

GHANA / JUDGMENT

Republic Vrs Awudi [2023]

GHACC 290 (14 March 2023)

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1 IN THE CIRCUIT COURT HELD AT MPRAESO ON TUESDAY 14TH DAY OF MARCH 2023 BEFORE HIS HONOUR STEPHEN KUMI, ESQ CIRCUIT JUDGE. CASE NO: B6 /1/2022. THE REPUBLIC V AWUDI GIDEON. J U D G M E N T: The Accused person has been charged before the court on one (1) count of defilement contrary to section 101 (2) of the Criminal Offences Act, 1960, Act 29, as can be seen from the statement of offence on the charge sheet. Meanwhile, the particulars of offence state as follows; “AWUDI GIDEON; AGE 20 AND A DRIVER’S MATE: On the 01/09/2021, at Nkawkaw Asuogya in the Eastern Circuit and within the jurisdiction of this court, you did have sexual intercourse with a female of 6 years of age”. On the basis of the above facts, the Accused was arrested and taken to the Divisional DOVVSU, Nkawkaw, and detained for further investigations. In his cautioned statement to the police, the Accused denied the offence. Nonetheless, after the police investigations, the Accused was put before this court to answer to the above-stated one count of defilement. The Accused, after the charge had been read out and explained to him, pleaded not guilty to the stated one count of defilement. He went on to explain to again deny the charge. The net effect was that the Accused had joined issue with the prosecution on the allegation against him. The prosecution in effect assumed the onus to proving the guilt of the Accused beyond reasonable doubt. EVIDENCE/CASE OF THE PROSECUTION. At the ensuing trial, the prosecution called four (4) witnesses in their attempt to discharge the Constitutional and statutory burden of proving the guilt of the Accused beyond reasonable doubt. 2 This accords with the fundamental rule in all criminal prosecution which is stated under Article 19

- (2) (c) of the 1992 Constitution as follows: “(2) A person charged with criminal offence shall (c) be presumed innocent until he is proved or has pleaded guilty”. The first prosecution was Augustina Boatemaa; who identified herself as the aunt to the alleged victim. The victim lives with her at Nkawkaw Asuogya. She gave the age of the victim as six (6) years. She recalled that at about 8:00pm on 1st September, 2021, while she was bathing the victim, she complained of abdominal pains when she attempted to wash her vagina. According to PW1, she suspected foul play and questioned the victim who disclosed to her that on 1st September, 2021, one Awudi Gideon- the Accused herein- had lured her into his room and had unprotected sexual intercourse with her. She added that her other children namely Osei Emmanuel, aged 11 years, Anastasia Gyeniwaa, aged 4 and Amanoa Shallon, who were

witnesses confirmed the incident to her. The second witness called by the prosecution was the alleged victim in the case, Antoinette Ampofo. She gave her age to be six (6) years old and a kindergarten pupil. She testified that on the afternoon of 1st September, 2021, she was at home together with some siblings of hers; namely Osei Emmanuel, Anastasia Gyeniwaa and Amana Shallom, when the Accused- whom she called Brother Kofi- came and asked them to follow him to his house; a request that they complied with. She recalled that upon reaching the house of the Accused, the Accused took them to his room, and later sent her siblings to go and buy for him some toffee, water and biscuit; while she was asked to stay behind. She was then asked by the Accused to lie down on a mattress placed on the floor at the room, which she complied with. It is her further testimony that the Accused removed her pant and put her on the bed in a supine position; after which the Accused inserted his penis into her vagina and succeeded in having sexual intercourse with her. She added that after the sexual act, the Accused warned her not to disclose the incident to anyone lest he would kill her. She stated that immediately after that, her siblings returned from the errand. The PW3 was Amana Shallom; a child of the PW1. She recalled that on the date of the incident, at about 3:00pm, while she was at home with her siblings – Osei Emmanuel, Anastasia Gyeniwaa and the victim- the Accused came and called them. 3 They followed the Accused to his house, where the Accused gave them GHC 1.00 to go and buy biscuit for him. When they were about to leave, Accused asked the victim to stay behind and she complied with. It is her further testimony that when they returned with the biscuit, the Accused then gave them another GHC 1.00 and asked them to go and buy bread with it for him, which they did. She added that when they returned with the loaf of bread, the Accused once again gave them GHC 1.00 to go and buy chewing gum, “Tomtom” toffee and biscuit, which they once again complied with. According to her, upon their return, they found that the Accused had closed his door. They forced the door open and saw the Accused lying on top of the victim on the mattress on the floor. She added that as soon as the Accused saw them, he got up. The police investigator in this case was the fourth prosecution witness called to testify. He was No. 44334 Detective Inspector Masawudu Tanko Manaf, of the Domestic Violence and Victim Support Unit (DOVVSU) at Nkawkaw. In terms of his evidence, the PW4 testified that he was on duty when he received an extract of occurrence from the Nkawkaw Central Police Station together with the Accused, which indicated that on the 1st September, 2022, the Accused had unprotected sexual intercourse with the alleged victim, Antoinette Ampofo, aged 6. He then re-arrested the Accused and detained him and subsequently obtained statement from the Complainant. He next issued a police medical form for the victim to attend hospital, which was returned endorsed; same which was admitted into evidence and marked as Exhibit C. He took investigation cautioned statement from the accused in which the Accused denied the offence. Exhibit A was the cautioned statement of the Accused. He also visited the scene of crime with the Accused and the victim; during which he took pictures of the scene. Exhibit D series comprised some pictures of the victim pointing at the room of the Accused and also the victim lying on top of the mattress at the room of the; ostensibly demonstrating as to how the Accused asked her to lie on the bed. After his investigations, he was given instructions to charge and put the Accused before this court. The Exhibit B is the charge

statement of the Accused CASE OF THE ACCUSED/DEFENCE: At the close of case of the prosecution, the court- pursuant to its bounden duty under section 174 of the Criminal Procedure Act, 1960, Act 30- determined that the case of the prosecution had 4 succeeded to raise or establish a prima facie against the accused person to warrant answer or explanation from him to avoid a ruling of the court against him on the charge or issue. Based on that, the accused was asked to open his defence pursuant to section 174 of Act 30/1960 (supra). In the case of *Gligah & Atiso v The Republic* (2010) SCGLR 870 @879, the Supreme Court of Ghana held, inter alia, as follows: “In other words whenever an accused person is arraigned before any court in any criminal trial, it is the duty of the prosecution to prove the essential ingredients of the offence charged the accused person beyond any reasonable doubt. The burden of proof is therefore on the prosecution and it is only after a prima facie case has been established by the prosecution that the accused is called upon to give his side of the story”. The Accused admitted knowing the victim from the same vicinity. He gave the age of the victim as six (6) years of age. He testified that on the date in question, he was cooking some rice and went to the house of the victim, who was then playing with her other siblings. He sent one Kwame to go and buy some uncooked eggs, which he did and returned with the eggs in the company of the victim. According to him, the children told him they were hungry; so he asked them to return later with a bowl for some of the cooked rice, which they did. However according to the Accused after the children had eaten the food, the Kwame came to tell him they were not satisfied or full; based on which he gave them money to buy some bread and drinks, which they did. Subsequently he had to respond to leave the house and returned to meet the victim and the children with the bread; and asked them to take the bread and drinks away and went out of the house again. It is his evidence that on the next day, he was informed by someone that the PW1 had alleged that the victim had complained of pains around her pelvis and that as he the Accused had come around to send the victim on the errand, he was responsible. It is his defence that the allegation against him are false. According to him, it is never correct that he had sexual intercourse with the victim on the date and place in question. The Accused called one witness. He was Asamoah Ebenezer. He gave his age as 10 and identified the Accused as his relation. According to him, he was at the house on the date and scene in question. He testified that he was the one the Accused initially sent to buy some eggs; so he asked a brother of the victim to accompany him on the errand but they were joined by the other children including the victim. When they brought the eggs, they realized they had gone bad, so the Accused asked them to go and replace them, which they did. At that time, the Accused’s food was ready so he scooped some of the food to them, which they went to eat together. 5 After finishing eating, the Accused sent them to go and buy bread and drinks for him, which he rather gave to them. He clarified that at the time they returned, the Accused was not at home but they saw the victim playing with some broom at the place. During the cross-examination of the DW1 by the prosecutor, the DW1 stated that on the multiple occasions they ran errands for the Accused, the victim went with them save the one they went to buy the loaf of bread for the Accused; albeit that according to him the Accused had also left the house around the same time. EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LAW. On the basis of the whole of the

evidence before the court at the end of the trial, and including the defence or explanations raised by the Accused herein, it is my considered opinion that the only issue raised for determination by the court is whether or not the prosecution succeeded to prove beyond reasonable doubt that the Accused, Awudi Gideon, defiled the victim, Antoinette Ampofo? Before I continue further, I think it is necessary and instructive to state at this juncture that the position of the law- both under the Common Law and the 1992 Constitution- is that the prosecution assumes the onus of proof to prove or establish the guilt of an accused beyond reasonable doubt. See Article 19 (2) (c) of the 1992 Constitution (supra). Meanwhile, statutorily, under section 15 of the Evidence Act, 1975, NRCD 323, the law is that; “Unless it is shifted, the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion on that issue”. As a corollary to the above section 15 of the NRCD 323, it is also provided under section 13 (1) of the NRCD 323 that; “Section 13 - Proof Of Crime (1) In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt”. Similarly, in the popular English criminal case of *Woolmington v DPP* [1935] AC 462, Lord Sankey (as he then was) stated or delivered of himself as follows in these timeless words: “Throughout the web of the English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner’s guilt subject tothe defence of insanity and subject also to any statutory exception..... No matter what the charge or where the trial the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained”.⁶ The prosecution in this case was therefore required to prove with credible and quality evidence and beyond reasonable doubt that the accused herein defiled the victim, on the alleged date, place and time at Nkawkaw Adensua. In spite of this onerous burden of proof on the prosecution, the law is that the accused or defence, in a criminal trial does not generally assume any burden of proof. In the same *Woolmington v DPP* case (supra), Lord Sankey (as he then was) very well summarized the extent of the onus of proof on the accused or defence as follows: “...whiles the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence” See also the case of *Commissioner of Police v Antwi* [1961] GLR 408, SC, where it was held inter alia that an accused person is not required to prove anything, save to and at best to merely raise a reasonable doubt as to his guilt. In expressing his opinion on the foregoing discussion on the various burdens of proof that prosecution and accused assume in the course of criminal proceedings/trials as is the case in the instant case, the erudite Dotse JSC, in the case of *Richard Banousin v. The Republic*; No. J3/2/2014, dated 18th March 2014, S.C. (Unreported)- which involved a criminal appeal on a charge of defilement- in his inimitably lucid fashion, held as follows, which I find applicable to the instate case *mutatis mutandis*; “It is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt in all criminal cases. A corollary 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 person's 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:- 7 “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”. The prosecution therefore, without doubt, assumed that onerous duty or onus to satisfy the court conclusively on the guilt of the Accused beyond reasonable doubt. It is not only de rigueur but also non-negotiable. Before I go on to address the main issue in this judgment, it is important to undertake a short discussion on the nature of the offence in this case: Which is about the nature, form and hue of the offence of defilement under the Ghanaian law. This is to enable the court appreciate and determine if the evidence of the prosecution or even on the whole of the evidence, proved the charge of defilement against the accused as it is also the position of the law that: “.....the prosecution has a duty to prove the essential of ingredients of the offence with which the appellant and the others have been charged beyond reasonable doubt”. See that case of Frempong alias Iboman v The Republic [2012] 1 SCGLR 297, per Dotse JSC. By way of a useful reminder, the Accused is before the court on one count of defilement contrary to section 101 (1) of Act 29/1960 (supra). That statutory provision reads as follows: “Defilement of child under sixteen years of age: Section 101 (1): For the purposes of this Act, defilement is the natural or unnatural carnal knowledge of a child under sixteen years of age. (2): A person who naturally or unnaturally carnally knows a child under sixteen years of age, whether with or without the consent, commits a criminal offence and is liable on summary conviction to a term of imprisonment of not less than seven years and not more than twenty-five years”. So that in the case of Eric Asante v The Republic, Unreported, Civil Appeal No. J3/7/2013, delivered on 26th January,

2017, the Supreme Court of Ghana, per Pwamang JSC, held as follows to state the ingredients of the offence of defilement:

1. That the victim is under the age of sixteen years (as provided for in Act 554).
2. That someone had sexual intercourse with her.
3. That person is the Accused. Obviously on the strength of the above statutory provision on defilement, in the popular case of Republic v Yeboah [1968] GLR 248, in which the accused defiled a nine year old girl who failed to make a report of the incident, it was held that even if that fact indicated that she was a consenting victim, her consent was of no consequence. Armed with the above authorities on what constitutes the prevailing law and thought on defilement in Ghana, I would now proceed and apply the above authorities to the facts of the instant case and indeed the very evidence before me, and determine to what extent that the prosecution have succeeded to prove their case against the Accused on the one count of defilement beyond reasonable doubt. In resolving the sole question or issue in the judgment, I have decided to do so by determining each of the three (3) ingredients of the offence of defilement as laid out and in the order or sequence given by Pwamang JSC in the Eric Asante case (supra). The first ingredient is the age of the victim. I must state without any tinge of equivocation that the prosecution's hallowed duty or onus of proving beyond reasonable doubt the guilt of the Accused on the charge of defilement included, involved and extended to also conclusively proving and establishing that the victim, at the time of the impugned sexual conduct with the Accused was less than sixteen (16) years. It is non-negotiable. In the case of Republic v Halm and Ayeh-Kumi, Court of Appeal (Full Bench), Digested in (1969) CC 155, the Full Bench of the Court of Appeal held that in determining whether an offence under any enactment has been proved, a court must look at the essential ingredients of the offence as contained in the enactment which creates and defines the offence and not the charge as set out in the charge sheet by the prosecution. 9 In applying the above principle or authority to the issue on the defilement charge against the Accused, as the enactment makes it an element or ingredient to the charge of defilement for the prosecution to prove that a defiled victim is or was less than 16 years at the time of the alleged sex, then the prosecution would fail to obtain conviction against the Accused in the instant case on the charge if and when the evidence does not conclusively prove- with credible evidence- the age of the victim. In his book, "Contemporary Criminal Law in Ghana", the learned author and Justice of Appeal, Sir Dennis Dominic Adjei, at page 213, wrote the following on the requirement by the prosecution to prove the age of the victim in a defilement charge beyond reasonable doubt: ".. the prosecution is required to prove that the child who is the victim of the criminal offence is less than sixteen of age. A case of defilement will fail where the prosecution fails to prove beyond reasonable doubt that the child who is the victim of the offence was under sixteen years at the time the offence was committed... In a case where the accused admits that he/ or she naturally or unnaturally knew the child and the child consented, the prosecution may nevertheless prove the age of the child unless the accused person admits the age of the child...". Now, the victim is alleged

to be less than sixteen years of age and a fortiori less than eighteen years of age. That being so, the victim being an infant or a child, section 19 (2) of the Juvenile Justice Act, 2003 (Act 653) states or provides some statutory documents as proof of the age of a child below eighteen years old in Ghana. That section reads as follows; “ 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 shall be evidence of that age before without proof of signature unless the court directs otherwise”. In proving the age of the victim, the alleged victim as PW2 had given her age as 6 (6) years and the Accused did not cross-examine her on that. Meanwhile, the PW1 as the aunt of the victim gave her age as six (6) years. The Accused also did not cross-examine or challenge the PW1 on the age of the PW2. The legal effect of failure to cross-examine a witness on material facts, as was held in the case of HAMMOND v. AMUAH and ANOR [1991] 1 GLR 89, is that when a party had given evidence of a material fact and was not cross-examined upon it, he needed not call further evidence of that fact. For it is received learning that failure by the defence to cross-examine amounted to an admission by the defence. See also the case of Quagraine v Adams (1981) GLR 599, CA. Meanwhile, the Accused person in his sworn evidence-in-chief, stated that the PW2 was six (6) years of age. That does not only show that the Accused has not challenged the age of the victim but 10 implicitly admits that the victim is about 6 (six) years old. That should go in favour of the prosecution’s case that the victim is less than sixteen (16) years of age. See the case of Asante v Bogyabi (1966) GLR 232 at 240. In *Re Asere Stool; Nikoi Olai Amontia IV* (sub. By) Tafo Amon II V. Akotia Oworsika III (substituted by) Laryea Ayiku III (20005-06) SCGLR 637, it was held in the holding 2 that; “Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than relying on such admission”. Meanwhile, even though I concede that ordinarily, a birth certificate or any of the other documents mentioned in the Juvenile Justice Act may be the best or even the most preferred evidence of the age of the victim. However in its absence, the evidence of a person such as a close relative, who is well acquainted, with the victim, as in the case of the PW1, the aunt and guardian of the victim is admissible, (See *Uganda v Enock Babumpabura Criminal Session Case No. 135 of 92.*). Similarly, I believe that observation by the court or judge of the victim in court/in the box and even common sense are also acceptable methods of gauging a victim’s age as was held in the English case of *R v Recorder of Grimsby. Ex Parte Purser* (1951) 2 All E.R 889. On the above authority of *R v Recorder of Grimsby Ex Parte Purser* case, I must indicate that as the trial judge who had the special advantage of seeing, observing and hearing the victim in court and in the witness box, the victim could not have been more than 8 years of age at the time she testified in court. She had all the innocence and vulnerabilities associated with a child of that age grouping. In the light of the above mass of evidence on the age of the victim, I find and hold that the prosecution succeeded to prove beyond reasonable that the victim, Antoinette Ampofo, was six (6) years old and a fortiori less than sixteen (16) years of age at the time of her alleged sexual intercourse with the Accused, Awudi Gideon. The first ingredient of the defilement charge is therefore proved or satisfied by the prosecution. That takes me to the second and third elements or ingredients of the charge; which are

whether or not that someone had sexual intercourse or carnal knowledge of the victim during period and place in question; and whether that person was the Accused; with or without the consent of the victim. In other words, it is my considered opinion that the prosecution's evidence must next prove or establish the following two things, especially in the light of the challenge or denial raised by the Accused that he did not have any sexual intercourse with the victim: Which are whether or not someone had the alleged carnal knowledge with the victim and whether that someone was the Accused herein only. 11 Now, carnal knowledge is defined in the Blacks Law Dictionary, 9th Edition, at page 241 as "sexual intercourse, especially with an underage female". Meanwhile, unnatural carnal knowledge is defined as "sexual intercourse with a person in an unnatural manner, or with an animal". See section 104 (2) of Act 29/1960 (supra). Under our laws, per section 99 of Act 29/1960 (supra), in order to prove carnal knowledge or unnatural carnal knowledge, all that is required is proof of the least degree of penetration of the vagina of the victim by the Accused with his penis in terms of this case. Our laws state that defilement can be by natural and unnatural carnal knowledge; all that is required to be proved is that the victim- whether a male or female- was less than sixteen years of age at the time of the alleged sexual intercourse. Archibald on Criminal Pleading 30th Edition page 1124 at paragraph 2873, also provides some assistance when he states that sexual intercourse is complete when a male sexual organ penetrates a female sexual organ; and that the slightest penetration is enough. Our courts have, time and again, applied that principle with unanimous approval and remarkable consistency. See Robert Gyamfi (alias Appiah) v The Republic, Criminal Appeal No. H2/02/19, delivered on 5th Feb, 2019, CA (Unreported), per Dzamefe JA. Sexual intercourse means that the man should have used his penis to penetrate the woman's vagina- as well as the anus and not by any other means such as with the use of the fingers, tongue or stick. See the case of The State v. Gyimah [1963] 2 GLR 446. On the evidence in support of this ingredient, the prosecution relied heavily on the evidence of the PW2, Antoinette Ampofo. The essence of the testimony of the PW2- whom the court found very credible in terms of the substance of her testimony and her ability to significantly recollect and recount the events of her dealings with the Accused. From her evidence-in-chief, the court is satisfied that she clearly knew what she was talking about. The court found the PW2- the victim- largely and reasonably consistent and testified clearly and in considerable detail about what the Accused had done to her on the material day. She was not hesitant and the court could tell she was truthful despite her tender age. For example, during her evidence-in-chief, the record will show that and revealed one and only thing: That she knew very well and had no doubt about the identity of the man with whom she had dealt intimately and had had sexual intercourse with on the date and place in question: Whom she identified as the Accused! She had given a graphic and vivid narration of the events of the day: That after the Accused sent her other siblings or children on errands, she was asked to remain in the room by the Accused; how 12 the Accused instructed her to lie on the mattress at the room, the Accused removing her panty, which she did; as well as how the Accused laid her in a supine position, and brought out his penis and then inserted his penis into her vagina and succeeded in having unprotected sexual intercourse with her. Clearly, such an evidence of

the victim as captured or can be gleaned from the above, showing graphic details and account of the events and activities between her and the Accused could not have been fabricated and made up. Those raw, cold and graphic details gave a bird's eye view account of the sexual activity between the Accused and the victim, which makes it more convincing for the court to accept and to find credible. It could only be given by a primary witness who knows the Accused and dealt with the Accused at some close, intimate and passionate level. See the dictum of Dotse JSC in the *Richard Banousin v The Republic* case (*supra*); where the venerable Dotse JSC as part of the reasons in allowing the appeal, criticized the lack of clarity and insufficiency in the evidence adduced to convict the appellant at the trial High Court; juxtaposing it to and preferring the graphic details and account of the rape victim in the case of *Gligah v The Republic* (*supra*). The nature of defilement is such that it is not always possible for witnesses to see or observe the act. It is an activity mostly involving an accused and a victim, except in some few cases where some passers-by or third party would come across them and thus serve as a witness. The victim has testified clearly that she was defiled by the Accused, whom she had also known for some time now at Nkawkaw Asuogya. In addition, from the facts and evidence, the Accused and the victim as well as the other witnesses are neighbours. They stay in the same neighbourhood. The victim even called the Accused "Bra Kofi", showing how closely they know each other or relate. It also shows and a fortiori I hold that the above situation did ensure that the victim would know and be certain about the identity of the Accused. When a witness such as the victim in an intimate and private crime such as defilement testifies in circumstances that she did and state that the one who had the sexual intercourse with her is the Accused- then a court should be satisfied that there is enough and sufficient and quality evidence of the identity of the accused before it on the charge. The law on the foregoing is that; "where the identity of an accused person is in issue, there can be no better proof of his identity than the evidence of a witness who swears to have seen the accused committing the offence charged". See the case of *Adu Boahene v The Republic* (1972) 1 GLR. In addition, the court finds that the facts of the case also created an opportunity for the Accused to commit the offence in question. The evidence shows that the Accused sent the PW2, DW1 and the other children on multiple occasions with the PW2 left behind in the room of the Accused. 13 This is based on the testimony of the PW3, Amanoah Shallom, who had testified that the Accused sent them on errands on three (3) different times successively; the first one to buy biscuits; the second one to buy a loaf of bread and the last one to buy toffees, when they returned to find the door to the Accused person's room locked, and forced it open to find the accused person on top of the victim. Even though the sole witness of the Accused had initially testified or suggested that the victim went with them on all the times the Accused sent them on errands, however he finally conceded during his cross-examination that on the last time they were sent- to buy the loaf of bread- the victim did not accompany them but stayed back at the house of the Accused; albeit that while they returned to find the PW2 playing with a broom at the house of the Accused, the Accused was not around. Even going by the evidence of the Accused person's sole witness, it failed to raise any reasonable probability that the Accused in all the circumstances could not have committed the offence as it showed that the Accused was

alone with the PW2 and there existed an opportunity for the Accused to have had the sexual intercourse with the PW2. In the case of *Dogbe v. The Republic* [1975] 1 GLR 118; at holden I, the High Court, per Ata-Bedu J (as he then was) stated thus: “In criminal trials, the identity of the accused as the person who committed the crime might be proved either by direct testimony or by circumstantial evidence of other relevant facts from which it might be inferred by the court. Thus opportunity on the part of the accused to do the act and his knowledge of circumstances enabling it to be done were admissible to prove identity.” Meanwhile, the evidence of the PW1, the aunt and guardian of the PW2, was that following the said sexual intercourse, the victim complained of pains in her vulva or vagina when she was bathing her, and ultimately confided in her about her ordeals in the hands of the Accused. Besides, there is the other piece of evidence; of the opinion of the medical officer, Exhibit C, who examined the victim, after the complaint was lodged against the Accused. The medical officer, upon examination of the victim a couple of days after the impugned sexual intercourse stated or wrote inter alia that the hymen had been widened and that some lacerations had been seen in the vagina of the PW2. The finding by the medical officer per the Exhibit C that the hymen of the victim had been widened reasonably appeared to support the claim of the victim and the position of the prosecution generally that, the victim was sexually assaulted in her vagina by someone, whom the victim identified as the Accused. 14 From the evidence of the PW1, PW2 (the victim), as well as the PW3 who had returned from the errands to see the Accused on top of the PW2, and also the opinion of the medical officer as per the Exhibit C, the cumulative effect, I find that the prosecution succeeded to prove beyond reasonable doubt that the Accused had sexual intercourse or carnal knowledge with the victim on the date in question. Besides, it must be stressed that even long before her testimony in court, she had initially mentioned the name of the Accused to the PW1, her aunt. She had also pointed out the Accused to the police at the police station as the one who had had vaginal sexual intercourse with. It is not as if it was only an in-dock identification of the Accused in the courtroom for the first time as was played out in the case of *Karim v The Republic* (2003-2004) SCGLR 812. She had also went with the Accused and the police investigator to the room of the Accused, where she pointed out the door to the room of the Accused, and the mattress on which the Accused had the sexual intercourse with her. In the case of *Kwaku Frempong v The Republic*; Criminal Appeal No. J3/5/2010; delivered on 18th January, 2012, the Supreme Court of Ghana per Dotse JSC, as part of the reasons in dismissing the appeal brought by the appellant on robbery charge, asked a rhetorical question, which I find applies to the instant case against the Accused person herein mutatis mutandis, thus; “For instance how come that, out of the many people in Accra, it was only the appellant and his two other friends that the 3rd accused Daniel Amewu pointed out as being part of the robbery gang. This event is significant in many respects. This is because not only was the appellant mentioned, but he led the Police to retrieve the car that was stolen and used to carry the other stolen items away” So taking a leaf out of the invaluable book of the erudite Dotse JSC, this court at Mpraeso wonders and asks how come that of all the men and out of the many men in Nkawkaw Asuogya, it was only the Accused, that the victim mentioned and pointed out as

the man who defiled her on the date in question? Accordingly, the court finds and holds as follows: That someone had sexual intercourse with the victim on or around 1st September, 2021 and that that very ‘someone’ who had the sexual intercourse with the victim, is the Accused person, Awudi Gideon. I must quickly indicate that despite the above findings and decision of this court, as required of me as the trial judge in criminal proceedings of this nature, I was required to give full consideration to a defence or explanations of an accused person- as held in the case of *Attah v Commissioner of Police* (1963) 2 GLR 460; as well as in the case of *Hausa v The Republic* (1981) GLR 840, where it was held that even where the trial court believes the prosecution witnesses and their case, it should still go ahead to consider whatever version of the case presented by the Accused at trial. I must indicate or put on record that I had given full consideration to the Accused’s defence or explanation on this issue; but without mincing words, I found them to be convenient afterthoughts, mere fabrications and not reasonably probable nor reasonable true. The court rejects them. See the case of *Bediako v The Republic* (2010-2012) 1 GLR 566. And as I have already stated above, the evidence or explanations of the Accused did not raise a reasonable doubt in the mind of the court. Because the evidence of his sole witness still showed that at a point in time the Accused and the victim were alone at the room, which ruled out the probability that the Accused could not have had the opportunity to have the sexual intercourse with the victim. In addition, I wish to state that even though the evidence of the PW2 had shown some inconsistency, the court did not find it material or substantial enough to warrant a rejection of her testimony taking the whole circumstances of the case into consideration. The said inconsistency was that the PW2 as per her filed and admitted witness statement had stated that the Accused had sexual intercourse with her through her anus. However, while she was in the box, the court had asked her to tell the court what really happened between her and the Accused on the date and crime scene in question in order to test her credibility. She repeated her previous statements except that she told the court that the Accused rather used his penis to penetrate her anus. The court has evaluated the said inconsistency but does not find it to be material to warrant the court to reject her testimony, especially in the light of the other pieces of corroborative evidence before the court; and also for the fact that, whether through her anus or through her vagina, same did not affect the proof of any of the elements of the offence of defilement aforementioned. In the case of *Brempong II v The Republic* (1997-98) 1 GLR 467, Benin JA (as he then was), offered the following instruction or guidance as to how inconsistencies in evidence should be evaluated and treated by a court in order to arrive at a fair and just decision; “... In law for conflicts and inconsistencies in evidence to influence a decision they must be material and such that they destroy proof of an element of the offence or totally discredit the witnesses such as to make their story unreliable. So long as there was evidence to support the charge of stealing which any reasonable tribunal could act upon to convict, there was a prima facie case made out. A court should not reject a pay’s case simply because the witnesses contradicted themselves here and there, especially when they testified to events which occurred some years earlier. The court should consider the materiality of the conflicts in the light of the issue(s) which such evidence sought to prove and decide whether it makes proof of the issue,

if relevant to the case, highly unacceptable or unreasonable to accept. But where the conflicts and inconsistencies do not affect the main issue before the court or proof of the elements of the crime, then the court could only consider them in the light of the 16 witnesses' credibility. In the light of the above authorities, the court finds no merit in the Accused's claim or defence or explanations upon a thorough evaluation by the court. His explanation or defence was not only not unbelievable but also not reasonably probable or reasonably true. It is for all the above findings of fact, conclusions and authorities why the court has held that the prosecution has succeeded to prove all the essential ingredients or elements of the offence of defilement beyond reasonable doubt against the Accused. The upshot or natural resolution is that the Accused person, Awudi Gideon, is found guilty on the one count of defilement. He is convicted accordingly. SENTENCING: Per the provision of section 101 (2) of Act 29/1960 (supra), the sentence for the instant offence upon a summary conviction is to a term of imprisonment of not less than seven (7) and not more than twenty-five (25) years. In determining the appropriate sentence for the convict herein, I have had to consider the authority of *Kwashie v The Republic* (1971) 1 GLR 488, which provides for the factors to be considered by a court before imposing the length of sentence on a convict. I have therefore, in the context of the facts of this case, considered, by way of mitigating factors, such as the about the few months he spent in custody to after the court determined that there was a strong prima facie evidence against him and would be imprudent to release him. See Article 14 (6) of the Constitution, 1992. The court has also considered the fact that he is a first offender. He is a young man and has pleaded for leniency from the dock. Despite the above mitigating factors, the court also notes that it has taken a dim view of the act and conduct of the convict, who instead of playing or serving as a father-figure to the victim and looking out for her- due to her relatively young age- rather, in the most despicable and condemnable of circumstances, took advantage of and lured the victim to violate her young, innocent and vulnerable body. The convict deserves some severe and deterrent custodial sentence, to serve as a deterrent to himself and to other criminal elements within the jurisdiction. I also take judicial notice of the fact that defilement is prevalent within the jurisdiction of this court. 17 In the light of the foregoing, the court hereby sentences the convict to serve twelve (12) years imprisonment in hard labour without the option of a fine. He is however informed of his statutory right of appeal if he is unsatisfied with the conviction and/or sentence. SGD: STEPHEN KUMI, ESQ CIRCUIT JUDGE. sk...

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