

IN THE CIRCUIT COURT HELD IN MPRAESO, EASTERN REGION ON  
WEDNESDAY 7<sup>TH</sup> FEBRUARY, 2024 BEFORE HER HONOUR MRS ADWOA  
AKYAAMAA OFOSU, CIRCUIT COURT JUDGE

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B6/25/2023

THE REPUBLIC

V

OFOSU APPIAH BISMARCK

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.....

TIME: 9:00

ACCUSED: PRESENT

CHIEF INSPECTOR BEATRICE LARBI FOR THE PROSECUTION PRESENT

SARKODIE ABOAGYE ESQ PRESENT HOLDING BRIEF FOR FRANCIS OSEI  
NSIAH ESQ

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## JUDGMENT

Bismark Ofosu Appiah, the accused person herein was arraigned before this court on a charge of 'indecent assault' contrary to section 103(1) of the **Criminal Offences Act, 1960 Act (29)**. He pleaded not guilty to the charge when same was read to him. His plea thus

put the facts in dispute thereby setting in motion the obligation on the prosecution to prove his guilt beyond reasonable doubt.

The brief facts of the case are that the complainant is a hair dresser and the mother of the victim who is four years old and they live at white house, a suburb of Nkawkaw. The complainant also sells indomie in the night at white house. The accused person is 21 years old and a driver and lives in the same vicinity with the complainant. The accused usually visits the complainant at where she sells the indomie.

On the 31<sup>st</sup> of January, 2023, about 9:00 pm, the complainant was at her selling place together with the victim and one Priscilla when the accused emerged and sat on a bench. When Priscilla was leaving, the accused carried the victim to escort her and midway, the accused diverted and sent the victim to his house at white house, undressed her and inserted his left little finger into her vagina and afterwards promised to buy her kalypo drink. The accused then sent the victim to her mother and bought her Kaizer apple drink with biscuit and left.

On the 2<sup>nd</sup> of February, 2023, the complainant saw some watery substance from the victim's vagina and when she interviewed her, she narrated the ordeal she went through in the hands of the accused. The complainant reported the matter to the police for action and police medical form was issued to the complainant to send the victim to the Nkawkaw Holy Family Hospital for examination, treatment and endorsement. On the 8<sup>th</sup> of February, 2023, the accused was arrested and cautioned. After investigation, he was charged with the offence as stated on the charge sheet and arraigned before this court.

In our criminal jurisprudence the prosecution that alleges that the accused person has committed a crime has the burden to prove his the guilt. This is because, the **1992 Constitution of Ghana** presumes the innocence of an accused person unless the accused person himself has pleaded guilty or been proven guilty. Therefore, once an accused

person pleads not guilty it raises a presumption that he is innocent and it is only when the prosecution is able to lead evidence to establish the facts upon which the accused is charged in terms of the required standard of proof, 'which is proof beyond a reasonable doubt' that the accused can be said to have been proven guilty. To this end, there are several provisions in the **Evidence Act, 1975 (NRCD 323)** which deal with the nature of the burden on the prosecution and the standard of proof. The relevant provisions are as follows:

***Section 10(1)** For the purposes of this degree the burden of persuasion means the obligation of a party to establish the requisite degree of belief concerning a fact in the mind of the tribunal of fact.*

***Section 11(2)** In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence reasonable mind could find the existence of the existence of the fact beyond reasonable doubt.*

***Section 13(1)** In any civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt.*

***Section 15 (1)** Unless and until it is shifted , the party claiming that a person is guilty of a crime or wrong doing has the burden of persuasion on the issue.*

Thus in **Kweku Quaye alias Togbe v. The Republic [2021] DLSC 10794 at page 9-10**, Mensa Bonsu Jsc stated:

*"It is trite law that the burden of proof in criminal cases rests on the prosecution and that the standard is "proof beyond reasonable doubt". Section 11(2) of the Evidence Act states that: "In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which*

*is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence reasonable mind could find the existence of the fact beyond reasonable doubt”.*

*The burden thus has two aspects: the burden to lead evidence on any fact required to be proved and the duty to provide sufficient evidence to persuade a reasonable mind as to existence of any such fact otherwise known in American Jurisprudence as ‘the burden of going forward’; and ‘the burden of persuasion’. To satisfy the burden of persuasion the standard of ‘proof beyond reasonable doubt’ must be met”*

Pursuant to discharging its burden of proof therefore, the prosecution in the instant case called three witnesses. PW1 was the complainant Yusif Zariatu, PW2 was the victim Vincentia Ottu and PW3 was the investigator Detective Inspector Seiko Abubakari.

PW1 told the court that she lives at white house a suburb of Nkawkaw and the victim, Vincentia Ottu is her four year old daughter with whom she lives. She said that she is a hair dresser and also sells cooked indomie in the night at white house. That the accused person lives in the same vicinity with her.

She testified that on the 31<sup>st</sup> of January, 2023, at about 9:00 pm, she was at her selling place with the victim and one Priscilla when the accused emerged and sat on a bench and started playing with the victim. When Priscilla was leaving, the accused carried the victim on his shoulder and escorted her. About 40 minutes, later, the accused person brought the victim to her and bought her kaizer apple drink with biscuit and left. On 1<sup>st</sup> February, 2023, about 4:00 am, when she woke up, she saw some watery substance from the victim’s vagina and when she interviewed her, she stated that when the accused carried her, he sent her to his room where he removed her panty and inserted his finger into her vagina.

PW1 again told the court that on the 3<sup>rd</sup> of February, 2023, she sent the victim to the Nkawkaw Holy Family Hospital for treatment and thereafter she reported the matter to the police for action. She said she was issued with a police medical form to send the victim back to the Holy Family Hospital for endorsement after which she returned the police medical form to the police and gave a statement.

PW2 the victim, gave an unsworn statement as per her witness statement by virtue of her age. She stated that she is four years old and live with her mother Yusif Zariatatu at white house a suburb of Nkawkaw. That on the 31<sup>st</sup> of January 2023, she was at where her mother sells indomie in the night when the accused emerged and carried her and sent her to his room at white house and he removed her panty and inserted his finger into her vagina. She further stated that afterwards the accused asked her what she wanted and she told him she wanted Kalypo and biscuit so he sent her to her mother at where she sells the indomie. The accused then bought her Kaizer apple and groundnut and left. She stated that her mother later found some watery substance from her vagina and at that juncture, she asked her about it and she narrated her ordeal to her. Her mother sent her to the Holy Family Hospital and thereafter she gave a statement to the police.

PW3 told the court that, she is stationed at the Divisional DOVVSU Nkawkaw and that on the 6<sup>th</sup> of February, 2023, he was in the office as an investigator on duty when he received an extract of occurrence from Nkawkaw Central Police Station indicating that on the 31<sup>st</sup> of January, 2023 the accused inserted his finger into the victim's vagina. On the same day, he received a police medical form duly endorsed by a medical doctor from the Nkawkaw Holy Family Hospital issued to her at the Nkawkaw Central Police station.

PW3 further testified that he obtained statements from PW1 and PW2 and on the 7<sup>th</sup> of February, 2023, the accused person was arrested by the police for investigation and he obtained cautioned statement from him in the presence of an independent witness. In the

course of investigation, he received the victim's health insurance card which indicated that she was born on the 10<sup>th</sup> of October, 2018. He paraded all the parties before the Divisional crime officer, Nkawkaw and he was directed to charge the accused with the offence of indecent assault which he duly complied with. PW3 tendered the following in evidence; the police medical form issued to the victim Exhibit A, the cautioned statement of the accused Exhibit B, the health insurance card of the victim Exhibit C and the charge statement of the accused Exhibit D.

At the close of the prosecution's case, the court ruled that there was a case for the accused to answer. The accused was therefore called upon to open his defence in accordance with **section 174 of the Criminal and other offences (Procedure) Act 1960, (Act 30)**

In his defence, the accused testified that on the day in question, he had closed from work and he went to PW1's work place where she sells indomie. When her daughter (the victim) saw him, she came to him and hugged him so he carried her. He said that he met a lady friend at the PW1's place so he went to see her off carrying the victim. After seeing her off, the victim was sleeping so he brought her back to PW1. When they got to PW1, the victim requested for a drink and he gave her GHC5.00 and he left.

The accused continued that after a week, he was at home when the police came to him that he was wanted at MTTD. He asked them what he had done and they told him. He told them he had not done any such thing and that if the allegation were true why would they wait until after a week. The accused further testified that they insisted that he should admit the crime and he said no. They took him to her mother at the store and whilst there his pastor and a church member came there and they prevailed on him that if he has done any such thing he should confess it and he told them he had not done any such thing. They insisted he should speak the truth and he also insisted that he had not done anything.

Section 103 (1) of Act 29 supra under which the accused is charged provides that

*“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*

In explaining acts that constitute indecent assault, sub section 2 of Section 103 further provides that:

*A person commits the criminal offence of indecent assault if without the consent of the other person that person;*

*(a) forcibly makes a sexual bodily contact with the other person, or*

*(b) sexually violates the body of the other person, in a manner not amounting to carnal knowledge or unnatural carnal Knowledge.*

Consequently, to secure a conviction, the prosecution must prove the following ingredients:

1. There was no consent
2. The accused either forcibly made a sexual bodily contact with the victim; or
3. The accused sexually violated the body of the victim in a manner not amounting to carnal knowledge or unnatural carnal knowledge

The offence under consideration in the instant case is not age specific unlike defilement, incest, rape etc however in proving the first element, that is, “that there was no consent” the age of the victim becomes important because in Ghana a child is not capable of giving consent. **Section 14 (a) of Act 29** supra thus provides that:

*In construing a provision of this act where it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or where it is required for a matter of justification or exemption that an act should be done with a person's consent,*

*(a) 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 indecency, 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*

Therefore for a sexual offence like the instant one which involves a child, the prosecution must prove that the victim is under sixteen years of age because the law is that where the victim in a sexual offence is under sixteen years of age, such a person is incapable of giving consent so that even if it is established that the person gave her consent for the act such consent will be deemed void.

Here, the evidence is that the victim was four years old at the time of the incident which occurred on the 31<sup>st</sup> of January, 2023. The prosecution tendered in evidence Exhibit C, the health insurance card of the victim which shows her date of birth as 10<sup>th</sup> October, 2018. In the case of **Robert Gyamfi v. The Republic** (unreported), [Suit No. H2/02/19] CA, Kumasi per Dzamefe JA, delivered on 27<sup>th</sup> February, 2019, the court stated: “...*The three certification mentioned there are not the only means of identifying one's age in our jurisdiction. Yes, I know the statute is specific for children below eighteen years. Aside those certificates mentioned, the National Health Insurance Card for now is one of the official documents for the identification and age of all Ghanaians, either young or old. The class or school register is also one of such official records accepted as indicating the identity and age of school children*”.

Thus the national health insurance card is one of the acceptable means of proving the age of a person in Ghana. Besides, the court had the opportunity of seeing the alleged victim



in person and had no doubt that the victim was under sixteen years of age. Furthermore, the accused did not deny that she is the alleged victim in question when she appeared in court. Therefore, on the basis of Exhibit C, the health insurance card of PW2 which states PW2's date of birth as 10<sup>th</sup> October, 2018 and the court's own observation of her, the court is satisfied that PW2 was four years old at the time of the alleged incident.

With the age so established, I am of the view that the first ingredient of the offence is satisfied since PW2 by her age was not legally capable of giving consent so that even if she did, same was void in terms of section 14 (a) of Act 29.

The next ingredient to be proved is either the accused forcibly made a sexual bodily contact with PW2 or sexually violated the body of PW2 in a manner not amounting to natural or unnatural carnal Knowledge.

Here, the evidence is that on the material date, the accused person carried PW2 with him to go and see one Priscilla off. That after seeing the said Priscilla off, the accused diverted his course and sent PW2 to her room and inserted his finger in her vagina. It is trite that with sexual offences, eye witness account is rare but it is possible. In this case there is no eye witness account. PW1's evidence was therefore based on what she was told by PW2 after she saw some watery substance in PW2's pant. PW2 by virtue of her age gave an unsworn statement and narrated how the accused person took her to his room, removed her pant and inserted his finger in her pant and promised to buy her drink and biscuit after the act. It is trite that an unsworn evidence of a minor needs corroboration. Thus in **Sey v Commissioner of Police [1963] 1 GLR** the court stated thus:

*"Accepting that the magistrate meant PW4 was a child of tender age, his unsworn evidence needed to be corroborated"*

Also in the **Republic v. Yeboah [1968] GLR 248** it was held as follows:

*The evidence of the victim on oath in law needed no corroboration but it was a prudent rule of practice to look for corroboration from some extraneous evidence which confirm her evidence in some material particular implicating the accused. Apart from the fact that the evidence of a victim in a sexual offence must be corroborated, there was the added factor that the victim was a young person of only nine years and the evidence of a young person must as a rule of prudence be well corroborated before being acted upon by a court. There was an ample circumstantial evidence corroborating the testimony of the victim that the accused ravished her. In all the circumstances of the case, even if there was no corroboration at all of the evidence of the victim which implicated the accused in some material particular, the court was sufficiently warned of the danger of acting on the uncorroborated evidence of a victim in a sexual offence who was a young person and was satisfied that the victim was a witness of truth.*

In the instant case even though PW1 did not witness the alleged act, it is her evidence that she noticed a watery substance from PW2's vagina subsequent to the alleged act. **Exhibit A** which is the police medical form duly endorsed by a medical officer of the Holy Family Hospital indicated that when PW2 was examined on the 5<sup>th</sup> of February, 2023, her pant was soaked with a yellowish discharge. This confirmed PW1's assertion that she found a watery substance in PW2's pant based on which she interrogated PW2 and she narrated the incident to her.

Furthermore, even though the accused denied the offence in court and even stated that the police insisted that he should speak the truth but he said he had done nothing wrong, Exhibit B which is the cautioned statement of the accused shows otherwise. In the said Exhibit B, which was not objected to by the accused at the time it was being tendered in evidence, the accused gave a vivid and incriminating narration of what happened. Below is an extract of Exhibit B:

*“On 01/02/23, I escorted Priscilla to buy cooked indomie from the complainant at white house, Nkawkaw and after buying the indomie, I carried the victim and escorted Priscilla and some few meters to Priscilla [sic] house, I diverted to my house together with the victim. When I got to my room, the victim told me that she wanted to urinate so I remove [sic] her panty for her to urinate. After she finished urinated [sic] I used my left little finger to brush her vagina and afterwards she put on her panty. I later on sent the victim to her mother. Before I escorted Priscilla, I gave the victim GHC5.00 and she bought five star drink. I have to state that I used my left little finger to brush the victim’s vagina”.*

Thus Exhibit B in some material particular corroborates the evidence of PW2 who I find to be a witness of truth, to extent that the accused person sexually violated the body of PW2 in a manner that does not amount to natural or unnatural carnal knowledge.

From all the circumstances of this case, I am satisfied that the accused came into contact with PW2 on the day in question, it was late in the night at about 9:00 pm, he carried PW2 and left with her at that time of the night, he took PW2 to his room, inserted his fingers into PW2’s vagina, promised to buy PW2 drink and biscuit after the act and he indeed bought the drink and biscuit for PW2.

In the case of **Ali Yusif (N0.2) v. The Republic [2003-2004] 1SCGLR at 183-184** It was held per Akuffo JSC (as she then was) that:

*“... the burden of persuasion and the burden of producing evidence in terms of sections 10 and 11 of the Evidence Decree, 1975 (NRCD 323) respectively, are the components of the burden of proof. Thus although an accused person is not required to prove his innocence during the course of his trial, he may run the risk of non-production of evidence and/or non-persuasion of the required degree of belief particularly when he is called upon to mount his defence”.*

In the instant case, the accused merely denied the charge when he was called upon to open his defence meanwhile there is direct and credible evidence before this court implicating the accused person. He indicated that he had witnesses but upon several adjournments he was unable to bring any witness.

The position of the law is that an accused person in a criminal trial has no burden to prove his innocence. All that he needs to do is to raise a doubt in the case of the prosecution. See: **Commissioner of Police v. Isaac Antwi [1961] GLR 408**

Having been able to establish a prima facie case against the accused, all that the accused needed to do in his defence was to have raised a reasonable doubt in the case of the prosecution. The accused however, was unable to lead sufficient evidence to raise a doubt in the prosecution's case.

Consequently the prosecution succeeds in proving the guilt of the accused person beyond reasonable doubt as required by law. The accused is therefore pronounced guilty and convicted accordingly.

## **SENTENCING**

In sentencing the accused, the court takes into consideration the plea in mitigation made on behalf of the accused person by his counsel, the fact that he is a young and first time offender, the age of the victim relative to the age of the accused and the period that he has spent in custody in accordance with article 14 (6) of the 1992 Constitution of Ghana and also the nature of the offence being a misdemeanour. The court also takes into consideration the fact that the accused person did not plead guilty simpliciter thereby

necessitating a full trial, the need to impose a deterrent sentence to prevent potential offenders from engaging in similar conduct and the need to protect children from sexual predators. The accused is therefore sentenced to serve a term of imprisonment of 18 month I.H.L.

**H/H ADWOA AKYAAMAA OFOSU (MRS)**

**CIRCUIT COURT JUDGE**