IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION ON THURSDAY THE 21ST DAY OF DECEMBER 2023 BEFORE HIS HONOUR CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE

BR/SY/CT/491/2023

THE REPUBLIC

VRS.

ALEX BOATENG

JUDGMENT

According to Prosecution on the 15th of May 2022 accused person defiled the victim one Fosuaa Mary by having sexual intercourse with her after which he threatened to kill her should she tell anyone about her ordeal. This allegedly happened when the complainant sent her daughter, the victim, on an errand at about 6:00pm on the said identified day but the victim failed to return. The next day, complainant mounted a search for her daughter only to find her in a relative's house but the victim fled upon seeing complainant. When the victim was eventually caught, she narrated her ordeal regarding how accused person forcibly had sex with her and threatened to kill her should she divulge the incident. This prompted complainant to report the matter to the police who subsequently arrested accused person. Accused person was thus charged with the offences of defilement and threat of death. Given the charges proffered, this Court shall first seek to determine Count One prior to that of Count Two.

Section 101(2) of Act 29/1960 provides that:

> "A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without the consent of the child commits a criminal offence and shall be liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years"

From the above provision the essential elements of the offence of defilement are as follows;

a. That the victim is a child under sixteen years of age.

b. That someone had sexual intercourse with the victim; and

c. That it was accused who had sexual intercourse with the victim.

Each of these elements ought to be established beyond reasonable doubt failure of which the case of prosecution must fail. This is because, Prosecution can only secure a conviction only after establishing all the elements of the offence in compliance with the standard set out in Section 11(2) of the Evidence Act 1975 (NRCD
323) which provides;

> "**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."**

This burden of proof is so fundamental and well-trodden in a myriad of cases and I shall not seek to re-invent the wheel but just to mention the following cases where this basic rule was further enunciated. In the Commissioner of Police v. Isaac Antwi [1961]

GLR 408 the Court held that;

> **"The fundamental principles underlying the rule of law that the burden of proof remains throughout on the prosecution... it always rests on the prosecution to prove the guilt of the accused beyond reasonable doubt."**

Also, Lord Sankey in Woolmington vrs. DPP [1935] AC 462 had earlier stated that, "**... it is the duty of the prosecution to**
prove the prisoner's guilt...

The first issue is to ascertain the age of the victim and according to Prosecution, the victim was 13 years old when the incident occurred. This was confirmed by the victim Fosuaa Mary (Pw3) who testified to the effect that she was 13 years of age at the time of the incident. This was not disputed by accused person during the cross examination of Pw3, nevertheless Prosecution proceeded to confirm same by tendering the National Health Insurance Card of the Pw3 which was tendered and marked as Exhibit D. A perusal of Exhibit D indicates that Pw3 was born on the 6th of December 2010 which meant that she was 12 years 5 months old at the time of the incident. Consequently, Prosecution had established the first element of the offence which is to the effect that at the time of the incident the victim was a child under sixteen years of age.

The second and third issues shall be dealt with together and it relates to whether or not someone had sexual intercourse with the victim and if so whether it was accused person who had sex with the victim shall be dealt with together.

Prosecution called three witnesses to establish its contention with regards to these issues and in a bid to establish the fact that someone had had sexual

intercourse with the victim, Prosecution called the investigator D/Cpl Gideon Ofori Adjei (Pw2) who testified that upon a report being lodged with the police a medical form was issued to the victim and she was subsequently examined by a medical doctor. Pw2 tendered the medical report which was marked as Exhibit F and F1. A cursory perusal of Exhibit F reveals the following observations by the medical officer;

> "on vaginal examination multiple bruised (minor) areas on labia majora with hyperdemic areas on labia minora. No semen observed, hymen completely broken"

Once the hymen of the victim had been broken there was a strong indication that penetration had taken place. However what caused the penetration. This was essential to be ascertained given the fact that, no sexual intercourse can be said to have taken place if penetration occurred by any means other than the male organ. In the case of Robert Gyamfi (alias Appiah) Vrs. The Republic (2019)
JELR 65737 the Court of Appeal observed that, "sexual intercourse (carnal is copula) means that the man should have used his penis

to penetrate the woman's vagina and not by any other means such as the fingers, tongue or stick" and this penetration must not necessarily be something grand but the least degree of penetration of the penis into the vagina is sufficient proof beyond reasonable doubt that there was a sexual intercourse. In this regard, Pw3 testified to the effect that on the day of the incident accused person pushed her unto a mattress took of her skirt and pant, held her mouth and had sexual intercourse with her. The only way by which sexual intercourse can take place is by the insertion of the penis into the vagina of a female thus by her testimony Pw3 sought to say that it was accused person who inserted his penis into her vagina thereby establishing sexual intercourse.

Accused person on his part did not challenge the tendering of Exhibits F and F1 neither did he challenge its contents. He however challenged the fact that he had sexual intercourse with the victim on the day Prosecution alleged the incident took place. For instance he questioned the victim as follows;

> Q. From the 14th of May to the 17th of May 2023 when you mother could not find you, where exactly were you? A. I was at home.

The question that arises is that, if the victim was at home during that period, how then could the accused person have had sex with her since she was at home even on the 15th of May 2023. Pw3 gave subsequent answers under cross examination regarding her whereabouts on the day preceding the day of the incident, the day of the incident and the day after the incident which answers were all very inconsistent even to the point that she indicated that she could not recall the day on which the incident took place. This obviously casts doubt in the case of the Prosecution. It makes one begin to question as to whether it was accused person who actually had sex with the victim, in the sense that, if the victim was at home on the 15th of May 2023 yet someone had sexual intercourse with her, then obviously it could not have been accused person since he does not live in the same house with the victim.

Prosecution's saving grace however was the caution statement of accused person which essentially could be described as a confession statement. The caution statement was tendered and marked as Exhibits A without objection by accused person. In Exhibit A accused person admits having sex with the victim but not on the day of alleged by Prosecution. Exhibit A was taken on the 18th of May 2022 and per its contents accused person states as follows;

> "...about four months ago in…2022, I had sexual intercourse with the complainant's daughter…the victim has a brother who usually comes to stay with me. The victim also comes to my house to call her brother to the house. So through the victim visiting my house that how I had sexual

intimacy with her…After my sexual intimacy with the victim, I left for Kumasi…"

From the above statement, one observes an admission on the part of accused person that he actually had sexual intercourse with the victim. However, his sexual intercourse with the victim was not on the 15th of May 2024 as alleged by Prosecution. In the case of Ekow Russell v. The Republic [2017-2020] SCGLR 469 a confession statement was defined as follows:

> "A confession is an acknowledgment in express words, by the accused in a criminal charge, of the truth of the main fact charged or of some essential part of it. By its nature, such statement if voluntarily given by an accused person himself, offers the most reliable piece of evidence upon which to convict the accused. It is for this reason that safeguards have been put in place to ensure that what is given as a confession is voluntary and of the accused person's own free will without any fear, intimidation, coercion, promises or favours."

In the instant suit, a perusal of Exhibit A indicates that same conforms with the requirements of the law as provided in section 120 of the Evidence Act 1975 (NRCD 323). This Court finds no basis therefore not to rely on same. Moreover, as earlier indicated the said statement were tendered into evidence without objection by accused person.

As to whether accused person can be found culpable of the offence solely on his confession statement, this was answered by the Supreme Court in a Practice Note in the case of State v. Aholo [1961] GLR 626 where Van Lare JSC citing with approval the cases of R. v. Omokaro (1941) 7 W.A.C.A. 146, which also cites the case of R. v. Walter Sykes (1913) 8 Cr. App. R. 233 directed as follows:

> "A conviction can quite properly be based entirely on the evidence of a confession by a prisoner, and such evidence is sufficient as long as the trial judge, as in this case, enquired most carefully into the circumstances in which the alleged confession was made and was satisfied of its genuineness."

Consequently, it is not strange at all if accused person herein is found culpable solely on his confession statement. This court accordingly finds and holds that the penetration of the victim's vagina was perpetrated through sexual intercourse between accused person and the victim. It follows therefore that Prosecution established its case against Accused person with regards to Count One beyond reasonable doubt.

On Count Two which is the charge of threat of death Pw3 alleged that accused person uttered words to wit; "if you tell anyone, I will kill you". Accused person however denied this assertion. Prosecution led no evidence to corroborate same as there were no witnesses to the alleged threat. Hence on this charge, the evidence for and against, in the view of the Court was evenly balanced and certainly must ensure to the benefit of accused person. Prosecution thus failed to establish Count Two beyond reasonable doubt. Accused person is accordingly acquitted and discharged on Count Two.

Given the fact that accused person is a first-time offender as well as a young offender, this Court shall impose the minimum sentence applicable by law. Accused is therefore sentenced to serve a term of imprisonment of seven (7) years imprisonment in hard labour on Count One.

SGD
H/H CHARLES KWASI ACHEAMPONG ESQ.

CIRCUIT COURT JUDGE – GOASO