IN THE HIGH COURT OF THE GAMBIA
CRIMINAL CASE No: HC/014/10/CR/007/AO

BETWEEN:

THE STATE COMPLAINANT

AND

YANKUBA NJIE ACCUSED PERSON

MONDAY 17th OCTOBER 2011
BEFORE HON. JUSTICE EMMANUEL A. NKEA

ACCUSED PERSON PRESENT
Mr. A. MIKAILU (DPP) FOR THE STATE PRESENT
MR. B.S TOURAY FOR THE ACCUSED PRESENT

JUDGMENT

The accused person herein is standing trial on a two count charge for having on the 21st day of October 2009 at Tallinding, in the Kanifing Municipality of The Gambia enticed one BINTA JARJUE out of the keeping of her lawful guardian contrary to Section 234 of the Criminal Code and for subsequently having unlawful carnal knowledge of her at Fajinkunda contrary to Section 122 of the Criminal Code. The accused person pleaded not guilty to both counts.

The Prosecution called evidence through five (5) witnesses and tendered five (5) exhibits in support of its case while the accused testified in his defense and called in three other witnesses to support his case.

The case of the prosecution is that on the 21st of October 2009, the Prosecutrix was sent to the Tallinding market to buy some baby nappies. The accused person who is a regular visitor to their compound was present when she was being sent. The accused met her later at the market and coaxed her to follow him to his house at Fajikunda. She went with the accused to his room whereupon the accused locked up the door, took out a knife, threatened her and forcibly had carnal knowledge of her. Because her wrapper was stained with blood flowing from the sexual intercourse, the accused gave her his wrapper – Yaya Jammeh wrapper; exhibit "A". She was only released by the accused the next morning, but because she did not know the locality, she could not find her way home. She was later picked up on the streets of Fajikunda by the accused. She went with the accused to his room where the accused had carnal knowledge of her a second time and yet again under threats by the use of a knife. She was again released the next morning and was later picked up on the streets of Fajikunda by her step father who testified as PW2. She was subsequently taken to the RVTH where she was examined and a medical certificate issued to that effect. PW1 later led the police to the residence where the accused lives and identified it as the place where she was sexually assaulted.

The accused denied these allegations both in his cautionary and voluntary statements and in his *viva vorce* evidence before this court. He called three other witnesses whose evidence points to the fact

that the accused could not have and did not have any sexual intercourse with the prosecutrix.

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 file written addresses. While the prosecution filed and adopted a nine page written address on the 10 of October 2011 the Defense decided to waive their right to address me thus paving the way for this judgment.

In their written address, the prosecution has referred me to a plethora of cases urging me to believe the evidence of the prosecution and to disbelieve the evidence of the defense. In her written submission Counsel for the prosecution Miss N Jallow framed out the following questions as the issues for determination in this case:

(a) Whether the victim was enticed and kept away from her lawful guardian,
(b) Whether the victim was taken away with or without the consent of her lawful guardian, and
(c) Whether the accused person penetrated the victim.

I must say straight away that Counsel did not help the Court at all as the above issues suggest that the accused was on trial on a one Count charge.

I have looked at Sections 234 and 122 of the Criminal Code but they do not provide any clear definition of what constitutes kidnapping from lawful guardianship and rape respectively. Rather Section 232 of the Criminal Code sets out the elements to be established with regards to a Section 234 offence as follows:

(a) That a girl was enticed and kept away from her lawful guardian,
(b) That her guardian did not give his/her consent,
(c) That the girl was under 18 years old,
(d) That the act was that of the accused person.

In order to ground a conviction under Section 122 of the Criminal Code, Section 121 requires that the prosecution must first establish the following:

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

I will now proceed to deal with these two sections one after the other.

With regards to the Section 234 Count, there is unchallenged evidence from the prosecution that PW1 was kept away from her lawful guardian for two nights. The accused himself confirms this fact when he stated in his evidence-in-chief that *"... my brother's wife now informed me that... the prosecutrix got lost and they searched for her the whole night. I stayed... till mid night and the girl was not seen".*

These pieces of evidence are also contained in exhibit “B” the cautionary statement of the accused. It is settled that facts which are not in dispute need no further proof. I am therefore inclined to hold that PW1 was kept away from her lawful guardian and this I shall hold as a fact.

There is also uncontroverted evidence that PW2 and PW3 went for a man hunt for PW1 to no avail. It is certain that if PW2 or PW3 had consented to the taking away of PW1 they would not have gone searching for her the whole night. The evidence on record points to the fact that at the time PW1 left the house none of her parents were at home. I do not see how logical it would be to try to infer consent on the part of PW2 and PW3 in the circumstance. The logical conclusion is that they did not consent to the taking away of PW1 and this I shall also hold as a fact.

I have seen from exhibit “G” the birth certificate of PW1 that she was born on the 15 January 1994. This piece of evidence is not only unchallenged, but remains the best evidence to determine the age of PW1. I have no reason to fault this piece of evidence; rather, I believe same in its entirety and as such I am inclined to find that PW1 at all material times relevant to this offence (2009) was just 15 years old. I need not say that this is certainly below 18 years. I am therefore satisfied that PW1 was below 18 years old at the time of this alleged offence and this I will further hold as a fact.

However, the crucial issue which has turned out to be the lone issue for determination as far as Count I is concerned is whether it can be said from the totality of evidence on record that it was the accused that kidnapped PW1. PW1 said of the accused as follows *"he later met me in the market. He called me and invited me to his house. He said he had something to give me. He coaxed me and took a taxi and we went..."* Although this piece of evidence was never challenged under cross examination, the accused in both his cautionary statement - exhibit "B" and his testimony before this Court completely denied this allegation.

It is perhaps important to mention that the accused is not a stranger to PW1 as there is a consensus on both sides that the accused was a constant visitor to the residence where PW1 lives. Of further relevance is the fact that PW1 would later lead the police to the residence where the accused lives and identified same as the place where the accused had contemptuous sex with her. This piece of evidence was never challenged by the defense. Rather, the accused admitted under cross examination that *"it is true that PW1 led the police team to my house in Fajikunda ... I do not know how she led the police to my house, all I know is that she has never visited me...".* The accused in trying to deny the allegations in Count I stated further that when PW1 arrived his residence with the police, she pointed at his step mother's room as the place wherein the accused had kept her for two nights.

I have looked at the evidence on record, and I cannot conjecture how PW1 would have been able to lead the police to the accused person's residence if she had never visited there before. PW1 has an unmistaken identity of the accused. There is also unchallenged evidence that PW1 was found at the Fajikunda neighborhood. When these facts are put together they form a perfect jigsaw pointing unshakenly to one conclusion; that the person who kidnapped PW1 is the accused and nobody else.

The allegation by the defense that the accused had initially made reference to a taxi driver as the person who took her away appears to me to be a well thought out plan designed to throw dust into the eyes of the Court thus preventing it from doing justice in this matter. DW2 who said she over head PW3 saying that the accused was taken away by a taxi driver would admit under cross examination that she "will wish the Court to show mercy on the accused if found liable" and that she will do anything to safe her husband from trouble. This lends support to the fact that DW2 was also deliberate in her attempt to mislead this court. From the above, I am satisfied that the elements of the offence under Count I have been successfully established by the prosecution and this I shall further hold as a fact.

Turning now to Count II, the prosecutrix has testified in support of this Count that the accused had unlawful carnal knowledge of her and without her consent. I must point out straight away that the proviso to Section 185 (2) of the Evidence Act is not relevant to this trial because

PW1 gave sworn evidence. The above notwithstanding, Section 180 (2) (a) makes it mandatory for the Court to seek for corroboration of the evidence of the prosecutrix. This is especially so as the accused has denied the allegations.

In terms of Section 179 of the Evidence Act 1994 "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*". Corroboration is therefore any evidence that tends to confirm the evidence of the prosecutrix on any material issue. See the West African Court of Appeal Case of *R v. SEKUN & Ors (1941) 7 WACA, 10*. It is also settled that the corroborating evidence must be extraneous to the evidence of the prosecutrix. See *R v. WHITE HEAD (1929) I.K.B 99, 102.*

In cases of this nature where the offence is not likely to be committed in the full glare of the public, safe in cases of *flagrante delicto,* it may be practically impossible, to expect a direct eye witness account in corroboration of the offence of rape. It may therefore be impossible to prove the matter charged by the direct and positive testimonies of eye witnesses. According to the learned author of *Archbold's Criminal Pleadings and Practice, 39th Edition paragraph 1141,* the Court can, with propriety, act on circumstantial evidence. In *OGUNBAYO V. THE STATE (2007) 8 NWLR (Pt. 1035),* the Court per TOBI JSC (as he then was) held inter alia that in cases of this nature corroboration could be

deduced from circumstantial evidence which, 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. In *POSU V. THE STATE (2011) LPELR-SC. 134/2010* the Court held that the nature of corroboration must depend on the particular circumstances of each case and that where an accused person has denied the allegation of rape, 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.

As far as this offence is concerned I must be quick to add that there are two issues to be corroborated here; the act of sexual intercourse and the element of consent or the lack of it.

With regards to the issue of sexual intercourse exhibit “D” the medical certificate of the prosecutrix confirms that there was sexual intercourse within the last two to three days. This to my mind is enough corroboration of the act of sexual intercourse.

It now seems to me that under the peculiar circumstances of this case where the accused had kidnapped the prosecutrix, it cannot be

expected that the prosecutrix would have consented to the eventual act of sexual intercourse and this I shall also hold as a fact. From these facts I arrive at the conclusion that the prosecution has also proved the offence under Count II and this I must also hold as a fact.

From the foregoing, I am therefore satisfied that the prosecution has proved their case on both Counts against the accused person beyond reasonable doubts. The accused person YANKUBA NJIE is hereby found guilty as charged on both Counts and convicted accordingly.

PREVIOUS CONVICTION: Nothing Known

ALLOCUTUS: This Court has now found you YANKUBA NJIE guilty of the offence of kidnapping punishable under Section 234 of the Criminal Code and the offence of rape punishable under Section 122 of the Criminal Code. Before sentence is passed on you, the Court would like to know if you or Counsel on your behalf will like to say anything in mitigation.

Mr. B.S TOURAY: The convict is a first offender. He is a young man who is still in the prime of his life with his future before him. We urge Your Lordship to temper justice with mercy.

SENTENCE

I have listened to the plea for leniency and have considered the fact that the convict is a first time offender, but the offences with which

the convict stands convicted for leaves the Court with little discretion.

In view of the above,

EMMANUEL A. NKEA
JUDGE

THE CONVICT IS HEREBY SENTENCED AS FOLLOWS:

1. Convict to serve a mandatory jail term of 5 years with hard labor on Count I.
2. Convict to serve life imprisonment on Count II.
3. Sentence to run concurrently and from the 20th day of February 2010 being the day the convict was first taken into custody.
4. There shall be no further Order.

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 17th DAY OF OCTOBER 2011

.....
REGISTRAR