IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HOHOE, HELD ON MONDAY THE 31ST DAY OF JULY 2023 BEFORE HIS LORDSHIP JUSTICE AYITEY ARMAH-TETTEH

NO. F22/4/2021

AGBORVI ANTHONY - APPELLANT

VRS

THE REPUBLIC - RESPONDENT

APPELLANT: ABSENT

COUNSEL MR. EMILE ATSU AGBAKPE THE APPELLANT

NANA KONADU FREMPONG (ASA) FOR THE RESPONDENT ABSENT

JUDGMENT

The appellant, Agbovi Anthony, appeals against the conviction and sentence imposed on him on 22 September 2020. The Circuit Court , Kpando presided over by His Honour Nana Brew imposed a sentence of 10 years imprisonment on appellant, having convicted appellant after trial on defilement of a child under 16 years.

The parties were asked to file their written submissions as far as 3 November 2022. The appellant filed his written address on 15 May 2023 but the respondent did not.

I have read the submissions of Counsel for Appellant. Even though I am not satisfied with the submission of counsel for the appellant for his reason asking for the setting aside of the conviction, I will nonetheless allow the appeal and set aside the conviction and sentence of 10 years for defilement. These are the reasons for coming to that conclusion.

The appellant was charged on one count as follows:

STATEMENT OF OFFENCE

Defilement: Contrary to section 101(2) of the criminal offences Act 29/60 as amended by section 11 of act 554

PARTICULARS OF OFFENCE

AGBOVI ANTHONY: Aged 19: Barber: You on the 27th day of August, 2020 at about 11: 20 am at Vakpo Yordanu in the Volta Circuit in Kpando Circuit and within the jurisdiction of this court, you carnally know one Grace Edith Owusu aged 8.

The Appellant pleaded not guilty to the charge when he was arraigned before the Court on 8 September 2020. After a full trial, he was convicted and sentenced to 10 years IHL.

It is against this conviction and sentence that the appellant has appealed to this Court for redress. The Appellant on 14 October 2023 filed a Notice of Appeal. The ground of appeal as found in the Notice of Appeal are as follows:

1. The conviction is manifestly against overwhelming evidence on record.
2. Other grounds may be filed upon receipt of the record of proceedings.

Briefly, the facts of the case are as follows: Complainant Addae Ruby is a businesswoman staying at Vakpo Jordanu whiles appellant Agbovi Anthony aged 19 a barber also staying at Vakpo Jordanu. Victim Grace Edith Owusu age 8 is a Class three pupil and attends Leklebi Duga primary school. Appellant's barber shop is closed to where the

complainant sells her secondhand clothes at Vakpo Jordanu. Tommy is a friend to appellant whose father owned the barber shop. On 27/08/2020 at about 7:30 am, the complainant left home with victim to sell their second-hand clothes. On same day, at 11:30 am, complainant after eating gave the plates to the victim to go and wash. Whilst victim was washing the plates, appellant left the barber shop and entered the house. Victim after washing took the plates to the kitchen where accused followed victim and lured here into Tommy's room. When appellant and victim got to the room, they met Tommy sleeping on the mattress when appellant went slept on same mattress and asked victim to sit on the mattress. Some few minutes later, tommy received a phone call from the secretary of the town, Tommy responded the call and left the room leaving appellant and victim. Appellant removed his shorts and after that removed victim's pant. Appellant asked the victim to lie down on the mattress where he inserted his penis into her vagina. Appellant after the act left the victim in the room and went to barbering shop. On 30/08/2020, victim complained of illness where she narrated her ordeal to the parents and mentioned accused as the one who had sexual intercourse with her. On 02/09/2020, a report was made to the police and appellant was arrested. Accused in his investigation cautioned statement denied the offence. Medical report form was issued to complainant for victim to be taken to hospital. The medical form was brought duly endorsed by the medical officer of Margret Marquart Catholic hospital confirming that the victim had been defiled.

Based on the above facts, the appellant was arrested and charged with the offence of Defilement contrary to section 101 of Act 29/1960 as amended by Act 554. The appellant during his trial before the Circuit Court, maintained his plea of not guilty but unfortunately, the Honourable court founded him guilty, convicted and was sentenced to serve a prison term of ten (10) year.

It is trite law, that an appeal constitutes a re-hearing especially when the Appellant comes under the omnibus ground of appeal that the judgment is against the weight of evidence , and what the re-hearing means is that the appellate court is to evaluate the evidence and assess all documentary evidence and case law and come to its own conclusion. This court being an appellate one in this matter, is therefore entitled to look at the entire evidence and come to its own conclusion on both the facts and law.

In **Agyeiwaa v. P & T Corporation** [2007-2008] 2 SCGLR 985, the Supreme Court per Wood C J said at 989 as thus:

> The well-established rule of law is that an appeal is by rehearing, and an appellate court is therefore entitled to look at the entire evidence and come to the conclusion on both the facts and the law.

See also the case of **Owusu Domena v. Amoah** [2015-2016] 1 SCGLR 790 where the Supreme Court per Benin JSC held as follows:

> 'Where the appeal was based on the omnibus ground that the judgment was against the weight of evidence, both factual and legal arguments would help advance or facilitate determination of factual matters.'

Again, when the appellant comes under the omnibus ground, he should be able to point out the evidence if applied to his case he would have been successful or evidence that were attributed to him that made him lose the case or made him fail to win.

Thus in **Akufo -Addo v. Catheline** (1992) 1 GLR 377 , the Apex Court of the land had this to say on the allegation that a judgment is against the weight of evidence.

> That whenever an appeal is based on the omnibus ground that the judgment is against the weight of evidence, the appellate court has jurisdiction to examine the

totality of evidence before it and come to its own decision on the admitted and undisputed facts. Thus, when an appellant complains that the judgment is against the weight of evidence, he is implying that there are pieces of evidence on record which, if applied properly or correctly, could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. The onus in such an instance is on the appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against.

In the instant appeal the issues that in my view arise in this appeal is whether or not the appellant had carnal knowledge of the victim, and this defiled her.

THE OFFENCE OF DEFILEMENT

INGREDIENTS OF OFFENCE

Section 101 of Act 29/60 (supra) reads:

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

(2) A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without consent, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven (7) years and not more than twenty-five (25) years.

From the above provisions, the ingredients of the offence defilement are :

1. That the victim was under the age of sixteen (16) years at the time of the act.
2. That someone has had natural or unnatural carnal knowledge of the victim herein.
3. That it was the accused who had natural or unnatural carnal knowledge of the victim and;

See Republic v. Yeboah [1968] GLR 248-256 per Baidoo J.

For the prosecution to secure conviction it has to prove all the three ingredients beyond reasonable doubt.

The prosecution must prove that the victim was under 16 years. The appellant in his written submission contends that the prosecution was unable to prove the age of the victim. From the facts the victim is 8 years and class three pupil. Under cross examination of the victim, PW1, the appellant did not challenge or contradict the age of the victim. And under cross examination of the appellant when the age of the victim was put to him, he did not deny it. This is what ensued under cross examination:

Q. Do you know the age of the victim?

A. No

Q. I put it to you that the girl is 8 years old.

A. I now know.

Having failed to deny the age of the victim, the appellant would be deemed to have admitted the age of the victim as 8 years.

The prosecution also tendered the medical report on the victim as exhibit C. Exhibit C has age of the victim as 8 years. Exhibit C was signed by the Dr. Michael Yajuchie Medical Officer of the Margaret Marquart Catholic Hospital Kpando. A medical certificate of a medical officer on the age of a person would be accepted as the true age of a person.

In my view the prosecution was able to prove that the victim was under the age of sixteen years and the trial judge was right as he found at page 8 of the proceedings that the victim was 8 years when the incident occurred.

The next ingredient of the offence is whether someone had carnal knowledge of the victim.

Section 99 of Act 29/60 (supra) provides what will constitute carnal knowledge or unnatural carnal knowledge and it provides as follows:

> When on the 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 knowledge or unnatural carnal knowledge is complete on proof of the least degree of penetration.

In **Gligah & Atiso v. The Republic** [2010] SCGLR 870 the Supreme Court had the opportunity to define carnal knowledge:

> Carnal knowledge is the penetration of a woman's vagina by a man's penis. It does not really matter how deep or how little the penis went into the vagina. So long as there was some penetration beyond what is known as brush work, penetration would be deemed to have occurred and carnal knowledge taken to have been completed.

The victim, PW1 in her evidence testified that the appellant testified that the appellant had sexual intercourse with her. The appellant denied ever having sexual intercourse with the victim. The appellant in his police cautioned statement denied the offence. The evidence of the appellant in court was almost a repetition of what he told the police when he was first arrested which was contained in his cautioned statement. This is case of oath against oath. I seem to believe the appellant when he said he did not have sexual intercourse with the victim.

The prosecution tendered the police medical form of the victim signed by the Medical Officer who examined the victim. I will reproduce portion of the report:

> *On examination was a young girl who was clinically stable. Systematic exams was grossly normal. Vaginal examination- normal vulvovaginal complex. No bruises of swelling seen on vaginal & anal vulva. Hymen is absent, whitish milky vaginal discharge seen. No obvious sign of recent penetration seen.*
>
> *Impression (1)? Defilement*

(2). Bacterial vaginosis R/O UTI

From the evidence the report of defilement was made to the on 2nd September 2020, that is barely a week after the alleged defilement. But the report indicates there is no obvious sign of recent penetration. And from the impression of the Medical officer even though he is not to determine whether the victim was defiled or not as that is for the court to determine, he is not sure if the victim was defiled. He puts a question mark by defilement in his impression.

From the evidence I believe the appellant when he said he did not have any sexual intercourse with the victim.

From the decisional authorities, in a criminal case the prosecution is to prove each essential ingredient of the offence an accused person is charged with. And the prove is proof beyond any reasonable doubt. If a prosecution is unable to prove one out of several essential ingredients of an offence, the accused person must be acquitted of the offence charged.

In **Frimpong alias Iboman v The Republic (2012) 1** SCGLR 297 at 313 DOSTE JSC had this to say:

> 'All is well known, it is trite law that in criminal cases, the duty on the prosecution is to prove the allegations against the appellant beyond all reasonable doubt. ***The prosecution have a duty to prove the essential ingredients of the offence*** with which the appellant and the others have been charged beyond any reasonable doubt. The burden of proof remains on the prosecution throughout and it is only after a prima facie case has been established, i.e a story sufficient enough to link the appellant and others to the commission of the offences charged that the appellant, therein accused is called upon to give his side of the story.'

In the case of **The Republic** v **Francis Ike Uyanwune** (2013)58 GMJ 162 at 177 **ADJEI J.A** at page 177 had this to say on the subject:

> "The law is that an accused person is presumed innocent until his guilt is proved beyond reasonable doubt and it the **duty of this court to satisfy itself that all the ingredients of the offence of defrauding by false pretences contrary to section 131 of the criminal offences Act, 1960 were proved**....." (***Emphasis mine)***

In the instant appeal, one of the essential ingredients of the offence of defilement of a female under 16 years contrary to section 101 of Act 29 as amended by Act 554 was not proved by the prosecution. The prosecution failed to establish that the appellant had natural or unnatural carnal knowledge of the victim.

To the extent that the prosecution was unable to establish that appellant had carnal knowledge of the victim, the trial Judge was wrong in holding that the appellant defiled the victim.

In conclusion, the appeal succeeds and I set aside the conviction and sentence of the appellant for defilement

(SGD.)

AYITEY ARMAH-TETTEH, J

(JUSTICE OF THE HIGH COURT)