

**IN THE HIGH COURT OF JUSTICE OF THE GAMBIA**  
**HOLDEN AT BASSE**

**BEFORE HIS LORDSHIP HON. JUSTICE A.E. NKEA**  
**THIS TUESDAY MAY 31<sup>st</sup> 2011**

**CASE NO: HC/629/10/CR/176/AO**

**BETWEEN:**

**THE STATE**

**Vs.**

**SELLU JALLOW**

**Mr. A.M YUSUF - SENIOR STATE COUNSEL FOR THE STATE**  
**MRS. N. NGOZI FOR THE ACCUSED PERSON**

**ACCUSED PERSON IS PRESENT.**

**JUDGMENT**

**SELLU JALLOW**, the accused person herein, was arraigned before this Honorable Court on Monday the 4<sup>th</sup> of April 2011; on a one count charge for haven contravened the provisions of Section 124 of the Criminal Code Cap 10.01 Vol. III Laws of The Gambia, 2009. The prosecution has alleged that on or about the 20<sup>th</sup> day of April 2010 at Bansang in the Central River Region of the Republic of The Gambia, the accused abducted one Mariama Sisawo with the intention of having canal knowledge of her. The accused who was represented by Mrs. Ngozi; learned counsel instructed by the National Agency for Legal Aid, pleaded not guilty to the charge.

The prosecution led evidence through five (5) witnesses and tendered one (1) exhibit; the Cautionary Statement of the accused person, in support of its case. The defense on its part led evidence through the accused person as the lone witness in his defense. The facts of this case are clearly borne out in the testimonies of prosecution witnesses and the accused himself.

One Lamin Tabally, a detective police officer formerly attached to the Bansang Police Station testified in support of the prosecution's case as PW1. His evidence is that, when the accused was brought to the Basang Police Station he was detailed to record the Cautionary Statement of the accused. He invited an independent witness, cautioned the accused, and then proceeded to record his statement. He read over the statement to the accused and the accused thumb printed thereon. This statement was tendered in evidence through this witness and is in evidence as exhibit "A". He was never cross examined by the defense.

Mariama Sisawo, a nursery three kid, gave unsworn evidence as PW2. Testifying in Chambers, she said she does not know the accused and has never seen him before. She can however remember that she was carried on a bicycle sometimes ago by the accused. The accused picked her near their compound gate, took her to the compound of one Nyanga. When she tried to talk after she was picked up by the accused, the accused would beat her with the head of a bicycle pump. When he took her to Nyanga's, he was tapping her on her body. Whilst they got to a junction, a first group came passed them, a second group came, and as they were

passing, that's when the accused was trying to pump up his bicycle. At this point, she ran away and met a lady called Myar Kongira. One Biran came later and joked with her that if she did not tell him what she was doing there, he was going to beat her. At this time another girl called Fatou Sowe pointed a torch at the direction of the accused and they saw the accused taking off his shirt.

Under cross examination, she said it is good for people to tell the truth. It was in the night when she saw the man with the bicycle, but she had never known the accused before. The accused carried her in the front of his bicycle, but when she was put on the bicycle she did not recognize anyone around. Biran and Myar only came afterwards. She is sure that it was the accused who carried her on his bicycle because she had once seen the accused in a fitter shop where bicycles are repaired. He recognized him because he was the one who carried her on his bicycle. She said Myar and Fatou never told her to say this. She knows these facts herself because Myar took the accused to the Police Station.

Testifying as PW3 is one Binta Sowe an age group of Mariama Sisawo. She too gave unsworn evidence and was heard in Chambers. She said she knows the accused and that one evening when PW2 was returning from buying rice, she was pushed and picked up by the accused. She saw PW2 being taken away on the bicycle by the accused. When she saw this, she called PW2's mother, but it was her father who came out and pursued the accused with his own bicycle.

Under cross examination, she said it is good for people to tell the truth, and that it will not be good if people tell lies. This was in the night and the bicycle had a blue color, and the accused was wearing a green shirt. Apart from both of them there was no other person around.

Testifying for the prosecution as PW4 is one Mariama Kongira fondly referred to by PW2 as Myar. She said one day as she was returning from the market she saw the accused standing with PW2 near a fence. Whilst she was in her compound she heard PW2's mother saying that PW2 had been taken away. She told her that she saw PW2 with a man standing near the fence but thought they were coming to the house. The man she saw standing with PW2 is the accused. She then took a torchlight to go for PW2, as she went towards where they were standing, she saw PW2 coming towards the road while the accused was standing behind a mango tree. When she asked PW2 where she was coming from, PW2 pointed and said she was coming from under the Mango tree. PW2 said somebody with a bicycle took her there and led PW3 to where the accused was, and when she put on her torchlight she saw the accused there. The accused was taking off his shirt. The accused took a stone and threw at her and wanted to run away. She was with one Fatoumatta Camara. This was after the 7 pm prayers. The accused ran away into a swamp to somebody's compound. The compound owner took him out and with the help of one man; the accused was taken to the police.

Under cross examination she said she is related to PW2 as her cousin. She had never seen the accused before seeing him that day with PW2. She

said she thought that the accused was taking PW2 home because many Fullas come to visit PW2's father regularly. PW2 did not tell her anything when she was passing and she did not speak to PW2. She did not speak to the accused either. It was already dark when she saw them. She identified the accused and he was wearing a white shirt. The accused was standing under a small mango tree and she could not possibly recognize him in that condition. She can not remember the color of his bicycle but she realized in the police station that the bicycle was rusty.

Under re-examination, she said she looked at the accused carefully and recognized him very well.

One Fatoumatta Camara, a student testified for the prosecution as PW5. She first saw the accused when they went looking for PW2 who had been taken away by the accused. When PW2 heard their voices as they were looking for her, she came out running. They asked her where she was coming from and she said pointed at the direction of the accused saying "the man who took me with a bicycle is over there..." under the mango tree. They went towards the accused and found that he was wearing a white shirt. They shouted and the accused began removing his shirt. The accused threw a stone at them. It was past 7 pm and she could not recognize the accused. He was arrested by some boys from the compound he ran into and was taken to the police station immediately thereafter.

Under cross examination she said she was not there when PW2 was taken away but heard people shouting that someone with as bicycle had taken PW2 away. They found PW2 in an empty piece of land without a fence,

but with some mango trees and PW2 was coming from the area with the mango trees. The accused was about 20 meters away from them and he ran through a broken fence into a street called Mauritani. She now says there was a fence where they found the accused and that when they initially saw the accused, they were only two of them, but were later joined some boys from the neighborhood. As they ran after the accused she did not have a complete focus on him, but it was not a wrong person who had been arrested. He was wearing a white shirt.

It was at this point that the prosecution elected to close its case. The defense elected to lead sworn evidence in rebuttal to the charge which is sufficiently reflected in the testimony of the accused.

According to the accused, he lives in Bansang and is a tyre-man. He said on that fateful day, as he was returning home from work, he met a crowd. The crowd began throwing stones at him shouting thief, thief. He ran into somebody's compound and they followed him there. He ran into the compound because the crowd was shooting him with stones and he needed to protect himself. After he was arrested the crowd informed him that PW2 was missing and he was the one who had taken her away on his bicycle. He was taken to the police station. Before he was arrested he was on the road pumping his bicycle. The prosecution witnesses who testified in this case were amongst those who were chasing him. He told the crowd and the police that he was not the one who carried PW2 on his bicycle. He did not take any little girl into the bush. Exhibit "A" is a direct replica of the viva voce evidence of the accused.

Under cross examination he said he did not take PW2 into the compound he ran into. He did not take anybody to any house. He does not know why the crowd was shouting and running against him.

The defense elected to close its case at this point and both counsels waived their right to address this Court thus paving the way for this judgment.

Section 124 of the Criminal Code reads *“A person who, with the intent to marry or carnally know a woman of any age, or to cause her to be married or carnally known by any other person, takes her away , or detains her, against her will, commits a felony ...”* I have carefully looked at the wordings of Section 124 of Criminal Code and it appears to me that for the prosecution to succeed to ground a conviction for the offence of abduction, the following essential elements must be established: *(a) that a girl/woman was forcefully taken away or detained by the accused and (b) the accused did so with the intention of him-self or someone else, to carnally know or marry her.* While (a) constitutes the *actus reus*, (b) constitutes the *mens rea* of the offence under charge. It is settled law that the prosecution can establish these elements by direct or circumstantial evidence, but in either case, it must be beyond reasonable doubts.

I shall begin this part of the judgment by first setting out the issues that are not in contention. First, it is not disputed that PW2 was taken away by a man with a bicycle. It is also not disputed that PW2 was later met on the road by PW4. It is further not in dispute that the accused was later

arrested by a mob and taken to the police station in Banssang where he denied the allegation against him. On the other hand whilst the prosecution witnesses assert that it was the accused who took PW2 away, the accused has vehemently denied this allegation.

Generally in criminal cases and indeed, as in this case, the crucial issue is not ordinarily whether or not the offence was committed. More often than not, the controversy is about the real identity of the perpetrator. Identification evidence therefore tends to show that it was the accused person who was seen committing the offence. In the Nigerian Supreme court case of *NDIDI V. THE STATE (2007) 30 SCQR 395* the Court held that in order to determine the identity of the accused as the perpetrator of the offence, the following issues must be taken into consideration: (a) circumstances in which the eye-witnesses saw the suspect, (b) the length of time the witnesses saw the suspect, (c) the lighting conditions, (d) the opportunity of close observations and (e) the previous contacts between the two.

The facts of this case show that the incident occurred well after 7 pm in the evening when it was already dark. The accused person in his Cautionary Statement to the police said he was arrested between the hours of 8 and 9 pm in the evening. This evidence which was never challenged is taken as settled. All the witnesses testified that it was already dark. From these pieces of evidence I am convinced that the state of light at the *locus criminis* was very poor and this I shall hold as a fact.



Whilst PW2 said she had once seen the accused near a fitter shop where bicycles are repaired; the prosecution did not lead any evidence of close observation to support the assertion that the person PW2 purportedly saw in the place where bicycles are repaired was the accused. This piece of evidence is made all the more doubtful by the unchallenged evidence of the accused, as contained in exhibit "A", that, he is a tire-repairer.

The crucial issue which has turned out to be the lone issue for determination in this trial is - who took PW2 away on a bicycle?

While PW3 gave evidence that the man who took PW2 away was wearing a green shirt on that day; there is abundant evidence on record that when the accused was arrested on that day, he was wearing a white shirt. Whilst PW2 said the bicycle used by the man who took her away on that day was blue in color; PW4 said the bicycle they saw with the accused was rusty. Suffice to say that when iron rod gets rusty it takes a kind of brownish color. Can I be tempted for once to believe that the person who was wearing a green shirt and had a blue bicycle could still be the accused who wore a white shirt and had a rusty bicycle? This is a fundamental source of doubt as far as it relates to the recognition of the accused as the perpetrator of the offence. The whole circumstances of this case, in my view, put the recognition and identity of the accused person in issue.

Again, while PW3 says she called on PW2's mother but it was her father who came out and chased the culprit with his own bicycle; PW4 said she was alerted by PW2's mother and she (PW4) explained to her how she had

seen PW2 with someone near the fence. Nothing is ever said again of PW2's father who had gone in chase of the culprit. Nothing is also said again about PW2's mother. One would have expected PW2's mother, in the natural flow of things to be on the spot with PW4. The evidence of PW4 is loaded with a lot of doubts. For example she would see her little female cousin with a man she has never seen before at that dark hour in the evening and pass without much ado? Is this piece of evidence convincing? I think it is not and this I shall hold as a fact.

Furthermore, the prosecution did not lead any evidence of PW4 having a torchlight in her possession when she alleged to have first seen PW2 and the accused near the fence. How then was she able to recognize the accused when it was already dark and she did not have the opportunity to closely observe the accused? I think she would not have been in the position to properly recognize the person she saw standing near the fence, and this I shall also hold as a fact.

Again, PW4 can remember having seen the accused in the market before. Perhaps, it is important to say that except a person has had a special encounter with some one he is meeting for the first time in a market place; it may not be an easy thing to easily identify this person subsequently. The prosecution did not lead any evidence of close observation to support the assertion that the person PW4 purportedly saw in the market was the accused. I do not think that I believe the evidence of PW4 at all. She is not a credible witness in my view as her entire evidence leaves more questions than answers. I therefore doubt the

credibility of the evidence of PW4 as she appears to me a total stranger to the accused.

The evidence led by the prosecution was fraught with further contradictions. For example, while the other witnesses all said the accused ran into a nearby house, which PW2 referred to as Nyanga's residence, PW5 said the accused ran across a swamp into a street called Mauritani. This piece of evidence leaves me with the impression that whilst the accused ran into Nyanga's residence some other person ran into Mauritani Street. What this piece of evidence has created in my mind is that the person whom PW5 said she saw running into Mauritani Street could as well be the person wearing a green shirt and having a blue bicycle. My mind is further clouded with doubts!

PW2 and PW3 who were purportedly the only persons around when PW2 was taken away are all kids under the age of 10 years. The evidence of these two kids is contradicting at several points. Whilst PW2 said she was alone when she was picked up by the man with a bicycle, PW3 said she was with PW2 and was the person who ran home to alert PW2's parents. So what value should I attach to the evidence of these two kids? In *UCHE V. REX (2006) 2 LC 758* the Appellant was acquitted by the Court because, the trial judge in the Court below failed to warn the jury on the nature of the evidence of children of tender years. I would have warned myself on the weight to be attached to the evidence of these children, but I recalled that their evidences were received in terms of **Section 185 of the Evidence Act**. The proviso to **Section 185 (2) of the Evidence Act**

warns that, the accused shall not be liable to be convicted unless such evidence is corroborated by some material evidence in support, thereby implicating the accused. See the Gambian Court of Appeal case of *LAMIN NICOL V. THE STATE CRIM APP. 1/80 (UNREPORTED)*. The evidence of these two witnesses apart from being poles apart was never also corroborated by any other material piece of evidence.

In the Gambia Court of Appeal case of *BOJANG V. THE STATE (1997-2001) GR 98*, the Court stressed the need to approach evidence of identification with caution, and stated that recognition by a person who knows the other may be more reliable than identification of a stranger. The evidence on record is that all the prosecution witnesses were strangers to the accused.

At this stage, I am convinced that the evidence led by the prosecution does not sufficiently identify and point to the accused as the perpetrator of the offence and this I shall hold as a fact. Therefore, the *actus reus* of the offence under charge has not been established by the prosecution and this I must also hold as a fact. Since the prosecution has failed to establish the *actus reus* of the offence under charge, it would be worthless and will amount to an exercise in futility if I try to venture into issues of the *mens rea*. What this means is that, I have a cloud of doubts in my mind whether or not it is the accused person who committed the offence under charge.

It is the law that once the prosecution fails to establish the *actus reus* of an offence such as the instant case, and where there are doubts in the

mind of the Court as to whether or not it is the accused who committed the offence, such doubts should be resolved in favor of the accused. I shall therefore give the benefit of doubts to the accused person. The accused, in my view, should be discharged and acquitted and this is what I must do now. The accused person, **SELLU JALLOW** is accordingly discharged and acquitted.

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**HON. MR. JUSTICE A.E NKEA**  
**HIGH COURT JUDGE**  
**31/05/2011**

Mr. YUSUF: My Lord, as a matter of policy, we wish to give oral notice of our intention to appeal the acquittal of the accused. We apply under Section 285 (e) of the CPC for the accused who has just been acquitted to be remanded in custody.

Mrs. Ngozi: With respect to the application made by the learned Senior State Counsel, we will be relying on Section 285 (e) (2) of the CPC to urge Your Lordship to admit the accused to bail and or allow him to continue on his bail. We also urge Your Lordship to make the necessary orders pursuant to Section 285 (e) (4) of the CPC.

### **FURTHER ORDERS**

Having listened to the learned Senior State Counsel and having also listened to learned defense Counsel, I shall further Order as follows:

(a) That SELLU JALLOW is allowed to continue on his existing bail pending the appeal to be filed by the State pursuant to Section 285 (e) (2) of the Criminal Procedure Code.

(b) That while on bail, SELLU JALLOW shall report every Monday to the Janjanbureh Police Station.

(c) Pursuant to Section 285 (e) (4) these orders shall be deemed quashed if the Petitioner fails to file their Notice and Grounds of Appeal within 30 days.

(d) These orders to be carried out forthwith.

(e) There shall be no further Orders.

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MR. JUSTICE E.A. NKEA  
HIGH COURT JUDGE  
31/05/2011