



THE TREATMENT OF CONSENT IN SEXUAL ASSAULT LAW IN GHANA

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1. Introduction

Sexual assault covers physical or sexual violence against a person, whether male or female, which violates the person's bodily integrity and sexual autonomy.¹ Although sexual assault can be committed by and against both sexes, women and girls tend to suffer the most from such offences. In Ghana, the term sexual offences is used in Chapter Six of the Criminal Offences Act, 1960 (Act 29) and it covers "any unlawful dealing with a female by way of rape, defilement, and in the case of unnatural carnal knowledge, the victim could be either a man or woman, indecent assault (man or woman) and again, incest."²

At the heart of most sexual offences in Ghana is the issue of consent; without consent sexual contact or acts are unlawful.³ The legal system's treatment of consent in Ghana reflects assumptions about women and how they do or do not consent to sexual acts. The burden on the prosecution to prove absence of consent on the part of a female, in a rape case for instance, is often met with assumptions and expectations which do not necessarily operate in every case. Thus, assumptions such as that "when there is no consent, there should be evidence of force or violence which is often in the form of either biting or scratching of the hands or even the male organ of the accused person"⁴ and expectations that, "when there was an opportunity to report, the victim did so punctually"⁵ are often at play. Thus, Ghanaian women who experience sexual violence often face significant challenges when they seek justice through the legal system.

Ghana's Criminal Offences Act, 1960 (Act 29) specifies the following sexual offences: rape, defilement, carnal knowledge or unnatural carnal knowledge of persons with mental challenges, indecent assault and incest. The offence of abduction in the Criminal Offences Act is also examined in this paper because it involves carnal or unnatural carnal knowledge and consent. In presenting the legal treatment of consent in sexual offences in Ghana, this paper analyzes the above noted sexual offences and the treatment of consent under these offences. The analysis involves not only the penal provisions but also case law and publications on consent in sexual offences. The paper further analyzes the impact of customary law on the treatment of consent in the various sexual offences in Ghana.

¹ See United Nations Entity for Gender Equality and the Empowerment of Women, Definition of Sexual Assault and other Elements, online: <http://www.endvawnow.org/en/articles/453-definition-of-sexual-assault-and-other-elements.html>, [accessed on May 5, 2011].

² E. H. Ofori-Amankwah, Outline of Criminal Law Lectures, University Press, KNUST, Kumasi, 2007 at 70. The Criminal Offences Act, 1960 (Act 29) does not offer a specific definition of the term "sexual offences".

³ There are exceptions to the requirement of consent, for instance in the case of defilement, which involves sex with a minor, proof of consent is not required.

⁴ Supra, note 2.

⁵ Ibid.

2. Definition of Consent

Ghana's Criminal Offences Act, 1960 (Act 29) does not specifically define consent but it contains provisions that explain consent. Thus, section 14 which is headed consent, provides for circumstances under which consent is void. The section reads:

In construing a provision of this Act where it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or where it is required for a matter of justification or exemption that an act should be done with a person's consent,

(a) a consent is void if the person giving the consent is under twelve years of age, or in the case of an act involving a sexual offence, sixteen years, or is, by reason of insanity or of immaturity, or of any other permanent or temporary incapability whether from intoxication or any other cause, unable to understand the nature or consequences of the act to which the consent is given;

(b) a consent is void if it is obtained by means of deceit or of duress;

(c) a consent is void if it is obtained by or under the exercise of an official, a parental, or any other authority; and the authority which is exercised other-wise than in good faith for the purposes for which it is allowed by law, is for the purposes of this section, a power unduly exercised;

(d) a consent given on behalf of a person by the parent, guardian of that person, or any other person authorized by law to give or refuse consent on behalf of that person, is void if it is not given in good faith for the benefit of the person on whose behalf it is given;

(e) a consent does not have effect if it is given by reason of a fundamental mistake of fact;

(f) a consent is, for the purposes of this section, obtained by means of deceit or duress, or of the undue exercise of authority, or to have been given by reason of a mistake of fact, if it would have been refused but for the deceit, duress, exercise of authority, or mistake;

(g) the exercise of authority, for the purposes of this section, is not limited to the exercise of authority by way of command, but includes influence or advice purporting to be used or given by virtue of an authority;

(h) a person shall not be prejudiced by the invalidity of a consent if that person did not know, and could not by the exercise of reasonable diligence have known, of the invalidity.

Thus, in considering consent in sexual offences such as rape and indecent assault, consent to sex and sexual touch is void if the person giving it is under sixteen years of age, if consent is obtained by deceit or by duress, if it is obtained by exercise of official authority which is exercised otherwise than in good faith, etc. Sub-section (d) above is noteworthy because it allows for consent provided on behalf of an individual to stand so long as it is given in good faith. Those recognized as able to provide such consent

include parents, guardians or persons authorized by law to give or refuse consent on behalf of individuals. The right of these persons to provide consent comes from Ghana's adoption of English common law which allowed consent to be given on behalf of women and children; a vestige of colonialism. The provision poses a challenge to the rights of women and girls when sometimes acts done in good faith on behalf of others are detrimental to their rights. For instance, in Ghanaian communities which practice early and forced marriage, this right of parents, guardians and persons authorized by law to give or refuse consent on behalf of individuals can have a detrimental impact on the rights of girls. Although Article 28(4) of the 1992 Constitution of Ghana requires that laws be enacted to ensure that, "no child be deprived by any other person of medical treatment, education or any other social or economic benefit by reason only of religious or other beliefs", and consequently the Children's Act of 1998 provides a law on non-discrimination (section 14) and asserts the rights of children(Part 1), some girls in Ghana experience deprivation in communities which believe that girls should be raised to marry upon maturity, such maturity often being below the eighteen years stipulated for marriage in section 14(2) of the Children's Act.⁶ Where parents and guardians consent to early marriages on behalf of girls, technically such girls are raped upon marriage although "good faith" of the parents and guardians may have being the operating factor in contracting such marriages.

Also in the Criminal Offences Act, section 42, headed "Use of Force in case of consent" provides circumstances under which use of force is justified on the ground of consent thus:

The use of force against a person may be justified on the ground of consent, but

- (a) the killing of a person cannot be justified on the ground of consent;
- (b) a wound or grievous harm cannot be justified on the grounds of consent, unless the consent is given, and the wound or harm is caused, in good faith, for the purposes or in the course of medical or surgical treatment;
- (c) consent to the use of force for the purpose of medical or surgical treatment does not extend to an improper or a negligent treatment;

⁶ See The Daily Graphic, " Girl, 16, Forced into Marriage," July 2009, online: <http://www.modernghana.com/news/230407/1/girl-16-forced-into-marriage.html> ; The Ghanaian Times, " 17 year old Girl in Forced Marriage," March 2008, online: <http://www.forwarduk.org.uk/news/news/246>; Joy News, "Women's ministry orders parents to stop girl's marriage," January 2011, online: <http://news.myjoyonline.com/news/201101/59693.asp> [all accessed on July 4, 2011]. The following are also insightful: Immigration and Refugee Board of Canada, *Ghana: Forced marriages; prevalence of such marriages; whether a woman can refuse such a marriage, and the consequences of the refusal; available state protection and redress (2004 - 2006)* , 24 October 2006, GHA101618.E , available at: <http://www.unhcr.org/refworld/docid/45f1473720.html> [accessed July 11, 2011] and Daily Graphic, "Girl, 19, Chained for Forced Marriage" July 17, 2001, online: <http://mobile.ghanaweb.com/wap/article.php?ID=127340> [accessed on July 10, 2011].

(d) consent to the use of force against a person for purposes of medical or surgical treatment, or otherwise for the benefit of that person may be given against the will of that person by the father or mother or guardian or a person acting as the guardian, if that person is under eighteen years of age, or by a person lawfully having the custody of that person if that person is insane or is a prisoner in a prison or reformatory, and, when so given, cannot be revoked by that person;

(e) where a person is intoxicated or insensible, or is from a cause unable to give or withhold consent, force is justifiable which is used, in good faith and without negligence, for the purposes of medical or surgical treatment or otherwise for the benefit of that person, unless a person authorised by that person or by law to give or refuse consent dissents from the use of that force;

(f) a party to a fight, whether lawful or unlawful, cannot justify, on the grounds of the consent of another party, force which that party uses with intent to cause harm to the other party;

(g) a person may revoke a consent which that party has given to the use of force against that person, and the consent when so revoked shall not have effect or justify force.

It is under this section, at 42(g), that a provision previously used to justify marital rape is found. Prior to its amendment in 2007, the provision allowed revocation of consent given in all cases except for consent given for the purposes of marriage.⁷ The phrase “purposes of marriage” was read to include sex between spouses. However, the provision as it currently reads allows for revocation of consent with no exceptions.

Finally, section 31 which specifies grounds on which the application of force or harm against a person is justified, at subsection (j) provides: “Force may be justified in the case and in the manner, and subject to the conditions provided for in this Chapter, on the grounds [...] (j) of the consent of the person against whom the force is used.” It is thus possible for example, for a husband to argue by reason of this provision that sexual force or force used by the husband against his wife is justified on the basis of consent of the wife to the force used against her.

⁷ Before 2007

Section 42(g) read:

a person may revoke any consent which he has given to the use of force against him and his consent when so revoked shall have no effect for justifying force; save that the consent given by a husband or wife at marriage, for the purposes of the marriage, cannot be revoked until the parties are divorced or separated by a judgement or decree of a competent court.[Emphasis mine]

3. Consent and Specific Sexual Offences:

The provisions on consent noted above apply to all the sexual offences specified in the Criminal Offences Act. This segment examines consent in the specific sexual offences under the Criminal Offences Act:

3.1.1. Consent in Rape Cases

Section 98 of the Act defines rape thus; “rape is the carnal knowledge of a female of not less than sixteen years without her consent.” Thus, to prove rape, the accused person must have had carnal knowledge, which is sexual intercourse (penetration⁸), of a female⁹ and there must have been a lack of consent on the part of the female. The various circumstances under which sexual intercourse will be said to be without consent are as indicated in sections 14, 42 and 31 above.

The interaction of the Act’s provisions on consent with the offence of rape is illustrated in the following analysis of case law:

In State v. Gyimah¹⁰ the facts proved by the prosecution was that the accused was a school teacher resident in the village and the girl was a school girl staying with her parents in the same village. On the day of the alleged rape, the girl was sent on an errand by her mother, when the accused called her in his room when she passed in front of his house. Evidence adduced at the trial proved that the accused had sexual intercourse with the alleged victim of the offence and that there was full penetration. The only issue was whether or not there was consent. The court held that the case for the prosecution had not been proved beyond all reasonable doubt and so the accused could not be held guilty of rape. The Court made the following statement on establishing consent,

On this crucial issue [that is the issue of consent] it is very important to weigh the whole of the evidence very carefully and balance the case presented by the prosecution and her witnesses against that of the accused. In assessing the weight of the evidence much depends on the credibility of the witnesses who testified on the issue.

Thus, the court’s determination of whether or not there is consent in a rape case is based on its determination that the victim of rape and her witnesses are credible. A full presentation of the judge’s reasoning is insightful in terms of how the court goes about its determination of the credibility of rape victims and witnesses:

Evidently there are some unusual features about the evidence of the first witness for the prosecution and the mother and sister of the prosecutrix

⁸ Section 99 of the Criminal Offences Act headed “Evidence of Carnal Knowledge” provides that, “Where on the trial of a person for a criminal offence punishable under this Act, it is necessary to prove carnal knowledge or unnatural carnal knowledge, the carnal knowledge or unnatural carnal knowledge is complete upon proof of the least degree of penetration.”[Emphasis mine]

⁹ Thus, under Ghanaian law, only females can be raped.

¹⁰ [1963] 2 GLR 446, High Court, Kumasi.

which raise very grave doubts in my mind and which make their story that the victim shouted in agony almost unbelievable . Firstly, there is some inherent improbability in the girl's story that she was forced and that she shouted in distress. This is a house in which other tenants live, situate in an open place with people constantly passing and there were other residents such as the landlord of the house who were never called, inmates of the house testified that they were in the house that morning and that they never heard any shouts. I find their evidence convincing and I believe them.

Secondly, the conduct of the girl herself indicates her willingness. She asks the court to believe that she walked straight into accused's room in all innocence. There is no evidence that the accused induced her by a ruse or deceit to join her in the room. There is no evidence that when she shouted the accused attempted to place his hand on her mouth.

...Though pressed by the accused on the shoulder, [the girl] "had the free use of her limbs and never slapped or attempted to kick the accused..."

The girl only put up an act by means of false cries, out of a sense of shame when her mother and sister caught her "in a shameful and disgraceful act red-handed."

Third, the doctor's report indicated that the girl's hymen had been previously perforated, and showed no recent injury and no bruises or violence either to the hymen or elsewhere on the girl.

Fourth, from the evidence the girl's mother's first reaction was anger, to which the girl remained silent, he said, "her silent conduct satisfied me as being consistent with the accused story that she consented to the act."

Thus, in the judge's view so long as nobody in the accused person's house heard the complainant shout, the complainant did not struggle with the accused, there was no evidence of recent perforation of the complainant's hymen and no bruises on the complainant and the complainant did not speak up upon her mother discovering her and the accused and asking what the complainant was doing in the accused's room, then the complainant had consented to the sexual act. However, it is also probable that all these facts may have existed and still the complainant would not have consented to sexual intercourse with the accused person.

Another rape case, in which the issue turned on consent is Agbemanya v. the State¹¹. In that case the prosecutrix, a girl of seventeen years, lived with her parents and the appellant was a relation to the mother of the girl and frequently visited them. The case of the prosecution was that the girl accompanied the accused to visit his friend's house. When they got there, they entered a room which was unoccupied. The appellant, undressed, locked the door, struggled with the girl and had sexual intercourse with her. The accused then took her back home. The accused admitted having had sexual intercourse with the prosecutrix but maintained it was with her consent. He said although

¹¹ (1964) GLR 663, SC.

she had put up some resistance she later yielded voluntarily to the intercourse. Though convicted by the trial court, the appellant appeal was allowed.

The appellate judge said: “Was the struggle which took place a genuine registration of non-consent?” He asked if it was credible that the girl sat and watched the accused strip off his clothes and lock the door thereafter, if she had not consented. Thus, the judge expected the girl to have proved that she tried to escape when she saw the accused strip off his clothes and lock the door. The judge also said although the girl’s pant was bloodstained they were not damaged because she took them off herself for the purpose of the intercourse. The trial judge, the appellate judge stated, did not direct himself and the assessors on the key issue, which was, “which of the two conflicting accounts was most probably? A question of fact.” The evidence according to the appellate judge when taken as a whole, both for the prosecution and the defence, established a very strong probability that there was such consent. The appellant was therefore, in the judge’s view, wrongly convicted.

In another case, Republic v. Dapaah¹², the accused on pretext of giving the complainant money to purchase something for him, grabbed her outstretched arm, pulled her into his room and forcibly had sexual intercourse with her twice, threatening her with a knife. On the third round of intercourse three witnesses testified that they heard the complainant pleading with the accused to let her go as he was killing her and they intervened.

The judge in this case stated that, “The evidence of the complainant directed to absence of consent on her part to the sexual intercourse is in my opinion amply corroborated so far as was possible in the circumstances, by the evidence of other witnesses called by the prosecution. I therefore accept her evidence and find that the prosecution has discharged the burden of proving its case beyond all reasonable doubt.” Thus, the evidence of other witnesses which corroborated that of the complainant was what convinced the judge of the credibility of the complainant’s claims.

The cases analyzed above highlight the extent to which the Ghanaian courts, focused on particular assumptions and expectation about how a complainant should behave, approach the issue of consent in a manner that does not ensure justice for women who experience rape. The treatment of consent in sexual offence cases reflect a position that a woman saying No to sex is not enough. She must show the strong resistance she put up to confirm her lack of consent. Did she scream, did neighbours or any passersby hear her screams? Did she scratch the accused? Etc. Thus, some ways of a woman expressing her lack of consent to sex seems to be preferred by the courts; loud and strong resistance is preferable to a “quiet No”.

¹² [1968] GLR 513, High Court, Kumasi.

3.1.2. Standard of Proof for Absence of Consent

A woman's claim that she did not consent to sex needs corroboration, a requirement that is not stated in statute but is an English practice that has become accepted in Ghana's courts.¹³ When an accused person raises the defence of consent in a rape trial, and given that the standard of proof is that of proof beyond reasonable doubt, the courts appear to rely more on corroboration, requiring the complainant to prove beyond her word that she did not consent to sexual intercourse with the accused person. Thus, the evidence of witnesses, medical evidence, circumstantial evidence etc. are the kind of corroborative evidence required.¹⁴ Without such corroborative evidence, the courts are unlikely to find that the woman was raped, relying only on her word. For instance, when a woman is raped and she fails to report promptly to the police and to hospital she is queried as to whether it was not because she had consented to sex with the accused person. The courts operate with the idea that every woman who is raped should and would report to the police station or hospital promptly, ignoring the traumatic nature of rape and the different ways in which women react to that kind of violent experience. While some may rush to report, others may coil into their shells and so do nothing for a while.

3.1.3 Customary Law and Consent in Rape Cases

Ghanaian customary law considers rape to be unlawful. However, there are customs, practices and beliefs in Ghanaian society which influence how rape cases are handled in the Ghanaian legal system. As earlier noted, the court's determination of whether or not there is consent in a rape case depends on its determination of whether the victims of rape and prosecution witnesses are credible. There is the possibility in making such determinations that factors including custom and practice may influence the court's interpretation of what acts or omissions makes the victim and a witness credible.

The rape cases discussed above point to the court's tendency to view as credible a rape victim who shows strong resistance to the rape act and whose rape was "heard" by people in the vicinity. This approach to determining the issue of consent in rape cases reflects reliance on certain cultural beliefs and practices and socio-cultural contexts in Ghana. One of such beliefs is that Ghanaian women mean the opposite of what they actually say when it comes to sex. Thus, a woman's No to sex is said to actually mean a Yes to sex. This belief may have developed from the socialization of Ghanaian girls and women to be passive when it comes to sex and to refrain from behaviour that shows that they are interested in sex in the same way as their male counterparts. Thus, a victim of rape must prove that she was not interested in sex with the accused person, in a way that is interpreted as a strong and public resistance. As Adomako Ampofo has explained,

[i]n a seminar on sexual harassment, and discussing the Anita Hill/ Clarence Thomas case, males in the audience argued that, as a result of the Ghanaian socialisation process, when a woman says 'no' she means 'yes', thus making it difficult to ascertain non-consent. A woman is expected to scream and fight if she

¹³ P.K. Twumasi, *Criminal Law in Ghana*, Ghana Publishing Corporation, 1985 at 285.

¹⁴ *Ibid.*

does not genuinely consent; if she does neither (for fear of her life or other reprisals) it is argued that she consented¹⁵,

Further, the words of the judge in *State v Gyimah* (supra) show that in a rape case where fierce resistance is not proven, the court may view the victim as a woman who actually wanted sex but cried “wolf” upon being discovered in a sex act in order to avoid disgrace. This attitude towards women makes a rape claim a significant challenge for women in Ghanaian society.

3.1.4 Marital Rape and Consent

Ghanaian law does not provide for marital rape specifically. All rape, including marital rape, is thus served by the above noted general rape provision. However, the revision of section 42(g) of the Criminal Offences Act removes any exception that could be made when it comes to rape involving married persons. The revised section 42(g) allows revocation of consent with no exemption; this change means that a spouse can revoke consent to sex in marriage, and should a husband force himself on his wife, a marital rape case can be brought before the courts. However, the interpretation of consent in marital rape cases is likely to meet challenges due to Ghanaian society’s acceptance of women’s presumed and perpetual consent to sex in marriage.¹⁶

No reported case is as yet available on marital rape in Ghana.¹⁷ However, it is likely that the treatment of consent, should marital rape cases arise, is likely to reflect a possible indirect impact of the practice of dowry on how both society and the courts view consent to sex. In both of Ghana’s matrilineal and patrilineal family systems, marriage involves the payment of dowry, the patrilineal system tending to be more elaborate than the matrilineal system, requiring significant amounts of money for the bride price and gifts. A man paying dowry to a woman and her family during Ghanaian customary marriage ceremonies leads to presumed on-going consent to sex during marriage. Although, the practice of giving dowry may also be interpreted as a sign of the significant value a man places on his intended and a means of honouring her, there is also often the conception of dowry as making a woman “bought and paid for.” Thus, those who view dowry as the purchase price for a wife find it difficult to understand that a wife may not consent to sex with her husband, every time.¹⁸ Adomako Adomako provided this quote from a member

¹⁵ Akosua Adomako Ampofo, *Controlling and Punishing Women: Violence against Ghanaian Women*, 56 *Review of African Political Economy* (Challenging Gender Inequalities in Africa), 1993, 102 at 104-105.

¹⁶ See Elizabeth Archampong, *Marital Rape – A Women’s Equality Issue in Ghana*, paper prepared for the Equality Effect, online: <http://theequalityeffect.org/resources.html> [accessed on May 5, 2011]; E. Archampong and F. Sampson, *Marital Rape in Ghana: Legal Options for Achieving State Accountability*, 22(2) *CJWL*, 2010 at 505-534.

¹⁷ See supra note 15 at 105 where the author states that, “[a]lthough the Ghanaian legal definition of rape makes it possible to charge a husband with rape, no such cases are documented...” . Also, research undertaken for this paper did not yield any case of marital rape in the Supreme Court Ghana Law Reports and the Ghana Law Report.

¹⁸ See Sally Armstrong, *Update on African and Canadian Women's Human Rights Project*, online: <http://www.fasken.com/files/Publication/a4ab4aaf-e25f-4f04-80cd-10d15a31b85a/Presentation/PublicationAttachment/59245880-5cfb-42fe-9c70->

of the audience at a moot court presentation on marital rape by the Law Students Union of 1991/92 of the University of Ghana for their annual law week:

*so far as they still remain married under the law the wife has no right to refuse the husband the marriage cake, having paid the expensive bride price. As custom demands the husband has the right of the sex organ of his wife on payment and satisfying all marriage procedure.*¹⁹

Further, although at custom it is acknowledged that a wife may not be available for sex with her husband, for instance, during and after pregnancy and during menstruation, the general position tends to be that a husband can have sex with his wife whenever he so desires, and the wife should consent to the husband's desire. The customary position of the wife as her husband's helper, supporter and assistant directly impacts the treatment of consent to sex in Ghana. The wife's role in a customary marriage is one of offering her husband all the support he needs, thus an insistence on the wife's right to choose whether or not to have sex, appears to change her role. The interpretation is that, if her consent is needed for sex, then she would not be supporting her husband, and rather be asserting a stance that is "anti-marriage". As Stafford has noted, "consent to marriage is the equivalent of consent to sex in Ghanaian custom and law."²⁰

3.2. Consent in Defilement cases

Section 101 of the Criminal Offence Act, 1960, (Act 29) provides for defilement as follows:

- (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 of the child, 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.

Thus, under Ghanaian law the issue of consent is irrelevant in cases of defilement. In R v. Yeboah²¹ where the accused defiled a nine year old girl and the girl failed to report the

[66355e14a9bc/Womens%20Networking%20Initiative%20July%202021%202010.pdf](#) accessed on June 22, 2011 where the author states,

The issue is this: in most African countries a dowry is paid for a woman. So a man presumes that he bought his wife and therefore owns her. Consequently she has no say in how she will be treated. If a man wants sex, she has no right to refuse. And if she does refuse he will rape her and then beat her for insulting him

[accessed July 10, 2011]. See also Ghana News Agency, "Reduced dowry to discourage husbands molesting wives" online: <http://www.modernghana.com/news/21024/1/reduced-dowry-to-discourage-husbands-molesting-wiv.html> [accessed on June 22, 2011].

¹⁹ Supra note 15 at 108.

²⁰ Nancy Kaymar Stafford, Permission for Domestic Violence: Marital Rape in Ghanaian Marriages, 29 Women's Rights Law Reporter 63 (2008).

²¹ [1968] GLR 248.

incident, it was held that, even if that fact indicated that she was a consenting victim, her consent was of no consequence.

3.2.1. Customary law and consent in defilement cases

Ghanaian customary law and practice does not allow sex with a child. However, due to differences in the age of maturity practiced in different Ghanaian communities and the practice of child marriage, there are incidents of children below sixteen who are forced to have sex. Child marriage was proscribed in Ghana in 1998 with the passage of the Children's Act, 1998 (Act 560)²² but there continues to be incidents of families marrying off their girls to adult men, and such incidents lead to defilement of the girls involved. Although no reported case presenting such a fact scenario could be located for this paper, it is worth considering the prosecution of the accused "husband" in a hypothetical case of a girl forced into early marriage in Ghana who files a defilement or rape complaint to which the accused "husband" argues consent as a result of the marriage. In such a case, for a girl below sixteen years her consent is irrelevant to the charge but for a married woman (above sixteen years) there is need to prove revocation of consent to sex in marriage. The Criminal Offences Act provides at section 100 that, "where a female is compelled to marry another person by duress as to make the marriage void or voidable, the marriage does not have effect for the purposes of Part One of the Act with respect to consent." Thus, a potential conflict in the legal provisions on defilement and rape as it affects such married girls can be avoided by treating forced marriages as void and therefore not subject to the consent provisions under the Criminal Offences Act.

3.3. Consent in Incest cases

Section 105 of the Criminal Offences Act provides for the offence of incest thus:

- (1) A male of not less than sixteen years of age who has carnal knowledge of a female whom he knows is his grand daughter, daughter, sister, mother or grandmother commits a criminal offence and is liable on conviction to a term of imprisonment of not less than three years and not more than twenty-five years.
- (2) A female of not less than sixteen years of age who has carnal knowledge of a male whom she knows is her grand son, son, brother, father or grandfather commits a criminal offence and is liable on conviction to a term of imprisonment of not less than three years and not more than twenty-five years.
- (3) A male of not less than sixteen years of age who permits a female whom he knows to be his grandmother, mother, sister or daughter to have carnal knowledge of him with his consent commits a criminal offence and is liable on conviction to a term of imprisonment of not less than three years and not more than twenty-five years.

²² Section 14(1) of the Children's Act, 1998 provides thus:

"(1) No person shall force a child: (a) to be betrothed; (b) to be the subject of a dowry transaction; or (c) to be married.

(2) The minimum age of marriage of whatever kind shall be eighteen years."

- (4) A female of not less than sixteen years of age who permits a male whom she knows to be her grandfather, father, brother or son to have carnal knowledge of her with her consent commits a criminal offence and is liable on conviction to a term of imprisonment of not less than three years and not more than twenty-five years.
- (5) In this section “sister” includes half-sister, and “brother” includes half-brother, and for the purposes of this section an expression importing a relationship between two people applies although the relationship is not traced through lawful wedlock.

Thus, incest is committed whether or not the male or female person on whom the act is committed consented to the act, and both parties involved in an incestuous act are guilty of the offence once they know they are related within the specified prohibited degrees of consanguinity.

3.3.1 Customary law and consent in incest cases

Generally, customary law and practice in the various communities reflect prohibited degrees of consanguinity matching those listed in section 105; any differences tend to extend, rather than limit the degrees listed in section 105. For instance, among the Akans of Ghana first cousins can marry. This kind of marriage known as “fie aware,” literally translated as marriage in the home, is arranged by parents from the same family. Consent is presumed effective if the parties are pleased with each other and the union as a whole. A woman married under such an arrangement is presumed to have consented to sex in marriage in the same way as any other married woman once she consents to the marriage.²³ There is no clear indication that customary law treats consent or the lack of consent differently in incest cases compared to other sexual offences.²⁴

3.4. Consent in abduction Cases

Sections 91, 92 and 95 of the Criminal Offences Act deal with the offence of abduction. Section 91 states the crime of abduction thus: “a person who abducts a child under eighteen years of age commits a misdemeanour.” Section 92(1) defines abduction thus:

A person commits the criminal offence of abduction of a child who with intent to deprive a person entitled to the possession or control of the child or with intent to cause the child to be carnally known or unnaturally carnally known by any other person –

- (a) unlawfully take the child from the lawful possession, care or charge of a person or

²³ Information obtained from Women in Law and Development in Africa (Wildaf) Ghana interview of Nana Ndede Wusu III paramount chief of Agona Ahanta West in the Western Region of Ghana as part of a project on consensual unions in Ghana undertaken in 2007 with support from AUSAID (on file with authors).

²⁴ The authors did not locate specific information on customary law treatment of consent in incest cases.

(b) detains the child and prevents the child from returning to the lawful possession, care or charge of a person.

Further, section 95(1) provides that:

For the purposes of the sections of this Chapter relating to child stealing and abduction

(a) it is not necessary that the taking or detaining should be without the consent of the person taken or detained, and it suffices if that person is persuaded, aided or encouraged to depart or not to return.

Thus, under the law on abduction it is irrelevant that the child abducted consented to the intent of the accused person to take her away in order to have sex with her.

3.4.1 Customary law and consent in abduction cases

Generally, customary law and practice in present day Ghana does not deal with abduction given that it is a criminal issue. There are incidents of men who have abducted, defiled and impregnated young girls, only to have the girls and/or their families negotiate marriage of the girls to such men. Most often when such cases go public the legal system intervenes and prosecutes not only the perpetrators but also the family members who condone such actions. The girls involved and their families may take such actions due to their poor financial circumstance and the status of the perpetrator in the society.²⁵

3.5 Consent in Indecent Cases

Section 103 of the Criminal Offences Act deals with indecent assault, providing at section 103(2) thus: “A person commits the criminal offence of indecent assault if, without the consent of the other person that person (a) forcibly makes a sexual bodily contact with the other person or (b) sexually violates the body of the other person, in a manner not amounting to carnal knowledge or unnatural carnal knowledge.”

The offence of indecent assault, in a fashion similar to rape, requires proof of the absence of consent. Thus, whether or not a woman consented to sexual contact is what determines whether the crime of indecent assault has been made out. The earlier discussion on rape and consent is relevant here too, in that in establishing consent in indecent assault cases the courts determine the credibility of the victim and witnesses drawing on beliefs and assumption of how a woman should behave in such situations. The court’s attitude towards rape victims, a trend likely to also impact indecent assault cases, disadvantages women by requiring that they respond to sexual aggression only in ways “accepted” as

²⁵ An insightful case is that involving the proprietor of a popular private school, Great Lamptey Mills, and a girl who was his student. The school proprietor impregnated the girl and later agreed with the girl and her family to contract a marriage which got leaked to the newspapers and radio stations leading to intervention by the legal system and human rights and gender advocates: see Ghana News Agency, Proprietor of Lamptey Mills Impregnates 16-Year-Old; online: <http://news.peacefonline.com/social/200909/26513.php> accessed on June 22, 2011; The Daily Graphic, Lamptey-Mills charged for rape, online: <http://news.myjoyonline.com/news/201008/51033.asp> accessed on June 22, 2011.

evidencing lack of consent. This attitude violates women's' human right to justice in cases involving sexual violence.²⁶

3.5.1 Customary law and consent in indecent assault cases

Indecent assault of women is not acceptable in Ghanaian customary law. Currently, such cases are treated as criminal matters but it is possible that as well, a perpetrator would be required to compensate a woman and her husband or her family, if she is unmarried, for dishonouring the woman.

3.6 Unnatural Carnal Knowledge and Consent

Section 104 of the Criminal Offences Act provides that:

- (1) A person who has unnatural carnal knowledge
 - (a) of another person of not less than sixteen years of age without the consent of that other person commits a first degree felony and is liable on conviction to a term of imprisonment of not less than five years and not more than twenty-five years; or
 - (b) of another person of not less than sixteen years of age with the consent of that other person commits a misdemeanour; or
 - (c) of an animal commits a misdemeanour.

- (2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or, with an animal.

Thus, proof of lack of consent in sexual offences involving unnatural carnal knowledge attracts harsh punishment, and where there is consent between the parties, it is a misdemeanour. The term "unnatural carnal knowledge" has been explained as referring to sex other than heterosexual sexual intercourse, as well as heterosexual sex that involves organs other than the penis and vagina such as anal sex.²⁷ Consent in this offence is likely to be determined based on the facts of each case, although there has not been as yet a reported Ghanaian case under this provision.

3.6.1 Customary law and Unnatural Carnal Knowledge

Ghanaian customary law is generally averse to sex which is other than that between a man and a woman. In recent times, a debate has arisen over the rights of homosexuals and lesbians in Ghana, and in the main public reaction is strongly against changing Ghanaian law to include such relations.²⁸

²⁶ The authors did not locate a Ghanaian reported case on consent in an indecent assault case in research undertaken for this paper.

²⁷ See Ofori-Amankwah, *supra* note 2 and Twumasi, *supra* note 12.

²⁸ See Daily Graphic, "Gays can be tried" June 7, 2011, online: <http://news.myjoyonline.com/news/201106/67049.asp> ; Ghana News Agency, "Homosexuality should not have a place in Ghana - Apostle Ofori-Kuragu" July 6, 2011, online: <http://www.modernghana.com/news/338480/1/homosexuality-should-not-have-a-place-in-ghana-ap.html>;

3.7 Consent in Domestic Violence Cases

Ghana's more recently enacted Domestic Violence Act, 2007 (Act 732) deals with domestic violence including sexual abuse²⁹ and at section 4 it provides that, "the use of violence in the domestic setting is not justified on the basis of consent."

The provision clearly rules out any argument that a wife, child or anyone else can, in a domestic setting, be said to have consented to violence, including sexual violence.

The main challenge with the Domestic Violence Act is that punishment under that Act is limited to misdemeanours (and so does not extend beyond three years), while sexual violence involves felonies (for which punishment is beyond three years). Thus, prosecution of cases of sexual violence cannot be under the Domestic Violence Act, rather such cases must continue under the Criminal Offences Act where they receive severe punishment.³⁰

3.7.1. Customary law and Domestic Violence cases

Customary law considers domestic violence as unlawful, however, in the past actions taken by leaders of the traditional communities against perpetrators of such acts have not been severe nor sent a clear sign of abhorrence of such acts. The impression was often created that women "asked for" and therefore "deserved" acts of domestic violence they experienced in homes, including sexual violence. Presently, domestic violence issues are criminal matters and no longer officially the preserve of customary law. However, a woman or girl who is a victim of domestic violence may decide and/or be convinced, often by family members or community leaders, to have a chief or opinion leaders such as family heads, assembly persons and religious leaders adjudicate the matter. In remote communities where the courts are far removed from the people, elders of the society tend to be engaged to settle such cases. This approach is less expensive and leads to a faster resolution than the formal criminal justice system. Second degree felony cases such as incest have been resolved under customary law; perpetrators paying compensation to their victims such as a white ram and schnapps. It is when a perpetrator refuses to pay

Kofi Adu Domfeh/Luv Fm/Ghana,"Homosexuality is an antichrist sexual revolution, says Catholic Archbishop" July 12, 2011, online: <http://news.myjoyonline.com/news/201107/69074.asp> [all accessed on July 12, 2011].

²⁹ Sexual abuse is defined at section 1(b)(ii) of the Domestic Violence Act thus:

sexual abuse, namely the forceful engagement of another person in a sexual contact which includes sexual conduct that abuses, humiliates or degrades the other person or otherwise violates another person's sexual integrity or a sexual contact by a person aware of being infected with human immunodeficiency virus (HIV) or any other sexually transmitted disease with another person without that other person being given prior information of the infection;

³⁰ Section 23 of the Domestic Violence Act provides that:

The punishment provided for in of this Act applies only to offences which under the Criminal Code 1960, (Act 29) are misdemeanours and shall not apply to any offence that is aggravated or the punishment for which under the Criminal Procedure Code, 1960 Act 30 is more than three years imprisonment and in any other case the provisions of Act 30 in relation to punishment for the specific offence shall apply.

such compensation that a chief or community leader may ask that the matter be sent to the police station. This situation in Ghana, on the face of it, appears to be in line with the country's plural legal system which acknowledges customary law as part of the laws of Ghana as provided in Article 11 of the 1992 Constitution. Clearly though, criminalization of domestic violence makes the criminal legal system the only forum for prosecuting such offences. It seems it remains with a victim to choose whether her case would be dealt with under customary law or within the formal criminal justice system.³¹

4. Conclusion

This paper has discussed consent in sexual offences under Ghanaian law, highlighting how the courts tend to handle consent and the impact on woman and girls in Ghana. It has also considered the relations between each of the offences and customary law and practice. The paper has shown that under Ghana's Criminal Offences Act the requirement of proof of the absence of consent in sexual offences such as rape and indecent assault tends to present challenges for women who experience such sexual violations. The courts tend to consider as credible accounts from victims and witnesses which tie in well with customary beliefs and assumptions about sexual violence. Beliefs and assumptions in the Ghanaian socio-cultural context as to how a rape victim should act and what set of facts actually reflect consent to sex tends to adversely impact victims of sexual offences. As Adomako Ampofo has observed, "[i]t should be clear, however, that there is no standard form of human reaction towards unacceptable behaviour. Some people fight and scream, others, cowed by fear, submit."³² Also, the fact that Ghana's penal law does not specifically define consent contributes to the court's reliance on its own presumptions and assumptions which may only end up denying justice to victims of sexual offences. Sexual offences, such as defilement and abduction, where consent of the victim is irrelevant in establishing the guilt of the accused person generally do not provide much opportunity for the development of the meaning and interpretation of the element of consent in sexual offences.

Overcoming the challenges with the treatment of consent in sexual offences requires a multi-pronged approach. In terms of the influence of customary law and practice on the issue of consent, especially for marital rape cases, one option would be to challenge the practice of dowry. This would require extensive dialogue and public education aimed at getting Ghanaian communities to accept that the requirement of dowry in marriage creates the impression that wives are bought and therefore they can make no decision on sex in marriage other than to ensure they are always available for sex. It is also worth considering that perhaps it is not customary law per se that is the challenge, but rather customary practices and the "taboo" surrounding talk about sex in traditional societies. It would be helpful to express the idea that women are autonomous, independent citizens, and as such their consent to sex should never be presumed. There would be the need to dialogue on and teach more publicly the need for assumptions about women and sex to change. Customary leaders and community members can be offered training on the need

³¹ These are insights from Women in Law and Development in Africa (Wildaf) Ghana's work in its offices in the Greater Accra, Western and Central Regions of Ghana.

³² Supra note 15 at 105.

to ensure the dignity and autonomy of all community members, including women. Their acceptance of the need to clearly recognize women's right to consent to sex as a fundamental right for women will help ensure women's rights. Developing a definition of consent in Ghana's sexual offence law should be explained as not aimed at promoting the prosecution of men but rather symbolizing the recognition of women as autonomous persons who can make decisions on every aspect of their lives and the need for those decisions to be respected by all. The idea that women are autonomous, independent citizens, and as such their consent can never be presumed must be emphasized.

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