IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA
CASE NO: FCT/HC/CR/79/2018

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA……..COMPLAINANT

VS

YUSUF FRANCIS KYEMANG……..DEFENDANT

Appearances:
Enwusoyeye R.A. Esq appeared for the prosecution.
Femi Adedeji Esq appeared for the defendant.

JUDGMENT

The defendant was arraigned before this court via a charge dated the 10th day of December, 2018 for the offence of rape punishable under section 1 of the Violence Against Persons (Prohibition) Act, and in which he pleaded not guilty to the charge.

In that circumstance, the burden was placed upon the prosecution to prove the allegation beyond reasonable doubt as is envisaged in section 135 (1) of the Evidence Act 2011, as amended. See the case of **Nwalu V. State (2018) All FWLR (pt 966) 267 at 280 paras. D-F** where the Supreme Court held that by the provisions of section 135 (1) of the Evidence Act, 2011, in discharging the onus of proving a case beyond reasonable doubt, is on the prosecution.

In trying to discharge the burden placed upon it, the prosecution called two witnesses, that is to say the investigation Officer and the victim of the crime, and in addition tendered two documents, that is to say, the statement of the defendant made at

the NAPTIP office and the medical report obtained at the Federal Staff Hospital.

The counsel to the defendant proffered and filed a written address on no case to answer by the defendant, and in its ruling this court overruled the counsel and ordered that the proceedings should continue. It is in this regard the defendant put up two witnesses in defence. That is to say, himself and the medical doctor that prepared a report.

According to the PW1 sometime in September, 2018 he was assigned to rescue the PW2, who is the victim, and she was rescued and her statement was taken and then they commenced the search for the defendant and was later arrested.

The PW1 testified further that the PW2 authorized him to write a statement on her behalf as she could not write very well, and after which she thumb printed the statement and he counter signed. He further testified that the PW2 was taken to hospital for check up after which a medical report was issued.

The PW1 further told the court that the defendant wrote down his statement in a NAPTIP standard sheet after words of caution.

During cross examination, the PW1 told the court that the alleged rape took place a day before it was reported to their office, and he could not remember the exact date, and that he inspected the bedroom of the defendant in which he discovered a blood stain on the bed sheet and he took the picture of it. He further told the court that it was during investigation, the victim told him that she was raped at the bedroom of the defendant; and that he rescued the victim not at the house of the defendant.

The PW2 testified that she was living in the village with her parents and then her aunt (DW1's wife) called her father to ask that she live with them so that she can be taking their son to school, and she came to Abuja on the 9th of August, 2018 and stayed with them for a month and three days before her aunt went to Zaria thereby leaving her with the defendant and their son.

The PW2 testified further that on the 13th of September, 2018, she took the son to school in the morning and came back home to meet the defendant and she greeted him and he responded before she commenced sweeping of the house. That the defendant was

said to have told her to take her breakfast before sweeping and when she finished, she entered into a room and the defendant told her that their NECO result was out and was asking how she could access it and in which she responded that she had communicated with her father on how to get it, and she was then instructed by the defendant to meet him after taking her breakfast as he had something to tell her.

The PW2 told the court that she went and met the defendant in the room, and he laid down on the bed and asked her if she had a boy friend and she answered in the affirmative, and he further asked if the boy friend had touched her and she answered in the negative. She told the court that the defendant asked her if she was a virgin and she also answered in the affirmative.

The PW2 told the court that the defendant then stood up and asked her to stand up and which she did, and he proceeded to pull down her zip and she took away his hands from her, and he then dragged her back and locked the door.

The PW2 told the court that the defendant forced her, have sex with her and in which she shouted and nobody was in the house. She further told the court that the defendant could not be able to make her lie down, but he used his leg and pushed her leg and she fell on the tile and she could not stand up again. That the defendant took and put her on the bed, removed everything from her body and raped her. That as she was shouting, the defendant took cloth and closed her mouth, and she took away the cloth and he used his hand to cover her mouth.

The PW2 told the court that when he finished raping her, the defendant stood and dressed up while leaving her lying on the bed, and he asked her to keep quiet and she refused. That the defendant took cable and flogged her that she should keep quiet and she refused, and he locked her up inside the room and left, and that she had to use an iron to remove the bathroom window to escape.

In the course of examination in chief the PW2 told the court that the defendant put his private part into her own.

During cross examination, the PW2 told the court that she told her aunty in a telephone conversation that she would start her menstrual period whenever she sees blood and that she told her boy

friend that she was in Abuja, and by the time she started seeing her menstrual blood on the 7th of September, 2018 her aunty had left.

The PW2 further testified that the bed had not stained with blood, and that she has never slept with her boy friend or anybody else.

The DW1, being a medical practitioner, identified EXH. 'B1' which was admitted in evidence and further testified that paragraph 2 of the medical report is a documentation of what he saw physically when the PW2 was presented to him at the hospital and when she came she was actually limping and not pale, which means she does not have any deficiency of blood, and she was anicteric, which means there was no any evidence of liver problem.

The DW1 further testified that Vagina examination shows normal vulvae Vagina, which means there was no problem with her vulvae and her Vagina and without an intact hymen, which means there is no hymen that covers the Vagina.

The DW1 went further to testify and explained that what causes a woman to loose her hymen are sexual intercourse, riding of bicycle, accidentally trauma from falls and tremble and assault.

The DW1 told the court that there was no sperm in the Vagina but that they have referred her to laboratory for test on HIV and hepatitis, and he has never seen her again.

The DW2 being the defendant, testified and told the court that it was he and his wife that invited the PW2 in order to help take their son to school while his wife schools in Zaria, and the PW2 is not a house help but their relative as she is his wife's niece.

The DW2 told the court that on the 13th of September. 2018 after he had prepared food for all of them, the PW2 took their son to school but he had to wait for her to return as he prepared for work because she had the key to the house. He further stated that he left the house and met her at the gate and enquired about why she stayed long at the school, and thereafter left for work but discovered on his way that he forgot a flash drive that contained an assignment he had to do at work and so he returned home in order to pick the flash drive. And on getting home, he said he passed through the main gate but found the main entrance locked and so

he used his key to enter into his parlour where he met the PW2 there and found a boy escaping out of their compound.

The DW2 told the court that he was shocked and checked his back door which he discovered was open, and this was against the prior instruction to PW2 never to open it as it had holes, and he then rushed to the gate through the said back door with the hope of meeting the boy but the boy had gone away, and he returned to the house and asked the PW2 about the boy who had just escaped but the PW2 was unable to give an answer. He told the court that as her guardian, he decided to punish her as a way of counseling her but that the PW2 cried and said that she was going to punish him for punishing her.

The DW2 further testified that the PW2 entered into the house and began to pack her load that she wanted to leave the house, and in a bid to be able to keep her from getting missing, he passed through the back door of the house and locked her in so she would not run away while he returned to the office in order to take permission from work and also to return home in order to send her back to her parents. He testified further that when he got to work he had to wait a bit to see his boss in order to obtain permission and also to charge his phone, and he got a call from his wife who informed him that a woman called her and asked her to come and pick PW2 from First Bank. He stated that as his wife was away in Zaria, he got the said woman's number and called her. The woman informed him that she was with PW2 at First Bank Wuse Zone, 5 and that she had found the PW2 at AYA round about, and he told the woman that he would meet them there and so he went with two of his colleagues and on getting there he discovered that it was NAPTIP officials and so they invited him to the office which he obliged them.

The DW2 told the court that he was taken to his house at Jikwoyi where the officers asked to see his bedroom and also checked other places, and they took pictures of the entire bedroom with their phone cameras and they said there was nothing incriminating as there was no blood on the floor or on the bed. He further testified that the officers entered PW2's bedroom and picked up a material and thereafter they all left and returned to their office.

The DW2 told the court that he was asked to write his statement but that he insisted that it has to be in the presence of his lawyer and that he was denied access to his phone, and he later wrote the statement himself.

The defence and prosecuting counsel filed their final addresses at the close of hearing.

The counsel to the defendant in written final address formulated two issues for this court to determine, that is to say;

1) Whether the prosecution has proved the essential ingredients of the offence of rape or any other offence beyond reasonable doubt to warrant the conviction of the defendant?
2) Whether in the face of the obvious contradictions in the testimony of the PW1 and PW2, this Honourable Court is not duty bound to discountenance the witnesses' testimony for being unreliable and inconsistent?

The counsel submitted that it is the duty of the prosecution to prove the defendant's guilt and as such, if at the end of the prosecution's case or the entire case there is no reasonable doubt produced by the evidence of the prosecution, then the defendant will be entitled to an acquittal no matter what the charge against him may be, and he cited the cases of **Adamu V. Nigerian Navy (2016) LPELR 41484 (CA)** and **Ogidi V. State (2014) LPELR 23535 CA** to the effect that it is the duty of the prosecution to prove the guilt of an accused person.

The counsel submitted also that the Supreme Court has held in several authorities that penetration is an important ingredient which must be established by the prosecution in order to establish the guilt of the defendant when it comes to the allegation of rape, and he cited the case of **Rabiu V. The State (2004) LPELR 7382 (CA).**

The counsel further submitted that it was held by courts that the testimony of the nominal complainant is insufficient when same is not corroborated either by another eye witness or documentary evidence. It was held in the above case that even where the prosecutrix testified that accused inserted his penis into her Vagina, the law requires such evidence to be corroborated by an independent witness. He also cited the case of **Simon Okoyoman V. The State (1973) LPELR (SC)** to the effect that it was not enough that

the prosecutorix alleged insertion of the defendant's penis into her Vagina or that he lay on her.

The counsel submitted that the PW1 has admitted during cross examination that he was not at the apartment when the alleged rape occurred, and that he did not meet with the PW2 until about a day after the alleged rape had occurred, and nothing was found in the room to establish that rape has been committed.

The defence counsel further submitted that there was nothing to show that she was raped or that there indeed was any sexual intercourse between the PW2 and the defendant.

It is also the contention of the defence counsel that the evidence of PW2 on record is contradictory having testified on one hand that it was PW1 that rescued her from the defendant's house on the day the alleged rape occurred and at the same time maintaining under cross-examination that she escaped from a small window which resulted in her limping.

The counsel also submitted that the PW2 testified that she was the last person to leave the house on the 13th of September, 2018 and she did not clean the floor having room with blood stains on the bed and floor, however, PW1 in his testimony said there was no blood stain anywhere in the defendant's room, and therefore, he asked the court to invoke the provision of section 167(d) of the Evidence Act which provides that evidence which could be produced but not produced would be deemed unfavourable to the person who with holds it, and he cited the cases of **Danladi V. Dangiri (2015) 2 NWLR (pt 1442) 124 SC** and **Zubairu V. State (2015) 16 NWLR (pt 1486) p. 504 SC.**

The counsel submitted that the reason for this argument; is premised on the fact that the pictures taken of the defendant's room, even though available were not tendered into evidence because they knew it would completely exculpate the defendant of the allegation or rape; and he cited the case of **Zubairu V. State (supra).**

As regards to EXH. 'B1' being the medical report tendered by the PW1, it is the contention of the defence counsel that the report clearly exculpates the defendant because it was confirmed in the report that PW2 did not loose blood and that her Vagina is normal

only that the hymen was broken and further argued that the report did not indicate that the hymen is freshly broken and there is no evidence before the court as to when it was broken, and that the implication of this is that the court will not speculate as there is no evidence establishing this fact, and he cited the case of **Kekong V. State (2017) 18 NWLR (pt 1569)** and **FCDA V. MTN Nig. Communication Ltd (2017) 10 NWLR (pt 1573) 220.** He further argued that despite the request of the defendant that a medical examination be carried out on him and PW2, but, that the prosecution refused to do so and as such there is no evidence linking the defendant with the commission of the offence. He further argued that the only testimony the prosecution has to prove is penetration, and the testimony of the PW2 is not corroborated and therefore falls short of the requirement of the law, and to him, the prosecution cannot use the oral testimony of the PW1 and the PW2 to contradict the content of EXH. 'A1' and 'B1' which clearly show that the defendant did not rape the PW2, and he cited the case of **Durosim V. Adeniyi & Anor. (2017) LPELA 42731 (CA)** AND **Skye Bank V. Perone (Nig.) Ltd (2016) LPELA 41443 CA** to the effect that the oral evidence cannot be allowed to add or subtract from or alter or contradict a written document.

The counsel therefore submitted that the prosecution has failed usefully to prove the essential ingredients of the offence of rape, beyond reasonable doubt and therefore urge the court to acquit the defendant.

Let me observe at this juncture, that the defence in preparing his written address mixed it with the already written submission that was argued at the stage of no case submission and even the court had ruled on that, and therefore, it will not be appropriate for this court to revisit such submission, and to that I therefore discountenance such submission as added to the present one.

The prosecuting counsel in his written address formulated one issue for determination, that is to say,

> Whether from the totality of the evidence led by the prosecution has proved the offence of rape charged beyond reasonable doubt to entitle this Honourable Court to convict the defendant charged?

The prosecuting counsel submitted that the complainant has proved the offence of rape charged beyond reasonable doubt to secure the conviction of the defendant, and to him, this is founded on the principle of law that when a court is giving consideration to the offence of rape, the prosecution is required to prove:

1) That the accused had sexual intercourse with the victim;
2) That the act of sexual intercourse was done without her consent;
3) That the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation and that the accused has a mens rea. The intention to have sexual intercourse without her consent or the accused acted recklessly not caring whether the victim contented or not and that there was a penetration.

The counsel argued that PW2's evidence before the court was in no way discredited during cross-examination that she was forced into sexual intercourse by the defendant, and he relied on EXH. 'B1' being the medical report which he says corroborated the fact the hymen of the victim was not intact and that the court can act on these testimonies as they are consistent.

The prosecuting counsel also submitted that the contradiction in the evidence of the prosecution as referred by the defence is a mere discrepancy and he cited the case of **Akpa V. State (2007) 2 NWLR (pt 1019) pp. 520-521** where the Court of Appeal reaffirmed the position of the Supreme Court in the case of **Ayo Gabriel V. The State (1989) 5 NWLR 457 at 468,** and further submitted that as far the above authorities not every contradiction or inconsistency would warrant the acquittal of an accused person as the contradiction must be substantial and fundamental to the main issue before the court.

On the issue of corroboration, the counsel submitted that the evidences of PW2 does not require corroboration as she is not a minor, and he cited the case of **Ndewenu Posu & Anor. V. State (2011) LPELR 1969 (SC)** to the effect that corroboration of the evidence of the victim of rape case is not required as a matter of law, and he further submitted that the evidence of the PW1 does not amount to hearsay rather what was told to him as an investigating officer and he cited the case of **Christopher Idahosa V. Sgt. Stephen**

Idahosa & ors. (2010) LPELR 9072 (CA) where it was held that the evidence of an investigating officer is not hearsay, and finally urged the court to convict the defendant as charged.

Now, it is the primary duty of this court to evaluate the evidence led at the trial, and to make appropriate findings and to come to a reasonable conclusion. See the case of **Obi V. F.R.N. (2018) All FWLR (pt 933) p. 1048 at 1080 paras. C-D.**

Thus, the PW1 told the court that the case was assigned to him and his team for investigation in which he wrote the statement of the PW2, being the victim after which she thumb printed and he counter signed, and that the defendant wrote his statement under a word of caution. During cross-examination the PW1 told the court that it was a day after the commission of the alleged rape was reported and that he inspected the bedroom of the defendant where he discovered a blood stain on the bed sheet, and he took pictures of it.

This evidence of the PW1 has not been challenged during cross examination, however, the defence counsel in his final address submitted that the prosecution could not produce the pictures taken by the PW1 at the bed room of the defendant because if produced it would be unfavourable to the prosecution, he relied on section 167(d) of the Evidence Act. To my mind what is so important is whether the evidence of the PW1 has been so challenged or discredited. The PW1 has given evidence as an investigating officer, and not as a witness who had been at the commission of the crime. This court will not treat the evidence of the PW1 as hearsay evidence let alone to reject it. See the case of **Kamila V. State (2018) All FWLR (pt 695) 11 at p. 31 paras. D-G.** It is also the discretion of the prosecution to call any number of witnesses or evidence or to tender any piece of evidence in trying to discharge the burden placed upon it. See the case of **Kamila V. State** cited above. Therefore for the fact that prosecution did not produce before the court the picture showing stain of blood, will not make this court to reject the evidence of the PW1, and to this, I so hold. The evidence of the PW1, being an investigating officer is hereby accepted in proof of the alleged offence.

Now, whether the evidence of the PW2 is worthy of acceptance?

The PW2 told the court that the defendant pull down her zip, dragged her back and locked the door. That as he could not make her to lie down, he used his leg and pushed her leg and she fell on the tile and she could not stand up again. That the defendant took and put her on the bed, removed everything from her body and raped her. That as she was shouting, the defendant took cloth and closed her mouth and she took away the cloth and he used his hand to cover the mouth. That the defendant put his private part and put into her own.

During cross-examination, there was nothing asked to challenge these pieces of evidence or even to discredit the PW2. What the defendant relies upon is that since he punished her, she would also punish him; and this does not touch on the pieces of evidence so given by the PW2. Therefore, for the fact that the evidence of the PW2 has not been challenged or discredited during cross examination, this court has no option than to accept it in proof of the alleged offence. See the case of **Oko V. State (2018) All FWLR (pt 968) p. 518 at p. 542 para. F** where the Supreme Court held that facts not challenged, contradicted or discredited are entitled to be given credibility unless they are inherently incredible in themselves. The evidence of the PW2 that the defendant has had carnal knowledge with her without her consent is hereby accepted in evidence in proof of the alleged offence.

Thus, it is the duty of this court to examine the exhibits tendered in the course of the trial. See the case of **Chemiron International Ltd V. Egbujuonuwa (2007) All FWLR (pt 395) p. 447 at 458 para. C** where the Court of Appeal, Lagos Division held that a trial court is at liberty to look at all exhibits tendered before it in determining a matter.

It is on the above authority that I have to look at EXH. 'A1' which is the statement made by the defendant at NAPTIP Office, and the medical report proffered on the PW2.

The defendant wrote a statement dated the 14th day of September, 2018 at about 5:22 p.m.

The defendant stated he saw some blood on the 12th of September, 2018 on a floor beside his cloth hanger and he suspected that it was the PW2 who might have come to pick something on the top of the hanger and her menstrual blood fell

down. That he sighted through his window a boy going out of the compound and when he went to find out as to who was the boy, he discovered that the boy left. That he locked her because she was packing her belongings to leave the house and for the fear of her not to loss, him being a guardian, and this was to enable him go to office and come back.

Thus, this is not a confessional statement, however, a mention was made that there was a blood, and that the defendant locked the PW2 in the house and left. The defendant did not relate the drop of blood with anything to do with the carnal knowledge that anybody has had with the PW2, rather he suspected that the PW2 might have dropped it during her menstrual blood.

The EXH. 'B1' shows that normal vulvae Vagina without intact hymen, that is to say the hymen has broken. The medical officer did not relate the report with any offence of rape suspected to have been committed.

The two exhibits are therefore accepted in proof of the allegation of the offence of rape as there is no any challenge during cross examination.

Thus, coming to the defence, in which the DW1 told the court that he was the one who prepared EXH. 'B1' bearing the medical report and that the PW2 came to him while limping and she was not pale, which means she does not have any blood deficiency, and she was anicteric, which means there was no evidence of liver problem. That the Vagina was normal vulva Vagina showed that there was no problem with her vulvae and the Vagina has no intact hymen which means there is no hymen that covers the Vagina.

The DW1 told the court that he has not taken any sample from the defendant as he has never seen the later. He further told the court during cross-examination that the PW2 was referred to the laboratory for further test, and the reason for that was because she alleged that the defendant had raped her, and since then he has not seen her.

The DW1 was not challenged nor was he discredited during cross examination, and the ultimate thing to do is to accept his evidence in trying to disprove the allegation by the defendant, and it is hereby accepted.

The DW2 told the court that he saw some drops of blood near his cloth hanger and he suspected that it might be that the PW2 has had her menstrual period and there was a drop from her. That he sighted a boy through his window when he came back to pick his flash drive from the apartment and before he could track the boy, he later left. That he locked her in the house for the fear of her getting out of the house and for her not to loss, being her guardian.

The DW2 denied having carnal knowledge with the PW2 and that he flogged her because of the boy that escaped, and this was during cross examination.

The evidence of the DW2 was not debunked during cross examination and the court has to accept it in disproving the allegation of rape.

Thus, let me at this juncture distill from the issues for determination already formulated by the counsel to the parties with a view to formulate the one that this court will resolve, and I have found the one formulated by the prosecuting counsel as apt and I adopt same, that is to say,

> **"whether from the totality of the evidence led, the prosecution has proved the offence of rape charged beyond reasonable doubt to entitle this court to convict the defendant?**

In this case of PW1, being the investigating officer did not give evidence that he was there when the offence was committed, but rather he conducted an investigation in that regard.

He told the court that he took some pictures, but he did not tender this before the court all in trying to suggest that an offence of rape was committed. He tendered the statement of the defendant made in his office, but that statement is not a confessional one. In a nutshell he did not say anything suggesting that an offence of rape was committed against the victim rather that he saw some blood stain in the floor, and he took pictures of those stains and he did not tender the pictures of those blood stains. He stated categorically that he obtained the statement of the defendant and that of the PW2 and that it was when the investigation commenced the PW2 told him that she was raped by the defendant. His evidence is nothing than to tender the written statement of the defendant. This

evidence even though accepted is not sufficient enough for this court to base any conviction on it, and I therefore, so hold.

The PW2's evidence was not challenged during cross-examination, and so it was accepted by this court. By this, it is very glaring that out of the pieces of evidence of the prosecution, it is only that of the PW2 that is so direct in trying to prove the alleged offence of rape, this is because she told the court that the defendant has inserted his penis into her Vagina, and that it was against her consent. See the case of **Popoola V. State (2012) All FWLR (pt 617) p. 767 at 773 paras. F-G** where the Court of Appeal, Ibadan Division held the sexual intercourse is deemed complete upon proof of penetration of the penis into the Virginia. Any slightest penetration of the penis into the Virginia will be sufficient to constitute the act of sexual intercourse, and it is not necessary to prove injury or rapture of the hymen to constitute the crime of rape. See the case of **Posu V. State (2010) All FWLR (pt 46) p. 507.** Let me at this juncture enumerate the ingredients required in proving an offence of rape to include:

a) That the accused had sexual intercourse with the prosecutrix;
b) That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;
c) That the prosecutrix was not the wife of the accused.
d) That the accused had the mens - rea the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not;
e) That there was penetration. What is the duty of this court is to examine whether those ingredients exist in the evidence of the PW2 in proving the offence of rape leveled against the defendant. See the case of **Isa V. Kano State (2016) All FWLR (pt. 822) p. 1775 at pp. 1783-1784 paras. H-D.**

It is in the evidence of the PW2 (the prosecutrix) that the defendant had inserted his private part into her private part, that is to say he has had sex with the PW2, and by this ingredient No. 1 has been established.

That the defendant used his leg to pull her leg and she fell on the tile and she could no longer be able to stand up, and he carried and put her on the bed. That he tried to pull her zip, and she took away his hand from her. The defendant while having sex with her closed her mouth with cloth and later with his hand so that she would stop shouting.

All these point at that, the PW2 did not consent to it, and by this ingredient No. 2 has been established.

That the defendant dragged her back and close the door to his bedroom, and went ahead to ask her whether she was a virgin, and by this ingredient No. 4 has been established.

That the PW2 was brought from her village for the purposes of taking the child of the defendant to school and that she is his wife's niece, and by this the ingredient No. 3, that the PW2 is not his wife has been established.

That the defendant inserted his private part into the private part of the PW2, that is to say, the defendant has inserted his penis into the Vagina of the PW2, and by this the ingredient of penetration, being an essential ingredient, has been established.

Thus, on the authority of **Upahar V. State (2003) FWLR (pt 139) p. 1514 at 1527 paras. B-E**, an ingredient of corroboration is included among the ingredients required for the proof of offence of rape, that is to say, the prosecution must adduce credible evidence to corroborate the complaint made by the prosecutrix.

Now the question that comes up for this court to provide an answer is that: whether in this case corroboration is required in proof of the offence of rape?

The Evidence Act 2011, as amended, does not provide that the offence of rape requires corroboration for it to be proved by the prosecution, but that it is a matter of practice. See the case of **Lucky V. State (2016) All FWLR (pt 857) p. 574 at p. 605** where the Supreme Court held that it is not a rule of law, but one of practice that an accused person on a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix.

Thus, it is the contention of the counsel to the defendant that corroboration is required in proving the offence against the defendant, however the prosecuting counsel contented that it is

only in proving an offence of rape committed against a child that corroboration is required.

Now the question that also arose for the court to answer is: whether corroboration that is required in practice only relates to a rape committed against a minor?

In finding an answer to this, I have to have recourse to section 209 (1) and (3) of the Evidence Act 2011, as amended, which read: 209 (1) "In any proceedings in which a child who has not attained the age of fourteen years, is tendered as a witness, such child shall not be sworn and shall give evidence otherwise than on oath or affirmation, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his piece of evidence and understood the duty of speaking the truth."

3) "A person shall not be liable to be convicted for an offence unless the testimony admitted by virtue of subsection (1) of this section and given on behalf of the prosecution is corroborated by some other material evidence in support of such testimony implicating the defendant."

By these provisions, it could be inferred that the evidence of a person who has not attained the age of fourteen years cannot sustain a conviction of a person suspected of committing any offence unless such evidence is corroborated. In the instant case the PW2 (the prosecutrix) is of eighteen years of age, and therefore, she does not fall within the category of the witnesses whose evidence must be corroborated in order to secure a conviction over the allegation of rape. To this therefore, so hold, however, I do not have to take exception to the principle that the court has to warn itself that it is unsafe to convict on the uncorroborated evidence of the prosecutrix and can convict after paying attention to the warning.

If it is satisfied with the truth of the evidence, this is irrespective of the position I have taken earlier on that in the case corroboration is not required, and to this I have to take the warning very serious. To this, I have to warn myself in convicting the defendant in an uncorroborated evidence of the PW2 and it is unsafe for the court to do that.

In the light of the foregoing, I have to examine the evidence of the defence with a view to see whether it corroborates with the

evidence of the PW2. In this case the defendant denied the allegation, hence the need to bring the medical report into limelight. See the case of **Popoola V. State (supra)** where the court held that it is where rape is denied by the accused person that the court is enjoined to look for medical evidence showing injury to the private part of the complainant or other parts of her body as corroboration:

In EXH. 'B1', which is the medical report it is to the effect that the patient, that is the PW2, is seen to be limping not pale anicteric and the virginal examination shows normal valve Vagina without intact hymen. During examination in chief, the DW1, who is the medical officer that prepared the medical report, explained that sexual intercourse is one of the causes for a hymen to break.

Another corroborative evidence is the stain of blood on the clothes or on the place where the offence is alleged to have been committed. This, the DW2 who is the defendant, stated that he has seen some spots of blood on the floor in his bedroom, even though he later discovered it was a nail cutter, this is also notwithstanding the pictures taken were not tendered.

The distressed condition of the prosecutrix soon after the unlawful sexual intercourse may amount to corroboration. See **R V. Redpath (1962) 46 ARP R p. 319.** In this regard, it is in evidence that the PW2 left the apartment of the defendant as she was found at AYA Abuja after escaping from the house of the defendant, and this is another corroborative evidence.

Thus, it was held in the case of **Upahar V. State (supra)** that corroborative evidence with respect to the offence of rape is evidence which shows or tends to show that the story of the prosecutrix that the accused person committed the crime is true, not merely that the crime has been committed. See also the case of **Lucky V. State (supra) per Rhodes – Vivour JSC at p. 613 paras A-B:**

> **"Corroborating means evidence that supports the evidence of the prosecutrix. Corroboration is not constricted only to evidence of a witness pointing to the appellant as the person who committed the offence. This is not the position of the law. Sex is usually not performed in the presence of a third party. In most cases, it is a hidden act performed**

behind closed doors, away from prying eyes. It is rare to get a witness to give evidence on oath that he saw the appellant had sex with the prosecutrix."

In the instant case, it will be difficult to have a person that will come before the court to testify that he saw the defendant having sex with the PW2 as it is performed in a hidden place behind closed doors. See also the case of **Isa V. Kano State supra at p. 1793 para. D** where the court held that corroboration in a rape case is that evidence which tends to show that by the story of the victim, the prosecutrix is the accused that committed the crime, and such evidence need not be so direct. It suffices if it corroborates the said evidence in some material particular to the charge in question.

Thus, it is on the above premise that I come to the conclusion that the evidence of the PW2 has been so corroborated, and I therefore, so hold.

It is also my position that all the ingredients required in proof of the offence of rape against the defendant have been duly established.

Thus, let me further have recourse to the testimony of the defendant with a view to see whether he has any available defence to warrant this court not to find him guilty of the offence charged.

The defendant made heavy weather in his testimony that he saw some drops of blood near his cloth hanger, and he suspected that it might be that the PW2 has had her menstrual period and that there was a drop from her. What will be lingering in the mind of the court on this piece of evidence is that what brought the issue of menstruation of the PW2 who is the prosecutrix, and how could it be a girl while menstruating a blood would be dropping on the floor from her private part? These certainly will cast a doubt in the mind of the court to either believe or to disbelieve the piece of evidence.

The defendant also relied on the fact that he sighted a boy through his window when he came back to pick his flash drive from the apartment on the same morning, and before he could track the boy, the later left and could not see him again. This also lingers in the mind of the court as to what brought the issue of a boy friend of the prosecutrix, and is the defendant suspecting any other person to have come to the house and to have had sex with the PW2 within

the time that he left the house and the time he came back to pick his flash drive? What was the interval of time between the time that left the house to the time that he came back to pick the flash drive. The defendant did not tell the court the efforts he made in tracing the boy he alleged to have sighted in the house, and by this, could it not amount to shifting the burden on the PW2 and to take away the mind of the court to the allegation leveled against him? This really makes the court to cast a doubt in believing the defendant.

The defendant also relied on the fact that he locked the PW2 on the house for the fear of her getting lost if she would have left the house, him being her guardian. Therefore, for whatever reason the defendant locked the PW2, this will really make her to be in distress for not knowing what will happen to her next and this will really make her to find a means of escaping from the house. This makes this court to cast a doubt as to the reason behind locking the PW2 and to believe in the assertion of the defendant.

On the whole and based upon the questions that required an answer, I have to doubt the evidence, and to this, I so disbelieve the defendant, and I therefore, so hold.

The defence counsel in his written address contented that despite the request of the defendant that a medical examination be carried out on him, but that the prosecution refused, as such there is no evidence linking the defendant to the commission of the offence alleged. To my mind, the evidence of the PW2 has not been so discredited and is so overwhelming to have proved the ingredients of the alleged offence, and in which I believe in. The contention of the defence counsel does not represent the position of the law in this regard. The position of the law is to the effect that the defendant could have been examined where the prosecutrix was found, during examination by the medical officer, to have venereal disease, and that is when the medical doctor should have gone ahead to examine the defendant as to whether he had venereal disease of a kind at least similar to that found in the prosecutrix's Vagina. See the case of **Upahar V. State (2003) FWLR (pt 139) at p. 529.** In the instant case, the Vagina was found to have been normal and no deficiency of blood, but that the hymen has broken.

All evidence has pointed that the defendant has had carnal knowledge with the PW2 irrespective of the evidence of the DW1 that the Vagina was normal but that the hymen has broken, and this is not inconsistent with a partial intercourse and the court will be entitled to find that sexual intercourse has occurred and this is if the court is satisfied on that point from the evidence led and the surrounding circumstances of the case.

The counsel to the defendant also contended in his address that there is contradiction between the evidence of the PW1 and the PW2 regarding stains of blood found. To my mind, there is no material contradiction in that regard, and even by the available record of the court, there is no where it is shown that there is any contradiction between the evidence of the PW1 and PW2 regarding stains of blood. See the case of **Owie V. Igbini (2005) 5 NWLR (pt 917) 184 at 218** where the Supreme Court held that there could be little differences when witnesses give evidence of the same subject matter. This is because human beings not being Machines do not act with the automation of Machines. If witnesses give evidence on the same subject matter or event to the exact minute detail, a trial court should seriously suspect such evidence because of the possibility of tutoring or rehearsal, developing into a recitation before the date of giving evidence. Thus, where there are immaterial differences in evidence of witnesses here and there that in itself shows their truthful testimonies, then there could not be a contradiction. In the instant case, I therefore so hold that there is no material contradiction in that regard.

The defendant made statement in his written statement that he saw some stains of blood on the floor while in his evidence in chief he said he saw a nail cutter mistaken it to be a blood.

It is in view of the above analyses that I come to the conclusion that the evidence of the PW2 which evidence is not capable of any other explanation other than which is adduced and in relation to all the surrounding circumstances and the corroborative evidence of the DW1, even though not so direct, have proved the ingredients of the offence of rape against the defendant at that he has had carnal knowledge with the PW2 without her consent, and there is the

concomitance of the actus reus and the mens rea, and to this, I therefore so hold.

In the circumstances, the defendant is hereby found guilty of the offence of rape punishable under section 1(2) of the Violence Against Persons (Prohibition) Act 2015.

CONVICTION

In view of the finding of guilt made against the defendant, the court has no option than to proceed to convict him accordingly.

The defendant is hereby convicted of the offence of rape punishable under section 1(2) of the Violence Against Persons (Prohibition) Act 2015.

ALLOCUTUS

DC – CT: We want to make an application before the court to call evidence as to the character of the defendant, and the witness is not in court, we shall be asking for an adjournment to bring a witness before the court, pursuant to section 310 of the Administration of Criminal Justice Act.

PC – CT: We are not objecting to it.

CT: But before that, I have to read the provisions of the Violence Against Persons (Prohibition) Act 2015 with a view for the defendant to know the extent of the punishment, which section 1(2) reads:

> **"A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except:**
>
> **a) Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment;**
>
> **b) In all other cases, to a minimum of 12 years imprisonment without an option of fine; or**
>
> **c) In the case of rape by a group of persons, the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine."**

Do you want the court to be lenient to you?

DC-CT: We are pleading that a date be given to us to call our witness as to character; we will want to plead with the court on to leniency.

With respect to the bail of the convict, I submit that the amount has been specify before the court throughout the trial, and he will not jump bail.

PC-CT: It is true that the defendant has been punctual before the court, and the defence counsel has promised, and to that I believe he will not fail.

CT: The matter is adjourned to 22nd day of January, 2020 for allocutus to be taken by way of calling witness to character of the convict as is envisaged in section 310 of the ACJA.

The counsel to the defendant assured the court that the convict will make himself available for possible sentence and to which the prosecuting counsel did not object.

Signed
Hon. Judge
15/01/2020

The court resumes sitting with the same membership. The defendant is in court.

R.A. Enwesoyele Esq appearing with Aishatu Ahmed Esq for the prosecution.

Femi Adedeji Esq appeared for the defendant.

DC-CT: The defendant came in a very bad condition this morning, that notwithstanding we are grateful for the magnamity of the court to allow us to have called our witness to the character of the convict. The witness is in court.

CT: The witness to the character duly affirmed.

Name – Nanwur Francis Yusuf

Address – Jikwoyi Phase II, Abuja SS Quarters extention.

Occupation – House wife

Age – 35 years old

DC – witness to character: Can you tell the court what you know about the defendant?

Witness – Court: The defendant is my husband, and we married for the past ten years, and I knew him right from Primary School, and we did the same Primary and Secondary School, and we are from the same locality.

Right from that time, I know my husband as a man of intergrity, honour, diligent and respectful.

Throughout our childhood, the defendant being my husband, is a quiet type among his peers. He is the only one that they can rely on because of his truthfulness and calmness. We grew up together, and he has never ever had any issue with anybody. He has never been arrested by any agency and he has never been punished by the Youth leaders in the village because of his calmness.

It is quiet unfortunate that this thing happened to my husband. Such is life and I knew my husband to be a good person. The defendant has two children, the first one is seven years and the second one is two years. He has aged parents between the ages of seventy and eighty and they are all alive and depending upon him for their well being. He has six siblings who he is catering for their well being financially and morally. I myself am a dependent as I solely depend upon him for my upkeep. He has been traumatized and we have been traumatized too, and the mere mention of the conviction last week he summoned courage to travel to the village and related the matter to our families, but his mother is not aware as she has high blood pressure. On relating the matter to our families and it got to the family of the complainant, and the girl heard about the matter and she was bittered and she was pleading that she would come back to the court and re-testify but the parents stopped her not to try that it was the trauma that made my husband to break down yesterday as the court can see his condition as he was admitted at Nyanya General Hospital as he has not been discharged as of today, but being a man of integrity he has to suspended the admission in order to come and face the judgment and that is why he is here.

I am presently standing as a widow to be doing nothing in Abuja, I am pleading with the court to temper justice with mercy in order to avert loss as our family for I don't know how to relate the issue to his mother who has a high blood pressure. Temper justice with mercy.

DC –CT: That will be all for the witness.

PC-CT: As a prosecutor in this case, I am not a persecutor, and I also have blood flowing in my vein.

The defendant was brought under the Violence Against Persons (Prohibition) Act and justice can be done in this case.

Let the law take its course. No question for the witness in form of cross-examination.

CT: I invite the two counsel in this case to come and address the court as to the purport of section 1 of the Violence Against Persons (Prohibition) Act 2015. More particularly on subsection 2 paragraph (b) as to what are the other cases.

Meanwhile the matter is adjourned to 28th day of January, 2020 for that.

Signed
Hon. Judge
22/01/2020

The court resumes sitting with the same membership. The convict is in court.

R.A. Enwusoyele Esq appeared for the prosecution.

Femi Adedeji Esq appeared for the convict.

PC – CT: The matter was adjourned for both parties to address this court as to section 1(2) (b) of the Violence Against Persons (Prohibition) Act 2015 based upon the court's invitation.

Based on the court's directive the prosecution has this to say that it is trite that punishment for offences is a function of the law creating the offence, and not the opinion of both parties.

Relevant section of the Violence Against Persons (Prohibition) Act 2015 under which the defendant was charged, and convicted is section 1(i) (a) of the same Act. Furthermore, the pursuant provision under section 1 of the Act that the defendant has been, convicted by the court in section 1(2) (a) & (b) of the Act which provides as to this that a person convicted under section 1 of the section is liable to punishment for life.

We therefore, that it is very clear that the maximum punishment for the offence which the defendant has been convicted by this Honourable Court is life imprisonment in line with section 1 (2) (a) while the minimum punishment for the same offence which the defendant has been convicted by this court is 12 years without options of fine in line with section 1(2) (b) of the Act. It is our submission that the punishment provided for the offence of rape under section 1 of the Act with which the defendant is charged is between 12 years of imprisonment without an option of fine and life

imprisonment as stated clearly and unambiguously in section 1 (2) (a) & (b) of the Act.

It is trite that where the process of a statute are clear and unambiguous, first as in this case, the court should give it its literal interpretation

Furthermore, the said provisions are mandatory to the extent that this Honourable Court has no discretion to sentence the defendant under section 1(2) to any term of imprisonment less than 12 years, or imprisonment without option of fine.

In the Supreme Court case of **Blessing Toyin V. F.R.N. (2013) 9 WRN (pt 1359) at 300 per Akaahs** where it was held that a justice has no discretion in involving a lesser punishment other than the mandatory penalty stated in the law creating that offence.

We therefore urge the court to sentence the convict accordingly in line with the mandatory provisions of section 1 (2) (a) & (b) of the Act.

DC-CT: The provision of section 1 of the Act is clear, however, section 2 (b) of the Act provides that any other case should have a minimum of twelve years without an option of fine. Our duty before the court is to assist the court in deciding the present case can amount the one the Act describe as in all other cases.

To answer this question we refer to section 311 of the court ACJA, that while when sentencing should consider some other factors.

The evidence before the court has shown that the defendant has not been convicted before today, and it is also not in doubt that the extent of this punishment is to deter the defendant from committing this offence or any other offence.

On the last adjourned date the wife of the defendant testified before the court for the purposes of mitigating the sentence on the defendant. It's in evidence that the defendant is a father and that his parents are aged. Automatically whatever the sentence, the court will pass shall directly affect the community, and in that circumstance there are the other factors this court is asked to consider in passing its sentences.

Primarily, this court has the discretion to decide as to the type of punishment this court has to impose, and we ask the court to temper justice with mercy.

SENTENCE

CT: I read in advance the provision of section 1 of the Violence Against Persons (Prohibition) Act in it entirely, and I have discovered that by the provisions of subsection 2 paragraph (b) other cases, have been mentioned. I also have had recourse to that paragraph and other subsequent sections of the Act, and I have not seen where the other cases have been listed in the Act.

I have also considered the submission of the both counsel where they have not, with all sense of understanding of the law, addressed this court as to what are the other cases. In this circumstance, let me quote the provision of section 1 of the Act which provides:

"A person commits the offence of rape if:-

(a) he or she intentionally penetrates the Vagina, anus, or mouth of another person with any other part of his or her body or anything else.

(b) The other person does not consent to the penetration, or

(c) The consent is obtained by force or means of threat or intimidation of any kind or fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance as additive capable of taking away the will of such person or in the case of a married person by impersonating him or her spouse."

(2) A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except"

a) where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years, imprisonment;

b) in all other cases, to a minimum of 12 years imprisonment without an option of fine;

or (c) in the case of rape by group of persons;

the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine."

By the provisions of subsection (1) of section 1 of the Act, it could be inferred that whoever penetrates into another person

Vagina without the consent of that other person is said to have committed rape; this provide a definition as to the offence of rape. However, by the provisions of section 1 (2) paragraph (b) of the Act which provides:

> **"in all other cases, to a minimum of 12 years imprisonment without an option of fine"**

To my mind, this subsection (2) of section 1 has to be read in its entirety, and if that is the position, what are the exceptions? The exceptions are as provided in paragraphs (a) (b) (c) of subsection (2) of section 1 of the Act in which in paragraph (b) mention is made of in all other cases that the question that was posed to the counsel on both sides is: what are the other cases.

To my mind, the subsection has not provided in details as to what are the other cases upon which a punishment of 12 years could be imposed upon a convict. What called for the court to ask the parties to address the court is for it to be cautious in handing down a sentence with necessarily taking into consideration of the whole punishment section.

In this regard, I have come to the conclusion that the punishment of rape is life imprisonment as the exception on paragraph (b) in relation to all other cases are not made clear.

Based upon the plea of leniency made by the counsel to the convict and the evidence of character of the wife of the convict this court has no option than to do what is appropriate, and that is to say the court does not have discretion to impose any lesser punishment except that has been provided in section 1 subsection (2) of the Act. Therefore, in considering the provisions of part 3, paragraph 12 (2) of the Federal Capital Territory, Courts (Sentencing Guidelines) Practice Direction 2016, I hereby sentence you Yusuf Francis Kyemang to life imprisonment.

Signed
Hon. Judge
28/01/2020