IN THE HIGH COURT OF THE GAMBIA

SUIT NO: HC/492/10/BK/031/A0

BETWEEN:

THE STATE - PROSECUTOR

AND

BERRAY SOWE - ACCUSED

Prosecutor - absent
Accused - present

O.D. Mbye for the Accused - present
E. Sanneh for the Prosecutor - absent

Before Hon. Justice A. Bah
This 30th day of June, 2011

The accused Berray Sowe stands charged by an indictment dated July 2010 with the offence of defiling a girl under the age of 16 years, now 18years as amemded contrary to Section 127 of the Criminal Code, Cap 10 Vol. III of the laws of The Gambia 1990.

Section 127 reads:

> *"Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony, and is liable to imprisonment for a term of fourteen years".*

The particulars of offence were that the accused, on or about the month of July 2009 at Ndemban Village within the jurisdiction of this honorable court, had carnal knowledge of Mariama Gibba and thereby committed an offence.

The prosecution in proving its case called four witnesses and tendered five exhibits to wit: voluntary & cautionary statement of the accused marked Exhibits 1&2 respectively; the statements of the complainant Exhibit 3; the birth certificate of the complainant Exhibit 4 and Exhibit 5 the letter requesting for the age determination of the complainant.

At the close of the case for the prosecution, the accused person gave evidence in his defence and did not call any other witness. At the conclusion of his case, both sides addressed the court orally.

The summary of the evidence of the prosecution witnesses is to the effect thus:

PW1- Detective corporal 703 Yorro Saidy, testified that he is a police officer attached to the Major Crime Unit at the Police Headquarters in Banjul. That on the 24th day of March, 2010, the accused person was referred to their unit for further investigation into an alleged defilement case and he was directed by his station officer to obtain a cautionary and a voluntary statement from the accused. That he obtained the voluntary statement of the accused, but the accused opted to write his own cautionary statement. Under cross-examination, nothing of relevance was put to the witness and his testimony remained unchallenged.

PW2- Mariama Gibba, the complainant stated that she lives at Ndemban Village from where she knew the accused person. That at that time the accused was a teacher at the Lower Basic School and she was attending the Ndemban Upper Basic School and was in grade 9. She testified further that one day she was asked by the accused to visit him at his house. That she went there but did not meet him. on another day whilst she was going to the shop to buy candle, she met up with the accused who asked her why she did not come to visit him. that she replied she had gone but did not meet him. It is her testimony that the accused then asked her to come that very day. That she later met the accused standing at the compound gate of Gibba Kunda when she came out from watching a film and they went together to his house. That at the accused person's house, they chatted for a while and the accused then asked her if she loved him to which she replied yes. That the accused asked her to have sex with him but she refused because she was waiting for her grade nine results. It is her further testimony that the accused then forcefully pushed her unto his bed, undressed her and had sex with her thereafter that she stopped seeing her periods and later discovered that she was pregnant. That she kept the pregnancy until she delivered the child. The complainant also testified that she gave a statement to the police when the incident happened. The said statement was admitted in evidence after hearing arguments on the objection raised by the defence to its admissibility. Further in her testimony, the complainant stated that she was 18years old and tendered her birth certificate in evidence.

Under cross-examination, the complainant admitted that the accused was not the first person she had sex with. That the first was one Yankuba Njie in 2008 when she was 15 years old. She admitted that she had visited the accused twice at night but that she has gone to visit him because she did not know why he had called her. She admitted falling in love with the accused the second time she went to visit him and had agreed to go to bed with him when he asked. The complainant also stated when it was put to her that a girl who had sex once or twice cannot be under 18years, that it could be possible. She however insisted that she was born in 1992.

PW4- Fabakary Gibba testified that he is the father of the complainant. That he is a senior teacher at Ndemban Lower Basic School where the accused is also teaching. Witness testified that during the Christmas holidays of December 2009, and whilst he was at Serrekunda, he had received a call from the guardian of his daughter at Brikama who had wanted to talk to him on his way back home. That he had referred her to his wife at Ndemban. That back at Ndemban, he was told by his wife that his daughters guardian wanted to tell him that his daughter was pregnant that he was unhappy when he saw her because she had not completed school that her education had to stop when it was time for her delivery.

Under cross-examination, PW4 testified that his daughter was born in 1992 and that she was registered in 2003 because they live in the provinces where she was born and it was not easy to get a birth certificate back then because you had to come to Banjul for it. P.W4 also testified that you could use a birth certificate a clinic card or even the parents could be asked the date of birth of the child when registering a child in school. In answer to question put to him, PW4 testified that he could remember the date of registration of the complainant because she has a case of concern and was in court and that the date was not made up very late in the day for the purpose of this case.

PW5 Sergent Kaddy Badjie testified that she is with the police child welfare under the Crime Management Unit. That she remembered her office investigating the case of the accused person. That her office had on the 23rd of March 2010 made a request signed by her O/C Yamundow Jagne Joof to the R.V.T.H for the determination of the age of the complainant. That her O/C is currently in Darfur but she will be able to recognise the document. The said document was tendered and admitted in evidence upon identification.

At the close of the case for the prosecution, the accused opened his defence. It is the testimony of the accused that he is a teacher but is currently not teaching and is at the Gambia College pursuing a Primary Teacher's Certificate. He stated that he disagrees with all that was said about him in the court. In his testimony, he explained that in 2009, the complainant was always passing by his house around 5.pm everyday at Ndemban Village where he was teaching. That the complainant used to stroll by going no where. That one day she passed him sitting at the corridor of his house and on her return she told him that she needed money to go for holidays to the Kombos because her father had told her that he was not going to give any to her. The accused stated further that the complainant told him that she would do something for him if he gave her the fare and that he had told her to come back again. That the next day, at night whilst he was going to the shop they collided and the complainant told him that she would come to his house after going to watch a film. It is his testimony that around 11:00pm that time the complainant came to his house, found him writing in his sitting room

and proceeded into his bedroom and sat on his bed. That he joined her inside and they started chatting and the complainant said she would do something for him so that he could help her with some money. According to the accused, the complainant started touching his body and he too responded. That the complainant started telling him that she loved him and offered to have sex with him. That before that he had asked her whether she was a virgin and she had responded no and that she used to have sex. That he then protected himself and had sex with her.

In his further testimony, the accused stated that he never thought the complainant was a young girl. However, that he knew that the complainant had just completed her grade 9. He testified that the average age for students who completed grade 9 was 18 years and above and then stated that his believe was rather 17 years or above. The accused further stated that as a teacher and a young man, it occurred to him that the complainant was 18years and above. In response to the question why does he think that the complainant was 18 years or above, the accused responded that it was because of the size of her body. That she was tall big and matured just like all her friends and that he never thought that she was below the age of 18years and had believed that she was 18 years old. It is his testimony that the complainant looks different now, because she was bigger in size then.

In his further testimony, the accused stated that when the complainant's pregnancy was reported to him eight months into her pregnancy, he had asked the complainant's father to come along with her so that he could ask her personally, but that she never came. That he repeated the same thing to him two days later when they met. That he accepted the pregnancy conditionally because he did have sex with her and the matter had been made a police case who were torturing and pressuring him. The accused further testified that at the police station, he was given a paper and told to confess that he was responsible because the complainant has said it was him. That he greed in his statement that he was responsible because they had started to slap him and took him into the cell. That after writing his statement, he was allowed to go home to come back the next day only to be told that the matter was forwarded to the child Welfare Unit at the Police Headquarters in Banjul. The accused further testified that at Banjul, he was told to write exactly what he wrote at Brikama or would be maltreated and he did. It is also his testimony that when the complainant gave birth, he was called to see the baby but he refused because she had already taken the matter to court and he was not also sure if the baby was his. However, that the baby is being taken care of by his people.

Under cross-examination, the accused stated that children normally go to grade 1 at the age of 8 or 9 years and would leave Lower Basic School at 15 or 16 years. He disagrees that if you start at 9 years you should then finish grade 6 at 14 years because you may repeat and disagrees that if you repeat once you would finish at 15 years. Still under cross-

examination, the accused stated that he had thought about the age of the complainant and that was why he had asked her whether she was a virgin and had never thought that she was under 18 years. When asked where in his statement Exhibit 2 did he mention that the complainant had asked him for money, the accused responded that it was not in his statement because he was not allowed to write his own words and was being commanded to write what the girl and her father said.

The accused further testified under cross-examination that he conditionally accepted the pregnancy though he has used a condom just to end the problem and to save himself from destruction in life. Further, he admitted that as a teacher, students looked up to him and the complainant as a student was more likely to listen to him but denied using that opportunity to have sex with her. He also denied using his position to solicit and have sexual intercourse with the complainant, because it was she who had tried him several times.

At the close of the evidence of the defence, oral addresses were made.

Mr. O.D. Mbye of counsel for the accused person in his address, submitted that the defence would rely heavily on the evidence in this case to establish that the accused had no reasonable cause to believe that the complainant was under 18 years at that time. That the accused had believed at the time that she was 18 years and above. It is the submission of counsel that it is imperative to look at the circumstances under which the carnal knowledge was had. That the complainant was invited by the accused to his house, that she went but did not find him the first time. It is his submission that a girl under 18 years is not expected to answer to such a call especially at night. That the accused must be judged by the standards of a reasonable man and that a reasonable man could not think that she was under 18 years at the time. Counsel submitted further that it takes a real woman to behave the way the complainant did at the second time of her visit. It is the further submission of Mr. Mbye that there is no evidence that the complainant resisted the advances of the accused, that after the intercourse, she had gotten up and left and that was the last time she saw the accused. That she is not innocent at all. That her mind set is that of a woman and not of a girl under 18 years. counsel further submitted that the complainant was able to keep her pregnancy hidden for some time which only a woman and not a child could do. That the accused had no reason to believe that he was dealing with a girl under 18 years because she did not behave like an innocent person in anyway. Counsel further submitted that innocence is important here in the reasonable inference to be drawn from the behavior of the complainant. That having known what was to happen after the first night, she could not be said to be innocent. Counsel urged the court to acquit and discharge the accused on this point.

On his second issue, counsel submitted that the offence the accused is charged with is a sexual offence under Section 180 (2) (a) of the Evidence Act 1994 and it needed to be corroborated. That the definition of corroboration is as stated under Section 169 of the Evidence Act to be independent evidence……." counsel submitted that the evidence of the complainant needed to be corroborated by independent material. That the evidence of the complainant is the sole piece of evidence. That her witness statement is unsworn and is not independent. Also, that the evidence of the accused had not been corroborated and his cautionary statement which was unsworn could not corroborate the sworn testimony.

On his third issue on the proof of age, it is the submission of counsel that the correctness of the complainant's birth certificate was questioned. That the complainant said to have been born in 1992 was not registered until 2003 and that raises a huge doubt which must be resolved in favour of the accused person. It is the further submission of counsel, that the proper person to have tendered the birth certificate and be cross-examined on it was Registrar of Births and Deaths at the Department of Health and which officer was not brought to court. That the complainant's father did not tender her clinic card which he said he had. Counsel submitted that the onus is on the prosecution to establish that she was less than 18 years of age and which onus has not been discharged. That the evidence of PW4 regarding the correctness of the birth certificate should be disregarded. Counsel finally submitted that no medical evidence was tendered to support the allegation that the accused had carnal knowledge of the complainant.

The prosecution in its address stated its case relying on Section 127 of the Criminal Code and submitted that it is inherent that the ingredients of the offence for which the prosecution must prove fall under three categories:

1. That the state has to prove that the complainant was less than 18 years of age at the time of the alleged offence.

2. Whether the accused had carnal knowledge of the complainant.

3. And did the accused have any reasonable cause to belief that the complainant was 18 years and above.

Mr. Sanneh state counsel submitted that the prosecutions had called four witnesses and tendered five Exhibits.

On the first ingredient, was the complainant under 18 years, the prosecution submitted that the complainant was in grade 9 at the time of the offence in July 2009. That given the time at which children go to school in this country, the complainant would still have been under 18 years in grade 9. Counsel submitted that to further buttress the age of

the complainant, they had tendered her birth certificate as Exhibit 4 which is conclusive evidence that at the time of the alleged offence, the complainant was infact 16 years 11 months old. That it is therefore irrefutably conclusive that in July 2009 the complainant was infact under the age of 18 years. On the second issue whether the accused had carnal knowledge of the complainant, it is the submission of the prosecutions that the complainant became pregnant after July 2009 and that the accused did not dispute that the child she consequently gave birth to was his own child. That it is also evident from Exhibits 1&2, the voluntary and cautionary statements of the accused, that he confessed to having carnal knowledge of the complainant and that as a confessional statement, it is compelling evidence. Counsel submitted that the resultant pregnancy was complete proof that the accused had carnal knowledge of the complainant and referred the court to R.V. Marsden (1891) 2 Q B at 149, a decision up held in Iko v. State (2003) 3 ACLR 49 at 73. These authorities were how ever discountenanced by the court as they were not provided.

On the third issue whether the accused had reasonable cause to believe that the complainant was 18 years and above. It is the submission of the prosecution that the accused was a teacher at the very village in which the complainant resided and went to school, and he was aware at all times that she was a grade 9 student. That it was therefore reasonably expected and apparent that she would have been under the age of 18 years. Counsel urged that the facts of this case speak for themselves. That the accused was not the teacher of the complainant and therefore no academic reasons for the complainant being at the accused house could be given.

In their further submissions, the prosecutions submitted that the case of the defence through out this trial had been inconsistent. That their line of defence had shifted from the issue of consent to describing the features of the complainant as being sufficient proof that she was 18 years and above. Counsel submitted that the birth certificate completely refuted that defence. Counsel finally submitted that the prosecution had proved its case beyond reasonable doubt in light of the evidence they had submitted and that the only conclusion to be drawn is that the accused had committed the offence for which he is being charged.

Having listened to the submissions from both sides and the issues raised therein, I totally agree that in a criminal matter the burden of proof is always on the prosecution to prove the guilt of the accused person beyond all reasonable doubt. See: Igabele v. The State 25 NSCQR 321 at 350; Gambo Musa v. The State 29 NSCQR 358 at 392-393; R v. Oledima (1940) 6 WACA (pt 202) Owen v. Isa (1961) 2 SCNLR 347.

In determing this case, I will adopt the issues raised by the prosecutions which I believe are almost similar to those raised by the defence and can

address same, I will however adopt a different sequence in addressing these issues.

On the issue of whether the accused had carnal knowledge of the complainant.

It is settled that for the prosecution to ground a conviction on a charge of defilement, the prosecution would have to prove the following ingredients of the offence beyond reasonable doubt.

1. That there was carnal knowledge.
2. That the act was unlawful.
3. That the girl was under sixteen years new 18 years as amended.
4. That the act was that of the accused person.

There is no iota of doubt in the evidence before this court that the accused had carnal knowledge of the complainant. Apart from the complainant alleging so, the accused himself admitted to having carnal knowledge of the complainant in his evidence under oath. It is trite that what is admitted needs no further proof. It remains admitted as establishing the facts alleged therein. See: Antoine Banna v. Ocean View Resort Ltd. (2002-2008) 1 GLR18, Mozie v. Mba Malu (2006) 25 NSCQR 425 Friday Kamalu & Ors v. Umuana & Ors (1997) 5 SCNJ 191.

However, as rightly pointed out by counsel for the defence, the offence for which the accused stands charge under Section 127 of the Criminal Code is a sexual offence which falls within the eases stated under Section 180 (2)(a) of the Evidence Act 1994 in which evidence needed corroboration. However there is no necessity to find out whether the evidence before the court on the issue of carnal knowledge has been corroborated in the face of a blatant admission by the accused. Notwithstanding, the court will still venture in to same it being a criminal matter. Section 179 of the Evidence Act 1994 states.

> "C*orroboration consists of independent evidence from which a reasonable inference can be drawn which confirms and supports in some material particular the evidence to be corroborated and connects the relevant person with the offence, claim or defence*".

When a piece of evidence requires corroboration what to look for is any independent testimony in support of the evidence as pointed out by the west African court of Appeal in R v. Sekun and others (1941) 7 WACA 10.

> "*In most cases where the question of corroboration arises the question is, is there independent testimony which affects the accused by tending to connect him with the crime?.....*"

See: also *R. v. Basker Ville (1916) 2 KB 658 at 667.*

It is thus clear that for that evidence to amount to corroboration, it must be extraneous to the witness who is to be corroborated. See: R v. White head (1929) I.K.B 99, 102. A person cannot therefore corroborate himself as the Learned Chief Justice pointed out, the witness only needed to repeat his story some 25 times in order to get 25 corroborations of it. *See: R. v. Christie (1914) A.C 545.*

I would therefore agree with Mr. Mbye that the witness statement of the complainant at the police station of the cannot amount to corroboration of her evidence in court. But what then of the evidence of the accused person. Certainly there cannot be any better corroborating evidence than his admissions both on oath and in his voluntary and cautionary statements Exhibits 1 and 2. It is settled that the guilt of an accused person can be proved by his confessional statement, or by circumstantial evidence or by evidence of eye witness of the crime. See: *Igabele v. The State 25 NSCQR 321 at 348-349*. Similarly, in the case of *The Queen v. Oblasa (1962) 1 AU NLR 6ST* it was held that if a person makes a free and voluntary confession which is direct and positive and is properly proved, he may be convicted on the confession alone without any further evidence. See: *James Obe Acha bua v. The State (1976) 12 SC 63.*

Furthermore, it is a fact that the complainant got pregnant after having sexual intercourse with the accused person and which pregnancy the accused has not denied. Infact it is his evidence that the child delivered by the complainant is being taken care of by his people. I therefore in light of the above I find as a fact that the evidence of PW3 has been sufficiently corroborated and hold that the prosecutions has proven beyond reasonable doubt that the accused had carnal knowledge of the complainant.

On the second issue of whether the prosecution has proved that the complainant was under 18 years of age at the time of the alleged offence.

The complainant P.W3, testified that she was 18 years. She identified her birth certificate and tendered same in evidence which was admitted dispite the objection and marked Exhibit 4 P.W 4 Fabakary Gibba, the complainant's father testified that she was born in 1992 and that he got her registered in 2003. The birth certificate having been admitted in evidence, it becomes indisputable that as at the date of the offence, the complainant was only 16years of age. The putting of counsel that "the date of registration of the complainant was made up very late in the day is of no moment. It is clear that the registration was done in 2003 well before the offence was committed in 2009. Thus there is no link between the two. Also, the defence has not led any evidence to buttress their point and was not able to dent the evidence of PW4 in cross-examination. The

registration in 2003 has not been shown to have raised any doubt which would need to be resolve in favour of the accused.

Further more, to corroborate the fact that the complainant was under 18years at the time of the offence, the prosecution had tendered in evidence the letter from the Child Welfare Unit, Police Headquarter which was admitted without objection and marked as Exhibit 5. What is Exhibit 5 all about? It is a letter dated 23rd March 2010, addressed to the Chief Medical Director, R.V.T.H, requesting for age determination of the complainant. The result of the dental examination was noted on the said letter and the complainant's age was given to be 17years. This piece of evidence has undisputeably established that the complainant was 16 years old or thereabout at the time of the offence in 2009 and was certainly below the age of eighteen years.

I therefore find as a fact that the prosecutions has proven beyond reasonable doubt that the complainant was under the age of 16 years now 18 years as amended, at the time of the offence. That being the case, I also find that the said carnal knowledge was therefore unlawful.

On the third issue of whether the accused had any reasonable cause to believe that the complainant was 18years and above.

The provisor to Section 127 of the Criminal Code States:

> "Provided that it shall be a sufficient defence to any charge under this Section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe and did infact believe that the girl was of or above the age of sixteen years now 18 years as amended".

It is apparent that the accused is trying to take advantage of this provisor in the latter part of his evidence. It is the submission of Mr. Mbye that from the behavior of the complainant, the accused had no reason to believe that the complainant was not 18 years and above. That she had the mind set and had behaved like a woman. That the complainant who had had sexual intercourse before having same with the accused is not an innocent person. Counsel submitted that it is imperative to look at the circumstances under which carnal knowledge of the victim was had. That the complainant had answered to the invitations of the accused and had gone to see him at night, they had an intercourse and she got up and left and that was the last time they saw each other. That she was also able to hide her pregnancy for some months.

On the other hand it is the submission of the prosecutions that the accused was a teacher at the very Village the complainant resided and

went to school. That he was at all times aware that the complainant was a grade 9 student. That it was reasonably expected and apparent that the complainant would have been under the age of 18 years and this was established. It is their further submission that the accused was in a position of trust and authority as a teacher. That no academic reasons could be put forward for the presence of the complainant in his house, the accused not being her academic teacher. Counsel for the state, submitted that the case for the defence has been sketchy or inconsistent through out the trial. That the defence had at the beginning adopted the defence of consent, then later to describing the features of the complainant as being sufficient proof that she was 18 years and above. That the only conclusion to be reached is that the accused had committed the offence for which he is charged.

Let me now turn to the evidence before the court. The prosecution has established that the complainant was under the age of 18 years at the time of the offence by exhibits 4 and 5. Also the complainant was a grade 9 student which the accused knew and admitted. That assuming she started school at grade 1 at 8/9 she would still be under 18years at grade 9. The evidence of the accused on the other hand is that from his conversation with the complainant he never thought that she was a young girl and did in fact believed that she was 18 years and above. That as a man and a teacher it occurred to him that the complainant was 18 years and above because of her size. That she was big and tall like all her friends and matured. The accused however stated that the complainant looks different now because she was bigger then.

Having listened to the evidence of the accused, it is my view that he has not established his defence of reasonable cause to believe in any material particular. The accused admitted that the complainant was a grade 9 student. He further gave evidence that his belief about the average age of students who finish grade 9 was 17 years or above. He did not lead any evidence in his defence to establish the size and maturity of the complainant he referred to at the time. The fact that the complainant was not an innocent child in that she had had a previous sexual intercourse does not in itself prove that she is 18 years and above. In the absence of any convincing evidence from the defence on whom the burden had shifted to establish their alleged defence and in the light of the prosecutions evidence, I cannot but to draw the conclusion I have been invited to draw by the prosecutions and which is that the accused had reasonable believe that the complainant was under the age of 16 years as amended to 18 years at the time of the offence. A reasonable man in my opinion would in consideration of the surrounding circumstances and evidence in this case, believe that the complainant was under the age of 18 years at the time of the offence.

In the premise therefore, I hold that the prosecutions from the totality of the evidence before this court has proved their case beyond all

reasonable doubt. See: *Miller v. Minister of Pensions (1947) 2 All ER 372 at 374.*

In consequence therefore, I find you guilty as charged and convict you accordingly. Do you have anything to say in mitigation why sentence should not be passed upon you.

ALLOCUTUS

Mr. Mbye - I would seek that sympathy of the court to tamper justice with mercy. He is a first offender and this is the first time he had been to court. The evidence is such that your lordship has done a thorough investigation of the case to arrive at this conclusion.

Your lordship has the discretion in terms of Sentencing. I would urge the court to caution and discharge the accused because he is a first offender. The accused is still a student at the Brikama College and to impose a custodial sentence on him would destroy his career and to a larger extent his life. I would therefore urge that your lordship should caution and discharge him.

SENTENCE

The court has taken due consideration of the mitigation of counsel on behalf of the accused person. As a result, the court will take the following extenuating circumstances into consideration.

1. That the accused person certainly appears to be a young man with apparently a clean past record, clean in that no previous convictions were alleged against him or proved.

2. That he is still a student at the Gambia College.

3. That it is a fact that the complainant was not an innocent child at the time in that she was already sexually active.

Having taken the above factors into consideration, I will exercise my discretion under Section 29(3) of the Criminal Code Cap 10 Vol. III of the Laws of The Gambia 1990 and not impose a direct custodial sentence. I will however not caution and discharge the accused either. Thus under the circumstances, I hereby Sentence the accused to a fine of D20,000.00 in default to 2 years imprisonment without hard labour.

.....

Hon. Justice A. Bah
Judge

30th/06/2011