IN THE GENDER-BASED VIOLENCE CIRCUIT COURT, SEKONDI –W/R, HELD ON TUESDAY, 25TH OCTOBER 2022 BEFORE H/H NAA AMERLEY AKOWUAH (MRS.)

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C6/17/21

THE REPUBLIC

vrs.

JUSTICE OWUSU

ACCUSED: ABSENT

PROS.: C.I. VERONICA TIBSON

JUDGMENT

Complainant is a co-tenant farmer with accused person and is brother to 14-year old Rosina Adubia. Accused person is a 54-year old farmer at Tikobo No. 2 where he lives in the community with complainant and his sister. In January 2021, wife of the complainant noticed that Rosina Adubia had not menstruated for a month. She interrogated Rosina who told her that accused person had had sex with her on several occasions whenever she visited his abode to sharpen her farming cutlass on his sharpening stone, popularly known as "*serebour*". Further medical screening revealed that Rosina was pregnant and consequently, a complaint was lodged to the Domestic Violence & Victims' Support Unit (DOVVSU) at Half Assini which issued a medical form to complainant to take Rosina to the hospital for examination. Accused person was arraigned on a charge of defilement contrary to section 101 (1&2) of the Criminal & Other Offences Act, 1960 (Act 29) to which he pleaded "Not Guilty", setting in motion a full trial in accordance with s. 172 of the Criminal & Other Offences (Procedure) Act, 1960 (Act 30).

To discharge the burden on it under sections 11 & 15 of NRCD 323, Prosecution called four witnesses; Alex Atweri the complainant, Rosina Adubiah the alleged victim, D/Cpl. Clement Kwabena Adofo, the police investigator in charge of the case and Dr. Derrick Adrian Arthur the medical doctor who examined Rosina Adubia. Save PW4, all witnesses testified via Witness Statements duly thumb- printed and signed variously.

All witnesses were cross examined by accused person and his lawyer, when accused person was present.

PW1 confirmed the contents as well as his signature on his Witness Statement filed on 18th February, 2021. He testified that sometime in January 2021, his wife noticed that Rosina had not menstruated for a month, necessitating an interrogation but from which Rosina insisted she was not pregnant. Following suspicions that she might be pregnant, he took her to the clinic where a laboratory test proved positive. At home, he informed their father who advised him to lodge a police complaint. After further interrogation, Rosina told her brother that accused person had had sex with her and so he must be responsible for her pregnancy. PW1 tendered into evidence his initial statement (**Exh. A**) given to the police on 27/01/2021, a mirror reflection of his testimony in Court.

For cross examination, accused person asked and put it to PW1 that his entire testimony was based on what his sister (Rosina) told him and he answered in the affirmative.

The testimony of PW2 was that she lived with her brother, PW1 and did not attend school although she was 14 years old. She testified that she used to sharpen her farm cutlass on accused person's stone and on each occasion, accused person would invite her to his room and have sex with her. This was the practice for a while but she was afraid to tell her brother because accused person promised to marry her in addition to his wife. Besides, after each sexual encounter, accused person would give her GHC10 or GHC20. However, in January 2021 her brother detected physical bodily changes in her and lodged a complaint with the

police, who issued out forms for her to be medically examined. The results were that she was 3 months pregnant. She tendered her initial statement taken on 03/02/2021 as Exh. B, a replica of her testimony.

Under cross examination, PW2 vacillated on her age, initially stating 14 years, then agreeing with counsel for accused person that she was more than 14 years. However, she did not state how much older she was above 14 years or if she was more than 16 years although under Re-examination, she told the Court that she was 14 years.

To resolve the issue of age, PW3 Det./Cpl. Clement Kwabena Adofo of the DOVVSU, Half-Assini tendered "Exh. G", an Age Estimation Report from the Effia Nkwanta Regional Hospital authored and endorsed by Dr. Derrick Arthur, a dental medical officer. Exh G estimated that Rosina was 15 years of age based on the finding that her third molars had not erupted despite the growth of her second molars which on the average appear at the age of 12 years. Continuing his testimony, PW3 testified that as part of his duties in investigating this case, he issued out police medical forms to the complainant, which was returned to him duly endorsed (Exh. F) with a pregnancy scan annexed, the contents of which will be discussed later in this judgment. Further, he tendered accused person's Investigation Caution Statement taken on 3/02/2021 (Exh. C), Charge Sheet dated 4/02/2021 (Exh. D), 4 photographs of the scene of crime (Exhs. E, E1 – E3), including the alleged "serebour" that Rosina allegedly sharpened her cutlass on, accused person's bedding where he is alleged to have had sex with Rosina, the farmhouse, etc. and a pregnancy ultrasound report of Rosina dated 26/02/2021 (Exh. H).

In cross examining PW3 in July 2021, Counsel put it to the witness that he conducted an armchair investigation and only regurgitated what the complainant and Rosina told him, to which PW3 responded in the negative. Counsel for accused person did not object to the admission of the exhibits into evidence but extensively cross examined PW3 on them. Referencing Exh. G, Counsel questioned its findings on the age of Rosina who, in his

opinion, was more than 16 years. Counsel posited that PW3 should have interviewed members of the Tikobo community or parents of Rosina to ascertain when she was born instead of resorting to a medical test. During proceedings, it came to the knowledge of the Court that Rosina had delivered a 7-month old premature baby which passed on sometime later.

With PW4, to ensure textual fidelity, I shall reproduce verbatim the relevant portion of his testimony that emphatically determined the age of Rosina to be 15 years.

> *"On oral examination, I noticed that the patient had all adult teeth present, except the last teeth which the layman will call wisdom teeth. So, I made my provisional diagnosis that the patient will be less than 17 years of age. To confirm or reject my provisional diagnosis, I requested for a radiograph. Upon return, I found out that the last teeth/wisdom teeth were present but were not fully formed. And so I came to the conclusion that based on the knowledge of the eruption sequence of teeth, I arrived at the patient being 15 years of age".*

In cross examination, Counsel for accused queried PW4 on the seeming confusion in a determination that Rosina is 17 years and 15 years in the same report. To this PW4 restated the basis of his finding, explaining that 17 years was based on a physical examination of Rosina's dental formation but the determination of 15 years was based on the more accurate radiography results.

The intended PW5, the medical doctor who examined Rosina to ascertain whether or not a male penis has penetrated her vagina failed to attend Court despite service of a Witness Summons served on him in accordance with s. 58 of the Court's Act, 1993 (Act 459). As such in closing its case, Prosecution announced to the Court that failing its efforts to procure the attendance of Dr. Frank Agbemordzi of Half Assini Hospital, it would rely on the testimonies of prior witnesses and exhibits tendered into evidence, specifically in this regard, Exh. F, the medical report that the witness was to have spoken to and earlier

tendered by the investigator. Questions as to the weight to be attached to Exh. F, its sufficiency to prove penetration since no cross examination was conducted on it due to the absence of the intended witness and whether pregnancy is prima facie proof of defilement will be discussed subsequently in this judgment.

INGREDIENTS OF DEFILEMENT

CARNAL KNOWLEDGE

From s. 101 (1&2) of Act 29 and the case of ***Robert Gyamfi @ Appiah v The Rep. [2019] DLCA 6331, delivered on 27/02/2019,*** the Court of Appeal reiterated the three (3) ingredients required for a charge of defilement to lie as; natural or unnatural carnal knowledge, of a child under 16 years and the perpetrator being the accused person. In ***Gligah & Atiso v The Republic [2010] SCGLR 870, SC,*** the court speaking through Dotse JSC at p. 579 said 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'.*

In the **Robert Gyamfi @ Appiah** case, it was stated that;

> *'The law is that carnal knowledge is complete on proof of the least degree of penetration – see Criminal Offences Act, 1960 (Act 29) Section 99. In simple language the fact that the hymen of a vagina is not torn does not mean the charge is not proven. The law is the least degree of penetration and not necessarily deep enough to tear the hymen'.*

It has been held that a broken hymen is not the only definitive means by which carnal knowledge may be established since in certain instances, a hymen may be intact but other evidences will show that penetration has occurred, even if to the least degree. Reference s. 99 of Act 29 and the ***Robert Gyamfi*** case (supra). The Oxford Dictionary has described a

hymen as '*a membrane which partially closes the opening of the vagina and whose presence is traditionally taken to be a mark of virginity*'. In the instant case, 'Exhs. F & H' prove beyond doubt that not only was Rosina's hymen torn, it was completely removed and admitted a penis that ejaculated enough sperms to make her pregnant. Despite the advancement of modern technologies such as Invitro Fertilization (IVF) and perhaps Immaculate Conception from which our Lord Jesus was born from, the major means of conception is through traditional sex, prima facie evidence of penetration which, where pregnancy occurs, does not require further medical examination to determine. In the instant case, there could be no better evidence of penetration than 'Exhs. F &H', which as at the 26/01/2021 showed a palpable 12-week pregnancy. With a simple calculation, it is surmised that sexual intercourse and conception occurred 12 weeks prior to 26/01/2021, and beyond the December 2020 date stated by Prosecution when it was alleged that accused person had sexual intercourse with Rosina. In pregnancy terms, conception probably occurred in November 2020, and the fact unbeknownst to Rosina, sexual intercourse continued, allegedly, with accused person. The finding that sexual intercourse had been ongoing prior to December 2020 is supported by paragraphs 5 & 6 of Rosina's Witness Statement, reproduced as follows:

> *5. after sharping (sic) my cutlass the accused will then invite me into his room and have sexual intercourse with me.*
>
> *6. it has been the practice for some time and because I was afraid of my brother, I did not inform him about the practice*

A more obvious proof of penetration other than a pregnancy could not be found and I firmly find that Prosecution has proved the ingredient.

AGE OF ALLEGED VICTIM

The second ingredient as to the age of Rosina being below 16 was proven by Exh. G, the medical report ascertaining her age at 15 years. Sections 122(1) & 19(2) of the Children's Act, 1998 (Act 560) and the Juvenile Justice Act, 2003 (Act 653) provide that '*in the absence of a birth certificate or a baptismal certificate, a certificate signed by a medical officer as to the age of a child below eighteen years of age shall be evidence of that age before a Family Tribunal without proof of signature unless the court directs otherwise'.* In other words, a birth certificate is the default proof of the age of a person with which no other proof is required, unless forgery, fraud or other criminal allegation is made as to the authenticity of such a birth certificate. It is without doubt that as at 17/02/2021 when same was authored, post two/three months when accused person was alleged to have had sexual intercourse with Rosina, she was 15 years.

Exh. G is very instructive also because being unschooled, Rosina did not know her date of birth and neither did her brother. I take judicial notice that the lack of basic knowledge of one's date of birth is quite commonplace within the unschooled and not surprising at all that even in modern times, a lot of Ghanaians have no inkling of how old they may be.

Accordingly, on the basis of 'Exh. G', a report by an expert witness admitted under s. 121 of the Act 30, I find that Rosina was 15 years or less as at the time of the alleged sexual intercourse between her and accused person.

IDENTITY OF ACCUSED PERSON

The final ingredient is the identity of the accused person and the proof that it was he, and no other male, who had carnal knowledge of the victim. PW2 consistently mentioned accused person as the one who had sex with her in his farmhouse. In ***Adu Boahene v The Rep. [1972] 1GLR 70*** the Court noted that *"the law is that where the identity of the accused was in issue, there can be no better proof of this identity than the evidence of the person who will swear to have seen him committing the offence"*. See also ***Yamoah & Razak vrs The Rep. [2012] 2 SCGLR 750*** and ***Howe vrs. Rep [2010] 33 MLRG 90 CA***. There was no equivocation in PW2's

testimony that it was the accused person who defiled her. The identity of accused person and the fact that he was the one who defiled the victim was corroborated by the testimony of PW1. PW1's testimony was key because although he was not the first person to whom Rosina told of her sexual encounters with accused person, he was the one that she repeated the assertion to.

I find on record that all prosecution witnesses named accused person as the one mentioned by PW2 as the perpetrator.

I find also that accused person confirmed that he was the only one that Rosina mentioned as the person who defiled her. This was in spite of another male farmer living in the farmhouse with accused person, as well as other male farmers living in nearby farmhouses.

Further, DW1 confirmed that PW1 mentioned accused person as the one his sister told him was responsible for her pregnancy, and no other person. He reiterated that at the Committee meeting, accused person also confirmed PW1 called and told him of Rosina's pregnancy and the accusation that he (accused person) was responsible.

With no eye-witness to the sexual encounter I hold that the testimony of Rosina was sufficient in identifying accused person as the one who had sex with her. It is trite that corroboration is not required to prove an offence unless a statute specifically provides for it, and in the instance of defilement, although desirable, it is not mandatory. Reference s. 7 of NRCD 323 on the definition of corroboration, holding (v) of the Court of Appeal judgment in the *Gyamfi @Appiah case (supra)* and page 288 of P.K. Twumasi's book "**Criminal Law in Ghana"**. For ease of reference, the Court of Appeal held in the Gyamfi @ Appiah that *"unless the law otherwise provides, there is no need of corroboration. The court could act on uncorroborated evidence of a single witness since judicial decisions depended upon intelligence and credibility and not on the multiplicity of witnesses produced at the trial"*. Be that as it may, I find in the instant

case that the testimonies of PW1, accused person himself and that of DW1 all corroborate the identity and person of accused as the one who had sexual intercourse with Rosina.

DEFENCE

At the close of Prosecution's case, the court carried out its duty in accordance with s. 174 of Act 30, made a finding that a prima facie case of defilement had been made against him and called on him to open his defence. At this stage, the Court explained the three options open to the accused person. i.e., his right not to testify enshrined in paragraphs (e) & (g), clauses (2) & (10) of Article 19 of the Constitution, 1992, the option to make a statement from the dock without oath or affirmation and the third option to testify from the Witness Box after taking the oath. Accused person opted to testify from the witness box and told the Court that when he was arrested by the police, he denied impregnating Rosina and repeated his denials when he was summoned by the Assemblyman for Tikobo No. 2 and also appeared before the Area Committee. In his opinion, the failure of PW1 to appear before the Area Committee after he lodged his complaint was an indication that the allegation of defilement against him was false. Accused person further said that it was strange that after informing him of Rosina's pregnancy in December 2020, 5 months later she gave birth to a baby boy. He accused PW1, brother of Rosina, of killing the baby boy a few weeks after its birth in order to cover up his lies and avoid the request he (accused person) made for DNA testing to be carried out on the baby, despite the fact of the baby's illnesses after its birth and accused person paying maintenance for the care of the baby. Accused person said he felt vindicated by the turn of events, especially when PW1, Rosina and the entire family moved out of the Tikobo No. 2 community to an unknown place. Accused concluded his defence and reiterated that he had not had sex with Rosina because of the 5 months' period within which she gave birth after his arrest in December 2020.

Cross examination of accused person confirmed the testimony of Rosina that she usually sharpened her cutlass at accused person's cottage, as did his farm caretakers, including

PW1. Secondly, that each caretaker lives in a separate farmhouse within the farm allocated to him to farm and it was in one such farmhouse that PW1 and his family lived. In his farmhouse, accused person confirmed that he lived together with one other male caretaker and his wife. Again, accused person confirmed that Exh. E series were indeed pictures of his farmhouse, his sleeping quarters and the stone for sharpening located behind his kitchen. Accused person agreed with Prosecution that whenever Rosina came to his farmhouse to sharpen her cutlass, she was alone although she always came to meet the caretaker's wife and children. Accused person agreed that Rosina and the other farmers knew where he slept but denied that she had ever entered his sleeping quarters. Accused person also expatiated on the allegation against him that as part of the inducements made to Rosina to enable him have sexual intercourse with her, he promised to marry her in addition to his wife as a mere commonplace statement made in local parlance to young girls just to encourage them to take care of themselves.

In explaining the contrast between the contents of his ICS & CS on the one hand, and his defence in Court, accused person stated that the police were not willing to listen to his side of the story, insisting that so long as the victim mentioned his name, the only name out of all the males in the community, he was responsible for her pregnancy. He denied the presence of the two independent witnesses at the taking of his statements by the police. Notably, it was only under cross examination that accused person raised this issue although he made no indication of being under duress, force or undue influence to give his statement or thumb print same. He told the Court that he believed the two statements tendered by Prosecution as his were based on the complainant's report lodged at the police station and not the true statement he gave but which the police disbelieved.

Ebusuapanyin Kofi Amponsah, a farmer and family head of the Asona Nkabom family of Tikobo No. 2 testified as DW1. He clarified that accused person and complainant were both tenant farmers of the chief of Tikobo. Further, that at his invitation, accused person came to

his house after complainant informed him of his sister's pregnancy. Before elders assembled to deliberate the issue, and in complainant's absence, accused person denied the charge. Finally, that complainant did not participate in the attempted settlement arranged, telling him that the matter was with the police.

Cross examination of DW1 established that though the witness knew accused person and had visited him at his abode, he did not know whether or not he lived with tenants or occupiers although he was emphatic that accused person lived alone on his cocoa farm at Daamuofu near Tsikobo while his wife lived within the Tikobo township. He confirmed that complainant indeed informed him of Rosina's pregnancy, the mention of accused person as the one responsible and attempts made by the community elders to settle the matter.

Despite filing a witness statement for one Michael of Tikobo No. 2 as DW2, he failed to appear before the Court to testify. On the authority of the Practice Direction on Case Management Conference and Disclosures (2019), paragraph 3 (2) (c), subject to sections 116-118 of NRCD 323 the Witness Statement of the intended DW2 does not constitute evidence and would not be considered. Does accused person's testimony raise a reasonable doubt as to his guilt as stipulated in s. 11(3) & 13(2) of NRCD 323.

The summary of accused person's denial was the premature birth of the baby, how PW1 failed to appear before the Committee to resolve the complaint he lodged and his suspicion that PW1 deliberately killed the baby to avoid the conduct of a DNA test on him to determine paternity. I shall deal with each defence forthwith.

From the evidence on record, the alleged sexual violations started sometime before December 2020. Prosecution stated in its Brief Facts that as at January 2021, Rosina had missed her menstrual period for a month or more. This was an estimation based on the complaint lodged and without the requisite expertise, cannot be relied on to determine the age of the pregnancy. According to Exh. F, as at 26/01/2021 the pregnancy was more than 12

weeks old, in simple language, 3 months old. Without knowing the exact date conception took place, the presumption in accordance with s. 18 of NRCD 323 is that sexual intercourse occurred sometime in November 2020. The discrepancy in the dates is resolved by Exh. F which though not cross examined on, is unquestionably credible on the authority of s. 112 of Act 30. In June 2021, the investigator whilst under cross examination confirmed that Rosina had given birth to a pre-term baby, presumably 7 months old, not 5 or so months as accused person alleged. Does the fact of the baby being premature raise a reasonable doubt as to whether or not accused person had sexual intercourse with Rosina? According to s. 13(1) of NRCD 323 and the case of ***Ali Yusuf Issa (No. 2) v The Rep. [2003-2004] SCGLR 174*** the authorities are agreed that accused person's argument does not amount to raising a reasonable doubt.

Concerning the second line of defence, I find that it does not hold sway. Indeed, complainant's refusal to participate in the attempted settlement by DW1 and the Committee was in line with s. 73 of Act 459 and cannot be inferred to have been out of deceit, falsehood or a lack of credibility as to the complaint lodged. Conversely, complainant's absence at the Committee meeting cannot inure to accused person's benefit. S. 73 of ACT 459 provides that "*Any court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceeding for a reasonable time and in the event of a settlement being effected shall dismiss the case and discharge the accused person".*

Finally, I dismiss unequivocally the unsupported and reckless allegation that the complainant killed the baby to avoid DNA testing especially when it is on record that the baby was preterm and sickly. According to the *mayoclinic.org*, an online medical portal, premature babies suffer from underdeveloped lungs resulting in respiratory distress, low

body temperature which results in inability to regulate the body temperature, feeding challenges which translate into low body weight, etc. these challenges were confirmed by accused person in his testimony and as such, it was no surprise that the baby passed, undeniably not at the hands of complainant.

The shallow defence put up by the accused person is further belied by his admission of guilt in his ICS & CS (Exhs. C & D). Notably, in Exh. C, accused person told police;

> "*Rosina Adubia is my girlfriend a month now she use (sic) to come to my house. On 29/01/2020 about 10:00am, Rosina (sic) brother Alex Atweri came to my house together with one of the .. and informed me that Rosina is pregnant and (she mentioned) through interrogation she mentioned my name.* ***I told them is true*** *and they told me that they are going to informed (sic) the elders in the township so the next day I should report myself to the elders. … later her brother Alex Atweri called me on phone and told me that he went to take Rosina to hospital for maternity checkup. I gave an amount of GHC140 to one 'okada' rider to be given to him …"*

In Exh. D, taken a day after Exh. C, accused person gave the following statement;

> *"What happened between I and victim Rosina Adubia was what I said in my caution statement. It is true that I am the one responsible for her pregnancy.* ***I had sexual intercourse with her once****. I told the victim's brother that I wanted her to learn a trade and I will pay all the bills so that after delivery, if they will permit me to marry her I will marry her"*

Being admissions, Exhs. C & D must conform to the requirements of voluntariness, (in other words, absence of undue influence, force, threat or maltreatment) and the presence of an independent witness stipulated in s. 120 of NRCD 323 on the admissibility of hearsay confessions. There was no objection to the admission of Exhs. C & D by Counsel for accused person. Neither were there questions raised as to any of the grounds stated in s. 120 which would have affected the credibility of the documents or the investigator who tendered them.

In fact, I find accused person's late testimony given under cross examination that what he told the investigator was not what was written down for him as a mere afterthought, an argument which according to ***Marfo v The Rep. [2018] 127 GMJ*** would be a subject of cross examination, not a finding that s. 120 of NRCD 323 had not been complied with. Considering the stark departure from his admissions made in Exhs. C & D I find his defence put up in Court shambolic.

CONCLUSION

In concluding, I must state here that the attempts to settle the allegation of accused person impregnating a 14-year-old child by the elders of the community is most reprehensible and contrary to s. 73 of the Courts Act, 1993 (Act 459). I dare say that from public common knowledge, which I take judicial notice of under s. 9 of NRCD 323, such unlawful enterprises are contributing to the increase in the commission of the sexual-based offences because offenders and potential offenders rely on the expectation of settlement, with no thought to the consequences of their actions on the victims and society.

Secondly, accused person's misconception that because the baby he fathered was dead, the offence he committed had died with it is most uneducated. The offence of defilement is in the very act of sexual intercourse with a child below 16 years, and not the consequences of the act, be it a resulting pregnancy, infection of a victim with a sexually transmitted disease, psychological trauma, etc., although such occurrences inform the court on militating factors that go to sentencing should an accused person be found guilty.

In this case, the trauma of pregnancy on the body of 14-year-old Rosina, physical and psychological effects of birth via a caesarean section and loss of a baby, even if a sickly premature one, are not lost on the Court and will be considered in sentencing.

CONVICTION & SENTENCE

It is without equivocation that I find that prosecution has proven the ingredients of defilement beyond reasonable doubt and *mutatis mutandis*, the guilt of accused person.

SENTENCE

Accused person is convicted of the offence of defilement contrary to s. 101 of Act 29 and sentenced to ten (10) years imprisonment in hard labour (IHL).

In the absence of the convict, a Warrant of Arrest is hereby issued in accordance with s. 170(4) of Act 30. Upon his arrest, the Warrant of Commitment which shall be signed and authorised by this Court, shall be endorsed at the back thereof with the date of arrest which shall also be the date of commencement of the sentence. The Warrant of Commitment shall be subject to renewal in accordance with law.

Upon his arrest in any part of Ghana, the convict shall be transferred to the Sekondi police and onward to the Sekondi Prisons to serve his sentence.

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H/H NAA AMERLEY AKOWUAH (MRS.)