IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 21ST DECEMBER 2022

CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B5/01/2020

THE REPUBLIC

VS

AKWASI AGYAPONG

ACCUSED PERSON PRESENT

DETECTIVE INSPECTOR PETER SADAARI FOR THE PROSECUTION, PRESENT

JUDGMENT

Ghana's criminal jurisprudence is such that proving a case should be so thorough to such an extent as to be beyond reasonable doubt that Accused is guilty of the offence, otherwise prosecution has embarked on a journey of failure. Therefore, the evidence that a prosecution

adduces must be cogent and without loopholes that will create doubts in the mind of the trier of facts.

Accused person herein was charged as follows:

STATEMENT OF OFFENCE

DEFLILEMENT; CONTRARY TO SECTION 101(2) OF THE CRIMINAL OFFENCES ACT, 1960(ACT 29)

PARTICULARS OF OFFENCE

AKWASI AGYAPONG; DRIVER'S MATE [sic]: For that you on the 09th day of September 2019 at Agyinpaboa, a suburb of Dunkwa-On-Offin in the Central Circuit and within the jurisdiction of this Court, did carnally know one Freda David aged fifteen (15) years.

Section 101(2) of Act 29:

"Whoever naturally or unnaturally carnally knows any child under sixteen years of age, whether with or without his or her consent commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than seven years and not more than twenty-five years.

Section 101(1)

"For purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age."

The following is the set of facts that Prosecution relied on to prefer the above charge against Accused:

1. Complainant is the victim's elder brother; both complainant and victim reside at Agyenpaboa – a suburb of Dunkwa-On-Offin.

2. The victim is aged 15 years.

3. Accused is aged 24years and resides at Bodomkrom near ……, Dunkwa-On-Offin.

4. On 09th September 2019 at about 03:00pm, Accused went to the cottage of complainant and asked the victim to give him water to drink which the victim did.

5. Afterwards, Accused asked the victim to accompany him to a nearby cocoa farm which Accused said belonged to his father, for them to carry cocoa beans.

6. When accused and the victim got to the back of the cottage, accused pulled a kitchen knife from his pocket and threatened to stab the victim, if she dared open her mouth.

7. Accused the carried the victim on his shoulder a distance into the cocoa farm and forcibly removed her panties and had sexual intercourse with her.

8. After the act, Accused left the victim alone to her fate in the farm.

9. The family members of the victim mounted a search for her and found her at the scene of crime and she was crying.

10. The victim narrated her ordeal to complainant and subsequently, the community searched the whole area for Accused but could not find him.

11. The case was reported to the police and a medical report form was issued for the victim to attend hospital; the endorsed form was brought to the police subsequently.

12. On 06th October 2019, based on the description of the suspect that the victim gave complainant, complainant got Accused arrested and handed him over to the Police.

13. During investigations, the victim took the police to the scene and the police observed that due to the unholy nature of the act of defilement, libation was poured to purify the gods of the land since it was a taboo to have sexual intercourse in the bush; an empty schnapps bottle was found at the scene and it was photographed.

14. In his cautioned statement, Accused denied having defiled the victim and said he did not even know the victim.

15. Accused was however charged with the offence of defilement and arraigned before this Court.

It is incumbent on Prosecution to lead evidence to prove the facts they presented in support of the charge. Prosecution called the three (3) witnesses. The said victim testified as the second prosecution witness (PW2) and her brother who is the complainant herein testified first as a prosecution witness – PW1. The prosecution submitted that the investigator herein got deceased after conducting her investigations into the matter and after charging Accused. Another police officer stepped in and testified on the investigations that culminated in the charging of Accused; he is given the tag PW3 i.e., the third prosecution witness herein.

According to PW2, on 09th September 2019, at around 03:00pm, whilst at home in a cottage, Accused came there and asked her for water to drink and she gave him water. After Accused had drunk the water, he asked her to accompany him to a nearby cocoa farm to assist him to carry his father's cocoa beans. When they got to the back of the cottage, Accused pulled a knife from his pocket and threatened PW2 that if she opened her mouth, he would stab her and ran away. Accused carried her some distance away and removed her pants and forcibly had sexual intercourse with her. After Accused had finished, he ran away as PW2 sat there crying. One Mr Paul then came and took her to PW1. PW2 then narrated what Accused did to her, to PW1. PW1 then went along with PW2 and PW1 reported the matter to the police. Based on the features of the body of Accused as described to PW1 by PW2, PW1 arrested somebody on 07th October 2019 and called PW2 and she identified that person as Accused herein.

It is the word of PW2 against Accused as to whether or not there was any sexual intercourse between the two.

Shall we now take a look at the side of the story of Accused person as he told the Court after Prosecution had closed their case. Accused elected to give a statement from the dock after the Court had explained section 63 of the Evidence Act, 1975(NRCD 323)/ section 174(1) of the Criminal and Other Offences (Procedure) Act, 1960(Act 30) vis-à-vis Article 19(10) of the Constitution.

Section 63 of NRCD 323 states:

> "(1) An accused in a criminal action may make a statement in his own defence without first taking an oath or affirmation that he will testify truthfully and without being subject to the examination of all parties to the action.
> (2) Such a statement by an accused is admissible to the same extent as if it had been made under oath or affirmation and subject to examination in accordance with sections 61 and 62.
> (3) The fact that the evidence was given without oath or affirmation, or that there was no possibility of examination, may be considered in ascertaining the weight and credibility of the statement, and may be the subject of comment by the court, the prosecution or the defence."

Section 174(1) of Act 30 states:

> "At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused sufficiently to require him to make a defence, the Court shall call upon him to enter into his defence and shall remind him of the charge and inform him that, if he so desires, he may give evidence himself on oath or may make a statement. The Court shall then hear the accused if he desires to be heard and any evidence he may adduce in his defence."

Article 19(10) of the Constitution states:

"No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

Accused stated:

"Somewhere in the year 2019, I was with my master and I was a driver's mate. My said master didn't give me 'chop' money. So, I decided to go to Ayanfuri with a friend of mine. On our way, my said master called. After he had called me and I was on my way was going to him, I got to a certain filling station and there was a cocoa farm behind that filling station. I then had a stick of cigarette in my pocket and so I went into that farm to smoke the cigarette. There I met a certain man called Awokye and that man asked me whether I was the one who had been stealing cocoa. That man did not allow me to smoke my cigarette, there and then he called people and they came on me with knives and implements used to uproot plantain known in Twi as "sorsor". I asked the men what wrong I had done but they still did not stop attacking me. The Awokye I mentioned earlier is rather my master that I referred to. The person who met me and asked me whether I was the one stealing cocoa from that cocoa farm is complainant i.e., Sule Yakubu. After those people had beaten me up, the said Sule Yakubu accused me of having had sexual intercourse with his sister. They then brought me to the roadside and complainant herein said they should beat me and kill me but one of those people said they shouldn't do that because I knew nothing about what Sule Yakubu was accusing me of. They then took me to the police station. The investigator asked me about the matter and I told her I knew nothing about the accusation. She then took a statement from me and I was arraigned before Court."

In accordance with section 63 of NRCD 323, the prosecutor gave the following as his comment on the statement that Accused gave from the dock:

> "The facts and all the testimonies of all the witnesses reflect the truth and nothing but the truth about this case. So I pray that Your Honour base on all of that and determine the case."

In the celebrated and oft quoted case of *Majolagbe v. Larbi* [1959] G.L.R. 190, Ollennu J. (as he then was) stated the following at page 192:

> "Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true."

Kpegah J.A. (as he then was) made a similar statement in the case of *Zabrama v. Segbedzi* [1991] 2 GLR 221 @ 246 where he stated:

> " … a person who makes an averment or assertion, which is denied by his opponent, has a burden to establish that his averment or assertion is true, and he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden."

Accused denied Prosecution's evidence on sexual intercourse. In fact, he did not give any direct reaction to that. It is either accused did not know anything about the alleged sexual intercourse or he is being evasive.

In the case of *Woolmington v. Director of Public Prosecutions* [1935] AC 462 @ 481, HL, Sankey LC stated:

> "…while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the Prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."

In the Ghanaian case *Commissioner of Police v. Isaac Antwi* [1961] GLR 408 SC – a case decided before NRCD 323 came into being, Korsah CJ stated:

> "The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution and that the evidential burden rests on the accused where at the end of the case of the prosecution an explanation is required of him, are illustrated by a series of cases. Burden of proof in this context is used in two senses. It may mean the burden of establishing a case or it may mean the burden of introducing evidence. In the first sense it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt; but the burden of proof of introducing evidence rests on the prosecution in the first instance but may subsequently shift to the defence, especially where the subject-matter is peculiarly within the accused's knowledge and the circumstances are such as to call for some explanation."

The learned judge continued, referring to Archbold's Criminal Pleading, (34th ed.) at p. 371, para. 1001, that:

> "Where the prosecution gives prima facie evidence from which the guilt of the prisoner might be presumed and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of 'guilty'. But if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted, because if upon the whole of the

evidence in the case the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them."

The onus therefore lies on the prosecution to produce cogent and admissible evidence to seek to establish the guilt of the Accused.

Thus, in section 11 of the Evidence Act, it is stated:

> "(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 on the issue.
>
> (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 a reasonable mind could find the existence of the fact beyond a reasonable doubt.
>
> (3) In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt.
>
> (4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."

Section 10 of the evidence act deals with burden of persuasion and it states:

> "(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."

(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 a preponderance of the probabilities or by proof beyond a reasonable doubt."

In *Ackah v. Pergah Transport Limited and Others* [2010] SCGLR 728; Sophia Adinyira JSC stated at page 736 that:

> "It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable[sic] than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree[sic]."

Section 14 of NRCD 323 allocates the Burden of Persuasion as:

> "Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."

Section 15(1) of NRCD 323 states:

> "Unless and until it is shifted, the party claiming that a person is

guilty of crime or wrongdoing has the burden of persuasion on that issue."

Section 17 of NRCD 323 allocates the Burden of Producing Evidence as:

"(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof.

(2) Except as otherwise provided by law, the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact."

Section 22 of NRCD 323 states: "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."

In a defilement case, the issues that are to be determined are:

1. Whether there was sexual intercourse between the accused and the alleged victim. If so,

2. Whether the alleged victim was less than sixteen(16) years of age at the time of the sexual intercourse.

Accused did not dispute the age Prosecution presented of PW2. The Court did not find any reason to doubt the said age given of PW2. Therefore, the only issue for the court to make a determination on in judging this case is about the sexual intercourse. There must be proof

that in the events that culminated in this criminal case, Accused person's penis penetrated PW2's vagina by the least degree, at least. See section 99 of Act 29.

The evidence PW2 gave about the sexual intercourse suggests that only she and accused are witnesses to whatever happened between her and accused as regards the intercourse. PW1's evidence on sexual intercourse was about what he was told by PW2. Therefore PW1's evidence on the issue before the Court is hearsay and I do not find it material in determining the issue supra. A prosecutorial team finding itself in this circumstance will want to rely on some corroborative evidence on the evidence of PW2 to seek to establish their case. In this regard, Prosecution produced what they said was the medical report on the examination on PW2. The following, *inter alia*, is the endorsement of the medical officer on that medical report dated 07th October 2019 and admitted in evidence as Exhibit C:

> "Client was alleged to have been defiled by an unknown man on 08th September 2019 and reported with lower abdominal pain.
> On examination was a healthy young lady, well kempt, not pale, not jaundiced, afebrile.
> No marks of violence were seen on the entire body.
> Cardiopulmonary system was normal
> Abdomen – No abnormality detected
> Vagina examination: No bruises or marks of violence were seen. Hymen was broken and introitus looks big. No blood or discharge was seen on the examining finger but cervical excitation tenderness was present…"

On the charge sheet, it is stated that Accused defiled PW2 on 09th September 2019 but in the endorsement of the medical officer it is stated 08th September 2019. PW2 in her evidence-in-chief stated that Accused had sexual intercourse with her on 09th September 2019. It is intriguing that it took about a month before medical examination was conducted in this case – a defilement case. A medical report, to have full force and effect evidentially, must have its

findings being linked to the accused one way or another. Timeous examination is imperative in such circumstances. For instance, if semen is found in the vagina and it is tested against the accused and it is proven that it is that of the accused, it will raise a strong case for the prosecution. In fact if the examination is done in reasonable time proximity especially the same day or latest the next day with the supposed victim's vagina unwashed and intact as regards any evidence, the probative value of the medical findings will be high. To do such a critical examination meant for evidential purpose that late appears preposterous. Anything at all can happen to the vagina the subject matter of the examination that can have the potential of eroding the evidential value of the vagina. In fact the medical officer did not state why "introitus" of PW2 looked big, by the findings upon the examination.

The said Mr Paul did not testify and Prosecution did not give any reason to the Court as to why he did not come to testify in this matter. The said Mr Paul being the one PW2 said chanced upon her and took her home, his evidence might have had some material significance in terms of probative value of the evidence of the prosecution so that Accused might be on the defensive on any material evidence that might have come from the said Mr Paul.

The testimony of PW3 as in his witness statement is as follows:

1 I am No. 47796 D/CPL Vincent Awudi.

2 I am a Police Officer stationed at Dunkwa-On-Offin Divisional DOVVSU.

3 I know the accused and the witnesses in this case.

4 I inherited this docket from No. 4556 PW/D/CPL Mavis B. Darkwa (now a deceased).

5 She completed investigations into the case and same presented in court before her demise and the docket referred to me.

6 On receipt of the case docket, I carefully perused it and found that a case of defilement involving the accused was referred to her on 09/09/2019 for investigation.

7 The victim involved was Freda David aka Kangyawora and the complainant was Sule Yakubu.

8 She obtained statement from the victim and issued police medical report form in respect of the victim for her to be sent To Dunkwa-On-Offin Government Hospital for medical examination.

9 The police medical report form was returned to the police well endorsed by a medical officer and same filed up in the case docket.

10 On 07/10/2019, the complainant arrested the accused and handed him over to the Dunkwa-On-Offin police patrols team and same was handed over to Divisional DOVVSU for investigations.

11 She obtained investigation caution statement from the accused in the presence of Mohammed Sumaila; an independent witness and same filed in the case docket.

12 The investigator (deceased) visited the scene of crime with the victim and took photographs of the scene which was a cocoa farm located at a cottage near Agyimpaboa.

13 She obtained the National Health Insurance of the victim which has her date of birth as 18/11/2005. Therefore, the victim was 15 years old at the time the crime was committed.

14 After conclusion of investigations, she charged the accused with the offence of defilement of a female under 16 years and charged caution statement obtained from him in the presence of an independent witness.

15 I also found that she did obtain statement from Sule Yakubu and also submitted her own statement as the investigator."

Photographs tendered in evidence by PW3 do not provide any significant evidential value probatively or actually to the determination of the issue at stake.

In *Oteng v The State*[1966] GLR 352@ 354, SC, Ollennu JSC stated:

> "One significant respect in which our criminal law differs from our civil law is that, while in civil law a plaintiff may win on a balance of probabilities, in a criminal case the prosecution cannot obtain conviction upon mere probabilities."

This principle found space in the *Evidence Act* of 1975 i.e. NRCD 323 @ section 13(1), to wit:

> "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."

See also *Fenuku v John - Teye* [2001-2002] SCGLR 985

On all the evidence, I hold that Prosecution has not succeeded in proving the guilt of Accused.

Accused is hereby acquitted and discharged.

(SGD)

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

21/12/2022