

GHANA / JUDGMENT

Republic Vrs Arthur [2023]

GHACC 234 (19 January 2023)

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19 January 2023

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IN THE CIRCUIT COURT OF GHANA HELD AT CAPE COAST, CENTRAL REGION ON FRIDAY 19TH DAY OF JANUARY, 2023 BEFORE H/H DORINDA SMITH ARTHUR (MRS.), CIRCUIT COURT JUDGE.

SUIT NO. 247/2022 THE REPUBLIC VRS JOHN KENNETH ARTHUR

JUDGMENT

The Accused person was arraigned before this Court on 04/05/2022 for the offence of Indecent Assault Contrary to Section 103(2) of The Criminal and Other Offences Act, 1960 Act 29. The accused person pleaded not guilty to the charge preferred against him for which reason the prosecution assumed the burden of proof and must prove the charge against the accused person beyond reasonable doubt in accordance with; Section 11(2) of the Evidence Act 1975 NRCD 323 states; "In a criminal action the burden of producing evidence when it is on the prosecution as to any fact which is essential to guilt requires the prosecution to produce sufficient evidence so that on all the evidence a reasonable mind will find the existence of the facts beyond reasonable doubt." Page 1 of 14 Further, Section 13(1) of NRCD 323 provides that the standard of proof is nothing less than proof beyond reasonable doubt no matter the offence charged. See the case of Ampabeng Vrs Republic [1977] 2 GLR 171 CA The prosecution in order to discharge the burden placed upon them called three witnesses and tendered three exhibits in evidence. THE PROSECUTION CASE The summary of prosecution case is that a case PW1 is the mother of the survivor (PW2). Accused person (AP) was PW2's chemistry Master at Aggrey Memorial Senior High School. According to PW1, she was informed by PW2 that AP called her one night during Prep time and counselled her and among others advised her to pursue law and communication at the University and that she should choose UCC instead of any other university so that he can monitor her. She said at another time in the evening AP was the Prep Supervisor and instructed PW2 to leave her class room for the science lab to study as the class room was not conducive to read. So PW2 followed AP to the lab and she met some students there studying and she joined them. After sitting on the lab stool which has no back support for awhile she felt pains in her back so she stood up. She continued that PW2 narrated that AP called her to stand straight

looking at the board and started demonstrating the pains she was having on her body and said the pains are from her spinal cord. She felt two fingers rubbed behind her knees almost where her thigh is and she thought she was too close so she moved a little away and another demonstration ended. She narrated further that the same thing happened, two fingers rubbed around her knees. Prep time was over and she moved out of the lab but at the entrance she felt someone squeeze her buttocks. She turned but AP had wore a face that did not look like he did it and remarked that she should not stay up to read but to sleep. Page 2 of 14 PW1 informed her French teacher the next day and the French teacher also told her to inform the Madam in charge of academics. She however went to the French teacher not to confront AP and not to tell her father. PW1 had another encounter with AP at the science lab. He said AP spoke ill about his wife and showed her a divorce letter. AP expressed his likeness for her in the inner room of the lab. AP got up to charge his phone and passed behind her. AP put his hand in her Tshirt and started fondling with her breast. She tried to find out why he was doing that and he told her to lower her voice. They struggled and AP put his hand in her pants and tried to finger her in her vagina and whilst he was doing that he remarked that he likes the way her vagina is bushy. AP also said he has low libido so his penis will not rise and that it has been a long time he had sex with his wife. He told her to allow him satisfy her sexual desires and not to allow any student boy to do that. She broke away and run away from the inner room of the lab. She said PW2 narrated the incident to her when she vacated and returned home so she advised her to stay away from AP and that she will inform the headmistress about the incident. PW2 tried to stay away from AP but AP is the Prep coordinator so he met her and another time he asked PW2 to sit on his laps but she refused. PW1 stated that PW2 kept calling the house so her father got to know about and through the help of others they got her to be transferred from the school. They reported the matter to the police. PW2 testified that she was in the science laboratory studying and AP at that material time went behind her and placed his arms around her neck. She said AP forcibly put his hands in to her T-shirt and squeezed her breast. She said she shouted for help but AP covered her mouth with his palm. AP moaned and rubbed his hands several times on her body. AP forcibly put his hands into the survivor's panties and inserted his finger Page 3 of 14 into her vagina without her consent. She struggled with him and she broke loose of him and run out of the place. PW3 is the police investigator and he tendered in evidence the caution and charged statements of AP, and the police medical report. EVALUATION OF EVIDENCE AND APPLICATION OF LAW At the close of case of prosecution, Learned Counsel for the accused person raised submission of no case per Section 173 of Act 30/60. Counsel contents that the case for prosecution provides no prima facie evidence of the commission of the offence of indecent assault charged and that accused must be acquitted and discharged. In a twenty page submission, counsel for AP analysed the evidence of prosecution and concluded that the witnesses' evidence were unconvincing and lacked corroborative credibility. Also, that nothing was discovered during the investigation to connect the AP or confirm the story of PW2. The submission of no case is upheld as the court is of the view that prosecution's case is circumstantially so weak and based on hearsay that it cannot be relied on to ground a prima facie case against accused sufficiently to require him to make a defence and that the accused person be acquitted and discharged with respect to the charge. These are my reasons: The offence of f indecent assault is a misdemeanour and its defined under

Section 103

- (2) of Act 29,(1960 as: “A person commits the offence of indecent assault if, without the consent of the other person he— Page 4 of 14
- (a) forcibly makes any sexual bodily contact with that other person; or
- (b) sexually violates the body of that other person in any manner not amounting to carnal knowledge or unnatural carnal knowledge” Consequently, the essential ingredients of the offense of indecent assault are;
1. That accused made sexual bodily contact with the survivor
 2. That the sexually body contact was made with force
 3. That the accused violated the body of the survivor in any manner with or without carnal knowledge. To satisfy the court with a conviction the prosecution must prove the aforementioned ingredients beyond reasonable doubt. See REPUBLIC V YEBOAH [1968] GLR 248-256 at Page 251. Here, a burden is cast upon the prosecution to prove each and every one of the above three ingredients beyond a reasonable doubt that accused person made sexual bodily contact with the survivor which was made with force and that forcibly sexual body contact violated the body of the survivor whether that body contact was with or without natural or unnatural carnal knowledge. PW1 is the mother of the survivor and she recounted to the court what the survivor narrated to her. She was not at the school at the time of the alleged incidents and as such was not privy to any of the alleged incidents. The court thereby treats her evidence as hearsay as was even admitted by her under cross examination as follows: Page 5 of 14 Q. And your daughter narrated the incident to you when she came home for vacation. A. Yes Q. All you told us this morning is based on what your daughter told you. Right? A. Yes Then later, Q. On the last adjourned date you told this court that your evidence given is essentially as a result of the claims made known to you by the survivor. Is that not so? A. Yes Q. And you therefore have no personal knowledge of what transpired since you were not present. A. No, I was not present. From PW1’s answers as shown above, she does not have any personal knowledge of the events and hence, her evidence is not conclusively reliable. Inasmuch as PW1’s evidence is based on hearsay, the court cannot rely on same to ground a prima facie against accused person as none of her evidence can be relied on to prove any of the ingredients of the offence charged. I then move on to the evidence of PW2, the survivor in this case. The pertinent events as narrated by her is where she said that she was in the science laboratory studying and AP at that material time went behind her and placed his arms around her neck. She said AP forcibly put his hands in to her T-shirt and squeezed her breast. She said she shouted for help but AP covered her mouth with his palm. AP moaned and rubbed his hands several times on her body. AP forcibly put his hands into the survivor’s panties Page 6 of 14 and inserted his finger into her vagina without her consent. She struggled with him and she broke loose of him and run out of the place. In REPUBLIC V YEBOAH [1968]GLR 248, the court decided inter alia that the evidence of a sexual victim need no corroboration but it is prudent to look for corroboration from

some extraneous evidence which can confirm the evidence of the victim. Thus even where the sexual victims testify, the court is advised to seek for corroborative evidence. See R V HENRY AND MANNING [1969] 53 CRIM APP REP 150 per Salmon J. The court held inter alia that “...in cases of alleged sexual offences, it is really dangerous to convict on the evidence of a woman or girl alone. This is dangerous because human experience has shown that in these courts, girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate and sometimes for no reason at all.” Even though this is an English case and is of persuasive influence only, it is of such great importance that the court cannot ignore that precedent for the weight it carries. However, prosecution provided no corroboration of the case of PW2 either by producing a witness or documentary proof of her assertions. PW1 who is her mother was not present when the alleged incident occurred neither is PW3 the investigator. During cross examination, PW2 admitted that none of the students studying at the science laboratory saw what AP allegedly did to her. Some of her answers are as follows: Page 7 of 14 Q. I heard you say that AP pressed your buttocks at a time you and other students were returning from prep. Is that correct? A. Yes, that is correct. Q. So I presume that these colleagues of yours saw the pressing of your buttocks. Is that what happened? A. No. Q. Nobody saw the alleged squeezing or pressing of your breast. Is that not so. A. That is so, nobody saw it. Q. Nobody again saw the alleged attempts of AP to finger you. Right? A. No, nobody saw that. From the answers PW2 did not have any witness to corroborate her assertions. Meanwhile, prosecution tendered in evidence a medical report dated 07/02/22 from Cape Coast Teaching Hospital. The court can infer that the medical report is tendered in evidence to corroborate the evidence of the survivor as to the sexual assault. However, the report did not add any substantial proof in favour of prosecution. This is because the medical report indicated that there was no bruise, no bleeding of the vagina, and the vulva is normal. Also the report indicated that the hymen of the survivor is intact. During cross examination of PW3, it was confirmed that the medical report does not have any connection of the offence as charged. The following question was posed: Q. ... the medical report that you tendered in evidence showed no evidence of indecent assault. Is that it? A. That is so. Page 8 of 14 The medical report is an independent evidence to provide corroboration to the evidence of prosecution and yet it rather threw doubts on prosecution’s case with regard to the charge levelled against AP. Additionally, PW3 could not corroborate the evidence of PW2 through his investigation. PW3 testified that he could not recover from the lab the ointment the survivor alleged was used to rub her back by AP. PW3 established that the lab is opened for all students to visit during prep hours and that he interviewed one student by name Nancy. He said the said Nancy said sometimes she enters the lab before the survivor and other times she goes to meet the survivor at the lab with other students. According to PW3, none of the students saw AP indecently assaulting PW2. When he was asked whether he believed AP committed the offence his answer was not in the affirmative but rather he said “partly”. His answer raised doubts in prosecution case and in that regard, his evidence did not corroborate the evidence of PW2. Therefore, none of prosecution witnesses was able to lead credible corroborative evidence to prove any of the ingredients of

the offence. Even though the court did not put any weight on PW1's evidence, it is noted that her evidence contradicted that of PW2. Indeed PW2's evidence in court also contradicted her statement to the police. Some of the contradictions are clearly shown when the PW1 was asked as to how she was informed by PW2. The question went as follows: Q. ... And your daughter narrated the incident to you when she came back home for vacation. A. Yes. Page 9 of 14 Q. And if they were true, the survivor would have communicated same to you whilst in school? A. They were not allowed to use phones in school. So the little opportunity she get to use the school house's phone, we do not talk much because she tells me there is a queue and other people are around waiting. So she tells me basic things of when she needs things and money. The evidence of PW1 was clear that PW2 narrated the incidents to her when she returned home for vacation contrary to what PW2 testified in court. Under cross examination PW2 answered among others the following: Q. I again heard you say that whilst in school, you used a colleague's phone to call your mother at home to brief her of the alleged indecent assault on you. Is that what happened? A. Yes, that is so. Q. Specifically which of the alleged indecent assault did you inform your mother on phone. If it is all you can inform the court. A. I informed my mother about the incident where I felt two fingers rubbed behind my knee and the incident that happened under the tree on phone. Flowing from the contradictory answers given by PW1 and PW2 on the same issues of where and when PW2 informed the mother of the incident, the court can safely infer that prosecution witnesses were not credible. This assertion was admitted by PW3 when Counsel for AP asked the following question: Q. Will you agree with me that the survivor is not being forthright and consistent with her story? Page 10 of 14 A. Yes This admission confirms that PW1 has not been a credible witness and this creates further doubts in the case of prosecution. The court cannot know which of the accounts is correct and thus the court cannot put weight on such evidence. Therefore, prosecution could not lead cogent evidence to prove all the elements of the offence of indecent assault against accused person as required of them because the adduced evidence is circumstantially so weak and based on hearsay that it cannot be relied on to ground a prima facie case against accused person. Prosecution evidence is insufficient. In the Supreme Court case of THE STATE VS. ALI KASSENDA [1962]1 GLR 144 at 149 pronounced on Section 173 of the Criminal Procedure Code, 1960 (Act 30) thus: "Section 173 is concerned with Summary trials where the judge decides both questions of law and fact. It Is for the judge in a summary trial to weigh the evidence and then decide whether from the facts proved the guilt of the accused can be inferred. Evidence is said to be sufficient when it is of such probative force as to convince and which if un-contradicted will justify a conviction. In addition, the court could not make any safe inference from the facts as the evidence adduced were not objective and without much practical certainty. Hence, prosecution failed to take the case out of the realm of conjecture, speculation and suspicion because the evidence could not convince the court and as such incapable of sustaining a conviction. See CASEWELL V POWELL Page 11 of 14 DUFFRYN ASSOCIATED COLLIERIES LTD. [1940] AC 152 P 169 particularly the opinion of Lord Wright. Consequently, prosecution could not establish any prima facie case against the accused person for the court to call him to open his defence. The evidence adduced by

prosecution failed to proof all of the three ingredients of the offence of indecent assault. It is a principle of law that in order to justify a conviction, the evidence adduced against the accused should attain a degree of certainty. See MOSHIE V. THE REPUBLIC [1976] 2 GLR 310. Under Section 173 of Act 30, 1960 where “at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused sufficiently to require him to make a defence, the court shall, as to that particular charge acquit him.” Here, the court is to do a balancing act at the close of the case for the prosecution to ensure that prosecution has led evidence to support the essential ingredients of the offences charged. See TAGOR V THE REPUBLIC [2009] 23 MLRG 78 at 132 where the Court of Appeal held that: “the paramount consideration in deciding whether prima facie case has been made or not is; whether the prosecution has proved all the essential ingredients or pre-requisites of the offence charged. No prima facie case is made where the prosecution was unable to prove all the essential ingredients. Even if one of the ingredients is not proved, the prosecution fails and no prima facie case is made.” Page 12 of 14 Therefore, after the balancing act of the evidence adduced by prosecution, if the court cannot convict the accused person on the evidence so led without any reasonable explanation then submission of no case should be upheld. This is because the accused person cannot add up to the prosecution’s case where at the close of its case, the prosecution is unable to establish a prima facie case against the accused person. See MALI VRS. THE STATE (1965) GLR 710 – 715 ; STATE V. ANNAN (1965) GLR 600-612 and ASARE V. THE REPUBLIC (1978) GLR 193 – 199 Therefore, the burden of proof remains throughout the trial on the prosecution and the accused person is not required to prove anything. In PUBLIC PROSECUTOR V. YUVAVAG (1935) 25 CR. APP R 72 AT PAGE 95 the court held that

- “Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact, it is sufficient for his acquittal if any of the acts which if they existed would constitute the offence with which he is charged are not proved.” Consequently, the court is not permitted to call the accused person for further evidence before ruling on a submission of no case where prosecution has not proved the essential ingredients of the offence. In sum, the case for the prosecution is considered as having collapsed. The court hereby enters submission of no case in accordance with Section 173 of Act 30 and accordingly, acquits and discharges the accused person on the offence of indecent assault. Page 13 of 14 H/H DORINDA SMITH ARTHUR (MRS.) CIRCUIT COURT JUDGE ACCUSED PERSON PRESENT. PROSECUTOR: C/INSP. SAMUEL AMOAKO PRESENT. MICHAEL MONNIE ESQ. WITH FRANK AMISSAH AND KOFI AMPAH FOR ACCUSED PERSON PRESENT. Page 14 of 14

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