

**IN THE HIGH COURT OF THE GAMBIA**  
**CRIMINAL CASE No: HC/323/09/CR/074/AO**

**BETWEEN:**

**THE STATE**

**COMPLAINANT**

**AND**

**ERNEST SANYANG**

**ACCUSED PERSON**

**THURSDAY 15<sup>th</sup> DECEMBER 2011**  
**BEFORE HON. JUSTICE EMMANUEL A. NKEA**

**ACCUSED PERSON PRESENT**  
**MRS. A. D BWALA (SSC) FOR THE STATE PRESENT**  
**MRS. N.S GBUJI FOR THE ACCUSED PRESENT**

**JUDGMENT**

By a bill of indictment dated the 13 July 2009, the prosecution has alleged that sometime in the month of June 2008 at Bundung, in the Kanifing Municipality of The Gambia, the accused person herein had carnal knowledge of one FATOU HYDARA a girl aged thirteen (13) contrary to Section 121 and punishable under section 122 of the Criminal Code. The accused person pleaded not guilty to the offence. The Prosecution's evidence was led through eight (8) witnesses and five (5) exhibits were tendered in support of its case while the accused led sworn evidence and called one witness in support of his defense.

The prosecution's case is that on or about the 29<sup>th</sup> September, 2008, the police received a tip-off that the prosecutrix was attempting to commit an abortion. The prosecutrix was arrested and kept under preventive custody at the child welfare centre at Bakoteh. She remained there for a week and was thereafter taken to the Royal Victoria Teaching Hospital (RVTH) where an age determination and a scan were conducted on her whereupon she was confirmed to be 13 years old and 15 weeks pregnant. The age determination report and the result of the scan which were both conducted on the prosecutrix on the 07/10/08 are in evidence as exhibits "A" and "B" respectively. The

prosecutrix has since put to birth. Upon interrogation by the police, the prosecutrix revealed that she was impregnated by the accused. The accused and the family of the prosecutrix live in the same compound. The accused was arrested and three statements recorded from him by the police. These statements are in evidence as exhibits "C", "D" and "E".

The accused denied the charge both in his statements to the police and in his testimony before this Court. He maintained that he is a palm wine taper who leaves his house in the mornings and returns late; usually after 10 pm. It is alleged by the defence that it was after the prosecutrix returned from a holiday visit to Cassamance, Senegal that she was found to be pregnant. Upon questioning by DW2 as to who was responsible for the pregnancy; the prosecutrix first mentioned one Amadou, then Buba. It was only at the police that she mentioned the name of the accused.

In her written address, learned defence counsel framed the issues for determination as follows:

- (a) Whether the prosecutrix was raped by the accused having regards to the position of the law on corroboration;
- (b) Whether the prosecution has proved the charge of rape against the accused beyond reasonable doubts.

In view of the above, Mrs Gbuji of learned counsel for the defence argued that by not carrying out a paternity test as on the baby of the prosecutrix as ordered by the Court; the prosecution has helped to create doubts as to whether the accused is the author of the pregnancy as alleged. She argued forcefully that the evidence of the prosecutrix was never corroborated in anyway contrary to the mandatory provisions of sections 179 and 180 (2) (a) of the Evidence Act. She submitted that just as there is no direct eye witness testimony so too is there no circumstantial evidence linking the accused with the offence. After referring the Court to a plethora of authorities to support her arguments

learned counsel urged me to discharge and acquit the accused person for want of sufficient evidence.

The prosecution elected to waive their right to address and did not make any arguments by way of a rejoinder.

I now turn to the substance of the matter before me. I have read sections 121 and 122 of the Criminal Code and it appears to me that for the offence of rape to be established, the prosecution must first prove the following:

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

I will now proceed to deal with the above issues one after the other.

The testimony of the prosecutrix is that the accused had unlawful carnal knowledge of her and without her consent. I agree with learned defence counsel that the requirement of corroboration is an essential element in rape or sexual offence cases. Since Nigerian case law has had such a tremendous influence on the criminal law jurisprudence of this country, I find it expedient to distinguish the position of the law on corroboration as it relates to rape and other sexual offence cases; as we have it here and as it obtains in Nigeria.

The position of the law in Nigeria with regards to corroboration in sexual offences was aptly stated in the case of *OGUNBAYO v. THE STATE (2007) 8 NWLR (Pt. 1035)*, wherein the Supreme Court of Nigeria stated inter alia that "... in the cases of a sexual character, it is eminently desirable that the evidence of the complainant should be strengthened by other evidence implicating the accused person in some material particular. It is true that there is nothing in law to prevent the court from convicting on the uncorroborated evidence of the complainant, but it is an established rule that the presiding judge must direct himself ... in such

a case on the desirability of there being corroboration of the complainant's evidence." This position has been applied in a plethora of authorities of the Supreme Court of Nigeria. See the cases of *IKO v. THE STATE (2001) 14 NWLR (Pt. 732)*; *POSU v. THE STATE (2011) LPELR-SC. 134/2010*. From these authorities it is seen that though there is no statutory requirement for corroboration, yet as a matter of practice, corroboration though not essential, is almost always required before conviction.

The above position is not true of our law as section 180 (2) (a) of the Evidence Act, makes it statutorily mandatory for the Court to seek for corroboration of the evidence of the prosecutrix in sexual offence cases. According to section 180 (2) of the Evidence Act;

*"...a court shall not in the following cases, act on uncorroborated evidence ...*

*(a) cases of rape and other sexual offences against the complainants;"*

The use of the mandatory 'shall not' in section 180 (2) (a) cited above, in my view, robs this court of any discretion. It is now common ground that in all cases where the law provides that corroboration is necessary, a conviction of an accused can only be valid when there is such corroborative evidence. That is the case where statutory corroboration is required (*IKO v. THE STATE (supra)*) as in the instant case.

In terms of Section 179 of the Evidence Act, corroboration is 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 W ACA, 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*.

Since there is no evidence of an eye witness account of the alleged offence, the law allows the court to rely on circumstantial evidence to determine the guilt or otherwise of the accused person. In *OGUNBAYO v. THE STATE (Supra)*, the Court 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 (Supra)* 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 it is my view that there are three issues to be corroborated here; the act of sexual intercourse, the element of consent or the lack of it, and the identity of the perpetrator.

With regards to the issue of sexual intercourse exhibit "B" the scan confirms that the prosecutrix had sexual intercourse at least some fifteen (15) weeks before. Although modern science has made it possible for a woman to be pregnant without necessarily subjecting herself to any direct sexual intercourse (e.g. artificial insemination cases); the peculiar circumstances of this case does not infer any other possibility than through sexual intercourse. There is unchallenged independent evidence in exhibit "B" showing that there was carnal knowledge of prosecutrix. Not having seen any piece of evidence on record in rebuttal and since there is nothing that leads me to hold the contrary; I therefore find as a fact that there was carnal knowledge of the prosecutrix. Exhibit "B" to my mind is therefore enough corroboration of the act of sexual intercourse.

In *R v. BASKERVILLE (1916) 2 KB 658 at 667*, the Court emphasized that the corroborating evidence must be an independent testimony, direct or circumstantial, which confirms in some material particular, not only that an offence has been

committed, but that the accused person has committed it. It now behooves me to find out if there is any evidence on record corroborating the evidence of the prosecutrix that the act is that of the accused.

Whilst there is evidence that the prosecutrix always assisted the accused person's wife in her domestic chores and in nursing their new born baby, there is also unchallenged evidence that the accused always went for tapping early in the mornings and always returned late when his wife was already in bed. In view of the outright and consistent denial of the offence by the accused person, it seems to me that the paternity test ordered by this court on 18<sup>th</sup> of March 2010, **per M.B Jonson Richards J** (as he then was) on the baby of the prosecutrix would have authoritatively resolved this issue.

In addition to the above, the prosecutrix appears to me to be an unreliable character; she was pregnant at the age of 13 but yet concealed same for 15 good weeks; she would later attempt an abortion of the pregnancy by self help measures and by resorting to very local and crude means. Furthermore, the unchallenged and uncontroverted evidence of DW2; that the prosecutrix had earlier identified one Amadou, then Buba and later the accused as the author of her pregnancy, suggest to me that she is a mischievous lad; with the risk of deliberate inaccuracy, or unintentional inaccuracy in her entire evidence. It is for these reasons that I do not believe her evidence one bit.

It is trite law that the need for corroboration will only arise if the evidence which should be corroborated appears credible and capable of believe (*DPP V. KILBOURNE (1973) AC 729 @ 746*). There is no need, therefore, to seek for corroboration as the evidence of the prosecutrix appears unreliable to me. Even at that, there is no corroborating evidence direct or circumstantial tending to support the testimony of the prosecutrix that the sexual intercourse was an act of the accused and or that the pregnancy was as a result of an act of the accused.

It is for this reason and the other reasons already highlighted above, that I have genuine doubts in my mind whether it is the accused that had carnal knowledge of the prosecutrix. I shall hold and resolve these doubts in favour of the accused person and in doing so; I shall order the discharge and acquittal of the accused person forthwith. The accused person **ERNEST SANYANG** is accordingly discharged and acquitted.

**EMMANUEL A. NKEA**  
**JUDGE**

**FURTHER ORDERS**

Having listened to the learned Senior State Counsel and having also listened to learned defense Counsel, and having regards to the purport of Section 285E of the CPC as adumbrated by this Court in the case of *THE STATE v. EBOU LOWE & Anor*, I shall further Order as follows:

- (1) That Ernest Sanyang be released on bail in the sum of D500 000 and one surety in like sum.
- (2) The surety to depose to an affidavit of means in like sum and must deposit his/her Identity Card with the Principal Registrar of this Court.
- (3) Pursuant to Section 285E (4) of the CPC, the above further orders shall be deemed quashed if the prosecution fails to file their Notice and Grounds of Appeal within 30 days.

**EMMANUEL A. NKEA**  
**JUDGE**

**ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF  
THE PRESIDING JUDGE THIS 15<sup>th</sup> DAY OF DECEMBER 2011**

.....  
**REGISTRAR**

