IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD AT CAPE COAST IN THE CENTRAL REGION ON WEDNESDAY THE 12TH DAY OF JULY, 2023 BEFORE HIS LORDSHIP JUSTICE BERNARD BENTIL - HIGH COURT JUDGE

SUIT NO: F22/14/2023

JOHN OTOO - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

JUDGMENT

This is an appeal by the Appellant against the judgment of the Circuit Court, Cape Coast, presided over by Her Honour Dorinda Smith Arthur. The learned trial judge tried and convicted the Appellant on 18th November, 2022 for the offence of defilement contrary to Section 101(2) of the Criminal Offences Act, 1960 (Act 29) and sentenced him to Eight (8) years IHL. Being aggrieved by the said conviction and sentence, the Appellant filed a Petition of Appeal on 15th December, 2022 (See page 83 of the Record of Appeal).

This appeal is premised on the following grounds:

a. That the conviction cannot be supported having regard to the evidence.
b. That the learned trial judge erred when she relied on the online article of one Dr. Charlsie Celestine accessed on 17th November, 2022 to conclude that the Survivor conceived before 22nd August, 2020.

c. That further grounds of appeal will be filed upon receipt of the record of proceedings.

Counsel for the Appellant has however filed no additional grounds of appeal. The facts as presented by the prosecution are that, the Survivor is a student and stays with her aunty Comfort Aidoo at Kakumdo, a suburb of Cape Coast. The Appellant is also a trader and stays at Anomabo near Cape Coast. The Appellant is the Stepfather of the Survivor. During the year 2019, the Survivor's biological father had sexual intercourse with her thus, he was convicted and sentenced to Twelve (12) years imprisonment.

Subsequently, the Survivor went to stay with her mother and the Appellant at Brafoyaw in Cape Coast. A day in the month of August 2020, the Survivor who was then Fifteen (15) years was dressing her mother's bed when the Appellant came into the room whilst everyone was away. The Appellant pushed the Survivor onto the bed, undressed her and forcibly had sexual intercourse with her until ejaculation which resulted in a pregnancy. On 29th November, 2021 the Survivor reported the matter to DOVVSU, Cape Coast, and the Appellant was eventually arrested. After investigations, the Appellant was charged with the offence of defilement contrary to section 101(2) of the Criminal Offences Act, 1960 (Act 29) and arraigned before the learned trial judge.

Dissatisfied with the outcome of the trial, the Appellant filed this appeal on the basis of the aforementioned grounds. I am therefore called upon to evaluate the entire evidence on record and discuss them in the light of the appropriate laws. The substantial issue raised by these grounds of appeal is whether or not the prosecution successfully discharged the burden of proof with respect to the charge of defilement.

The omnibus ground in criminal cases and just as the omnibus ground in civil cases calls for the appellate court to examine the entire evidence and come to its own conclusion. A ground of appeal which alleges that a conviction is unreasonable or cannot be supported by the evidence on record is an invitation to the appellate court

to re-hear the matter. This is in accordance with the settled law that an appeal is by way of rehearing. This Honourable Court is therefore bound to evaluate the evidence adduced at the trial to determine whether or not the evidence supports the conviction or whether errors were committed by the trial judge which have occasioned substantial miscarriage of justice against the Appellant. See **RICHARD KWABENA ASIAMAH V THE REPUBLIC (CIVIL APPEAL NO. H2/20/2018) DATED 6 JUNE, 2019 (DELIVERED BY THE COURT OF APPEAL).**

The success of an appeal in criminal matters is dependent upon whether the Appellant has suffered a substantial miscarriage of justice. Section 31(2) of the Courts Act, 1993 (Act 459) provides that:

> *(2) The court shall dismiss the appeal if it considers that a substantial miscarriage of justice has not actually occurred or that the point raised in the appeal consists of a technicality or procedural error or a defect in the charge or indictment but that there is evidence to support the offence alleged in the statement of offence in the charge or indictment or any other offence of which the accused could have been convicted on that charge or indictment.*

The offence of defilement is created by section 101(2) of the Criminal Offences Act. Section 101(2) of the Criminal Offences Act provides as follows:

> *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.*

The ingredients of the offence are clearly spelt out in the provision above. Therefore, to secure a conviction, the prosecution must prove that:

a. the victim was less than 16 years at the time of the offence;
b. a person has had natural or unnatural carnal knowledge of the victim; and
c. that person is the Appellant.

Suffice to say that these ingredients must be proved beyond reasonable doubt.

See Section 13(1) of the Evidence Act, 1975 (N.R.C.D. 323).

In the book "Essentials of the Ghana Law of Evidence", S. A. Brobbey expounded on the standard of proof required in criminal cases from pages 48 to 55 as follows:

> *Proof beyond reasonable doubt does not mean that there should be no doubt whatsoever in the case presented by the prosecution. It means that by the end of the trial, the prosecution must prove every element of the offence or the charge (but not all the facts) … The consideration for the principle of proof beyond reasonable doubt can be illustrated this way: if there is any element of the charge which is essential for the accused to be convicted, that element should be established to the satisfaction of the trier of facts in such a manner that a reasonable mind could conclude that the accused is guilty of the offence or that the existence of the facts constituting the charge is more probable than its non-existence.*

It is abundantly clear from the evidence on record that the Survivor was sexually active before her sixteenth birthday. It is also very clear from the evidence on record that the Appellant had carnal knowledge of the Survivor. The Appellant states in paragraph 11 of his Witness Statement at page 48 of the Record of Appeal that "*I never had sex with the Survivor before she was Sixteen (16) years".* Moreover, this fact is further proved by **EXHIBIT E** at page 93 of the Record of Appeal which conclusively establishes the Appellant as the father of the child delivered by the Survivor.

Thus, in my view, the crucial element left to be established is the age of the child at the time of carnal knowledge. The age of the Survivor is germane in defilement cases. The law requires the Survivor to be below the age of Sixteen (16) years at the time of the offence. It is settled law that a child above the age of Sixteen (16) years cannot be defiled.

According to **EXHIBIT C** at page 88 of the Record of Appeal, the Survivor was born on 22nd August 2004. The investigator (P.W. 2) in paragraph 9 of his Witness Statement at page 20 of the Record of Appeal stated that the alleged offence occurred "*one day in the month of August 2020.*" This, in my view, falls short of the standard of proof on the prosecution. A day in the month of August, 2020 could be 22nd August at which date the Survivor has attained Sixteen (16) years or could be before her birthday. This indubitably creates doubt in the mind of a reasonable person as to the age of Survivor at the time of the offence.

Moreover, the Survivor in her Witness Statement at page 17 of the Record of Appeal also stated that the alleged offence took place "*One afternoon…*". See paragraphs 8 to 14 of the said Witness Statement. This, like the testimony of P.W. 2, also falls short of the standard of proof on the prosecution. This uncertainty is further confirmed when the Survivor admitted under cross examination that the Appellant is being charged for the alleged act that took place in August 2020. (See page 32 of the Record of Appeal). The following ensued under cross examination.

Q: I put it to you that Accused person has being charged for the alleged act that took place in August, 2020 leading to the alleged pregnancy.

A: Yes.

In the absence of a conclusive date of the sexual encounter in August, 2020 there is no justification to assume that the sexual encounter happened before the 16th birthday of the Survivor. It is trite learning that, doubt is always construed in favour of an accused person. The Appellant is therefore entitled to the benefit of the doubt regarding the time or date of the offence.

According to **EXHIBIT D** (the Maternal and Child Health Record Book) at page 91 of the Record of Appeal, the Survivor's first day of last menstrual period is 19th August, 2020. This means the Survivor was menstruating Three (3) days to her birthday. P.W.2

admitted this fact under cross-examination at page 35 of the Record of Appeal as follows:

Q: Kindly take a look at the second page of your exhibit D which is page 6 of the booklet. Kindly tell the court the first day of the last menstrual period

A: It is captured 19-8-2020.

Q: Therefore if the birth day of the Survivor is 21-8-2008 then she started mensuration Three (3) days to her birthday.

A: Per the Exhibit yes.

EXHIBIT D further stated that as of 9th November, 2020 the Survivor was only Eleven (11) weeks Two (2) days pregnant. This means that the Survivor got pregnant on 22nd August, 2020. This was also admitted by P.W.2 under cross-examination at page 35 of the Record of Appeal. The following ensued under cross-examination:

Q: Look at the portion with the ultra sound scan result ad tell the court the gestational age of the pregnancy as of 19-11-2020.

A: It is stated 11 weeks 2 days.

Q: Kindly have a look at the 2020 calendar look at November 9th 2020 and count back 11 weeks and 2 days.

A: 11th weeks backs from 9th November falls on 20th August, 2020.

Q: Therefore on the alleged date of sexual intercourse the survivor was already Sixteen years on 22nd August 2020. Is that not so.

A: Per the records yes.

The import of **EXHIBIT D** is that the Survivor got pregnant either on her 16th birthday or immediately after her 16th birthday. This goes to contradict the Survivor's testimony during cross-examination at page 29 of the Record of Appeal where she stated that the

first sex was on her 15th birthday. This is heavily contradicted by the evidence on record.

By virtue of **EXHIBIT C**, the Survivor's 15th birthday fell on 22nd August, 2019 at which time she was probably living with her biological father. As already stated, she admitted that the Appellant was standing trial for an alleged act which took place in August, 2020 leading to her pregnancy. Therefore, the only logical conclusion is that the first sex between the Survivor and the Appellant in the month of August 2020 was on her 16th birthday and it is this sexual intercourse which got the Survivor pregnant.

In this regard, the conclusion of the trial judge based on the post of one Dr. Charlsie Celestine is not supported by the evidence on record. At pages 10 and 11 of her judgment (on pages 75 and 76 of the Record of Appeal), the learned trial judge stated as follows:

"According to Dr. Charlsie Celestine, an obstetrician and gynaecologist in her post "Due Date Calculator" Flo.health,

> *"**The due date is 40 weeks from the first day of your last menstrual period. But some women can go beyond that to 42 weeks. The nine months of pregnancy are actually 40 weeks**. And your baby's estimated due date falls on the 40th week, when you'll actually be around 10 months pregnant. That is to account for the fact that pregnancy is measured according to gestational age, not fetal age. So that means you count pregnancy from your LMP, not the date you conceived, adding an extra two weeks even though you weren't technically pregnant then. Also, this method recognized that not all months have the same number of days, so you'll likely be pregnant at nine months…"*

Flowing from the above, if the child was born on May 16, 2021 then the survivor was pregnant before 22nd August 2020 if 39 or 41 weeks are used. This means that the Survivor was less than Sixteen years when she became pregnant assuming the first sexual intercourse is the one that resulted in the pregnancy."

I have examined the source of the quotation above and I am satisfied that the whole quotation cannot be attributed to the said Dr Charlsie Celestine. Save for the part in bold, the rest are information on the flo application on how to calculate due date.

This notwithstanding, I am unable to see how the said quotation is useful in determining the age of the Survivor at the date of carnal knowledge (i.e., the date of the first sexual intercourse). The above is only useful in determining or calculating the due date from the first day of last menstrual period (LMP) and not the date of conception as can be seen below:

> *So that means you count pregnancy from your LMP, not the date you conceived, adding an extra two weeks even though you weren't technically pregnant then.*

Clearly, calculation begins two weeks prior to the date of conception when the woman is not technically pregnant. Thus, the trial judge was wrong in concluding that the Survivor was pregnant before 22nd August, 2020 when the evidence establishes that the Survivor was 11 weeks 2 days pregnant as of 9th November, 2020. (i.e., on 22nd August, 2020).

I am satisfied that there has been a substantial miscarriage of justice thus this appeal should succeed. A judge must reach conclusions based on the totality of evidence adduced at trial and the application of the relevant laws.

Following from the above, I am of the considered opinion that the prosecution failed to prove the guilt of the Appellant beyond reasonable doubt. A reasonable mind faced with the totality of the evidence adduced cannot be convinced beyond reasonable doubt that the Appellant had carnal knowledge of the Survivor at a time when she was below Sixteen (16) years. I have reached this conclusion with no relish. Despite sympathising with the Survivor for having a rough childhood, I am mandated to dispense justice in accordance with the law.

This appeal therefore succeeds in whole. The Appellant is hereby acquitted and discharged. The conviction and sentence imposed by the trial court are set aside accordingly.

(SGD)

BERNARD BENTIL J.

[HIGH COURT JUDGE]

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