

**IN THE CIRCUIT COURT “A”, TEMA, HELD ON TUESDAY, THE 23RD DAY
OF JANUARY, 2024, BEFORE HER HONOUR AGNES OPOKU-BARNIEH,
CIRCUIT COURT JUDGE**

SUIT NO: D10/39/23

THE REPUBLIC

VRS:

1. YAW KATAMANI

2. TAMAKLOE ESTEVI

ACCUSED PERSONS

PRESENT

D.S.P. STELLA NASUMONG FOR PROSECUTION

PRESENT

NO LEGAL REPRESENTATION

JUDGMENT

FACTS:

The two accused persons were jointly charged and arraigned before this Court on 28th February, 2023 on two counts of defilement contrary to **Section 101(2)** of the Criminal Offences Act, 1960 (Act 29).

The brief facts presented by the prosecution are that the complainant, Serlom Torsu, aged 40, is a commercial motor rider and resides with his daughter, the victim, Angel Torsu, aged 9 years at the time of the alleged incident. The first accused person and the second accused person reside in the same house as the complainant and the victim at Gbetsile. The prosecution alleges that in the early part of the year 2023, the first accused person lured the victim into an abandoned kiosk situated in the same house and had sexual intercourse with her.

Again, on 12th of June 2023, at about 8:00 am, whilst the victim and her younger brother were playing outside, the second accused person also lured the victim to the same abandoned kiosk and had sexual intercourse with her and afterwards gave the

victim an amount of One Ghana Cedi (GH¢1.00). The victim confided in her father about her ordeal and a complaint was lodged at the Police station leading to the arrest of the accused persons. The prosecution further claims that a medical report of the victim established among others that, the victim's hymen was broken and there was a creamy foul-smelling discharge, evidencing sexual intercourse. After investigations, each accused person was charged with defilement and the two were jointly arraigned before the court.

THE PLEA

The first accused person pleaded not guilty to the charge after it had been read and explained to him in the Ewe language. The second accused person on his part, pleaded guilty to the charge after it had been read and explained to him in the Ewe Language. When the court enquired from the second accused person whether he understood the import of his plea of guilty, he stated that he did not understand and when the court interpreter further explained the import of the charge to him, he stated that he did not penetrate the vagina of the child with his penis and that it was just “*brush work*”. The court therefore entered a plea of not guilty based on the explanation of the second accused person for the prosecution to prove the guilt of both accused persons beyond a reasonable doubt.

BURDEN OF PROOF

The foundation of our criminal justice system is premised on **Article 19(2)(c)** of the 1992 Constitution, which provides that a person charged with a criminal offence is presumed innocent until he is proven guilty or has pleaded guilty. In the case of **Asante (No.1) v. The Republic (No.1)** [2017-2020] I SCGLR 132 at 143 per Pwamang JSC held that:

“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 was the accused person who committed it.”

Under **Section 13** of the Evidence Act, 1975(NRCD 323), when the accused person is called upon to open his defence, the standard of proof of the defence is on balance of probabilities only.

ANALYSIS

Here, the accused person is charged with defilement contrary to **Section 101(2)** of Act 29. Defilement is defined in **Section 101(1)** of Act 29 as “*the natural or unnatural carnal knowledge of a child under sixteen years of age.*” **Section 101(2)** of Act 29, which proscribes defilement states as follows;

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

In the case of **Asante v. The Republic**, (supra), the Supreme Court identified the following ingredients of the offence of defilement which the prosecution must prove to secure conviction;

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

On the first ingredient of the charge, **the prosecution must prove that the victim is under the age of 16 years.** In the instant case, the age of the prosecutrix as a person below the statutory age of 16 years was not seriously contravened by the accused persons. The third prosecution witness, the investigator, in her evidence-in-chief, testified that during her investigations into the case, the complainant produced the

birth certificate of the victim in this case, admitted and marked as **Exhibit “D”** which indicated that she was born on 3rd January 2014 implying that at the time the incident is alleged to have occurred in the year 2023, the victim was below the statutory age of 16 years. Therefore, the prosecution successfully proved the age of the victim as a person below the age of sixteen years at the time the incident is alleged to have occurred.

Secondly, **the prosecution must prove that someone had carnal knowledge of the child below the statutory age of 16 years.** The law is that the least degree of penetration suffices in proving natural or unnatural carnal knowledge. See **Section 99** of Act 29. In the case of **Gligah & Atiso v. The Republic** [2010] SCGLR, 870 where the Supreme Court per Dotse JSC held that:

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

To prove that someone had sexual intercourse with the victim, the first prosecution witness (PW1), the complainant, Selorm Torsu testified that he lives at Gbetsile Sanco and works as a commercial motor rider. According to his testimony, he had been living with the victim and his younger brother for the past four years when their mother divorced him and left the children with him. PW1 further states that the victim is the eldest and she was 9 years old at the time of the alleged incident. PW1 testified that on 12th June 2023, when he returned from work, his brother who lives in the same house with him told him that a co-tenant in the house had informed him that the victim told her son that the second accused person herein, has been having sexual intercourse with her. Upon hearing this, he called his daughter and interviewed her and she confessed and added that the second accused person had been having sexual

intercourse with her in an abandoned kiosk closer to their house and mentioned 11th June 2023 as the last time he had sex with her. After this confirmation from the victim, he took her to the Gbestile Police Station and lodged a complaint.

At the police station, the victim was interviewed again by one police officer and in his presence she again mentioned the name of the first accused person as the first person who had sexual intercourse with her a month before the 2nd accused person started having sexual intercourse with her in the abandoned kiosk. After lodging the complaint, he was issued with a Police Medical Form to send the victim to the hospital for examination and also an extract to be taken to the Afienya Domestic Violence and Victim Support Unit. He took the victim to the hospital and returned the endorsed medical form to the police at Afienya DOVVSU and his statement and that of the victim were obtained. He led the police to the accused persons' places of abode and they were arrested and taken to the police station for the necessary action.

The second prosecution witness (PW2), the alleged victim, Angel Torsu testified that she was nine (9) years at the time of the alleged incident. She further testified that she knows both accused persons who live in the same compound house where she lives with her family. She stated that after her first encounter with the first accused person, the second accused person, popularly known as Efo Etse also gave her money and asked her to come inside the kiosk. When she went, she saw a mosquito net on the floor in the kiosk and the second accused person asked her to remove her pants and lie down on the net which she did. He also removed his clothes and inserted his penis into her vagina, had sexual intercourse with her and warned her not to tell anyone about it. According to the testimony of the second prosecution witness, the second accused person had had sexual intercourse with her so many times, but she could only recall the last one which was on a Sunday in June. She further states that the last time the second accused person had sexual intercourse with her, her father was sleeping and she was outside playing with her brother when the second accused person called her to come into the abandoned kiosk and she went.

The second prosecution witness mentioned again that she usually passes through the back of the kiosk which is broken so no one sees her when she enters the kiosk. When she went inside the kiosk, the second accused person again had sexual intercourse with her and after that gave her money. A few days after the last sexual intercourse, her father confronted her with the issue and she confessed to him that the accused persons had sexual intercourse with her. After that, her father took her to the police station and reported the case and later took her to the hospital. When they returned from the hospital, they went to Afienya Police Station and her statement was taken.

The third prosecution witness, the investigator, *No. 9569 PW/CPL. Belinda Ayorna* stationed at Afienya Domestic Violence and Victim Support Unit (DOVVSU) testified that she knows the other prosecution witnesses in this case. According to her, she was the detective on duty on 15th June, 2023 and the victim together with the complainant brought an extract of occurrence dated 12th June, 2023 together with an unendorsed medical form from Gbetsile Police Station where he first reported that one Etsevi had sexual intercourse with his 9 years old daughter Angela Torsu and the case was referred to her for investigation. She advised the complainant to send the victim to the hospital for her to be examined and return the medical form for the necessary action. The complainant, on 15th June 2023, returned from the hospital with the victim and endorsed the medical form.

The third prosecution witness further testified that during investigations, she obtained statements from the complainant and the victim. The victim then told her that one Etsevi, the second accused person herein, had sex with her on 11th June 2023, in an abandoned Kiosk situated on the compound where they both lived. The victim told her further that, before Etsevi had sex with her, one Yaw Katamani @ Elegbedzi, the first accused person herein, had sex with her in the same kiosk. The victim stated again that in that kiosk, was a blue Mosquito net and that was the bed on which the two accused persons took her and variously had sex with her on different occasions.

On the 16th of June, 2023, the station officer informed her that, the complainant led the night patrol team to the place of abode of the accused persons to arrest them for having had sexual intercourse with the victim. The accused persons were detained in cells and later, the complainant and the victim visited the Police Station to identify the accused persons as the two people who had sexual intercourse with the victim. She then interrogated the accused persons and took statements from them where the first accused person denied the offence but the second accused person admitted having had sexual intercourse with the victim.

Subsequently, the complainant and the accused persons led her into the kiosk where the incident took place. At the scene, she observed that the kiosk was located in front of a house that the complainant described as his family house. The victim also pointed out one side of the kiosk which had an opening, where each of the accused persons pulled her through into the kiosk and had sex with her. The investigator then took photographs of the opening. She also noticed that, the main entrance into the abandoned kiosk was locked, which made it difficult for the accused persons to again entry into the kiosk, except through the opening. The complainant brought out the key to open the kiosk. The victim and the accused persons led her into the kiosk and in the kiosk, she saw a blue mosquito net which the victim pointed out to her as the bed on which the accused persons had sex with her as captured in the initial statement of the victim. She then asked both accused persons as to whether that was the room as well as the mosquito net on which they had sex with the victim. The first and second accused persons confirmed this assertion by the victim. The victim told her further that each of the accused persons gave her money after having sex with her, an assertion the first accused person denied but the second accused person confirmed the same. She took the accused persons back to the police station and detained them. After investigations, the accused persons were charged with their respective offences. She tendered in evidence the charge statements of the accused persons admitted and marked as **Exhibits “B” and “B1”** respectively.

To further corroborate the account of the prosecution witnesses that someone had sexual intercourse with the victim, the prosecution called the medical officer Dr Gloria Amankwa Attah who examined the victim to give evidence. She testified that she works at the Obstetrics and Gynaecological Unit of the Tema General Hospital. She identified and tendered the Police Medical Report Form admitted and marked it as **Exhibit “E”** as a document prepared by her. According to her testimony, she saw the victim on 12th June 2023 at the Gynaecological Emergency Unit of the Tema General Hospital with a complaint of an alleged sexual assault which had been occurring repeatedly involving a man who was alleged to be living on the same premises. After taking the history, the patient was examined and she was generally stable and her cardiac and pulmonary functions were all stable. However, vaginal examination showed or revealed redness of the walls of the vagina, the hymen was broken and there was also a foul-smelling creamy discharge noted so the findings suggested there was some trauma to the area or the region and also suggests penetration. Appropriate laboratory requests were made and appropriate medication given and that was the last time she came into contact with the victim and her father.

The evidence led by the prosecution witnesses is firmly corroborated by the evidence of the medical officer that someone had sexual intercourse with the victim. Thus, I find that the prosecution successfully proved the second ingredient of the offence charged.

Lastly, **the prosecution must prove that it was the two accused persons charged in this case and no other person who had sexual intercourse with the victim** Proof of the identity of a person who committed a crime is key in a criminal trial since it is not enough to prove that a crime has been committed but further that it was the person (s) charged before the court who committed the crime. See the case of **Adu Boahen v. The Republic** (1973) GLR 70 CA. The victim in this case was emphatic that the two accused persons had sexual intercourse with her.

EVIDENCE AGAINST THE FIRST ACCUSED PERSON

Whereas the victim maintains that the first accused person was the one who first had sexual intercourse with her and it was only once, she states that she could not remember the exact time the first accused person allegedly had sexual intercourse with her. The second prosecution witness further states that the first accused person only had sexual intercourse with her once. The first accused person from the day of his arrest, his arraignment before the court and throughout the proceedings vehemently denied having had sexual intercourse with the victim and maintained his innocence. The first accused person in his investigation caution statement admitted and marked as **Exhibit “A”** and in his charge statement admitted and marked as **Exhibit “B”** denied taking the victim to a kiosk and having sexual intercourse with her albeit he states that he knows her and that he sometimes gives her money.

The victim under cross-examination by the first accused person, the following ensued;

Q: Are you saying that I had sexual intercourse with you?

A: Yes, My Lord.

Q: When I had sexual intercourse with you were you able to walk?

A: Yes, My Lord.

Q: When I had sexual intercourse with you were you able to walk to school that day?

A: Yes, My Lord.

Q: When I had sexual intercourse with you did you bleed?

A: No, My Lord.

Q: Do you remember that after the arrest, I was granted bail and I asked you whether I had sexual intercourse with you and you said no?

A: Yes, My Lord.

Q: Do you know that I did not have sexual intercourse with you?

A: You did it to me.

Q: Do you know sexual intercourse?

A: No, My Lord.

Q: And you claim I had sexual intercourse with you.

A: My Lord, A1 removed my panties and removed his panties and removed his penis and put it inside my vagina.

Q: You are telling this court a lie. I never had sexual intercourse with you. You are just a little child.

A: You did it.

Q: It is not true. I never had sexual intercourse with you. When I was granted police enquiry bail you were asked and you said I did not do anything to you.

A: You did it.

Q: Are you saying that I had sexual intercourse with you and you were able to walk?

A: I was able to walk.

Q: You are telling this court a lie. I never had sexual intercourse with you. You are just a little child and I can never do anything with you.

A: You did it to me.

Q: Are you saying that when I had sexual intercourse with you, nothing happened to you and A2 had sexual intercourse with you and you bled to the extent that you were sent to the hospital?

A: The first person who did it, I was hurt. When you did it, I did not bleed but I was hurt.

The first accused person in his evidence on oath was again insistent and put up a spirited defence that he had never had sexual intercourse with the victim. He testified in his defence that the allegations against him were false and that on the day of his arrest, he was sleeping around 2 am and 3 am when the police officers opened his door and arrested him. When he asked them about his offence, they asked him to follow them to the police station. When he came out of his room, he saw the second accused person in handcuffs standing at a distance with the police waiting for him. He was also handcuffed and when he enquired again about the reason for his arrest, the police informed him that he would be allowed to contact his family members at the police station. When they got to the police station, the police informed him that he had sexual intercourse with the victim in this case which he denied and added that the victim was a child and a niece to his boss and as such, he could not have sexual intercourse with her. He further testified that sometimes when he sends the children and gives them money when he has money. He also stated that he goes to work and comes home late by the time the children are sleeping and the children leave the house early before he wakes up. He therefore denied having sexual intercourse with the victim. According to him, in his presence when the investigator asked the victim whether he knew him, she answered yes and when further asked if he had sexual intercourse with her, the victim shook her head indicating no. The investigator took his caution and charge statements in which he denied having sexual intercourse with the victim. The first accused person under cross-examination by the prosecution maintained his stance and stated that the allegation is actuated by malice since the complainant is not on talking terms with him.

From the evidence led by the prosecution and the defence put up by the first accused person, the only evidence linking the first accused person to the crime charged is the account of the victim that the first accused person was the first person who had sexual intercourse with her before the second accused person had sexual intercourse with her. Unlike the victim's evidence against the second accused person, she recounted with particularity how and when the alleged sexual intercourse happened, in respect of the first accused person, her evidence is scanty since she could not state

the period that he had sexual intercourse with her. She indicates that she was injured the first time but there is no evidence of same. From the cross-examination reproduced above, she gave inconsistent answers as to whether at the police station when asked she stated that the first accused person did not have sexual intercourse with her. The medical evidence, aside from stating that the victim was not a virgin and the findings confirmed sexual assault, there is no evidence linking the first accused person to the crime charged as the person who had sexual intercourse with the victim.

On the totality of the evidence led by the prosecution and the defence put up by the first accused person, I hold that the prosecution failed to prove their case against him beyond reasonable doubt. I therefore pronounce the first accused person not guilty of the charge and I acquit and discharge him on a charge of defilement.

EVIDENCE AGAINST THE SECOND ACCUSED PERSON

The victim in this case positively identified the second accused person as the one who had sexual intercourse with her and that he has had sexual intercourse with her on numerous occasions. The third prosecution witness, the investigator, testified that upon his arrest, the second accused person admitted that he had sexual intercourse with the victim. The second accused person, in his investigation caution statement, admitted and marked as **Exhibit “A1”** stated that on 11th June 2023, at about 2:00 pm, he was at home when he saw the victim and her friends playing. He called the victim and told her that he wanted to have sex with her and give her an amount of GH¢10 and she agreed. He then gave her the GH¢10 before he had sexual intercourse with her. After having sex with her, she came out of the kiosk but he does not know and cannot tell if someone saw them or not. On 16th June 2023 about 3:00 am, the police arrested him and sent him to the police station.

Again, when the accused person appeared before the court, he pleaded guilty and when the court enquired if he understood the import of his plea, he stated that he only

brushed his penis around the vagina but did not penetrate. On the issue of the consent of the child, under **Section 101** of Act 29, consent of a child below 16 years to sexual intercourse is immaterial. Also, **Section 14(a)** of Act 29, provides that:

“a consent is void if the person giving the consent is under twelve years of age, or in the case of an act involving a sexual offence, sixteen years, or is, by reason of insanity or of immaturity, or of any other permanent or temporary incapability whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which the consent is given;”

The combined effect of these provisions is that for purposes of establishing defilement, consent of the child cannot inure to the benefit of the second accused person since such a child is incapable of giving consent in law. Thus, the contention of the second accused person that the victim consented and agreed to have sexual intercourse with him for an amount of GH¢10 is untenable.

Additionally, the accused person in his defence on oath stated that he did not intend to have sexual intercourse with the victim and that he lost both parents and his twin brother which makes him sad and that on the day of the incident, he was drunk. The defence put up by the second accused person in court shows that he is raising an issue of intoxication. In the case of **Ketsiawah v. The Republic** [1965] GLR 483, the court held that:

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

In my respectful view, the defence of intoxication raised by the second accused person is an afterthought since the defence was raised for the first time when he mounted the witness box. The defence also strains credulity since there is no evidence that at the time he had sexual intercourse with the victim, he had consumed intoxicating liquor and was in such a state as to approximate his condition to insanity. The answers given by the second accused person under cross-examination below show that he was in full control of his mental faculties and indeed appreciated his sexual encounter with the victim. Under cross-examination, the following ensued;

Q: How long have you lived in that house with the victim and her father?

A: About 8 months.

Q: You just told this court that you indeed had sexual intercourse with the victim. Can you tell the court how many times you have had sexual intercourse with the victim?

A: My Lord it was only once.

Q: What time of the day did this sexual intercourse take place?

A: My Lord around 2 to 3 pm.

Q: Can you tell the court where you had this sexual intercourse with the victim?

A: My Lord in a kiosk situated in our house.

Q: I am putting it to you that it is not true that you have only had sexual intercourse with the victim once.

A: My Lord it was only once.

Q: I am again putting it to you that you deliberately gave the victim money and had sexual intercourse with her and not under the influence of alcohol as you want the court to believe.

A: That is not correct.

Q: I am again putting it to you that the victim mentioned that you have had sexual intercourse with her severally in that abandoned kiosk.

A: That is not correct.

Q: I am again putting it to you that the victim you had sexual intercourse with is below the age of 16 years which is an offence.

A: That is true.

Q: I am again putting it to you that when the victim's father reported the case to the police, he was issued with a medical form to send the victim to the hospital for examination.

A: Yes My Lord.

Q: I am again putting it to you that the medical examination also confirmed the victim has been defiled.

A: Yes My Lord.

Q: You see the victim mentioned you and A1 as the people who had sexual intercourse with her.

A: That is true My Lord.

Q: I am finally putting it to you that during the early months of 2023, you and A1 had sexual intercourse with the victim for which you are before this court.

A: Yes My Lord.

On the totality of the evidence led by the prosecution and the defence put up by the second accused person, I hold that the second accused person failed to raise a reasonable doubt in the case of the prosecution. The medical evidence does not show that it was merely “brushwork” as the accused person would want the court to believe and that it corroborates the account of the victim that the second accused

person had penetrative sex with her several times leading to the tear in the hymen and the foul smell observed during the vaginal examination by the medical officer.

I therefore hold that the prosecution proved their case beyond reasonable doubt that the second accused person had sexual intercourse with the victim, a female aged 9 years at the time of the alleged incident. I therefore pronounce the second accused person guilty of the charge and convict him accordingly on a charge of defilement.

Sentencing of Second Accused Person

In sentencing the second accused person, the court takes into consideration the fact that he is a first-time offender and the accused person's plea in mitigation of sentence. Per **Article 14 (6)** of the 1992 Constitution, time spent in custody pending trial is considered. The aggravating factors the court considers are the age of the victim (9 years) relative to the age of the accused person, (24 years) and the need to impose a deterrent sentence. The court also considers the numerous occasions that the accused person had sexual intercourse with the victim

I therefore sentence the accused person to serve eighteen (18) years imprisonment in hard labour (IHL).

Consequential Order

Psychological counselling is recommended for the child victim.

SGD.

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