IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE WINNEBA, HELD ON MONDAY THE 13TH DAY OF DECEMBER, 2022, BEFORE HIS LORDSHIP, JUSTICE ABOAGYE TANDOH, HIGH COURT JUDGE.

SUIT NO. CC15/001/2021

1. **EMMANUEL AGYIR** @ KOFI BOADI
2. **OSWALD ADONGO**
3. **YAW AMOAH** … **APPELLANTS**

VS

THE REPUBLIC … **RESPONDENT**

JUDGMENT

The 1st Appellant/Convict Oswald Adongo and the 2nd Appellant/Convict Yaw Amoah, were each charged with the offense of Conspiracy to commit crime to wit – Defilement and the offense of Defilement contrary to **Section 23(1) and 101** as well as Section 101 of the **Criminal Offenses Act, 1960 (ACT 29)**

The Appellants were arraigned before the Circuit Court Agona Swedru in the Central Region on the 20th day of August 2019 where they pleaded not guilty to the respective charges. After trial, the Appellants on the 24th day of November, 2020, were convicted and sentenced to ***10 years imprisonment (IHL)*** on each count to run concurrently.

The Appellants dissatisfied with the judgment of the court below, have mounted this appeal in their bid to secure their freedom by way of acquittal and discharge of the

charges against them and the punishment thereof pursuant to **Section 21(1) of Act 459 as amended.**

THE BRIEF FACTS OF THE CASE

The Complainant Vida Kyeneboah is the Aunt to the victim Gifty Sackey aged 15 years staying at Agona Nyarkrom. The 1st accused (A1) Emmanuel Egyiri alias Kofi Boadi Sky GEE is unemployed whilst the 2nd accused (A2) Oswald Adongo and the 3rd accused (A3) Yaw Amoah are Khebab sellers and also stays at Agona Nyarkrom. A1, A2 and A3 are friends. A1 usually assist A2 and A3 in the roasting and selling of Khebab. A1 and the victim have been in a relationship for about one month. On the 28th day of July 2019, about 12:00 am, the victim met A1 at the Nyarkrom Petrol Shell where A2 and A3 were selling Khebab. The victim told A1 to escort her to her house but A1 told her it was late and convinced the victim to pass the night with him. A1 took the victim to A2 and A3's room where the four of them passed the night. In the course of the night, A1, A2 and A3 sexually abused the victim in turns. A1 later escorted the victim to her house. The victim fell sick and complainant took her to Agona Nyarkrom Health Center for treatment. At the health center, the victim was questioned by the nurses and she told them A1, A2 and A3 have had sexual intercourse with her in turns. The victim was referred to Agona Swedru Municipal Hospital for further treatment. A report was made at Agona Nyarkrom Police Station and the accused persons were arrested. A Police medical report form was issued and the report was dully endorsed by a Medical Officer. The case was later referred to the Agona Swedru Divisional Dovvsu and in their cautioned statements the accused persons denied the offences and after investigations were arraigned before this honourable court (the court below).

THE GROUNDS OF APPEAL

The grounds of appeal filed by the Appellants were:

a) That the conviction cannot be supported having regards to the evidence on records.

b) The Court failed to appreciate the case of the 2nd and 3rd Accused/Appellants.

c) There had occasioned a substantial miscarriage of justice when the trial judge convicted 2" and 3 Appellants on count one on the basis of the mere presence of the PW2 and A1 in the room of the Appellants.

d) The trial judge was wrong to discredit the evidence of the 1s Accused Persons at the detriment of 2 and 3 Accused Persons occasioning substantial miscarriage of the justice in the conviction of the Accused Persons.

e) That the trial judge interferences for his circumstantial evidence on the third essential element of the charge were biased against the 2nd and 3rd Accused Persons which interferences accessioned substantial miscarriage of justice.

In determining the Appeal before me, I will combine grounds a, b and c together and deal with them given that they all lead to the same conclusion and consequences.

It is trite that an Appeal is by way of re-hearing especially in the instant appeal where the judgment is being challenged as not supported by the weight of the evidence. This principle was reaffirmed by the Supreme Court speaking through Appau JSC in the case of **EVELYN ASIEDU OFFEI V YAW ASAMOAH ODESHE KWAKU AGYAPONG**[1] thus:

> ***"… An appeal is by way of rehearing, particularly where the appellant alleges his notice of appeal that the decision of the trial court was against the weight of evidence. In such a case, it is the duty of the appellate court to analyse the entire***

record of appeal, take into account the testimonies…it is immaterial whether the appeal is a second one from the Court of Appeal to the Supreme Court."

See: **TUAKWA V BOSOM (2001-2002) SCGLR 61**.

This position of the law that an appeal is by way of re-hearing especially when the evaluation of the evidence by Court below is in doubt, was re-echoed by the Supreme Court speaking through Adinyira JSC as well as Dotse JSC in the cases **Ackah v Pergah transport & Others [2010] SCGLR @ 728 – 739 and Abbey & Others v Antwi V SCGLR 17 @ 34 – 35.** This no doubt allows the appellate court the opportunity to re – examine the record and arrive at its own decision one way or the other.

THE BURDEN OF PROOF IN A CRIMINAL CHARGE

Section 11(2) of the Evidence Act 1975 NRCD 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."

Section **13(1)of the Evidence Act 1975 NRCD 323** provides the extent of proof or the burden on the prosecution in a criminal action thus:

(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 a reasonable doubt.

Therefore, the failure on the part of the prosecution to discharge the burden according to the legal standard which standard is beyond reasonable doubt, will lead to the acquittal and discharge of the accused persons or convicts as the case may be..

See Donkor v The State {1964} GLR 598, SC

Yeboah v The Re (Consolidated) {1972} 2 GLR 281

Republic v Adams {1960} GLR 91 at 95 CA

Mali v The State {1965} GLR 710 SC

The criminal law in Ghana is settled that one cannot ground a conviction if the prosecution bases its findings on mere probabilities if not beyond reasonable doubt which clearly draws a distinction between our civil law and criminal law. See Oteng v The State {1966} GLR352 – 354,SC.

It is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt in all criminal cases. What "beyond a reasonable doubt" means is that, the prosecution must overcome all reasonable inferences favouring innocence of the accused. Discharging this burden is a serious business and should not be taken lightly. The doubts that must be resolved in favour of the accused must be based on the evidence, in other words, the prosecution should not be called upon to disprove all imaginary explanations that established the innocence of the accused. The rule beyond a reasonable doubt can thus be formulated thus:-

"An accused person in a criminal trial or action, is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt, he is entitled to a verdict of not guilty."

See article 19 (2) (c) of the Constitution, 1992 and Dotse JSC in the case of Richard Banousin v the Republic , Appeal # J3/2/2014, 18/03/2014.

See also:

1. Frimpong @ Iboman v Republic [2012] 1 SCGLR 297

2. Gligah&Anr. v The Republic [2010] SCGLR 870

3. Amartey v The State [1964] GLR 256 S.C

Section **11(1) of the Evidence Act 1975 NRCD323** define the burden of producing evidence as the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party. The extent of onus on the defense on the other hand is provided by **section 13(2) of the Evidence Act 1975 which states:**

"Except as provided in section 15 (3), in a criminal action, the burden of persuasion, when it is on the accused as to a fact the converse of which is essential to guilt, requires only that the accused raise a reasonable doubt as to guilt." See Commissioner of Police v Antwi {1961} GLR 408 SC.

THE CHARGES, THE EVIDENCE AND THE APPLICABLE LAW

I will first of all deal with grounds a, b, and c together and proceed to deal with ground (d) and (e). This has become necessary because the three grounds dove – tail into each other as they all borders on the view on the Appellants that the conviction was not supported by the evidence on record or that the evaluation of the evidence that led to the conviction was doubtful.

For the avoidance of doubt, grounds a, b and c as filed were:

a) That the conviction cannot be supported having regards to the evidence on records.

b) The Court failed to appreciate the case of the 2 and 3 Accused/Appellants.

c) There had occasioned a substantial miscarriage of justice when the trial judge convicted 2'' and 3 Appellants on count one on the basis of the mere presence of the Pw2 and A1 in the room of the Appellants.

Therefore, the appellate court is enjoined to re – examine and analyze the entire record and arrive at its own conclusion or otherwise particularly with respect to the offenses of Conspiracy and Defilement of which the Appellants were charged.

I will first of examine the records with respect to the offense of Conspiracy and proceed to deal with the offense of Defilement against the 2nd and 3rd convicts therein and the 1st and 2nd Appellants herein. For ease of reference the 2nd and 3rd convicts will also be referred to as 1st and 2nd Appellants as earlier indicated.

It is argued for and on behalf of the Respondent that the elements of conspiracy are agreement or acting together of two or more people for a common purpose to either commit or abet a crime and that the need for previous concert or deliberation is not necessary. The Respondent then referred to the case of **Azametsi & others v The Republic [1974] 1 GLR 228 @ 238 – 239**

It is the view of the Respondent that the convicts agreed to act together to defile the victim PW2 because the victim left home on the 7th of August and returned home on 9th August and woke up sick with difficulty walking per page 61 of the record of appeal. The Respondent further supported its view with the fact that the investigator inspected the 1st and 2nd Appellants' room where they were alleged to have slept and had sex with the victim.

This piece of evidence was opposed by the Appellants and argued that the Appellants did not commit the offense and that the trial judge relied on circumstantial evidence in his inference per page 94 of the record.

The charge of Conspiracy under **section 23(1) of the Criminal Offenses Act, 1960 Act 29 states thus:**

" If two or more persons agree or act together with a common purpose for or in committing or abetting a crime with or without any previous concert or deliberation each of them is guilty of conspiracy to commit or abet that crime as the case may be."

In the case of **REPUBLIC v. MAIKANKAN AND OTHERS [1972] 2 GLR 502-514 the court, per ABOAGYE J. as he then was held thus:**

"For a charge of conspiracy to succeed under section 23 (1) of the Criminal Code, 1960 (Act 29), there must be evidence that the accused persons agreed or acted together with a common purpose to commit the offence."

Despite the comprehensive view or principle discussed in the Maikankan case **(SUPRA)**, the charge of conspiracy encountered some legal challenges by virtue of the wording during the Review of the Law Commission which seems to have amended the previous legal position. The wording before the amendment reads thus:

" If two or more persons agree or act together with a common purpose for or in committing or abetting a crime, whether or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet".

The wording after the Review reads thus:

" Where two or more persons agree to act together with a common purpose for or in committing or abetting a crime, whether or without any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet".

In the case of the Republic v Augustine Abu & Ors unreported ACC/15/13 where the Learned senior brother Marful Sau JA sitting as additional High Court Judge held the view that in an offense of conspiracy, the prosecution had to prove that there was prior agreement to act together and not by simply acting together. This in the view of Marful Sau JA arose because of the seeming amendment of s23(1) of the Criminal Offenses Act, Act 29 by the Law Review Commission when it had no mandate so to do and invited Parliament to take a second look at the law. Also, the Learned author Dennis Adjei JA discussed in his book the departure of the Court Appeal from the view expressed by Marful Sau JA with the view that once the Law Review Commission had no such mandate and exceeded its powers so, all the amendment with respect to s23 (1) of Act 29 is null and void and proceeded to consider the original law as good law. **See Republic v Ekene Anozie Suit # H2/44/12 delivered on 27/06/13, unreported**. Dennis Adjei JA in his book Modern Approach to the Law of Interpretation in Ghana, first Edition, was of the view that the Court of Appeal could not suo moto strike down the law and that the amendment occasioned by the Law Review Commission could only be corrected by an amendment by Parliament if deemed necessary.

Accordingly, the current position of the law is as captured in the Law Review Commission which requires two or more people to agree to act together and not to agree or act together. There must therefore a prior agreement to act together. As a result the reference of the agreement should not be drawn solely on the acting together but also on the prior agreement. This position of the law in the case of Azametsi was a good law then but unfortunately there is now a clear departure of the law of conspiracy from the previous Azametsi principle as explained above.

Therefore, the issue for consideration was whether or not there was any prior agreement on the part of the 1st and 2nd Appellants or convicts to commit the offenses charged (Conspiracy to wit Defilement) against them that led to their respective conviction.

It is not denied per pages 38, 45 62,63 of the record of appeal that the victim PW2, the 1st and 2nd Appellants and the 1st convict all slept in a room belonging to the Appellants. What is however in doubt is whether or not there was any cogent evidence to establish that the Appellants agreed between them or with others to commit the offense neither was the court below able to establish how it arrived at any such conclusion.

In the instant case before this court, the victim PW2 in her evidence stated that she met 1st convict Emmanuel Egyir @ Kofi Boadi in town about 1.00 am with his friends being the 1st and 2nd Appellants at their Khebab Joint and she asked the 1st convict to escort her home but he refused. As a result, the victim PW2 said she will accompany him (1st convict) to sleep at his place and go home the next day so the 1st convict took her a room belonging to the Appellants, and together with his friends she spent the night with them.

In my evaluation, I was wondering what a 15 year old girl was doing at that ungodly hour of 1.00 am when she went with the 1st convict at the Khebab Joint belonging to the Appellants where he sometimes visits. Your guess is as good as mine.

I find that because there was a funeral in the 1st convict's home and their quest as lover birds in their quest to spent time together anywhere convenient, they both ended up at the Appellants home or room.

In the case of **Duah v. R. (1987 – 88) 1 GLRR 343 – 360** the court at holding 3 stated:

"Circumstantial evidence of surrounding circumstances which by undersigned co-incidence was capable of proving a proposition with the accuracy of mathematics. In criminal cases it was sometimes not possible to prove the crime charged by direct positive evidence of persons present at the time the crime was committed. So where the testimony of eye-witnesses was not available, the jury was entitled and indeed permitted to infer from those facts which the prosecution had proved other facts necessary either to complete the elements of guilt or establish innocence. However, before drawing the inference of the guilt of the accused from circumstantial evidence, it was very important to make sure that there were no other co-existing circumstances which would destroy or weaken the inference. Thus circumstantial evidence had to be closed examined and acted upon only when the circumstances were such that the guilt of the accused had of necessity to be inferred and that the fact led to no other conclusion."

From the foregoing, there are two options one being the fact that once a woman sleeps with three men then they went to have sex with her whilst it is also possible the Appellants genuinely allowed the 1st convict and the victim who are known friends to sleep in their room because it was very late and dangerous at that ungodly hour. And for security reasons as rightly suggested by the victim, she decided to sleep with them and return home the next day. Because there are other conclusions to be drawn from the evidence on record, circumstantial evidence will not suffice in the instance case.

From the foregoing, I find that, there was no evidence of a prior agreement to commit crime neither was there any irresistible circumstantial evidence so to establish.

I will now deal with the conviction of the Appellants for Defilement. **Section 101 (1) (2) of the Criminal Offenses Act, 1960, (ACT 29) which states:**

(1) For purposes of this Act defilement is the natural or unnatural carnal knowledge of any child under sixteen years of age.

(2) 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.

Section 99 of the Criminal Offenses Act, 1969, (ACT 29) defines and provides for the elements of Carnal Knowledge thus:

"Whenever, upon the trial of any person for an offence punishable under this Code, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge shall be deemed complete upon proof of the least degree of penetration."

Also **Section 104 (1)(a)(b)(c)** provides for Unnatural Carnal Knowledge thus:

(1) Whoever has unnatural carnal knowledge—

(a) of any person of the age of sixteen years or over without his consent shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than five years and not more than twenty-five years; or

(b) of any person of sixteen years or over with his consent is guilty of a misdemeanour; or

(c) of any animal is guilty of a misdemeanour.

Section 104(2) of the Criminal Offenses Act, 1960 (Act 29) *defines Unnatural carnal knowledge thus:*

"(2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal."

From the foregoing, the elements of the offense of Defilement as rightly stated for and on behalf of the Respondent are ;

1. That the victim defiled must be under 16 years of age

2. That someone had natural or unnatural carnal knowledge of the victim

3. That it was the accused was the one who had carnal knowledge of the victim.

It is not in doubt that the victim was under sixteen years of age at the time the offense was alleged to have been committed, as she was born on the 10th day of May 2004

It was further argued on behalf of the Respondent that in order to prove the 2nd element of natural or unnatural carnal knowledge, there must be evidence of the least degree of penetration of the female organ (vagina) by the male organ (penis) as provided under Section 99 of Act 29 which I wholly agree. **See Republic v Yeboah [1968] GLR 248 @ 253 quoted by the Respondent.**

According to the Respondent, the prosecution in establishing the 2nd element of defilement tendered in evidence the Medical Report of the Swedru Municipal Hospital authored by Dr Solomon Nti Arhin per page 103 of the record of Appeal. The Respondent further argued that the examination of the speculum revealed an offensive vaginal discharge, a broken hymen with no mucosal bruising. The Respondent further

argued that the medical report was suggestive that someone had sexual intercourse with the victim PW2 which corroborated the evidence of PW2.

The third element that came for consideration was whether it was the Appellants and the 1st convict who defiled the victim. It was argued by the Respondent that the victim PW2 identified the 1st, 2nd and 3rd convicts as the perosns who defiled her and that does not put in doubt the identity of the convicts as those who defiled the victim. **See Adu Boahene v The Republic [1972] GLR 70 @ 75 as quoted by the Respondent.**

The Respondent further argued that the victim slept with the convicts in the same room and it was also established that the victim was the girlfriend of the 1st convict.

It was also argued on behalf of the Appellants that the mentioning of the Appellants by the victim was an afterthought and at the instance of PW1 in an attempt to implicate them. Under cross examination the following ensued between the 1st convict (A1) as quoted by Counsel for and on behalf of the Appellants:

Q. Have you asked your daughter whether she has slept with another man before.

A. No

Q. I suggest to you that on the day I sent her home and she slept with us we did not do anything to her.

A. I disagree with you, when she came from you, on the third day we saw that she has swelled up, you followed up to our house and when you came we have already asked and she said she came to you and have sex with you so I ask you because the girl mentioned a certain Kofi's name so I asked whether you are the said Kofi and I told you what the girl said and you admitted same. I invited my landlord and another person and told them that you are the one who had sex with the girl. When we came the victim was in the room so I brought the victim out and confirmed the story in the presence of

the two (2) women which you were present you said you took the victim to the room of your co-accused who are your friends. At the police station you confessed that the victim is your girlfriend and that you have had sex with her twice.

Q: At the police station I said I have not had sex with the victim but she has slept in my room twice, I suggest that to you.

A: That is not what you said, the police even told you that did you not know that you cannot have sex of someone below 18 years.

Q: I suggest to you that when your daughter came to sleep with us no one had sex with her.

A: I disagree with you; you cannot tell me that she came to sleep in your room twice without having sex with her since she is not your sister or relative. **See page 14 of the record of appeal.**

It was argued on behalf of the Appellants that at all material time the accusation of defilement was against the 1st convict for which reason PW1 invited him and told him to take PW2 to the hospital because PW2 confirmed in the presence of two women and the 1st convict that the first convict was the one who had sex with her as she is his girlfriend.

From the foregoing, I will examine the arguments raised by the respective parties and the evidence on record and make a determination. As indicated, the age of the victim PW2 places her squarely within the provision of defilement if a man's penis enters her vagina with or without her consent being under 16 years and same is not in doubt.. **See Section 99 of Act 29.**

With respect to the 2nd element of Defilement, the accused or convict denied having had any sexual intercourse with the victim. But granted without admitting that someone had sex with the victim per her evidence and same supported by the medical report can

we reasonably say that the Appellants were among those who defiled her? Indeed the sleeping arrangement of the convicts was revealing, the victim slept on a carpet with the 1st Accused/Convict whilst the 1st and 2nd Appellants together slept on a different bed in the same room. The narration given by PW2 against the 1st and 2nd Appellants were not cogent enough. At one point she saw someone trying to remove her panties but asked the person to stop and he did. All this while her boyfriend was sleeping and she did nothing to arouse the attention of the others. At another point someone pointed a torchlight on her in the room and the person slept but got up later and forced himself on her and had sex with her. All that PW2 said about the 1st Appellant was that he told her to take money to have sex with her but she refused per page 25 – 26 of the appeal record. Given the evidence of the victim PW2 she seemed to have had difficulty as who among the Appellants had sex with her. The identity if those who were with her in the room was not in doubt but who did what and how, was what was in doubt especially when she kept saying someone and ended lumping all of them to have had sex with her.

Furthermore, and upon examining the medical report per page 103 of the records, it raises more questions than answers. The report for example did not address the issue of whether the broken hymen was recent or old and specifically within the period under consideration when the offenses were allegedly committed. Also the report revealed that though the hymen was broken, there was no mucosal bruising. Does that mean that the victim's hymen was already broken and able to endure sex involving three men without bruises? Was the alleged sexual encounter involving one person hence the absence of bruises.

Therefore, the best person to have answered these material and critical questions was the Medical Officer Dr Solomon Nti Arhin and not PW3 the investigator who knows next to nothing in biology and medicine. I am wondering why the Prosecution failed to

call him as a material witness when he works at the Agona Swedru Municipal Hospital not too far from where the court is located.

We should be mindful of the heavy legal burden in a criminal trial to ground a conviction, which burden is proof beyond reasonable doubt. Therefore leaving a material witness in such a serious offense will be herculean to succeed. In the case of **SARPONG v. THE REPUBLIC [1981] GLR 790–801 per ANSAH-TWUM J. as he then was at holding three said: "The failure of the prosecution to call the General Manager of A.C., Ltd. to prove the falsity or otherwise of the statement of fact the appellant was alleged to have made, amounted to a failure to call a material witness whose evidence would have disposed of the case one way or the other."**

See: R. v. Ansere (1958) 3 W.A.L.R. 385, C.A.

In the instant appeal and with particular reference to the charge or offense of Defilement, there were several issues that was not addressed that left a wide vacuum in the case for the prosecution. This became necessary because with the accused having denied the offense of Defilement, it was important for the prosecution to have called in the Medical Officer who was a material witness.

From the foregoing, I find and that the prosecution failed to prove both the offense of Conspiracy and the Offense of Defilement beyond reasonable doubt as the appellants succeeded in raising a doubt in the case for the prosecution. **See: Sections 13(1) and 13(2) of the evidence Act, 1975 NRCD 323.**

Having so held, the pursuit and determination of grounds (d) and (e) are rendered redundant and otiose.

Therefore, the conviction and sentences of Conspiracy and Defilement against the 1st and 2nd Appellants (2nd and 3rd Convicts) are each set aside.

Accordingly, the 1st and 2nd Appellants are each acquitted and discharged.

(SGD)

JUSTICE ABOAGYE TANDOH

JUSTICE OF THE HIGH COURT.
