

IN THE CIRCUIT COURT "A", TEMA, HELD ON TUESDAY, THE 25TH DAY
OF APRIL, 2023, BEFORE HER HONOUR AGNES OPOKU-BARNIEH,
CIRCUIT COURT JUDGE

SUIT NO: D10/11/22

THE REPUBLIC

VRS:

LUCAS AYIKWEI

ACCUSED PERSON

PRESENT

C/INSP. SUSANA AKPEERE FOR PROSECUTION PRESENT

RITA AMONOO-MENSAH, ESQ. FOR THE ACCUSED PERSON PRESENT

RULING ON SUBMISSION OF NO CASE

FACTS:

The accused person was brought before this court on the following charges;

1. Indecent assault contrary to **Section 103(2)** of the Criminal Offences Act 1960 (Act 29)
2. Indecent assault contrary to **Section 103(2)** of the criminal offences Act 1960 (Act 29)
3. Threat of death contrary to **Section 75** of the Criminal Offences Act 1960 (Act 29)

The brief facts presented by the prosecution are that the complainant, Harriet Mawuse Ayikwei, is the wife of the accused person. According to the prosecution, the accused person and the complainant have been married for 12 years with three children, made up of two daughters namely; Dorcas Ayikwei and Dorinda Ayikwei aged 11, and 7 years respectively and a son aged 3 years. The prosecution states that the family lives in a chamber and hall self-contained house located within a gated compound where the complainant operates a shop daily. The prosecution alleges that two years prior to the alleged incident, Dorinda Ayikwei, the youngest daughter of the accused person complained to her mother that, the accused person had been inserting his finger into her vagina. Based on that, the complainant tasked her oldest daughter, Dorcas, to monitor her little sister. The prosecution alleges that in August 2021, Dorcas caught the accused person in the act inserting his finger into Dorinda's vagina. When Dorinda told the accused that she was going to tell her mother, he pulled a knife from a drawer in the room and threatened to kill her if she disclosed the incident to anyone.

The prosecution further alleges that unknown to the complainant, the accused person was sexually abusing the oldest daughter, Dorcas Ayikwei. On 2nd August, 2021, Dorcas began to bleed, which alarmed the complainant and upon questioning her, she confessed to her that on 2nd October, 2021, the accused person had sexual intercourse with her and also in the month of August 2021. The alleged victim, Dorcas also told the complainant that the accused person has had sexual intercourse with her on many occasions when the complainant was busy at the shop. On 5th October, 2021, when the complainant had left for church,

the accused person who was left alone with the children, had sexual bodily contact with Dorcas twice same night.

Consequently, the complainant lodged a formal complaint with the police and police medical form was issued to her to send the alleged victims to the hospital for examination. On 13th October, 2021, the complainant returned the victim's medical report duly endorsed by a medical officer at the Tema General Hospital. As a result, the accused person was arrested and after investigation caution statement was obtained from him, he was charged with the offences of Incest, Indecent Assault and Threat of Death and put before this honorable court. The case was adjourned to enable prosecution to conclude its investigations. After careful investigations and study of the medical report, the accused person was later charged with the offences of Indecent Assault and Threat of Death and arraigned before this Honourable Court.

THE PLEA

The accused person who was represented by Counsel pleaded not guilty to the charges after they had been read and explained to him in the Twi language. The onus was therefore on the prosecution to prove the guilt of the accused person beyond reasonable doubt.

At the trial, the prosecution called four witnesses and tendered in evidence **Exhibit "A"**- Referral Letter from the Department of Social Welfare, Prampram District, **Exhibit "B", "B1"**- Medical Forms of Dorcas and Dorinda Ayikwei respectively, **Exhibits "C", "C1", "C2"**- Photographs of the accused person, **Exhibit "D"** -Birth Certificate, **Exhibit "E"**- Weighing Card- **Exhibit "F"**-

Investigation Caution Statement of accused person, **Exhibit "G"**- Charge Statement of accused person, **Exhibit "G1"**-Charge statement of accused person dated 11th November, 2021. At the close of the case for the prosecution, counsel for the accused person submitted that there was no case sufficiently made out against the accused person requiring him to open his defense and filed a written submission of no case on 14th April, 2023.

THE LAW ON SUBMISSION OF NO CASE

Section 173 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30):

"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 case of **Michael Asamoah & Another v The Republic, Suit No. J3/4/2017**, delivered on 20th July, 2017, the Supreme Court, per Adinyira JSC (as she then was), restated the law on submission of no case at page 5 as follows;

"The underlying factor behind the principle of submission of no case is that an accused should be relieved of defending himself where there is no evidence upon which he may be convicted. The grounds upon which a trial court may uphold a submission of no case as enunciated in many landmark cases whether under summary trial or trial on indictment may be restated as follows:

- a. There has been no evidence to prove an essential element in the crime;*
- b. The evidence adduced by the prosecution has been so discredited as a result of cross-examination; or*
- c. The evidence was so manifestly unreliable that no reasonable tribunal could*

safely convict on it;

- d. *The evidence was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt, and one with innocence”.*

Regarding the standard of proof at this stage, the Supreme Court in the case of **Tsatsu Tsikata v. The Republic** [2003-2004] 1 SCGLR, 1068, stated that the standard of proof at the submission of no case stage is a prima facie case and not beyond reasonable doubt since the court has not had the opportunity to hear the defence.

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”

I shall proceed to discuss the ingredients of the charges against the accused person in the light of the evidence adduced by the prosecution to determine if at the close of the case for the prosecution, the prosecution succeeded in proving the essential ingredients of the offences charged requiring a full trial or the

evidence is one sided favouring the accused person such as not to call upon him to open his defence.

ANALYSIS

COUNT 1

On count 1, the accused person is charged with Indecent Assault contrary to **Section 103(1)** of Act 29. Indecent assault is provided for under **section 103(1)** of the Criminal Offences Act, 1960(Act 29). **Section 103(1)** of Act 29, provides that a person who indecently assaults another commits a misdemeanor and is liable on conviction to a term of imprisonment of not less than six months. **Section 103(2)** defines indecent assault in the following terms:

103(2) A person commits the criminal offence of indecent assault if, without the consent of the other person that person —

(a) Forcibly makes a sexual bodily contact with the other person; or

(b) Sexually violates the body of the other person, in a manner not amounting to carnal knowledge or unnatural carnal knowledge.

Thus, to succeed, the prosecution must prove the following essential ingredients of the offence;

- a. That the accused person forcibly made sexual bodily contact or sexually violated the body of another person;
- b. That the sexual bodily contact or sexual violation was without the consent of the other person

- c. That the sexual bodily contact or sexual violation did not amount to carnal knowledge or unnatural carnal knowledge.

Additionally, under **Section 14** of the Criminal Offences Act, a person below the age of 16 is incapable of consenting to sexual offence and any such consent given by a child is void and of no defence to a charge of sexual assault.

Here, the particulars of offence states that in August 2021, at Miotso near Prampram, the accused person sexually violated the body of his biological daughter Dorcas Ayikwei aged 11 years by using his penis to brush her clitoris. Thus, it is obligatory for the prosecution to lead admissible and cogent evidence to prove that the accused person made sexual bodily contact with his first daughter in a manner not amounting to carnal or unnatural carnal knowledge.

To prove that the accused person herein made sexual bodily contact with his biological daughter, PW1 testified that she lives with the accused person and their three children in the same house. According to her testimony, when Dorcas Ayikwei was six- years old, she complained to her and demonstrated how the accused person laid on her and used tissue to wipe her vagina afterwards. When she confronted the accused person immediately over the allegation, he almost suffocated her to death but later admitted the offence and pleaded for forgiveness. She further states that a few weeks prior to reporting the instant case, Dorinda informed her that Dorcas was bleeding. This was surprising to her since Dorcas was only 11 years old. She thought Dorcas had started menstruating but after observing her for some time, she realized that she bled for two weeks.

Upon interrogation, she informed her that the accused person inserts his penis into her vagina when she was working at her shop and anytime she travelled.

Additionally, PW1 testified that on the 5th of October, 2021, she went to church whilst Dorcas and her siblings were asleep, the accused person pulled down his trousers, put on a condom and laid on Dorcas and later removed the condom and put it in his cream backpack. According to her, Dorcas stated further that the accused person put his penis into her vagina again when she woke up. Dorcas again informed her that she told a friend at school but could not tell her because she was shy and afraid. Based on this information, she proceeded to the Police Station on 12th October 2021 after she reported the matter to the Department of Social Welfare Prampram District office and the case was referred to the police for further action. She tendered in evidence the referral letter admitted and marked as **Exhibit 'A'**.

PW1, under cross-examination by counsel for the accused person testified that her shop is at home and the children leave home every morning for school and return at 3:30pm where she receives them and prepare them for bed. At 6:00pm, the accused person drives the children away and prevents them from watching television for them to go to bed. PW1 further testified that on the day she alleged she went to an "*All Night Service*" and returned with the accused person having sexually molested the children, she did not in fact go to church but went to the Studios of Adom FM to report the incident. She maintains that she could not have told the accused person her reason for going to Adom FM. PW1 testified further under cross-examination by the prosecution as follows;

Q: For two weeks that you said Dorcas bled, did you show to the police any pant, dress or cotton that was stained with blood.

A: My Lord, I did not show the police any of the items mentioned because at the time I went to the police station, the bleeding had stopped and the victim who I gave the pads to is there and will come and testify.

Q: So, from your narratives, the accused person has had uncountable sexual intercourse with the children. Is that so?

A: My Lord, according to Dorcas the accused person has sex with her twice a day. Around 3:30pm when she comes from school and the 2nd one around 7:00pm before I come home.

Q: When you went to the doctor, what did the doctor tell you directly about the 11 years and 7 years old.

A: The doctor said it was indecent assault on both children.

Q: I suggest to you that, that is not what Doctor Ephraim Osei Nkrumah told you.

A: My Lord, that is what the doctor said in the presence of myself and the social welfare worker from Prampram.

Q: I suggest to you finally that your assertion that the accused person had sexual intercourse with the 11 years old on countless occasions is palpable falsehood by the medical report.

A: My Lord, what I heard the doctor say was indecent assault.

The testimony of the first prosecution witness that the accused person has had sexual intercourse with the first victim strains credulity considering the charge

before the court. From the charge, the accused person is alleged to have brushed his penis on the clitoris of the alleged victim. It is therefore strange that the alleged brushing of clitoris would cause PW2 to bleed for more than two weeks without sending her to the hospital for medical attention. The admission of PW1 under cross-examination that the medical report indicates indecent assault cannot support her contention that the accused person had sexual intercourse with the alleged victim twice a day right in the house since her shop is located in the house and she takes them to school and when they return home, she receives them and prepare them to go to bed. It is also strange that PW1 who claims that the accused personally sexually abused the child at a tender age of six years never reported but waited till after five years before reporting. The conduct of PW1 in bypassing police stations to lodge a complaint and going to the media smacks of an ulterior motive other than a person whose child has been defiled by her own father for five years under her roof.

The evidence of the second prosecution witness, Dorcas Ayikwei, the material witness for the prosecution did not do much to support the essential ingredients of the charge. She testified that she is 11 years old and a Class 5 pupil and that PW1 and the accused person are her biological parents and she lives with them and her siblings in the same room. According to her testimony, her mother is a seamstress and operates a shop in front of their house where she works every day and the accused person is a carpenter but mostly at home. She sleeps on the same mattress with her siblings in the same room with her parents.

PW2 further testified that her father has sexual intercourse with her anytime time she returns from school. When she enters the room, the accused person would open the door to spy outside and after that, he would push her against the wardrobe in the room, pull down his trousers and put on a Kiss condom and remove her pant. The accused person will then raise one of her legs and put his penis inside her vagina until a creamy substance comes out from his penis. Again, the accused person will then remove the condom and put it in his cream-coloured backpack which he uses for work and clean his penis with a tissue. According to her, the accused person had sex with her twice a day, i.e., in the afternoon when she returns from school and before she sleeps since her mother is always at the shop and closes at 9:00pm. She further testified that the accused person has had sexual intercourse with her on countless occasions but she did not tell her mother because she was shy and afraid. She further testified that the accused also told her that he would make her fail in her exams if she mentioned it to her mother. Also, on the 02/08/21, the accused person inserted his penis into her vagina again which caused her to bleed for two weeks. This scared her and made her to inform her mother. And that on the 05/10/21, her mother told them she was going to church and after she left, her father locked up the gate and whilst her siblings were asleep, the accused person got up from his bed, pulled down his shorts and inserted his penis into her vagina until a creamy liquid substance came out. The accused person then removed the condom and put it in his backpack. After a while, the accused person came back and repeated the act. She then informed her mother who reported the case to the police and she was sent to the hospital to be examined leading to the arrest of the accused person.

The second prosecution witness under cross-examination by counsel for the accused person, testified that she has lost count of the number of times that her father had sexual intercourse with her. According to the victim, although her father used condom, when he finished having sexual intercourse with her and she went to the washroom, she saw a creamy substance in her pants. PW2 further testified as follows under cross-examination;

Q: So in all these incidents that you said your father was having sex with you for three years, twice a day where was your mother?

A: My mother has a store in front of the house so she has been selling.

Q: Your mum for these three years was always at the shop and your father was always in the house.?

A: Yes my Lord. Sometimes my father goes to work and comes back early.

Under further cross-examination, the following ensued;

Q: Do you have any material which you used to clean your blood since you said you were bleeding?

A: Yes, My Lord. I used tissue to clean up and after that I put it in the water closet and flashed it.

Q: So, you did not stain anything only tissue.

A: It stained my two panties.

Q: You say for two weeks you wear only two panties. Is that what you are saying.

A: No, my Lord.

Q: I therefore suggest to you that you did not bleed at all because there is no activity of sexual intercourse.

A: After I stained 2 panties, I told my mother and my mother gave me some of her small pads.

Again, the testimony of PW2 that the accused person had multiple sexual intercourse with her on countless occasions does not support the case of the prosecution that the accused person indecently assaulted PW2 since she claims that there was carnal knowledge which caused her to bleed for two weeks but there is no medical evidence before the court to corroborate her assertion.

PW4, the investigator testified and tendered the medical report on Dorcas Ayikwei dated 13th October, 2013, admitted and marked as **Exhibit "B"**, states that:

"Patient was seen today with complains been alleged assaulted sexually by the father on 2nd August, 2021. She claims she bled for 2 weeks from the vagina after that. On vaginal examination, there were no external body injuries directly related to the incidence. On examination, no bleeding or discharge was present. The hymen was intact. The history and examination findings suggest INDECENT ASSAULT. The HIV screen was negative."

PW4 under cross-examination testified as follows;

Q: What necessitated the re-examination of the victims?

A: My Lord, as stated earlier, the docket was presented before Jupol at the time and after going through the docket of Dorcas Ayikwei, she requested that another medical examination should be conducted at the Police Hospital. It was not my idea.

Q: It was not your idea but you accepted hook, line and sinker.

A: My Lord, it was instructions from the Jupol.

Q: So, you are telling this court that you are under strict instructions on what to do or not to do based on the strict instructions of your superiors.

A: That is not so my Lord.

Q: You did not change your brief facts and your brief facts says that the accused person has been having sexual intercourse twice a day every day with the victim?

A: I have been consistent.

Q: The children, when they came to give evidence said their father has been having sex with them continuously.

A: My Lord, they did not state continuously in their statements. I am not aware of what they said when they gave evidence.

The accused person in his Investigation Caution statement admitted and marked as Exhibit "F", denied sexually assaulting his own daughters and attributed the complaint to his marital woes with the complainant. According to him, the complainant first accused him of having sexual intercourse with Dorcas when she was six years old after he failed to give her money, she had demanded from him. Also, the complainant once accused him of trying to use her for money rituals after he bought her a pair of slippers as a gift. The accused person further states in his caution statement that in August 2021, he returned home from work and met Dorcas asleep by 6:30pm which was unusual of her and when he asked PW1 she informed her that the child felt dizzy and fell down in school when the teacher asked her to run around the compound and that she Dorcas was menstruating. He asked her to take her to the hospital because he thought she

was too young to menstruate but PW1 said it was not necessary because it was a normal condition and later when he enquired about her condition, she told him he should not worry and that it was a normal condition. The accused person therefore blamed the complainant for the accusation because he has not been able to meet her financial demands.

The evidence led by the prosecution on record spelt doom for the prospects of the success of the case of the prosecution. The evidence of the prosecution is that the accused person has been having sexual intercourse with the alleged victim for three years but the medical report shows that this child's hymen is intact and that the examination findings are suggestive of indecent assault. It is also strange that the first prosecution witness will state that the victim bled for two weeks without sending her to the hospital to ascertain the cause but rather blame it on the alleged sexual intercourse with the accused person. The prosecution not sure of the case initially charged the accused person with incest and then changed to indecent assault in the face of the medical evidence tendered by the prosecution. However, the whole evidence led by prosecution was to prove defilement which failed in the light of the contradictory evidence on record. On the evidence led by the prosecution, I find that the evidence has been so discredited as a result of cross-examination and is so manifestly unreliable that no reasonable tribunal can safely convict upon it, the submission of no case on count is therefore upheld. The accused person is acquitted and discharged.

COUNT 2

The first prosecution witness testified that her 7-year-old daughter, Dorinda informed her on two occasions that the accused person inserted his fingers into her vagina. She therefore tasked PW2 to always keep an eye on her and report any suspicious thing. Later, PW2 informed her that she saw the accused person inserting his finger into the vagina of PW3 and the accused person threatened to kill PW2 with a knife if she disclosed the incident to anyone. PW2 testified that on one occasion, she saw the accused person inserting his finger into the vagina of PW3 and when she threatened to tell PW1 about the incident, the accused pulled a knife from a drawer and threatened to kill her with the knife. The third prosecution witness testified that she sleeps in the same room with her parents and her siblings and that anytime she was alone with the accused person in the room, he would insert his fingers into her vagina. According to her, this happened on many occasions and she reported the conduct of the accused person to her mother. The third prosecution witness further testified that on one occasion, when PW2 caught the accused person in the act inserting his finger into her vagina, he pulled a knife from a drawer and threatened to kill her with it.

PW4 tendered in evidence Exhibit "B1", in which the medical doctor who examined PW3 on the same day he examined PW2, on 13th October, 2021 at 10:20am repeated the content of the report for Dorcas when he again stated that:

"Patient was seen today with complains been allegedly sexually assaulted by her father on multiple occasions. On examination, there were no external body injuries directly related to the incidence. On vaginal examination, no bleeding or discharge was present. The hymen present and it looked intact. The HIV test was negative. The history and examination findings are suggestive of INDECENT ASSAULT."

The prosecution failed to call the medical officer who prepared this report to be subjected to cross-examination. PW3 under cross-examination by the prosecution testified that she leaves home for school with her siblings and that she sleeps in the same room with her parents and siblings. The question then is the multiple occasions that the accused person inserted his finger into her vagina, where was her mother and siblings that she sleeps in the same room with? Assuming, without admitting that she reported this conduct to her mother, why did she fail to take any action to protect the child from further abuse. PW1 also, upon hearing of such abuse did not send the victim to the hospital to ascertain the veracity of her story but rather tasked PW2, whose credibility has been seriously impeached on record to monitor her. I therefore find that the evidence led by the prosecution has been so discredited and is so manifestly unreliable that no reasonable court can convict upon it. The submission of no case on count two is therefore upheld. The accused person is acquitted and discharged.

COUNT 3

Here, the accused person is charged with threat of death contrary to **section 75** of Act 29. The prosecution alleges that the accused person threatened to kill PW2 with a knife with intent to put her in fear of death.

The section provides that:

"A person who threatens the other person with death, with intent to put that person in fear of death, commits a second-degree felony".

The term “*threat*” is defined under **section 17** of Act 29 to mean “ *a threat of criminal force or harm*”. The threat may be oral or in writing and may be communicated to the person threatened either directly or through another person. It is not a necessary element of the offence that the person using the threat will carry out the threat. See **section 17 (3) and (4)** of Act 29.

Therefore, to succeed, the prosecution must establish the following essential elements of the offence charged.

- i. *There must be evidence of threat to kill issued by the suspect against the life of the victim.*
- ii. *Intent on the part of the accused to put the victim in fear of death.*

In the case of **Behome v. The Republic** [1979] GLR 112, the court held as follows;

In the offence of threat of death, the actus reus would consist in expectation of death which the offender creates in the mind of the person threatened whilst the mens rea would also consist in the realization by the offender that his threats would produce that expectation.

The evidence of the prosecution witnesses is that when PW2 saw the accused person inserting his finger into the vagina of PW3, he pulled a knife from a drawer in the room and threatened to kill her with it if she disclosed the incident to anyone. PW4, the investigator testified that when she visited the scene of the alleged crime, PW2 showed her the drawer where the accused picked the knife from. When she conducted a search in the drawer and the cream-coloured bag PW2 mentioned that the accused person was putting condom inside, she did not find any incriminating evidence in the bag. The court having made a finding that the prosecution failed to make a prima facie case that the accused person indecently assaulted PW3, it reasonably follows that PW2 could not have

witnessed such an incident for the accused person to threaten her with death. The conduct of the whole case by the prosecution leaves much to be desired. From the charge of incest to the charge of indecent assault based on a medical report shook the very foundation of the case of the prosecution and the account of the prosecution witnesses on the issue could not be believed with the inherent contradictions in the case of the prosecution from the onset. I therefore hold that the prosecution failed to make a prima facie case against the accused person that he threatened PW2 with death to require him to open his defence. The submission of no case on the charge of threat of death is upheld. The accused person is acquitted and discharged.

CONCLUSION

On the totality of the evidence led by the prosecution, I hold that the prosecution woefully failed to establish a prima facie case against the accused person sufficiently to require him to open his defence. The submission of no case is upheld. The accused person is acquitted and discharged on all three counts.

**H/H AGNES OPOKU-BARNIEH
(CIRCUIT COURT JUDGE)**