IN THE HIGH COURT OF THE GAMBIA
CRIMINAL CASE No: HC/439/10/CR/111/AO

BETWEEN:

THE STATE COMPLAINANT

AND

ASSAN JARRA ACCUSED PERSON

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

ACCUSED PERSON PRESENT
Mr. S. ABI FOR THE STATE PRESENT
MRS N. GBUJI FOR THE ACCUSED PRESENT

JUDGMENT

The accused person herein is standing trial on a two Count charge for having on the 24th day of May 2010 at Barra, in the West Coast Region of The Gambia abducted and taken one NABBA FATTY a girl under the age of sixteen (16) to Sanchu Mutel against her will contrary to Section 124 of the Criminal Code and for subsequently having carnal knowledge of her at Sanchu Mutel contrary to Section 127 of the Criminal Code. The accused person pleaded not guilty to both counts.

The Prosecution led evidence through three (3) witnesses and tendered one (1) exhibit in support of its case while the accused person led evidence as the sole witness in his defense and tendered one exhibit.

The case of the prosecution is that on the 24th of May 2010, at night whilst PW1 (Naba Fatty) was waiting to board a vehicle for Essau, the accused invited her to join him in a vehicle, saying he too was going to Essau. When they arrived at Essau, the accused refused to let her step down and threatened to beat her up if she forcefully tried to get out of the vehicle. The accused took her to his house at Sanchu Muntel where she remained with the accused for eight days with the accused having sexual intercourse with her every night. She was only released when the police raided the residence of the accused in search of her. The accused was later arrested and taken to the police station whereat he volunteered a cautionary statement which is in evidence as exhibit “A”. The accused person’s defense was a complete denial of these allegations insisting that exhibit “A” was obtained by duress. These are the brief facts upon which I must now proceed to determine the guilt or otherwise of the accused person.

However, suffice to state that at the close of the hearing both sides were given the opportunity to file written addresses. While the prosecution filed a five page address on the 14 of July the Defense did not respond to same within the 14 days time frame as ordered by the Court. When this matter came up for adoption of addresses on Monday the 10th of October, 2011, neither the State Counsel nor the Defense Counsel were in Court. The Court was constrained in the circumstance to proceed to judgment without any further reference to both Counsels.

I have looked at Sections 124 and 127 of the Criminal Code and it seems to me that, in order to secure a conviction under these sections of the law the prosecution must first establish the essential ingredients of the offences.

Under Section 124 of the Criminal Code, the prosecution is required to first prove that:

(a) A woman or girl was taken away or detained,
(b) There was a desire to marry or have carnal knowledge of her,
(c) The woman or girl did not give her consent,
(d) The act was that of the accused person.

Under Section 127 (1) of the Criminal Code, the prosecution is required to establish that:

(a) There was carnal knowledge of a girl,
(b) The act was unlawful,
(c) The girl was under the age of eighteen years, and
(d) 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 124 Count, the evidence of PW1 is that *"each time the accused gets up; he locked me inside the house until the police arrived".* This piece of evidence was never challenged. To detain requires depriving a person from the liberty to go and come as he/she wishes. PW1 also led unchallenged evidence to the effect that

the little money she had on her was taken away by the accused person to prevent her from escaping. The effect, and as settled in a number of decided authorities, is that unchallenged or uncontroverted fact or facts need no further proof. See the Gambian Court of Appeal Case of *ANTOINE BANNA V. OCEAN VIEW RESORT LTD. (2008) 1 GLR 1*. On the strength of this authority, I am inclined to hold that the girl Nabba Fatty was detained by the accused person herein and this I shall hold as a fact.

PW1 also testified that *"all the nights I spent there the accused had sex with me"*. In exhibit "A" the accused admitted having sexual intercourse with PW1 for three (3) nights. Therefore, apart from the complainant alleging so, the accused himself admitted to having carnal knowledge of the complainant in exhibit "A". Suffice to state here that by a ruling dated 21 June 2011, this Court admitted exhibit "A" as having been voluntarily made and obtained. I consider the subsequent complete denial of these acts in his evidence-in-chief as an afterthought. I must also be quick to add, and this is settled, that this retraction does not adversely affect the situation once the Court is satisfied of the truth as contained in exhibit "A". It is trite that what is admitted needs no further proof. Exhibit "A" therefore, remains admitted as establishing the facts alleged therein. See*: MOZIE v. MBA MALU (2006) 25 NSCQR 425*.

It seems to me that it does not really matter whether the sexual intercourse was for three nights as alleged by the Accused or eight

nights as alleged by PW1. What is germane is that the Accused had sexual intercourse with PW1. There is therefore, uncontroverted evidence of sexual intercourse and this I shall also hold as a fact.

The accused both under cross-examination and in his evidence-in-chief did not advance any other cogent reason why he detained or locked up PW1 for eight (8) days in his room. I will therefore not only find that the accused had carnal knowledge of PW1, but also that he detained her for that purpose, and this I shall further hold as a fact.

Turning to the issue of consent or the lack of it, I must say straight away that there is no direct evidence on record where PW1 or any other witness for that matter, said the sexual intercourse between PW1 and the accused was obtained with force. All what PW1 said is that *"all the nights I spent there the accused had sex with me".* However, having already held that the accused detained PW1 against her wish, and even if she did not resist or did not say she was forced, it immediately appears to me that under the peculiar circumstances of this case; where the accused had detained PW1 for the purpose of having carnal knowledge of her, it cannot be expected that PW1 consented to the eventual act of sexual intercourse and this I shall also hold as a fact.

The evidence on record is also categorical; that it was the accused who invited PW1 to join him in the van to Essau; that it was the accused that locked up PW1 in his room at Sanchu Mutel; and that it was the accused who had sexual intercourse with PW1. All these

unchallenged facts demonstrate only one thing; that the act was that of the accused person and this I shall further hold as a fact.

In view of the above, I am satisfied that the prosecution has sufficiently established the commission of the offence contemplated under Section 124 of the criminal code against the accused person. I shall accordingly find the accused person guilty as charged on Count I.

Turning now to Count II, I have already held that the accused person had carnal knowledge of PW1 and because PW1 did not consent to this, I will also hold that the act was unlawful and this I shall find as a fact. The lone issue that must now be resolved with regards to the second count is whether PW1 was under the age of 18. In fact, according to the proviso to Section 127 of the Criminal Code, it shall be a sufficient defense, if it is shown to the satisfaction of the Court that the accused had reasonable cause to believe and did in fact believe that the girl in question is above 18 years. Therefore, the issue of the age of the girl is of crucial importance in the prosecution of a Section 127 offence.

Although PW1 testified that she was 16 years old as at the 14 December 2010 when she testified in Court, which piece of evidence was supported by the oral evidence of PW2, there is no other evidence tending to confirm that fact. The Prosecution did not tender her birth certificate or any other medical report to support this assertion. I have warned myself of the severe punishment of fourteen (14) years

associated with this offence and, it immediately seems to me that oral evidence as to the age of PW1 does not suffice.

The issue of age is central to a Section 127 offence. Evidence as to the age of the victim, therefore, needs to be copious and cogent and may require in some cases, like in the instant case, some form of medical evidence or report supporting the alleged age. I say so because, under cross examination on the 2nd of March 2011, PW1 said she put to birth in December 2010 after a full blown period of nine (9) months. My understanding of this piece of evidence is that, PW1 was already an expectant mother in May 2010 when these offences were allegedly committed.

From the foregoing there are candid doubts in my mind whether PW1 is indeed under the age of 18 as alleged. It is trite that once there is a doubt in criminal matters, such doubts must be resolved in favor of the accused. I shall accordingly resolve this doubt in favor of the accused herein and in doing so I shall find him not guilty of the offence charged under Count II.

Having already found him guilty on Count I, I shall now proceed to convict the accused person. The accused person ASSAN JARRA is accordingly convicted as charged pursuant to Section 124 of the Criminal Code.

PREVIOUS CONVICTION: Nothing Known.

ALLOCUTUS: This Court has now found you ASSAN JARRA guilty of the offence of Abduction under Section 124 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.

Mrs. GBUJI: The convict is a first offender. He is an adult and the sole bread winner of his family. I refer the Court to Section 29 of the Criminal Code which gives the Court the unfettered discretion to even impose a fine on the convict.

SENTENCE

Having listened to the plea for mercy and having considered the fact that the convict is a first time offender, I am tempted to temper justice with mercy in passing sentence. 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 4 years with hard labor.
2. Sentence to run from the 2nd day of June 2010 being the day the convict was first taken into custody.
3. 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

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REGISTRAR