IN THE HIGH COURT OF THE GAMBIA
SPECIAL CRIMINAL DIVISION
HOLDENT AT BANJUL
CRIM. CASE No HC/414/11/CR/130/AO

BETWEEN:

THE STATE **COMPLAINANT**

Vs.

MOHAMMED SAMBOU **ACCUSED PERSON**

MONDAY 28 MAY 2012
BEFORE HON. MR. JUSTICE EMMANUEL A. NKEA

ACCUSED PRESENT
MR. S. H. BARKUN (DPP) FOR THE STATE PRESENT
MRS. L. OGBEDO FOR THE ACCUSED PRESENT

JUDGMENT

MOHAMMED SAMBOU is indicted with two counts of criminal offences contrary to sections 121 and 272 respectively of the Criminal Code, Cap. 10:01 Vol. III, Revised Laws of The Gambia, 2009. The particulars of offence alleged in count one that the accused raped one MAIMUNA LAMIN at Bijilo Village on the 15 May 2011. The accused is alleged in count two to have used actual violence, at the same place and time, to rob the said MAIMUNA LAMIN of her Ericson mobile phone.

The accused pleaded not guilty to the offences on the 1st of November 2011. The prosecution called four (4) witnesses and tendered two (2)

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 15 of May 2011 the prosecutrix (PW1), a 20 year old girl boarded a taxi from Serrekunda to Bakoteh at about 9 p.m. The accused was the driver of the said taxi. At Bakoteh, the accused changed course towards Manjai. The prosecutrix screamed for help but was given a knock on the left eye by the accused who also threatened to kill her if she continued to shout. As the prosecutrix continued to scream the accused threatened to let loose of the car and actually did so twice. Seeing that the accused was serious with his threats, the prosecutrix kept quite. The car was driven into a nearby bush at Bijilo where the accused took off her clothes, beat her on the ribs, bit her on the lips as he tried to forcefully kiss her, and unsuccessfully tried to rape her. The accused continued with the prosecutrix in his car to another area where he forced her into the back seat of the car. The prosecutrix was very weak at this time and it was on this second occasion that the accused succeeded in having sexual intercourse with her. After he finished with her the accused took her mobile phone, abandoned her at that point and drove off. The prosecutrix however managed to record the number of the vehicle as 6139. She was rescued by another driver who took her to PW3 and later to the police station. She was taken to the Kanifing Hospital by the police but was referred to the Royal Victoria Teaching Hospital where she was examined and treated. The medical report issued at the RVTH is in evidence as exhibit "B".

About three days later the prosecutrix spotted the car in which she was raped at the Tipper Garage in Bakoteh. She stopped and boarded the taxi and later hired the taxi to the Brusubi police station where she alerted the police. The person (PW2) driving the taxi this time was not the accused. However, PW2 helped the police to identify and arrest the accused. The Ericson phone was recovered from the accused after his arrest. This phone is in evidence as exhibit "A". Suffice to state here that the statements recorded from the accused by PW3 were rejected in evidence on grounds that they were obtained after the accused was beaten by the police.

On his part the accused denied the charge. He referred to the prosecutrix as a prostitute who hired his services as a taxi man on that fateful day. He picked her from City Pop in Serekunda to Bakoteh but at some point around the Serrekunda intersection to Bakoteh, the prosecutrix asked the accused to drive her to Super Bar at the Brikama Highway. They agreed on an additional charge. At Supper Bar the prosecutrix waited more than expected but later joined to Bakoteh. On their way to Bakoteh the prosecutrix informed him that she lost all the money she had in her bag. The accused refused to receive payment in kind or allow her till the next day to pay but decided to drive off to the police. The prosecutrix attempted to escape from the moving car but was held on her dress by the accused. As he continued to drive, the prosecutrix held on the steering wheel and his hands diverting the car towards some onlookers. The accused only regained control of the car after giving the prosecutrix some blows on her hands. At that point the prosecutrix succeeded to get out of the car; he threw out her plastic bag

to her and because a group of about three boys were approaching him aggressively he then drove off. He wanted to drive to the police but saw a pregnant woman by the side of the road that he took to the hospital. One of the ladies with the pregnant woman picked up a phone at the back seat and gave to him. This phone is exhibit "A". He went to City Pop several times to hand over the phone to the prosecutrix but did not find her there.

At the close of the hearing, both sides filed written briefs of arguments.

In his brief of arguments, Mr. Udombi, the learned state counsel conceded to the need for corroborative evidence in sexual offence cases under section 180 of the Evidence Act, but argued that while there is corroboration in the instant case, the statutory requirement of corroboration in rape cases should be considered as unconstitutional as it discriminates against women qua women. In support of this head of argument learned counsel referred the court to the Uganda Court of Appeal case of ***BASOGA PATRICK v UGANDA (Cr App 42/2002)***. Learned counsel further submitted that there was strong circumstantial evidence from which the court could infer the commission of the offences.

Mrs. Ogbedo of learned counsel for the defence submitted that there is need for the evidence of PW1 to be corroborated, but that there was no such corroboration. Learned Defence counsel noted that there were contradictions in the prosecution's case as far as the time the prosecutrix boarded the taxi is concerned. She urged the court to resolve the contradictions in favor of the accused person. Learned

counsel contended that the allegation of rape cannot be supported by the evidence on record and urged the court to hold that the prosecutrix was never raped. She submitted that the allegation of theft cannot be sustained by the evidence on record. She contended that the evidence on record is not cogent, compelling nor equivocal and therefore cannot result to a conviction. She urged me to discharge and acquit the accused person.

I will now turn to the offences under charge and in doing so I will first set out the position of the law on the constitutive elements of both offences. I will proceed thereafter to deal with count two before turning to count one.

The law on rape requires that the prosecution must prove the that (i) there was carnal knowledge of the prosecutrix; (ii) that the act was that of the accused person; and (iii) that the prosecutrix did not consent.

With regards to the section 272 offence (robbery with actual violence), the law requires the prosecution to prove that (i) the accused stole property; and (ii) that he did so with the use of actual violence.

I note that both offences with which the accused has been charged attracts the very severe punishment of imprisonment for life. I therefore hold the strong view that to succeed; the prosecution must lead copious, cogent, compelling and unequivocal evidence which unshakingly points to the accused as the man who committed the offences. The prosecution therefore has the un-shifting burden of proving all the ingredients of the offences with which the accused has

been charged (see the Gambia Court of Appeal case of ***MOMODOU JALLOW v. COMMISSIONER OF POLICE (1960- 1993) GLR 39).*** Although the prosecution can do so by either direct or circumstantial evidence, the law requires that in either case the prosecution must prove the guilt of the accused beyond reasonable doubts (see the case ***WOOLMINGTON V DPP (1953) A.C. 462)***. From the foregoing, it clear that the prosecution must succeed on the strength of its own evidence and not allowed to rely on the weakness of the defence or lies told by the accused as the basis for a conviction.

I have referred myself to the case ***MILLER v MINISTER OF PENSIONS [1947] 2 ALL ER 372, 373*** and warned myself of what prove beyond reasonable doubts means**.** I have also referred myself to sections 179 and 180 (2) of the Evidence Act on the need of corroboration in sexual offence cases.

I will now take the two counts starting with count two.

With regards to count two (2); there is unchallenged evidence that the prosecutrix hired the services of the accused on that fateful date. There is also uncontroverted evidence that the prosecutrix had her cell phone (exhibit "A") with her at the time she boarded the taxi. The evidence on record also shows that the phone was not given to the accused by prosecutrix. In his sworn evidence before this court PW2; the owner of the vehicle that was used by the accused on that date said he saw the accused with a new phone the following day and enquired. The accused informed him that he bought it. The accused did not tell him that it was left in the taxi by a troublesome passenger. The evidence of

PW2 was never challenged at all. The accused never reported the matter or the missing phone to the police as he should by law do. The phone was only recovered from the accused after his arrest. When I put these facts together they form a perfect jigsaw which unshakingly points to the determination of the accused to retain exhibit "A". These pieces of evidence though circumstantial in nature are nevertheless compelling, cogent and unequivocal and glaringly establish the fact that the accused intended to permanently deprive the prosecutrix of her phone (exhibit "A") and this I shall hold as a fact. The first element of section 272 of the Criminal Code has therefore been established by the prosecution with the certainty required by law.

On the issue of violence; I must say straight away that apart from the fact that the accused himself testified of how he gave the prosecutrix some blows with his fist, the prosecutrix herself led strong evidence; in an electrifying manner which graphically visualized the manner in which she was assaulted by the accused. She was threatened and beaten several times on her face by the accused. When she was very weak to resist the accused, she was taken to an isolated spot where she was forced into the back seat of the car and ravished by the accused. I watched the prosecutrix broke down into tears and she narrated this crucial part of her ordeal to the full glare of the court. These were certainly no crocodile tears. Furthermore the accused himself testified that exhibit "A" was recovered from the back seat of his car. He had held unto the dress of the prosecutrix to force her back into the car as she wanted to escape. The prosecutrix also held his hands and the steering wheel. All these pieces of evidence positioned the prosecutrix

at the front seat of the car, but also that there was a tussle between the two. That the phone was eventually recovered from the back seat of the car is eloquent proof that the prosecutrix was thrown into the back seat of the car. I am therefore satisfied that she was forcefully thrown into the back seat of the car by the accused and this I shall hold as a fact.

The **BLACK'S LAW DICTIONARY** (8th Edition Pg. 1601) defines violence as ***"the use of physical force usually accompanied by furry, vehemence or outrage".*** The act of throwing the prosecutrix into the back seat of the taxi fits into this definition and therefore amounts to actual violence on her person by the accused, and this I shall also hold a fact. From the foregoing, I am satisfied that the prosecution has also proved the second element of the offence under section 272 of the Criminal Code beyond reasonable doubts.

Turning now to the first count brought under sections 121 and 122 of the Criminal Code, I will deal with the issue of corroboration as a preliminary matter.

Both statute and case law authorities emphasize the need for some other evidence to support the allegation of contemptuous sex (see section 180 (2) of the Evidence Act and the West African Court of Appeal Case of ***R v. SEKUN & Ors (1941) 7 W ACA, 10***). It is also settled that any corroborating evidence must be extraneous to the evidence of the prosecutrix ***(see R v. WHITE HEAD (1929) I.K.B 99, 102).***

By virtue of section 180 (2) (a) of the Evidence Act, the law enjoins that I must seek for corroboration of the evidence of the prosecutrix on this count.

Section 180 (2) of the Evidence Act provides;

> ***"...a court <u>shall not</u> in the following cases, act on uncorroborated evidence ...***
>
> ***(a) cases of rape and other sexual offences against the complainants;" (emphases mine).***

The use of the mandatory ***'<u>shall not</u>'*** in section 180 (2) (a) cited above, robs this court of any discretion. The law is settled that when statutory corroboration is required as in the instant case, a conviction of an accused can only be valid when there is such corroborative evidence ***(see the Nigerian Supreme Court case of IKO v. THE STATE (2001) 14 NWLR (Pt. 732).***

The learned State Counsel has urged me to hold section 180 (2) (a) of the Evidence Act as unconstitutional on the grounds that it discriminates against women qua women.

I agree that section 4 of the 1997 Constitution envisages the supremacy of the Constitution, and that any law which is inconsistent with any provision of the Constitution is to the extent of that inconsistency void. I agree that section 33 of the Constitution protects the right not to be discriminated against, and that section 121 of the Criminal Code is principally an offence against a woman or girl child. It would seem therefore that to require corroboration in rape cases would amount to a

kind of discrimination against them qua women or girls. This inference can only be drawn from a narrow and restrictive construction of section 180 of the Evidence Act.

It is settled law that a statute to be better understood must be read as a whole and not in isolated parts (see the Gambia Court of Appeal Case of ***ATTORNEY GENERAL v PAP CHEYASIN OUSMAN SECKA (2002-2008) 2 GLR, 73).*** I have looked at section 180 (2) of the Evidence Act and found that sexual offence cases are just one of the listed categories of cases requiring corroboration. The list includes other categories such as claims against the estate of a deceased person; sexual misconduct in matrimonial causes; perjury; and cases of exceeding speed limits. It is for the above reasons that I am not persuaded by the arguments advanced by counsel. I overrule them.

I now return to the crux of the matter in count one.

It is essential for me to now determine whether on the evidence it has been established that the accused had contemptuous sex with the prosecutrix after throwing her into the back seat of his car. I have looked at exhibit "B" and it is evident that the hymen was absent, but also that some whitish vagina discharge was present. Although there were no eye witnesses, I must state straight away that I believe the evidence of the prosecutrix in its entirety. The conflicting evidence as to the time she boarded the cab was not material enough to disturb the prosecution case. I believe and accept every material aspect of her evidence as truthful. The learned defence counsel has urged me to hold the absence of injuries on her private organ as proof that there was

sexual intercourse. This argument could not persuade me. The prosecutrix testified that at the time she was thrown into the back seat of the car, she had become so weak that she could not put up any resistance to the accused. The absence of injuries in her private part, in my view, indicates that there was no resistance from the prosecutrix and the accused had little or no difficulties in penetrating her.

The prosecutrix was 20 years old at the time of the incident and I am satisfied that she knew what sexual intercourse meant at that time. She was very consistent and steadfast and it was easy to visualize from her testimony a true picture of how the accused ravished her sexually. I observed the demeanor and the manner in which the prosecutrix gave her evidence; she broke down in tears when she gave evidence of how the accused penetrated her. I believe upon the evidence of the prosecutrix that she was ravished by the accused after having been thrown into the back seat of the car.

In addition, to the above, the prosecutrix informed PW4 on the very day of the incident of the ordeal she had gone through in the hands of the cab driver (accused). She was taken to the hospital by PW4 and was medically examined at about 2 am. The hymen was missing and she presented with some whitish vaginal discharge. Medical jurisprudence indicates that such discharges could be normal or abnormal. In the instant case, there was unchallenged oral evidence from the prosecutrix that the vaginal discharge necessitated an HIV test on her, suggesting it was an abnormal discharge, resulting from the sexual encounter. The accused himself gave evidence that he abandoned the

prosecutrix and drove away when he saw some people approaching his car. This conduct is not synonymous with that of a person who was demanding for his money from a truculent passenger. From this conduct alone, I reach the conclusion that the accused was doing something wrong. Since I already believe the evidence of the prosecutrix it is easy for me to also reach the conclusion that the wrong act in question was the act of rape alleged by the prosecutrix. The surrounding circumstance therefore presents such compelling and cogent evidence that leads me to the conclusion that the prosecutrix was sexually assaulted by the accused and this I shall also hold as a fact.

I have not seen any evidence on record which gives me the slightest impression that the sexual encounter was consensual. I hold on the evidence that it was not. I therefore believe from the circumstances of this case that the prosecutrix did not consent to the sexual intercourse and this I shall hold as a fact. The prosecution and therefore in my view proved the elements of the offence under section 121 of the Criminal Code with the certainty required by law.

From the foregoing, I reach the conclusion that the prosecution has proved its case beyond reasonable doubts on both counts. The accused person **MOHAMMED SAMBOU** is accordingly convicted as charged on both counts.

EMMANUEL A. NKEA
JUDGE

COURT: Has the convict any previous conviction?

MR. BARKUN: My Lord, there is no previous conviction against the convict.

COURT: Is there anything you or counsel would wish to say as to why the law should not be applied as it is?

MRS OGBEDO: My Lord the convict is a first offender. He is a young offender of about 31 years, with his life still in front of him. He has a wife and a child and is the sole bread winner of his family and the only care giver to his parents. He has shown sufficient remorse. If given another chance, the convict will be reformed. We urge the court to temper justice with mercy. We urge the court to invoke section 29 (2) and (3) of the Criminal Code in favor of the convict.

SENTENCE

I have listened to the plea in mitigation presented by counsel on your behalf. I will consider that you are a first time offender as a mitigating factor in your favour. I will also consider the fact that you are a young person as a further mitigating factor.

Your lawyer has urged me to invoke section 29 of the Criminal Code in your favour by imposing a lesser sentence other than life imprisonment envisaged by the law. In acceding to that request, I have considered the special circumstances of this case and reach the conclusion that your conduct constitutes and pose a serious risks to unsuspecting commuters. If the use of cab drivers at night by women

is perceived as dangerous, then our society is moving towards a total breakdown of the rule of law. This is unacceptable. It is for the above reasons that I will impose a long custodial sentence on you which should serve as deterrence to others in your position.

In view of the foregoing, I will sentence you MOHAMMED SAMBOU to 25 years imprisonment on Count One; and 25 years imprisonment on Count Two. Both sentences to run concurrently from the date you were first taken into custody.

I will make no further Order.

EMMANUEL A. NKEA
JUDGE

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 28 DAY OF MAY 2012

.....
REGISTRAR