IN THE HIGH COURT OF THE GAMBIA
CRIMINAL CASE No: HC/165/11/CR/052/AO

BETWEEN:

THE STATE COMPLAINANT

AND

ANDRE VAN ROY ACCUSED PERSON

MONDAY 14th NOVEMBER 2011
BEFORE HON. JUSTICE EMMANUEL A. NKEA

ACCUSED PERSON PRESENT
Mr. A. MIKAILU (DPP) FOR THE STATE PRESENT
Mr. K. SANYANG THE ACCUSED PRESENT

JUDGMENT

The accused person ANDRE VAN ROY was arraigned on an information containing six Counts of charges of rape, defilement, seduction, and indecent acts by tourist. In Count I the prosecution has alleged that sometimes in 2008, at Tintinto in the West Coast Region of The Gambia, the accused had unlawfully carnal knowledge of one FATOUMATTA JALLOW a 15 year old girl without her consent contrary to Section 121 of the Criminal Code. In Count II the accused is alleged to have between 2010 and 2011 at the same village unlawfully had carnal knowledge of one NDEY FATOU BOJANG a girl under the age of 18 years contrary to Section 127 (1) of the Criminal Code. In Counts III and IV the accused is alleged to have between the periods 2008 to 2011 and 2010 to 2011seduced the said FATOUATTA JALLOW and NDEY FATOU BOJANG respectively contrary to Section 38 of the

Children's Act. In Counts V and VI the accused is alleged to have between the periods 2008 to 2011 and 2010 to 2011 exposed his genital organs to FATOUMATTA JALLOW and NDEY FATOU BOJANG respectively contrary to Section 12 of the Tourism Offences Act.

The accused person pleaded not guilty to the charge. Challenged by this plea, the prosecution called evidence through eleven (11) witnesses and tendered series of exhibits in support of its case while the accused led evidence in his defense and called one witness to support his case.

The case of the prosecution is that about three years ago, that is, in 2008, the accused met PW2 and requested to take her to his house. PW2 then took the accused to her mother to seek for permission. PW2 later went with the accused to his house. The accused would eventually give her a mobile phone and a bicycle. These items are in evidence as exhibits "D" and "E" respectfully. At some point, PW2 took her friend PW3 and introduced to the accused. The accused has since then repeatedly had sexual intercourse with both PW2 and PW3 and in some instances with both of them simultaneously. Although the consent of PW2 was obtained by intimidation in the first sexual encounter with the accused, she subsequently consented to the sexual advances of the accused after that time. It is as a result of this alleged first sexual encounter that the accused has been charged with rape. On her part PW3 always consented throughout to the sexual urge of the accused, but because she was below 18 years at the time, the

prosecution has pressed a charge of defilement against the accused for his sexual relationship with PW3.

The accused was reported to the police by PW5 his former watchman with whom he now has an acrimonious relationship. The accused residence was searched wherein an empty pornographic cassette folder- exhibit “C” was recovered. The accused was arrested, taken to the police station and interrogated. Exhibits “A” and “B1-B2” are the Cautionary and two Voluntary statements recorded from the accused in the process. PW2 and PW3 were taken to the Royal Victoria Teaching Hospital (RVTH) where they were medically examined. Exhibits “F1-F2” are the results of the said medical examinations. Exhibits “G” and “J” are the Child Health Visit Card and the birth certificate of PW3 showing that she was born in 1996. Exhibit “H” is the birth certificate of PW2 showing that she was born in 1995. Exhibit “K” is a digital photograph taken of the accused and PW2 in his house.

The accused person denied the charges both in his statements to the police and in his testimony before this court. He states that it is impossible for him at his advanced age to have sexual intercourse with two young girls at the same time. He tendered exhibit “DE2” to strengthen the allegation of an acrimonious relationship with PW5 whom according to this exhibit was evicted by a Court Order from the residence of the accused. These are the brief facts upon which I must now proceed to determine the guilt or otherwise of the accused person.

Perhaps it is important to state that at the close of the trial both sides were given the opportunity to address. While the State waived its right to do so, the defense briefly addressed me orally. In his oral submissions, Mr. K Sayang of learned Counsel for the defence has urged me to discharge and acquit the accused person because according to him, there is no direct evidence apart from the oral evidence of PW2 and PW3 linking the accused and the offences under charge. He submitted further that for the medical reports of PW2 and PW3 to be relevant they ought to have been conducted a long time ago. Learned Counsel for the defence who did not address me on the charges touching on seduction and indecent acts by a tourist, simply framed the issues for determination as follows:

(a)Whether the accused had sexual intercourse with PW2 and PW3.

(b)Whether he did so without their consent.

I will prefer to first deal with Counts V and VI in which the accused is charged with indecent acts by a tourist. The Gambia Tourism Authority Act (Cap 32:06) Revised Laws of The Gambia 2009 defines a tourist as a visitor in The Gambia for a period of more than 24 hours for holiday, leisure, conference, religion, sports, health, business or any similar purpose. From exhibit “A”, it is clear that the accused is not a tourist but a resident farmer with his own house at Titinto village. The charges under the Tourism Offences Act are in my view not properly brought, and I will not border myself to deal with them. I will accordingly strike down the charges under Counts V and VI.

I shall now turn to the sexual offence charges in Counts I and II. Suffice to say that to ground a conviction under Section 122 of the Criminal Code, (Count I) Section 121 requires that the prosecution must first establish the following:

(a) There was carnal knowledge of the Prosecutrix,
(b) The act was unlawful,
(c) The prosecutrix did not give her consent, and
(d) The act was that of the accused person.

I have carefully looked at Section 127 (1) of the Criminal Code, (Count II) and it appears to me that the prosecution is required to establish that:

(a) There was carnal knowledge of a girl,
(b) The act was unlawful,
(c) The girl was under the age of eighteen years, and
(d) The act was that of the accused person.

Section 180 (2) (a) of the Evidence Act makes it mandatory for the evidence of the prosecutrix in a sexual offence case to be corroborated. It is for this reason, that it is now good law in our jurisdiction that in cases of a sexual character it is eminently desirable that the evidence of the complainant be strengthened by other evidence implicating the accused person in some material particular. In other words, there must be some evidence tending to confirm, support and or strengthen the evidence of the prosecutrix

(*D.P.P V. KILBOURNE (1973) A.C. 729 @ 758)*. It is also settled law that corroboration need not consist of direct evidence that the accused person committed the offence, nor need it amount to a confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge (*R. V. GOLDSTEIN (1914) 11 CAR 27)*.

The evidence of the prosecutrix in sexual offence cases could be corroborated by either direct positive evidence of eye witnesses or by circumstantial evidence (*Archbold's Criminal Pleadings and Practice, 39th Edition paragraph 1141).* Apart from PW2 and PW3 who each testified that the accused had sexual intercourse with them at the same time, there is no evidence of any eye witness who said he saw the accused sexually assault them. The accused has also denied the allegations. In the circumstance the Court will resort to circumstantial evidence. I must immediately state that there are two issues to be corroborated here; the act of sexual intercourse and the element of consent or the lack of it.

Some of the circumstances that could readily infer the commission of rape, could include amongst others, (a) the denials of the accused, (b) the last opportunity the accused had to commit the offence, (c) medical evidence of the examination of the prosecutrix confirming the allegation of recent forcible coitus and (d) the existence of recent semen in the vagina of the prosecutrix directly traced or traceable to the accused see (*OGUNBAYO V. THE STATE (2007) 8 NWLR (Pt. 1035).*

The nature of corroboration must also depend on the particular circumstances of each case and where an accused person has denied the allegation of rape, as in the instant case, the evidence of corroboration that the Court must look for, is for instance (a) medical evidence showing injury to the private part or to other parts of her body which may have been occasioned in a struggle, and (b) semen stains on her clothes or the clothes of the accused person on the place where the offence is alleged to have been committed (*POSU V. THE STATE (2011) LPELR-SC. 134/2010).*

In exhibits “F1-F2” the medical reports of PW2 and PW3, there is evidence of penile penetration and a broken hymen. These pieces of evidence were unchallenged and uncontroverted. I admit them as establishing the facts therein. These pieces of evidence corroborate the evidence of PW2 and PW3 of the repeated sexual encounters they had with the accused person. I therefore find as a fact that the accused had sexual intercourse with PW2 and PW3.

I must confess that, while there is evidence on record corroborating the subsequent voluntary sexual encounters between the accused and PW2 and PW3, there is no evidence on record corroborating the purported first and involuntary sexual encounter between PW2 and the accused. The available evidence on record therefore falls short of the mandatory requirements of Sections 180 (2) (a) of the Evidence Act. The issue of forcible coitus in this regard, has in my view not been established with the certainty required by law. In view of this finding,

it stands to reason that the charge of rape under Count I will therefore not stand.

There is no evidence on record of any conjugal relationship between the accused and PW2 and PW3. I have not seen on record any other justified reason why the accused should engage in sexual activities with PW2 and PW3. The effect of this is that the sexual encounters with the accused persons were unlawful and this I shall hold as a fact.

As already stated above, exhibits “G” and “J” confirms that PW3 was born in 1996. This will put her age at 15 years. From exhibit “H” PW2 was born in 1995. This puts her age at 16 years. There is no evidence on record challenging these facts. I therefore take them as admitted.

From the foregoing, I am satisfied that the evidence on record has established the following; (a) that there was carnal knowledge of PW2 and PW3, (b) that these acts of sexual intercourse were unlawful, (c) that PW2 and PW3 are both below the age of 18 years, and (d) the acts were those of the accused person. The prosecution has in my mind successfully established the offence of defilement against the accused on both PW2 and PW3 and this I shall hold as a fact.

I now turn to the seduction charges. As a preliminary issue, I must state that both the Children’s Act and the Criminal Code fail to define what seduction means. However, under common law, seduction occurs when a man entices a woman of previously chaste character to have unlawful intercourse with him by means of persuasion,

solicitation, promises, or bribes or other means not involving force (Black's Law Dictionary, 8th Edition). Thus the solicitation, persuasion, bribe, or promises must be prior to and not after the act. Having already found that the accused had intercourse with both PW2 and PW3, the lone issue to be resolved now is whether or not the victims were enticed by the accused person.

In her evidence in chief, PW2 stated of the promises made to her by the accused thus *"... I wash the dishes after which he requested for sex and I had sex with him. On this day he promised that when he gets to Holland he will buy me a bicycle and another mobile phone..."* It seems from this piece of evidence that the promises were made after the intercourse and not before. On her part PW3 stated of a different incident thus *"... on this day he demanded for sex and we refused and he promised to give us D100 each and so we had sex with him..."*. It is on this piece of evidence that I will rely to hold that the accused made promises to PW2 and PW3 to induce them towards having sexual intercourse with them and this I shall also hold as a fact. I am therefore satisfied that the prosecution has proved the offence of seduction against the accused person under counts III and IV.

In view of the above, I am satisfied that the prosecution has sufficiently proved their case with the degree of certainty required by law in part. I shall accordingly find the accused person ANDRE VAN ROY not guilty on Counts V and VI and I shall proceed to discharge him on both counts.

In the same breath I find the accused person guilty of the defilement of FATOUMATTA JALLOW in Count I. Guilty of defilement of FATOU NDEY BOJANG in Count II. Guilty of the Seduction of FATOUMATTA JALLOW in Count III, and guilty of the Seduction of FATOU NDEY BONANG in Count IV. I shall proceed with the conviction of the accused person accordingly.

PREVIOUS CONVICTION: Nothing Known.

ALLOCUTUS: This Court has now found you ANDRE VAN ROY guilty of double offences of defilement under Section 127 (1) of the Criminal Code and double offences of seduction under Section 38 (1) (a) of the Children's Act. Before sentence is passed on you, the Court would like to know if you or Counsel on your behalf has anything to say in mitigation.

MR K SANYANG: The convict is a first time offender. He is an aged man who has been afflicted by a medical condition in detention. He has shown sufficient remorse and will not repeat this offence if given another opportunity. We ask for leniency. We ask the Court to temper justice with mercy. We urge the Court not to impose a custodial sentence. We refer the Court to Section 29 (2) of the Criminal Code.

SENTENCE

I have carefully listened to the plea for leniency, and I have also considered the fact that the convict is a first time offender and an old

man who is in the evening of his life. The convict has also in his plea for mitigation shown sufficient remorse. I find him to be repentant. Having considered the particular circumstances of this case, I am tempted to temper justice with mercy. I find it fitting in the circumstance to invoke Section 29 (2) of the Criminal Code cited by Counsel in his favour. In doing so I shall not give the convict a mandatory jail term. In view of the above I shall,

EMMANUEL A. NKEA
JUDGE

SENTENCE THE CONVICT AS FOLLOWS:

1. Convict is sentenced to pay a fine of D100 000 on Count I in default to serve 10 years imprisonment with hard labour.
2. Convict is sentenced to pay a fine of D100 000 on Count II in default to serve 10 years imprisonment with hard labour.
3. Convict is sentenced to pay a fine of D100 000 on Count III in default to serve 10 years imprisonment with hard labour.
4. Convict is sentenced to pay a fine of D100 000 on Count IV in default to serve 10 years imprisonment with hard labour.
5. The above sentences to run concurrently.
6. I shall Order the Convict to pay FATOUMATTA JALLOW compensation of D100 000 pursuant to Section 145 of

the CPC as read together with Section 31 (2) of the Criminal Code in default convict to serve an additional 10 years imprisonment with hard labour.

7. I shall also Order the Convict to pay FATOU NDEY BOJANG compensation of D100 000 pursuant to Section 145 of the CPC as read together with Section 31 (2) of the Criminal Code in default convict to serve an additional 10 years imprisonment with hard labour.
8. There shall be no further Order.

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 14th DAY OF NOVEMBER 2011

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REGISTRAR