IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION ON WEDNESDAY THE 6TH DAY OF DECEMBER 2023 BEFORE HIS HONOUR CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE

BR/SY/CT/98/2022

THE REPUBLIC

VRS.

AMADU ALHASSAN

JUDGMENT

On the 30th of November 2023, when the Court was about to read the judgment in this matter, Counsel prayed the Court to be granted leave to file his written Address. Consequently, leave was granted for the said written address to be filed on or before the 4th of December 2023. However, it was not until this morning, the 6th of December 2023 at 8:30am that Counsel filed his written address. Despite filing the address out of time, this Court shall consider the arguments made by Counsel.

At the time of the occurrence of the incident which has brought about the charge against accused person, Prosecution allege that the victim was 13 years of age. At that age, it is alleged that the accused person who was then a 20-year-old young man, nevertheless proposed to the victim who accepted his love proposal and they twain began dating. Their relationship was however not confined to mere dating but metamorphosed into a

sexual one where the two love-birds engaged in sexual escapades over a couple of months.

The father of the victim noticed certain changes in his daughter but since his daughter was not willing to confide in him, he solicited the help of certain elders of his church to whom the victim readily poured out the contents of her heart.

According to Prosecution, this enquiry revealed that, accused person and the victim were in a relationship and often had sexual intercourse together. Furthermore, any time the two engaged in sex, the victim always fell ill. A report was subsequently lodged with the police and accused person was arrested. He was charged with the offence of defilement, arraigned before the Court on the 16th of September 2021 and pleaded not guilty to the offence. This is the brief facts which Prosecution has proffered to support the charge of defilement.

The facts as espoused reveals glaringly that the accused person and the victim were in a relationship which connotes consent on the part of the victim. However, it is trite that in matters of this nature, consent is irrelevant and same can neither absolve the culprit from the consequences of the charge nor can it be considered as a mitigating factor. This is inherently embodied in the section proscribing the conduct as follows:

Section 101(2) of Act 29/1960 which 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"

It therefore did not matter if the accused person and the victim were in a relationship. What was essential is whether the elements of the offence had been met which were;

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

b. Someone had sexual intercourse with the victim; and

c. 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 who testified to the effect that she was 13 years of age at the time of the incident. Counsel challenged Pw1 on this fact by questioning her as follows;

> Q. You stated that you are thirteen (13) years of age in paragraph two of your witness statement? A. That is true.
>
> Q. It is not true that you are 13 years of age, but rather 16 years old?
>
> A. It is not true that I am 16 years of age. I am 13 years old.
>
> Q. Can you tell the Court the year you were born?
>
> A. I was born on the 11th of October 2007.

Hence it must be asked, was Pw1 born on the 11th of October 2007 as alleged?

Prosecution, put the matter to rest by tendering the birth certificate of Pw1 which was marked as Exhibit D. Exhibit D is a birth certificate bearing the name of the victim and indicates that she was born in Goaso on the 11th of October 2007. Counsel sought to challenge the authenticity of Exhibit D when he questioned Constable Agyapong Akosua Salomey (Pw3) as to whether she confirmed through investigations whether the certificate was in fact in the system of the birth and death Registry. When Pw3 answered that she did not know if Exhibit D was in the system or not, counsel put it to her as follows;

> Q. Your failure to ascertain whether the said birth certificate was in the system of the birth and death Registry means that the birth certificate is not genuine?
>
> A. I do not know whether it is genuine or not.

Based on this answer, Counsel at page 12 of his written address filed on the 6th of December 2023 stated;

> "…per the answer given by the prosecution clearly shows that the prosecution woefully failed to proof the age on the birth certificate that was submitted to them and upon which they said the victim was thirteen (13) years of age." (sic).

I think Counsel failed to appreciate the fact that the burden to establish the authenticity of Exhibit D rested upon accused person. Once Prosecution procured a document, which from all indications was the birth certificate of the victim, confirming that the victim was born on the 11th of October 2007, that document (Exhibit D) was prima facie evidence of her age. Since it was accused person through Counsel who was disputing the authenticity of Exhibit D, the onus fully fell on accused person to lead such credible and sufficient evidence indicating that Exhibit D was in fact not authentic, this he failed to do. Section 11(1) of the Evidence Act 1975 (NRCD 323) provides that, "…the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue". Consequently, since accused person through Counsel failed to produce such sufficient evidence proving that Exhibit D was not authentic, his contention must fail.

A cursory assessment of Exhibit D rather contains all the hallmarks of an official document as it bore the file number 658801 as well as an entry number 665. It can therefore be presumed that official duty has been regularly performed and it is regular until any credible evidence to the contrary is given in accordance with Section 37(1) of the Evidence Act 1975 (NRCD 323). This Court therefore finds that, Exhibit D is the birth certificate of the victim and duly establishes beyond reasonable doubt that the victim (Pw1) was 13 years and 10 months old at the time of the incident, clearly falling within the confines of the law.

The second and third issue which has to deal with whether 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.

With regards to these issues, Prosecution called three witnesses and although each witness offered some insight into the matter, the testimony which was very material to the case of Prosecution was the testimony of the victim (Pw1) the relevant parts of which are captured in paragraphs 8 to 22 of her witness statement filed on the 5th of October 2021. She testified to the effect that she was given a mobile phone by elders of her church for evangelism purposes. She however found a mobile number scribbled on the floor of their kitchen and decided to call the number which turned out to be that of the accused person. The two started chatting continuously until such time that accused person proposed love to her which she ultimately accepted. Pw1 indicated that one day, accused person invited her to his house and when she honoured the invitation accused had sex with her in his room. Her vivid narration as to how events unfolded is captured in paragraphs 13 to 15 of her witness statement as follows;

> "13. That when I entered the house we entered his room and I sat close to his bed.
>
> 14. that he then asked me to remove my cloth and I told him I can't and he removed it himself.
>
> 15. that he pushed me unto the bed and had sex with me"

This appears to have been her first sexual intercourse with the accused person because from paragraphs 16 to 21 of her witness statement, Pw1 indicates that subsequent to that initial encounter, she had sex with the accused person severally on other occasions.

Counsel for accused person in cross examining Pw1 asked just one question which was relevant to the allegations made against accused. He questioned her as follows;

Q. Have you ever had sex before?

A. No, I have not.

Having elicited this answer, Counsel immediately ended his cross examination without probing the witness as to why she was accusing the accused person of having had sex with her when she alleged that she had never had sex before.

At page 5 of his written address, Counsel argued as follows;

> "…there cannot be a case of defilement if there is no sexual intercourse or has no carnal or unnatural carnal knowledge of a child under sixteen (16) years of age.
>
> …per the answer given above the victim that "SHE HAS NEVER HAD SEX" and which the prosecution failed to prove and per the evidence on record the prosecution failed to demonstrate to this court that the victim has ever had sex and that if even the victim has ever had sex was linked to the accused person" (sic)

The head and tail of Counsel's argument was simply that since the victim (Pw1) had admitted that she had never had sex, then she had not had sex with the accused person and the case of defilement against accused person must fail.

Unfortunately for Counsel and for that matter accused person, taking into consideration the totality of the evidence on record, the answer given by the victim to the effect that she had never had sex did not necessarily mean that she had never in fact had sex with the accused person before. Based on the evidence on record, her answer rather suggested that prior to the events at hand, she had never had sex with anyone before, in other words, she was a virgin until she met accused person. Clarity would have been brought on this matter had Counsel probed further during cross examination but Counsel felt he could ride on the back of this ambiguous answer given by the victim.

As noted, the evidence on record sufficiently establishes that contrary to the testimony of the victim that she had never had sex before, she had in fact previously had sex. This Court comes to this conclusion for a number of reasons as stated in the below;

i. The medical report.

The medical report dated the 7th of September 2021 was tendered and marked as Exhibit C. By Exhibit C, the victim was examined by a medical officer in the person of Dr. Afrifa Peter Kwaku who indicated in the report as follows;

> "Perineal examination: showed well developed female reproductive organ, with whitish discharge at introitus. No erythema or lacerations were seen. The hymen is broken but not a recent incident.
>
> Impression: Alleged Defilement"

The question then is, was the victim's hymen broken by any other means other than sex? This was answered in the same medical report at page 3 which indicated that penetration was successful and that there was ejaculation into the vagina. To the best of my knowledge, the only organ of the body used in ejaculation is the penis. Consequently, it can be concluded that someone used his penis to penetrate the vagina of the victim thereby tearing the hymen and consequently ejaculated into the vagina. The least degree of penetration of the penis into the vagina is sufficient proof beyond reasonable doubt that there was a sexual intercourse. 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". This Court thus finds that the someone had sexual intercourse with the victim and so it certainly cannot be the case that she has never had sex before.

Who then did the victim have sex with? The answer to this leads to the second reason of the Court. ii. Implied admission by accused person:

As noted earlier, Pw1 narrated in vivid, clear and unequivocal terms how accused person had sex with her the first time as well as subsequent times. Strangely however, neither Counsel for accused person nor accused person himself challenged Pw1 on these rather damning accusations. The law is that, if an accused does not challenge nor controvert the evidence proffered against him, it means that the testimony or the assertion is true or has been admitted by him. (See: Prah and Others v. The Republic [1976] 2 GLR 278, Republic vrs. Eshun (B18/02/2023) [2023] GHACC 192 (20 April 2023) and of Robert Gyamfi (alias Appiah) Vrs. The Republic (2019) JELR 65737). It follows therefore that the person who had sex with the victim is none other than the accused person. This was not a case of mistaken identity where the victim had mistaken the accused person for someone else. "The law is that where the identity of the accused was in issue, there can be no better proof of this identity than the evidence of the person who will swear to have seen him committing the offence". (See: Yamoah and Razak v. The Rep. [2012] 2 SCGLR 750 and Howe v. Rep [2010] 33 MLRG 90 CA). The description given by the victim (Pw1) as to how the events played out leading to the sexual intercourse between her and the accused person could not be deemed to have been something she conjured out of thin air. She knew who the accused person was and confirmed the fact that they were in a relationship, a fact which went unchallenged by accused person during the cross examination of Pw1. It was in his evidence in chief that accused alleged that he was not in any relationship with the victim, clearly an afterthought.

In his Defence, accused person simply sought to allege that the charge against him was actuated by malice on the part of the victim's father who was not in talking terms with him for no reason. If indeed, Pw1's father was not in talking terms with accused person,

can he say so of the victim, who was the one actually accusing him of this unwholesome conduct?

Accused person subsequently called two witnesses, Korankye Juliana (Dw1) and Mariama Alhassan (Dw2) whose evidence had no bearing with the charge against accused person. They simply stated that accused person informed them that complainant was not in talking terms with him. Even if this was the case, this did not derogate from the fact that the accused person had had sex with the victim's young daughter. In any case, granted the complainant was not in talking terms with the accused person, given the facts as established in this case, no reasonable parent in the shoes of the complainant would continue to act as though nothing was wrong between him and accused person. This Court accordingly holds that, the present charge against accused person is not borne out of malice by the victim's father. On the contrary, the evidence on record prove beyond reasonable doubt that, accused person and no other, had sexual intercourse with the victim who was 13 years 10 months old at the time of the incident. Prosecution has consequently, established its case against accused person beyond reasonable doubt. Accused person is found guilty of the offence and hereby convicted. Taking into consideration the fact that accused is a young man who is about 22 years of age and without a previous conviction this court shall seek to impose a sentence that would reform him. However, the court is mindful of the fact that the offence is one abhorred by members of the community within the jurisdiction of the Court yet same is surprisingly prevalent. There is therefore the need to impose a sentence which would deter like-minded persons from committing similar offences within the community. In balancing these factors this court deems it appropriate to impose a term of imprisonment of Nine (9) years in hard labour on Accused person.

SGD
H/H CHARLES KWASI ACHEAMPONG ESQ.

CIRCUIT COURT JUDGE – GOASO