IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDEN AT BANJUL
CRIM CASE No: HC/566/11/CR/173/AO

BETWEEN:

THE STATE **COMPLAINANT**

AND

SANNA KAH **ACCUSED PERSON**

MONDAY 25 FEBRUARY 2013
BEFORE HON. JUSTICE EMMANUEL A. NKEA

ACCUSED PERSON PRESENT
MRS N.I. JAWARA FOR THE STATE PRESENT
MRS O. UDUMA AND N. GBUJI FOR THE ACCUSED PRESENT

JUDGMENT

Upon a bill of indictment dated and filed the 8th February, 2012, the prosecution has alleged that on or about the 2nd day of November, 2011, at Lamin Village, in the West Coast Region of The Gambia, the accused person herein had unlawful carnal knowledge of one SICILIA JARJUE, a 10 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 eight (8) witnesses and six (6) exhibits tendered in support of its case while the accused led sworn evidence as the lone witness in his defence.

The prosecution's case is that on or about the 2nd day of November 2011, one Dusu Nyang (PW1) noticed the prosecutrix moving on the nearby street with her inner pants in hand, bleeding with blood stains all over her body. PW1 called the attention of her neighbor Juliet (PW3) who identified prosecutrix as a neighbor living behind her house. The prosecutrix was taken to her mother and thereafter they traced the drops of blood up to the door of a room said to be occupied by the accused. The accused was arrested and matter reported to the police. The prosecutrix identified the accused to them as the person who ravished her. During the investigations, the prosecutrix was made to see a Doctor who examined her and issued a medical report exhibit "B".

The accused denied the charge both in his recorded statements to the police and in his testimony before this Court. He maintained that he has been framed up by PW4 as a result of a dispute arising from his refusal to allow PW4 establish an amorous relationship with one Fatou a married lady living in the same compound with the accused. He thus denied the charge thereby putting in issue all the essential ingredients of the offence of rape.

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

Under section 121 of the Criminal Code, the essential elements of rape which have to be proved beyond reasonable doubt are:

(a) that there was unlawful sexual intercourse involving the prosecutrix;

(b) that the prosecutrix could not or did not consent; and

(c) that the accused participated in the unlawful sexual intercourse.

These ingredients may be established by either direct or circumstantial evidence or upon the confession of the accused person himself (***AHMED v. THE NIGERIAN ARMY (2011)1 NWLR 89).***

In the instant case, there was no eye witness account of the alleged rape, thus eliminating all the prospects of any direct evidence in support of the indictment. The prosecution therefore relied heavily on circumstantial evidence in prove of the offence. Although I agree that circumstantial evidence is very often the best evidence, in that it is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics, I also agree that circumstantial evidence must be narrowly examined so that a possibility of fabrication to cast suspicions on an innocent person is ruled out.

To be sufficient to support a conviction in a criminal trial, circumstantial evidence must be complete and unequivocal. It must be compelling and must lead to the irresistible conclusion that the accused and no one else is the culprit. The facts must be incompatible with the innocence of the accused and incompatible of explanation upon any other reasonable hypothesis than that of his guilt particularly as all doubts must be resolved in favour of the accused.

I must state at this point that the prosecutrix is sick of the voice and ear and cannot speak freely – a kind of dumb she is. She looked mentally and

physically unstable. She is a pupil at the St John School for the Deaf and Dumb. She could not lead any concrete evidence even with the aid of her teacher and mother.

As far as the first element of the offence is concerned the law is that where there was no eye witness account of the alleged sexual offence, the Courts can rely on circumstantial evidence to resolve the issue. Such evidence could include amongst others, medical evidence of the examination of the prosecutrix confirming the allegation of recent forcible coitus ***(OGUNBAYO v. THE STATE (2007) 8 NWLR (Pt. 1035).*** It is clear from the Medical Report - exhibit "B" and the testimony of PW1, PW2 and PW3 that the prosecutrix was sexually manhandled. She was seen with her inner pants in hand with blood stains all over her body. There was therefore sufficient corroboration in support of the alleged sexual intercourse; as such the provisions of section 180(2) of the Evidence Act have been satisfactorily complied with. The conclusion I reach from these facts is that the prosecutrix was sexually assaulted and this I shall hold as a fact. I therefore resolve the first element in favour of the prosecution.

The undisputed age of the prosecutrix was put at 10 years only. At this age and with her physical and mental condition; the prosecutrix could not have consented to that particular sexual activity. This is the conclusion I must reach on this issue and in doing so I hold that the prosecution has proved the first two elements of the offence charged beyond reasonable doubts and this I shall again hold as a fact.

From the foregoing, it now seems to me that the only issue that stands out for determination in this case, is ***whether the accused had sexual intercourse with the prosecutrix***?

The prosecution in urging me to answer this question in the affirmative; has placed heavy reliance on the blood drops that were traced to the door of a room said to be occupied by the accused. The accused in denying the charge, testified that he does not live in the compound but rather watches over the property in the night. He does not have a room of his own there but watches the property from a bench outside the door. He goes to the farm everyday; including the date in question and only returns by 4 pm as such he could not have been the person who sexually assaulted the prosecutrix if at all she was raped there.

The first issue that was raised by the evidence adduced by the prosecution is the identification of the accused by the prosecutrix as the person who defiled her. Although the prosecution witnesses all conceded that there was no Identification Parade conducted in line with the TUMBUL GUIDELINES; and this was a fit case for an identification parade, the ability of the prosecutrix to properly identify her assailant was seriously damaged and discredited when the prosecutrix was asked in Chambers to identify her assailant and she pointed at the Judge (that is my humble self). From this, I reached the conclusion that the prosecutrix could not have properly identified the person who ravished her and this I shall hold as a fact, and is doing so I will not rely on this piece of evidence in favour of the prosecution. This raises doubts in my mind as to who the real culprit is,

this doubt must be resolved in favour of the accused and that is the law ***(QUEEN v. OBIASA (1962) 1 ALL NLR 651)***.

The second issue that was raised by the evidence on record is whether the accused was the occupant of the room that had the blood drops at its door. The accused maintained throughout the trial that he was not the occupant of that room or any other room in that property. From these denials it seems that Fonday Sonko; the owner of the property was a material witness whose evidence could have settled this crucial issue one way or another. However, the prosecution did not find it necessary to list or 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, and the failure of the prosecution to call such a witness means that I cannot reach the conclusion whether the accused was the occupant of that room or not and that is the law ***(MBALLOW V. THE STATE (1960-1993) GLR 437).***

As such the evidence that the accused does not occupy any room in that property was never sufficiently challenged. It is the law that unchallenged and uncontroverted evidence must be regarded as establishing the facts alleged ***(ANTOINE BANNA v. OCEAN VIEW RESORT LTD (2002-2008) 1 GLR, 1***). The prosecution therefore failed to proof that the accused was the occupant of the room and this I shall hold as a fact. And for these reasons, I reach the conclusion that the accused was not the occupant of the room where the alleged rape occurred.

The third issue is whether there were semen or blood stains on exhibits C-C1 traceable to the prosecutrix and or the accused. Where an accused person has denied the allegation of rape, the evidence that the Court must look for, is for instance semen or blood stains on the clothes of the prosecutrix 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)***. The evidence adduced by the prosecution is that, when PW1, PW2, PW3 and PW4 traced the blood to the door of the house they immediately formed the opinion that the rape was committed inside the room and not outside. Exhibits C-C1 is a bed sheet and a red inner pant said to belong to the accused that were recovered from the crime scene.

Although I could not confirm the presence of any semen or blood stains when I examined exhibits C-C1; there was also no forensic examination of these exhibits to confirm the presence of any semen traceable to the accused and or blood stain traceable to the prosecutrix. As such there are doubts whether there were any semen or blood stains on exhibits C-C1. These doubts must be resolved in favour of the accused and that is the law ***(QUEEN v. OBIASA (1962) Supra)***.

In addition, all the witnesses who testified for the prosecution said they never opened the door to the room where the alleged rape took place. It is therefore doubtful how exhibits C and C1 believed to have been retrieved from the crime scene were obtained when all those who testified said they did not open the room into the house. Exhibits C-C1 are therefore of doubtful origin and this I shall hold as a fact. It is for these reasons that I

will not attach any weight to exhibits C-C1. In the circumstance, I cannot therefore rely on these exhibits to connect the accused to the offence under charge.

Furthermore, the accused persistently denied the allegations against him. Apart from informing the Court that he is not the occupant of the room where the alleged rape took place, the accused also testified of a scheme by PW4 to get him into trouble. The evidence of a design to frame him up by Pierre Mendy PW4 made some sense in light of the evidence on record. For example; while PW1, PW2 and PW3 testified that the prosecutrix was given a clean bath by her mother before being taken to trace the blood drops; Pierre Mendy who joined them on the way still talked of seeing the prosecutrix with blood stains all over her body. It makes him look in the face of the Court as a naked liar whose evidence could not be believed at all. And I do not believe his evidence at all.

Therefore, while it seems very clear that the little CECILIA JARJUE was seriously ravished, and that there were strong suspicions that the accused could have been the culprit; there was no concrete evidence linking up the accused with the crime. It must be emphasized here that while reasonable suspicion is a ***sine qua non*** for criminal investigations and prosecutions, it can never found the basis for any conviction, no matter how strong the suspicion may be ***(IKO v. THE STATE (2001) 14 NWLR (Pt. 732), 221).*** From the foregoing, I find that prosecution failed to link offence committed to the accused with the certainty required by law. As such the prosecution failed to prove the last element of the offence.

It is trite law that the prosecution must prove beyond reasonable doubt each and every essential ingredients of the offence charged before a meaningful conviction can be secured (***MOMODOU JALLOW v. COMMISSIONER OF POLICE (1960- 1993) GLR 39 and WOOLMINGTON V DPP (1953) A.C. 462).***

The charge was therefore not proved beyond reasonable doubts. 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 (SUPRA))***. In view of the above, I am compelled at this point to discharge and acquit the accused person. The accused person **SANNA KAH** 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 25TH DAY OF FEBRUARY 2013

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REGISTRAR