IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HOHOE, HELD ON FRIDAY THE 27TH DAY OF FEBRUARY 2023 BEFORE HIS LORDSHIP JUSTICE AYITEY ARMAH-TETTEH

SUIT NO.F22/15/2022

EPHRAIM KOFI ASIEDU - APPELLANT

VS.

THE REPUBLIC - RESPONDENT

PARTIES: - APPELLANT ABSENT (IN LAWFUL CUSTODY)

RESPONDENT ABSENT

COUNSEL: - MR. EMILE AGBAKPE FOR MS JOAN AKORFA OSEI FOR APPELLANT PRESENT

MR. ANTHONY A. GHATTIE (ASA) FOR RESPONDENT ABSENT

JUDGMENT

This is an appeal against the Judgment of the Circuit Court, Jasikan dated 16 February 2022 and presided over by His Honour Alfred Kwabena Asiedu Esq.

On the 16 February 2022, the Appellant was arraigned before the Court, on one count of defilement contrary to Section 101(2) of the Criminal and other Offences Act 1960, (Act 29).

When the charge was read and explained to the Appellant, he pleaded guilty simpliciter. He was convicted on his own plea and sentenced to 7 years IHL.

It is against this conviction and sentence that the Appellant with leave granted by this Court on 24 June 2022 for extension of time within which to appeal, has filed this appeal. The grounds of appeal found in the Notice of Appeal dated 24 June 2022 and filed on the same are as follows:-

1. *The learned trial court judge erred by not taking evidence regarding the age of the victim (sic).*
2. *The conviction flowing from the charge is wrong in law because the Appellant is (sic) juvenile at the time of the trial.*
3. *The sentence is wrong in law because the Juvenile cannot be sent to serve in adult prison.*

The facts as presented by the prosecution are that the complainant is a secretary at KASEC whiles the victim RA aged 14 years , is a form 2 student at a secondary school in Kadjebi. The appellant aged 18 years is unemployed. On 18/01/2022, while the victim was going home after school, with a witness in this case, the appellant and two others called them into a room and one of the accused persons pushed her down and with the help of the two accused persons they covered her mouth, removed her dress, and had sexual intercourse with her one after the other. The witness managed to escape. The accused persons went into hiding after committing the crime. A report was made to the Police and medical form was issued to the complainant and she sent the victim to hospital. The

victim was treated, and the medical form endorsed and returned to Police. The appellant was later arrested from his hideout and charge with the offence.

Counsel for appellant in his submission contended that in their earlier applications to this Court they had exhibited the Birth Certificate of the appellant which clearly show his date of birth as 4th February 2005 and that he was under 18 years at the time he was arraigned before the Circuit Court on the charge of defilement.

It is important that the trajectory of events in this appeal are put in its proper perspective. The appellant was convicted on 16 February 2022. On 5 May 2022, he filed a Notice of Appeal and on the same day filed an application for bail pending appeal. The appellant in the said application exhibited three documents. They were **Exhibit EA1**, the proceedings of the trial Court, **Exhibit EA2** Birth Certificate and **Exhibit EA3** Notice of Appeal. On the return day of the application, which was 13 May 2022, Applicant was absent, his Counsel was also absent, and Counsel for the Republic who was also absent wrote for an adjournment. The application for bail pending appeal was accordingly adjourned to 18 May 2022. On the 16 May 2022, the applicant through his lawyer filed a notice of withdrawal of the application for bail pending appeal. In fact the application for bail pending appeal was filed based on an appeal which was filed out of time so, the application itself was incompetent. The appellant was convicted on 22 February 2022 and the Notice of Appeal was filed on 5 May 2022 over two months after his conviction. By section 325 of the Criminal Procedure Act 1960, Act 30 as amended by section 8 of Act 116 and Act 633, the time limited for the filing of an appeal in a criminal case is one month. Appellant then on 16 May 2022 filed an application for extension of time within which to appeal. The said application had only one Exhibit attached to it and that was the record of proceedings at the trial Court. So, for all intents and purposes there is no birth certificate that this Court can look at and consider in the determination of this appeal as the application for bail pending appeal that was withdrawn was withdrawn with all its

Exhibits including the birth certificate. Even if the application was still pending and not withdrawn could this court have a look at the birth certificate and considered it in this appeal. I do not think so. This birth certificate was not part of the proceedings at the trial court. It was first introduced when the applicant filed the application for bail pending appeal which was withdrawn. In my view introducing it for the first time on appeal would have amount to leading fresh evidence on appeal and the appellant had not sought leave of the court to introduce the birth certificate as fresh evidence on appeal. I will now deal with the grounds of appeal.

GROUND 1

In arguing this ground, Counsel for the Appellant contends that the prosecution in the charge sheet presented the age of the appellant as 19 years but in the facts, they stated the age as 18 years. It is the contention of Counsel that prosecution was inconsistent with the age of the appellant and with the disparity in the age of the appellant stated, the prosecution should have taken steps to confirm the age of the Appellant. According to Counsel the age of an accused person has she puts it, 'has a heavy bearing on the jurisdiction of a Court to deal with special persons.'

The Respondent on the other hand contends that the Plea of the Appellant was taken, and he pleaded guilty simpliciter and that there was no obligation on the trial judge to take further evidence with regard to the age of the Appellant.

Section 1 of the Juvenile Justice Act 2003, Act 653 provides as follows:

1. Juvenile

> *(1) For purposes of the Act, a juvenile is a person under eighteen years who is in conflict with the law.*

(2) A juvenile shall be dealt with in a manner which is different from an adult, except under exceptional circumstances under section 17.

And section 17 provides as follows:

17. Exclusive jurisdiction and transfer

(1) A court of summary jurisdiction other than a juvenile court shall not hear a charge against or dispose of a matter which affects a person who appears to the Court to be a juvenile, if the Court is satisfied that

(a) the charge or matter is one in which jurisdiction has been conferred on juvenile courts, and

(b) a juvenile court has been constituted for the place, district or area concerned, and where the Court is satisfied, the Court shall make an order transferring the charge or matter to the juvenile court.

19. Presumption and determination of age

(1) Where a person, whether charged with an offence or not, is brought before a Court otherwise than for the purpose of giving evidence and it appears to the Court that the person is a juvenile, the Court shall make inquiry as to the age of that person.

(2) In the absence of a birth certificate or a baptismal certificate, a certificate signed by a medical officer as to the age of a person below eighteen years of age is evidence of that age before a Court without proof of signature unless the Court directs otherwise.

(3) An order of a Court shall not be invalidated by a subsequent proof that the age of the child has not been correctly stated to the Court and the age presumed or declared by the

Court to be the age of the juvenile shall be deemed to be the true age for the purpose of a proceeding under this Act.

(4) Where it appears to the Court that the person brought before it has attained the age of eighteen years, that person shall for the purposes of this Act be deemed not to be a juvenile and shall be subject to the Procedure Act.

From the provisions above the when a juvenile who is a person under 18 years and is in conflict with the law it is the Juvenile Court that has jurisdiction to hear the matter and not the Circuit Court except where the juvenile is charged together with an adult as provided for under section 18 of Act 653. And that when it appears to the Court that the person brought before it has attained the age of eighteen years that person shall be deemed not to be a juvenile for the purposes of the Act.

In the instant appeal from the proceedings, the Appellant was present in court when the case was called and was seen by the trial judge. The trial judge did not make any enquiry as to his age. And it can be reasonably be inferred that it appeared to him that the appellant had attain the age of eighteen years.

Further, the charge was read and explained to the appellant in the Ewe language. The particulars of offence is as follows:

"EPHRAIM KOFI ASIEDU AGED 19 YEARS, UNEMPLOYED: On 14/05/2021, in Kadjebi in the Oti Circuit and within the jurisdiction of this court, did have carnal knowledge of ROSEMARY ANSAH a female child aged 14 years."

After the charge was read over and explained to him which included his age as 19 years, he did not raise any objection or query but admitted the offence by pleading guilty. There was no reason for the trial court to have doubted the Appellant had not attained eighteen years .

The age of the appellant was also mentioned as part of the facts and the appellant once again raised no objection in Court with regards to his age when the facts were read.

The law is that in criminal cases an accused is presumed innocent unless proven guilty or he pleads. This presumption of innocence is constitutionally guaranteed under Article 19 (2) (c) of the Constitution 1992, which provides as follows:

Article 19 (2) A person charged with a criminal offence shall –

> *(c) be presumed to be innocent until he is proved or has pleaded guilty, '*

Section 11(2) of the Evidence Act 1975 NRCD 323 also states as follows:

> *'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 15 (1) of the Evidence Act 1975 NRCD 323 also states that:-

> *'Unless and until it is shifted, the party claiming that a person is guilty of a crime or wrongdoing has the burden of persuasion on that issue.'*

Article 19 (2) of the 1992 constitution, ss. 11(2) and 15(1) of the Evidence Act 1975, NRCD 323 places the burden to prove the guilt of an accused person on the prosecution. Therefore, the prosecution which asserts that the accused should be convicted of the charge preferred against him has the onus of proving that assertion.

This presumption of innocence is rebuttable by the Prosecution upon adducing evidence before a Court of competent jurisdiction that a person charged with a criminal offence has indeed committed the offence beyond reasonable doubt. It is the fundamental obligation of the prosecution to rebut the presumption of innocence by evidence beyond reasonable doubt that a person accused of an offence has committed the said offence.

In **Kwame Awuah v The Republic** (2019) 129 GMJ at 169 , the Court had this to say on who lies the burden of proof in criminal trials when it held as follows:

> *"The law is trite that in criminal trials, the burden is always on the prosecution to prove its case against the accused beyond all reasonable doubt and the accused is not under any obligation to prove his innocence."*

Korsah CJ in the case of **Commissioner of Police v. Isaac Antwi** (1961) GLR 408, SC, had this to say**:**

> *" … The law is well settled that there is no burden on the accused. If there is any burden at all on the accused, it is not to prove anything, but to raise reasonable doubt. If the accused can raise only such a reasonable doubt, he must be acquitted …".*

In **Republic v. District Magistrate Court Grade II, Ex Parte Yahaya** (1984-1986) 2 GLR 361 at 365, Brobbey J (as he then was) stated:

> *" … One of the cardinal principles in criminal law in this country is that when an accused person pleads not guilty, his conviction must be based on evidence proved beyond reasonable doubt …".*

The law is also that a genuine plea of guilty to a charge amounts to a judicial confession to have committed the offence. Such a plea obviates the necessity for a trial or proof of the charge by the prosecution. In criminal trials conviction should be based on proof

beyond reasonable doubt. However where the person charged admitted the charge and his plea forestalled the prosecution from leading evidence to establish the charge against him, he would not be allowed to contend that the charge had not been proved against him because, by his plea of guilty he had waived the duty upon the prosecution to offer proof of the charge. See **Rep v Yiadom** [2001-2002] 1 GLR 558.

In the instant appeal, the appellant by his election to plead guilty to the charge, denounced his presumption of innocence guaranteed under the 1992 constitution as well as discharge the prosecution of the evidential obligation on establishing his guilt of the charge against him .The trial judge did not err by not taking evidence as to the age of the appellant. This ground of appeal fails.

GROUNDS 2 AND 3

The gravamen of the Appellant's grounds of appeal to my understanding is that the trial Judge erred in law when he failed to treat the Appellant as juvenile at the time of the trial. Accordingly, the conviction from the charge was wrong or that the trial Judge erred in law when he failed to treat the appellant as an adult offender and failed to convict him and sentence him as such.

Additionally, grounds of appeal imply that the only place he could have been sent to serve the sentence is a Senior Correctional Centre in accordance with Act 653
Section 46(7) provides that

"A juvenile or young offender shall not be detained in an adult prison"

Section 1(1) provides that

"For the purposes of the Act, a juvenile is a person under eighteen years who is in conflict with the law"

Section 60(1) provides that in this Act unless the context otherwise requires.

> *"juvenile" means a person who is under the age of eighteen years who is in conflict with the law.*
> *"young person" means a person who is eighteen years or above eighteen years but is under twenty one.*

In the instant appeal, the appellant at the time of his trail before the Circuit Court, he had attained 18 years and was not a juvenile. From the facts even though the appellant was not a juvenile he was a young person but was he a young offender in terms of the Juvenile Justice Act ?.

The definition of a younger offender is provided in section of 60(1) as follows;

> *"young offender" means a young person who has been convicted of an offence for which the Court has power to impose a sentence of imprisonment of a month or upwards with the option of fine."*

For one to qualify as a young offender under the above provision, the persons must be

1. A young person
2. That he has been convicted for an offence
3. That the conviction relates to an offence that attract a term of imprisonment of one month or more and
4. That the offence which led to the conviction must allow for the option of a fine.

Relating the above requirement to the instant appeal,

a) The appellant was nineteen years old at that time of his conviction. He was therefore a young person.
b) The appellant was convicted of the offence of defilement of a female child under 16 years of age.
c) The sentence imposed by law upon conviction for the offence of defilement of a female under 16 years of age is a minimum seven (7) years and not more than twenty-five (25) years.
d) The offence of defilement of a child under 16 years of age therefore carries a sentence of imprisonment of 7 years or upwards.
e) The offence of defilement does not allow for the option of a fine as a punishment upon conviction.

For the avoidance of doubt, **Section 101(2) of Act 29** provides:

> *"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 term of imprisonment of not less than seven years and not more than 25 years."*

The term young offender is inextricably linked with the type of offence for which one is convicted and the prescribed penalty for same.

So, where a young person who is convicted for the offence of Defilement of a female child under 16 years contrary to section 101 (which does not allow for the imposition of a fine), then, that young person cannot qualify as a young offender.

The Appellant in instant case was neither a young offender nor a juvenile when he was convicted by the trial Circuit Court Judge. Consequently, the trial Circuit Court Judge was not wrong in law because the Appellant was not a juvenile at the time of the trial.

Also, the sentence handed down to the appellant by the learned Circuit Court Judge was not in conflict of the Juvenile Justice Act, 2003(Act 653). Since the Appellant was not a juvenile or young offender.

THE SENTENCE

The cardinal principles to consider in sentencing a person convicted of an offence were stated in the case of **Kwashie v The Republic (1971) 1 GLR 488 at 493**. In that case it was stated as follows:-

> *"In determining the length of sentence, the factors which the trial Judge is entitled to consider are: the intrinsic seriousness of the offence, the degree of revulsion felt by law abiding citizens of the society for the particular crime, the premeditation with which the criminal plan was executed, the prevalence of the crime within the particular locality where the offence took place, or in the country generally, the sudden increase in the incidents of the particular crime, mitigating or aggravating circumstances such as extreme young, good character and the violent manner in which the offence was committed."*

Also, in the case of **Kamil v Republic (2011) SCGLR 300 @ 315-316**, the Supreme Court stated that sentences serve a five fold purpose, namely to be punitive, calculated to deter others; to reform the offender, to appease the society and to be a safeguard to this country."

The trial Circuit Court Judge took into consideration the fact that the Appellant was a 1st offender and of such a tender age and accordingly awarded the minimum prison term provided under the law for the offence of Defilement of a child under the age of sixteen years which is 7 years in prison. Grounds 2 and 3 are also dismissed.

In conclusion. the appeal is dismissed and the judgment of the Circuit Court in convicting and sentencing the Appellant is hereby affirmed.

(sgd)

AYITEY ARMAH-TETTEH J.

JUSTICE OF THE HIGH COURT