and ravished her in the months of February and March, 2023 respectively.

The prosecution thus succeeded in leading sufficient evidence in proving that it was the accused person and no other person who had sex with PW2 in the month of March, 2023 in his lotto kiosk. Consequently, the prosecution has succeeded in proving the offence of defilement contrary to section 101(2) of the Criminal Offences Act, 1960 (Act 29) against the accused person.

The prosecution thus succeeded in leading sufficient evidence in proving that it was the accused person and no other person who touched the victim's breast, kissed her and inserted his finger into her vagina in the months of February and March, 2023 respectively.

On a thorough perusal of the evidence on the record and on a full and careful consideration of the charge, the exhibits and the applicable laws, this Court finds the accused person guilty of the two (2) counts of indecent assault contrary to section 103 (1) of the Criminal and Other Offences Act, 1960 (Act 29) and convicts him on each one of them accordingly.

On the totality of the evidence on the record together and on a full and careful consideration of the charge, the exhibits and the applicable laws this court therefore

finds as a fact the accused person in the months of February and March, 2023 respectively threatened PW2 with death.

The learned author P.K. Twumasi in his book**:** **Criminal Law in Ghana** at page 77 stated:

"The general principle of our law is that intention, like many other states of mind, is incapable of direct proof; it is always inferred from proven facts. This is a principle of English common law which has been accepted as an important principle of our criminal law."

From the evidence on record, it can reasonably be inferred that the intention of the accused person in threatening PW2 that he will kill her if she discloses to anyone that he had sex with her was to put PW2 into fear of death and I hold same.

This Court is further satisfied beyond reasonable doubt that the prosecution established beyond reasonable doubt that at the time the accused person threatened to kill PW2 should she disclose to anyone that he had sex with her, the accused person had the intent to put that person in fear of death.

Consequently, the prosecution has succeeded in proving the two (2) counts of the offence of threat of death contrary to section 75 of the Criminal Offences Act, 1960 (Act 29) against the accused person.

On a thorough perusal of the evidence on record together and on a full and careful consideration of the charges, the exhibits, the applicable laws, and the above analysis, this Court finds the accused person guilty of the two (2) counts of threat of death contrary to section 75 of the Criminal Offences Act, 1960 (Act 29) and convicts him accordingly on each one of them.

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

i. The age of the accused person and the victim being fifty- two (52) years and twelve (12) years respectively. ii. the intrinsic seriousness of the offences charged; iii. the gravity of the offences charged; iv. the degree of revulsion felt by the law-abiding citizens of this country for the crimes committed;

v. the premeditation with which the criminal plans were executed; vi. the prevalence of the offences within the Accra Metropolitan Assembly and the country generally; vii. the sudden increase in the incidence of these crimes; viii. 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 acts is almost non-existent; and ix. the accused person's lack of show of remorse for his actions. 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; ii. counsel for the accused person's plea for leniency and mitigation; and iii. the four (4) months 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, defilement, indecent assault and threat of death 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 saddened by the current development of defilement, indecent assault and threat of death and wonders 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 this young girl. The law will take its full course in this matter today so that others who harbour such traits would be deterred. Since the offences preferred 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.

The accused person had no mercy on the victim when he ravished her. This court will also not show him any mercy as it was stated in the Bible in Matthew 5:7 that mercy is shown to those who deserve mercy

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 indecently assaulting and 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.

On this note, this court hereby sentences the accused person to twelve (12) years imprisonment with hard labour (I.H.L) on count one namely defilement contrary to section 101 (2) of the Criminal Offences Act, 1960 (Act 29).

The accused person is further sentenced to two (2) years imprisonment with hard labour (I. H.L) each on counts two (2) and four (4) namely threat of death contrary to section 75 of the Criminal Offences Act, 1960 (Act 29).

This court also sentences the accused person to three (3) years imprisonment with hard labour (I.H.L) each on counts three (3) and five (5) namely indecent assault contrary to section 103 (1) of the Criminal Offences Act, 1960 (Act 29).

The sentences of the accused person are to run concurrently.

CONCLUSION

The accused person is sentenced to twelve (12) years imprisonment with hard labour (I.H.L) on count one namely defilement contrary to section 101 (2) of the Criminal Offences Act, 1960 (Act 29), two (2) years imprisonment each with hard labour (I.H.L) on counts two (2) and four (4) namely threat of death contrary to section 75 of the Criminal Offences Act, 1960 (Act 29) and three (3) years imprisonment each with hard labour (I.H.L) on counts three (3) and five (5) namely indecent assault contrary to section 103 (1) of the Criminal

Offences Act, 1960 (Act 29).

The sentences of the accused person are to run concurrently.

CHIEF INSPECTOR OPOKU ANIAGYE FOR THE REPUBLIC PRESENT

AMA AWOTWE BOSUMAFI FOR YVONNE AMEGASHIE FOR THE

ACCUSED PERSON PRESENT

(SGD)

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

(CIRCUIT COURT JUDGE)