IN THE CIRCUIT COURT "A", TEMA, HELD ON TUESDAY, THE 29TH DAY OF NOVEMBER, 2022, BEFORE HER HONOUR AGNES OPOKU-BARNIEH, CIRCUIT COURT JUDGE

SUIT NO: D10/47/20

THE REPUBLIC

VRS:

CHARLES LEKENTE

ACCUSED PERSON **PRESENT**

ASP STELLA NASUMONG FOR PROSECUTION **PRESENT**

KOFI EDEM PENTY, ESQ. FOR THE ACCUSED PERSON

PRESENT

RULING ON SUBMISSION OF NO CASE

FACTS:

The accused person was arraigned before this court on a charge 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 is the mother of the victim aged 9 years at the time of the alleged incident and the accused person is a mason and lives in the same vicinity with the complainant and the victim. The prosecution alleged that on or before March, 2020, whilst the victim was going to play with her friends, the accused person sent her to his room where he had sexual intercourse with her on an old mattress on the floor and thereafter warned her not to tell anyone to prevent him from going

to prison. It if further alleged that, the victim, out of fear, did not inform anyone until on 6th August 2020, when the complainant detected changes in the victim.

The prosecution further claims that the complainant inspected the private part of victim as she usually does and saw that her vagina was inflamed with lacerations. When she interrogated the victim, she narrated the incident to the complainant. A complaint was lodged at the Domestic Violence and Victim Support Unit (DOVVSU) Ashaiman and a police medical form was issued to the complainant to send the victim to the hospital for treatment and same returned duly endorsed. After investigations, the accused person was charged with the offence and arraigned before the court.

THE PLEA

The accused person who was represented by counsel pleaded not guilty to the charge after it had been read and explained to him in the Ewe language. The accused person having pleaded not guilty to the charge, put the entire facts of the prosecution in issue and thereafter the prosecution assumed the onerous burden to prove the guilt of the accused person beyond reasonable doubt.

The case proceeded to trial and the prosecution called three witnesses and tendered in evidence **Exhibit "A"**, the Medical Report, **Exhibit "B"**-Weighing card of the victim, **Exhibit "C"**-The Caution Statement of the Accused person, **Exhibit D**-the charge statement of the accused person. At the close of the case of the prosecution, learned counsel for the accused person submitted that there is no case made out sufficiently to require the accused person to open his defence and filed a written submission of no case on 25th November, 2022.

THE LAW ON SUBMISSION OF NO CASE:

Section 173 of the Criminal Procedure Act, 1960 (Act 30) provides that:

"Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him."

In the often cited case of **State v. Ali Kassena (1962) GLR 144-154,** the Supreme Court laid down the principles governing a submission of no case when it stated that a submission that there is no case to answer might properly be made and upheld:

(a) *When there has been no evidence to prove an essential element in the alleged offence;*
(b) *When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it*

Further, in the case of **Tsatsu Tsikata v. The Republic [2003-2004] 1 SCGLR 1068**, the Supreme Court held in its holding 5 that:

"On a submission of no case, the judge's function was essentially to determine whether there was a genuine case for trial, i.e. whether there were any genuine factual issues that could properly be resolved only by a finder of fact because they might reasonably be resolved in favour of either party. The enquiry has to focus on the threshold question whether the evidence presented a disagreement to require for a full trial, or whether it was one-sided that one party must prevail as a matter of law…"

The court further stated that the standard of proof at this stage is the establishment of a prima facie case and not proof beyond reasonable doubt

since the accused person has not had the opportunity to put forth a defence to punch holes in the case of the prosecution. In the case of **Kwabena Amaning Alias Tagor and Anor. v. The Republic** (200) 23 MRLG 78, the court held that:

" prima facie evidence is evidence, which on its face or first appearance, without more, could lead to conviction if the accused fails to give reasonable explanation to rebut it. It is evidence that the prosecution is obliged to lead if it hopes to secure conviction of the person charged. At this stage, the trial court is not supposed to make findings of facts since the other side has not yet spoken to determine who is being factual. What the trial court has to find out at this stage that the prosecution has closed its case is whether or not the evidence led has established all the ingredients of the offence charged for which the accused person could be convicted if he failed to offer an explanation to raise doubts in the said evidence"

The elements of a submission of no case are discussed in the light of the evidence led in support of the ingredients of the offence to determine if at the close of the case of the prosecution, a prima facie case is made out to call on the accused person to open his defence.

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 (No.1) v. The Republic (No.1)**[2017-2020] I SCGLR 132, the Supreme Court, per Pwamang JSC, at page 143, identified the following ingredients of the charge 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.

Further, under **Section 14 of Act 29**, a child under 16 years of age lacks the capacity to consent to sex. Thus, any consent to natural or unnatural carnal knowledge is void and it is immaterial for purposes of proving a charge of defilement that the child consented.

On the first ingredient of the offence charged, **the prosecution must prove that the victim is a child below the age of 16 years.** The presumption and determination of the age of a person in a court proceedings is provided for under **Section 19(1) and (2)** of the Juvenile Justice Act 2003, (Act 653), follows;

*"(1) Where a person, **whether charged with an offence or not, is brought before a Court** otherwise than for the purpose of giving evidence and it appears to the Court that the person is a juvenile, the Court shall make inquiry as to the age of that person.*

*(2) In the absence of a birth certificate or a baptismal certificate, a certificate signed by a medical officer as to the age of a person below eighteen years of age is evidence of that age before a Court without proof of signature **unless the Court directs otherwise."***

In the case of **Robert Gyamfi v The Republic (unreported),** [Suit No. H2/02/19] CA, Kumasi per Dzamefe JA, delivered on 27th February, 2019, the court stated: "... *the three certifications mentioned there are not the only means of identifying one's age in our jurisdiction…Aside from 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*."

Also, in the case of **Kwesi Donkor v. The Republic** [Suit No.42/2017) delivered on 10th May, 2019, the Ho High Court presided over by Eric Baah stated as follows:

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

To prove that the second prosecution witness, the victim was below the statutory age of 16 years at the time of the alleged incident, at the time of filing her witness statement on 6th October, 2020, PW1 gave her age as 9 years old. Under cross-examination by Counsel for the accused person on 1st March 2022, PW2 testified that she was 11 years old but as at the time of the alleged incident she was 9 years old but she could not tell her date of birth.

The first prosecution witness, the mother of the victim (PW1), who filed her witness on the same day as PW1 testified that the victim turned 10 years old

on 10th September, 2020. PW1 who was emphatic in her evidence in-chief on the age of the victim testified as follows under cross-examination by counsel for the accused person:

Q: The said Anita Degbevi is she your daughter?

A: Yes my Lord.

Q: What is her date of birth?

A: My Lord, as for the date I gave birth to her I cannot remember very well but I know her age.

In support of the case of the prosecution that the victim was 9 years old at the time of the alleged incident, PW3, *No. 40256* Detective Sergeant Louis Aboagye Annoh who tendered in evidence the witness statement of the investigation as an exhibit to the hearsay rule tendered in evidence the weighing card of the victim which was admitted and marked as **Exhibit "B".** In **Exhibit "B"**, the Hospital registration number and the birth registration number are not indicated which raises issues about authenticity of the document. Contrary to the evidence of the second prosecution that the victim was born on 10th September, 2010, the weighing card of the victim states that she was born on 26th August, 2010. PW3 could not answer any question on the documents tendered by him since he stated that he did not conduct investigations into the case and he has no idea about the documents tendered by the prosecution. In my considered opinion, the defence having put the age of the victim in issue and the authenticity of the weighing card in issue, it was incumbent on the prosecution to adduce cogent and admissible evidence to prove the age of the victim as a person below the age of 16 years. On the evidence led by the prosecution, I hold that the prosecution failed to establish the age of the victim.

I shall now proceed to discuss the second and third ingredients of the offence charged which are that the prosecution must establish that the accused person and no other person had sexual intercourse with the victim. This is the most contentious issue. Whereas the prosecution maintains that it is the accused person and no other person who had sexual intercourse with the victim, the accused person vehemently denied it and maintained his innocence throughout the trial.

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 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 the accused person had carnal knowledge of the victim, the first prosecution witness (PW1), Mercy Siameh, the mother of the victim testified that sometime ago, she noticed changes in the victim. According to her testimony, periodically, she inspects the victim's private parts to check if she is maintaining personal hygiene. Thus, on Thursday, 6th August, 2020, when she inspected the victim's vagina, she noticed that the entrance of her vagina had opened and looked bigger. When she questioned her, she refused to tell her the truth. To compel her to speak the truth, she inserted grinded ginger into her anus and thereafter she mentioned the name of the accused person as

the person who had sexual intercourse with her but she could not tell the exact date and month. The victim further told her that the accused person warned her not tell anyone else he would be sent to prison. Upon hearing this, she went with her brother to report the matter to the police and she was issued with a police medical form to send the victim to the hospital.

The cross-examination conducted by counsel for the accused person of PW1 is instructive and I deem it necessary to reproduce the relevant portions. Under cross-examination by counsel for the accused person, the following discourse ensued;

Q: *You have stated in paragraph 5 of your witness statement that you have been inspecting your daughter's vagina periodically to check if she has been washing the private part well.*

A: *Yes my Lord.*

Q: *How often do you do this inspection?*

A: *It is often like in two weeks, 3 weeks or one month.*

Q: *So the alleged incident that you complained of to the police when did your daughter tell you it occurred?*

A: *It was on a Thursday evening. It was in August 2020.*

Q: *So the incident occurred in August 2020. Is that right?*

A; *Yes my Lord.*

Q: *Again, you have also stated that after inspection you realized that your daughter's vagina had become opened and looked bigger. Is that the case?*

A: *Yes my Lord.*

Q: *And that you had to insert grinded ginger into your own daughter's vagina.*

A: Yes my Lord.

Q: And as a result of the pain she mentioned the accused person's name and one Julius. Is that not the case?

A: Yes my Lord.

Q: When your daughter, Anita mentioned the accused person's name as a result of the excruciating pain from the ginger you inserted into her vagina, did she tell you the time of day this incident happened?

A: My Lord, when I asked her she said it was a long time and that particular day she cannot remember.

Q: You just stated that your daughter said it was a long time ago. How long is the period?

A: My Lord, it was during the lockdown period that I saw the thing on my daughter.

Q: I am putting it to you that the lockdown was in March and not more than 14 days.

A: Yes my Lord.

Q: So you see it cannot be the case as you suggested in paragraph 6 of your witness statement that you discovered the vagina was big in August 2020.

A: My Lord, the child said it was during when she was in school but I did the examination on her during the lockdown.

Q: So it means that you are no longer standing by paragraph 6 and 7 of your witness statement (counsel reads) since there was no lockdown in August 2020 in Ghana.

A: My Lord, I did not inspect during March.

Q: So now you have abandoned March and come back to August.

A: My Lord, it was during August.

From the cross-examination conducted by counsel for the accused person, the first prosecution gave conflicting account on when the incident is alleged to have happened. The position of the law on a witness giving contradictory evidence is clear. In the case of **Poku v. The State** (1966) G.L.R. 262 SC, the Supreme Court held that:

"When a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the jury should not merely be directed that his evidence given at the trial should be regarded unreliable, but should also be directed that the previous statement, whether sworn or unsworn, does not constitute evidence upon which they can act."

Whereas the case of the prosecution is that the incident took place in March, 2020, the first prosecution witness maintains that the incident took place in August when she noticed that the introitus of the victim was inflamed and looked bigger in size. Also, the first prosecution witness admitted that it was as result of the trauma the victim suffered when she inserted ginger into the anus of the victim that made her to confess that the accused person had sexual intercourse with her but warned her not to disclose the incident to anyone. Also, from the testimony of the victim's mother, the victim mentioned the name of a boy called Julius as the one who carnally knew her and it was when she inserted ginger into the victim's vagina that she mentioned the name of the accused person.

The second prosecution witness, the victim testified that one time, after her mother had inspected her vagina, she asked her why her vagina had become big but she refused to answer. Consequently, her mother threatened her to tell the truth else she would insert ginger into her vagina. Thereafter, her mother instructed her elder sister to grind ginger for her, which she inserted into her vagina. After that, her mother asked her once again about the cause of the change in the size of her vagina and she confessed to her that some time ago, during the school going period, the accused person had sexual intercourse with her.

According to her testimony, she told her mother that it happened on a day when she had returned from school in the afternoon and was going to her friend's house. The accused person called her and when she got to the entrance of his room, he asked her to enter his room but she declined and he pushed her into the room, placed her on a bed on the floor in his room and locked the door. The accused person then removed her pant and inserted his penis into her vagina and had sexual intercourse with her. After the act, the accused person opened the door for her to go out and he warned her not to tell her mother else he would be sent to prison and the police will beat him with a cane.

Under cross-examination by counsel for the accused person, the following ensued;

Q: You have also stated that after taking your bath your mother told you to lie down in order for her to inspect your vagina. Is that correct?

A: Yes my Lord.

Q: After the inspection what did your mother ask you?

A: *My mother asked me what they did to my vagina.*

Q: *You stated that you did not tell your mother anything. Is that correct?*

A: *Yes my Lord.*

Q: *Did your mother insert ginger into your vagina?*

A: *Yes my Lord.*

Q: *Was it painful?*

A: *Yes my Lord.*

Q: *So did you cry?*

A: *Yes my Lord.*

Q: *Was your mother yelling at you at that time?*

A: *Yes my Lord.*

Q: *Did she beat you?*

A: *No my Lord.*

Q: *You wanted the pain to stop. Is that correct?*

A: *Yes my Lord.*

Q: *And as a result you mentioned that accused person's name. Is that correct?*

A: *Yes my Lord.*

Q: *So it means if your mother had not inserted the ginger you would not have mentioned Bro Charles name?*

A: *Yes my Lord.*

Q: *After mentioning that said Bro Charles name, you were still in pains. Is that correct?*

A: *Yes my Lord.*

Q: *Was your mother still yelling at you?*

A: *No my Lord.*

Q: *After mentioning Bro Charles name you also mentioned a certain Julius. Is that correct?*

A: *Yes my Lord.*

Q: *You have also stated that the said incident between you and Charles happened after school. Is that correct?*

A: *Yes my Lord.*

Q: *And you said you were in the company of your friends. Is that correct?*

A: *No my Lord. I was not with my friends.*

Q: *So it means that when the incident happened, school was not on vacation. Is that correct?*

A: *No my Lord. We were not on vacation.*

Q: *It happened in the afternoon. Is that correct?*

A: *Yes my Lord. It was in the afternoon.*

Q: *Do you remember when this incident happened?*

A: *No I do not remember.*

The testimony of PW2, the victim under cross-examination shows that the only reason she mentioned the name of the accused person is because of the pains she was suffering due to the insertion of ginger into her vagina. The victim again testified that she mentioned the name of another boy called Julius as also having had sexual intercourse with her.

The investigator who investigated the instant case was unavailable as a witness and as such, her witness was tendered as an exception to the hearsay rule but the investigator who tendered it could not answer any question based on the witness statement of the substantive investigator. The accused person in her investigation caution statement and charge statement admitted and marked in evidence as **Exhibits "C" and "D"** respectively stated that in his presence when the PW1 asked PW2 whether he had sexual intercourse with the victim, she mentioned the name of one Julius as the person who had sexual intercourse with her.

From the medical report, **Exhibit "A"**, the complaint to the medical doctor was that two people allegedly sexually assaulted the victim a few months prior to seeing the doctor on 12th August, 2020, but she could not tell the exact date of the incident or time. The findings of the medical doctor is that on vaginal examination, there was no bleeding or discharge and there was a breech or tear in the interior wall of the hymen with scar tissue formed at the base.

Again, when counsel requested for the medical doctor to appear to be subjected to cross-examination on the medical report, the prosecution informed the court that the doctor was no longer working with the Tema General Hospital and had travelled outside the jurisdiction and as such was unavailable to give evidence. Admittedly, **section 121(1)** of the Criminal and Other Offences Procedure Act, 1960(Act 30) permits such reports produced by a Government Medical Practitioner to the court to be used as evidence of the facts stated therein, however, **section 121(6)** mandates the court, in the

interest of justice to summon the author of the report to be examined as a witness. In this, case, Counsel for the accused person having expressed a strong desire for the medical practitioner to be summoned to be cross-examined on the report and the prosecution having failed to produce him, it has denied the defence all facilities for the accused person to defend himself as enjoined by the 1992 Constitution on fair trial.

The reliability of the evidence led by the prosecution witnesses was seriously challenged under cross-examination when the star witness for the prosecution stated that she mentioned the name of the accused person as one of the people who had sexual intercourse with her as a result of the pain she experienced from the grinded ginger her mother inserted into her vagina. The first and second prosecution witnesses also admitted that the victim mentioned the name of one Julius but as explained by the first prosecution, the said Julius was arraigned before a Juvenile court in respect of the case and the court determined that he was not a juvenile.

The accused person having denied the offence entirely and having pleaded alibi, it was incumbent on the prosecution to lead cogent and admissible evidence to prove the date and time the accused person herein is alleged to have had sexual intercourse with the victim, which the prosecution failed to do. The investigator who conducted investigations into the case did not avail herself for cross-examination. The prosecution filed a report on 23rd August, 2021, on their investigations on the plea of alibi raised by the accused person. The report concludes that the alibi is supported by cogent evidence, which makes it impossible for the accused person to have been the one who committed the alleged offence.

In the case of **Bediako v. The Republic** [1976] I GLR 39-43, the court held in its holding 1 that:

"It was not the duty of the appellant to prove his alibi, but before the prosecution could be called upon to displace a defence of alibi, that defence must have been properly brought to the notice of the prosecution or there had to be evidence of it before the trial court, and the notice should contain such particulars as would enable the prosecution to conduct proper investigations into the movement of the appellant."

The prosecution having investigated and agreed with the defence in the report of alibi that there is evidence supporting the alibi and that there is no possibility of the accused person having committed the alleged offence, it will be an exercise in futility to call on the accused person to open his defence to establish his alibi.

On the totality of the evidence led, I find that the prosecution failed to make a prima facie case against the accused person as the one and no other person who had sexual intercourse with the victim warranting him to open his defence.

The submission of no case is accordingly upheld. The accused person is acquitted and discharged.

(SGD)

H/H AGNES OPOKU-BARNIEH

(CIRCUIT COURT JUDGE)