

GHANA / JUDGMENT

REPUBLIC VRS BOATENG (B6/11/2024) [2023] GHACC 1154 (29 November 2023)

[2023] GHACC 1154

COURT

Circuit Court

CASE / FILE NUMBER

B6/11/2024

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IN THE UPPER WEST CIRCUIT HELD AT WA ON 29th DAY OF NOVEMBER 2023 BEFORE HIS HONOUR JONATHAN AVOGO ESQ. CIRCUIT COURT JUDGE B6/11/2024 THE REPUBLIC VRS BAAFI BOATENG

JUDGMENT

I appreciate and will state in this judgment that a senior counsel impressed upon the court not to proceed to render a decision in this matter on the day evidence ended but take a look at the facts and law so a decision is delivered at a later day with the reason for the decision. I must say the decision will not have been different from today though I appreciate the input of the officer of the court and will have subscribed to the biblical quote that..... Defilement under section 101 (1) of Act 29 can be committed against a girl or a boy under 16 years of age. Defilement is when the child is naturally or unnaturally carnally known with or without the consent of the child. The prosecution is required to prove the following beyond reasonable doubt against the accused person in case of defilement.

- a) That, the victim has been carnally known either naturally or unnaturally.
- b) The victim was under 16 years old at the time the accused person carnally knew her him/her. The consent of the victim is immaterial. Based on this understanding, as per the charge sheet, accused has been charged with attempted defilement which the provisions of section 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. With the offence well explained to the accused before taking his plea, he went ahead to plead not guilty to the only offence charged leaving prosecution to prove the guilt of the accused and this prosecution has to go beyond reasonable doubt. To the contrary for the accused person as in criminal jurisprudence, the only burden on an accused is to create a doubt in the mind of the court save in cases of strict liability offences. It must be emphasised that in all criminal cases, any inconsistencies which cannot be reconciled should be to the advantage of the accused person and in this case accused gave a defence during his full trial and it is this defence that the court will evaluate to obtain if he raised a doubt in the case of

prosecution that should inure to his advantage in the wake of several decided cases.

Summary of case Before delving into the case of the various witnesses I must be quick to summarize the entire case to allow for effective comprehension from the beginning of the judgment than waiting to have an entire read. The complainant is the mother of the four (4) year old alleged victim whilst the accused is a tailor apprentice who sojourned to live with his elder sister. That on 16th September 2023 at about the hours of 8:30am the victim left home to attend arabic lessons in her vicinity and was met by accused who stopped and asked her to come to him. The victim is said to have refused the call but the accused went towards her and forcefully removed her from her preferred route to an uncompleted building where he undressed her and allegedly placed her in a supine position whilst he removed his penis from his trousers and pants. That to allow for easy ingress, the accused is said to have smeared his manhood and that of the vaginal area of the victim with a cream and was about trying a penetration into the non-existing vagina because a four-year-old barely has one to receive this bull bar. Thereupon, complainant is said to have arrived at the scene because she had heard some voices and went towards the scene and she unbelievably raised an alarm whereupon young men in the area got informed and gave accuse a hot chase and he was apprehended. It is said that when accused was arrested he admitted to having planned to defile the little one and led prosecution to reconstruct the scene where the attempt took place before Police men who then re-arrested and prepared him for me. The summary above was the basis of the arraignment of the accused and accordingly pleaded not guilty to the charge and after pretrial processes and filling, the case came up for hearing and a decision is being pronounced today.

EVIDENCE OF PW1 The mother of the child Sahadatu Hamza told the court the victim was her very own and aged four (4) years and a KG1 pupil of Limanyire Model School. That on 16th September 2023 when she left home for Arabic studies she kept too long in returning home and upon confirming the return home of her colleagues he went out in search of her. That on reaching a section of a road behind her house, she heard the victim shouting in an uncompleted building. That she went into the space she heard the noise and saw accused with his trousers barely dropping to his knees and had a lubricant smeared around his penis and same also applied to the private parts of the little one with her in a supine position for accused to drive through her vagina a penis. Apparently according to accused that was what caused pain and the little one screamed drawing her attention. That upon sighting what she described, she raised alarm and accused escaped running away amidst shouts from her but was pursued by concern youth in the neighborhood and was arrested whereupon she questioned her daughter as to what happened and she narrated that she was on her way home when accused dragged her into an uncompleted building and asked her to undress and forcibly assisted her do so after which she was placed face down and a yellowish substance suspected to be a lubricant smeared on her private parts. That accused made an attempt to insert his penis into her vagina but she screamed and that drew her attention to look for where the noise was coming from. Two other witnesses gave evidence before the Police investigator and all three accounts corroborated the account of the complainant mother that it was upon the prompting of the cry of her daughter that she emerged to look for her and sadly the result

was that accused had attempted defiling the four (4) year old. As stated earlier in this judgment, it is the search for a doubt in the case of prosecution that will save the accused from conviction. Having given the account of prosecution for which the court agreed with it of having passed the test of a prima facie case for which the accused was obliged to put up a defense, the evidence of the accused as presented to the court was that he was new to the area and that he was on an errand to see a friend but upon seeing some young men appear to chase someone, he also run for his life. Accused who appeared untidy in his defense maybe from his lack of knowledge of the law that an attempt to commit a crime is punishable same way like the crime being successfully committed admitted sighting the little girl and sending her to buy him water and that he walked with her up a little to direct her to where the water was sold and it was upon that encounter that he was accosted by PW1 and accused of having attempted to defile the little one. As whether these defenses raise a doubt or not will be reviewed along the dictum of two decided cases, one old and the other very recent but certainly anchored on the same principle of providing the accused with the benefit of doubt if any. To allow for clarity of this decision so as justice is not just seen to be done but manifestly so done to further engender public confidence in the justice delivery system following recent decisions in defilement cases by this court, I will proceed to identify some findings of fact in the evidence gathered: 1- Accused admits being in the company of the victim

2. The reason for being in her companionship was that he had sent her to buy him water
3. The accused denies being in possession of any lubricant let alone intending to use same to get an ingress into the victim's vagina
4. Accused also claims he decided to run when he heard and saw some young men appearing to be chasing someone in the community.
5. The complainant mother (PW1) declared her attention was drawn to look for her daughter upon hearing her voice from an uncompleted building close to her residence.
6. That upon getting closer and entering the structure, she saw accused pants down to his knees before her daughter supinely placed before him
7. That upon seeing the posture of her daughter and that of accused she raised alarm and accused attempted fleeing the scene.
8. That further questioning of the victim revealed she was asked to lay prostrate in a supine position and a lubricant applied to her vagina to allow accuse have smooth ingress into the vagina.
9. That accused attempted to insert his penis into the vagina of the victim and thereupon because of the difficulty of penetrating she screamed out loudly. The findings of facts above catalogues that of accused, the complainant and statements of the victim to her mum, these are hearsay to the effect that it was her mum who gave that to the court but not the victim because she failed to appear to be one who can present such facts especially after a

traumatic event like that. The evidence of prosecution and the defense of the accuse will then require the court to resolve the omnibus issue of: Whether or not the account of PW1 can be said to have been proven by evidence to allow the court proceed to examine if the accused had the mens rea of defiling his victim for which the charge of attempted defilement should subsist against him I have chosen to deal with this matter this way mindful of the pronouncement made in the case of RICHARD BANOUSIN vs. THE REPUBLIC when the court of appeal decided to go under section 153 (1) of Act 30 to deal with the appellant when the evidence was not in support of same. The court commented as follows: “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.” Without sounding mitigatory early in my evaluation of the evidence and application of the law, what remains the fact from the findings of fact and the dictum which is raised to a ratio descidendi because this court remains a lower court is that the Law Office should have advised the Prosecution with this decision in mind. Be that as it may, the court will restore the law so as justice is done. In resolving the omnibus issue, allow me break it into three to first deal with the evidence proof adduced by prosecution to support their charge. PW1 alludes to having apprehended the accused right at the scene of crime; what were the substances she recovered and presented to Police of led Police to the scene of crime to discover? Absolutely nothing. To succeed prosecution should have proof of the cream used or the receptacle from which it was scooped from or a proof that it was applied and having so seen it was cleaned and left on a material to show proof. Pieces of evidence from PW2 & 3 state the seeing of accused having his trousers run down to his knees when he was seen. Be that as it may, the fact remains hanging that since the building was uncompleted, many things could be going on there that accused could be involved in and I will not take hook line and sinker the evidence of PW1. I reject her evidence as one that failed the test of evidential proof and can be close to a multitude of suspicions. Having so dealt with the porous leg of

evidence that prosecution wielded because it was not corroborated to support its trust, the continuation to deal with whether or not accused was in mens rea to attempt a defilement of the alleged victim will be otiose because the evidence did not suggest same. The dictum of *MOSHIE v. THE REPUBLIC* [1976] 2 GLR 310-321 comes in handy on corroboration of unsworn statement to the effect that the judge stated the rule as: "The rule of evidence is that unsworn evidence given by a young child needs corroboration. It has been said that the evidence of young children is always subject to doubt, for very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expression are rudimentary. It has also been said that most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction. Yet the evidence of children may be acute and accurate particularly with regard to offence committed against themselves" This caution is insightful as I have applied it cautiously in the wake of the fact that the victim could barely say anything when presented as a witness to the court besides rhyming her name like she was in a nursery class let alone to have understood the circumstances of the act if indeed it did occur to narrate same to her mum in the manner prosecution wants us to belief. In the case of *Anane v. The State* [1963] 2 G. L. R. 65, S. C. the court stated among other things that, quite apart from that it is in practice, to require corroboration of the evidence of the prosecutrix in charges of rape and connected offences, and continued that the need to corroborate the unsworn evidence of a child is not a mere rule of practice but it is firmly rooted in law, for section 10 of the Oaths Act, 1960 (C. A. 12), provides in no ambiguous terms that: "No person shall be convicted or judgment given upon the uncorroborated evidence of a person who shall have given his evidence without oath or affirmation." I am however mindful of the fact that the general rule of law is that a conviction can be based on the evidence of a single witness who is an eye witness provided the court believes that witness. See the case of *the Republic vs. Asafu-Adjaye* [No. 2] [1968] GLR 567, CA. The caution therefore is that it is dangerous to convict an accused person on uncorroborated evidence because corroboration is evidence which supports the testimony of a witness by confirming that the witness is telling the truth in some material particular in his testimony thereby giving credibility to the story. Wary of the caution on corroboration of evidence and the dictum in *Bediako v The Republic* [2010-2012] 1 GLR 566 where the law succinctly presented by His Lordship Dennis Adjei JA stated that a court of law is enjoined to examine the defense put up by an accused person after the prosecution has proved its case beyond reasonable doubt to ascertain whether the defense is acceptable, where it is acceptable, the accused shall be discharged. Where the defense is unacceptable, the court shall further consider whether the defense is reasonable probable and if it is, the accused shall be acquitted and where it is not reasonable probable, the court is further required to examine the entire records to ascertain whether there is other defense which may inure to the benefit of the accused. I have looked at the evidence and found out that the defense of accused is first acceptable and could proceed to discharge him but for public confidence I allowed myself to be further enjoined in the case cited above to proceed to find out if the defense was reasonably probable and this I found also to be so because they want of evidence in proof that a lubricant was used or applied on the victim was lacking and I so

hold that the accused should benefit from the several evidential gaps left behind by prosecution and I proceed to acquit and discharge accused person of the charge of attempted defilement. I continue to commend the prosecutor who after being introduced to the job is flying as if he was trained and put in waiting. This is commendable against those who appeared to trade as prosecution. HIS HONOUR JONATHAN AVOGO ESQ CIRCUIT COURT JUDGE, WA 10

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