

IN THE CIRCUIT COURT OF GHANA HELD AT CAPE COAST, CENTRAL
REGION ON FRIDAY 20TH DAY OF JANUARY, 2023 BEFORE H/H DORINDA
SMITH ARTHUR (MRS.), CIRCUIT COURT JUDGE.

SUIT NO. 169/2022

THE REPUBLIC

VRS

DAWOO MUSAH

JUDGMENT

The Accused person was arraigned before this Court on February 11, 2022 for the offence of Defilement Contrary to **Section 101(2) of The Criminal and Other Offences Act, 1960 Act 29.**

The accused person pleaded not guilty to the charge preferred against him for which reason the prosecution assumed the burden of proof and must prove the charge 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**

Under the **Evidence Act, 1975 (NRCD 323)** the burden of proof has two elements – namely, the burden of persuasion and the burden of producing evidence. The two are not the same. The burden of persuasion as provided in Section 10 of the Act involves the establishment of a requisite degree of belief concerning a fact in the mind of the court; or the party raises a reasonable doubt concerning the existence or non-existence of a fact, or that the party establishes the existence or non-existence of a fact. This burden is on both the prosecution and the defence.

In determining what is proof beyond reasonable doubt, our courts generally rely on the definition of Lord Denning in **MILLER VRS MINISTER OF PENSIONS [1947] ALL E.R. 372 AT 374**. In short the evidence that the prosecution adduced in proof of the charges must preclude every reasonable hypothesis except those which tend to support the charges. Conversely, the accused persons only need to adduce evidence which raises reasonable doubt as to their guilt.

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

THE PROSECUTION CASE

The summary of prosecution case is that PW1 is the survivor in this case. According to her she is thirteen years old and lives with accused person(AP) in the same house. She sleeps with her grandmother and her little brother. Her grandmother travelled and she was with her little brother alone in the room for the night. She noticed that her little brother had developed fever so she decided to go and knock on her mother's door. On her way, she saw someone entering her grandmother's room but she thought it was her grandfather so she continued walking. Her mother did not respond so she returned to the room. There was left over water in the room so she decided to sponge her brother who was still asleep with it. She was sponging her brother when someone suddenly pulled her, held her tightly and pushed her on the ground. He used his hands to cover her mouth and she was so afraid she started shouting but AP took a pillow to cover her mouth. She tried to stretch her hand to wake her brother up but AP prevented her. He removed her pants, pulled his black trousers down, removed his penis whilst one of his hand was holding the pillow. He inserted his penis into her vagina and she screamed but he did not stop. He continued to push inside her until ejaculation. He removed his penis and warned her not to inform anybody else he will kill her and her mother. She said AP spoke to her in pidgin English. After that AP stood in the verandah and waited for a teacher tenant to put his light off before he left for his room. She said she wanted to go and knock on her mother's door and inform her about the incident but as soon as she came out, AP also came out from his room and with fear that AP will kill her, she returned inside the room. Early in the morning when she woke up, she informed her mother what happened. According to PW1, her room was dark but she could see him and she also recognised his voice as he is the only one in the house who speaks pidgin English. She said the following morning, AP was still wearing the same clothes he wore

when he forced to have sexual intercourse with her. She was taken to the hospital and examined and treated.

PW2 is the father of the survivor and the complainant. He corroborated the evidence of PW1 to the effect that the survivor informed her mother and he was informed. He took the survivor to the hospital and she was given treatment.

PW3 is the police investigator and he tendered in evidence the caution and charged statements of AP, the medical report and the survivor's NHIS card indicating her date of birth as 15/06/2008.

THE DEFENCE

Accused testified that he was raised by his father in Sokoto, Nigeria though he was born at Swedru. He returned to Ghana and has been in Ghana for seven months. Her mother sent her to Twifo Praso to learn mechanics and he started about six weeks ago. According to him, he stays in the same house as PW1 and innocent about the charge. He said the survivor is like a little sister to him and what happened is a case of mistaken identity. He stated that he was arrested five days after so he could have run away if he had done it.

EVALUATION OF EVIDENCE AND APPLICATION OF LAW

The offence of defilement under **Section 101(2) of 1960, Act 29** states that;

“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 offense of defilement 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**

To satisfy the court with a conviction the prosecution must prove the aforementioned three ingredients beyond reasonable doubt. The prosecution is required to prove that a crime has been committed but also must link the accused person to the commission of the crime especially where accused pleaded not guilty.

I will deal with all the issues together as they are intertwined but in sequence which is whether or not someone has had natural or unnatural carnal knowledge of the survivor and accused is the one who had carnal knowledge of the survivor and the survivor is under sixteen years of age.

The first issue is whether or not someone has had natural carnal knowledge of the survivor and same will be determined together with the second issue as to whether accused is the person who had carnal knowledge of the survivor.

PW1 testified and stated that she was sponging her sleeping little brother when someone suddenly pulled her, held her tightly and pushed her on the ground. He used his hands to cover her mouth and she was so afraid she started shouting but AP took a

pillow to cover her mouth. She tried to stretch her hand to wake her brother up but AP prevented her. He removed her pants, pulled his black trousers down, removed his penis whilst one of his hand was holding the pillow. He inserted his penis into her vagina and she screamed but he did not stop. He continued to push inside her until ejaculation. He removed his penis and warned her not to inform anybody else he will kill her and her mother. She said AP spoke to her in pidgin English. After that AP stood in the verandah and waited for a teacher tenant to put his light off before he left for his room. She said she wanted to go and knock on her mother's door and inform her about the incident but as soon as she came out, AP also came out from his room and with fear that AP will kill her, she returned inside the room. Early in the morning when she woke up, she informed her mother what happened. According to PW1, her room was dark but she could see him and she also recognised his voice as he is the only one in the house who speaks pidgin English. She said the following morning, AP was still wearing the same clothes he wore when he forced to have sexual intercourse with her. She was taken to the hospital and examined and treated.

The survivor narrated how accused person had sexual intercourse with her vividly to the court and her evidence was so coherent. She mentioned that AP inserted his penis into her vagina and she screamed but AP continued and pushed in and out till he ejaculated.

In defilement cases, carnal knowledge of the survivor has to be proven and same can be ascertained if accused person used his penis to penetrate the vagina of the survivor. Thus the act of sexual intercourse is deemed complete upon proof of any, the slightest or least degree of penetration. This is the express provision of **Section 99 of Act 29, 1960** which states that:

“Whenever, upon the trial of any person for an offence punishable under this code, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge shall be deemed complete upon proof of the least degree of penetration”

For the purposes of proving penetration decided cases finds it sufficient if there is evidence that any part of the virile organ of the accused was within the labia of the pendulum of the female, however slight this may be.

However, penetration is purely a question of fact and as most sexual offences are done in privacy or out of sight and hearing of third parties, eye-witnesses account to corroborate the act is very rare. The court therefore is making inference from circumstantial evidence and the DNA report relied on by prosecution.

According to the survivor, accused had sexual intercourse with her when she was laying her mother’s bed. He pushed her onto the bed and had sexual intercourse with her. She mentioned accused had sexual intercourse with her twice after she had taken her bath in as well. According to her, it is one of such sexual intercourse which resulted in the pregnancy.

In R V. CAMPBELL [1956] 2 ALL ER 272, CCA which was cited in the case of REPUBLIC V YEBOAH [1968] GLR 248, the court gave a rule that the evidence of a young person must as a rule of prudence be well corroborated before being acted upon by the court. The court per Baidoo J in Yeboah’s case qualified the rule of prudence and 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 in some material particular implicating the accused

Here, the court is to get extraneous evidence that must link accused person to the sexual act as narrated by the survivor. Prosecution tendered in evidence a medical report and the report indicated that there are mild tenderness at the inner site of the vagina, bruises of the labia minora and majora, hymen broken and bruise on the left upper arm of the survivor.

The medical report concluded defilement and added that there was penetration and ejaculation. Also that there was bleeding after the act.

Here, the medical report gives a credible corroboration to the evidence of the survivor that a penis entered her vagina and that she was forced. The medical report confirms the evidence of the survivor that someone had natural carnal knowledge of her and that there was penetration of a penis into her vagina which caused the bruises and the bleeding.

I then move to determine whether it was AP who had the natural carnal knowledge of the survivor. The survivor testified that she lives with AP in the same house and that she knows AP. She added that she saw AP when he was having sexual intercourse with her and when he left for his room. She also mentioned that AP spoke to her in the room after he had sexual intercourse with her in pidgin English and warned her not to inform her mother else he will kill her and her mother. According to PW1, it is only AP who speaks pidgin English in the house. She again identified the clothing AP was wearing. When she was testifying she mentioned that AP pulled his black trouser down, removed his penis and inserted it into her vagina. PW1's evidence clearly identifies her assailant to be the AP as she recognised him by sight, voice, physique and clothing. Indeed, some of the questions posed by AP to the survivor clearly depict that he had sexual intercourse with her. Under cross examination, the survivor answered among others the following questions:

Q. When I had sex with you did you see blood in the room?

A. There was blood but it was when I was urinating and I cleaned it. It was also in the urine and I saw that when I was going to throw it away in the morning and that was when I saw my mother and informed her.

Q. Has anybody had sex with you before?

A. I had not had sex before until you forced to have sex with me.

Q. If you were a virgin then you should have bled.

A. I have said earlier that there was no blood on the floor but I saw blood in my urine and when I cleaned myself.

It can be gleaned from the questions and answered given that AP had sexual intercourse with the survivor but he doubts the survivor was a virgin as he did not see blood on the floor.

On the issue of the identity of the AP as the perpetrator, counsel for AP asked PW2 the following questions:

Q. Your daughter's accusation of AP is borne out of a mistaken identity.

A. It is not true. My daughter saw AP and was able to describe the attire AP was wearing as well.

Q. In the darkness, your daughter's perception could not have been correct.

A. There is light outside the room and my daughter saw him when AP went to the veranda. After the act, the survivor followed AP and so she was able to identify the top and trousers and the colours he wore. She knows him well in the house.

Q. Your statement of your daughter having being able to see the clothes of AP is a false hypothesis.

A. It is not true. I do not agree with you. There are other men staying in the house. Some teachers have been staying there for about five years. The survivor could not accuse AP falsely. She was able to identify AP well.

The answers given by PW2 threw more light on PW1's case and also corroborated her evidence that she was able to identify AP well and thus there can not a mistaken identity as Counsel for AP instigated.

Therefore, the survivor was able to identify AP as the perpetrator by sight and also by voice when he spoke to her and was able to identify his clothes and the colours he wore that night. She stated that AP was wearing the same clothes in the following after the incident. It is noted that AP in court spoke pidgin English even though later he decided to change his language to Hausa. The survivor lives with him in the same house and from the evidence, AP returned from Nigeria and has been living with them and they know him to speak pidgin English.

In **GLIGAH AND ATISO V. THE REPUBLIC [2010] SCGLR 870**, the Supreme Court held in holding (3) that where:

There were pieces of evidence which if put together made a very strong case against the accused person[s]. The same with circumstantial evidence. It was generally accepted that when direct evidence was unavailable, but there were bits and pieces of circumstantial evidence available, and when those were put together, they would make stronger, corroborative but more convincing evidence than direct evidence.

From **Gligah**, the court can accept pieces of evidence or circumstantial evidence where direct evidence is not available. Here, circumstantial evidence is used to make the case stronger or to corroborate or give more convincing evidence. See

THE STATE VRS BROBBEY AND NIPAH [1962] 2 GLR 101 where the court held that circumstantial evidence must lead to one and only one irresistible inference that the appellant is guilty of the offence charged. See also LOGAN V THE REPUBLIC [2007-2008] 1 SCGLR 76 where it was held that:

“For circumstantial evidence to support a conviction it must be inconsistent with innocence of the accused. It must lead to irresistible conclusion not only that the crime had been committed, but it was in fact committed by the persons charged in order to arrive at a definite conclusion. Conviction based on circumstantial evidence which is not supported by facts is wrongful.”

Here, the court can safely conclude that prosecution was able to lead sufficient evidence that someone had natural carnal knowledge of the survivor and that someone is AP as he was identified by the survivor when he was having sexual intercourse with her, when he went outside to the veranda, when he spoke with her in pidgin English, and when he wore the same clothes as he was wearing when he entered survivor’s room and forcibly had sexual intercourse with her. These pieces of evidence when put together make the case of the prosecution credible.

The next ingredient is the determination of the age of the survivor.

The prosecution tendered in evidence the National Health Insurance Card indicating the date of birth of the survivor as 15th June 2008. This means that the survivor was thirteen years when the incident occurred. The NHIS card was not discredited and thus, it is accepted that the survivor was below the age of sixteen years at the time of the offence.

Therefore, the prosecution was able to sufficiently prove all the three ingredients of the offence of defilement beyond reasonable doubt. The court thus finds as a fact that the accused had sexual intercourse with the survivor who was under sixteen years of age and thus defiled her. See **THE REPUBLIC V GYAMFI (2007) 13 MLRG 192.**

Did accused person create doubts in prosecution's case?

I have already determined that the prosecution was able to prove all the three ingredients of defilement against the accused person and thus it was left with accused to lead evidence to either create doubts in prosecution's case or discredit the evidence.

The AP testified that was raised by his father in Sokoto, Nigeria though he was born at Swedru. He returned to Ghana and has been in Ghana for seven months. Her mother sent her to Twifo Praso to learn mechanics and he started about six weeks ago. According to him, he stays in the same house as PW1 and innocent about the charge. He said the survivor is like a little sister to him and what happened is a case of mistaken identity. He stated that he was arrested five days after so he could have run away if he had done it.

Under cross examination the accused answered among others the following questions:

Q. Can you recollect during the evidence of PW1 you were here?

A. Yes.

Q. She identified you with your face, attire you were wearing and your voice. Am I right.

A. No.

Q. So your statement in paragraph 11 that it was a mistaken identity is false.

A. Yes.

Here, AP admitted that there was no mistaken identify. In that regard, then his evidence is corroborating that of PW1 to the effect that he was identified by face, voice and attire he wore on that night.

Some of the answers AP gave were not credible during cross examination as he lied about when he was arrested among others.. These are some of the answers:

Q. Your evidence at paragraph 12 that you were arrested five days later is false.

A. It is true.

Q. I am putting it to you that the incident occurred on 03/02/2022.

A. False

Q. And you were arrested on the 04/02/2022/

A. False.

Q. So it will not be correct that you were arrested five days later.

A. False.

His evidence that he was arrested five days ago is far from being correct as it is on record that the survivor was taken to the hospital on the 04/02/2022 the morning after the incident and AP was arrested on the same day.

The evidence of accused does not raise any doubt as to his guilt as he was not able to discredit the evidence of prosecution but rather either admitted part of prosecution evidence or discredited his own evidence.

Hence, the accused person could not raise a doubt in his defence that he was not the one who defiled the survivor and that the survivor was not under sixteen years when he had sexual intercourse with her even forcibly. Consequently, the accused person failed to raise a doubt in the evidence of the prosecution.

DISPOSITION

I therefore find the accused person guilty of the offence of defilement of a female fewer than sixteen years of age under **Sections 101(1) of Act 29** and convict him.

Pre sentencing hearing:

I have considered all the mitigation factors rendered by counsel for accused person on behalf of accused person that he is a young adult.

That the court should give him the barest minimum of the sentence.

I have noted that accused took advantage of the survivor who was taking care of his little brother. He forcibly had sexual intercourse with her and threatened to kill her if she should disclose.

I hereby sentence accused person to eight (8) years IHL for the offence of defilement.

The survivor is referred to UUC Counselling unit for counselling.

Accused is convicted and sentenced.

H/H DORINDA SMITH ARTHUR (MRS.)

CIRCUIT COURT JUDGE

ACCUSED PERSON PRESENT.

PROSECUTOR: C/INSP JOHN ASARE BEDIAKO PRESENT.

EUGENE LARBI APPIAH ESQ. FOR AP PRESENT