

IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDENT AT BANJUL
CRIM. CASE No HC/069/12/CR/026/AO

BETWEEN:

THE STATE

COMPLAINANT

Vs.

OUSMAN BALDEH

ACCUSED PERSON

FRIDAY 21 DECEMBER 2012

BEFORE HON. MR. JUSTICE EMMANUEL A. NKEA

ACCUSED PRESENT

MRS. N.I. JAWARA FOR THE STATE PRESENT

MRS. N. GBUJI FOR THE ACCUSED PRESENT

JUDGMENT

OUSMAN BALDEH is indicted on a charge of rape contrary to section 121 and punishable under section 122 respectively of the Criminal Code, Cap. 10:01 Vol. III, Revised Laws of The Gambia, 2009. The State has alleged that on or about the 1st day November 2011, at Sanchaba Touba in The Gambia, the accused had unlawful carnal knowledge of one **SIRAJO JALLOW** a nine year old girl without her consent.

The accused pleaded not guilty to the offence.

The prosecution called seven (7) witnesses and tendered three (3) exhibits in support of the indictment. The accused testified as the lone witness in his defence and tendered one exhibit.

The prosecution's case is that on or about the 1st day of November 2011, PW4 over heard the prosecutrix telling the accused to leave her. This was in the accused person's room. PW5 entered the room where she met the accused on the prosecutrix. She alerted other neighbors. The accused then ran out into the toilet. She observed the child and found some slippery water on her. The child was later examined at the RVTH and exhibit "B" issued. The accused was later arrested and statements recorded from him. These statements were received in evidence as exhibits 'A' and "C'.

The accused denied the allegations both in his statements to the police and in his evidence before this court. In his defence the accused stated that while doing some laundry that day, he needed to get some more soap and so sent the prosecutrix to get the soap for him. As the prosecutrix was returning from the shop she fell onto the ground and he assisted to lift her up. PW4 then came to the scene and raised concerns. In his cautionary statement he said he went into the room to get some money for the soap without noticing that the prosecutrix was behind him. When he turned he mistakenly pushed the prosecutrix to the ground. PW4 came in when he was assisting the prosecutrix to get up.

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*).

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*).

Having carefully read through the submissions of both sides and having also carefully considered the totality of evidence adduced before this Court, it seems to me that only one issue stands out for determination in this case, and that is, *whether the accused had sexual intercourse with the prosecutrix?*

I now attempt an answer to this case by looking at the evidence on record. There is the eye witness account of the alleged rape by PW4. The evidence of the prosecutrix though unsworn is similar in material particulars with that of PW4. On the evidence, I found as a fact that upon medical examination of the prosecutrix on the 2 November, one

day after the alleged rape **SIRAJO JALLOW** presented with a partial breaking of the hymen.

Although the examining Doctor said she could not authoritatively confirm rape, she however did not rule out that possibility. The important and essential ingredient of the offence of rape is penetration. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. The slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. Proof of full rupture of the hymen is unnecessary to establish the offence of rape (*OGUNBAYO v. THE STATE (2007) 8 NWLR 157*). The partial breaking of the hymen is sufficient evidence supporting the fact of sexual assault. I therefore find as a fact that the prosecutrix was sexually assaulted.

I believe the evidence of PW4, which has to a large extent been corroborated by exhibit C. The sworn evidence of the accused did not persuade me at all. Rather, his statement in exhibit C tallies with the other pieces of evidence in this matter. In exhibit C, the accused states how he accidentally fell on the prosecutrix. That sounds like a ferry-tale to me. I believe that PW4 met the accused on the prosecutrix and that the injury on the hymen of the prosecutrix was caused by that act of the accused.

This sequence of events establishes a clean nexus between the accused and the act. I am therefore satisfied that the accused had unlawful sexual intercourse with **FATOU TOURAY** and this I shall hold as a

fact. The first and third ingredients of the offence have therefore been satisfactorily established by the prosecution.

On the second ingredient, it is obvious that the prosecutrix was too tender to consent to any form of sexual activity. She accordingly could not and did not give her consent to that sexual activity and this I shall again hold as a fact.

From the foregoing, I reach the conclusion that the prosecution has proved its case with the certainty required by law. The accused person **OUSMAN BALDEH** is found guilty and accordingly convicted as charged.

EMMANUEL A. NKEA
JUDGE

PREVIOUS CONVICTION:

COURT: You have now been found guilty of the offence of rape contrary to section 121 and punishable with up to life imprisonment under section 122 of the Criminal Code. Before sentence is passed on you, do you or counsel on your behalf have anything to say in mitigation?

ALLOCUTUS:

SENTENCE

The Convict is a first offender. He is becoming a middle aged man of about 40 years old. His Counsel has told court that he has been remorseful. She asked for leniency from court. The convict himself told court that he has family responsibilities; he has relatives to look after. He asked for a short sentence. He confirmed that he is a first offender. These are reasons for mitigation on your behalf.

However, as I am moved to show leniency, I recall that the offence he committed carries a maximum sentence of Life Imprisonment. The circumstances under which the crime was committed must be considered in order to tailor sentence to the merits of the offender and offence.

The circumstances in which he committed the offence are so grave because he is a brother to the victim's father. He ravished a very small child fit to be his old child and who looked up to him as a dad. The age difference is very big. The victim could not even understand the impact. Some day in future she will know. There was no respect for

such a small child to introduce her to such stigma. This kind of offence is abhorrent. The convict very well knew the father of the victim. He knew that he would continue to live and interact with the victim and her parents in the future. He did not care how traumatizing it would be to the victim and her parents.

I consider the convict's conduct a beastly display of his manhood. It was a very selfish way of satisfying his greed for sex. The convict was real danger to the women and girls in that neighborhood. The victim suffered a lot of indignity at that very tender age and more so from a person that ought to show her love and protection. It is people like the convict who should be kept away from society for some time.

The offence of rape is so rampant in this country. I shall pass a deterring sentence. The convict is sentenced to 25 years imprisonment.

EMMANUEL A. NKEA
JUDGE

**ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND
THE HAND OF THE PRESIDING JUDGE THIS 21 DAY OF
DECEMBER 2012**

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REGISTRAR

