IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 10TH OCTOBER 2023

CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B6/04/2023

THE REPUBLIC

VS

AKWASI AGYAPONG

ACCUSED PERSON PRESENT

DETECTIVE CHIEF INSPECTOR PETER SADAARI PRESENT, HOLDING THE BRIEF OF *SERGEANT PRINCE ADU AMOAKO,* FOR THE REPUBLIC

JUDGMENT

The accused person was charged with two sexual offences as under Chapter 6 of the *Criminal Offences Act*, 1960(Act 29). One is "indecent assault", the provision of that offence under the law is provided under section 103(2) of Act 29, to wit:

> *A person commits the offence of indecent assault if, without the consent of the other person he—*
>
> *(a) forcibly makes any sexual bodily contact with that other person; or*
>
> *(b) sexually violates the body of that other person in any manner not amounting to carnal knowledge or unnatural carnal knowledge.*

Whoever indecently assaults any person shall be guilty of a misdemeanour and shall be liable on conviction to a term of imprisonment of not less than six months. See section 103(1) of Act 29.

The second charge is the offence of defilement. The provision for this is provided in section 101(1) of Act 29, to wit:

> *For purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.*

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. See section 101(2) of Act 29.

When arraigned before this court, Accused pleaded *Not Guilty* to both counts on the charge sheet. At the end of the prosecution's case, the court found that the prosecution had not made out a case sufficiently against Accused on count two to require him to open his defence on that count. The court therefore acquitted and discharged Accused on count two. The court found that Accused had a case to answer on count one and therefore called upon him to open his defence, if he so desired.

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

> *If 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.*

Section 174(1) of Act 30 states:

> *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 and shall remind him of the charge and inform him that, if he so desires, he may give evidence himself on oath or may make a*

statement. The Court shall then hear the accused if he desires to be heard and any evidence he may adduce in his defence.

The holding of the court as regards section 173 as given on 13th September 2023 reads:

> "In the evidence-in-chief of PW1, the alleged victim herein, she stated: "He then put his penis at my vagina and attempted to penetrate my vagina but his penis could not enter my vagina. In the medical report Exhibit D, the medical officer wrote: "The hymen was intact." There is no evidence that despite the hymen being intact, there was any degree of penetration for the Court to make an assessment of the penetration to determine whether it satisfies section 99 of Act 29 or not. I hold that the prosecution have not been able to prove that there was carnal knowledge by Accused person on PW1. Therefore, in accordance with with section 173 of Act 30, I hold that the prosecution have not made out a case against Accused person on Count two for him to be called upon to open his defence on that count. Accused is hereby acquitted on Count two.
>
> Prosecution, by the evidence they have provided, have made out a case against Accused on count one. So, Accused will be called upon to open his defence on Count One, if he so desires. See section 174(1) of Act 30."

The following(*mutatis mutandis*) were the particulars the prosecution gave of the offence on count one which Accused is alleged to have committed:

> "AKWASI AGYAPONG, AGED 24 YEARS; MENIAL WORKER: For that you on the 13th day of May, 2023 at about 4:00pm at Agya Adu Estate near Mfuom a suburb of Dunkwa-On-Offin in the central circuit and within the jurisdiction of this court did indecently assault one Alberta Feni 12years old."

Section 112(2) of Act 30 states:

> *The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating*

all the essential elements of the offence and if the offence is one created by an enactment may contain a reference to the enactment.

To my understanding, the above provision in Act 30 applies to the particulars of offence as couched on the charge sheet inasmuch as it applies to the statement of offence. The prosecution should therefore state the act of Accused which they say amounts to indecent assault and not to use a technical language as in the clause: "...did indecently assault…"

A police officer herein with the title and name as on a document attached to the charge sheet, D/CPL. Awudi Vicent Habakuk, being in charge of this case gathered the following as facts based on which the police charged the accused for the said offences:

1. The complainant is the biological mother of the victim.
2. The victim is aged 12years.
3. Accused person is a menial worker.
4. On 13th May 2023 at about 4:00pm, the complainant sent the victim on an errand; while she was returning from the errand, the accused met her and asked her to help him carry his cassava in a nearby farm.
5. The victim followed Accused into a cocoa farm.
6. In the cocoa farm, Accused pushed the victim on to the ground, held her neck, removed her underwear and forcibly had sexual intercourse with her on the ground in the cocoa farm.
7. After the act, Accused told the victim to go home and that he would carry his cassava himself.
8. The victim returned home and told complainant about what accused had done to her; complainant then reported the matter to the police.
9. The police issued a police medical form to the complainant to send the victim to any government hospital.

10. Complainant returned the medical form to the police duly endorsed by a medical officer.

11. The victim led the police to the scene and photographs were taken.

12. The victim described the attire Accused was wearing at the time of the incident as orange on top and pair of black jeans trousers down.

13. Accused was later arrested and in his investigation cautioned statement he denied ever committing an offence.

14. In the course of investigations, the attire that the victim described were found in the abode of Accused and Accused claimed ownership of them.

15. In the course of the investigations, Accused was paraded with three other suspects for identification and the victim identified Accused herein as the culprit.

Prosecution called three witnesses. The victim testified as the first prosecution witness and she was referred to as PW1. The second person that testified was referred to as PW2; she is the complainant herein. The investigator herein was referred to as PW3 as he testified last.

PW1 when she testified stated that when Accused asked her to help him carry his cassava, she told Accused that her mother had sent her and that if she delayed, her mother would beat her. PW1 then attempted to scream; Accused told her that if she screamed he would use razor blade to cut her. Accused then took PW1 to a certain cocoa farm. When they got there, he held her neck and kicked her and she fell on the ground. Accused then undressed her and he also undressed himself. He then put his penis at her vagina and attempted to penetrate her vagina but his penis could not enter her vagina.

PW2's evidence was primarily hearsay evidence that Accused had sexual intercourse with PW1 as told her by PW1. See section 116 -118 of NRCD 323.

According to PW3, PW2 reported to the police on 15th May 2023 that Accused person had had sexual intercourse with PW1. PW3 tendered in evidence the endorsed medical report on PW1 and it was admitted in evidence and marked Exhibit D. The endorsement reads:

> "12year old female at St Mark Hospital on 13th May 2023 at 5:00pm in the company of her mother crying with complains of alleged sexual assault by a stranger whiles[sic] she was sent by her mother to buy bread.
>
> On Examination -
>
> She was afebrile, anicteric, not pale and well-hydrated. No obvious wounds in any part of the skin grossly.
>
> There was no vulva swelling, erythema or bleeding from the vagina. The urethal was normal in appearance with no obvious discharge or bleeding. The hymen was intact.[emphasis supplied by the court].
>
> Patient was managed on post exposure prophylaxis for HIV as well as antibiotic cova
>
> Impression- 12year old alleged sexual assault with normal external genitalia findings."

It was signed by one Dr Martin Botchway.

So clearly, a combined assessment of PW1's evidence and the medical report suggests a case of indecent assault and not defilement. See the court's ruling supra in accordance with section 173 of Act 30 supra.

PW3 tendered in evidence a document he said contained the cautioned statement taken from Accused for the purposes of investigations; it was marked Exhibit B. In Exhibit B, Accused denied knowing the victim anywhere and ever having any sexual intercourse with her and even doing anything to her.

Section 62(1) of NRCD 323 states:

> *At the trial of an action, a witness can testify only if he is subject to the examination of all parties to the action, if they choose to attend and examine.*

The following is the cross-examination Accused did of PW1:

Q. Who took the photograph ie Exhibit A that shows you.

A. A policeman.

Q. What is his name.

A. I do not know his name and he did not mention his name to me.

Q. What is the date on which the photograph was taken.

A. I did not check the date.

Q. What day of the week was the photograph taken.

A. I do not know the day.

Q. In which month did he take the photograph.

A. May 2023.

Q. What is the name of the doctor who attended to you when your mother took you to the hospital the first time.

A. Dr. Reindorf.

Q. What is the name of the second doctor you and your mother went to.

A. He did not mention his name to me.

Q. What is your date of birth.

A. 09th December 2010.

Q. When you met me as you told the court what was I holding and what was I wearing.

A. You were holding a rag; you were wearing an orange attire on top and a pair of trousers down. The trousers was blue black in colour.

Q. I put it toy you that you are not being truthful to the Court.

A. I am being truthful to the Court.

Q. When you met me, was I barefooted.

A. You were wearing a pair of sandals.

Q. When you claimed I called you, what is the name of that area.

A. Agya Adu Estates.

Q. I put it to you that you have been coached to come and say what you have said to the court against me.

A. Nobody has coached me.

Section 80 of the *Evidence Act* states:

> *(1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the truthfulness of his testimony at the trial.*
> *(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:*
> *(a) the demeanour of the witness;*
> *(b) the substance of the testimony;*
> *(c) the existence or non-existence of any fact testified to by the witness;*
> *(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;*
> *(e) the existence or non-existence of bias, interest or other motive;*
> *(f) the character of the witness as to traits of honesty or truthfulness or their opposites;*
> *(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;*
> *(h) the statement of the witness admitting untruthfulness or asserting truthfulness.*

In *Ntiri* v. *Essien* [2001-2002] SCGLR 451, it was held that the trial judge has the duty to ascertain credibility of a witness.

Considering PW1's evidence in conjunction with the cross-examination done of her, I find her evidence to be credible

Whilst PW2 was under cross-examination, the following came up, *inter alia*:

…

Q. I put it to you that all that you have told the court is not true. I did not know your said daughter; I only got know her when I was arrested and I saw her at the police station.

A. It is true that you had sex with my said daughter because my said daughter described the attire you were wearing at the time of the sexual intercourse to me and after the police had arrested you the said attire was found with you.

Also of PW3, the following is the cross-examination, Accused did:

Q. What footwear did PW1 tell you I was wearing when I called her.

A. The victim did not mention any footwear to me.

Q. PW1 under cross-examination stated that I was wearing a pair of jeans – blue black in colour but you are telling the court the jeans you retrieved as you stated in paragraph 10 of your witness statement is black in colour. So which is which.

A. The colour of the said jeans is black.

Q. I put it to you the Exhibit E1 is not the jeans trousers I was wearing.

A. It is not true.

The cross-examination done by accused appears quite shallow and lacks the capability to discredit the prosecution witnesses.

Ollennu J(as he then was) in *Majolagbe v. Larbi* [1959] GLR 190 made reference to a dictim he gave earlier in *Khoury and Anor v Richter* which judgment was delivered on 8th December, 1958, as regards proof in law. That dictum has been referred to with approval in *Klutse v. Nelson* (1965)GLR 537 @ 542 and also *Baah Ltd v. Saleh Brothers* [1971] 1GLR 119 @ 122. That dictum is:

"'Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'."

Section 10(1) of the *Evidence Act*,1975(NRCD 323) defines "Burden of Persuasion" and it states:

For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

Section 10(2) of the *Evidence Act* adds that: *The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

Section 11 of NRCD 323 defines "Burden of Producing Evidence" and states further as follows:

(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.

(3) In a criminal action the burden of producing evidence, when it is on the accused as to any fact the converse of which is essential to guilt, requires the accused to produce

sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt.
(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

In *Ackah v. Pergah Transport Limited and Others*[2010] SCGLR 728 at 736; Sophia Adinyira JSC threw more light on burden of proof when she stated that:

> *"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable*[sic] *than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree*[sic]."

After the prosecution had closed its case and the court found that there was a prima facie case against Accused on count one, the court explained section 63 of the Evidence Act/section 174(1) of Act 30 as well as Article 19(10) of the Constitution to Accused. He chose to give a statement from the dock.

The following is what Accused stated:

> "Had it not been the day PW1 came to testify in this Court in this matter, I would not know her. I did not know PW1 anywhere. I have not done anything to her."

Prosecutor gave the following as his comment in accordance with section 63 of NRCD 323 supra:

> "We highly believe that we have proved our case on count one beyond reasonable doubt."

In *Zabrama v. Segbedzi* [1991] 2 GLR 221 @ 246, Kpegah J.A. (as he then was) stated:

> *" … a person who makes an averment or assertion, which is denied by his opponent, has a burden to establish that his averment or assertion is true, and he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden."*

Accused did not lead evidence in his defence to seek to dispel the prosecution's establishments against him.

In Commissioner of Police v. Isaac Antwi supra, Korsah CJ stated:

> *"The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution and that the evidential burden rests on the accused where at the end of the case of the prosecution an explanation is required of him, are illustrated by a series of cases. Burden of proof in this context is used in two senses. It may mean the burden of establishing a case or it may mean the burden of introducing evidence. In the first sense it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt; but the burden of proof of introducing evidence rests on the prosecution in the first instance but may subsequently shift to the defence, especially where the subject-matter is peculiarly within the accused's knowledge and the circumstances are such as to call for some explanation."*

The learned judge continued, referring to Archbold's Criminal Pleading, (34th ed.) at p. 371, para. 1001, that:

"Where the prosecution gives prima facie evidence from which the guilt of the prisoner might be presumed and which, therefore, calls for an explanation by the prisoner and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of 'guilty'. But if an explanation is given by or on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted, because if upon the whole of the evidence in the case the jury are left in a real state of doubt the prosecution has failed to satisfy the onus of proof which lies upon them."

Interestingly, I find that whilst Accused was cross-examining PW2, he asserted that he got to know PW1 when he was arrested and saw her at the police station but in his statement in his defence, he stated that he got to know PW1 on the day she testified in court in this case. All in all, I do not find Accused to be a credible witness. See section 80 of NRCD 323 supra.

I find that Accused put his penis at the vagina of PW1. The issue therefore is:

> Whether accused person putting his penis at PW1's vagina in the manner he did amounts to indecent assault.

As already held, as there was no degree of penetration by the evidence, carnal knowledge or sexual intercourse did not take place. However, I find from the evidence that Accused forcibly made sexual bodily contact with PW1 and thereby sexually violated the body of PW1 but that sexual contact did not amount to carnal knowledge. See section 99 of Act 29.

In *Oteng v The State*[1966] GLR 352@ 354, SC, Ollennu JSC stated:

> "*One significant respect in which our criminal law differs from our civil law is that, while in civil law a plaintiff may win on a balance of probabilities, in a criminal case the prosecution cannot obtain conviction upon mere probabilities.*"

This principle was echoed in the *Evidence Act* of 1975 i.e. NRCD 323, in section 13(1), to wit:

> *In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt*.

See also *Sasu Bamfo v Sintim* [2012] 1 SCGLR 136 at 138 and also *Fenuku v John-Teye* [2001-2002] SCGLR 985

I hold that the prosecution, on all the evidence, have succeeded in proving the guilt of Accused beyond reasonable doubt on count one. Accused is hereby convicted on the said count.

In sentencing Accused, I have taken into consideration the way Accused sexually violated the victim in a forcible manner. I have taken into account the period Accused been in lawful custody in this case.

Article 14(6) of the *Constitution* states:

> *Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he has spent in lawful custody in respect of that offence before the completion of his trial shall be taken into account in imposing the term of imprisonment.*

Accused is hereby sentenced to two(2) years imprisonment in hard labour on count one.

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

10/10/2023