CORAM: HER WORSHIP (MRS.) ROSEMARY EDITH HAYFORD, SITTING AS DISTRICT MAGISTRATE, DISTRICT COURT "B", SEKONDI ON 16TH FEBRUARY, 2023

CC NO.58/2020

THE REPUBLIC

V

JONAS FORDWOUR

TIME: 9:00 AM

ACCUSED PRESENT

COMPLAINANT ABSENT

CHIEF INSPECTOR JENNIFER BOAKYE ACHEAMPONG FOR THE REPUBLIC - PRESENT

F. F. FAIDOO FOR THE ACCUSED PERSON - ABSENT

JUDGEMENT

The accused person herein is charged with Publication of obscene material contrary to section 280 of the Criminal Offences Act 1960, (Act 29) and Emotional Abuse contrary to section 1(b)(iv) of the Domestic Violence Act 732 of 2007.

He pleaded not guilty to both charges and so the prosecution assumed the burden to prove the guilt of the accused beyond reasonable doubt.

FACTS OF THE CASE

The facts in support of the charges are that the complainant is a teacher and resides at Safokrom while the accused is an evangelist and resides at Ketan a suburb of Sekondi. The complainant and the accused person were in a relationship for about 7 years. The relationship got sour for lack of trust and the complainant threatened to break up with the accused. During the relationship, the complainant engaged the accused and he created a Facebook account for her. As a result, the accused became familiar with her username and password. On 25/04/2020 the complainant went to the accused and told him she could no longer be in the relationship. The accused then demanded to have his final sex or take monetary compensation from the complainant else he will defame her. The complainant refused the demand of the accused and left. That same day the accused logged into the complainant's Facebook account and posted a secretly recorded sexual intercourse he had with her in his room. The video went viral on social media and persons who had access to viewing it started calling the complainant and prompting her about the video. The accused also sent said video to the complainant via WhatsApp. On 26/04/2020, the complainant reported the matter at the Sekondi Police station and the accused was arrested. An investigation cautioned statement was obtained from him and after investigations, the accused was charged with the offence and put before this honourable court.

It is trite that in criminal prosecutions it is the prosecution that carries the burden to prove the guilt of the accused person beyond reasonable doubt. The accused has no such burden to prove his innocence. All he needs to do is to raise a doubt in the case of

the prosecution. This is expressed in ***section 11(2) of the Evidence Act 1975, NRCD 323*** which provides that:

> ***"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 reasonable doubt"***.

At the end of the case for the prosecution however, the prosecution is only expected to have established a prima facie case which means that they should have proved all the ingredients of the offence to require the accused to open his defence. Proof beyond reasonable doubt is considered at the end of the entire trial where the accused has entered his defence. (**SEE TSATSU TSIKATA V THE REPUBLIC [2003-2004] SCGLR 1068)**

In an effort to discharge its burden therefore, the prosecution led evidence through three witnesses, the complainant PW1, the sister of the complainant PW2 and the investigator D/Inspr. Roland Sakiya. It must be noted that a witness statement was filed for one Saviour Adatsi as PW3. However, he failed to appear in court hence the said witness statement was struck out as withdrawn. Thus, the investigator became PW3.

PW1 told the court that she was in a relationship with the accused person for 7 years however, as a result of some misunderstandings and mistrust between them she decided to opt out of the relationship. On 25/04/2020 she communicated the same to the accused person who did not take kindly to that and demanded sex or monetary compensation otherwise he would do something untoward to her. PW1 said she refused and left for her house. On that same day while at home she switched on her data and saw a nude video of her having sex with the accused person with his face

hidden. Said video was sent to her via her WhatsApp and Facebook accounts/page with a message asking her why she had recorded a nude video of herself and published same on her Facebook messenger page. According to the complainant after analyzing the video very well, she realized it was a sex video of her and the accused in his room. PW1 says she suspected that the accused person did the recording and circulated same because he created her Facebook account for her and the accused is familiar with her username and password. PW1 further stated that she received calls from PW2 and one Saviour in respect of the said nude video they have intercepted on social media. PW1 subsequently reported the matter to the police.

In cross-examination accused sought to impugn the testimony of PW1 by suggesting to her that PW1 decided to quit the relationship because the accused could not meet his excessive monetary demand and for that matter PW1 manufactured the complaint against the accused person.

PW2 is the sister of PW1 and they are friends on Facebook as well as the accused person. PW2 told the court that she received a video from PW1's Facebook account on 25/04/2020, however, she opened the same on 26/04/2020. She realized it was a nude video of PW1 having sex with a man. She immediately called PW1 and enquired about the video. PW1 informed her that it was her boyfriend the accused who secretly recorded her having sex with him and posted the same on social media. PW2 further told the court that, PW1 indicated to her that the accused person created the Facebook account for her and he was the only person who was familiar with her username and password. Further that she had had problems with the accused lately and had decided to end the relationship with him. However, unknown to PW1 the accused had secretly recorded her and circulated the same on her Facebook account for public ridicule. According to PW2, she advised PW1 to report the matter to the police. She then

accompanied PW1 to lodge the complaint at the police station as well as give her statement.

In cross-examination it was suggested by counsel for the accused that since PW1 was pregnant, it was the one who impregnated her that was captured in the video and that PW1 was promiscuous and had many lovers. This was vehemently denied by PW2.

PW3 D/Inspr. Roland Sakiya is the detective assigned to the case. He said he got to know the accused person and all the witnesses through the conduct of this case. He further told the court that on 26/04/2020 he was on duty when PW1 in the company of PW2 reported a case of publication of obscene material, and emotional abuse under the domestic violence act against her boyfriend, the accused person. The case was referred to him to investigate. PW3 said he obtained statements from PW1 and PW2 as well as one Saviour Adatsi. He also viewed the obscene video on PW1 and PW2's phones. PW3 further stated that on that same day, PW1 led the police to the accused person's house at Ketan a suburb of Sekondi and identified him as the culprit. The accused was apprehended and sent to the station together with the exhibit phone, Samsung galaxy A20 which was tendered and marked as **Exhibit A.** Accused person gave his written investigation cautioned statement and the same was tendered as **Exhibit B**. PW3 further said that on that same day, he took the accused person and PW1 to the scene for inspection and enquiry. At the scene items that were captured in the obscene video which included a bedsheet and pillow case were tendered as **Exhibit C.** The Bible and pomade found in the room were also tendered and marked as **Exhibits D and E** respectively. Pictures of the scene were also taken and same tendered as **Exhibit F.** PW3 further tendered the order granted the police for the retention and examination of Exhibit A as **Exhibit G**. According to PW3 on 8/5/2020 Exhibit A was sent to the Cybercrime Unit CID headquarters in Accra for forensic examination. The Forensic

Report and its appendices as well as the video footage on a pen drive were tendered as **Exhibit H** and **L** respectively. PW3 further tendered the accused person's further written investigation cautioned and charged statements and the same were tendered and marked as **Exhibits J** and **K** respectively. PW3 stated that the accused was charged with the offences and put before this court after investigations.

At the close of the case for the prosecution, the court ruled that the prosecution had been able to establish a prima facie case against the accused person in respect of the charge of Publication of obscene material contrary to section 280 of the Criminal Offences Act 1960, (Act 29) but however failed in respect of count 2 which is Emotional Abuse contrary to section 1(b)(iv) of the Domestic Violence Act 732 of 2007 after a submission of no case was filed by Counsel for the accused person. The accused person was therefore discharged on count 2 and ordered to open his defence in respect of count 1.

Whereas the duty of the prosecution is to establish the guilt of the accused beyond reasonable doubt, it is incumbent on the accused person only to raise a doubt in the evidence of the Prosecution. The accused person will be required to lead evidence that will rebut the presumption of quilt raised by the prosecutions. The burden of proof will then shift to the accused to introduce sufficient evidence to avoid a ruling against him on the issue as stated in s. 11(1) of NRCD 323

The extent of the onus of proof on the accused was well summarized in the celebrated case of **Woolmington v Director of Public Prosecution [1953] AC 462** at **481 HL** where **Sankey LC** noted:

"…while the prosecution must prove the guilt of the prisoner, there is no such burden on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his quilt; he is not bound to satisfy the jury of his innocence"

Leading the accused person in evidence by his counsel, the accused person stated that he is an evangelist and that the complainant (PW1) was his fiancée for about 6- 7 years. He said that during the period of the relationship they did everything as a married couple, they communicated on phone, and sometimes visited each other however they were not engaged in any sexual act. The accused person further stated that he has seen the video for which he has been charged however he is not the man in the said video and the penis shown in same is not his. He sees the charge as a frame-up and that he was not the one who sent the video.

The accused was charged with the Publication of Obscene Material contrary to section 280 of the Criminal Offences Act 1960, (Act 29)

Section 280 of Act 29 provides

"**Publication or sale of obscene Material**

A person who publishes or offers for sale an obscene book, writing or representation commits a misdemeanor"

The elements or ingredients therefore to be established by the Prosecution would be

1. ***That there must be a material that is obscene***
2. ***That the said obscene material was published***
3. ***That same was published by the accused person***
4. ***The purpose is to deprave the recipients***

In their questto prove the above elements, the prosecutor tendered **Exhibit L** through PW3. This is a video footage of a male having sexual intercourse with the complainant (PW1). A view of the said **Exhibit L** leaves no doubt of its obscenity. From the evidence, it was also obvious that the said **Exhibit L** was published. PW1 and PW2 both received the said video on their Facebook pages. And indeed, PW1 also received a copy on her WhatsApp page via **Exhibit A** (the Samsung Galaxy A20 that was retrieved from the accused person at the time he was arrested). I shall come to this later in this judgment regarding the ownership of the said phone. Further on page 4 under findings the first paragraph of **Exhibit H**, which is the report on digital forensic examination on **Exhibit A**, it was clearly stated that on 25th April 2020, the video (Exhibit L) was sent from PW1's Facebook Messenger account to one hundred and fifty (150) friends of the Complainant. This lends credence to the fact that Exhibit L was published. Below is the exact point.

> "*Checks on exhibit phone "Samsung Galaxy A20" revealed that, on 25th April 2020 between 11:46 am and 4:24 pm, the video file "20190914_162147.mp4" was sent from "Gloria Tawiah" Facebook Messenger account to One Hundred and Fifty (150) friends of victim Gloria Tawiah. Ref. Appendix J1-J3*"

Now the court must establish whether or not it was the accused who posted or published the said video. I shall tackle the ownership of Exhibit A that was challenged by the accused person during his cross-examination. Accused alluded to the fact that there are a lot of Samsung Galaxy A20s in Ghana and what was sent could be for anyone . It must, however, be noted that during Case Management Conference (CMC) the accused was asked whether he had been served with all disclosures and witness statements that the prosecution intended to rely on and he answered in the affirmative.

Q. Accused Person have you been served with all the materials for disclosure that prosecutor intends to rely and the witness statements?

A. Yes

Besides the above, at the time Exhibit A was being tendered as that of the accused person's, no objection whatsoever was raised from the accused person or his lawyer. It was then admitted into evidence. No alternative phone was tendered by the Accused as his apart from Exhibit A. Strangely enough the accused person under cross-examination confirmed that the phone belongs to him but says it was manipulated. Below is what transpired on the 13th of August, 2022 at page 66 of the record of proceedings

Q. I am putting it to you that nobody or the CID manipulated your phone.

A. ***<u>The phone belongs to me</u>*** *and I know what I do on the phone, it has been manipulated*

Clearly from the above, the accused person admits that the phone belongs to him, it is therefore my considered view that the accused knew at all material times that Exhibit A was his, he cannot now turn around and deny the same is not. I find that Exhibit A is for the accused person and it is the same Samsung Galaxy A20 that was retrieved from him at the time of his arrest.

It must be noted that it was based on this phone that the forensic examination was conducted and a report (Exhibit L) was produced. As I indicated earlier, said Exhibit L was never objected to. And in fact, none of the exhibits tendered by the prosecution was objected to by the accused person. From **Exhibit L** it was realized that the obscene video was taken by exhibit phone **Exhibit A**, the property of the accused person, and the said video was taken on the 14th of September, 2019. The findings on page 3 of Exhibit L

further show that Exhibit A, (Samsung Galaxy A20) sent the said video on PW1's WhatsApp page. In **Exhibit L** it was stated that "*WhatsApp account name "Jhonas" registered with phone number ±233271166099 was found on exhibit phone "Samsung Galaxy A20" Ref Appendix B*". The accused person does not deny that his registered WhatsApp name is what has been captured above neither does he deny the number is his number. The conclusion therefore in Exhibit L was that "The video file titled "20190914_162147.mp4" was shared via WhatsApp with Gloria Tawiah on phone number 0272516410 by WhatsApp number 0271166099 owned by suspect Jonas Fordwour using exhibit phone "Samsung Galaxy A20" on 25th April 2020 at 10.31 am.

Exhibit L further concluded that "*The video file titled "20190914_162147.mp4" was shared on Facebook messenger to Hundred and fifty (150) friends of Gloria Tawiah on 25th April 2020 between 11.46am and 4.24pm using the exhibit phone "Samsung Galaxy A20"*

PW1 indicated in her evidence that she had received the said video on WhatsApp first from the accused person before later seeing same on Facebook. This confirms the evidence of PW1 that the accused person knew her password since he created the Facebook account for her. The accused person in his evidence denies that he created the said Facebook account, but he never denied the assertion by PW1 when she stated so. Below is what was said.

"Q. Did you see me sending the video to your Facebook?

A. No, I did not see you but I have an explanation. *You created the Facebook for me and you know my username and password (emphasis is mine)*.

This answer was never denied by the accused person because he knew he was the one who created the said account for PW1

I wish to reproduce portions of the conclusion of the forensic report below.

"**Conclusion**

1. *The video file titled "20190914_162147.mp4" was recorded by exhibit phone "Samsung Galaxy A20" on 14/09/2019 at 4.21pm*

2. *The video file titled "20190914_162147.mp4" was shared on facebook messenger to Hundred and fifty (150) friends of Gloria Tawiah on 25th April 2020 between 11.46am and 4.24pm using the exhibit phone "Samsung Galaxy A20"*

3. *The video file titled "20190914_162147.mp4" was shared via WhatsApp with Gloria Tawiah on phone number 0272516410 by WhatsApp number 0271166099 owned by suspect Jonas Fordwour using exhibit phone "Samsung Galaxy A20 on 25th April 202 at 10.31am"*

Clearly from the above, the obscene video was posted by the accused person on PW1's Facebook messenger since same was circulated by the accused person's personal phone. The accused person seems to suggest that because his face was not seen in the video he was not the one who posted the said video. I respectfully differ from his view. The issue is about who posted the said video and not who is in the video. In any case as to who is in the video, I do not doubt the evidence of PW1 that she knows features of the accused, eg the penis and mark on the accused person's body. After all, she was in a sexual relationship with the accused person for over 7 good years. During cross-examination of PW1 below ensued

Q. Did you see the accused person in the video did you?

A. I did not see him in the video but I saw certain indicators that made me think that indeed he was the one.

Q. Can you mention those indicators

A. There is a mark on his left hand – I saw his hand in the video, I also saw his bible as well as his pomade. I saw the colour of the room which made me know that he is the one. Moreover, I know the penis and when I saw it I know (sic) that indeed he was the one.

Q. I am putting it to you that all those items you have mentioned cannot be found on the accused person and where the video took place is not the accused person's room. (emphasis mine)

A. Indeed, the video took place in his room and also the Bible and the pomade belongs to him

I must say that if counsel for the accused person had been meticulous to have read the accused person's cautioned statement, perhaps such questions may not have been asked at all. I say so because the accused person in his own cautioned statement **Exhibit B** clearly stated as follows:

> *"After watching the video carefully, I saw that the sexual act took place in my own room because I saw my bedsheet, pomade that I apply on my body and my bible in the video"*

The above is a clear admission by the accused claiming ownership of the items that were in the video. This statement corroborates the evidence of PW1. See **Tsrifo V vrs Dua VIII (1959) GLR 63 at 64 – 65. (***infra***)**

I observed a trend of inconsistencies in the evidence of the accused person. The accused person in his evidence avers that the person in the video is not him and that even though he was in a relationship with PW1 for over seven (7) years and did everything with her as a couple they never had sex. This is vehemently denied by PW1 and the prosecution. Under cross-examination, the following was asked:

Q. Were you having sex with her whiles you were dating her
A. NO (emphasis mine)

The above statement is however inconsistent with the statement of the accused person at the time he was arrested. In his own further cautioned statement, tendered without any objection as **Exhibit J** dated the 29th of April, 2020 the accused person stated the following:

"…I have had sexual relations with her…"

He went on further to say that

"…We have been dating for some years now and I love her. There is no grudge between us. We do have sexual relations…"

The above clearly contradicts the accused person's evidence on oath at the trial where he stated that there was no sexual encounter between them which could have even culminated in the video.

In **State v Otchere [1963] 2 GLR 463**, it was held that "*a witness whose evidence on oath is contradictory of a previous statement made by him whether sworn or unsworn, is not worthy of credit. Such evidence cannot, therefore, be regarded as being of any importance in the light of the previous contradictory statement, unless the witness is able to give a reasonable explanation for the contradiction*"

However, in this case, no reasonable explanation has been offered by the accused for the contradiction.

In **Buor v The State [1965] GLR 1 SC** it was held that "*if a witness has previously said or written something contrary to what he had testified at the trial, his evidence should not be given much weight."*

Even under cross-examination the line of questions asked by the counsel for the accused person clearly indicates that the accused person and PW1 were in a sexual relationship. Below ensued

Q. For the past 7 years you have been in this relationship you have had sex several times, uncountable times

A. That is so

Q. And there has never been any occasion that the accused has exerted force on you for sex

A. That is so

Q. And you also give him any time he makes the demand not so

A. Yes

This line of questions and answers is clearly an indication that the accused person and PW1 were sexually involved and that the accused person's denial under oath makes him not a credible witness. The accused person in trying to disassociate himself from the video (Exhibit L) made some statements which further contradict his previous statements and also bother on his credibility. The accused person specifically stated under cross-examination that he does not have a black bible and that all that appeared in **Exhibit F** (the picture taken on the scene) were brought in by PW1 and the investigator. He further stated that even the video would vindicate him. Below is what transpired on the 25th of October, 2022 at page 68 of the record of proceedings.

"Q. Have a look at Exhibit F – the picture shows your bedroom, is that correct

A. Yes – it is the picture

Q. I am putting it to you that, that was the same room that was found in the video while you and PW1 was (sic) having sex

A. It is not correct – I can see some items which were brought into the room by the CID and the complainant the day we went to the room. The Bible and the bedsheet are not mine as well as the pillow case and the pomade in this particular picture are not mine. I do not have any black bible in my room. The video when it was shown to me by the CID had a red Bible on the bed and this particular Bible was brought in by the CID and the complainant. He himself testified to this Honourable Court that the day he went to my room he arranged the room to look like the one in my room and that is true.

Q. I am putting it to you that you are not being a truthful witness in this case, no investigator brought in a bible and pomade into your room, together with the bedsheet they are all yours

A. That is not correct my Lord. I do not have a black bible in my room and even the video can prove that."

Exhibit L is the video that sparked the controversy. In the said video the bedsheet, which is a bit flowery in nature is the same as what in is **Exhibit F**. The pomade which is yellowish in colour is the same as what is in Exhibit F and indeed the colour of the Bible in the video is Black and not red as the accused stated under cross-examination.

Furthermore, his evidence under cross-examination further contradicts his own statement made in his cautioned statement, Exhibit B dated 28th April 2020 which I have already quoted. However, for ease of reference, I shall reproduce the same below.

"*After watching the video carefully, I saw that the sexual act took place in my own room because I saw my bedsheet, pomade that I apply on my body and my bible in the video*"

Clearly, the accused person is not a credible witness. Moreover, the evidence of the accused person's witness clearly corroborated the evidence of the Prosecution in respect of the colour of the accused person's bible. DW1 in his evidence stated the following:

> *"I can describe my brother's room, he uses a Bible, the Bible he uses is BLACK and a stuffed chair"*

It is trite that "*where the evidence of a party on an issue is corroborated by the evidence of the opponent or the opponent's witness, while that of the opponent on the same issue stands uncorroborated, a court ought not to accept the uncorroborated version in preference to the corroborated one*". See **Tsrifo V vrs Dua VIII (1959) GLR 63 at 64 – 65.**

Thus, I totally reject the evidence of the accused person and find that the contents of Exhibit F are the same as the contents in Exhibit L. The fact that the face of the accused person does not show in the video is irrelevant in the case.

The Supreme Court speaking through **Apaloo JSC** (as he then was) in **Ansah-Sasraku v The State [1966] GLR 294 at 298 SC** held that *where a case boils down to facts and credibility of witnesses if the court takes the view that one side or the other is the truth, then the accounts are mutually exclusive of each other. Once the court decides to believe one side of the story, it means the other side is a fabrication. The Magistrate does not have to consider as reasonably probable the defence which he considers without doubt to be false*.

Applying the above case to the facts of this case, from the facts and evidence so far analysed above, the credibility of the accused person is at stake, considering the conflicts and contradictions in his evidence I find the evidence of the prosecution credible and reject that of the accused person.

The accused person avers that PW1 is tarnishing his image because he failed to give PW1 an amount of GH₵200.00 as a push-off that she demanded. PW1 vehemently denies this claim. I shudder to think that because of a mere GH₵200.00, PW1 would post such an obscene video of herself on social media and to what end?

In respect of the last ingredient, I rely on **R v HICKLIN & ANOR (1868) LR 3 QB 360 LC 371** where it was stated that

> "*The test of obscenity is "whether the tendency of the matter charged as obscene, is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hand a publication of this sort may fall*"

The **Black's Law Dictionary, Deluxe Ninth Edition** defines depraved (of a person or crime) as corrupt; perverted; heinous; or morally horrendous.

There is no doubt indeed that the video footing is quite obscene and can deprave its recipients.

In sum, I find the prosecution has been able to prove the guilt of the accused beyond reasonable doubt and consequently I find the accused is guilty of the offence charged and is hereby convicted on count 1. Having so found him, I am set to sentence the accused but before I do so may I find out whether the accused person has something to say by way of mitigation?

AP: I plead with the honourable court to be merciful and lenient on me. I am very sorry for all that has happened so the court should be lenient and merciful.

Court: Prosecutor, is the Accused Person known

Prosecutor: No, my Lord

BY COURT: I have taken into consideration the fact that the accused is a first-time offender and his plea of mitigation. I have also considered the need to purge our society from the offence of publication of obscene material which is becoming virtually uncontrollable. It is also my candid view that potential offenders must as a matter of concern be deterred from the commission of such offences. Consequently, the accused is accordingly sentenced to pay a fine of 300 penalty Units in default of the fine accused will serve two months in imprisonment. In addition, the accused person is to serve a custodial term of two weeks.

The accused is further ordered to execute a bond to be of good behaviour for a period of one year in default accused person shall serve a term of one-year imprisonment.

I further order that all the items retrieved from the accused person be returned to him.

(SGD)

H/W ROSEMARY EDITH HAYFORD (MRS)
MAGISTRATE