IN THE GENDER-BASED VIOLENCE CIRCUIT COURT AT SEKONDI –W/R, HELD ON TUESDAY,18TH JULY 2023BEFOREH/H NAA AMERLEY AKOWUAH (MRS.)

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C6/2/22

THE REP.

Vrs

ALEX YARBOYE

ACCUSED: PRESENT

PROS.: CHIEF INSP. PATRICK AMOH-MENSAH

C/ACC.: PRINCE FREDERICKNII-ASHIE NEEQUAYE,Esq.

JUDGMENT

According to Prosecution, in the month of April and July 2021, Alex Yarboye(accused person) had sexual intercourse with then eight-year-old JonitaKyeremah (victim) on the occasions when her mother left her in the care of his mother and travelled to Accra for business. After the second incident of alleged sexual intercourse, Jonita complained to her auntie, the complainant, with whom she lives. Upon arraignment on a charge of defilement contrary to s. 101 of the Criminal (And Other Offences) Act, 1960 (Act 29), accused person pleaded "Not Guilty"

SUMMARY OF LAW &EVIDENCE

s. 101 of Act 29 provides 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"

From the provision above, the following can be teased out as the ingredients that make up the offence of defilement and require proof beyond reasonable doubt for a conviction as stated in s. 11(2) of the Evidence Act, 1960 (NRCD 323). These are carnal or unnatural carnal knowledge, age of the victim as below sixteen (16) years and unimpeachable evidence that accused person is the one who had carnal or unnatural carnal knowledge of the said victim.

S. 99 of Act 29 provides that where it is necessary to prove *'carnal knowledge or unnatural carnal knowledge', the carnal knowledge or unnatural knowledge is complete on proof of the least degree of penetration*'. In ***Gligah&Atiso v The Republic [2010] SCGLR 870@879,*** the Supreme Court speaking through Dotse, JSC at p. 579 said that *'Carnal knowledge is the penetration of a woman's vagina by a man's penis. It does not really matter how deep or however little the penis went into the vagina. So long as there was some penetration beyond what is known as brush work, penetration would be deemed to have occurred and carnal knowledge taken to have been completed'.*

To prove the age of a victim, s. 122 of the Children's Act, 1998 (Act 560) provide that in the absence of a birth certificate or baptismal certificate, a medical doctor's certificate verifying the age of a child below eighteen (18) years will be sufficient. S. 19(2) of the Juvenile Justice Act, 2003 (Act 653) mirrors the provision in s. 122 of Act 560 and also repeats '*unless the court directs otherwise'*. In effect, a medical report is sufficient proof of age and does not require proof of a signature thereon to be accepted as proof of the stated age.In ***Robert Gyamfi @ Appiah v The Rep. [2019] DLCA 6331***, delivered on 27/02/2019, the Court held that the victim's age of 12 years was proved by her oral testimony in court and corroborated by the NHIS card tendered by the prosecution. The court explained that the phrase '*unless the court directs otherwise'*admits of other means, including school register

and records, apart from the birth certificate and baptismal certificate stated in Acts 560 and 653.

Identity of an accused person as the perpetrator of an offence is key to proof of the offence alleged to have been committed. It is trite that criminal prosecution is *in personam,* against the very person who actually committed the *actusreus* of the offence, except in a few inchoate offences where the very *mens rea,* often of an abettor, agent provocateur or co-conspirator, is punished for the *actusreus* even if he/she did not physically partake in the commission of the offence. It is in this sense that it is imperative for Prosecution to prove that an accused person was the one, and only one, who committed an offence. There are several means by which the identity of an accused person may be established. One of the means was noted in "***Phipson on Evidence"***, 10th ed., pg. 170 para. 1381, where the author stated that' *when a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony, or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristics: e.g. height, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties or peculiarities including blood group …* ".

Another means was stated in ***Razak & Yamoah v The Rep. [2012] 2SCGLR 750***when the SC noted that identity may be proved by '*personal characteristic or peculiarities like the height of the person given by the oral evidence by prosecution witnesses on oath in court'.*

Thirdly, in ***Adu Boahene v The Rep. [1972] 1GLR 70***, it was held 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 swears to have seen the accused committing the offence charged*'.

To establish the three ingredients above and fulfill s. 11(2) NRCD 323 which provides that "*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", Prosecution called six (6) witnesses to testify and tender various exhibits.

In the words of PW2 narrating the three (3) occasions she alleged that accused person had carnal knowledge of her, she said;

> *"… Alex covered my mouth with a cloth and tied my hands and inserted his penis/manhood/ "kolokolo" into my vagina. He lay on top of me. …"*
>
> *Again, he did it again. In his mother's room, he tied my hands and my mouth again and inserted his penis/ "kolokolo" into my vagin".*
>
> *"When I went, he repeated the act of tying my hands, covered my mouth and inserted his penis into my vagina. After the act he warned me not to tell anyone else he will kill me"*

Under cross examination, counsel for the accused person put it to PW2 that she was untruthful because she had only told Eiffel Roland Amankwah (PW3) that accused person only '*played with her breasts*' which to him she did not even have any to even support the allegation. However, PW2 explained that accused person did play with her breasts in addition to having sexual intercourse with her three times.

I found PW2 very clear in her mind on what accused person did to her, i.e., having sexual intercourse with her. PW2 was expressive during trial and used the gender-appropriate names for both the male and female genitalia, including the sociolinguistic 'kolokolo', an alias for penis. Similar to the observations by the Court of Appeal in the *Robert Gyamfi* case, I find that PW2 gave a vivid account of the sexual encounters on all three occasions, setting out the events that happened before, during and after each encounter. For instance, she told the Court the following as the pre and post events to the first sexual encounter;

> "*One day, my mother travelled to Accra and when she was leaving, she left me with Alex's mother. In the evening, Alex mother said that I and Alex' junior sister Loretta should go*

and sleep in my mother's room. The following morning, Loretta went to school. When she left for school, …"

"After he was done he told me/warmed me that if I should tell my mum or anyone that he covered my mouth, tied my hands and had sex with me, he will kill me"

To the second encounter, the pre-events was that;

"I went to school and I returned. When I came back, his mother and junior sister were cooking in the kitchen.

To the third encounter, she detailed thus;

My mother returned from Accra, Alex came and called me and said we should go and watch "Double Cara", a telenovela on Max TV. I was in my room when he came to call me. He said we should go and watch it in his mother's room. His mother was not around. They had gone to church. His mother and Loretta, his sister had gone to church.

After each encounter, PW2 said accused person warned her not to tell anyone of what he did to her and that put so much fear in her that she kept the assault to herself for months before disclosing her experiences to PW3 for the first time. Considering the minutiae details of her testimony, I have no grounds to disbelieve the testimony of PW2.

Further evidence of carnal knowledge was in Exh. G, H & H1 the medical report and laboratory scans which made the observations that *"the introit us could freely admit one forefinger. The hymen was partially stretched and thinned shallow. In conclusion, she has recurrent pelvic inflammatory disease as a result of repeated defilement"*. S. 121 of the Criminal (Procedure) Act, 1960 (Act 30) provides that *"Any document purporting to be an original report under the hand of any Government medical practitioner, … and report, may, if it is directed to the Court or is produced by any police officer to whom it is directed or someone acting on his*

behalf, be used as evidence of the facts therein stated in any enquiry, trial, or other proceeding under this Code".

Despite the admission into evidence and prima facie proof of Exh. G, H & H1 Counsel for accused person disputed the veracity of the doctor's findings, as entitled him under cross-examination under s. 62(1) of NRCD 323. Counsel asked questions about how PW5 arrived at the conclusion of "penile penetration" when he had indicated that the hymen was merely "stretched", not torn as expected in a defilement case. The following captured the interaction between Counsel for accused person and PW5:

Q: I am suggesting to you that the fact that there is a vaginal discharge and reddened vulva is no indication that the child had been defiled

A: I disagree because it could have resulted as a result of complications of penetration. And the other finding is that the introit us/vagina could admit a finger freely and for that age we do not normally expect that. Also, for adult virgins, they can only admit the tip of a finger, not the whole finger

Q: But you realize that for there to be pelvic inflammation, necessarily the hymen must have been torn

A: I disagree because you do not necessarily have to have a torn hymen but, in this case, I explained that the hymen was stretched

Q: I am suggesting to you that from what has been said in this court, if there really was any defilement, the hymen would be torn not necessarily stretched

A: I think I saw the child 3 months after the act so given the circumstances and period, there could have been a repair and normally, I do a speculum exam so I really saw the hymen very well. Sometimes, it depends also on the size of the penis. If it is small, it can stretch.

To support the expert opinion, I refer to the oft-cited case of Robert Gyamfi where the Court reasoned in upholding the High Court's finding that penetration has been proven that medical evidence may prove that the hymen of a victim was not broken but if there was evidence of least degree of penetration of the victim's female organ by the male organ, there was sexual intercourse. The law does not state that in respect of a virgin, her hymen should be broken before it may be concluded that there was penetration. The law is that carnal knowledge is complete on proof of the least degree of penetration. See the Criminal Offences Act, 1960 (Act 29), section 99. In simple language, the fact that the hymen of a vagina is not torn does not mean the charge is not proven. The law is "*least degree of penetration* "and not necessarily deep enough to tear the hymen. In this instance, PW5 found that PW2's hymen was stretched, not torn, and I accept her explanation that this could be as a result of healing over time. The laboratory scans in Exh. H series was also undisputed that fluid had collected in PW2's pelvis resulting from repeated infections due to repeated sexual assault.

Being the first person that PW1 confided in, I find the testimony of PW3 weighty as corroborative evidence to support the assertion that not only did accused person fondle PW2's breasts, he also had penetrative sex with her.

Accordingly, I find that Exhs. G, H & H1 are conclusive evidence of the findings made therein on the authority of sections 112 & 113 of NRCD 323. A court's duty is to reach its own conclusion and so may depart from an expert opinion, so-called, with good reason. Reference the cases of ***Tetteh v Hayford [2012] 1SCGLR 417@423-424, Sasu v White Cross Insurance Co. Ltd. [1960] GLR 4 and Darbah v Ampah [1989-90] 1GLR 598@606.***However, without a contrary opinion based on the evidence presented by either the prosecution or the defence, I have no basis to depart from the findings in Exh. G, H & H1 especially considering the corroborative testimony of PW5. From the preceding, I find the ingredient of penetration proved.

PW1 tendered a copy of PW2's birth certificate (Exh. B) with her date of birth stated as 17th February 2012, putting her age at nine (9) years at the time of the established sexual assault. Not more need to be said about PW2's age in light of PW1's testimony and the fulfillment of Acts 560, 653 and discharge of the burden to produce sufficient evidence in s. 11(1) of NRCD 323, reiterated in the case of ***Ali Yusuf Issa (No. 2) v The Rep. [2003-2004] SCGLR 174***.

The final ingredient of the identity of the accused person being the one who sexually assaulted PW2 was supported and proven by ample evidence. First, was the positive identification by PW2 and indeed the other prosecution witnesses, including PW6, his mother who confirmed that herself, accused person, PW1 & PW2 all lived within the same shared compound house. On the identity of accused person as the perpetrator, there was no equivocation in PW2's testimony that it was he who had sexual intercourse with her. Despite the barrage of questions posed to her by counsel for accused person's notable energetic style, she maintained her testimony of accused person having sexual intercourse with her three times on the two occasions that PW1 left her in the care of PW6, accused person's mother. As has become custom with sexual offenders, PW2 told the court that accused person threatened to kill her should she tell anyone and this frightened her enough to keep the secret for weeks.

The identity of the accused person and the fact that he was the one who had sexual intercourse with the victim was corroborated by the testimonies of PW1&PW3. PW1's testimony is key because she lives with the victim and the accused person as well within the same house. PW3 confirmed the story PW2 told him where she mentioned accused person as the one who had sexual intercourse with her. Finally, was the testimony of PW4, the investigator who confirmed that it was accused person's name that was mentioned by PW1, PW2 & PW3. No other name was mentioned before or at the trial other than accused person's. With prosecution witnesses' testimonies, the desirability of corroboration in

sexual offences, though not mandatory or essential, has been met. Reference s. 7 of NRCD 323 on the definition of corroboration and holding (v) of the Court of Appeal judgment in the **Gyamfi @Appiah** case (supra) reproduced for ease of reference;

> "*unless the law otherwise provides, there is no need of corroboration. The court could act on uncorroborated evidence of a single witness since judicial decisions depended upon intelligence and credibility and not on the multiplicity of witnesses produced at the trial*".

See also page 288 of P.K. Twumasi's book **"Criminal Law in Ghana**".

I find the ingredient of identity proven beyond reasonable doubt, not only on the preceding discussion but also on the fact that living within such close quarters and the circumstances, the accused person was very well known to PW2 and had the time and opportunity to carry out the sexual assault on PW2.

DEFENCE

Is proof of the essential ingredients of an offence sufficient to convict an accused person? Is proof of the ingredients equal to proof beyond a reasonable doubt, especially in the face of an accused person's denial and defence? It is the law that after an accused person has put forward a defence, a trial judge must examine same and exercise one of three options open to him/her as restated in the case of ***Rep. v Francis Ike Uyanwune [2013] 58 GMJ 162*** where the Supreme Court cited with approval the cases of ***Lutterodt v Commissioner of Police [1963] 2GLR. 429*** and ***State v Sowah & Essel [1961] GLR. 743-747***. These options are;

(i) if he accepted their explanations, he must acquit;

(ii) short of accepting their explanations if he was left in doubt, he must also acquit; and

(iii) he must be satisfied of their guilt of the crimes alleged against them only on consideration of the whole evidence adduced in the case.

Beyond the three-tier test above, it is trite law that even where a judge disbelieves the defence of an accused, he/she still has the duty to consider whether the defence is reasonably true or probable. See the case of ***Mahamadu Lagos v COP [1961] GLR 181, SC.*** In the ***Lutterodt*** case, a judgment delivered by Crabbe, Mills-Odoi and Ollennu JJ.S.C., the Justices noted that;

> *"Where a decision of a trial court turns upon the oath of a prosecution witness against that of a defence witness, it is incumbent on the trial court to examine the evidence of the said witnesses carefully along with other evidence adduced at the trial before preferring one to the other. If the court prefers the evidence of the prosecution then it must give reasons for the preference, but if it is unable to give any reasons for the preference, then that means that there is a reasonable doubt as to which of the versions of the story is true, in which case, the benefit of the doubt must be given to the defence"*

Paying heed to the above holdings, I have considered the defence of accused person which he set out on 18/10/2022 when he went into the witness box, and prior, in Exhs. D& E, his Investigation Caution Statement and Charge Statement dated 12/07/2021 & 14/07/2021, tendered by PW4. Accused person did not call a witness but testified for himself. He flatly denied having had sexual intercourse with PW2 in both Exhs. D & E. However, he narrated and confirmed that PW1 indeed left PW2 in his mother's care. His statements confirmed PW2's testimony of spending the night with accused person and his sister Loretta in her (PW2's) auntie's room, waking up the following morning and preparing her for school. The point of departure between the two testimonies was accused person saying that he sent her off to school while PW2 told the Court that accused person had sexual intercourse with her for the first time after seeing off his sister to school. The second point of departure in the testimony of accused person and prosecution's case was the time of the commission of the offence; February 2021 for accused and April & July, 2021 for prosecution. The significance of these two dates, as to whether accused person was a

juvenile or not as at the time of the commission of the offence, will be discussed shortly in this judgment. This discussion is also important because it was the gravamen of the defence put up. Indeed, Exh. 1 a statutory declaration executed on 20/09/2021 was tendered by the defence through PW6, mother of accused person. In Exh. 1, PW6 swore that her son, accused person was born on 10/05/2005 but that due to the non-registration of his birth, she had mixed up his date of birth and age. Under cross-examination by Counsel for accused person, she answered;

Q: The earlier date of birth which you gave was 25th March, 2003 which means that he was 18 years then. How do you explain that?

A: The first date I gave, which is the 18 one was due to forgetfulness. When I called my sister and told her of the case and she asked me how old he was because by then he had been remanded into police custody for about a month, and she told me that Alex was not yet 18. It was then that I realized that the date I gave was a mistake. When I found out, I realized that I had miscalculated his age because I thought Alex was 3 years older than my sister's daughter Emmanuella, who he is 3 months older than. They are of the same age but I miscalculated it with 3 years instead of 3 months. I told my first lawyer who I contracted and he advised me to go and swear an affidavit

Notably, there was no objection to Exhs. D & E which has the accused person's date of birth as 28/3/2003 and in fact 18 years given as accused person's age. The same date of birth appeared on the admission forms of the accused person into the Bompeh SHTS which is on record as proof of his studentship required by the Court as part of his bail conditions granted on 16/08/2021, several months before hearing commenced, keeping in mind the provisions of Acts 650 & 653 as well as the holding in the *Robert Gyamfi* case on school records being acceptable documentary proof of age. On the contrary, when accused person opened his defence, he gave his age as 17 years.

Referencing the law on determination of age as provided for in Acts 560 & 653 discussed elsewhere in this judgment, Exh. 1 does not meet the cut and I reject same as proof of the age of accused person. Besides, the reasons set out therein, plus the explanations of PW6 given under cross-examination begs belief even as an alleged illiterate, when in paragraph 3 of her testimony, also noted in Exh. J her initial statement dated 13/07/2021, she testified that she gave birth to accused person on Saturday, 28/03/2003 at Nkonya in the Oti Region. Indeed, were I to remotely accept the explanation of PW6, it is quite difficult to believe accused person's testimony that he was 17 years old when Exhs. D & E, given when the matters were fresh in his mind, and he was under no compulsion or coercion, but freely and voluntarily given as his age on record. Further, accused person cannot plead illiteracy being in secondary school and past basic education.

From the immediate preceding, I find that accused person's date of birth is 28/03/2003, 17 years as at February 2021 when he claimed that PW1 left PW2 in his mother's care; and 18 years as at April & July as claimed by the prosecution.

On the totality of the evidence before me: from the Charge Sheet, Brief Facts, the testimonies of PW1 who was the one who left her niece in PW6's care, PW3 (reference paragraphs 2 & 3) where he stated that PW2 came to his shop about 3 months prior to July 2021 when he gave his statement (Exh. C) and told him of accused person playing with her breasts; PW4 (reference paragraph 8)and PW5 (reference Exh. G dated 9/7/2021 which mentioned that PW2 said accused person had defiled her about 3 months ago and answers under cross-examination reproduced above): I find ample evidence that supports the finding that the sexual assault occurred in April-July, 2021 and not January or February as contended by accused and his mother, who have proven to be witnesses not worthy of belief or credit. Reference ***State v Otchere & Ors. [1963] 2GLR 463***.

In the instance, I find that the prosecution has established the offence of defilement contrary to s. 101 of Act 29. I reject the defence put up that the accused person is a juvenile

and therefore should be treated under the provisions of Act 653, which I have averted my mind to, particularly, sections 40, 43, 44 & 60, reproduced below for clarity;

s. 43(1), Act 653

> *"Where a juvenile or young person is convicted of an offence for which the court has power to impose a sentence of detention or imprisonment for one month or more without the option of a fine and it appears to the court that it is in the best interest of the juvenile or young offender, the court may make an order for the detention of the juvenile or young offender at a centre"*

s. 60

> *"young offender" means a young person who has been convicted of an offence for which the court has power to impose a sentence of imprisonment for one month or upwards with the option of a fine"*

Rather, unfortunately, although accused person is a young offender, he cannot be treated under Act 653 as to the maximum sentence of 3 years since s. 101 of Act 29 provides the minimum punishment for defilement to be 7 years, without the option of a fine and thus falling outside Act 653. I quite understand the circumstances of accused person who has his impending final examinations to write, but unfortunately, Act 653 cannot be his saving grace.

CONVICTION

Accused person is hereby convicted of the offence of defilement contrary to s. 101 of Act 29.

SENTENCE

Accused person is sentenced to seven (7) years in prison, IHL. Sentence passed is due to his young age, being a first-time offender and the prospect that he may yet be redeemed.

ANCILLARY ORDERS

With knowledge of the accused person sitting for his WASSCE examinations this year, the Director of the Sekondi Prisons is hereby ordered to take the accused person to Bompeh SHS and make available all facilities to enable the accused person prepare and sit for his papers.

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H/H NAA AMERLEY AKOWUAH (MRS.)