IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDEN AT BANJUL
CRIMINAL CASE No: HC/515/12/BK/029/D1

BETWEEN:

THE STATE **COMPLAINANT**

AND

MOMODOU CAMARA **ACCUSED PERSON**

MONDAY 15 APRIL 2013
BEFORE HON. JUSTICE EMMANUEL A. NKEA

ACCUSED PERSON PRESENT
Ms. N. JALLOW FOR THE STATE PRESENT
Ms. N. GBUJI FOR THE ACCUSED PRESENT

JUDGMENT

MOMODOU CAMARA is charged with the offence of rape contrary to section 121 of the Criminal Code Cap. 10 Vol. III Revised Laws of The Gambia 2009. It has been alleged by the prosecution that on or about the 22nd day of September 2012 at Tanjeh, in the West Coast Region of The Gambia, the accused had unlawfully canal knowledge of Hassanatou Sowe a four (4) year old girl without her consent. The accused pleaded not guilty to the charge.

The prosecution's case is that on or about the 22 of September, 2012, the prosecutrix ran to her mother (PW2) crying and pointing at her private organ and saying the accused gave her a piece of bread and

then fell on her and had sexual intercourse with her. PW2 examined her and found some slippery substance believed to be sperms in her. She called in some neighbors and the accused was confronted and later arrested by the police. During investigations, the prosecutrix was examined and a medical report - exhibit "A" issued.

In his defence the accused stated that on that fateful day, he closed from work at about 3 am and because it was too late he decided to stay the night at the bakery where he works. As he was washing his face the next morning, PW2 came to the bakery and confronted him asking him what he had done to the prosecutrix. He denied raping the prosecutrix or giving her bread. He was nevertheless arrested and charged.

The law on rape requires the prosecution to prove beyond reasonable doubts (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 (***MOMODOU JALLOW v. COMMISSIONER OF POLICE (1960- 1993) GLR 39 and WOOLMINGTON V DPP (1953) A.C. 462).*** And the law is also settled that the prosecution may rely on either direct or circumstantial evidence or upon the confession of the accused person himself to establish these elements (***AHMED v. THE NIGERIAN ARMY (2011)1 NWLR 89).***

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.

Having carefully read through the various submissions 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***?

The element of penetration is the most important and essential determinant of sexual intercourse. And the law is that sexual intercourse is deemed complete upon proof of penetration only. And the law is also settled, that 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 still be sufficient to constitute the crime of rape. Proof of a ruptured hymen is

therefore unnecessary to establish the offence of rape ***(OGUNBAYO v. THE STATE (2007) 8 NWLR 157)***.

Now, the accused made two statements to the police; the one was a pure confession of the offence of rape, but was rejected by the Court because of non compliance with the mandatory provisions of section 31(2) of the Evidence Act. The statement not having been recorded or read back to the accused in the presence of an Independent Witness as required by law. The other was an admission which was admitted in evidence for what it is worth.

Having referred myself to section 180 (2) (a) of the evidence Act on the need for corroboration in sexual offence cases, and having further reminded myself that the only direct evidence before the Court is the evidence of the child witness; which equally requires corroboration, I have noted that the prosecutrix could not complete her oral testimony before the Court as she became too shy at one point to further her testimony. Her evidence was therefore, not tested. And the law is that a Court cannot rely on the untested evidence of a witness. I accordingly discard the evidence of the prosecutrix in its entirety.

The absence of the victim's evidence may not be necessarily fatal to the prosecution case as an accused can be convicted of the crime based on the testimony of witnesses other than the victim. Her inability to testify therefore, should not absolved the offence where there is credible evidence to support the commission of the crime.

And there was evidence from PW2 who initially examined the prosecutrix and said to have found some slippery substance in her. This she believed to be sperms. It was to her that the prosecutrix had complained of the alleged sexual intercourse. She confronted the accused immediately and then called in the police. The prosecutrix was medically examined three days later and although the hymen was still intact and no injuries were found; there was however evidence of genital fondling. From the peculiar circumstances of this case, and although PW2 is not a medical officer, I have considered her age and the fact that she has mothered several children, and it now seems to me that she was right to say that slippery substance which she found in the prosecutrix was sperms.

Now, the defence has mooted that the vagina injury on the prosecutrix could have been sustained when her mother examined her. It is unthinkable, that the mother of the prosecutrix could have fondled with the genital of her own daughter to that extent only to pin down the accused. There was no evidence of any grudge between them, so that there was nothing PW2 stood to gain from it. I am therefore, not persuaded the least by this piece of submission. I reject it.

Rather, the accused had admitted in his voluntary statement–exhibit "B" that he placed his penis into the vagina of the prosecutrix. When I relate this piece of evidence with the testimony of PW2 and the medical findings in exhibit "A", I immediately reach the conclusion that there is sufficient corroboration of sexual intercourse. And I now hold as a fact that the prosecutrix was sexually assaulted.

The sequence of events in this case establishes a clean nexus between the accused and the act. The victim was not the wife of the accused and no justification has been advanced, neither have I seen any on record to suggest that the sexual intercourse was a lawful one. I therefore hold that the sexual intercourse was unlawful and this I shall again hold as a fact.

The first and third elements of the offence have therefore been satisfactorily established by the prosecution. I resolve same in favour of the prosecution.

It is so obvious that the prosecutrix at the age of four (4) 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. The prosecution therefore also proved this fact beyond reasonable doubts.

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

EMMANUEL A. NKEA

JUDGE

PREVIOUS CONVICTION: Nothing Known

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?

SENTENCE

Having listened to the plea for leniency by counsel on behalf of the convict, I agree that the convict is a first time offender. However, the offence he committed carries a maximum sentence of Life Imprisonment. The circumstances in which he committed the offence are so grave because he ravished a very littler child who could not even understand the impact of the act and he did not care how traumatizing it would be to the victim and her parents. And when some day in future she knows, it may stigmatize her for the rest of my life.

This is a beastly display of manhood and a very selfish way of satisfying greed for sex. The convict therefore is a real danger to the women and girls in that neighborhood. It is people like the convict who should be kept away from society for some time. I shall pass a deterring sentence. The convict is sentenced to 20 years imprisonment.

EMMANUEL A. NKEA
JUDGE

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 15 DAY OF APRIL 2013

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REGISTRAR