THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-SC-0288 OF 2006

UGANDA :: PROSECUTOR

VERSUS

TANGIT MARTIN :::::::::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. MR. JUSTICE RUBBY AWERI-OPIO

JUDGMENT:-

The accused Tangit Martin was originally indicted for the offence of defilement contrary to section 129 (1) of the Penal Code Act. The particulars of the offence were that the accused between the months of February and March 2004, at Lower Nsoba Zone in the Kampala District had unlawfully sexual intercourse with A moit Anna a girl below the age of 18 years.

Upon the commencement on the 7th August 2007 of the Penal Code, (Amendment) Act, 2007 which replaced section 129 of the Penal Code Act the accused was tried under the new offence of aggravated defilement under section 129 (3)(4) (c) of the Penal Code (Amendment) Act 2007. The state never tendered formal amendment on the Indictment but I think that did not prejudice the trial since the amendment simply refined the ingredients according to aggravating circumstances as follows:-

(a) Where the person against whom the offence is committed is below the age of fourteen years;

(b) Where the offender is infected with Human Immunodeficiency Virus (HIV);

(c) Where the offender is a parent or guardian of or a person in authority over the person against whom the offence is committed;

(d) Where the victim of the offence is a person with a disability; or

(e) Where the offender is a serial offender.

When the indictment was read and explained to the accused he denied the offence whereupon the prosecution was called upon to prove all the ingredients of the offence charged beyond all reasonable doubt. The prosecution was required to lead evidence to prove the following ingredients of the aggravated defilement relevant to the current indictment:-

1) That the girl victim was below 18 years old during the time of the alleged sexual intercourse.

2) That the act of sexual intercourse was performed on the girl victim.

3) That the accused was the one who performed the sexual Act.

4) That the accused was a parent or guardian of or a person in authority over girl victim: See section 129 (3)(4) (c).

In a bid to discharge the burden of proof cast on it, the prosecution adduced the evidence from three witnesses:-

Achom Christine (PW1) testified that she was 30 years old and aunt to the victim. She told court that the victim was a total orphan who was born on 17th August 1990. she took custody of the victim after she had lost her mother. By that time the victim was 8 years old. In 2004 the wife of the accused fell sick and was admitted in Mulago Hospital. During that time the victim was sent to help the sick lady who was her sister and it was during that period that the accused started having sexual intercourse with the victim which resulted in pregnancy.

Dr. Nsereko Mukasa (PW3) testified that he examined the victim on 20/2/2006 and established that she was 16 years old. He testified that victim had only 28 teeth, which convinced him to believe that she was 16 years old. He testified that a normal adult would have 32 teeth. He concluded that the victim had had

penetrative sexual intercourse because her hymen had ruptured and she had delivered of a child.

Amoit Anna (PW3) confirmed that she had sexual intercourse with the accused during the time she was nursing his wife who was her sister. She told court the accused used to sneak to her bed and have sexual intercourse with her even when they were sleeping in the same room with the wife of the accused and the brother of the accused. Subsequently, the accused continued sexual intercourse with her in various places, including the bush. As a result of the sexual encounters, she became pregnant but refused to reveal it to anybody. It was only when the welfare of the child became a problem that she starting looking for the accused and later on she revealed to her aunt Achom (PW1) that the accused was the father of her child. Subsequently the matter was reported to police whereupon the accused was arrested and charged accordingly.

The accused made unsworn defence of total denial and told court that he only stayed with the victim at his home for only three days before she was removed because she was not helping his wife in doing whatever she had been assigned to do. The accused produced two witnesses to support his case who testified inter alia that according to the sleeping arrangement in the small room it was not possible for the accused to have sexual intercourse with the victim.

As far as the age of the victim is concerned, the prosecution relied on the evidence of Christine Achom (PW1) who testified that the victim was born on 17th August 1990. Therefore she could have been about 14 years old during the alleged incident. Dr. Nsereko Mukasa (PW2) who examined the victim on 20/2/2006 testified that he found her to be about 16 years old. He based that opinion on the fact that the victim had a set 28 teeth. According to him only persons below 18 years have that number of teeth. He oprined that persons of 18 years and above have full dentition i.e. have a set of 32 teeth. I find the above to be a persuasive

scientific argument which our courts have take comfort in: ***Uganda Vs Peter Matovu Kampala Criminal Session Case No. 146 of 2001*** (unreported).

From the above evidence I am well convinced that the victim was a girl below 18 years old. In fact it was clear from looking at the victim during her testimony that she was a girl below 18 years old. She was however frank enough to reveal that he parents died when she was young before they could tell her her age. Furthermore, the prosecution evidence about the age of the victim was not contradicted. In the circumstances, my finding is that the prosecution has proved successfully that the victim was a girl below 18 years old during the alleged incident.

The second ingredient is whether sexual Act was performed on the girl victim. Here sexual Act means:-

(a) Penetrative of the vagina, mouth or anus, however light, of any person by a sexual organ.

(b) The unlawful use of any object or organ by a person on another person's sexual organs.

Sexual organ means a vagina or a penis.

: See Section 129 (7) of the Act.

I must mention here that there is a slight problem with the above definition by the inclusion of mouth and anus as object of penetration without making them sexual organs. Would it for instance constitute an offence if someone pushes a pen in another's mouth.

Be that as it may, in the instant case, the prosecution evidence was that sexual act was performed on the victim Amoit Anna (PW3) who testified that she had sexual intercourse several times between February – March 2004 when she was staying at the home of the accused. During that time the wife of the accused was sick and she was called upon to help in domestic work.

During that time accused started pestering her for love. The accused succeed having sexual intercourse with her one night when his wife went back to the hospital to remove her stitches but never returned home. The accused too that advantage and had sexual intercourse with her even when his brother was sleeping in the same small room. Later on she continued having sexual intercourse, which resulted in pregnancy after which she produced a baby boy. The victim came to testify in court with that baby. Dr. Nsereko Mukasa (PW2) testified that by the time the victim was produced before him for examination on 20/2/2006 she was breastfeeding a baby of about 8 months old. That he examined her hymen had ruptured and concluded that she might have had penetrative sexual intercourse. The victim testified that at first she denied being pregnant because she was young and had no knowledge or experience on pregnancy issues. On the other hand Achom Christine (PW1) the body changes she saw on the victim made her to conclude that se was pregnant.

From the above evidence, I am well convinced that the victim did experience acts of sexual intercourse which resulted in her conceiving and delivering a baby. There was no suggestion that the baby was conceived neither through the Biblical Holy Spirit nor by scientific manipulations. For the above reasons it is my conclusion that some one did perform sexual acts with the victim, which resulted in her pregnancy and birth of a human being. So that ingredient was proved beyond reasonable doubt.

This leads me to the most crucial ingredient as to who performed the acts of sexual intercourse with the victim. Here the prosecution relied heavily on the victim's evidence. It is trite law that proof of penetration and participation in sexual intercourse is normally by the victim's evidence and other cogent evidence: See ***Bassita Hussein Vs Uganda Supreme Court Criminal Appeal No. 35 of 1935*** (unreported).

The evidence of Amoit Anna (PW3) who was the victim in this case was that she started having the time she was staying at the home of the accused while nursing his wife of the accused had

undergone cesarean operation. During that time the accused started pestering her for love but she thought the accused who was her brother-in-law, was joking. She reported such advances of the accused to his wife but her answer was that the accused was her brother-in-law. She testified that one time the wife of the accused went back to Mulago Hospital to have her stitches removed, but proceeded to spend the night at the home of the brother of the accused. So, during that night the accused left where he was sleeping and moved to the victim where he forced her into sexual intercourse.

Subsequently the accused continued tormenting the victim with his sexual acts while they were sleeping in the same room with the wife. The accused would sneak in the middle of the night to perform sexual intercourse with the victim. On another occasion, the accused went to the market with the victim to buy food. As they were returning, the accused took the victim to a nearby bush where they had sexual intercourse. Amoit testified further that one Sunday the accused was off duty he decided to send his wife

off to go and buy food in the market. As the wife was away they decided to perform sexual acts from the home.

The accused in his defence denied the offence and was supported by two witnesses. The emphasis was that it was not possible for the accused to have sexual intercourse with the victim in such a small room in the presence of his wife without the victim making alarms. According to the victim, the accused started pestering her for sex and she reported the same to her sister who appeared not bothered, perhaps because of the caesarean stress. Her response was that the victim should have known that the accused was her brother-in-law. That response did not stand as unequivocal rebuke of the accused. In the process the accused took advantage of the young girl while his wife whether by collusion or evil intervention, spent the night at away from home at the home of the brother of the accused and proceeded to force the victim into sexual intercourse. After setting the stage, the accused continued tormenting the victim with his sexual acts even from the same room where his wife and brother were

sharing. The victim enumerated two other occasions when the accused had sexual intercourse with her, one time in the comfort of the bush and another occasion in the house of the accused when he had tricked the wife to go to the market to buy food. The above evidence was watertight from the victim who was a young innocent and helpless in-law and could not have been concocted. It seems that the wife of the accused was prepared to side with the accused because at no occasion did she challenge him upon the allegations made by the victim about his advances.

The defence that was not practicable for the accused to have sexual intercourse in the same room which was shared by his wife and brother could not hold any water. This is because in the first place, the wife of the accused was not moved by the report advanced by her sister that the accused was tormenting her with sexual intercourse. Her response was simply that the accused was brother-in-law to the victim. That could sound as if she was advising the sister to tolerate the advances of the accused. As for the presence of the brother in the same room, it was common

knowledge that these people were sharing the same tiny room and that would not deter the accused from enjoying his conjugal rights with his wife. Apparently therefore, privacy during sexual intercourse was not well known vocabulary in that home.

For the above reasons I find that the prosecution has proved that the accused participated in performing sexual intercourse with the victim.

Lastly court has to decide on the fourth ingredient whether the accused was a parent or guardian of or person in authority over the victim, the prosecution relied on the evidence from Achom Christine (PW4) who testified inter alia that the victim was staying at the home of the accused as she was helping the wife of the accused. The wife of the accused was a sister of the victim. Amoit Anna (PW3) who was the victim also confirmed that she was living with the accused while helping his wife who was sick. The accused in his defence also alluded to that when he stated

that the victim was taken to his home by his mother-in-law (Christine Achom (PW4)) to go and help his sick wife. That evidence was supported by Etyang James (DW1) who testified that Amoit Anna the victim was brought to help the wife of the accused during the time she was sick. The accused being brother-in-law to the victim he was the guardian of or a person in authority over the victim. He was responsible for the custody and welfare of the victim and the victim could not do anything without authority from the accused.

For the above reasons I do find that the prosecution has succeeded in proving all the ingredients of this offence.

Both assess surprisingly advised me to acquit the accused person on the ground that not all the ingredients of the offence had been proved. One assessor asserted that it was not possible for the accused to have sexual intercourse with the victim from the same room where his wife was sleeping more especially without the

victim making an alarm. Another opinion was that the medical examination was performed after a long time. So sexual intercourse was not proved. The other reason was that the defence witness Etyang James was a man of sound mind who was clear that the accused did not commit the offence.

After considering the evidence in the above manner I find that the two assessors misdirected my guidance. First of all the acts of sexual intercourse were not only performed in the house where the wife and the brother of the accused were sharing. Apart from having sexual intercourse in that house, the accused also performed sexual acts against the victim in various places and occasions. One such place and occasion was when the victim went to the market with the accused to buy food. On their way back, the accused led the victim to the bush where they had sexual intercourse. That evidence was not challenged. Another occasion occurred one Sunday when the accused was off duty. The accused tactically sent off his wife to go to the marked to buy food. As the wife was away the accused performed sexual acts with the victim. Another point to note is that it was apparent that

the wife was not bothered about the allegations of sexual harassment against the accused.

As for the medical evidence, it is true the medical examination was performed after a long time. However that was because the victim had not disclosed the one who was responsible for her pregnancy. In any case, there was sufficient evidence to show that the victim had experienced penetrative sexual intercourse. The victim was noted pregnant by an experienced woman who noted her body changes and concluded that she was pregnant. It is trite law that in sexual offences examination by experienced indigenous women is as good as medical examination. See: .....

Above all sexual intercourse is proved by the victim's evidence and medical evidence. Here the victim was emphatic that the accused impregnated her and she gave birth to his baby. In conclusion therefore, I find that the prosecution adduced sufficient

evidence to prove al the ingredients of this offence and is disagreed with both assessors. I find the accused guilty as charged and he is convicted accordingly.

RUBBY AWERI OPIO

JUDGE

3/12/2007.

3/12/2007:-

Accused present.

Kote for the state.

Kasirivu for the accused on state brief.

Judgment read in open court.

Kote:-

The convict is a first offender with no previous record. The convict is guilty over every serious offence with maximum of death sentence. The accused took advantage of an orphan and had sexual intercourse with her. The orphan was under his care. That sexual intercourse resulted in pregnancy. That compounded the problem of that girl. Now she is a single mother with no income to look after a two year old boy.

Defilement is rampant which has destroyed the future of young girls. She can't find a job to look after the baby the legislations have found it wise to categorize the offence as aggravated. The accused should therefore be given a severe sentence to serve as a lesson and also deter others.

Kasirivu:-

The convict is apologetic and prays for leniency. He will not repeat it. He had been on remand for almost 2 years. He has a wife and 4 children. Even the victim told court that she wanted the victim to be left but that she wants maintenance of the child. Severe sentence would be punishing poor wife and children and even the victim. I therefore pray that you give a lenient punishment.

Accused:-

I am sorry. I have a family of 5 people. I am an orphan and my wife too. I pray for leniency. I will not repeat it.

Court:-

Sentence on 4/12/2007 at 9.00a.m.

RUBBY AWERI OPIO

JUDGE

3/12/2007.

4/12/2007:-

SENTENCE:-

This is a very serious offence which entails maximum sentence. The accused ravished his sister in law a girl who was under his care. The accused had the audacity to perform sexual acts against the victim without respecting his sick wife who was even sharing the same room. That reckless relationship resulted in pregnancy as a result of which the victim is now a helpless single mother. This court should therefore take a serious view of this offence.

However, I have listened to the submissions of the counsel for the accused and the accused himself in mitigation. He has seen his fault at last and appears to be remorseful. He is a young man who should be given a chance to reform and live a useful citizen both to the state and his family. I do not think a long custodial sentence would serve any purpose. He is accordingly sentenced to four years' imprisonment.

Right of appeal explained.

RUBBY AWERI OPIO

JUDGE

4/12/2007.