IN THE HIGH COURT OF THE GAMBIA
CRIMINAL CASE No: HC/111/11/BK/012/D2

BETWEEN:

THE STATE COMPLAINANT

AND

MUSTAPHA SILLAH ACCUSED PERSON

MONDAY 09th NOVEMBER 2011
BEFORE HON. JUSTICE EMMANUEL A. NKEA

ACCUSED PERSON PRESENT
MR. E. JAITEH FOR THE STATE PRESENT
MR. M. DRAMEH FOR THE ACCUSED PRESENT

JUDGMENT

The accused person herein is charged on an Information containing a two count offence for having on or about the 4th day of January 2011, at Sokuta, Kombo North, Western Region of The Gambia by force and deceitful means induced one WUDAY TABALLY to his residence where she was detained for a day contrary to Section 233 of the Criminal Code and for subsequently having unlawful carnal knowledge of her without her consent contrary to Section 121 of the Criminal Code. The accused person pleaded not guilty to both counts.

The Prosecution led evidence through three (3) witnesses and tendered four (4) exhibits in support of its case while the accused person led evidence in his defence as well as called one additional witness in support of his defense and tendered one exhibit.

The case of the prosecution is that on or about the 4th day of January 2011, the prosecutrix was sent on an errand but only returned the following morning. It later turned out that the prosecutrix stayed the night with the accused in his residence. The prosecutrix is said to have suffered from mental retardation at birth and is believed to have been forcefully taken by the accused to his residence where she is said to have been sexually assaulted by the accused. The residence of the accused and the prosecutrix is separated by a common fence. The matter was reported to the police and the accused was arrested at Tanji where he regularly works and statements recorded from him. These statements are in evidence as exhibits “A – B2”. The victim was taken to the hospital where she was medically examined and a medical report – exhibit “C” issued to that effect.

In his defence, the accused described the prosecutrix as his girl friend. He admitted staying the night with the prosecutrix in his room but that it was at the insistence of the prosecutrix. He denied the act of sexual intercourse but admits kissing the prosecutrix the normal way. The prosecutrix is a regular visitor to the accused.

These are the brief facts of this case. I must now proceed to determine the guilt or otherwise of the accused person. From the wordings of Sections 121 and 233 of the Criminal Code, it seems to me that, in order to secure a conviction under these sections of the law the prosecution must first establish the following essential elements of the offence:

Under Section 121 of the Criminal Code;

(a)there was carnal knowledge of a girl,

(b)the act was unlawful,

(c)the act was without the consent of the victim, and

(d)the act was that of the accused person.

Under section 233 of the criminal code;

(a)a person was induced by deceitful means,

(b)the person was taken away or detained,

(c)the person did not give consent,

(d)the act was that of the accused person.

I will now proceed to deal with these two counts starting with Count II. Apart from stating in Count II that the prosecutrix was induced deceitfully, there is no other piece of evidence supporting this allegation. In her testimony before this Court the prosecutrix who testified as PW3 stated of the incident thus *"...on the 4-01-2011 my mother sent me to look for lemon when I met the accused who called me but I refused, telling him that I was sent by my mother ...The accused took me to his house and lay me on the bed..."* There is no other piece of evidence from the prosecutrix to shed light on how she was induced or deceived by the accused person. The prosecution has therefore failed to establish this element of the offence and this I must hold as a fact.

In both his cautionary statement - exhibit “A” and his evidence-in-chief before this court, the accused stated that it was the prosecutrix who came visiting him and that he unsuccessfully persuaded her to go back home. These pieces of evidence were never challenged but rather reinforced by the evidence of DW2. He maintained that he met the prosecutrix once in December 2010 in the accused person’s house. That on the 4th of January 2011, he called the accused, and the accused passed him over to the prosecutrix. He requested her to allow the accused join him for dinner but she turned off the phone on him. These pieces of evidence were never challenged by the prosecution. The effect, and as settled in a number of decided authorities, is that unchallenged or uncontroverted fact or facts need no further proof. See the Gambian Court of Appeal Case of *ANTOINE BANNA V. OCEAN VIEW RESORT LTD. (2008) 1 GLR 1*. It remains admitted as establishing the facts alleged therein *MOZIE v. MBA MALU (2006) 25 NSCQR 425.* On the strength of these authorities, I am inclined to hold that the girl WUDAY TABALLY was never taken away or detained by the accused and that it was her decision to remain with the accused person herein and this I shall also hold as a fact.

Its stands therefore that the prosecution has failed to satisfactorily prove the offence charged in Count II. This Count must therefore fall to the ground.

With regards to the Section 121 Count, the evidence of the prosecutrix is that *“…The accused took me to his house and lay me on the bed and*

forcefully had sexual intercourse with me…" The accused denied this in his evidence before the Court. However, by virtue of section 180 (2) (a) of the Evidence Act it is mandatory for the evidence of the prosecutrix to be corroborated in this direction. It is thus settled law that in cases of a sexual character it is eminently desirable that the evidence of the complainant be strengthened by other evidence implicating the accused person in some material particular. Any evidence tending to confirm, support and strengthen other evidence sought to be corroborated would be sufficient for this purpose. See the case of *D.P.P V. KILBOURNE (1973) A.C. 729 @ 758*. Also settled, is that corroboration need not consist of direct evidence that the accused person committed the offence, nor need it amount to a confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge. See the case of *R. V. GOLDSTEIN (1914) 11 CAR 27*.

I must say straight away that the issue of corroboration is of crucial importance to a section 121 offence and that there are two issues to be corroborated here; the act of sexual intercourse and the element of consent or the lack of it. The best evidence of corroboration of sexual intercourse is usually a report of the medical examination of the victim. Exhibit "C"- the medical report of the prosecutrix corroborates the fact of sexual intercourse when it states at column 5 thus *"… hymen broken… large deposit of semen was seen at the posterior fornix…"* This medical examination was conducted the following day after the incident. The medical findings authoritatively controvert the

denials of the accused. I will rely on this piece of evidence as there is nothing on record to urge me to do otherwise. I am therefore satisfied that there was sexual intercourse between the accused and the prosecutrix and this I shall hold as a fact.

The crux of this matter now lies in the determination of the second issue; the element of consent or the lack of it. While the accused person has alleged in exhibit “A” that he did not do the act at all, the prosecutrix has contended that the accused did but also that he did so forcibly. In *POSU V. THE STATE (2011) LPELR-SC. 134/2010)*, the Court held that the nature of corroboration must depend on the particular circumstances of each case and that where an accused person has denied the allegation of rape, the evidence of corroboration that the Court must look for, is for instance:

(a) medical evidence showing injury to the private part or to other parts of her body which may have been occasioned in a struggle, and
(b) semen stains on her clothes or the clothes of the accused person on the place where the offence is alleged to have been committed.

Exhibit “C” does not reveal that the prosecutrix sustained such injuries as could infer forcible coitus. The inference is that the sexual intercourse was not forcible. Having already held that it was the prosecutrix who visited the accused and having also held that the prosecutrix had refused to leave the accused person’s house when he

requested her to do so, I do not see how I can form an opinion of forcible coitus in the circumstance. The prosecution had contended that the prosecutrix was a patient of mental retardation at birth. This is a medical condition, but the allegation of mental retardation was not supported by any medical evidence. I could have found for defilement but again, the age of the prosecutrix was not also medically established. Since lack of consent is of primary importance in the offence of rape, and since the prosecution has not satisfactorily proved the lack of it, I am constrained in the circumstance to also hold that this count must fall to the ground.

In view of the foregoing, the accused person shall be discharged and acquitted on both counts.

EMMANUEL A. NKEA
JUDGE

ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 9th DAY OF NOVEMBER 2011

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REGISTRAR