IN THE GENDER-BASED VIOLENCE CIRCUIT COURT AT SEKONDI –W/R, HELD ON TUESDAY, 7TH MARCH 2023 BEFORE H/H NAA AMERLEY AKOWUAH (MRS.)

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C6/4/21

THE REP.

Vrs

FRANCIS KWADWO ANDOH

ACCUSED: PRESENT& PRO SE

PROS.: CHIEF INSP. VERONICA TIBSON

JUDGMENT

To the charge of defilement contrary to s. 101 of the Criminal (And Other Offences) Act, 1960 (Act 29), the accused person pleaded "Not Guilty".

The facts in support of the charge were that sometime on16th -17th July 2021 accused person, under the guise of encouraging 12-year-old Francis Appiah to resume schooling after he had played truancy for some time, lured him into his room and had anal sexual intercourse with him, what is termed "unnatural carnal knowledge". Richard Kofi Gyata, father of Francis Appiah observed that his son was not walking properly and questioned him. His son then told him that on two occasions, the accused person had anal sex with him in his room. With the assistance of the Assemblyman for the area, the accused person was sent to the Banso police, who then transferred the case to the Domestic Violence & Victims Support Unit (DOVVSU), Sekondi Police.

To prove defilement, Prosecution must adduce evidence beyond reasonable doubt as stipulated under s. 13(1) of the Evidence Act, 1960 (NRCD 323).Firstly, that accused person

had had unnatural carnal knowledge with Francis Appiah. Secondly, that Francis Appiah was under 16 years of age. Thirdly, that it was indeed accused person, and no other male, who had anal sexual intercourse with Francis Appiah.

Prosecution presented the testimonies of Richard Kofi Gyata (PW1), Francis Appiah (PW2), Abena Oforiwaa (PW3), D/Insp. Eric K. Awuni (PW4) and Dr. Dowuona Hammond (PW5) to support its charge. Prosecution tendered six (6) exhibits in addition as documentary proof of the allegation. Save PW2 who testified viva voce, all witnesses testified via Witness Statements duly signed and dated.

UNNATURAL CARNAL KNOWLEDGE

As to the ingredient of unnatural carnal knowledge, the story in PW1's own words are as follows;

> *"When I got there, he had a small phone and I collected it and was playing a game on it. I fell asleep. When I woke up from my sleep I thought I had urinated on myself so I told Accused person that I wanted to use the toilet and he asked me to defecate in his room but I told him I could not. He brought me out and said he was going to bring me a paper for me to clean my buttocks but when he went inside, I ran away.*
>
> *…*
>
> *Whiles I was in school, [the] accused person came there and asked me come to his house after closing. I went home and did all my chores. I then told my mother that accused person said I should go to his house and she said I could go. Again, when I got there I took his small phone and was playing a game on it but fell asleep. I was not really asleep but pretended to be. He* ***smeared*** *some medicine on my anus and inserted his penis into my anus. I told him that when I got home I will tell my mother but the Accused person said I should not and that he will give me money when I am going home. When he inserted his penis into my anus, it*

was painful. I was lying on his bed. It was a student's mattress, without a wooden frame. He was lying on me from the back. He gave me GH¢5 and escorted me home.

On the first occasion, when I woke up and thought I had wet myself, it was not urine. It was a yellowish substance and it was on my anus. I did not defecate in his room. I wanted to run home and that is why I said I wanted to use the toilet. Also, my anus was soft and I could feel the pain there. When I woke up, my shorts were removed and on the floor but I was in my top. I took my shorts and wore them. When I woke up, accused person was sleeping beside me. On the 1st night, I went home alone. On the 2nd night, he took off my shorts to my knee level, applied the medicine to my anus and inserted his penis into my anus. When he was done, he gave me GH¢5 not to tell my mother. He escorted me home himself"

Under cross examination, accused person put it to PW2 that if PW2had visited his house, it was to play with accused person's children in his absence. This was denied. Again, accused person said he never asked PW2 to come his house after close of school because he only escorted him halfway to school. As such it could not be true that he made the alleged request for a visit on the premises of the school. Accused person insisted that being a galamsey operator, he returned home after 10:30 pm and so it could not be that he PW2 waited till that late in the evening. In another breath, the accused person said that indeed whenever PW2 visited his home, he and his children were by then asleep.

In this regard, the testimony of PW1 in corroborating his son's (PW2's) testimony was that he was aware of the accused person's assistance in getting his son to resume schooling. This included taking the boy to school in the mornings and the boy going to the accused person's home after school hours. However, after some time, his son refused to go to the accused person's house and gave no explanation. PW1 said he later realized that his son's walking gait had changed and when questioned, he told PW1 that the accused person had anal sex with him on two occasions. After his son narrated his ordeal to him, he solicited

the assistance of the Assemblyman for the area, and together, the accused person was arrested.PW1 said he took his son to the Kwesimintsim Hospital for examination which confirmed that his son had been sodomised. He tendered his initial statement to the police dated 21/07/2021(Exh. A) and the damaged phone the accused person allegedly gave to Francis Appiah (Exh. B) as a bribe to buy his silence but took back with the promise of getting the boy a better one. Police retrieved the same from his room.

Under cross examination, the narrative on how the phone was given to PW1 and later came into accused person's possession was contradictory and not much weight will be attached to same as evidence of an inducement.

It was also established that accused person assisted in getting PW2 to school and chaperoned him for two months. The questions put to PW1 showed that accused person was quite involved in the care of PW2 to the extent of bathing him, buying him pens for school, helping him recover his school bag and stationery when he fell back into truancy, etc. It was obvious that accused person endeared himself to the boy and his family to enable him carry out his true intentions.

Proof of unnatural carnal knowledge was further testified to by the investigator in charge of the case. He told the Court that after PW1 lodged the complaint he issued him with a medical form, in line with police administration practice, to take Francis Appiah to any government hospital. The endorsed Medical Form was returned to him and he tendered same into evidence as Exh. C.

Being the author of Exh. C, Dr. Emmanuel Papafio Dowuona-Hammond testified as PW4. He testified that the complaint he received from Richard Kofi Gyata (PW1) and his son Francis Appiah (PW2) was a painful sensation experienced when the latter moved his bowels, in other words, passed stool or used the toilet. In his own words, he said;

"On my examination, there were no lacerations. The anal sphincter was intact and there was no anal tag (it is a growth that is beneath which you usually see on some people. When it's bruised it may bleed and be painful, but in this patient, there was nothing like that upon my examination)

What I would like to say is that the anal sphincter prevents fecal incontinence and it will only weaken only when there is a trauma or laceration to the sphincter where it is broken or there has been a frequent penetration where it loses its elasticity or tension.

The examination finding was just about pain as he was presented. But apart from the pain sensation, there was nothing in the anatomical structure of the anus to suggest forceful penetration or sex"

Despite no evidence of forceful penetration or lacerations PW4 concluded "that there had been sex secondary to sodomy". Exh. C is dated 20/07/2021.

Attached to Exh. C was the referral form issued by the Adum Banso Clinic which was the first port of call for examination of PW2 after the matter was reported. It was dated 19/07/2021, a day before Exh. C was authored. Thereon, the examining nurse indicated thus;

1. *Pain at the anus after inserting my index finger*
2. *There was the presence of laceration and tear at the anal orifices*

The obvious differences in the findings by the two health facilities cannot be overlooked, especially when PW4's conclusions are not supported by his findings. A court's duty is to reach its own conclusion and may depart from an expert opinion, so-called, with good reason. Therefore, I reject the findings of PW4. 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.***

In line with the duty bestowed on me, I shall avert my mind to the case of ***Rep. v Francis Ike Uyanwune [2013] 58 GMJ. 162*** wherethe Supreme Court cited with approval the case of ***Lutterodt v Commissioner of Police [1963] 2GLR. 429*** where the Supreme Court, in a judgment delivered by Crabbe, Mills-Odoi and Ollennu JJ.S.C. 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"*

Without proof of carnal knowledge, an essential ingredient, Prosecution will fail. In this regard, I have examined the testimony of PW2 in detail and find that the missing link is the 'medicine' the accused person was alleged to have applied on PW2's anus. In his testimony reproduced above, PW2 told the Court several times how the accused person applied the said 'medicine' to his anus on the two occasions that he penetrated him. PW2 described it as a 'yellowish substance' which he found on his anus the first time when he woke up. It was the same yellowish substance that the accused person was alleged to have applied the second time when PW2 said he deliberately pretended to be asleep since he was asleep the first time it happened. In my considered opinion, it is unlikely that when the 'medicine' was applied to his anus, the entry would have left lacerations or indications of forced entry. It is no wonder therefore, that PW4 did not see signs of forced penetration such as bruises or lacerations. I am minded to reject the findings made by the Adum Banso clinic because even though the officer was the first to examine PW2, it is difficult to accept that overnight, all the indications said to have been observed vanished such that PW4 saw

none. Besides, the observations made were not in compliance with s. 121 of the Criminal (Procedure) Act, 1960 (Act 30).

In conclusion, I find that even though there were no indications of forced penetration, based on the testimony of PW2, particularly on the use of the 'medicine' on his anus, and actual penile penetration into his anus on the second occasion, there is no doubt in my mind that penetration indeed did occur.

AGE OF VICTIM

Sections 122(1) & 19(2) of the Children's Act, 1998 (Act 560) and the Juvenile Justice Act, 2003 (Act 653) provide that '*in the absence of a birth certificate or a baptismal certificate, a certificate signed by a medical officer as to the age of a child below eighteen years of age shall be evidence of that age before a Family Tribunal without proof of signature unless the court directs otherwise'*. In other words, a birth certificate is the default proof of the age of a person with which no other proof is required, unless forgery, fraud or other criminal allegation is made as to the authenticity of the birth certificate. In ***Robert Gyamfi @ Appiah*** case, the Court held that although s.19 (2) of Act 653 makes a birth certificate the default proof of age, it does not exclude other means of proof. The Court gave examples of proof such as a school register, baptismal certificates and other means as directed by the Court, such as dental assessment, laboratory or other medical procedures to ascertain age.

Prosecution did not proffer any of the aforementioned means of proof of age of Francis Appiah. On record, there is no legally accepted documentary proof of the age of Francis Appiah as required, save the exhibit attached to the medical report (Exh. C) which indicates Francis Appiah's date of birth as 10/05/2009. Abena Oforiwaa, mother to Francis Appiah gave his age as 12 years but did not state his exact date of birth when she testified.Is her statement of her son's age sufficient proof of same? Is Francis Appiah's statement under oath that he was 12 years old sufficient proof of same?

When cross-examining her, accused person did not dispute Francis Appiah's age. There was also no dispute that as at 2021 when the alleged incident occurred, Francis Appiah was in Class 5. Under s. 9 of NRCD 323, I take judicial notice of the fact that the average class 5 pupil is less than 12 years. Of course, in the instant case and the circumstances on record as to Francis Appiah's truancy, it is little wonder that he was in class 5 at the estimated age of 12 years.

With the discretion given to a trial judge to make findings of fact based on observations and the demeanor of a witness in court, and having duly seen and observed Francis Appiah while testifying, I find that Francis Appiah is a child.

Accordingly, despite the lack of documentary proof of Francis Appiah's age, I find that his age of 12 is incontestable and should it be argued that he is older, he still cannot be more than 16 years.

IDENTITY

PW2 physically identified the accused person as the man he and his mother met at school one morning. He also physically identified him in Court as one and the same man who asked his mother for directions to their house with the promise of doing everything possible to ensure that PW1 attended school everyday. To buttress the point that he knew the accused person very well, PW1 further explained while under cross-examination that the accused person stayed with a teenager called Asante, not with his three children as he alleged. Indeed, the said Asante was also a pupil in his school, and even though he lived at K9, he spent most of his time with the accused person and often left sometime after 9:00 pm.

The testimony of Abena Oforiwaa, (PW5) confirmed the identity of the accused person as the one whom she interacted with and who assisted in taking her child to school. She further confirmed that he was the one who gave the instruction for her son to visit when

he finished doing his chores. In fact, from his Investigation Caution Statement (Exh. D), Charge Statement (Exh. E), and proceedings in Court, the accused person did not deny knowing PW2 & PW3 except to say that despite the admission that PW2 visited his home, he did not have unnatural carnal knowledge of him. The identity of the person who committed the crime must be established and put beyond doubt that another person, possibly, could be the perpetrator of the crime. See the case of ***Razak &Yamoah v The Rep. [2012] 2SCGLR 750*** where the SC noted 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 …* "

From the testimonies above, I find that the identity proved of the accused person proved as the one who had unnatural carnal knowledge of the victim.

CONCLUSION

On the testimonies of the witnesses and exhibits tendered, I find that the requirements for the proof of defilement against Francis Appiah have been established beyond reasonable doubt as required by s. 13 of NRCD 323.

CONVICTION&SENTENCE

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

Accused person is sentenced to 8 years' imprisonment, IHL.

The almost minimum sentence is passed in consideration of the fact that the accused person has been in custody since his arrest as well as on health considerations.

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H/H NAA AMERLEY AKOWUAH (MRS.)