

IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 08TH DECEMBER 2023
CORAM: HIS HONOUR YAW POKU ACHAMPONG

CASE NO.: B6/05/2023

THE REPUBLIC

VS

MARTIN OBENG @ KOJO

ACCUSED PERSON PRESENT

SERGEANT PRINCE ADU AMOAKO FOR PROSECUTION, PRESENT

JUDGMENT

The Accused person was arraigned before this Court charged as follows:

COUNT ONE

STATEMENT OF OFFENCE

INDECENT ASSAULT CONTRARY TO SECTION 103 OF THE CRIMINAL
OFFENCES ACT, 1960(ACT 29)

PARTICULARS OF OFFENCE

MARTIN OBENG @ KOJO, AGED 22 YEARS; ELECTRICIAN: For that you on 24th
May 2023 at about 09:00pm at Denkyira Praprabebida in the Central Circuit and
within the jurisdiction of this Court indecently assaulted[sic]... a female[sic] aged
six(6) years.

COUNT TWO

STATEMENT OF OFFENCE

DEFILEMENT OF FEMALE[SIC] UNDER SIXTEEN YEARS OF AGE, CONTRARY TO SECTION 101 OF THE CRIMINAL OFFENCES ACT, 1960(ACT 29)

PARTICULARS OF OFFENCE

MARTIN OBENG @ KOJO, AGED 22 YEARS, ELECTRICIAN: For that you on 24th May 2023 at about 09:00pm at Denkyira Praprabebida in the Central Circuit and within the jurisdiction of this Court did carnally know ... a female[sic] six(6) years.

Section 103 of Act 29 states:

- (1) 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.*
- (2) 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.*

Section 101 of Act 29 states:

- (1) For purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.*
- (2) 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.*

The following are the facts that the prosecution relied on to charge Accused person:

“The complainant ... is a farmer and biological mother of victim ... aged 6 years. The accused ... is an electrician aged 22years. On 24/05/2023 [at] about 9:00pm [,]

complainant who was also an indomie seller was with victim at her food joint with friends together with the accused. The next day 25/05/2023 [,] victim returned from school and narrated to complainant that on the[sic] 24/05/2023[,], the accused forcefully had sexual intercourse with her. On 27/05/2023[,], the complainant lodged a formal complaint at the police station and police medical report form issued to the complainant to send victim to any Government Hospital for examination and endorsement which she did. Statements were obtained from both complainant, victim and available witnesses. Accused was subsequently arrested and in his investigation cautioned statement [,] he denied having committed the offence vehemently hence was charged...”

Prosecution called three(3) witnesses. The first to testify was the alleged victim herein and she was referred to as PW1. PW2 was the second to testify and that happened to be the mother of the victim. The investigator testified last – thus she was referred to as PW3. PW1 said she was seven(7) years old but when the Court asked her her date of birth she could not tell the Court. As the prosecution gave the age of the victim as six(6) years on the charge sheet and there was some time lapse before she testified, seven(7) years as the age of the victim at the time testified is reasonably probable. PW1 gave an unsworn evidence because of her age.

According to PW1 on 24th May 2023 at about 09:00pm, she was watching TV and a certain boy came to tell her that her mother was looking for her. When she was on her way to see her mother, she met Accused. Accused took her to a room and asked her to sit down. So, she sat down. Accused then took a whitish paper and rolled it and set a match into it and smoked it. After that, Accused asked her to lie down and she lay down. Accused removed her panties and put his penis into her vagina. Accused then gave her biscuits and a drink and three Ghana cedis(GH¢3.00) and told her that she should not tell her mother about what he had done to her. PW1 further stated that she was watching the TV at one Bro

Emma Chairman's room when the boy came to call her that her mother was looking for her, and that the Bro Emma Chairman was a chairman at Praprabebida.

The following, *inter alia*, form part of the witness statement of PW2:

" ...

5. On 24/05/2023, the victim... was at my indomie food joint when later I noticed the victim's absence.

6. I therefore started searching for the victim from within the neighbourhood and to victim's father's place to find out if victim was there.

7. On reaching a section of the road, I met the victim in the company of five other children and the accused.

8. On 28/05/2023 about 3:00pm victim... informed me after she returned from school that, the previous night whiles she was watching television with her friends at the Unit Committee Chairman's room, witness Kofi came to call her and told her that her mother was calling her.

9. Victim further narrated that when she went outside, the accused ... called her into one particular room, put her on the floor and forcibly removed her panty and had sexual intercourse with her.

..."

When PW3 mounted the witness box, she said that on 25th May 2023, PW2 reported this case at Denkyira Kyekyewere Police station and the police at Kyekyewere arrested Accused and brought him to Dunkwa-On-Offin Divisional Domestic Violence and Victim Support Unit for investigation.

PW2 tendered in evidence the document she said contained the investigation cautioned statement of Accused. It was marked Exhibit A. The statement reads:

"I do not know both the complainant and victim. It is not true that I have defiled victim... I came from Diaso to Praprabebida about 4 day[sic] to arrest[sic] on 20/05/23 to work. On Wednesday 24/05/23 [at] about 8:00pm, the children in the

house where I stay[sic] were watching Television together with the said victim – numbering seven in all. The kids came to me that they were hungry and that they wanted indomie but I told them that my money was not enough to buy them indomie hence I bought drinks and biscuits for them but it could not reach all of them and I gave victim and one other cash the sum of GH¢3.00 to buy themselves something. Later on [at] about 9:00pm, three boys from the kids came to call me to escort them to their house. On reaching a section of the road where a bridge was, I left them to go home. The next day, I was going to make a call at the government school where one young man asked me if I was the one who came[sic] his child money and [I] replied in the affirmative. I heard nothing of it again until later that evening 25/05/23 [at] 3:00pm, I was at the park when police from Kyekyewere came to arrest me. At the station, I was informed by the police that a defilement case had been lodged against me. I was then detained in cell. I know nothing about this case. I did not defile the victim.”

Accused is said to have relied on the statement he gave in Exhibit A in what PW3 tendered in evidence as containing the charged statement of Accused.

PW3 also tendered in evidence a medical report she said was from medical examination done on the alleged victim upon request by the police. The endorsement of the medical officer who examined the victim is as follows:

"RE: [name withheld], 6 years 27/05/2023 @ 11:30am

Client was brought by mother with complaints of alleged defilement. According to client, she was called by the accused who is known to her to come to his room. She alleges he had penetrative peno-vaginal sexual intercourse with her. He then allegedly warned her not to inform her mother and sent her home. The alleged incident occurred on 24/05/2023 in the evening at Praprabevida.

On examination, client appears clean with clean clothes.

Vaginal examination shows a perforated hymen with no bleeding seen.

Impression: Alleged defilement.”

It is signed by Dr Emmanuel Tagoe, Medical Officer Dunkwa-On-Offin.

After the prosecution had closed their case, the Court evaluated the evidence based on section 173 of Act 30 and called upon Accused to open his defence on both counts.

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.

The Court then proceeded to explain section 174(1) of Act 30/ section 63 of NRCD 323 vis-a-vis Article 19 (10) of the *Constitution, 1992* to Accused.

Section 174(1) of Act 30:

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.

Section 63 of NRCD 323 states:

(1) *An accused in a criminal action may make a statement in his own defence without first taking an oath or affirmation that he will testify truthfully and without being subject to the examination of all parties to the action.*

(2) *Such a statement by an accused is admissible to the same extent as if it had been made under oath or affirmation and subject to examination in accordance with sections 61 and 62.*

(3) *The fact that the evidence was given without oath or affirmation, or that there was no possibility of examination, may be considered in ascertaining the weight and credibility of*

the statement, and may be the subject of comment by the court, the prosecution or the defence.

Article 19(10) of the Constitution, 1992 states:

No

person who is tried for a criminal offence shall be compelled to give evidence.

Accused chose to give evidence on oath from the witness box.

According to Accused, on 24th May 2023 at about 09:00am, he was in the veranda of the house he stayed in at Praprabebida. Whilst there at that time, nothing happened between him and PW1. He denied any knowledge about the charges. On that day at about that time, Accused bought biscuits for some five children and after they had left where he gave them the biscuits, they came back with PW1 in their company and they told Accused that PW1 was complaining that she did not get some of the biscuits. So, Accused gave PW1 some coins being GH¢3.00. Accused gave GH¢3.00 to PW1 for her to use it to buy some of the biscuits. In conclusion, Accused stated that he did not have sexual intercourse with PW1.

Ollennu J(as he then was) in *Majolagbe v. Larbi* [1959] GLR 190 made reference to a dictum 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'."

Later on, in the judicial life of Ghana, Kpegah J.A. (as he then was) whilst looking at proof in law stated in *Zabrama v. Segbedzi* [1991] 2 GLR 221 @ 246, that:

“... 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.”

I find that the prosecution called material witnesses. They also tendered in evidence documents that they found reliable to prove their case. They thus proved their case by proper legal means.

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.

Whilst Accused cross-examined PW2, the following, *inter alia*, came up:

Q. I put it to you that I did not have sexual intercourse with your daughter.

A. After the incident, I took my daughter to a nearby clinic and a nurse there confirmed that somebody had put his penis into my daughter's vagina. It was after visiting the clinic on that occasion that I reported the matter to the police.

Q. I put it to you that I did not put your daughter on the floor.

A. I was not in the room.

Earlier the cross-examination Accused did of PW1 produced the following, *inter alia*:

Q. Which room did I take you to.

A. The room in which you sleep.

...

Q. I put it to you that I did not have sexual intercourse with you.

A. You had sexual intercourse with me.

Q. I suggest to you that I had a sickness so I would not have sex with somebody's daughter to infect her.

A. You had sex with me.

Accused did not cross-examine PW3.

Accused in turn was subjected to cross-examination by the prosecution as follows:

Q. I am putting it to you that you called the victim to your room and you forcibly had sexual intercourse with her.

A. It is not true.

Q. I am putting it to you that it is because you had sexual intercourse with the victim that is why you gave her GH¢3.00.

A. It is not true. I had been in that house for four(4) days, having come from Kumasi to that town to do some electrical jobs when this matter came up. Whilst in that house the children in the house were fond of me and they called me Bro Prince, Bro Prince. They requested that I gave them indomie and I decided to give them biscuits; those that I gave the biscuits to returned to me saying that PW1 was complaining that she had not got some of the biscuits and so I gave her the GH¢3.00 for her to buy some biscuits.

Q. I am putting it to you that when you were having sexual intercourse with the victim, you opened the volume of your sound system so high making the music being played so loud that no one could hear the shouting of the victim.

A. It is not true. There was no electricity in the house. That is why I was brought from Kumasi to do the electrical job I referred to earlier.

Q. I am putting it to you that you are not a truthful witness to this Honourable Court.

A. I am telling the truth.

Q. Do you remember that you told this Court that you were watching television with the victim and other children in the house in which you were staying.

A. I do not remember telling the Court that. The town had just been connected to the national grid of electricity and so only a few people in the town were using electricity. Those few people included the chairman of the unit committee of that town and he sometimes put his television outside for the children to watch. So I stated in Court that PW1 and the other children went to watch television at where the unit committee chairman had put his television set.

In *Adu Boahene v. The Republic* [1972] 1 GLR 70, CA, the Court held that where the identity of an accused 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.

The only eyewitnesses to any sexual intercourse if there was, can be said to be Accused and PW1. PW1 is a child of seven(7) years old and therefore her evidence may not be so convincing as she may not necessarily know what she testified to. There therefore has to be some corroborative evidence to seek buttress PW1's evidence.

Section 7(1) of the Evidence Act states:

Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.

PW2's evidence borders primarily on hearsay as far as any sexual intercourse that might have been is concerned.

In *Ackah v. Pergah Transport Limited and Others*[2010] SCGLR 728; Sophia Adinyira JSC stated at page 736 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]."

Section 10(1) of 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.

The said medical report therefore becomes of essence in seeking corroboration of PW1's evidence. A careful perusal of the medical report *supra* shows that no proper medical examination was done. The doctor said that the hymen of PW1 had been perforated. He did not tell us whether it was a penis that did the perforation or what might have done the perforation. The incident allegedly took place on 24th May 2023 but the medical examination was done on 27th May 2023. Between those two days, did anything happen to the vagina of PW1 that culminated in the said perforation of her hymen? Apart from the perforation of the hymen, had anything happened to the vagina area of PW1 to suggest that a male organ had penetrated the vagina of the victim by the least degree?

Section 99 of Act 29 states:

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.

As regards count one, there was no indication on the medical report to suggest that somebody used his or her finger or any part of the body to do something to PW1 culminating in the said perforation of the hymen. The medical officer made no comment on the alleged blood in PW1's panties.

In fact what the medical officer wrote at the tail end of the endorsement thus: 'Impression: Alleged defilement', is out of order. Defilement is a technical term under the law and it is captured in Act 29. A court of competent jurisdiction has to try a matter before there can be the conclusion that *defilement* as under the law on sexual offences has taken place; it is not for a medical officer to make that conclusion.

In this day and age of advancement in medical technology, I wonder why the investigative team will not conduct a test on the supposed blood stain vis-a-vis Accused, to find any link there may be.

Section 14 of NRCD 323 allocates the Burden of Persuasion as:

Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.

Section 15(1) of NRCD 323 states:

Unless and until it is shifted, the party claiming that a person is guilty of crime or wrongdoing has the burden of persuasion on that issue.

Section 17 of NRCD 323 allocates the Burden of Producing Evidence as:

(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof.

(2) Except as otherwise provided by law, the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.

Section 22 of NRCD 323 states:

In a criminal action a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond a reasonable doubt, and thereupon, in the case of a rebuttable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact.

In *Commissioner of Police v. Isaac Antwi*[1961] GLR 408 SC, Korsah CJ stated that:

“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.”

Accused offered explanation as to his side of the story in seeking to discharge the onus on him as regards burden of persuasion. See section 10 of NRCD 323. He, however, did not produce any evidence to counter the evidence adduced and produced by the prosecution as regards burden of producing evidence. See section 11 of NRCD 323.

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 the statement Accused gave to the police and his evidence before this court including his answers under cross-examination, he appeared consistent and therefore appeared quite credible.

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 found space 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 *Fenuku v John-Teye* [2001-2002] SCGLR 985

Granted that we put PW1’s evidence aside because it was an unsworn evidence as it was given by a child aged about 7 years, we may be looking at circumstantial evidence.

In *Dogbe v The Republic*[1975] 1 GLR 118, it was held that the identity of the accused as the person who committed the crime might be proved either by direct testimony or by circumstantial evidence of other relevant facts from which the identity might be inferred by the court.

Thus circumstantial evidence is evidence gathered from the surrounding circumstances relevant to the matter from which inference may be made as to the guilt of the accused person.

In *The State v Anani Fiadzo*[1961] 1 GLR 416 @ 419, Sarkodee Adoo JSC propounded that:

“Presumptive or circumstantial evidence is quite usual, as it is rare to prove an offence by evidence of eye-witnesses, and inferences from the facts proved may prove the guilt of the appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption follows irresistibly from the circumstances proved in evidence; and to justify the inference of guilt the inculpatory facts must be incompatible

with the innocence of the appellant, and incapable of explanation upon any other reasonable hypothesis [than] that of guilt. A conviction must not be based on probabilities or mere suspicion."

If indeed there was any sexual intercourse perpetrated on PW1, could it be some other person other than Accused. The evidence adduced by prosecution is not clear-cut on Accused as the perpetrator of the crimes herein. There are doubts on the mind of the Court. Any such doubts shall inure to the benefit of Accused.

In *Dexter Johnson v. The Republic* [2011] 2 SCGLR 601 @ 663 Dotse JSC referred to Lord Viscount Sankey's statement in *Woolmington v. DPP* [1935] AC 462, as follows:

"Throughout the web of the English Criminal law, the golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt...if at the end of, and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

I also imbibe this principle stated in the Woolmington case *supra* and hold that the prosecution have failed to prove the guilt of Accused.

Accused is hereby acquitted and discharged on both counts.

(SGD)

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

08/12/2023