IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDENT AT BANJUL
CRIM. CASE No HC/489/11/BK/031/D1

BETWEEN:

THE STATE **COMPLAINANT**

Vs.

ELLIMAN CEESAY **ACCUSED PERSON**

MONDAY 30 APRIL 2012
BEFORE HON. MR JUSTICE EMMANUEL A. NKEA

ACCUSED PRESENT
MS. S. SANKAREY FOR THE STATE PRESENT
MRS O UDOMA FOR THE ACCUSED PRESENT

JUDGMENT

The accused stands charged with the offence of rape contrary to sections 121 and 122 of the Criminal Code Cap. 10:01 Vol. III, Revised Laws of The Gambia, 2009. It is alleged by the State that the accused had unlawful carnal knowledge of one MBERRY CEESAY a girl aged 15 years, at Kunkujang Village, on the 22nd April 2011.

The accused pleaded not guilty to the offence. The prosecution called two (2) witnesses and tendered three (3) exhibits in support of the indictment.

The accused testified as the lone witness in his defence and tendered one exhibit.

The accused is a relation to the step mother of the prosecutrix. The accused is 20 years old and the prosecutrix is 15. The prosecution's case is centered on the evidence of the prosecutrix who testified as PW1. In her testimony before this court the prosecutrix alleged that on the 22/04/2011 the accused invited her to see his house. She obliged. Whilst at his residence, the accused requested to have sexual intercourse with her but she declined. The accused however insisted and despite her resistance the accused forcefully had carnal knowledge of her. She said she tried to push the accused away from her but she was unable to do so. The accused only got up from her when his brother (Pap) came into the room. She saw blood when the accused got up from her. When she went home she felt some pains on her stomach. She did not tell her mother of the sexual encounter and the pains but told one of her friends who advised her to take some **'blue washing powder'** which she did. The pains persisted and the prosecutrix informed her mother of the sexual encounter but did not reveal that it was the accused that had ravished her. Her mother took her to the Fajikunda Health Centre where she was examined and later arrested by police officers from the Bundung Police Station. Upon a further medical examination of the prosecutrix at the Royal Victorial Teaching Hospital, a medico-legal report was issued. This report is in evidence as exhibit **"B"**. At the police station, the prosecutrix volunteered a statement which was tendered in evidence by the Defense as exhibit "**DE1"**. The police later

arrested the accused and in the course of investigations two statements were recorded from him by PW2. These statements are in evidence as exhibits **"A-A1".**

Suffice to say that the statement of the prosecutrix (PW1) in exhibit DE1 presents a different picture from her testimony before the court. In exhibit DE1 PW1 stated that she went to the house with two of her friends namely Fadia Ceesay and Mariama Touray. When they arrived at the house they met one Pap Ceesay who served them with drinks. She drank hers but her friends did not drink theirs. She fell asleep and when she woke up she did not see anybody but discovered that she was bleeding from her private part. She went home and was advised to drink the blue washing powder by her friend.

On his part the accused relied on his statement to the police but insisted that although the prosecutrix was his girl friend, he had no sexual intercourse with her on that day. In his statements to the police the accused denied the allegations but admitted that he and the prosecutrix visited the house of one Pap Ceesay on the day in question.

At the close of the hearing on the 18 of April 2012, both sides waived their right to address me. In proceeding to judgment, it is incumbent on me to first state the position of the law on rape. In a charge of rape, the prosecution must prove the following three elements:

1. That there was carnal knowledge of the prosecutrix;
2. That the act was that of the accused person; and

3. That the prosecutrix did not consent.

The burden to prove the above elements rest on the prosecution, and the standard of prove required in all criminal cases is prove beyond reasonable doubt. This burden does not shift to the accused person at any stage except in a few statutory exceptions, but the offence of rape is not one of them. The prosecution can discharge the burden and standard of prove by either direct or circumstantial evidence, but in either case the prosecution must succeed on the strength of its evidence and not on the weakness of the defence. If there is any doubt created by the evidence, that doubt must be resolved in favour of the accused.

I have referred myself to the cases of ***WOOLMINGTON v DPP [1953] AC 462 and MILLER v MINISTER OF PENSIONS [1947] 2 ALLER 372,373*** and warned myself of what prove beyond reasonable doubts means**.** I have referred myself to sections 179 and 180 (2) of the Evidence Act and warned myself of the need for corroboration in sexual offence cases.

With the above in mind, I now turn to the elements of the offence charged. I deal with them one after the other.

Although the defence, by introducing exhibit **DE1** has succeeded in exposing some contradictions in the prosecution's case, I am of the view that such contradictions were not fundamental as far as the first element of the offence is concerned. In both her testimony before this court and her statement to the police the prosecutrix was consistent that she was sexually assaulted on the 22nd of April 2011. The medico-legal certificate (exhibit

"B") revealed that the hymen was gone. There were some fresh minor lacerations around the posterior region of the vulva confirming recent coitus. There is therefore no doubt whatsoever that the prosecutrix was sexually assaulted and this I shall hold as a fact. In view of the foregoing, I am satisfied that the prosecution proved that there was carnal knowledge of the prosecutrix beyond reasonable doubt.

To determine the second element, I find it necessary to state that in her testimony before this court, the prosecutrix stated that the accused had carnal knowledge of her without her consent and that the accused remained on her until when Pap Ceesay came into the room. This suggest that Pap Ceesay either caught them red handed or at least met the accused lying on the prosecutrix in the bedroom. The accused denied all these allegations. His denials are contained in exhibits **"A-A1".** Pap Ceesay is therefore a material witness whose testimony would have provided direct evidence to resolve this issue one way or the other. Since the prosecution must succeed on the strength of its case and not on the weakness of the defence, it is the duty of the prosecution to call all material witnesses whose evidence would settle a vital issue**.** See ***MARENA v. THE STATE (1960-1993) GLR 396***. Although Pap Ceesay was listed on the list of witnesses as PW2, the prosecution for some very strange reasons which can only be attributed to ineptitude and lack of commitment in their prosecutorial function, failed to call this witness. This legal goof on the part of the prosecution is compounded by the fact that the witness statement of

the prosecutrix (DE1) points to Pap Ceesay and not the accused as the person who sexually assaulted her.

The law is settled that once cautionary and voluntary statements have been admitted by the court they automatically form part and parcel of the prosecution. See ***NWACHUKU v THE STATE (2007) 31 NSCQR 312-359*** and ***EDET OFFIONG EKPE v THE STATE (1994) 9 NWLR (Pt. 368), 273.*** Thus exhibits **"A-A1"** in which the accused denied the allegation forms an integral part of the case relied upon by the prosecution. The cumulative effect of all these is that the prosecution is relying on contradictory evidence to prove its case. I should have at this stage dismissed this case for the contradictions inherent in the prosecution's case but also for the lack of corroborative evidence in support of the identification of the accused as the person who sexually assaulted the prosecutrix. However, the accused admitted in exhibit **"A"** that he was with the prosecutrix at the residence of Pap Ceesay that very night. I believe this piece of evidence to be true as it corroborates the evidence of the prosecutrix and in doing so I hold that the prosecutrix was together with the accused that night and this I shall hold as a fact.

It is the evidence of the accused that when they left Pap Ceesay's house, they took the prosecutrix right up to the junction of her house where she was allowed to go home. The circumstances are such that I can safely infer that if there was any sexual encounter with the prosecutrix that night, as there was, it is most likely to be the act of the accused and this I shall again

hold as fact. I am therefore satisfied that the prosecution has established the second element beyond reasonable doubt.

The third element is whether the sexual encounter was consensual or not. It is the evidence of the prosecutrix that the accused was her boy friend, and that she refused to tell her mother of the incident until she drank 'blue washing powder' which aggravated her abdominal pains. She admitted under cross examination that she would not have revealed same to her mother but for the complications which arose after she drank the 'blue washing powder'. She further admitted having lied to the police as a way of protecting the accused. Apart from the 'minor lacerations' there were no other injuries to suggest that the sexual intercourse was accompanied by the kind of violence suggested by the prosecutrix in her testimony before me (see ***POSU v. THE STATE (2011) LPELR-SC. 134/2010).*** Rather, the defensive and protective attitude of the prosecutrix towards the accused is poles apart with that of a victim of unwanted sex who in most cases would immediately want to see their aggressors punished. This protective attitude is indicative and reflective of the fact that the prosecutrix had something to hide about the sexual encounter. From the circumstances of this case it seems obvious to me that, what the prosecutrix was hiding is the fact that she consented to the sexual intercourse with the accused. I watched the prosecutrix carefully and she did not appear to me to be an innocent lad. I am convinced by the peculiar facts of this case that the sexual intercourse was consensual and this I shall hold as a fact. The prosecution therefore

failed to prove this element and it is accordingly resolved in favour of the accused.

The accused should have been discharged and acquitted at this point, but I have referred myself to the provisions of section 151 and 155 of the Criminal Procedure Code, and it now seem incumbent upon me to determine whether on the evidence, the accused falls to be dealt with in terms of the provisions of section 127 of the Criminal Code.

For the accused to be dealt with in terms of Section 127, it must be shown that:-

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

The facts of this case reveal that accused had sexual intercourse with a girl under the age of 18 years. Pre-marital sex with a girl under 18 years is unlawful and cannot be justified under our laws. All the above elements have therefore been affirmatively established and this is beyond reasonable doubts.

In view of the foregoing, I am satisfied that the accused, in the circumstances, is guilty of defilement as stated in section 127, and not of rape wherewith he was charged. I therefore find the accused not guilty of

rape and I return the verdict of guilty to defilement in contravention of section 127 of the Criminal Code.

EMMANUEL A. NKEA
JUDGE
30/04/2012

PREVIOUS CONVICTION:

Miss SANKAREY: My Lord nothing is known.

COURT: I take that there is no previous conviction.

ALLOCUTUS:

Mrs. Udoma: My Lord, the convict is a first offender. He has shown sufficient remorse during the trial and has learnt his lesson. He is only 20 years old and a relation to the prosecutrix. We urge the court to give the convict a second chance reform. We urge the court to temper justice with mercy. We refer the court to section **29 (2)** of the Criminal Code and urged the court to impose a shorter term. .

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 a very young man who is in the morning of his life. The convict has also in his plea for mitigation shown sufficient remorse. I find him to be repentant. Giving him a long custodial sentence may not be proper in the circumstances taking his age and the experience of the victim. 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 long jail term. I will sentence him to 3 years imprisonment commencing from the date the convict was first taken into custody.

EMMANUEL A. NKEA
JUDGE

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 30 DAY OF APRIL 2012

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REGISTRAR