

**IN THE CIRCUIT COURT “A”, TEMA, HELD ON TUESDAY, THE 23RD DAY
OF JANUARY, 2024, BEFORE HER HONOUR AGNES OPOKU-BARNIEH,
CIRCUIT COURT JUDGE**

SUIT NO: D10/02/22

THE REPUBLIC

VRS:

STEPHEN McCARTHY

ACCUSED PERSON

PRESENT

**D.S.P. STELLA NASUMONG, HOLDING THE BRIEF OF A.S.P. GEORGE
DOE FOR PROSECUTION**

PRESENT

PRINCE KWEKU HODO, ESQ. FOR THE ACCUSED PERSON **ABSENT**

JUDGMENT

FACTS:

The accused person was charged and arraigned before this Court on 28th September, 2021 on a charge of defilement contrary to **Section 101(2)** of the Criminal Offences Act, (1960) Act 29.

The brief facts as presented by the prosecution are that the complainant is a labourer and lives at Abonkor, a suburb of Tema Newtown. The victim, Beauty Kugblenu was aged 10 years at the time of the alleged incident and lives with her mother, Vida Ansah at Manheam, a suburb of Tema Newtown. The accused person was also aged 25 years, a labourer and lived in the same house with the victim and her mother in a kiosk. The prosecution alleges that on 18th September 2021 at about 9:30 pm, the victim returned home after she had gone out to sell fruits with her elder sister. The accused person helped the victim pack the bench and basket containing fruits into a room. The prosecution again states that the accused person who had earlier proposed

love to the victim lured her to the back of the bathroom, removed her pant, made her bend down and inserted his penis into her vagina and forcibly had sexual intercourse with her through her back. Due to the sexual act, the victim sustained bruises and bled. The accused person covered the victim's mouth with his hand to prevent her from shouting. The victim managed to run away from the accused and fell on a plastic bowl which got broken. On 19th September 2021, the victim disclosed her ordeal to Hawa Mohammed. The complainant who had information about the incident confronted the accused person got him arrested and handed him over to the Fishing Harbour Police. The complainant was later referred to lodge a formal complaint with the Regional Domestic Violence and Victim Support Unit which he did. A Police medical form was also issued to him to send the victim to the hospital for examination. After investigations, the accused person was charged with the offence and brought before this honourable court.

THE PLEA

On 28th September 2021, the accused person who was then self-represented pleaded not guilty to the charge after it had been read and explained to him in the Twi language. The accused person having pleaded not guilty to the charge put the facts of the prosecution in issue and thereafter the prosecution assumed the burden to prove the guilt of the accused person beyond reasonable doubt. Subsequently, the accused person engaged the services of a lawyer to represent him at the trial.

BURDEN OF PROOF

It is trite learning that a person charged with a criminal offence is presumed innocent until he has pleaded guilty or proven guilty. See **Article 19(2)(c)** of the 1992 Constitution. This burden and standard of proof required of the prosecution in criminal cases is codified in the **Evidence Act, 1975, NRCD 323, Section 11 (2) and 13 (1)** which respectively provides as follows: —

"11(1) In a criminal action, the burden of producing evidence when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt."

Section 13 (1)

"13(1) In a 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 reasonable doubt."

Further, in the case of **Tsatsu Tsikata v. The Republic [2003-2005] 1GLR 296**, the Supreme Court held in its holding 5 that:

"... As provided in section 11(2) and (3) of the Evidence Decree, 1975 (NRCD 323) on the part of the prosecution, the burden of producing evidence required the production of sufficient evidence so that on all the evidence, a reasonable mind could find the existence of facts beyond reasonable doubt, whilst on the part of the accused person, the burden of producing evidence required him to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to his guilt."

Thus, the burden is on the prosecution to prove the essential ingredients of the charge of defilement against the accused person beyond reasonable doubt. When the accused person is called to open his defence, what is required of him is to raise a reasonable doubt in the case of the prosecution. The standard of proof on the defence is on a preponderance of probabilities only. **See Section 13** of the Evidence Act, 1975(NRDC 323).

ANALYSIS

In the instant case, the accused person is charged with defilement contrary to **section 101(2)** of Act 29. **Section 101(2)** of Act 29, states 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 is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years.”

Defilement is defined in **Section 101(1)** of Act 29 as *“the natural or unnatural carnal knowledge of a child under sixteen years of age.”*

The Court of Appeal in the case of **Charles Twumasi v. The Republic**, *Suit No. H2/24/2018 (unreported)*, delivered on 13th February 2020, stated, inter alia, that to succeed on a charge of defilement, the prosecution must establish the following essential elements;

1. That someone has naturally or unnaturally carnally known the victim,
2. It was the accused person who carnally knew the victim,
3. The victim was under sixteen years old at the time the accused person carnally knew her, and;
4. Consent of the child is immaterial.

Firstly, **the prosecution must prove that the victim is a child below the statutory age of 16 years.** Here, the fact that the victim is a child below 16 years is not in dispute. The victim at the time of testifying on 23rd November 2021 gave her age as twelve years old. The second prosecution witness, the investigator testified that during investigations, the complainant brought the victim's birth certificate and she realised that the victim was born on 23rd November 2009 indicating that at the time the accused person had sexual intercourse with her, she was eleven (11) years old. The prosecution also tendered in evidence the birth certificate of the child admitted and marked as **Exhibit “C”** which shows that the victim was born on 23rd November 2009. Thus, at the time the incident is alleged to have occurred on 18th September

2021, the victim was below the statutory age of 16 years. The prosecution therefore succeeded in establishing the age of the victim beyond a reasonable doubt.

Secondly, **the prosecution ought to prove that someone had sexual intercourse with the victim.** Section 99 of Act 29, states that “*where on a trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal or unnatural carnal knowledge is complete on proof of the least degree of penetration.*” In the English case of **R v. Hughes** (1841) 9 C & P at 752, it was held that for purposes of proof of penetration, it is sufficient if the prosecution lead evidence to show that any part of the virile organ of the accused was within the labia of the pendulum of the female, and however slight this may be, it is sufficient to establish penetration.

To prove that someone had sexual intercourse with the victim, the prosecution called four witnesses. The first prosecution witness, the alleged victim testified that the complainant in the case is her father and that she lives with her mother in Manhean, a suburb of Tema. The first prosecution witness testified that about a month ago in the evening, she had closed from the place where she sells fruits with her elder sister. She asked the accused person who she only knew as Jojo to assist her in packing the bench and the basket of fruits into a room. At the time of packing the bench and fruits the accused person proposed love to her and she turned him down. The accused person then held her hands and dragged her to the back of the bathroom, removed her panties and his as well, covered her mouth with one of his hands, made her bend down and inserted his penis into her vagina and forcibly had sexual intercourse with her through her back. She could not have shouted for help because the accused person covered her mouth.

The first prosecution witness further testified that after the accused person succeeded in having sexual intercourse with her, he left her and in the process of running away from the scene, she fell on a plastic bowl which got broken. When she got home, she felt pains in her vagina and when she bent down to check, she realised blood was flowing out of her vagina. The following morning, when she could not stand the pain, she informed Hawa Mohammed who is also a tenant in their house and she confronted the accused person's brother whom the accused person lives with that the accused person had had sexual intercourse with the victim. The brother of the accused person invited the accused person and confronted him with the issue but the accused person denied having sexual intercourse with her.

The victim further testified that whilst the discussion of the issue was going on, the complainant who is her father appeared at the scene, arrested the accused person in her presence and sent him to the Tema Fishing Harbour Police Station. After reporting the case, her father took her to the hospital where she was treated and discharged. Later, she gave her statement to the police and visited the scene of the crime with the investigator where she showed the police the back of the bathroom as the place where the accused person had sexual intercourse with her and pictures were taken. She also showed the investigator the broken plastic bowl on which she fell and she took photographs of same. The witness under intense cross-examination by Counsel for the accused person was insistent that the accused person had sexual intercourse with her.

The second prosecution witness, Mr. Michael Kugblenu testified that on 8th September 2021, he received a phone call from a strange number asking him to rush to Manhean Last Stop, Tema Newtown where his ex-wife lived with his daughter, the alleged victim in the case. He quickly called his ex-wife on the phone to know what had happened but she told him that she had travelled so she did not know what had happened. He rushed to the said house and met the accused person seated on the

ground surrounded by a lot of people. He approached the crowd and met the victim crying and a woman told him that the accused person had had sexual intercourse with the victim. He quickly arrested the accused person and took him to the Fishing Harbour Police Station together with the victim where he lodged a formal complaint and handed the accused person over to the police. The police issued him with a Police Medical Form to take the victim to the Tema General Hospital which he obliged. After treatment and discharge of the victim, the doctor wrote his report and signed the medical form which he returned to the police. He was later referred to the Regional DOVVSU where the investigator assigned to the case took his statement. He told the police that the victim was 10 years old and the police requested the birth certificate of the child and he produced same to the police.

The third prosecution witness, the investigator also testified that on 20th September 2021, she was on duty at about 11:00 am when the instant case was referred to her by her unit coordinator for investigations. She read the diary of action and got to know that the second prosecution witness reported that the accused person herein had sexual intercourse with his 10-year-old daughter. During investigations, she interviewed the complainant and the victim in the case and took their statements. The victim also confirmed the sexual intercourse that the accused person had with her and recounted to her how the incident happened. The victim told her that after sexual intercourse with the accused person, she bled from the vagina. She issued a police medical report form for the complainant to send the victim to the hospital but the complainant told him that he had already been issued one and had taken the victim to the hospital and he returned the endorsed medical form. The medical report form was admitted and marked as **Exhibit “D”**.

The third prosecution witness further testified that the accused person was arrested and brought to the police station and during interrogations, he confirmed the account of the victim that he forcibly had sexual intercourse with her after helping her to pack

fruits. The accused person volunteered a caution statement in the presence of an independent witness which was admitted and marked in evidence as **Exhibit “A”**, after a mini-trial. She later asked the accused person to lead her to the back of the bathhouse he told her that he had sex with the victim. The accused person led her to a compound with a lot of kiosks inhabited by people including the accused person, the victim and the victim’s mother at Manhean, Tema, New Town. At the said compound, she asked the accused person to lead her to the back of the bathhouse he told her he had sex with the victim on 18th September, 2021. She then invited the victim to the scene and she confirmed that indeed that was the spot where the accused had sex with her. She also showed her a broken plastic container which she fell on whilst running away from the accused person. She took photographs of the scene of the crime and tendered same as **Exhibits “E” and “E1”**. After investigations, she charged the accused person. She tendered in evidence the charge statement of the accused person admitted and marked as **Exhibit “B”**.

The medical officer who examined the victim also testified as the fourth prosecution witness. In his testimony before the court, the medical doctor stated that a vaginal examination of the victim revealed a broken hymen, there was a laceration at the interior vagina region and at the time of examination, sperms and blood were seen. He then gave the patient post-exposure prophylaxis and the victim was counselled. The doctor testified that he saw the patient a day after the alleged sexual intercourse. From the medical report, **Exhibit “D”**, Dr Alhassan Hanifa stated that a vaginal examination of the victim revealed a broken hymen, laceration at the anterior vaginal region, blood seen, and sperms seen. The date of issue of the medical form is 19th September 2021. During cross-examination of the witness by Counsel for the accused person, counsel challenged the probative value of the medical report filed by the doctor since the report of the semen analysis and the blood allegedly seen by the doctor at the time of examination of the victim was not produced in court. It is trite that medical reports like all expert evidence are not dispositive and the final decision on whether or not there has been carnal knowledge remains with a judge.

In the case of **Godfred Ocansey v. The Republic** (unreported), [Suit No. 26/200] delivered on 4th March, 2004, the Court of Appeal per Apaloo JA held that:

“The question of medical evidence and its “conclusiveness or inconclusiveness” ought not attract any arguments in this appeal. There are authorities and these are legion that say that expert opinion cannot determine the ultimate issue to be decided by the Court. Expert opinion only assists the Court and the Court is not at all bound by such opinion. “

Thus, the medical report alone cannot determine the material fact in issue although it acts as confirmatory proof of the allegation made by the victim. In the instant case, the court found the testimony of the victim to be credible since she remained unshaken in her evidence that the accused person had sexual intercourse with her after assisting her in packing the fruits. The incident was reported and the following day, the victim visited the hospital for examination which confirmed the sexual assault. On the totality of the evidence led by the prosecution and the defence put up by the accused person, I hold that the prosecution established that someone had sexual intercourse with the victim.

On the third ingredient of the offence, **the prosecution must prove that it was the accused person and no other person who had sexual intercourse with the victim.** The prosecution witnesses were emphatic and unshaken in their testimonies before the court that it was the accused person and no other person who had sexual intercourse with the victim. The accused person in his investigation caution statement admitted and marked as **Exhibit “A”**, taken on 20th September 2021 stated that he lives on the same compound with the victim, her mother and sister and that the victim always comes for his mobile phone to watch movies. He states that even though he does not know the age of the victim, on Friday, 17th September 2021, at about 8:30 pm, the victim was with her mother who sells fruits in front of their house. The victim sat beside him and took his phone that she was watching movies on which

made him propose love to her but the victim did not give him an answer until the next day when the victim informed him that she was not interested in him and that a certain man had bought indomie for her that he would have sex with her with a condom.

On Saturday, 18th September 2021, at about 9:30 pm, the victim was packing the fruits to the house and she asked him to help her with the bench which he did. When they got to the house, he lured her to a section of the house where a tenant fries pastries and started fondling her and she removed her pant and he also opened his zip and inserted his penis into her vagina and had sex with the victim in a standing position. In the process of having sex with her, she became angry and asked him to stop which he did and they both left the scene. In the charge statement of the accused person, **Exhibit “B”**, taken on 23rd September 2021, the accused person denied having sexual intercourse with the victim.

The position of the law is that a court can convict based on the confession of an accused person provided the confession was genuine and untainted. In the case of **Billa Moshie v. The Republic** [1977] 2 GLR, 418, CA, in its holding 2 stated:

“A conviction could quite properly be based entirely on the evidence of a confession by a prisoner, and such evidence was sufficient as long as the trial judge inquired most carefully into the circumstances in which the alleged confession was made and was satisfied of its genuineness”

Also, in the case of **Ekow Russel v. The Republic** [2017-2020] 1SCGLR at 469, the court held in its holding 6 that:

“it was correct to state that the admission of a statement by a court did not necessarily mean that the statement was of evidential value so as to automatically result in conviction. A statement that was admitted into evidence must be weighed to determine whether it was valuable enough to sustain the conviction sought.”

The court therefore must examine the alleged confession statement to determine its genuineness. In the instant case, Counsel for the accused person objected to the admissibility of the caution statement and alleged that the statement was not voluntarily taken. The Court conducted a mini-trial and after that found the investigation caution statement of the accused person to have been voluntarily given. The accused person in his evidence on oath testified that on 18th September 2021, at about 9:30 pm, he was at home when his brother called him to come to the house. When he got there, he saw his brother chatting with a lot of people at the back of the house. His uncle and one of the relatives of the victim told him that the victim had alleged that he had sexual intercourse with her the previous day in the evening which he denied having had sexual intercourse with the victim. According to him, after telling them that he was innocent, the father of the victim and one gentleman in military uniform subjected him to beatings and sent him to the police station. The next day they took him to DOVVSU Main Harbour. During interrogation, he told her that he did not know anything about the allegation levelled against him. After several questioning, he still maintained that he did not have sexual intercourse with the victim and the investigator began to threaten him and used a taser on him. Out of fear, he stated that he had sexual intercourse with the victim. They visited the scene of the crime and photographs were taken after which he was sent back to custody.

Under cross-examination of the accused person by the prosecution, he stated that portions of his statement that he assisted the victim to pack fruits were made by him and that the victim told him that a certain man had said that he would buy indomie for her and in return have sexual intercourse with her. The accused person maintained that he only stated that he had sexual intercourse with the victim because the investigator threatened him whilst he was giving his statement. The accused person further stated that he was crying when the investigator was taking his statement so he was surprised that the investigator stated that he had sexual intercourse with the

victim. The accused person further stated that in the house of his brother, he admitted the offence based on the beatings that they subjected him to.

The court has perused the statement of the accused person and is satisfied that his testimony on oath which is inconsistent with her statement to the police is not worthy of credit. The narration of the accused person in his statement confirms the account given by the accused person on how the sexual intercourse took place between herself and the accused person. Quite apart from the confession of the accused person, there is ample evidence implicating the accused person in the crime charged. The victim, a child of sound mind was emphatic and positively identified the accused person as the person and no other person who had sexual intercourse with the victim. The victim could not also be mistaken as to the identity of the accused person since they live in the same house and are known to each other. The statement of the accused person that the victim consented to the sexual intercourse and only withdrew her consent at the last hour is untenable since the victim, being a person below the age of sixteen (16) years at the time of the alleged incident is incapable of consenting to sexual intercourse and any such consent, even if given by the victim is void.

On the totality of the evidence led by the prosecution and the defence put up by the accused person, I hold that the prosecution proved their case beyond reasonable doubt that it was the accused person and no other person who had sexual intercourse with the victim at a time when the victim was below the statutory age of sixteen (16) years. I therefore pronounce the accused person guilty of the charge and convict him accordingly on a charge of defilement contrary to **Section 101(2)** of the Criminal Offences, 1960 (Act 29)

SENTENCING

In sentencing the convict, the court takes into consideration his plea in mitigation of sentence, the fact that he is a first-time offender, and the youthful age of the convict who was aged twenty-six (26) years at the time of the incident. In accordance with **Article 14(6)** of the 1992 Constitution, time spent in custody pending trial is considered. The court also considers the impact of the defilement of the defilement on the reproductive and emotional health of the child.

I therefore sentence the accused person to serve a term of imprisonment of Fifteen (15) years in hard labour.

Consequential Order

Psychological counselling is recommended for the child victim.

SGD.
H/H AGNES OPOKU-BARNIEH
(CIRCUIT COURT JUDGE)