IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDEN AT BANJUL
CRIM CASE No: HC/326/11/CR/103/AO

BETWEEN:

THE STATE **COMPLAINANT**

AND

ALIMAMEH GIBBA **ACCUSED PERSON**

MONDAY 22 OCTOBER 2012
BEFORE HON. JUSTICE EMMANUEL A. NKEA

ACCUSED PERSON PRESENT
MRS N.I. JAWARA FOR THE STATE PRESENT
MRS O.ODUMA WITH N. GBUJI AND L. OGBEDO FOR THE ACCUSED PRESENT

JUDGMENT

By a bill of indictment filed the 18 July 2011, the prosecution has alleged that on or about the 30th day of May 2011, at Madiyana Village, in the West Coast Region of The Gambia, the accused person herein had unlawful carnal knowledge of one FATIMA BADJIE, a 13 year old girl without her consent 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 four (4) witnesses and tendered two (2) exhibits in support of its case while the accused led sworn evidence and called one witness in his defence.

The prosecution's case is that on or about the 30th day of May 2011 the prosecutrix (PW3) was sent to the house of the accused to get a pressing iron. While at the house, the accused asked the prosecutrix to get into the room of his daughter. As she got in, the accused closed the front and back doors of his house and went inside the room to meet the prosecutrix. He tied her up by the hands, forced a headscarf into her mouth and then raped her. As the prosecutrix left the house of the accused, he met up with PW2 to whom she explained her ordeal; PW4 said he was present when the prosecutrix explained this to PW2. PW2 saw how the prosecutrix entered the house of the accused and noticed that she stayed therein for a long time with all the doors closed. The accused initially denied the allegations when he was confronted but would later admit to one Abdoulie Sowe that he was under a spell when he did the act. The matter was reported to the police and PW1 was detailed to record statements from the accused. The statements were rejected after a Voire Dire was conducted because the State was unable to produce the Independent Witness who witnessed the voluntariness of the statements. During the investigations, the prosecutrix was made to see a Doctor who examined her and issued a medical report. The Medical Report and treatment card are in evidence as exhibits "A-A1".

The accused denied the charge in his testimony before this Court. He maintained that he has been framed up by PW2 and PW4 as a result of a dispute arising from his position as the Deputy Imam of the village and his refusal to attend Friday prayers in the old Mosque. He told court that he is sexually inactive and therefore could not have committed the offence of

rape as charged. The evidence of DW2 points to the persistent denial of the allegation by the accused at the village level.

At the end of the trial, both sides waived their rights to address me.

Turning now to the substance of the matter before me, I must state that before the prosecution can secure a conviction of a section 121 offence, they must have established beyond reasonable doubts that: (a) there was carnal knowledge of the Prosecutrix, (b) the prosecutrix did not give her consent and, (c) the act was that of the accused person.

The testimony of the prosecutrix is that the accused had carnal knowledge of her and without her consent. In ***THE STATE v. ERNES SANYANG (HC/323/09 of 15/12/2011- Unreported)*** **and** ***THE STATE v. SALIFU NJIE (HC/361/10 of 15/02/2012)***, this court dilated on the position of the law on corroboration as it relates to rape and other sexual offence cases under our laws where it was emphasized that 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. While section 179 of the Evidence Act, qualifies corroboration as any evidence that tends to confirm the evidence of the prosecutrix on any material issue (***R v. SEKUN & Ors (1941) 7 W ACA, 10),*** it has been held that such corroborating evidence must be extraneous to the evidence of the prosecutrix (***R v. WHITE HEAD (1929) I.K.B 99, 102).***

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, there are two pieces of extraneous evidence which seeks to corroborate the allegation of rape. First is the alleged admission which the accused made to one Abdoulie Sowe. It has been alleged that during a confrontation meeting held at the Alkalo's residence a day after the alleged rape, the accused is said to have stepped aside with Abdoulie Sowe where he admitted and confessed to him that he was under a spell when he committed the offence. Second is the medico-legal certificate and treatment card in evidence as **exhibits "A" and "A1".** These pieces of evidence now fall to be evaluated and scrutinized by the court.

The admission or confession of an accused person to a crime is the best evidence of corroboration against him. From the evidence adduced it seems that Abdoulie Sowe is a material witness whose evidence could have settled the crucial issue of whether the accused admitted or confessed to the offence or not. However, for some strange and unexplained reasons the prosecution did not find it necessary to call this very important witness. The duty of the prosecution to call all material witnesses whose evidence would settle a vital point in the trial is long established ***(MBALLOW V. THE STATE (1960-1993) GLR 437),*** and the failure of the prosecution to call such a witness means that I cannot reach the conclusion whether the accused ever admitted and or confessed to the crime.

In cases where there was no eye witness account of the alleged sexual offence, as in this case, the law allows the Court to rely on circumstantial evidence to resolve the issue of corroboration. Such evidence could include

amongst others, evidence of (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 ***(OGUNBAYO v. THE STATE (2007) 8 NWLR (Pt. 1035).*** It is settled that where an accused person has denied the allegation of rape, as in this case, 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 ***(POSU v. THE STATE (2011) LPELR-SC. 134/2010)***.

If the accused used such force on the prosecutrix as she has alleged, that force would have normally left some traces of bruises. The alleged rape is believed to have taken place on the 31 of May 2011 and the prosecutrix was examined the very next day 1 June 2011. I have looked at the treatment card (exhibit "A") carefully and observed the diagnosis thereon as "***Abnormal vagina discharge. No sign of penetrating sexual intercourse or struggle"***. My understanding of the above diagnosis is that the abnormal vagina discharge was not as a result of any recent sexual activity. Furthermore, the fact that the prosecutrix presented with an abnormal vagina discharge was suggestive of the fact that she could be suffering from some form of sexually transmitted disease. The police ought to have

requested the examining Doctor to pursue the matter further by conducting further examinations on the prosecutrix and the accused with a view to determine whether the same medical conditions were present in the accused. Thus, there is no evidence linking or associating the abnormal vagina discharge on the prosecutrix to the accused person.

I have equally looked at the medical report (exhibit "A1") carefully and the medical findings recorded in columns 5, 6 and 8 respectively reads thus ***"No injuries found", "None" and "No Injury found".*** The combined effect of exhibits A-A1 is that there is no medical evidence of any recent sexual intercourse or struggle or any injury whatsoever on the prosecutrix.

Not having seen any medical evidence of any injury to the private part or any other part of the body of the prosecutrix in support of the alleged force or struggle that was allegedly used to commit the alleged offence, and not having seen any medical evidence in support of any recent sexual intercourse on the prosecutrix, I reach the conclusion that there is no corroborating evidence, direct or circumstantial in support of the allege rape of the prosecutrix by the accused and this I shall hold as a fact.

In addition, the accused persistently denied the allegations against him. Apart from informing the Court of his sexual inactiveness, the accused also testified of a scheme in village to get rid of him. The evidence of a design to frame him up in the village was never challenged by the prosecution. It is the law that unchallenged and uncontroverted evidence must be regarded as establishing the facts therein ***(ANTOINE BANNA v. OCEAN VIEW***

RESORT LTD (2002-2008) 1 GLR, 1), it is for this reason that I will believe the evidence of the accused that there were plans in the village to frame him up and this I shall hold as a fact. It is also for this reason that I will attach little weight to the evidence of PW2. Even if, I were to believe the evidence of PW2 that the accused locked the door with the prosecutrix inside for long hours, there is no reason why he failed to raise an alarm taking his subsequent interest in the matter, the age of the prosecutrix and the fact that he suspected some wrong doing. These are additional reasons why I will treat the evidence of PW2 with caution.

While the evidence of sexual inactiveness was not supported by any medical report, the expert evidence in ***THE STATE v. SALIFU NJIE*** (supra) confirms that the RVTH does not have the facilities to properly assess the erectile function of a man.

The documentary evidence tendered by the prosecution contradicts the testimony of the prosecutrix in an important way.

When I put together the entire evidence of the prosecution, and when I consider the fact that there is no corroborating evidence direct or circumstantial tending to support the testimony of the prosecutrix of an unlawful carnal knowledge of her by the accused, and when I further consider the fact that the accused gave unchallenged evidence of a plot in the village to frame him up, a cloud of doubts besets my mind whether in the circumstances of this case, the accused could be said to have raped the prosecutrix. The net effect of the foregoing is that I have strong doubts in

my mind whether the prosecutrix was raped or not, talk less by the accused person.

The law is trite that where there is a doubt in criminal trials such doubts must be resolved in favour of the accused ***(QUEEN v. OBIASA (1962) 1 ALL NLR 651)***. I shall therefore hold and resolve these doubts in favour of the accused person and in doing so; I hold that the prosecution has failed to prove its case beyond reasonable doubts that the accused had unlawful carnal knowledge of the prosecutrix.

The law is settled that where the prosecution has failed to prove its case beyond reasonable doubts the accused is entitled to an acquittal (***WOOLMINGTON v. DPP (1935) AC 462)***. In view of the above, I am compelled at this point to discharge and acquit the accused person. The accused person **ALIMAMEH GIBBA** is accordingly discharged and acquitted.

EMMANUEL A. NKEA
JUDGE

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 22nd DAY OF OCTOBER 2012

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REGISTRAR