

IN THE CIRCUIT COURT OF GHANA HELD AT CAPE COAST, CENTRAL REGION ON FRIDAY 16TH DAY OF APRIL, 2024 BEFORE H/H DORINDA SMITH ARTHUR, CIRCUIT COURT JUDGE.

SUIT NO. 302/2023

THE REPUBLIC

VRS

EMMANUAL FYNN@ CAESOR

JUDGMENT

I. INTRODUCTION

This is one of such cases akin to a situation where a person catches a bird, pluck the feathers from the bird and present same before an elder to pronounce the type of bird they have presented.

[1] The Accused person was arraigned before this Court on 20/06/2023 for the offence of Defilement Contrary to **Section 101(1) of The Criminal and Other Offences Act, 1960 Act 29**.

[2] The accused person pleaded not guilty to the charge preferred against him for which reason the prosecution assumed the burden of proof and must prove the charge against the accused person beyond reasonable doubt in accordance with;

Section 11(2) of the Evidence Act 1975 NRC 323 states;

“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 will find the existence of the facts beyond reasonable doubt.”

Further, **Section 13(1) of NRCD 323** provides that the standard of proof is nothing less than proof beyond reasonable doubt no matter the offence charged.

See the case of **Ampabeng Vrs Republic [1977] 2 GLR 171 CA**

The prosecution in order to discharge the burden placed upon them called one witness and tendered nine exhibits in evidence.

II. THE PROSECUTION CASE

[3] The summary of prosecution case is that the complainant, Mr. Peter Kwaku Annobil (hereinafter referred to as PW1) is the grandfather of Priscilla Quansah (hereinafter referred to as the survivor). The survivor is fourteen years of age and a student of A beadze JHS and staying with her step father and mother at A beadze Tabosom. According to him he had information that the accused person has been having sexual intercourse with the survivor but when he asked her, she denied. He also heard the survivor has not been sleeping in the house. He enquired from the survivor and she confirmed that she sometimes pass the night in the accused person’s room. He further asked the survivor and she told him accused person had sexual intercourse with her on two different occasions.

[4] Kwabena Tawiah is the step-father of the survivor (hereinafter referred to as PW2) and he testified that during the month of May 2023, the survivor went and passed the night in the accused person’s room. He continued that on 14/06/2023 the survivor left the house in the evening and returned at midnight and her mother informed him.

He then took the survivor to PW1 where she was interrogated and she confirmed that accused person had sexual intercourse with her on two occasions.

[5] Azumi Mohammed (hereinafter referred to as PW3) is the senior sister of the survivor and she testified that the survivor has been going out with the accused for some time and on 14/06/2023 the survivor asked accused person for money to buy provisions for her vacation party the next day. She went with the survivor to accused person's house that same day at 9:00pm and met him with his friend by name Kwaku Moses. He said accused starting pulling her into his room when he saw them but she resisted and run outside leaving behind the survivor and accused person. She said some four boys wanted to rescue them from accused person so they entered the house but accused released his dogs and they boys run away and went and informed PW1. She said the survivor confirmed to her that accused person is her boyfriend and he has had sexual intercourse with her on two different occasions. She said sometimes the survivor goes to sleep in the room of the accused person till day break and she did that on 01/06/2023 so PW3 reported her to PW2.

[6] The survivor testified that accused person is an extended family brother and on 14/06/2023 he met him after school and she asked him for money for her vacation party the next day and accused asked her to come to where he is working at a building. She said that evening, she went with PW3 to accused and he wanted to have sexual intercourse with PW3 but she declined and accused turned on her and said if her sister is refusing then she should allow him to have sexual intercourse with him so that he gives her the money she was requesting.

[7] According to the survivor she refused say her father would beat her if she allows. She said her senior brother met her with accused person and went and informed PW1. The complainant called her and PW3 and asked them what happened and she told him

that accused wanted to have sexual intercourse with them but they refused. She however told PW1 that accused had sexual intercourse with her on two different occasions in the month of May 2023 in his room and he gave her Ghc20.00. She said accused warned her not to tell anybody about it and that made her to keep it to herself until PW1 asked her about it.

D/PW/CPL Grace Ansah Wilson (hereinafter referred to as PW5) is the police investigator and she tended in evidence the caution and charge statements of accused person, the medical report, and birth certificate indicating the date of birth of the survivor as 1st March 2009.

III. EVALUATION OF EVIDENCE AND APPLICATION OF LAW

[8] At the close of case of prosecution, Learned Counsel for the accused person raised submission of no case per **Section 173 of Act 30/60**. Counsel contents that prosecution's case has failed to prove the salient ingredients of the offence of defilement as the survivor on oath denied the allegation against accused person testifying accused has never had sex with her and that she made her statement to the police under duress.

[9] Counsel contends that accused must be acquitted and discharged in compliance with section 173 of Act 30 of 1960 as a case has not been made out sufficiently against him to require him to make a defence.

[10] The submission of no case is upheld as the court is of the view that prosecution's case is circumstantially so weak and based on hearsay that it cannot be relied on to ground a prima facie case against accused sufficiently to require him to make a defence especially so when the survivor denied the sexual acts between her and the accused person. These are my reasons:

[11] The offence of defilement under **Section 101(2) of 1960, Act 29** states that;

“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.”

[12] Consequently, the essential ingredients of the offense of defilement are;

1. That someone has had natural or unnatural carnal knowledge of the survivor
2. That someone is the accused person.
3. That the survivor is under sixteen years of age

See: **ERIC ASANTE V THE REPUBLIC 2017 109 GMJ 1 SC**

[13] To satisfy the court with a conviction the prosecution must prove the aforementioned three ingredients beyond reasonable doubt. The prosecution is required to prove that a crime has been committed but also must link the accused persons to the commission of the crime especially where accused persons pleaded not guilty.

[14] I will deal with all the issues together as they are intertwined but in sequence which is whether or not someone has had natural or unnatural carnal knowledge of the survivor and if accused person is the one who had carnal knowledge of the survivor and the survivor is under sixteen years of age.

[15] The first ingredient which is whether someone has had natural carnal knowledge of the survivor can be proven from the testimony of the survivor. That testimony must be credible and there must be availability of corroborative evidence like a medical report and or other witnesses. The medical report is very important to reveal certain facts which hitherto did not exist. The second ingredient is for prosecution to prove that it was the accused, who had carnal knowledge of the survivor and not any other

person. Here the evidence of the survivor is very crucial and unless there was direct prove of the parties being caught in the sexual act by other witnesses, it is only the survivor who can tell the court her perpetrator. The last ingredient is for prosecution to prove the age of the survivor through some accepted documents proving the age.

[16] The evidence of prosecution is to the effect that someone had natural carnal knowledge of the survivor and that someone is accused person. PW1 testified that he got the information that accused who is his younger brother was having an affair with the survivor his granddaughter. He also got the information that the survivor was not sleeping at home. He continued that when he asked the survivor she confirmed to him that she sometimes spends the night with accused person and that accused has had sexual intercourse with her in his room in the month of May 2023.

[17] The evidence of PW2 was to the effect that the survivor in the month of May 2023 passed the night at accused person's place and he was informed by the mother of the survivor that she repeated that in June 2023. It was based on that report that he sent the survivor to PW1.

[18] PW3 the sister was with the survivor when they went to accused person's place but she left the survivor there as according to her, the accused wanted to have sexual intercourse with her but she resisted. She however left the survivor there. According to her the survivor spent the night with accused.

[19] In proving whether someone had carnal knowledge of the survivor it is important that prosecution provide evidence to show someone used his penis to penetrate the vagina of the survivor. Where there is prove of the least degree of penetration of the penis of the accused person into the vagina of the survivor, it can said the person had natural canal knowledge of the survivor. See **Section 99 of Act 29/60**

supra and in QUEEN V PAPADIMITROPULOUS (1957) 98 CLR 249 where penetration was defined as the physical act of penetration. Thus in proving defilement the requirement of the law is penetration no matter the least degree.

[20] Flowing from above, the evidence of the survivor is very crucial in a sexual offence as she is supposed to be the victim and thus the rightful person to confirm someone had natural carnal knowledge of her. However, even though the survivor filed a witness statement to the effect that the accused person had carnal knowledge of her twice, she denied under cross examination that the accused person has ever had sexual intercourse with her. She went further and explained that she made her statements to the police under duress from PW2.

[21] It is noted that not every doubt in the prosecution's case should enure to the acquittal of the accused. The doubt must be a reasonable one as distinct from a fanciful doubt – See OTENG VRS THE STATE [1966] GLR 352 AT 314.

For as Denning J (as he then was) said in MILLER VRS MINISTER OF PENSIONS [1947] 1 ALL ER 372 AT 373 “the law will fail to protect the community if it admitted fanciful possibilities to deflect the course of justice”.

[22] In the instant that the sexual victims testify and do not deny the sexual act, the court is advised to seek for corroborative evidence as against relying on the evidence of the survivor alone. See R V HENRY AND MANNING [1969] 53 CRIM APP REP 150 per Salmon J. The court held inter alia that

“... it is really dangerous to convict on the evidence of a woman or girl alone. This is dangerous because human experience has shown that in these courts, girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such

stories are fabricated for all sorts of reasons, which I need not enumerate and sometimes for no reason at all.”

[23] Even though this is an English case and is of persuasive influence only, it is of such great importance that the court cannot ignore that precedent for the weight it carries. This is because there are a lot of instances where the survivors have not been candid with the courts.

[24] From the evidence of the survivor, the court can infer that she is either lying to the court through her evidence or that she lied earlier to prosecution as the answers she gave during cross examination are in contrast to her own witness statement and the statement she gave to the police at the police station. whichever way the evidence of the survivor is looked at, she cannot be deemed as a credible witness to prosecution as her evidence cannot be worthy of credit or given much weight.

[25] Furthermore, the police general medical report revealed that the vagina of the survivor showed no obvious scars or abrasions around the perineum. This examination report is supposed to be for a girl who had past the night with accused person who allegedly had sexual intercourse with her. It was the morning she returned home that she was sent to PW1 and the case was reported for her to be examined. And yet there was no abrasions found in her perineum. Even so, the medical report alone cannot be relied on as there is nothing in it to link accused person to the offence of defilement in the absence of credible evidence from the survivor the supposed victim.

[22] In the absence of the survivor’s credible evidence, it can safely be inferred that there is no direct evidence from the other prosecution witnesses to give firsthand or direct account of what happened and prosecution could not also provide circumstantial evidence that links the accused person to the crime of defilement.

[23] Therefore, it can safely be inferred that prosecution could not lead sufficient evidence to prove carnal knowledge of the survivor by the accused person. Hence, the first and second elements of defilement were not proven beyond reasonable doubt.

[24] Here, prosecution could not lead cogent evidence to prove all the elements of the offence of defilement against accused person as required of them because the adduced evidence is circumstantially so weak and based on hearsay that it cannot be relied on to ground a prima facie case against accused person. Prosecution evidence is insufficient.

[25] Under **Section 173 of Act 30, 1960** where *“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.”*

[26] Here, the court is to do a balancing act at the close of the case for the prosecution to ensure that prosecution has led evidence to support the essential ingredients of the offences charged.

See **TAGOR V THE REPUBLIC [2009] 23 MLRG 78 at 132** where the Court of Appeal held that:

The paramount consideration in deciding whether prima facie case has been made or not is; whether the prosecution has proved all the essential ingredients or pre-requisites of the offence charged. No prima facie case is made where the prosecution was unable to prove all the essential ingredients. Even if one of the ingredients is not proved, the prosecution fails and no prima facie case is made.

[27] Here, two of the essential ingredients of defilement were not proved beyond reasonable doubt as the survivor, the supposed victim, denied under

cross examination that accused person had sexual intercourse with her. Hence, the court can say no prima facie case is made against accused person to require him open his defence.

[28] Therefore, after the balancing act of the evidence adduced by prosecution, if the court cannot convict the accused person on the evidence so led without any reasonable explanation then submission of no case should be upheld. This is because the accused person cannot add up to the prosecution's case where at the close of its case, the prosecution is unable to establish a prima facie case against the accused person.

See MALI VRS. THE STATE (1965) GLR 710 – 715 ; STATE V. ANNAN (1965) GLR 600-612 and ASARE V. THE REPUBLIC (1978) GLR 193 – 199

[29] Therefore, the burden of proof remains throughout the trial on the prosecution and the accused person is not required to prove anything. In PUBLIC PROSECUTOR V. YUVAVAG (1935) 25 CR. APP R 72 AT PAGE 95 the court held that

- “Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact, it is sufficient for his acquittal if any of the acts which if they existed would constitute the offence with which he is charged are not proved.”

[30] Consequently, the court is not permitted to call the accused person for further evidence before ruling on a submission of no case where prosecution has not proved the essential ingredients of the offence.

In sum, the case for the prosecution is considered as having collapsed.

[31] Consequently, prosecution could not establish any prima facie case against the accused person for the court to call him to open his defence. The evidence adduced by prosecution failed to proof all of the three ingredients of the offence of defilement. It is a principle of law that in order to justify a conviction, the evidence adduced against the accused should attain a degree of certainty. See **MOSHIE V. THE REPUBLIC [1976] 2 GLR 310.**

[32] The court hereby enters submission of no case in accordance with **Section 173 of Act 30** and accordingly, acquits and discharges the accused person on the offence of defilement.

H/H DORINDA SMITH ARTHUR

ACCUSED PERSON PRESENT.

PROSECUTOR: C/INSP. MUMUNI MOHAMMED FOR THE REPUBLIC PRESENT.

EUGENE LARBI APPIAH ESQ. FOR ACCUSED PERSON PRESENT.