IN THE CIRCUIT COURT HELD AT TEPA ON TUESDAY THE 7TH DAY OF DECEMBER 2021 BEFORE HER HONOUR GWENDOLYN MILLICENT OWUSU ESQ., CIRCUIT JUDGE

14/2020

THE REPUBLIC

VRS

SOLOMON ADDO

PROSECUTION: CHIEF INSPECTOR JONAS NEWLOVE ADJEI

COUNSEL FOR ACCUSED PERSON: DANIEL KORANG ESQ.

JUDGMENT

Accused has been arraigned before this court charged with one count each of defilement and carnal knowledge of an idiot contrary to sections 101(2) and 102 respectively of the Criminal Offences Act, Act 29, 1960.

A summary of the facts presented by prosecution states that complainant resides at Tepa Ward 4 with the victim who is her granddaughter. Victim aged 14 years is a primary four pupil of Tepa Methodist primary school who has a history of delayed speech impairment and mental retardation. Accused aged 39 is a barber residing at Tepa Ward Three. In the month of May, 2019, accused lured victim into his friend Daniel Amoako alias Asonkoi's room at Tepa Ward 4. Accused locked victim in the said room and went away. Accused returned with a drink which he drank, and thereafter, undressed victim and himself, and had sexual intercourse with her. Accused after the act gave ten Ghana Cedis to the victim and made himself scarce until victim spotted him on 01/07/19 sitting in front of his said friend Asonkoi's house and caused his arrest. Victim after being sexually abused had

since been experiencing series of health issues. A medical report form was given to the complainant by the Police to send victim to hospital for examination and treatment, and same was returned duly endorsed by the medical doctor indicating that victim had been defiled. After investigations, the accused was charged with these offences. He pleaded not guilty before this court.

The accused person has denied being the perpetrator of the crime he has been charged with. Prosecution therefore had to prove beyond reasonable doubt that he committed the crime he has been charged with. The duty therefore fell on prosecution to prove their case beyond reasonable doubt in accordance with Section 13 (1) of the Evidence Act, 1975, (NRCD 323).

BURDEN OF PROOF

The prosecution had the burden to prove that the victim had been defiled, and the accused person was the perpetrator. This is so because in our criminal law jurisprudence, it is the prosecution which carries the burden of proof, the standard of which is proof beyond reasonable doubt as reflected in the statement of Lord Sankey in **Woolmington v. DPP [1935] UKHL 1** that

"*no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained*".

It was held in Dexter Johnson v. the Republic [2011] 33 GMJ 68 S.C that prosecution would have to discharge this burden by leading evidence satisfactorily to prove that the

accused person committed the offences he has been charged with. Any doubt in the prosecution's case should inure to the benefit of the accused person.

Section 11(2), (3) and (4) of the Evidence Act refers to the burden on prosecution to prove the guilt of the accused person beyond reasonable doubt. Section 11(2) 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 the guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of a fact beyond a reasonable doubt*".

This is true to upholding the fundamental principle in Article (19) (2) (c) of the 1992 Constitution that everyone is innocent until proven guilty. To establish culpability, the prosecution must present enough evidence to convince the court that the accused is guilty of the offence charged. The Prosecution has the burden to provide evidence to satisfy all the elements of the offence charged.

It was held in **Asare v. The Republic (1978) GLR 193 – 199** that "as a general rule, there was no burden on the accused to establish his innocence. Rather it was the prosecution that was required to prove the guilt of the accused beyond all reasonable doubt."

On count one, section 101 of the Criminal Offences Act, Act 29, 1960, provides thus:

(1) For purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.
(2) 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.

To succeed in its case, the prosecution must establish beyond reasonable doubt, three (3) essential elements:

1. The victim is a girl under 16 years of age.
2. Someone has had sexual intercourse with the victim; and
3. That someone is the accused person.

Count two (2) on the charge sheet is the offence of "Carnal knowledge of an idiot contrary to section 102 of the criminal offences Act, Act 29 of 1960. Section 102 also states that "Whoever has carnal knowledge or has unnatural carnal knowledge of any idiot, imbecile or a mental patient in or under the care of a mental hospital whether with or without his or her consent, in circumstances which prove that the accused knew at the time of the commission of the offence that the person had a mental incapacity commits an offence and shall be liable on summary conviction to imprisonment for a term of not less than five or more than twenty-five years".

Analysis of evidence on record

The first witness to be called by the prosecution (PW1) was the victim, Ernestina Asadu. The victim could not walk, was carried into the chamber of the court for the hearing, and appeared very helpless. The victim had impaired speech but was able to communicate with the court. She was able to answer questions pertaining to her name, where she lives, as well as telling the court that she does not work but attends school, and that she knows

the accused person. She told the court per her witness statement that she cannot remember the exact date of the incident but about two (2) months before the accused was arrested, she was standing at main Tepa Ward 4 refuse dump and the accused called her by her name and asked her to come. She went to the accused and the accused took her to his friend Asonkoi's room at Tepa ward 4. She narrates how the accused locked her in the room alone, came back with a drink and consumed same without giving her some, and after consuming the drink alone, undressed her and himself, and had sex with her, two (2) times, after which accused gave her GHC10. The victim was asked if the person who defiled her was present in the court, and she answered in the affirmative. She was asked to identify the person, and she pointed at the accused, identifying him as the person who had defiled her.

During cross-examination, the accused tried to elicit from the victim that she the victim had raised her attire to show him that she was menstruating and needed the money to buy sanitary pad. He sought to establish that he only gave the money to the victim because the victim had approached him and asked him for money to buy sanitary pad. This, the victim vehemently denied.

Q. Was I not standing there when you came to ask me for something?

A. No.

Q. So you do not remember coming to ask me for money when I answered that I had no change (small denominations) on me.

A. I did not ask him for anything.

Q. Do you recall asking me for which I asked which house you come from; and you are going round asking for alms?

A. I did not ask for anything.

Counsel for the accused sought to find inconsistencies in the time stated that the offence occurred, but there exists no such inconsistency. It was clearly stated that the victim caused the accused to be arrested on July 1, 2019, and it was stated that the incident occurred about two months prior to the arrest, which tells us that the alleged offence took place in May. However, counsel for the accused is seeking to convince this court that the filing of the witness statement in November, and the fact that victim had said the offence took place two months earlier, places the period of the commission of the alleged offence in September. This in my opinion is not sufficient to discredit the evidence by PW1 that she had been defiled. The victim has no idea about any witness statements and when prosecution will file them. She can only reckon with the time she was giving her statement.

Even though the victim had difficulty expressing herself, she never minced words as to what had happened to her. She never once was confused as to who the perpetrator was. She was able to lead the police to the venue of the incident, and showed them where the act took place, and pictures were taken. She pointed out the accused person to the court that he was the one who had had sexual intercourse with her. She even narrated how the accused bought drink, and drank all of it without even giving her any. I do not find any contrary evidence indicating that victim had not been defiled. Was the defilement done by the accused, or somebody else?

The position of the law as stated in **Adu Boahen v. The Republic (1972) GLR 70, CA** is that "where the identity of an accused person is in issue, there can be no better proof of his identity than the evidence of a witness who mounts the witness-box and swears that the man in the dock is the one he saw committing the offence, which is the subject-matter of the charge before the court."

Counsel for the accused sought to convince the court that on account of the idiocy of the victim, her ability to clearly and vividly remember the personality and identity of the accused after two months of the alleged offence is seriously questionable. In one breath, counsel for the accused says the victim does not suffer from idiocy; and in another he seeks to rely on the idiotic status of victim to say her ability to identify her assailant is questionable? This, in my view, is untenable. The victim with her difficulty in expressing herself, did not once contradict herself as to who had had sexual intercourse with her.

Counsel for the accused also submits that the evidence of PW2 has no weight as she was not present when the alleged offence was committed. Clearly, counsel for the accused did not get the grasp of the evidence of PW2. PW2 did not state that she was a witness to the incident. What was the nature of the testimony of PW2? She only testified to the deteriorating health of her granddaughter from the month of May, to which she could find no remedy. She testified as to the nature of victim's ailments which was characterized by severe pains in the lower abdomen, the offensive odour from victim's vagina, and the incessant cries of the victim at night. She also testified to the fact that she took her granddaughter to various places in her bid to get a cure for her to no avail. She testified as to the victim's inability to eat or drink which resulted in victim growing lean. She testified that victim due to her illness from the month of May falls when she stands, vomits, and defecates on herself. The fact of victim not being able to walk is something that became apparent to the court in the course of the trial. PW2 has testified that she knew nothing until about 1600 hours on July 1, 2019, when she returned from Tepa Government Hospital, and was informed that victim together with her mother have gone to the police to lodge a complaint against a certain man for defiling victim. She later came to know that the said man is the accused person Solomon Addo, whom she pointed out to the court. At the end of her evidence the accused was called upon to cross-examine

her. The Accused person asked the Witness to answer the question: "Do you think if I had had sexual relations with this child, she will be able to stand?" The Court disallowed the question, and told him to ask questions relating to the testimony given and facts, not as to what the Witness thinks or does not think. Accused person then said he had no questions to ask the Witness. In actual fact, the victim at the time of the trial was in no position to stand or walk, and was always carried to court and into the court chamber for the hearing.

PW3, the investigator, was called out of turn. This is because the medical officer who was to testify had been transferred to the North and could not attend court on that day. Prosecution thus prayed the court to take the investigator out of turn so as not to waste the slot. She tendered photographs of the room where the alleged defilement took place which were admitted and marked as exhibit "H", "H1", and "H2". The investigator, PW3, also tendered the National Health Insurance Card of the victim, exhibit "G", which states the date of birth of the victim to be July 10, 2004, clearly meaning that at the time of the alleged incident, the victim was at the age of 14 years and some months; which also means the victim was below 16 years. PW3 also tendered in evidence the various investigating caution statements given by the accused to the police, as well as the charged statements. The first investigating caution statement was given by the accused to the police on July 1, 2019, in the presence of one Irene Adobea, an independent witness. This was admitted and marked exhibit "A". The accused gave a further investigating caution statement on July 3, 2019, in the presence of Anthony Dimalya, an independent witness, which was admitted and marked exhibit "B". On July 4, 2019, the charged statement of the accused was taken in the presence of Anthony Dimalya, which was admitted and marked exhibit "C". The accused on August 13, 2019, gave a further investigating caution statement, and a charged statement to the police in the presence of Emmanuel Asare, an independent

witness, which were admitted and marked exhibits "D" and "E" respectively. At the end of the evidence-in-chief of PW3, accused was invited to cross-examine her but he said he had no questions for her. It is settled in law as per the dictum in Fori v Ayirebi [1966] GLR 627, SC, that when a party has made an allegation, and it is not denied by the other party who has every opportunity to react, there is no need for further evidence to be led on same.

Dr. Kwame Kusi Agyemang, PW4, is the medical officer who examined the victim. He testified that PW2 had brought PW1 to Tepa Government Hospital, and he was the medical officer who did the examination. He identified exhibit "F", the Police Medical form as having been endorsed by him. He testified that he had put his findings on the form, and explained his findings thus: "On the 2/07/2019 at about 12:06 pm, I assessed the victim. The name of the victim was Ernestina Asadu, 14 years old. She claimed that one "Solo" locked her up in one Barber called Asonkoi's room. The "Solo" had penovaginal intercourse with her. The victim could not tell the exact date or day on which it happened. The victim on assessment also has delayed speech development and mental retardation. The assessment revealed the victim had lost considerable weight. I also assessed the perineum but found no bruises. The hymen was not intact. It was not freshly torn; it had been torn some couple of days or weeks earlier". He also stated in his report that PW1 had a depressed mood. At the end of his evidence-in-chief, the accused was invited to cross-examine him but he said he had no questions for the witness.

The next adjourned date after the testimony of PW4, the accused failed to attend court, and could not be traced. A bench warrant was issued for his arrest. The accused was admitted to bail on October 29, 2019. He appeared in court up to February 18, 2020, when the Medical Superintendent who had examined the victim testified. Thereafter, the accused disappeared and could not be found. The case was adjourned to February 25,

2020, and the accused was absent. Nobody could tell the court where the accused was, and no tangible reasons were given by anyone as to the whereabouts of the accused. It was on June 30, 2020, that the accused was brought before the court in Police custody, and even then, accused could not offer the court any tangible reason and/or proof as to why he had been absent from court on any of the various occasions.

Counsel for the accused, in his submission to the court to re-admit the accused to bail in the light of prevailing circumstances stated that"… the court rescinded the bail on account of the accused person's inability to appear at some appointed time and dates before the court. I have had conference with the accused and he explains that it was not a wilful disrespect or disregard for the court. I convey accused person's regret and apology to the court …". The facts however, did not support this submission. It was not the situation that the accused came to court late, or came at a later date to find out the new adjourned date, or sent someone to get the date for him, or came at the next adjourned date with proof of his inability to attend court previously. When the accused failed to attend court on February 25, 2020, a Bench Warrant was issued for his arrest, but the accused could not be found. The case was adjourned to March 19, 2020, but the accused did not show up, and the Police had not been able to locate him. As at April 28, 2020, when the case was called, accused had not been located, he did not attend court, and the bail bond was to be estreated on the sureties. The case was again adjourned to May 19, 2020. When the case was called on that date, the accused was still nowhere to be found, and the case was adjourned to June 16, 2020, but still, the accused did not show up, and there was no information as to his whereabouts. In all of this, only one out of the three sureties appeared before the court when the application for forfeiture was before the court.

The next person who was to testify, PW5, was Daniel Amoako alias Asonkoi, who is a close friend of the accused. The alleged defilement supposedly took place in his room,

but he could not be traced. The police could not find him, but according to PW2, he always sneaked in and out of the place. A warrant had to be issued to procure his attendance in court. Though a hostile witness, he testified that he and the accused are so close that they know everything about each other. It also came to light in his testimony that he does not always lock his door when going out, especially, when he does not intend to go far.

On November 25, 2020, the police had information that PW1 had passed away. A summary of the post mortem report from the Okomfo Anokye Teaching Hospital (KATH) stated the immediate cause of death to be severe sepsis, severe anaemia, and necrotic ano-vaginal lacerational injuries. The prosecution reverted to the office of the Attorney-General and were advised that the accused cannot be held liable since the death did not occur within a year and a day after the alleged defilement.

At the close of prosecution's case, the identification of the accused person by PW1 without mincing words, and the additional evidence on record against the accused led me to conclude that prosecution had succeeded in establishing a prima facie case against him for which he was called upon to open his defence.

THE CASE FOR THE DEFENCE

In the accused person's first statement given to the police, exhibit "A" on his arrest, it is stated that the victim is not his friend, however, he knows the said victim through her uncle Kwame Owusu. He said victim came to him at the place of the alleged incident and begged him for GHC 5.00. He held her hand, and victim suddenly told him of something flowing from her private part. He checked victim and realised she had menstruated. He asked her why she had not informed her mother, and gave victim GHC 10.00 to buy

sanitary pad. This statement was given on July 1, 2019. On July 3, 2019, accused gave another statement to the police. It was stated that he made a mistake in exhibit "A", which he wants to correct. It is then stated that he did not hold victim or touch her, that the victim whose name he does not know but can identify approached him and begged for GHC 5.00, and in his attempt to give her the money, victim removed the cloth around her neck, exposing herself to him that she had menstruated. This is exhibit "B". On July 4, 2019, he gave his charged statement exhibit "C" in which it is stated that he is relying on exhibit "B". On August 13, 2019, the accused person made a further statement, exhibit "D" to the police. He again stated that the first statement he made, exhibit "A" was a mistake, and he wants to correct same. What he said was virtually a regurgitation of exhibit "B". He thereafter gave a new charged statement, exhibit "E", in which he stated he is relying on exhibit "D", and further stated that it is his true statement made of his own free will, and has been told that he can add, alter, correct or change anything when he wishes. In the witness statement of the accused, he says that a girl whom he hardly knew approached him and begged him to give her GHC 5.00, and gave her name as Ernestina. He asked if Kwame Owusu is her uncle and she answered in the affirmative. Kwame Owusu is his friend. He also stated that after a series of questions, the investigator wrote the story without allowing him to tell his own story. Accused denies the offences he has been charged with.

In the case of **Lutterodt v. Commissioner Of Police [1963] 2 GLR 429**, the court held that "Where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court shall proceed to examine the case for the defence in three stages:

Firstly, it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, and the court should acquit the defendant;

If the court should find itself unable to accept, or if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and Finally quite apart from the defendant's explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e., prosecution and defence together, and be satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if not, it should acquit."

I shall therefore proceed to consider the defence of accused person.

The accused in exhibit "A" says the victim is not his friend but he knows the said victim through her uncle Kwame Owusu who is his friend. He said he held her hand, and victim suddenly told him of something flowing from her private part. He checked victim and realised she had menstruated. In both exhibits "B" and "D" he stated that he did not hold victim or touch her, that the victim whose name he does not know but can identify approached him and begged for GHC 5.00, and in his attempt to give her the money, victim removed the cloth around her neck, exposing herself to him that she had menstruated. In his witness statement, he says that a girl whom he hardly knew approached him and begged him to give her GHC 5.00, and gave her name as Ernestina. He asked if Kwame Owusu is her uncle and she answered in the affirmative. All these statements were given on different days, in the presence of different independent witnesses. Exhibit "A" was witnessed by Irene Adobea. Exhibits "B" and "C" were witnessed by Anthony Dimalya. Exhibits "D" and "E" were witnessed by Emmanuel Asare but the accused portrays in his witness statement as if they were all taken at the time when he says he was not allowed to tell his own story, and some facts were inserted by the investigator against his consent. During the trial, he had the opportunity to cross-examine the investigator when these statements were tendered in evidence but he said

he had no questions for her. In **Fori v Ayirebi** supra, it was held that if the party fails to cross-examine his opponent or the witness while the opponent or the witness is in the box and he has the opportunity to react to his opponent's case, the court should not attach much weight to the evidence that the party later gives on that particular issue after the opponent or his witness has left the witness-box. Similarly, in **Quagraine v Adams, [1981] GLR 599, CA**, it was held that where a party makes an averment and his opponent fails to cross-examine on it, the opponent will be deemed to have acknowledged, sub silentio, that averment by the failure to cross-examine. Accused during cross-examination asked PW1, "Do you recall asking me for which I asked which house you come from; and you are going round asking for alms?"; at another time, accused says he knew the victim through her uncle Kwame Owusu who is his friend; and at another time he says that a girl whom he hardly knew approached him and begged him to give her GHC 5.00, and gave her name as Ernestina. Accused has given various conflicting averments in the statements before this court. Counsel for accused sought to discredit the evidence of PW1 but the accused is not on trial for giving money to the victim and the circumstances thereof. Accused is on trial for defilement and could not raise any doubt that he probably did not commit the offence. The court noticed with interest that the accused avoided asking PW1 any questions on the sexual intercourse. He mainly dwelt on seeking to contradict the victim that "she" had asked him for money. The victim vehemently denied asking the accused for anything. The accused eventually succeeded in eliciting answers from the victim pertaining to the giving out of the said GHC 10.00. This court, being the trier of facts, does not find this detrimental to the case of the prosecution, considering the state in which the victim was carried into the court. The court took notice of the fact that she could not express herself intelligently, and could barely express herself properly. The court also took notice of the anger with which the victim vehemently denied having asked anything from the accused, even in that weak, sickly state in which she was. From the evidence before the court, I am unable to accept the explanations given by the accused,

neither do I find his explanations reasonably probable. Considering the evidence in its entirety, I am of the view that the accused person failed to lead credible evidence to raise a reasonable doubt in the case of the prosecution against him as to his guilt as required under sections 11(3) and 13(2) of the Evidence Act, 1975, (NRCD 323).

CONCLUSION

At the end of the trial, there was no doubt that the victim had been defiled, and no doubt as to who defiled her. I find from the evidence before the court that prosecution has been able to prove the charge on count one against the accused person beyond reasonable doubt. I reject the explanation offered by the accused person as being not reasonably probable and find him guilty on count one, and convict him accordingly.

Prosecution put all their industry into proving count one to the exclusion of count two. They led no evidence to establish the imbecility of the victim, as well as evidence to support that the accused knew that fact about the victim. It is trite law per the principle in Nyameneba & Ors v The State [1965] GLR 723 that, while ignorance of the law is no defence, ignorance of fact is a complete defence. Save that PW4 mentioned in his report that the victim had a history of delayed speech development and mental retardation, prosecution failed to adduce any evidence to discharge their burden of proof on count two. This court holds that the evidence on record does not provide sufficient proof to convict the accused on that charge since the court cannot go on a frolic of its own by making findings that are not supported by the record. The court holds that the accused is not guilty, and accordingly acquits the accused on count two.

SENTENCE

In deciding the sentence of the accused person, I have taken into consideration his plea for mitigation as well as all the aggravating and mitigating factors in line with the Ghana Sentencing guidelines. I have also considered the case of **Adu Boahene vrs The Republic** supra and at page 78, the Court also held that "*Where the Court finds an offence to be grave, it must not only impose a punitive sentence, but also a deterrent or exemplary one so as to indicate the disapproval of society of that offence. Once the Court decides to impose a deterrent sentence, the good record of the accused is irrelevant".* Accordingly, looking at the abhorrent nature of the offence, I hereby sentence the convict to twenty-two (22) years imprisonment in hard labour.

SGD

H/H GWENDOLYN MILLICENT OWUSU (CIRCUIT JUDGE)