IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDENT AT BANJUL
CRIM. CASE No HC/452/11/CR/139/AO

BETWEEN:

THE STATE **COMPLAINANT**

Vs.

MODOU LAMIN YERANJANG **ACCUSED PERSON**

FRIDAY 30 NOVEMBER 2012
BEFORE HON. MR. JUSTICE EMMANUEL A. NKEA

ACCUSED PRESENT
MR. S.H. BARKUN (DPP) FOR THE STATE PRESENT
MRS. N. GBUJI FOR THE ACCUSED PRESENT

JUDGMENT

MODOU LAMIN YERANJANG is indicted on a single count offence of rape contrary to section 121 and punishable under section 122 respectively of the Criminal Code, Cap. 10:01 Vol. III, Revised Laws of The Gambia, 2009. The State has alleged that on or about the 10th day August 2011, at Sanyang Village in the West Coast Region the accused had unlawful carnal knowledge of one **FATOU TOURAY** a four year old girl without her consent.

The prosecution's case is that on or about the 10th day August 2011, the Prosecutrix (PW6) complained to her mother (PW3) that the accused was touching her on her vagina. PW3 initially ignored this as a joke.

But as PW3 was giving the Prosecutrix a bath in the evening, she repeated to her that PW3 had touched the place where the accused touched her and it pained. Upon this information, PW3 alerted two of her neighbors and then proceeded with the prosecutrix to the hospital. She was referred to the police who returned with her to the hospital. The Prosecutrix was then examined by PW4 and given medication. The medico-legal certificate issued upon the examination of the Prosecutrix is in evidence as exhibit "B". The accused was later arrested by PW2 and statements recorded from him by PW1 and PW5. These statements were received in evidence as exhibits 'A' and "C'. The girl victim was too shy to, and could not testify in court apparently due to her very tender age.

In his defence the accused stated that when he returned from work on that day he entered his room and suddenly saw six police officers coming for him. He was informed that he had raped the prosecutrix; the daughter of his brother, but he denied the allegation. He was arrested and beaten on the way as he was being taken to the police station leaving him with injuries on the head. A statement was then written at the police station and he was forced to sign same as his. He thus denied the charge thereby putting in issue all the essential ingredients of the offence of rape.

Under section 121 of the Criminal Code, the essential elements of rape which have to be proved beyond reasonable doubt are: - that there was unlawful sexual intercourse involving the prosecutrix; that the prosecutrix could not or did not consent; and that the accused

participated in the unlawful sexual intercourse. These ingredients may be established by either direct or circumstantial evidence or upon the confession of the accused person himself (***AHMED v. THE NIGERIAN ARMY (2011)1 NWLR 89).*** It is trite law that each and every essential ingredients of the offence charged must proved beyond reasonable doubt by the prosecution before a meaningful conviction can be secured (***MOMODOU JALLOW v. COMMISSIONER OF POLICE (1960- 1993) GLR 39 and WOOLMINGTON V DPP (1953) A.C. 462).*** And it must be emphasized that an accused person bears no duty of proving his innocence since he is presumed innocent until proved guilty or until he pleads guilty.

In this case, there was no eye witness account of the alleged rape, thus eliminating all the prospects of any direct evidence in support of the indictment. The prosecution therefore relied heavily on circumstantial evidence and the confession statements of the accused in prove of the offence. Although I agree that circumstantial evidence is very often the best evidence, in that it is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics, I also agree that circumstantial evidence must be narrowly examined so that a possibility of fabrication to cast suspicions on an innocent person is ruled out. To be sufficient to support a conviction, circumstantial evidence must be complete and unequivocal. It must be compelling and must lead to the irresistible conclusion that the accused and no one else is the culprit. The facts must therefore be incompatible with the innocence of the accused and incompatible of explanation upon any other reasonable

hypothesis than that of his guilt particularly as all doubts must be resolved in favour of the accused.

Having carefully read through the various briefs of arguments filed and having also carefully considered the totality of evidence adduced before this Court, it seems to me that only one issue stands out for determination in this case, and that is, ***whether the accused had sexual intercourse with the prosecutrix***?

The prosecution in urging me to answer this question in the affirmative has placed heavy reliance on the extra-judicial statements of the accused person made to the police after his arrest. These statements which are pure confessions of the offence of rape were later retracted by the accused person during the trial.

In urging me to answer this question in the negative the defence has contended forcefully that the inability of the prosecutrix to testify in support of the allege rape meant that there was no evidence that could be corroborated at all. Learned defence counsel submitted that by virtue of section 180 (2) (a) of the Evidence Act, the court must seek for corroboration of the evidence of the prosecutrix in sexual offence cases. This submission in my view is misconceived. Section 180 (2) (a) of the Evidence Act simply provides thus;

> ***"...a court <u>shall not</u> in the following cases, act on uncorroborated evidence ...***
>
> ***(a) cases of rape and other sexual offences against the complainants;" (emphases mine).***

My understanding of this section of the Evidence Act is that a court cannot act on the uncorroborated evidence from any source to sustain a conviction in a sexual offence case. While I agree that conviction of an accused can only be valid when there is such corroborative evidence ***(IKO v. THE STATE (2001) 14 NWLR (Pt. 732),*** I must state straightaway that section 180(2) (a) does not impose any requirement that the prosecutrix must testify. However, where the evidence from the prosecutrix is the sole evidence in support of the charge of rape, then such evidence must be corroborated.

The law is that whatever evidences the prosecution may wish to adduce to prove its case; such evidence must be credible such that it is sufficient to prove the case beyond reasonable doubt. The absence of the victim's evidence is not necessarily fatal to the prosecution case in sexual offences as an accused can be convicted of the crime on the basis of the testimony of witnesses other than the victim. This must be so because a toddler of two years may not be expected to be able to testify in court. Her inability to testify, should not absolved the accused person from criminal liability when there is credible evidence to support the commission of the crime. The prosecution may therefore properly rely on credible eye witness accounts and compelling medical evidence to secure a conviction on sexual offence cases. I therefore agree with the learned State Counsel that the inability of the child victim to testify in this cause did not necessarily fatal.

I also agree with the submission of the learned State Counsel that once a cautionary statement is admitted in evidence it immediately forms an integral part of the prosecution's case and the court is bound to rely on its probative value ***(AMOSHIMA v. STATE (2009) 4 NCC 280)***. In the instant case the prosecution has adduced credible evidence of the confessions of the accused to the crime. Although a court can convict on the confessions of an accused person alone, the fact that the accused took the earliest opportunity in court to deny having made the statements makes the issue of corroboration of the said evidence crucial (***R v. SAPELE & ANOR (1952) 2 FSC 74)***.

The law is that where a confession is free and voluntary and in itself fully consistent and probable, and the inculpating statements are corroborated by several facts, the entire evidence is admissible ***(KANU v. THE KING (1952) 14 WACA 30)***. A free and voluntary confession of guilt by a person, when duly made and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence as long as the court is satisfied of the truth of the confession ***(EFFIONG v. THE STATE (1998) 8 NWLR (Pt. 562) 362).***

The confessional statements of the accused person in this matter were only admitted in evidence after a rigorous and sustained process of a ***voire dire.*** The Court was therefore satisfied with the voluntariness of the said statements.

While I agree that the retraction of the confessions by the accused does not *ipso facto* render the confession inadmissible (***R. v. JOHN AGAGARIGA ITULE (1961) 1 ANLR 402)***, it is desirable to have

outside the confession to the police, some other evidence, no matter how slight of the circumstances which make it probable that the confession was true (***ULUEBEKA v. THE STATE (2000) 7 NWLR (Pt. 665) 404; IDOWU v. THE STATE (2000) 12 NWLR (Pt. 680) 48).***

I shall therefore seek corroboration to the confessional statements before I can reach any conclusion on the guilt or otherwise of the accused. The corroborative evidence will help the Court to determine the weight to be attached to the confessional statements (***R. v. SYKES (1913) 8 CR. APP. R. 233)***.

On the evidence, I found as a fact that upon medical examination of the prosecutrix on the 10 of August 2011; the day of the alleged rape **FATOU TOURAY** presented with a tear on the pineal area of the vagina. This examination was conducted upon the complaint of prosecutrix to her mother that the accused had 'touched' her on that spot. Although the medical report shows that the hymen was intact, the examining officer testified before this court that the injury on the prosecutrix was indicative of penetration. The important and essential ingredient of the offence of rape is penetration. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. The slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. Proof of the rupture of the hymen is unnecessary to establish the offence of rape ***(OGUNBAYO v. THE STATE (2007) 8 NWLR 157)***. The vagina injury on the prosecutrix is therefore sufficient

outside evidence corroborating the confessions of sexual intercourse by the accused person in exhibits "A" and "C".

The evidence of PW2 is that the arresting team found the accused hiding under a bed in the house. This piece of evidence was not only unequivocal, unchallenged and uncontroverted but was also replicated with the same exactitude in exhibit "C". This is an additional outside evidence corroborating the confessions of the accused person.

This sequence of events establishes a clean nexus between the accused and the act. I am therefore satisfied that the accused had unlawful sexual intercourse with **FATOU TOURAY** and this I shall hold as a fact. The first and third ingredients of the offence have therefore been satisfactorily established by the prosecution.

On the second ingredient, it is obvious that the prosecutrix was too tender to consent to any form of sexual activity. She accordingly could not and did not give her consent to that sexual activity and this I shall again hold as a fact.

From the foregoing, I reach the conclusion that the prosecution has proved its case with the certainty required by law. The accused person **MODOU LAMIN YERANJANG** is accordingly convicted as charged.

EMMANUEL A. NKEA
JUDGE

PREVIOUS CONVICTION

MR. SEMALEMBA: My Lord we have no record of the previous conviction of the convict.

COURT: You have now been found guilty of the offence of rape contrary to section 121 and punishable with up to life imprisonment under section 122 of the Criminal Code. Before sentence is passed on you, do you or counsel on your behalf have anything to say in mitigation?

ALLOCUTUS

MRS. GBUJI: My Lord the Convict is a first time offender. He has been in custody since August 2011. He has shown sufficient remorse throughout this trial. He is 41 years old and a responsible family man who has been taking care of his aged mother as well as the entire family of the prosecutrix.

We urge the Court to invoke section 29 (2) and (3) of the Criminal Code to impose a shorter term instead of the maximum term required by law. We refer the Court to the case of NYABALLY v. THE STATE.

We pray the Court to temper justice with mercy.

CONVICT: I beg for a leniency. I am a family man with a wife and four children. They will all suffer if I am sentenced to life. I beg for a shorter sentence.

SENTENCE

The Convict is a first offender. He is 41 years old. His Counsel has told court that he has been remorseful. She asked for leniency from court. The convict himself told court that he has family responsibilities; he has relatives to look after. He asked for a short sentence. He confirmed that he is a first offender. These are reasons for mitigation on your behalf.

However, as I am moved to show leniency, I recall that the offence he committed carries a maximum sentence of Life Imprisonment. The circumstances under which the crime was committed must be considered in order to tailor sentence to the merits of the offender and offence.

The circumstances in which he committed the offence are so grave because he is a brother to the victim's father. He ravished a very small child fit to be his old child and who looked up to him as a dad. The age difference is very wide. The victim could not even understand the impact. Some day in future she will know. There was no respect for such a small child to introduce her to such stigma. This kind of offence is abhorrent. The convict very well knew the father of the victim. He knew that he would continue to live and interact with the victim and her parents in the future. He did not care how traumatizing it would be to the victim and her parents.

I consider the convict's conduct a beastly display of his manhood. It was a very selfish way of satisfying his greed for sex. The convict was real danger to the women and girls in that neighborhood. The victim

suffered a lot of indignity at that very tender age and more so from a person that ought to show her love and protection. It is people like the convict who should be kept away from society for some time.

The offence of rape is so rampant in this country. I shall pass a deterring sentence. The convict is sentenced to 25 years imprisonment with hard labour.

EMMANUEL A. NKEA
JUDGE

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

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REGISTRAR