

IN THE CIRCUIT COURT "A", TEMA, HELD ON TUESDAY, THE 6TH
DAY OF DECEMBER, 2022 BEFORE HER HONOUR AGNES OPOKU-
BARNIEH, CIRCUIT COURT JUDGE

SUIT NO: D10/44/20

THE REPUBLIC

VRS:

1. SAGOE JAMES
 2. RICHARD QUAYE
 3. JOSEPH ANNUM MARKWEI
 4. SYLVESTER ADJEI
-

ACCUSED PERSONS

PRESENT

C/INSP. SUSANA AKPEERE HOLDING THE BRIEF OF A.S.P STELLA
NASUMONG FOR PROSECUTION

PRESENT

EDWARD METTLE-NUNOO, ESQ. FOR THE ACCUSED PERSONS

PRESENT

JUDGMENT

FACTS

The four accused persons were each charged and arraigned before the court on a charge of defilement of a ten-year-old contrary to **Section 101(2)** of the Criminal Offences Act, 1960 (Act 29).

The brief facts narrated by the prosecution are that the complainant, the mother of the victim aged ten (10) years at the time of the alleged incident.

According to the prosecution, the complainant and the victim live on the same compound with the first, second and fourth at Tema Newtown whilst the third accused person lives in the neighbourhood where the complainant sells.

The prosecution alleged that sometime in July 2020, the Complainant suspected victim of having sexual relationship with men but when she confronted her, she denied. However, on 24th July 2020, the complainant detected that the victim was having difficulty in walking, she looked pale and her breast also looked saggy. The complainant questioned the victim again and she confessed that one Tess had sexual intercourse with her in his room and offered to give her an amount of Two Hundred and Twenty Ghana Cedis (GHC220) and also threatened her with death if she disclosed the incident to anyone. After much persuasion victim further revealed that the first, second, third and fourth accused persons and a fifth person who is not before the court also had sexual intercourse with her previously on different dates.

The complainant subsequently lodged a complaint at the Tema Regional Domestic Violence and Victim Support Unit, and the four accused persons were arrested on a charge of Defilement. A police medical report form was issued and the victim was sent to the Tema General Hospital where she was examined and the report showed that she had been defiled.

The accused persons were subsequently charged with the offence of Defilement of a child under 16years contrary to **Section 101(2)** of the Criminal Offences Act, 1960 (Act 29) whilst efforts are being made to arrest Suspects, Tess and one Africa.

THE PLEA

The four accused persons pleaded not guilty to their respective counts after the charges had been read and explained to them in the Fante, Twi, Ga and

languages respectively. The accused persons having pleaded not guilty to the charge puts the facts of the prosecution in issue and thereafter the prosecution assumed the burden to prove the guilt of the accused person beyond reasonable doubt.

BURDEN OF PROOF

Under **Article 19(2)(c)** of the 1992 Constitution, a person charged with a criminal offence is presumed innocent until he is proved or has pleaded guilty. It is trite learning that in criminal cases, the burden is on the prosecution to prove the guilt of the accused person beyond reasonable doubt. This legal burden is codified in **Sections 11, 13, and 15** of the Evidence Act, 1975, (N.R.C.D. 323).

In the case of **Banousin v. The Republic** [2015-2016] 2 SCGLR 1232 at page 1241, the Supreme Court held that:

“The burden the prosecution has to prove is the accused person’s guilt, and this is beyond reasonable doubt. This is the highest burden the law can impose; and it is in contra distinction to the burden a plaintiff has in a civil case, which is proof on a preponderance of probability of the evidence. What “beyond reasonable doubt” means is that, the prosecution must overcome all reasonable inferences favouring the innocence of the accused. Discharging this burden is a serious business and should not be taken lightly. The doubts that must be resolved in favour of the accused must be based on the evidence; in other words, the prosecution should not be called upon to disprove all imaginary explanations that established the innocence of the accused person.”

Thus, the burden is on the prosecution to prove the essential ingredients of the charge of defilement against the accused persons beyond reasonable doubt. When the accused person is called to open his defence, all that is

required of him is to raise a reasonable doubt in the case of the prosecution. The standard of proof for the defence of the accused person is on a preponderance of probabilities only, which is a lighter burden than what the law imposes on the prosecution. See the case of **Osae v. The Republic** [1980] GLR, 446.

ANALYSIS

Here, the accused persons are charged with defilement contrary to **Section 101(2)** of Act 29. **Section 101(2)** of Act 29, 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.”

Defilement is defined under **Section 101(1)** of Act 29 as *“the natural or unnatural carnal knowledge of a child under sixteen years of age.”*

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 to this, under **Section 14 of Act 29**, a child under 16 years of age lacks the capacity to consent to sex. Thus, it is not a defence for a person charged with defilement to contend that the child consented to the sexual intercourse since consent is immaterial in proving a charge of defilement.

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 age of the victim as a person below the age of 16 years is not seriously controverted. The first prosecution witness, the victim gave her age as 10 years, which the second prosecution witness confirmed. The prosecution also tendered in evidence **Exhibit B**, a Bone Age Determination Report.

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).

Here, the Bone Age Determination report estimates the age of the alleged victim as between 13-15 years. This was not subjected to rigorous cross-examination and counsel for the accused person in his written address to the court did not contest the age of the victim. I accordingly find that prosecution proved the age of the victim as a child below the age of 16 years at the time of the alleged incident beyond reasonable doubt.

On the second and the third ingredients of the offence, the prosecution must prove that each of the accused persons charged in this case and no one had sexual intercourse with the victim. **Section 99** of Act 29 states that:

“Where on a trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal or unnatural carnal knowledge is complete on proof of the least degree of penetration.”

In the English case of **R v. Hughes** (1841) 9 C & P at 752, it was held that for purposes of proof of penetration, it is sufficient if the prosecution lead evidence to show that any part of the virile organ of the accused was within the labia of the pendulum of the female, and however slight this may be, it is sufficient to establish penetration.

To support their case that the four accused person had sexual intercourse with the alleged victim, the prosecution relied on the testimonies of the victim and her mother as well as the medical report on the examination of the victim admitted and marked as **Exhibit “A”**. The medical report states in part;

“vaginal examination revealed no bleeding or trauma. No inflammation or mass. There was however a creamy whitish discharge with excoriated region peri vaginally as a result of persistent itch. There no is hymen which may indicate evidence of penetrative sex”

The history recorded by the medical officer, M.K Sallah is that the victim alleged that she had sexual intercourse with about six (6) different men who lured her with material gifts and money spanning the course of approximately six(6) months. When PW3, the investigator, was questioned on the medical report, she stated that the medical officer who examined the victim will be the best person to answer questions based on the medical report and that all that she read in the report was that there was no hymen which may be indicative of penetrative sex. The defence expressed interest in cross-examining the medical doctor and after eight(8) adjournments

prosecution failed to produce him for cross-examination on the report. Although **Section 121(1)** of the Criminal and Other Offences Procedure Act, 1960(Act 30) permits a report produced by a Government Medical Practitioner to the court to be used as evidence of the facts stated therein, **Section 121(6)** mandates the court, in the interest of justice to summon the medical practitioner who prepared the report to be examined as a witness. In this, case, Counsel for the accused person having expressed a desire for the medical practitioner to cross-examine the medical officer on the report, and the prosecution having failed to produce him, denied the defence all facilities for them to defend the charges leveled against them.

I shall now proceed to evaluate the evidence led by the prosecution in support of the allegation against each accused person to determine if the prosecution succeeded to prove that each of the four accused persons had sexual intercourse with the victim.

EVALUATION OF THE EVIDENCE AGAINST THE FIRST ACCUSED PERSON

The star prosecution witness, (PW1) the victim, Comfort Edubia, testified against the first accused person that one day at dawn, whilst her mother had gone to Accra, she was lying on a bench when the first accused person came out of his room and being alone and afraid, he invited her to his room. The first accused person then informed her that he had heard that the second accused person has had sexual intercourse with her, which she admitted but

pleaded with him not to tell her mother. The first accused person then demanded to have sexual intercourse with her to keep her sexual encounter with the second accused person a secret. Additionally, PW1 testified that the first accused person promised to give her money or buy bicycle for her. Based on that, she agreed to have sexual intercourse with him but after the act, the first accused person reneged on his promise.

PW2, the mother of the victim testified she suspected that the victim has been sexually abused and on 22nd July, 2020, she detected changes in the victim but she denied that she had been sexually abused when questioned. When she threatened to beat her, she disclosed that six men have had sexual intercourse with her including the four accused persons. According to her, one Mike who the victim confided in also confirmed that the accused persons have had sexual intercourse with the victim. According to her, the victim could not give the exact date each accused person had sexual intercourse with her but said some were before March when schools had closed.

The first accused person vehemently denied the offence and in his investigation caution statement and charge statement admitted and marked as **Exhibits "C" and "D"** respectively and maintained his innocence throughout the trial.

The first accused person in defence testified that the victim had a penchant for stealing his money and when he reported her to her aunt and confronted her over the theft issue, she promised to find trouble for him and true to her words, she made the instant allegation against him. He denied inviting the victim into his room since there is no relationship between them.

Under cross-examination by the prosecution, the first accused person testified that on about three occasions, the police brought the victim home looking for her mother and that she had been roaming about between 11:30pm and midnight. He maintained under intense cross-examination that he never had sexual intercourse with the victim.

From the cross-examination conducted by defence counsel and the history recorded in the medical report, **Exhibit "A"**, the victim alleged that six (6) people had sexual intercourse with her. However, there is no evidence linking the first accused person to the tear in the hymen if indeed it was as result of penetrative sex apart from the scant account of the victim. Apart from the testimony of the victim mentioning the name of the 1st accused person as one of the people who had sexual intercourse with her, there is no corroborative evidence that the first accused person indeed had sexual intercourse with her. The said Mike who PW2 mentioned as the one who confirmed to her that the accused persons had sexual intercourse with PW1 was not called as a witness to be subjected to cross-examination. The need for corroborative evidence in sexual assault cases cannot be gainsaid. It is not enough for a victim of sexual assault case to just mention names of people without adducing cogent and admissible evidence to show that each of the four men who stand accused, had sexual intercourse her.

On the totality of the evidence led by the prosecution and the defence put up by the first accused person, I hold that the prosecution failed to prove that it was the first accused person and no other person who had sexual intercourse

with the victim. I therefore pronounce the first accused person not guilty of the charge and I accordingly acquit him of the charge of defilement.

EVALUATION OF THE EVIDENCE AGAINST THE SECOND ACCUSED PERSON

PW1, the victim testified that during the lockdown period, the accused person invited her to play games with him and subsequently took her to his room where he had sexual intercourse with her and promised to buy a phone and also give her an amount of GH¢50. PW1 testified that after having sexual intercourse with her, he asked her to out of the room and promised to get her the phone after work.

PW1, under cross-examination by the Counsel for the accused person, the following ensued;

Q. Do you know anybody by name Richard Quaye alias Wofa.

A. Yes My Lord.

Q. Do you know the work Richard Quaye alias Wofa does?

A. Yes my Lord.

Q. What work?

A: He works at GPHA

Q. The said Wofa he has a wife.

A. Yes my Lord.

Q. And the wife does not work, is that so.

A. Yes my Lord.

Q. Between Wofa and his wife, do they have children?

A. Yes My Lord.

Q. How many children.

A. They have three children.

Q. Can you tell us where Wofa and his wife and children live?

A. No my Lord.

Q. You do not know where Wofa lives. Is that what you are saying?

A. I know.

Q. Where does he live?

A. He lives in our house.

Q: You will agree with me that Richard Quaye's wife who is unemployed is always at home.

A. Yes My Lord.

Q. You will agree with me that due to the lockdown, all the accused persons were home and did not have the opportunity to go out.

A. Yes my Lord.

The second prosecution witness, the mother of the alleged victim under cross-examination by counsel for the accused person also confirmed that the wife of the second accused person is sick and she is always at home. PW2 also under cross-examination testified that in addition to the four accused persons arraigned before the court, the victim also mentioned the names of two others one of whom the defence maintains that he is called Tess and is the boyfriend of the victim.

The second accused person vehemently denied the allegation against him and testified that he never had sexual intercourse with the victim during the lockdown as alleged. He relied on his Investigation Caution Statement and Charge Statement admitted and marked as **Exhibit C1** and **Exhibit D1** respectively. He maintained that even though he lived in the same house with the victim and his wife and four children, he has never had any close contact with her let alone have sexual intercourse with her. According to him, his wife is plagued with a sore and she is always home. It is therefore strange that the victim will allege that he had sex with her in his room. According to him, he recalls that the only time he had a close encounter with the victim was on one occasion during the day when she without his permission entered his room and on discovery, he sacked her. He stated that he is innocent of the charge preferred against him, as he has never had any form of sexual encounter with the victim.

From the evidence led by the prosecution and the defence put up by the second accused person, the testimony of the victim that the second accused person had sexual intercourse with her in his room strains credulity in the face of the admission by both PW1 and PW2 that the second accused person lives with his sick wife and four children in the same room. The question that will agitate the mind of any reasonable person is where was the sick wife of the second accused person when he took the victim to the room to have sexual intercourse with her? This can only be answered by the victim but she failed to give details about when the sexual encounter took place, and where the wife and children of the second accused person were at the time since she admitted under cross-examination that it was during the lockdown and as such they were all home.

Therefore, on the totality of the evidence led, I hold that the evidence adduced by the prosecution in support of the charge that the second accused person had sexual intercourse with the victim leaves a lingering doubt in the mind of the court and any doubt in the case of the prosecution must enure to the benefit of the accused person. I therefore hold that the prosecution failed to prove their case against the second accused person as the one who had sexual intercourse with the victim. I accordingly, I pronounce the second accused person not guilty of the charge and I acquit and discharge him of same.

EVALUATION OF THE EVIDENCE AGAINST THE THIRD ACCUSED PERSON.

On count 3, the third accused person is also charged with defilement of the victim aged 10 years old. The particulars of offence states that on or before July 2020, the third accused person carnally knew the victim aged 10 years.

The victim in her testimony before the court testified that one Saturday during the school period, her mother left to Accra and left behind the keys to her shop and money for her to buy food. The accused person gave her GH¢2 to buy food. After a while, she went to a public toilet where the third accused person is the operator to attend nature's call. Whilst in the toilet, the third accused person entered the female section to peep at her vagina. When she finished, he asked her to follow him into his room for GH¢10, which she agreed and entered his room attached to the public toilet. When they entered the room, the third took off his clothes and was naked before her, fondled her breast and inserted his fingers into her vagina.

The third accused person in his testimony before the court denied the allegation against him. He stated that he relies on his caution statement and

maintained that he has never had sexual intercourse with the victim. According to him, he does not have any room attached to the public toilet where PW1 alleges that he had sex with her.

The testimony of the victim against the third accused person that he fondled with her breast and inserted his fingers into her vagina is completely inconsistent with the charge of defilement, the particulars of offence stated on the charge sheet as well as the facts presented by the prosecution. Whereas the third prosecution witness, the investigator maintains that her investigations revealed that all the accused persons had sexual intercourse with the victim, the victim in her evidence in chief states that the third accused person only fondled with her breast and inserted his fingers into her vagina.

Additionally, at the hospital PW1 and PW2 informed the medical officer as captured in the history contained in **Exhibit B**, the medical report that 6 men including the four accused persons herein had sexual intercourse with her on different dates spanning a period of six(6) months. **Otchere and Others** [1963] 2 GLR 463 the court held in holding 14 that:

"A witness whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn is not worthy of credit and his evidence cannot therefore be regarded as being of any importance in the light of his previous contradictory statement unless he is able to give a reasonable explanation for the contradictions"

The evidence led by the prosecution shows that the third accused person did not have sexual intercourse with PW1 as the prosecution would want the court to believe. On the totality of the evidence led, I find that the prosecution woefully failed to prove their case of defilement against the third accused person. I accordingly pronounce the third accused person not guilty of the offence and I accordingly acquit and discharge him of same.

EVALUATION EVIDENCE AGAINST THE FOURTH ACCUSED PERSON

The first prosecution witness testified in respect of the fourth accused person that during the school going period, she brought homework but her mother could not assist her. The next morning, whilst going to school, she met the fourth accused person and she asked him to assist her with the homework. The fourth accused person then demanded for sex as his reward since he was aware the first and second accused persons had had sexual intercourse with her. The fourth accused person then took her to his room and had sexual intercourse with her on his bed.

The fourth accused person also testified that prior to this incident, he lived in the same house with the victim and her mother who are PW1 and PW2 respectively in the case. He further states that he has never assisted her with homework, and he has never been asked to assist PW1 with her homework. According to him, PW1 was emphatic that the alleged sexual encounter with her was during the lockdown period when all schools were closed and as such, she could not have brought homework for him to assist her with the homework.

The fourth accused person under rigorous cross-examination by the prosecution maintained that he has never helped the victim with homework and that the victim in her statement claims that the incident happened during the lockdown. Additionally, he attacked the credibility of the victim and stated that due to the nature of the buildings in the area, one can see PW2's room when the curtains are drawn and once, the victim, whilst in their room the victim was naked and was asking him to look at her since one could see their room when the curtains are drawn due to the layout of the area. According to him, he warned her to put her clothes on and to desist from such acts and threatened to beat her if she repeated same, an incident PW2 is aware.

The prosecution witnesses failed to corroborate the testimony of the victim that the fourth accused person helped her with homework and demanded sex in return. The evidence is so porous that it cannot form the basis of a conviction.

I therefore hold that the prosecution failed to prove its case against the fourth accused person beyond reasonable doubt. I therefore pronounce the fourth accused person not guilty and acquit and discharge him of the charge of defilement.

CONCLUSION

In conclusion, I hold that the prosecution failed to prove their case beyond reasonable doubt that each of the four accused persons had sexual intercourse with the victim aged 10 years at the time of the alleged incidence.

Accordingly, I pronounce all the four accused persons not guilty of their respective charges and I accordingly acquit and discharge them on each of the four counts of defilement contrary section 101(2) of Act 29.

(SGD)

H/H AGNES OPOKU-BARNIEH

(CIRCUIT COURT JUDGE)