IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2015

CORAM: ANSAH JSC (PRESIDING)
DOTSE JSC
ANIN-YEBOAH JSC
BAFFOE BONNIE JSC
AKOTO BAMFO(MRS) JSC

CRIMINAL APPEAL
No: J3/2/2014

18TH MARCH 2014

RICHARD BANOUSIN ACCUSED/APPELLANT/ APPELLANT

VRS.

THE REPUBLIC RESPONDENT RESPONDENT RESPONDENT

JUDGMENT

VICTOR DOTSE JSC:

On the 18th day of March 2015, this court by a unanimous decision allowed the appeal herein against the decision of the Court of Appeal dated 28/2/2013 and set aside the conviction and sentence imposed on the appellant by the said Court

of Appeal judgment and accordingly acquitted and discharged him of his conviction for attempted rape and sentence of 7 years. We however reserved our reasons for the said decision which we indicated would be filed on or by the 2nd day of April 2015.

We now proceed to give our reasons for our said decision as follows:

We begin this opinion by an observation of the times and life of Sir Isaac Newton, that great 17th Century English Mathematician and Philosopher who has given the world some natural laws of physics which apply to human beings, just as they apply to the movement of bodies in the universe. And we are sure everyone isfamiliar with one of these laws, and that is, *"for every action, there is an equal and opposite reaction."* This in real terms means that for every action one takes, there is an opposite reaction and a price to pay for it. This could be positive or negative.

How does the above statement by Sir Isaac Newton apply to the circumstances of this case? Well, if only the Accused/Appellant/Appellant, hereafter referred to as the Appellant had not requested the victim of the rape charge, RashidaKanton,PWI to follow him to his bungalow for her seized pullover among others that he had seized from the students, the chain of events, culminating in the conviction of the Appellant by the High Court, Wa, and the subsequent confirmation of same by the Court of Appeal, would not have resulted into the instant appeal by the appellant to seek a reversal of that conviction and sentence to 7 years I.H.L. Fact of the matter is that, the career of the appellant as a teacher has been brought to a pre-mature end by his lack of discretion.

FACTS OF THE CASE

The appellant was at all times material to the cause of events giving rise to his arraignment before the High Court, Wa, on one count of rape contrary to section 97 of the Criminal and other Offences Act, 1960 (Act 29) a teacher at the Kanton Senior High School at Tumu in the Upper West Region. In that capacity the appellant on the 28th day of July, 2009 requested the complainant and victim of the rape charge Rashida Kanton Ibrahim, a student of the same school to come to his apartment for some pullovers which the appellant claimed he had seized from the students earlier at an entertainment programme in his capacity as the entertainment master of the school. These pullovers also included one seized

from the complainant and the appellant therefore invited the complainant to follow him to his apartment for her pullover and the others at about 9.00 am on the said 28/7/2009.

The complainant later alleged that the appellant had raped her and asked her to wash herself before they returned to school. From the evidence on record, the appellant informed one of her friends called Kashifa, also a student of the same school about the said rape incident. But surprisingly, this student and friend was never called as a witness.

Eventually, the complainant informed her parents in the evening of the same day, following which a report was made to the Headmaster of the school. As the appellant denied the rape charge allegations before the Headmaster and the parents of the victim at the school, a report was made to the Police as a result of which the appellant was arraigned and tried summarily before the High Court, Wa, on one count of rape which stated thus:

> **"Statement of offence**
>
> Rape contrary to section 97 of the Criminal Offences Act, 1960 (Act 29)
>
> **Particulars of Offence**
>
> Richard Banousin, Teacher
>
> For that, you on the 28th day of July 2009 at Tumu in the Upper West Region had carnal knowledge of one, Rashida Kanton Ibrahim without her consent."

At the trial before the High Court, the complainant testified as PWI, her father as PW2, the medical officer Dr. Gomez who attended to her as PW3, Lance Corporal Theophilius Awihere, the Policeman who initially received the complaint and commenced investigations as PW4, and finally, Detective Lance Corporal Charles Lartey who completed the investigations as PW5.

The appellant when he was asked to open his defence, elected to speak from the dock and made a statement thereby denying the Republic/Respondent/Respondent hereafter referred to as Respondent from cross-examining him.

CONVICTION AND SENTENCE

After the trial and addresses by counsel, the learned trial Judge Koomson J, presiding over the High Court at Wa, on the 29th July 2010 convicted the appellant on the offence of rape as charged and sentenced him to a term of 7 years in the following words:-

> *"On the whole of the evidence adduced in the case, I am convinced that the prosecution has proved beyond reasonable doubt that the accused person had sexual intercourse with PW1 without her consent. I therefore hold that the guilt of the accused had been proved by the prosecution.*
>
> *In the circumstances I find the accused person guilty of the offence charged and convict him accordingly.*
>
> *In sentencing the accused I have taken into consideration the fact that the accused is a first offender. Regard has also been given to the fact that accused is the breadwinner of his family. Regard has further been given to the fact that the accused has been expelled from the school where he was teaching.* ***Abuse of students by their teachers in our schools however must not be tolerated. Teachers are to be role models to students. They are to inculcate in them a good sense of morality.***
>
> ***If teachers are allowed to take advantage of students then, this nation has a bleak future as the children who are the future leaders of this country would be morally abused by the time they leave school. All efforts should therefore be made to halt sexual abuse of our children in the various schools. On this note, I hereby sentence the accused person to a term of 7 years imprisonment I.H.L."***

APPEAL TO COURT OF APPEAL AND IT'S DECISION

Feeling dissatisfied and aggrieved with the decision of the High Court, the appellant unsuccessfully appealed against the High Court decision. The Court of Appeal on 28th February 2013 dismissed the appeal as follows:-

> ***"There is evidence of intention to rape and the appellant attempted it but was resisted.*** *In s.153 (1) of Act 30/60, it is provided*

that when a person is charged with an offence he may be convicted of having attempted to commit that offence although the attempt is not separately charged.

That being so in the absence of any positive evidence of the ingredient of actual carnal knowledge, to wit penetration of the vagina, we set aside the conviction of the appellant of rape. In its place, we find him guilty of attempted rape and convict him. *And since the provisions of s. 18 (2) of Act 29/60 made the punishment for an attempted crime for which a person has been convicted the same as the punishment for a crime which has been completed, i.e. actually committed, we maintain the seven (7) years IHL imposed on the appellant by the trial court.*

We therefore confirm the conviction of the appellant on the charge as varied, and dismiss the appeal."

APPEAL TO SUPREME COURT

Feeling again aggrieved and dissatisfied with the decision of the Court of Appeal, the appellant has appealed to this court, with the following as the grounds of appeal.

GROUNDS OF APPEAL

1. The Court of Appeal lacks the jurisdiction to interprete the 1992 constitution which jurisdiction it erroneously assumed and exercised same in its judgment of 28th February 2013 contrary to the clear provisions of the Constitution 1992'.

2. The judgment of the Court of Appeal is a nullity as same was given contrary to clear provision of statutes and binding judicial dicta.

3. The Court of Appeal erred when it held that the only offences triable on indictment are those mentioned in article 19 (2) (a) of the 1992 Constitution.

4. The Court of Appeal was wrong in law when it held that the offence of rape was not an indictable offence.

5. The Court of Appeal erred as it failed to consider the fatal effect of the failure of the prosecution to call a vital witness to its case.

6. The Court of Appeal erred when it held that the accused person was guilty of attempted rape contrary to the law and evidence on record.

7. That judgment is against the weight of the evidence on record.

Burden of Proof

In order to appreciate the resolution of the issues that have been identified as a bench mark in this appeal, it is considered worthwhile to set out in general and specific terms, the duty that rests on the prosecution to prove the guilt of the appellant beyond reasonable doubt.

It is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt in all criminal cases.

A corolary to the above rule is based on the fact that an accused is presumed innocent until he is proven guilty in a court of law. This the prosecution can only do if they proffer enough evidence to convince the Judge or jury that the accused is guilty of the ingredients of the offence charged. The Prosecution has the burden to provide evidence to satisfy all the elements of the offence charged – in this case rape. The burden the prosecution has to prove is the accused persons guilt, and this is proof beyond a reasonable doubt. This is the highest burden the law can impose and it is in contra distinction to the burden a plaintiff has in a civil case which is proof on a preponderance of the evidence.

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

See cases like the following:

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**

4. **Darko v The Republic [1968] GLR 203, especially holding 2**

This presumption therefore places upon the prosecution the burden of proving accused/appellant guilty beyond a reasonable doubt. Reasonable doubt is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence, is open to some possible or imaginary doubt.

GENERAL COMMENTS AND ANALYSIS OF THE EVIDENCE ON RECORD

In this respect, it is necessary to refer to the evidence of the complainant in detail and make the necessary comparisons and analysis as follows:-

PW1 – Rashida Ibrahim Kanton - Victim of alleged rape

"On the 28/7/2009 about 9.00am. I was in my classroom. I was revising my notes. The accused person came to our classroom. The accused asked me to follow him to collect my pullover. I also followed him to his house on the school campus. The accused asked me to sit down whiles he fetches the pull-overs. I sat down. The accused brought the pullovers and sat by me. He started asking me whether some of the students and teachers have proposed to me. I told him no one has proposed to me. He then placed his hand on my laps and started kissing me. I wanted to leave the room but the accused rushed and locked the door. The accused then locked the door. The accused then started pulling me and in the process my school uniform got torn. The accused pulled me to his bedroom. He removed his trousers leaving his white boxer shorts on. He pushed me unto his bed and had sex with me.

After this the accused person told me I should not tell anyone. The accused asked me to take an ablussion can and go and wash down myself. I did so. The accused gave me the pullovers and opened the door. We went back to the school. I went to my class. I was crying. One of my friends asked me why I was crying. I went outside with my friend and I told her what the accused did to me. She advised me to report the matter to our headmistress. I told her I would rather tell my parents. In the evening I called my parents and told them what the accused did to me. They came to the school that evening to see the headmaster. I reported the case to the headmaster. The Headmaster asked us to go and come the next morning. The next morning we went to the headmaster's office. The accused person was present. I narrated the incident to them. The accused denied having sex with me. We therefore reported the matter to the Police. I was given medical forms to attend hospital. I went to hospital. I have the school uniform which got torn when the accused pulled me. I want to tender it in evidence."

From the above evidence, the following stand out clear:-

1. That the appellant, requested complainant to accompany her to his house for pullovers, which she obliged.

2. That the appellant engaged in some amorous conversations and conduct with the complainant.

3. That at a stage, the complaint's uniform got torn due to some harassment of her by the appellant.

4. The appellant locked the door on the complainant and pushed her to the bed.

5. The appellant requested complainant to wash herself with an ablussion can, which she did.

6. Thereafter, they went back to the campus and she confided in one of her friends what the appellant had done to her.

7. Contrary to her friend's advice, she reported the incident to her parents, instead of the school authorities which led to the Headmaster being informed by her parents.

8. The appellant denied having had sex with the complainant before the Headmaster and thereafter the incident was reported to the Police.

It is also critical at this stage to refer briefly to portions of the evidence of the father of the complainant Ibrahim Luri, PW2, as well as that of Dr. Royale Gomez, PW3, the medical officer who examined the complainant and issued a report on her behalf.

PW2 – Ibrahim Luri, father of PWI- Evidence in Chief.

"The next day we went there. The headmaster invited some teachers and the accused. PWI was made to narrate the incident again. The accused was made to narrate his side of the incident. ***His narration tallied with what PW1 said except that the accused said his penis did not enter the vagina of PWI.*** *We left the school and reported the matter to the Police. PWI was made to narrate the incident to the Police. She was given a medical form to attend hospital. We took her to the hospital. She was examined by two Cuban Doctors. A report was issued and we sent it to the Police. The accused was arrested by the Police.*

Q. Did you say your daughter called you at 8.30 pm on that day

A. It was after 8.30pm that she called

Q. Can you give us the time?

A. I only know it was after 8.30p.m

Evidence of PW3 – Dr. Royale Gromez

"My name is Dr. Royale L. Gomez. I live at Tumu. I am a medical officer attached to the Tumu Hospital.

On the 29/7/2009 I concluded a medical examination on one Rashida Kanton Ibrahim. I issued a medical report. I have the report and want to tender it in evidence.

By Court: Medical Report tendered and marked as Exhibit "B".

I did not see any signs of violence on the body of the girl. ***I conducted a vaginal examination and found the hymen broken. It was not recently broken. If it were recent there would have been signs. I did not find any sperm inside or outside.*** *I conducted a pregnancy test and scan but they were all negative.*

Q. From your findings can you conclude that there was a penetration of the vagina of the victim?

A. I cannot say

Q. Infections of the gland is very common

A. Yes

Q. That is all"

It is interesting to observe that, after PW3 had testified and was cross-examined, the learned trial put asked the following question to the medical officer.

By Court:- ***"From your examination, did you find the girl to be very active sexually?***

A: Yes"

This question and answer is very revealing. This is because during cross-examination, the complainant was asked the following questions to which she answered as follows:-

Q. "Before 28/7/09 you might have had sex before

A. I never had sex before this date

Q. Put. You are not being truthful

A. I am truthful

Q. Before the said date, were you a virgin?

A. Yes"

If one juxtaposes the above testimony of the complainant with what the medical officer said about the sexual **activeness** of the complainant and the fact that the hymen of the complainant was not recently broken and went on to state that, *"if it were recent there would have been signs",*we are minded to be very cautious in the credibility to attach to portions of the complainant's evidence.

In making the above observation, we are not unmindful of the caution that exists when an expert testimony such as was proffered by the medical officer is being considered. See case of **Sasu v White Cross Insurance Company Limited [1960] GLR 4.** We will revert to this case later in the judgment**.**

On the part of the appellant, it is on record that, his caution charged statement was tendered into evidence whilst he also made a statement from the dock. In view of the comments that had been made in respect of the appellant's case and that of the complainant, it is considered prudent to state in extenso these two pieces of statement or evidence.

Caution statement of the appellant

Suspect states in English Language and same is recorded down in the presence of an independent witness as follows:-

"I am a teacher at Kanton Senior High School, yesterday 28/7/09 after an interaction with Senior High School IC, I invited Kanton Rashida one of my pupil students to come with me for collection of seized students items in my possession.

Because of my very good relationship with her, she obliged and went with me to the house. In my house, we had a lot of chats and in the course of the discussion, I encourage her to be a good girl.

I placed my hand on her laps and she informed me that the father told her not to have anything to do with any man sexually. At this moment she got up and in the process I tried calming her down to sit down, I held her uniform and she moved away with force and out of that the thread got loose and that part of the uniform got opened. She told me if I persist she would tell the father so I told her to relax and that were going out soon to campus. I gave her ablussion can to wash her face at the bathroom. After

washing her face; we went out with the seized items. ***I never had sex with her."***

Statement from the dock by the Appellant

"Accused: By the rules of engagement of the teaching service, we are required to find out from students why they perform poorly. Under this rule I conducted some examination for Rashida's class. She was the only one who failed. I invited her to the staff common room to find out why she performed abysmally. There after she became very close to me as a master and student. She was pleased to find out I have taken time to find out about her progress in her academic pursuit. One weekend she visited me at my place and brought me a book entitled "The History of Gold Mining". I asked her why she brought the book to me and she said it was a gift to thank me for all the good things I have been doing for her regarding her studies. On my 30th birthday she gave me a present. I have been in charge of the School's entertainment for long.

On one entertainment night I got into the entertainment hall and realized that a lot of the students were improperly dressed. I directed the prefect on duty to confiscate the improper dresses. Unfortunately, Rashida's own was part of collection. After the collection, I took the clothing's to my place. Since then Rashida kept pressuring me for her dress. I asked her to wait till the end of the term. She reminded me of her dress at the end of the term. I was due for an African Peer Review Workshop in Tamale so I asked her to follow me after class to my place for the dresses. When we got to my place I released the dresses to her and asked her to pick her own and release the rest to her colleagues. Thereafter we left for school together. On the following day 29th I was in my room watching a programme on T. V. when the headmaster sent a messenger to call me. At the headmaster's office he informed me that he has received a complaint from Rashida and her parents that I raped her. He also indicated that the parents were prepared to pursue the matter to its logical conclusion. He asked that there should be a concession if only I should agree that I raped her for the matter to be settled at his office. The headmaster impressed upon me that I should admit so that the matter would be solved. The

headmaster became angry and indicated that he will take the matter from the parents and make sure that I am punished for my intransigence. "

What stands out clear is that, from the very beginning of this incident, that is to say from the headmaster's office, to the Police Station and the Court, the appellant has consistently denied having any sex with the complainant.

We had set out supra, some common threads that run through the complainant's story and that of the appellant.

The issue that the appellant did not have sex with the complainant has been confirmed by the medical officer's evidence. This fact is very crucial in the sense that the Prosecution have failed to call a vital and material witness, and that is the friend of the complainant, Kashifa. As will be explained later in this judgment, the issue of corroboration sometimes in matters of rape like the instant one is very important and could tilt the scales of justice one way or the other.

One may ask, why did the complainant, not report the incident that was alleged to have happened in the morning of 28/7/09 to anybody except her friend Kashifa, even then, it was upon enquiries. It was even much later that night after 8.30pm that the complainant informed her parents on phone.

From the narration of the evidence on record, it is quite apparent that the appellant and the complainant know each other fairly well, such that the complainant even gave the appellant a book that her father bought for her.

In real terms, the only point of divergence and this is the crux of the matter is whether the appellant had any sexual act, with the complainant. In this instance, the least degree of penetration would suffice. But this is the point the Court of Appeal has captured in their judgment that there was no evidence of any such penetration. The Court per Ayebi J.A stated as follows:-

"The vexed issue in this appeal is whether or not the prosecution has proved the carnal knowledge, to wit penetration of PWI by the appellant beyond all reasonable doubt. In the written submission of the appellant grounds (1) (2) and (3) of the appeal were argued together. Various issues were raised and argued to show that the Republic failed to discharge the burden of proof as required by the law.

As I noted early on, the issue which arose out of the three grounds of appeal which call for determination is whether the prosecution has succeeded in ***proving that the appellant penetrated the vagina of PW1 to any degree.*** *This is the reason for ground (2) of the appeal that the trial judge erred in law when he failed to resolve doubt in favour of the accused.*

From the submission of the appellant, the doubt I believe refers to the uncertain evidence of the medical doctor. We need to remind ourselves that the evidence of the medical doctor like all expert evidence is opinion evidence. It does not decide the issue it is offered to prove. It only assists the trial Judge in making a finding on the issue by considering it alongside other evidence on record."

We have already quoted the Court of Appeal, wherein they substituted the offence of attempted rape for that of rape and therefore maintained the conviction and sentence.

STATEMENTS OF CASE BY LEARNED COUNSELS' FOR THE PARTIES

We have perused the erudite and thought provoking statements of case filed by learned counsel for the parties, namely, Mujeeb Rahman Ahmed for the appellant and learned Chief State Attorney, William Kpobi for the Republic/Respondent.

We note with appreciation the content of their submissions and the invaluable assistance they have offered this court.

We have also taken note of the many decided cases referred to us as well as the various constitutional and statutory provisions that were relied upon by them in stating their rival positions.

We also observe with appreciation, the very serious issues touching one of the core criminal procedural rules of practice that the said statements of case has brought to the attention of this court for determination. This includes the issue as to whether the trial of the offence of rape as contained in sections 97, 98 and 99 of Act 29 is on indictment or summary.

We take note of the fact that, learned counsel for the appellant argued his statement of case on the basis of the grounds of appeal filed, except to observe that grounds 2 and 5 have not been argued and must be deemed to have been abandoned.

On the other hand, learned counsel for the Respondent, the learned Chief State Attorney formulated some three issues, and although those three issues could have been further reformulated into two issues, we have decided to use the said formulation by the learned Chief State Attorney as a benchmark for our analysis and decisions. These issues are as follows:

1. Whether an offence labeled as a first degree felony can be tried summarily.

2. Whether the prosecution adduced enough evidence to corroborate the ingredient of carnal knowledge in the offence of rape that the appellant was charged with
3. The issue of constitutionalism, (i.e. whether it is the Supreme Court that must interprete any provision of the Constitution 1992 in any proceedings in courts below the Supreme Court where an issue of constitutional interpretation arises).

We now proceed to deal with these issues, seriatim.

ISSUE I – WHETHER AN OFFENCE LABELLED AS FIRST DEGREE FELONY CAN BE TRIED SUMMARILY

1. Since the arguments of learned counsel in respect of this issue have already been recounted elsewhere in this judgment, we proceed to our discussions and analysis of same.

Undoubtedly, it is the Criminal and other Offences (Procedure) Act, 1960 Act 30 that regulates the conduct and procedure of criminal prosecution in Ghana. In this respect, it is imperative to refer to section 1 (1) and (2) of Act 30 which provides as follows:-

1(1) “A criminal offence under the Criminal Offences Act, (Act 29) 1960 shall be enquired into, tried and otherwise dealt with in accordance with this Act.”

1(2) “An offence under any other enactment shall, subject to that enactment be enquired into, tried and dealt with in accordance with this Act.”.

We are therefore of the firm conviction that, it is to Act 30 that one must look, in order to determine how an offence created under Act 29 is to be tried. This provision is however subject to the Constitution 1992 which is the Grundnorm and from which all enactments derive their validity, reference article 2 (1) (a) and 11 (1) of the Constitution 1992.

The net effect of this is that, unless, the statutory provision on the mode of trial of an offence of Rape, which is an offence created under Act 29, is inconsistent with any provision of the Constitution 1992, the procedure outlined for the trial of that offence as a first degree felony and an indictable offence pursuant to Act 30 must be deemed to be valid and applicable at all times.

Section 2 (2) of Act 30 provides thus:-

“An offence shall be tried on indictment if

(a) It is punishable by death or **it is an offence declared by an enactment to be a first degree felony, or**
(b) The enactment creating the offence provides that the mode of trial is on indictment.”

We are also mindful of the following constitutional provisions in articles 19 (2) and 125 (1) & (2) of the Constitution 1992 which state respectively as follows:

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

(a) in the case of an offence other than high treason or treason, the punishment for which is death or imprisonment for life, be tried by a judge and jury....”

125 (2) “Citizens may exercise popular participation in the administration of justice through the institutions of public and customary tribunals and the jury and assessor systems.”

The above are therefore clear indicators, that the Constitution 1992 has given tacit approval and endorsement of the jury and assessor systems of citizen participation in the administration of justice in the country.

It also re-emphasises that, the Constitution 1992, has provided a mandatory trial on indictment in respect of cases punishable by death or life imprisonment. For all other offences and the procedure for the such trials, it is to the relevant criminal procedure rules in Act 30 that one must look to.

It was basically due to the above that, the Supreme Court, when confronted with a similar situation in 1971, in the opt quoted case of ***Republic V Maikaikan [1971] 2 GLR 473***, held that, under section 243, of Act 30, the trial of offences other than those punishable with death or life imprisonment is by a court with aid of assessor, unless the court for stated reasons, directs that the accused be tried by a jury.”

Bannerman C.J, in delivering the opinion of the court further stated as follows:-

> *“Article 20 (2) (a) of the Constitution, is not in conflict with provisions made for the trial of offences as contained in the Criminal Procedure Code, 1960 (Act 30) or any other law.”*

The provisions in article 20 (2) (a) of the Constitution 1969 are in parimateria to the provisions of article 19 (2) (a) of the Constitution 1992.

That being the position, we are of the view that there is infact no conflict between article 19 (2) (a) of the Constitution 1992 and section 2 (2) (a) of Act 30.

Section 97 of Act 30 imposes a minimum of 5 years and a maximum sentence of 25 years for anyone who is convicted of committing the offence of rape.

It is important to observe that, even though, this amendment of section 97 was done by Act 554, (section 11 thereof) the classification of rape as a first degree felony has been maintained.

It is to be further noted that, the submissions of learned Chief State Attorney, Mr. William Kpobi to the effect that, the amendment of section 97 of Act 29, which created the offence of rape, reduced the punishment to various terms of imprisonment with a lower and upper limit, led to the offence of rape no longer being an indictable offence in view of article 19 (2) (a) of the Constitution 1992.

This submissions not only erroneous but also misleading and fails to take into account the dominant nature of Act 30 as a procedure rule of practice in criminal prosecutions of this nature. This is so because, it has to be noted that, Act 30 contains the procedure rules of practice in respect of all criminal trials under offences created pursuant to Act 29. Other offences created under other enactments may be tried under Act 30 provided the offence creating enactment provides accordingly.

We have already stated that rape is an offence created under Act 29. Rape is still a first degree felony, and under section 2 (2) (a) of Act 30, an offence shall be tried on indictment if it is declared to be a first degree felony. It is to be noted that since no specific legislation has been made for the trial of rape offences, it is to Act 30, and the provisions in section 2 (2) (a) thereof that regulate the trials of offences charged under section 97 & 98 thereof of Act 29.

Article 19 (2) (a) of the Constitution 1992 did not prohibit the trial of the first degree felony cases as indictable offences like rape which do not carry death or life imprisonment sentence.

A clear reading of the said article 19 (2) (a) of the Constitution gives the clearest impression that, the Constitution was only making exceptions for the trial of high treason and treason, for which a different mode of trial has been provided for under the Constitution 1992. In this respect, it may be instructive to refer to article 139 (2) (a) (b) (c) and (d) of the Constitution which provides as follows:

2. The High Court shall be constituted by

(a) by a single Justice of the Court

(b) by a single Justice of the Court and jury; or

(c) by a single Justice of the Court with assessors; or

(d) by three Justices of the Court for the trial of the offence of high treason or treason as required by article 19 of this Constitution."

The above clearly re-emphasises the fact that, the High Court is differently constituted as and when the need arises. It is constituted as

(i) a single Justice
(ii) with a single justice with jury
(iii) with a single justice with assessors
(iv) with three justices for the trial of the offence of high treason.

It is to be further noted that, whenever the Court is constituted by a Judge with either a jury or assessors, for the trial of a criminal offence under Act 29, or any other enactment, the relevant procedure rule of practice is Act 30.

See section 203 of Act 30 which mandatorily provides that a reference in an enactment to an offence as indictable shall be construed as indications that the offence is to be tried in accordance with Part V of Act 30 which deals with Trials on Indictment.

Section 204 of Act 30 also provides that trials on indictment shall be by a jury or with the aid of assessors as contained in Part V of Act 30.

The submission by the learned Chief State Attorney Mr. William Kpobi, that the rationale for the amendment of rape and other kindred offences in section 97 and 98 of Act 29 was to expeditiously adjudicate such cases even though desirable is not supported by law, any rule of interpretation or rule of practice.

For example, the following sections of Act 29, deal with specific offences as follows 48 with attempted murder, 50 on manslaughter, 70 with use of offensive weapon and section 172 (2) with intentionally and unlawfully causing damage to any property or likely to cause danger to life are all classified as first degree felonies.

From criminal law practice, it has been fairly and firmly well established that, all the above offences to wit, attempted murder, manslaughter, use of offensive weapons, rape etc, are all indictable offences and are tried with a Judge and jury. Even though we deprecate and frown upon the length of time that it normally takes to prepare a Bill of Indictment and bring accused persons to trial, we also observe the recent lightening speed with which the Attorney-General's Department has been able to prepare the Bill of Indictment in a rape case in less than three months. Whilst complimenting the staff of the A. G. for a good work done, it is also our firm conviction that we cannot sacrifice statutory rules of procedure for purposes of expedition and sacrifice the former on the altar of the latter.

In view of the above analysis of the rival contentions of learned counsel in their respective statements of case on the above issue, we come to the following conclusions:-

1. That, the offence of rape in section 97 of Act 29 is still an indictable offence and cannot with respect be tried summarily by a Judge of the High Court sitting without a jury as was done in this case.

ii. That article 19 (2) (a) of the Constitution 1992 does not prohibit the trial of other criminal offences that do not carry death or life sentence.

See cases like:

Republic v Maikankan and others, [1971] 2 GLR 473 SC

Republic v Asiamah [1971] 2 GLR 478 SC

ISSUE 2 – WHETHER THE PROSECUTION ADDUCED ENOUGH EVIDENCE TO CORROBORATE THE INGREDIENT OF CARNAL KNOWLEDGE IN THE OFFENCE OF RAPE THAT THE APPELLANT WAS CHARGED WITH

The determination of this issue has become very crucial because of the decision of the Court of Appeal, which in essence overturned the findings of fact by the learned trial Judge that there was carnal knowledge of the victim, but in the end convicted the appellant of the offence of guilty of attempt to commit rape pursuant to section 153 (1) of Act 30 and sections 18 (1) and (2) of Act 29.

Section 153 (1) of Act 30 provides as follows:-

> *"A person charged with an offence may be convicted of having attempted to commit that offence although the attempt is not separately charged."*

We shall revert to a fuller discussion of this section later in this judgment.

The vexed issue in this appeal is therefore whether or not the prosecution has proved the carnal knowledge, to wit penetration of PWI by the appellant beyond all reasonable doubt. In the written submission of the appellant grounds (1) (2) and (3) of the appeal were argued together. Various issues were raised and argued to show that the Republic failed to discharge the burden of proof as required by law.

In offences like rape, defilement and indeed in respect of any of the sexual offences, use of language must be brutally frank in order to depict and establish the essential ingredients of the offence charged.

In the case of rape for example, what must be proven are the following:-

1. That the victim, in this case Rashida has been carnally known.
2. That the person who had carnal knowledge of the victim is the accused in this instance, the appellant.
3. That the victim (Rashida) was carnally known against her wish, that is to say, she did not consent to the sex.
4. That the victim is aged 16 years or more.

How did the prosecution lead evidence on these vital ingredients? It has to be noted that, section 98 of the Criminal and other Offences Act, 1960 Act 29 defines rape as follows:-

> "*Rape is the carnal knowledge of a female of sixteen years or above without her consent."*

It is from the above definition that the essential ingredients of the offence of rape have been identified and listed supra.

Section 99 of Act 29 provides what in law will be considered as proof of carnal knowledge in the following terms:-

> *"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."***

In this instance, it will not matter whether there was emission of semen into the vagina of the complainant (victim) or not. Since the offence with which the appellant has been charged is rape, defined as carnal knowledge of the victim, evidence must be led to show that there was some degree of penetration into the female organ designed naturally and biologically for that purpose.

We have indeed elsewhere in this judgment recounted all the relevant pieces of evidence on the carnal knowledge of the victim as was testified to by herself as PW1, PW3, the medical officer and also what the appellant himself stated in his cautioned statement and evidence from the dock. The relevant portion of the evidence of P.W.1, reads thus:

> *"The accused pulled me to his bedroom. He removed his trousers leaving his white boxer shorts on. He pushed me unto his bed and had sex with me."*

The above is all the evidence on the material charge of rape. As a matter of fact, this evidence lacks clarity in several respects as to whether the appellant indeed had sex with the complainant.

For example, did the appellant undress the complainant forcibly before the sexual act? If that is so, where is the evidence?

On the contrary, did the appellant just push her into the bed and started having sex with her with the boxer pants on and her own uniform and underwears on?

Again, the prosecution should have been really brutally frank with the evidence on this aspect of the charge since this is the crux of the matter. For example, how the appellant managed to penetrate into the female organ of the complainant ought to have been led to establish credibility for the prosecution's

case. The size of the male organ, the degree of penetration if any, all ought to have been stated in evidence

It is the female sex organs called the vulva and vagina that are normally penetrated into during any sexual act which can qualify to be carnal knowledge under sections 98 and 99 of Act 29. The complainant has not led any evidence as to whether there was any degree of penetration into the vulva and the vagina. It is noted that, it is *"the vulva that consists of the external genital area and includes the clitoris and other vital sensitive nerve receptors."*

The vagina on the other hand *"is a soft tissue tube, which extends downwards and forwards from the cervix of the uterus to its external opening at the Vulva.*" Reference *"You and Your Health",Volume 2 New Edition, ShryockHardinge, page 433.*

No evidence whatsoever has been led by the prosecution to establish how the appellant penetrated into the complainant's sexual organs.

However, if we compare the evidence that was led by the victim of the rape case in the case of **Gligah&Anr.v The Republic [2010] SCGLR 870,** the stark reality unfolds that, the prosecution in the instant case failed the test. This is what the evidence in the Gligah case states on the rape incident.

> *"That day I was hawking with my second-hand clothes in front of the Central Police Station to Kantamanto. Whilst going, the accused persons called me... After I went to them to have a look at my things, they spoke something in Ga and since I have not been in Accra for long, I did not understand what they were saying. All of a sudden, they opened a door and they pushed me inside the room. The second accused closed the door so I was left with the first accused in the room. In the room I saw two foams on the floor; one has been covered with a red cloth and the other one with a plain cloth.* ***The first accused then pushed me down on the foam, knelt down on my thighs, removed my pant and had sex with me. He had sex with me four times; whilst he, the second accused, called him and said "Charley do it fast, officer will come." So he stopped and went out. He did not even give me anything to clean myself; whilst the second accused also came in and had sex with me once. After they had finished, they opened***

the door for me and packed my things for me and asked me to go."

The graphic details of how the rape incident took place really gives a birds eye view account by the complainant in the Gligah case which is a far cry from what we have in the instant case. The victim in the Gligahcase, continued her evidence in the reported case as follows:-

"I really cried but there was nobody to help because the windows were all closed. So I went to Kantamanto to tell my friend Salome that two policemen have slept with me and she said: No! Cynthia, let's go to them."

If one considers the consistency of the appellant in his denial of the act of rape, ranging from the Headmasters office to the Police Station and the Court, the prosecution need to have done more to establish the ingredients of the offence charged.

There is no cogent evidence on record that the complainant has been carnally known on the 28th of July, 2009, let alone it being done by the appellant.

The medical report and the evidence led by PW3, Dr. Royale Gomez, speaks volumes and should not have been wished away. For example, PW3 was emphatic that he found the hymen of the complainant already broken.

He added that, it was not recently broken and if it had been recently broken, there would have been signs. Again PW3 stated that, he could not state whether there was any penetration of the vagina of the victim.

Then the ultimate question from the learned trial Judge destroyed any credibility that the complainant had. This is because, during the cross-examination of the complainant, she was emphatic that prior to 28/7/2009, she had never had sex before and that she was a virgin. This was the question from the Court:-

Q: From your examination, did you find the girl to be very active sexually?

A: Yes

Even though the appellate court tried to underscore the importance of the above question and its effect, the significance of the question and answer lies in the

demolition of the credibility of the complainant that she had sought to establish for herself as a virgin to wit, *"someone who has never had sex".*

It is correct as the Court of Appeal stated that, the sexual activity or inactivity of the complainant has nothing to do with the offence of rape, and to this we agree.

But the crux of the matter is the probative value that will be placed on the testimony of the complainant vis-à-vis that of the medical officer, and by necessary implication the offence of rape with which the appellant has been charged.

Learned Chief State Attorney, for the Republic/Respondent stated very strongly that the evidence of the medical officer P.W.3, like all expert evidence is opinion evidence. In that respect, learned counsel submitted that this does not decide the issue it is offered to prove. He stated further that, it only assists the trial courts in making a finding on the issue by considering that opinion alongside other evidence on record. This undoubtedly is a core of statement of the law and the Court of Appeal stated same in their judgment

Whilst we have taken the above admonition into account, we accept the evidence of the medical officer for the following reasons:

In accepting the evidence of the medical officer as expert evidence, we have been mindful of the caution by the Supreme Court in the case of ***Sasu v White Cross Insurance Co. Ltd. [1960] GLR*** 4, at pages 5 & 6 where the court stated thus: *"expert evidence is to be received with reserve, and does not absolve a Judge from forming his own opinion on the evidence as a whole."*

The above case was an appeal against the decision of Ollennu J, (as he then was) where he was of the view that,

> "*In my opinion, that expert evidence, given by those two highly qualified automobile engineers, is not only scientifically sound but practically real."*

However, in reversing Ollennu J's decision and sounding the caution on expert evidence, it is important to re-examine the basis upon which that caution was made.

VanLare JA, who delivered the judgment of the Court of Appeal, drew inspiration from the following:-

> *"It may be useful in these circumstances to refer to what appears in Taylor on Evidence (12th Ed.) Vol. 1.,para. 58 at p.59 as follows:-*
>
> *"Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These witnesses are usually required to speak, not to facts, but to opinions, and when this is the case, it is often quite surprising to see with what facility,* ***and to what an extent, their views can be made to correspond with the wishes or interests of the parties who call them. They do not, indeed willfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans, their Belief becomes synonymous with Faith as defined by the Apostle, for it too often is but "the substance of things hoped for, the evidence of things not seen". To adopt the language of Lord Campbell, skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." emphasis***

However, in the instant appeal, the reverse is the case. This is because PW3 was a prosecution witness. In line with the quotation referred to supra, he ought to have been deemed to support the case of the prosecution, but he turned out to have given an objective and unbiased expert testimony. Under these circumstances,we feel quite comfortable to make the necessary deductions and conclude that it is safe to rely on the expert evidence of PW3.

This is especially so when we consider the medical officers report in the Gligah case which established quite clearly that there was some penetration by a firm male organ.

Evidence of the medical officer who examined the victim in the Gligah case, Dr. Christian Boamah as captured on page 881of the report

V/v – multiple abrasions (L) labia majora and posterior, hyper centre vaginal mucosa, vaginal discharge with probable semen. No active bleeding..."

Explaining the above report, the second prosecution witness stated in her evidence (on page 15) as follows:-

> *"I dwelt on the vagina examination and I said the multiple abrasions, which means small small tears, small lacerations. I said it was on the left outer lip that is what we call labia majora and then posterior, that is, you look at the outer lip deeper inside, noticed there is small abrasions there. Then I said the inner vagina was red and I stated that there was a vagina discharge with a probable semen... but what is most important is the spermatocytes in the swab that I took."*

Concluding her testimony, the medical officer in the Gligah case stated her opinion as follows:-

> *"In this specific case all that I can say is that, it could have been caused by* ***a very firm male organ, which later discharged some sperms****."*

The evidence of the victim of the rape charge in the Gligah v Republic case was brutally frank and very convincing.

For instance, words like *"the first accused then pushed me down on the foam, knelt down on my thighs, removed my pant and had sex with me"* are all pointers of proof of the rape in the Gligah case which is absent in this case.

There are more instances of such frankness which were confirmed by the evidence of the medical officer which we have just referred to.

For example, the medical report was conclusive that there were multiple abrasions which he described as *"small, small tears or lacerations in the vagina".* This is consistent with the story of the victim that the 1st accused had sex with her four times, meaning in ordinary parlance that the accused therein had four discharges during the act.

Secondly, the medical report confirmed that the type of injury caused to the vagina and its various parts could have been caused by a very firm male organ which is consistent with the story of the victim.

Finally, we consider the effect of the provisions of section 153 (1) and (2) of Act 30, which provides that persons accused of an offence, in this case rape, may be convicted of attempted rape although the attempt to commit the offence is not separately charged. In this appeal, this is the section upon which the Court of Appeal based itself when it rather convicted the appellant of the offence of attempted rape, despite the fact that the real offence of rape has been proven and held by them not to have been established.

We have already referred to the essential ingredients of the offence of rape and also referred to section 18 (1)& (2) of Act 29 which deals with attempt to commit crimes.

Whilst conceding that the Court of Appeal acted within its remit when they used section 153 (1) of Act 30 to convict the appellant of attempt to commit rape, we hold and rule that there was absolutely no evidence upon which the court could have so held.

There was no evidence of penetration, not even romance or foreplay by appellant on the complainant resembling what we described as brush work in the Gligah case.

This conclusion by the Court of Appeal is indeed very surprising in view of the fact that, learned Chief State Attorney, had invited the Court of Appeal to consider applying section 159 (1) of Act 30, which provides as follows:-

> *Where a person is charged with rape, unnatural carnal knowledge or defilement and the original charge is not proved, that person maybe convicted of the lesser offence of indecent assault although not charged with that offence."*

We are of the view that, the Respondent indeed must have realized the weakness of their case hence the attempt to take cover under section 159 (1) of Act 30. We are indeed dismayed that the Court of Appeal went beyond this invitation and substituted the offence of attempt to commit rape instead of the offence charged. We must confess that we have strained our minds so hard without appreciating the relevance of the Court of Appeal decision to convict for attempted rape when there was no evidence.

Once there was no such evidence, the fact that the complainant is 16 years and above and complains of having been raped amounts to her oath against that of the appellant without any other corroborative evidence.

See the cases of

1. **Gligah v The Republic, already referred to**

2. **Amartey v The State [1964] GLR 256 SC**

3. **Darko v Republic [1968] GLR 203**

Under the circumstances, we have no hesitation in holding that the issue of whether the prosecution adduced sufficient evidence to establish and or corroborate the ingredient of carnal knowledge of the complainant has not been proven. In this respect therefore, it is our contention that, the substitution by the Court of Appeal, of an offence of attempted rape, on the appellant, and convicting him of same and maintaining the sentence of 7 years is wrong in law and is accordingly set aside.

ISSUE 3 - THE ISSUE OF CONSTITUTIONALISM, (I.E. WHETHER IT IS THE SUPREME COURT THAT MUST INTERPRET ANY PROVISION OF THE CONSTITUTION 1992 IN ANY PROCEEDINGS IN COURTS BELOW THE SUPREME COURT WHERE AN ISSUE OF CONSTITUTIONAL INTERPRETATION ARISES.)

The determination of this issue admits of no controversy whatsoever.

There is absolutely no doubt that, the Constitution 1992, has exclusively reserved for the Supreme Court the jurisdiction of interpreting and or enforcing the constitution as is provided for in articles 2 (1) (a) (b) and (2) and 130 (1) and (2) of the Constitution 1992.

The exclusivity of this interpretative and enforcement jurisdiction of the constitution to the Supreme Court is so special that except for the Enforcement of Fundamental Human Rights and Freedoms which have been ceded to the High Court, reference article 130 (1), all other courts in Ghana below the Supreme Court are enjoined to stay proceedings in any matter whenever an issue of constitutional interpretation arises before them, and refer such a matter to the

Supreme Court for interpretation. See article 130 (2) of the Constitution 1992. There are a legion of cases which support this view, see the cases of

i. *Oppong v Attorney-General [2003-2004] 1 SCGLR 376 per Bamford AddoJSC*
ii. *Republic v Special Tribunal Ex-parte Akosah [1980] GLR 592 C.A*
iii. *Republic v High Court, Accra , Ex-parte Attorney-General, Balkan Energy & Others – Interested Parties [2012] 2 SCGLR*
iv. *Republic v Maikankan & Others [1971] 2 GLR 473 – a referral case to the Supreme Court*
v. *Republic v High Court (Fast Track Division) Accra, Ex-parte Electoral Commission (Mettle Nunoo & others – Interested Parties) [2005-2006] SCGLR 514*

This latter case was a referral case from the High Court to the Supreme Court where it held inter alia as follows:-

> *"In the instant case, at the centre of the whole controversy, lay the disputed interpretation of important constitutional provisions, namely, article 45, 63 (9) and 64 (1) of the 1992 Constitution section 2 of the Electoral Commission Act, 1993 (Act 451) and the Public Elections Regulations, 1996 (C.I.15)"*

vi. *Agyekum v Boadi [2000] SCGLR 282, holding 2 thereof*

We also endorse the decision of Bannerman C.J., in the Maikankan case as follows:-

> *"A lower court is not bound to refer to the Supreme Court every submission alleging as an issue the determination of a question of interpretation of the Constitution or of any other matter contained in article 106 (1) (a) or (b). if in the opinion of the lower court the answer to a submission is clear and unambiguous on the face of the provisions of the Constitution or laws of Ghana, no reference need be made since no question of interpretation arises and a person who disagrees with or is*

aggrieved by the ruling of the lower court has his remedy by the normal way of appeal, if he chooses."

The Supreme Court speaking with unanimity through our respected sister Sophia Akuffo in the earlier Balkan case, intitutled, ***Republic v High Court, (Commercial Division) Accra; Ex-parte Attorney-General, Balkan Energy Ghana Ltd. & Others, (Interested Parties) 2011 2 SCGLR 1183***, after reviewing the laws and cases on referral by lower courts to the Supreme Court held as follows:-

"The Court would therefore hold that the High Court should have referred to the Supreme Court the question raised in the proceedings before him concerning article 181 (5). Having refused to do so, the Judge had usurped the jurisdiction of the Supreme Court and breached the 1992 Constitution".

From the old and new cases, the position might fairly well be stated thus:-

Where the constitutional provisions that call for interpretation are plain, precise, clear and unambiguous and no real or genuine issue of interpretation arises, the lower court can apply the provisions as they are, or where those provisions have already been interpreted by the Supreme Court, then the lower court must take guidance from the interpretation of that constitutional provision from the Supreme Court's interpretation which is binding on them anyway. Thus it is only in cases where there are real and genuine issues of constitutional interpretation that the Supreme Court will be requested to perform its role.

We however observein the instant appeal that, the Court of Appeal itself made the correct observations that the said article 19 (2) (a) of the Constitution 1992 are clear, precise and unambiguous but went forward to hold that section 2 (2) (a) of Act 30 being subordinate to article 19 (2) (a) is inconsistent with the constitutional provision in 19 (2) (a).

This court having held that there is infact no conflict between article 19 (2) (a) and section 2 (2) (a) of Act 30, the Court of Appeal was thus in error when they held a contrary view.

At the time that it occurred to the Court of Appeal that a genuine question of interpretation has arisen, they should have stayed further proceedings in the matter and referred the issue for constitutional interpretation to this court.

In view of our decision in this appeal, it is considered superfluous to undertake an excursion into the status of Act 646 and section 43 of the Courts (Amendment) Act 2003, Act 620 as was contended and argued in the statements of case filed. We do not see that it is necessary to draw any pararels about those legislations.

CONCLUSION

In view of the matters stated supra, we make the following decisions:-

1. That under the state of existing constitutional and statutory legislation in Ghana, reference article 19 (2) (a) of the Constitution 1992 and sections 1 (1) & 2 and 2 (2) (a) of the Criminal and other Offences (Procedure) Act 1960, Act 30, rape is still an indictable offence and cannot be tried summarily as was done in this case.

2. That the prosecution have failed to discharge the burden of proof that they have to establish in proving the guilt of the appellant beyond all reasonable doubts, in other words that on the strength of the evidence adduced in the trial court, the prosecution has failed to lead sufficient evidence to justify the conviction and sentence of the appellant for an offence of rape.

3. That it is not every constitutional provision that a lower court must as of necessity refer to the Supreme Court for interpretation. Where the words of the provision are plain, precise, clear, unambiguous and admit of no interpretation, a lower court need not refer it to the Supreme Court for interpretation. Where however the provision has previously been decided by the Supreme Court, the lower courts are bound by that decision.

However, if as in this case, the lower court embarks upon an interpretative role which is likely to have far reaching consequences such as has happened in this case, i.e. having an effect on the system of trial the appellant must have, which is summary or indictable, reference must be made to the Supreme Court.

Under the circumstance, this court, pursuant to sections 31 (1) (a) and (b) of the Courts Act, 1993 (Act 459) hereby allows the appeal by the appellant against the judgment of the Court of Appeal dated 28th February 2013.

Accordingly the conviction and sentence of the appellant by the Court of Appeal of even date is set aside on the following grounds:

i. that it is unreasonable and cannot be supported having regard to the evidence on record;

ii. that it is wrong in law and fact and;

iii. has resulted into a miscarriage of justice.

The appeal therefore succeeds.

(SGD) V. J. M DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE- BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO- BAMFO (MRS.)

JUSTICE OF THE SUPREME COURT

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