IN THE CIRCUIT COURT OF GHANA HELD AT CAPE COAST CENTRAL REGION ON THURSDAY 23RD DAY OF MAY, 2023 BEFORE H/H DORINDA SMITH ARTHUR (MRS.), CIRCUIT COURT JUDGE.

SUIT NO. 240/2022

THE REPUBLIC

VRS

ANTHONY KORSAH @ DADA JOE

JUDGMENT

The Accused person was arraigned before this Court on April 22, 2022 for the offences of carnal knowledge of imbecile and Defilement Contrary to **Sections 102 and 101(2) of The Criminal and Other Offences Act, 1960 Act 29.**

The accused person pleaded not guilty to the charges preferred against him for which reason the prosecution assumed the burden of proof and must prove the charges against the accused person beyond reasonable doubt in accordance with;

Section 11(2) of the Evidence Act 1975 NRCD 323 states;

"In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind will find the existence of the facts beyond reasonable doubt."

Further, **Section 13(1) of NRCD 323** provides that the standard of proof is nothing less than proof beyond reasonable doubt no matter the offence charged.

See the case of **Ampabeng Vrs Republic [1977] 2 GLR 171 CA**

The prosecution in order to discharge the burden placed upon them called three witnesses and tendered 7 exhibits in evidence.

THE PROSECUTION CASE

The summary of prosecution case is that PW1 is the survivor and she testified that she knows accused person as a taxi driver at the Asinadze lorry park. On 08/03/2022 at 5.00, she was going to attend public washroom when she met accused and he asked her to follow him to an uncompleted building at Abura Roman Park. In the building, accused removed her dress and asked her to lie down on the bare floor. Accused removed his pair of trousers and laid on her, put his erected penis into her vagina and had sexual intercourse with her. After the sexual intercourse, accused gave her one Ghana cedi. She continued that accused had sexual intercourse with her on several occasion after the first act so she narrated her ordeal to her mother when she was asked that someone saw her in an uncompleted building having sex with the accused.

the complainant (PW2), is the biological father of the survivor who is a special child aged fifteen years. He stays with the survivor and the mother at Abura, Cape Coast. According to PW2, he returned from his hometown and his wife informed him that accused person has been having sexual intercourse with the survivor in an uncompleted building at Abura Roman School. He enquired from the survivor and she mentioned the name of the accused person.

PW3 is G/Const Richmond Otuey a detective Police Officer stationed at DOVVSU Cape Coast. He investigated the case. He tendered in evidence the caution and charged statements of accused person. He visited the crime scene at model government school at Jukwa and detected that the said school is located at the extreme outskirt of the Jukwa Township and the survivor led police to the corridor which has a gate at one end with a cemented floor. He stated that the school is partly surrounded with bushes and has not been installed with electricity and the surroundings are very silent. He tendered in photographs of the crime scene and said accused admitted to the offence in the presence of the survivor. He tendered also in evidence the General medical form and birth certificate of the survivor indicating the date of birth of the survivor as October 27, 2006.

EVALUATION OF EVIDENCE AND APPLICATION OF LAW

At the close of case of prosecution, counsel for accused applied for the court to enter submission of no case per **Section 173 of Act 30/60.** Counsel did not file his submission before the court gave this ruling. I have considered all the evidence adduced by prosecution in this case and I sou moto rule that the submission of no case is dismissed as the court is of the view that a case is made out against the accused person sufficiently to require him to make a defence and that the accused person be called upon to open his defence. These are my reasons:

The offence of defilement is defined under **Section 101(2) of Act 29,(1960)** which states: "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."

Consequently, the essential ingredients of the offence are;

1. That someone has had natural or unnatural carnal knowledge of the survivor
2. That someone is the accused person.
3. That the survivor is under sixteen years of age

See: **ERIC ASANTE V THE REPUBLIC [2017] 109 GMJ 1 SC**

Also the charge of having carnal knowledge of imbecile is defined under **Section 102 of act 29/60** as follows:

> 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.

From Section 102 of Act 29 above, prosecution will have to prove the following elements;

I. Someone has had natural or unnatural carnal knowledge of a survivor
II. That someone is the accused person
III. The survivor is an imbecile, idiot, or a mental patient.

From the two charges, prosecution would have to prove the following elements:

1. Someone has had natural or unnatural carnal knowledge of the survivor

2. That someone is the accused person
3. The survivor is under sixteen years of age
4. The survivor is an imbecile, idiot or a mental patient.

To satisfy the court with a conviction the prosecution must prove the four aforementioned ingredients beyond reasonable doubt. From the preliminary facts provided by the prosecution that gave rise to the charge, the kind of sexual act complained of is natural carnal knowledge.

I will deal with all the elements together to determine whether there was any carnal knowledge of the survivor who is under sixteen years, an imbecile, and whether it was the accused person who had natural carnal knowledge of the survivor.

Prosecution called three witnesses and tendered in evidence six exhibits to prove the guilt of the accused.

I will not venture to go into the merits and finding of facts in this ruling as hearing is on-going and accused is yet to testify. I will determine whether the evidence adduced by prosecution is able to prove the elements of defilement and having carnal knowledge of an imbecile upon the balancing acts such that accused could be convicted if he fails to offer an explanation to raise doubts in the adduced evidence. See **TAGOR V. THE REPUBLIC [2009] 23 MLRG 78 @130**

The first and second elements are whether someone has had carnal knowledge of the survivor.

The survivor testified that accused person

The survivor sufficiently adduced evidence that accused had carnal knowledge of her on two different occasions. Her narrations of the two incidents give a vivid description of what happened on that day. She was given Ghc5.00 on each occasion and warned not to disclose the acts to anybody.

In **REPUBLIC V YEBOAH [1968] GLR 248**, the court decided inter alia that the evidence of a sexual victim need no corroboration but it is prudent to look for corroboration from some extraneous evidence which can confirm the evidence of the victim. Here, the medical report concluded that the survivor's vaginal shows no lesion in the perineum and hymen was torn at six and 12 o'clock position.

The other prosecution witnesses' evidence corroborates the evidence of the survivor to the effect that the accused had sexual intercourse with the survivor twice one on the bare floor of the school corridor and the other at the back of his taxi cab.

The evidence of prosecution witnesses were not discredited under cross examination by Counsel for accused.

Therefore, the evidence of prosecution witnesses are admitted as sufficient to prove the elements of someone having carnal knowledge of the survivor.

It is noted that the identity of accused person is not in dispute as same has been very well established by the evidence. Here, prosecution successfully established that he is the very person the survivor referred to as the person who had sex with her. The survivor went with him and the police to the school and she identified him to the parents.

Therefore, prosecution has proved sufficiently that it was accused who had carnal knowledge of the survivor.

I have noted the survivor did not inform the parents until the aunt reported her to the complainant. I have also noted that from the evidence of the survivor, accused warned her not to disclose the acts to anybody. I must add that the failure of the survivor in delaying to report the incident or refusing to report until confronted does not exonerate the accused person. It merely perhaps shows that she was a willing victim even though from her evidence she said she screamed for help when accused was having sexual intercourse with her. On the other hand, if she consented to the sexual act, her consent is no defence in defilement cases. See **REPUBLIC V. YEBOAH [1968] supra.**

Moreover, **Section 101(2) of Act 29** explicitly rule out consent as a defence because a child less than sixteen years old does not have capacity to give consent hence the defence of consent will not suffice.

The last element is the age of the survivor, whether she is fewer than sixteen years. Prosecution tendered in evidence birth certificate for the survivor indication her date of birth as October 27, 2006. This shows that the survivor is fifteen years. This evidence was not discredited and the court has nothing else to consider than to accept the birth certificate as prove of the age of the survivor.

In **TSATSU TSIKATA V. THE REPUBLIC [2003-05] SCGLR 1068, ATUGUBA JSC** expressed his opinion on Section 173 of the Criminal Procedure Code, Act 30 1960 and stated that;

> "Section 173 of the Criminal Procedure Code 1960, (Act 30) provides; "At the close of the evidence in support of the charge, *if it appears to the Court that a case is made out against the accused sufficiently to require him to make a defence,* the Court shall call upon him to enter into his defence …" (e.s). In

my view, whether " a case is made out against the accused sufficiently to require him to make a defence." depends on S.11 of the Evidence Decree, 1975 (N.R.C.D 323) which provides as follows:

"11(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

(2) In a criminal action *the burden of producing evidence, when it is on the prosecution* as to any fact which is essential to guilt, *requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt".* To my mind this provision means that, a reasonable mind, applying his powers of reasoning to the evidence led by the prosecution at the close of its case, will end in the conclusion that it CAN BE, if no contrary evidence is led, said that the relevant fact which has to be established by the prosecution has been established BEYOND REASONABLE DOUBT." This certainly calls for an assessment of and not merely a reading of the evidence so led, in a manner consistent with the requisite standard of conviction that must at that stage of the trial be induced in the mind of the reasonable person. Again such assessment must be based "on all the evidence" and not on only parts of the evidence, but where there is a myriad of facts tending to establish the same fact one need not, after considering them, set all of them out in one's opinion. I would also, say that, applying the maxim expressio unius est exclusio alterius, that S. 11(2) requires and contemplates only one acceptable finding if the prosecution is to qualify

> from the heats unto the final stage of a criminal competition, (if competition it be) namely, that the reasonable mind COULD find that the essential elements of the offence have been proved beyond reasonable doubt. If the prosecution by this test qualifies for the finals of the competition then it can only succeed for a conviction if on all the evidence, after hearing the version of the accused, if any, a reasonable mind MUST now find that the crime is established beyond reasonable doubt. Thus, if for example, at the end of the prosecution's case the evidence led points POSSIBLY only to the guilt of the accused but he is able to show that it is a case of mistaken identity of him, the case founders."

Therefore, a submission of no case can only be upheld where the court is of the view that the accused person cannot be convicted based on the evidence adduced by prosecution. Where the court is of the opinion that the evidence led points possibly only to the guilt of the accused then he has to be called upon to open his defence.

Consequently, the submission of no case raised by learned counsel for AP is dismissed. The accused person should prepare and appear in court to open his defence.
Case to take its normal cause.

H/H DORINDA SMITH ARTHUR (MRS.)
CIRCUIT COURT JUDGE.

ACCUSED PERSON PRESENT

SGT SAMUEL APPREY FOR PROSECUTION PRESENT

ENOCK MICHAEL KOFI DZAPASU ESQ. FOR ACCUSED PERSON PRESENT.