

SUPREME COURT OF NIGERIA
15TH JULY, 1993. SC.133/1991
CORAM:- M. L. UWAIS, A. B. WALI, O. OLATAWURA, U.
OMO, M. E. OGUNDARE, JJSC

ISAAC SAMBO

APPELLANT

v.

THE STATE

RESPONDENT

CRIMINAL LAW -

Conviction for attempted rape-admitted evidence of a child-where uncorroborated-whether conviction is proper

CRIMINAL

PROCEDURE -

Admission of the evidence of a child-without conducting the required tests - as to the child's understanding of the nature of an oath - and need to tell the truth - effect thereof

CRIMINAL

PROCEDURE -

Submission by accused - that court ought to suo motu call for statement of a witness to the police - for purposes of contradicting his evidence in court - whether sustainable - whether accused is denied fair hearing.

EVIDENCE -

Medical evidence which is not certain - sought to be used as corroboration for evidence of a child - whether proper

FACTS

The Appellant, a legal Practitioner was arraigned before the High Court of Bauchi State charged with the offence of raping a 10 year old girl. The case of the prosecution was that the Appellant sent the victim, his neighbour to fetch water for him for bathing. The girl, PW1 fetched the water and brought to the Appellant whereupon the Appellant invited her into his room locked his door and put on his music set. He then removed PW1's dress and tried to force his penis into her vagina. When PW1 started crying saying she did not like what he was doing to her. The Appellant

released her and pleaded with her to forgive him in order not to spoil his name. PW1's sister however invited the Police, on seeing blood in PW1's private part and on consequently learning of what transpired between PW1 and Appellant.

The Appellant rested his case on that of the prosecution Counsel for the appellant submitted that the court ought suo motu to call for the statement of PW1 (the complainant) to the police to contradict her with it. He argued that failure of the trial court to do that occasioned a violation of the Appellant's right to fair hearing. After considering the evidence before him, the trial court found the Appellant guilty and convicted him of the lesser offence of attempted rape. He appealed to the Court of Appeal which affirmed the conviction of the trial court. He then appealed to the Supreme Court. The Supreme Court had to decide among other things, whether there was evidence corroborating the evidence of PW1 (a child) and whether Appellant's right of fair hearing was violated.

HELD (unanimously allowing the appeal)

1. The evidence of PW4the medical doctor was at best, talks of possibility as opposed to certainty. It was wrongly considered by the trial court as constituting corroboration, and it falls short of the standard of proof required for the offence charged. (p. 11 L22)
2. Part of the Appellant's statement in which he stated that the child was "crying saying she did not like what I was doing to her" can indeed be considered by the court. It is evidence that can be used against him even though he did not testify in his defence. (p.11L33)
3. The three pieces of evidence of the prosecution cannot be taken together as corroboration required by law. The evidence is circumstantial and without more, it cannot be sufficient proof that the Appellant committed the offence charged. (p. 12 L 4)
4. The trial court must be deemed to have judicial notice of PW1's statement but it does not follow that without its attention being drawn to it, it is under any obligation to suo motu call for it and proceed to contradict PW1 with it. The trial court was therefore right in what it did and did not thereby violate the Appellant's right to a fair hearing. (p. 13 L19)

(PT. 300) 399

5. The procedure required to be carried out under the Evidence Act as properly detailed in Mbele's case (1990) 4 NWLR 484 was not carried out. And the observation on the record as to PW1 being a Moslem child of eleven years old who knows the nature of an oath but does not know the consequences of telling a lie whilst affirming to speak the truth, is not sufficient compliance with the required procedure.(p.14L12)

6. The effect of the trial court's failure to carry out both tests (as to a child's required level of understanding and the need to tell the truth, and that the witness understands the nature of an oath) is not a mere irregularity. The failure should result in making the evidence of the PW1 an evidence which the court of Appeal should have disregarded in considering the appeal. (p. 15 L 5)

REPRESENTATION

Tayo Oyetibo, Esq (with him, A. Oshin), for the Appellant
 A. Jauro Esq. Director of Public Prosecutions, Ministry of Justice, Bauchi State (with him, U. E. Hassan, State Counsel, Ministry of Justice, Bauchi State), for the Respondent

CASES REFERRED TO:

1. Esangebedo v. State (1989) 4 N.W.L.R. 57
2. Mbele v. State (1990) 4 N.W.L.R. 484
3. Okafor v. C.O.P. (1964) 1 All NLR 302
4. Okoye v. State (1972) 12 S.C 115
5. Okpanefe v. State (1969) 1 All NLR 420
6. Olaleye v. State (1970) N.S.C.C. (Vol. 6) p. 250
7. Osafire v. Odi (No. 1) (1990) 3 N.W.L.R. (pt. 137) 130
8. Queen v. Ekalag (1960) SCNLR 488
9. Queen v. Ekpata (1957) SCNLR 1
10. Shazali v. State (1988) 3 N.W.L.R. (pt. 93) 164.

STATUTES:

1. Evidence Act Cap. 112 Laws of the Federation of Nigeria. 1990 Section 155 (1), 179 (5), 180, 183 and 209
2. Penal Code, Section 282

LEAD JUDGMENT BY OMO JSC

The appellant, who is a legal practitioner resident at Gombe, Gombe Local Government Area of Bauchi State, was in August 1988 arraigned before the High Court of Bauchi State (Bauchi Judicial Division) and charged with committing the offence of rape against a
5 10 year old girl, one Bilkisu Umaru, contrary to section 283 of the Penal Code.

At the trial, the prosecution called four witnesses - the child and complainant (P.W.1), her sister (P.W.2), the investigating Police Officer (P.W.3), and the Medical Officer who examined her (P.W.4).
10 The appellant neither testified nor called any witnesses. He rested his case on that of the prosecution. After hearing counsel on behalf of the prosecution and the accused in address, the learned trial Judge delivered a considered judgment in which she convicted the appel-
15 lant of the lesser offence of attempted rape and sentenced him to a term of 6 months imprisonment plus a fine of N1,000.00 or, in the alternative to the fine imposed, an additional sentence of 3 months imprisonment.

The case of the prosecution, briefly, is that the appellant, on
20 the 2nd July, 1987, requested the complainant (P.W.1), who is a neighbour of his, to fetch him water for bathing. When she brought the pail of water to the appellant's house, he invited her into his room, locked his door, and put on his music set. He then removed the child's dress, forced her on to his bed and tried unsuccessfully to put
25 his private part (penis) on her private part (vagina). When the child started crying, he unlocked the door of his room and let her go, pleading for her forgiveness so that "his name would not be spoiled". On getting home, P.W.1 took off her bloodstained pant and washed same. When, later still, the sister (P.W.2) met her crying and asked
30 her what was wrong with her, she told her what the appellant had done to her. On examination of her private part by P.W.2, she found some blood thereon. P.W.2 then made a report to the Police which led to the arrest of the appellant. In the course of investigation, P.W.1
35 was sent to the General Hospital, Gombe, for examination, and statements were obtained from the appellant by the Police.

In his two statements to the Police, the appellant admitted that he sent P.W.1 who is his neighbour to fetch "bathing water" for him. When she brought same to his room, there was music being

played on the radio and he began to dance with her. She however, started crying, stating that she did not like what he was doing to her. He then left her and she departed. At no time did he rape or force himself on her.

Dissatisfied with his conviction and sentence by the High Court, the appellant appealed to the Court of Appeal against same. Briefs were duly filed by the parties, and after hearing the appeal, the court below dismissed same and affirmed the conviction and sentence of the trial High Court. The appellant has appealed again - to this court.

Five issues for determination were set out by the appellant in his brief, as follows:-

- "1 *Whether the Court of Appeal was right in law and on the facts in holding that there was evidence corroborating the evidence of the P.W.1 to sustain the conviction of the Appellant for attempted rape.* 15
2. *Whether the disparity between the written statements of the P.W.1 and her evidence in court is not such as would render her evidence unreliable and if the answer is in the affirmative whether the Court of Appeal did not violate the Appellant's right to fair hearing in refusing to consider Appellant's counsel's submission on the point.* 20
3. *Whether the Court of Appeal should have confirmed the conviction and sentence passed on the Appellant by the trial Court when the same was based on speculation.* 25
4. *Is it not mandatory for a trial court to conduct the usual preliminary test as to the capability of a child to testify before receiving the child's evidence under section 182 (1) of the Evidence Act? If the answer is in the affirmative, whether the court of appeal should not have quashed the conviction of the Appellant based on the evidence of the P.W.1 which is a child which evidence was received by the trial court without conducting the preliminary test.* 30
5. *Whether the contradiction, inconsistencies and disparities in the totality of the evidence adduced by the prosecution are not such as would warrant a setting aside of the conviction and sentence passed on the appellant by the trial court and affirmed by the Court of Appeal."* 35

The respondent also set out in his brief five issues for determi-

nation, which are framed thus:-

1. *Whether the Court of Appeal was right in law and on the facts in holding that there was evidence corroborating the evidence of the prosecutrix (PW1) to sustain the conviction of the Appellant for attempted rape.*
2. *Whether the Court of Appeal was right in holding that the contradictions in the evidence adduced by the prosecution are minor and do not affect the substance of the prosecution's case.*
3. *Whether the Court of Appeal was right in law when it failed to give detailed consideration to the Appellant's Counsel's submission on the contradiction between the PW1's oral evidence in court and a previous statement made to the police on the ground that the alleged statement was never tendered in court as the alleged statement was never tendered in court as to form part of the evidence before the court.*
4. *Whether the Court of Appeal was right in upholding the conviction and sentence passed on the Appellant by the trial court when same was based on speculation.*
5. *Whether or not the trial court has complied with the provisions of sections 154 (1) and 182 (1) of the Evidence Act before receiving the evidence of the PW1."*

The first issue for determination in both briefs call for an examination of the facts which the court below (and even the trial court before it) relied upon to come to the conclusion that there was evidence corroborative of testimony of PW1. (the complainant/prosecutrix) as required by law.

Rape is defined in Section 282 of the Penal Code as follows:-
 "282(1)

A man is said to commit rape who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances -

- (a) *against her will;*
- (b) *without her consent;*
- (c) *without her consent, when her consent has been obtained by putting her in fear of death or of hurt;*
- (d) *with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;*
- (e) *with or without her consent, when she is under fourteen years of age or of unsound mind.*

(2) sexual intercourse by a man with his own wife is not rape, if she has attained to puberty."

There is no provision under the code itself for corroboration in the case of the rape of a girl under the age of 11 or 13 years, as is the case in the Criminal Codes of the Western/Bendel States and the Federation respectively. These latter Codes provides specifically that-

"A person cannot be convicted of the offence(s) on the uncorroborated testimony of one witness".

This lacuna is however taken care of by section 178 (5) and 182 of the Evidence Act Section 178 (5) states that -

"178(1)

Except as provided in this section, no particular number of witnesses shall in any case be required for the proof of any fact.

Sedition and Sexual Offences

(5) A person shall not be convicted of the offences mentioned in sections 218, 221, 223 or 224 of the Criminal Code upon the uncorroborated testimony of one witness (notes: Italics mine)

Section 218-224 deal with offences against morality; and under section 218 particularly is very apposite, as it creates the offence of defilement of girls under thirteen years (similar to the offence being considered in this appeal).

Section 182 which deals with the unsworn evidence of a child provides -

"182 (1)

In any proceeding for any offence the evidence of any child who is tendered as a witness and does not in the opinion of the court, understand the nature of an oath, may be received, though not given on oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) If the court.....

.....

(3) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and

given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused (note; Italics mine)

(4)"

(These are now sections 179 and 283 in Cap. 112 of the Laws of the Federation of Nigeria 1990.) The provisions set out, in brief, require the corroboration of the testimony of a child by other material evidence implicating the accused in order to convict in the case of the defilement/rape
5 (under the code) of a child.

This issue was considered both by the trial High Court and the Court of Appeal both of which held that there was such corroborative evidence, and proceeded to find the appellant guilty. The trial High Court held such corroboration established First by the following finding:-

10 *"The fact that the PW1 left the room of the accused crying and was found crying by her sister, the fact that when she was examined by the PW4 there was inflammation and trauma on her private part which in the opinion of the P.W.4 might have been caused by forceful entry all lead the court to arrive at only one conclusion*
15 *that there must have been an attempted rape on the P.W.1 by the accused.*

(note: Italics mine)

and secondly by "circumstantial evidence as shown by the prosecution".

On appeal the court below set out in its judgment, "some relevant
20 evidence that could be described as corroborating the evidence of the prosecutrix P.W.1 as follows:-

"PW.2 - "I did see blood between her thighs and coming of her private part".

25 *P.W.4 - "There is a possibility of trauma on the vagina which might have been caused by possible entry. "The appellant's caution statement Exh. 'B' where he said "....was dancing and playing with the girl in my room, when she started crying, saying she did not like what I was doing to her"*

It ended by stating that-

30 *"I think the supra evidence are in my opinion sufficient corroboration of the evidence of P.W.1. See Mbele v. State (1990) 4 N.W.L.R. (Pt. 145) Page 484".*

It also relied on the evidence of P. W.4, as to the state in which she found the child; P.W.4, as to the state and condition of the child when he exam

ined her vagina; and the appellant's statement that the child cried when he was dancing with her; as circumstantial evidence which provided the required corroboration.

In his submission the appellant has urged that the nature of evidence required to sustain a conviction for attempted rape on the unsworn evidence of a child was not led in the case on appeal. Such evidence, he said, must be one that implicates the accused person in the commission of the offence. It must show that the accused person actually committed the offences. Appellant then made submissions on the three pieces of evidence 5 relied on by the court below as constituting corroboration. On that of P.W.2 that she saw blood coming from between the thighs of the child and from her private part, he submitted that-

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"this piece of evidence does not in any way entangle the accused in the offence alleged. Thus the evidence does not say or even suggest that the blood found on the thighs and coming out of her private part was that of the accused. Nor that the same blood was found on the body or private part of the accused so as to suggest 15 that the accused had contact with the private part of the P.W.1."

As to the evidence of P.W.A (wrongly attributed to P.W.3) that "there is a possibility of trauma on the vagina which might have been caused by possible entry, appellant's submission is that-

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"the Court of Appeal misdirected itself on this point because it did not direct itself towards the evidence of the same P.W.4 immediately before the evidence quoted above which says: 25
"There was a possibility of rape in my opinion. It is however not conclusive (Italics mine)"

He further went on to submit that this evidence of P.W.4 did not satisfy the standard of proof required in criminal cases, which is proof beyond reasonable doubt and not proof on probabilities or possibilities. It merely shows that it is possible that the offence was committed and not that it was 30 actually committed. On the portion of the appellant's statement to the police (Exhibit B) relied on as corroboration, appellant has submitted that it does not suggest any inference that rape or any attempt to commit rape was made by the appellant on P.W.1. It is also not a confession in law of the offence charged that can be relied on to convict the appellant. 35 Appellant also attacked the court below's finding on circumstantial evidence in which it stated -

5 *"I believe the evidence of P.W.2 on the state she met P.W.1, the appellant's statement that P.W.1 cried when he danced with her and the revelation in the medical superintendent's evidence on the state and condition of P.W.1 he examined her vagina. This examination was carried on the very next day after the incident. Even though it was not done on the very day, I am of the view that the evidence was cogent."*

10 The reasons for this attack are set out in the particulars of misdirection to Ground 2 of the grounds of appeal. They will be commented upon in the course of my consideration of the main issue, if necessary, it is sufficient to state here that the point was therein made that the court below cannot "believe or disbelieve" evidence which it did not have the advantage of
15 seeing. The contradictions of these pieces of evidence with other evidence led and their inconclusive nature were also pointed out. In conclusion appellant has submitted that these pieces of evidence cannot constitute circumstantial evidence on which this court can convict because it is not cogent, complete, unequivocal, compelling and showing with mathematical accuracy, that it was the appellant who committed the offence for
20 which he was convicted vide *Adie v. The State* (1980) 1972 S.C. 110 (150/151); *Gabriel v. The State* (1989) 5 N.W.L.R. (pt. 122) 457 (463)

The respondent in its brief relied on the same pieces of evidence
25 which the court found to constitute corroboration. In addition it also relied on "the evidence of P.W.2 who met P.W.1. Crying shortly after she (P.W.1) came out of the appellant's room". This latter addition can be disposed off immediately. It is not a correct rendering of the evidence of P.W.2 who never said that she saw her sister (P.W.1) crying shortly after she came out
30 of appellant's room. The time factor introduced is not unimportant here. How long after is "shortly after"? If it was shortly after, we would expect P.W.2 to immediately challenge the appellant who is a neighbour; and the child would have been taken to P.W.4 for examination the same (instead of the next) day.

35 In considering the pieces of evidence relied upon as constituting corroboration, the first point that I have to make is that all of them taken singly or together constitute circumstantial evidence, as opposed to direct evidence of the offence charged or proved. If any of them is shown to be

unreliable or otherwise discredited, it need not be further considered as relevant circumstantial evidence.

The submission of appellant on the piece of evidence of P.W.2 relied on by the court below, is only valid in my view if the contention is that taken by itself that piece of evidence cannot constitute corroboration. Even though the evidence does not prove the offence charged/proved, it could, 5 where other cogent evidence is available, be circumstantial evidence which can be considered in coming to the conclusion whether corroboration has been established or not. Objection to this piece of evidence has however also been raised by appellant's counsel on the ground that the court below wrongly believed this piece of evidence when the trial High Court which saw 10 and heard the witness did not make any such finding. The trial court no doubt must have taken into account the evidence of P.W.3 who saw the girl soon after the sister (P.W.2) made her complaint, and did not see any blood either on her or on her wrapper. Nor did P.W.A, who the other three witnesses (P.W.1, P.W.2, P.W.3) testified, saw P.W.1 that very day. If P.W.2 15 saw blood in P.W.1's thigh and private part, unless it is cleaned of, particles of it (even though caked) would have been observed by P.W.4 in the course of his investigation. The piece of evidence is therefore at best flawed. The evidence of P.W.4 the medical superintendent is an entirely different matter. It is so equivocal and, at the highest, talks of possibility (as opposed to 20 certainty) ,that it is really valueless. There was on examination no bleeding or discharge. No evidence of the hymen having been recently interfered with; but it was shown to have been "broken (or not intact). Rape was stated to be only a possibility but not conclusive. Finally, whilst P.W.4 is sure that he saw P.W.1, the day after the event complained of, P.W.1, 25 P.W.2 and P.W.3 swore that P.W.4 examined her the same day. I agree with the appellant that this evidence was wrongly considered as constituting corroboration by the court below. It falls far short of the standard of proof required for the offence charged. Part of the appellant's statement in which he stated that the child was "crying saying she did not like what I was doing 30 to her" can indeed be considered by the court. It is evidence that can be used against him even though he did not testify in his defence vide *Shazali v. The State* (1988) 5 N.W.L.R. (Pt. 93) 164. It is however only fair to observe that the appellant said that he understood the girl to be saying that she did not like the dancing, and no more. Whilst this piece of evidence 35 cannot by itself constitute proof, it is evidence which the court can look at when considering corroboration.

In the final analysis the question that has to be decided is whether these three pieces of evidence, the first flawed, the second useless, and the third not by itself proof of offence charge, can taken together, constitute
5 corroboration as required by law. The evidence is circumstantial and in my view is certainly not sufficiently cogent, compelling and unequivocal as to show without more than the appellant committed the offence charged/proved. The answer to the first and most important issue raised by the appellant is in the negative.
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The complaint in the second issue is that the court of appeal violated the right of fair hearing of the appellant by refusing to hear and fully consider his counsel's submission that the disparity between the statement
15 made to the Police by P.W.1 and her evidence in court rendered her evidence unreliable. For this submission counsel relied on the proviso to section 208 of the Evidence Act which reads-

20 *"Provided always that it shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may thereupon make use of it for the purpose of the trial, as it shall think fit"*
(note: Italics mine).

25 The main part of section 208 deals with the procedure for confronting a witness with a past statement made by him with a view to contradicting same with his present statement on oath. In that case the attention of the witness must be drawn to the contradictory portions, so that opportunity be given to him to explain same, if possible. The proviso thereto set out above
30 allows the court to require the production of such a statement/document and thereafter to use same for its own purpose. Such power can only be exercised during the trial. In order to be able to exercise this power (right) the attention of the court must in my view be drawn to the document either by its own observation or by the party seeking to benefit from the contradiction
35 in the document. In the present case not only was the court's attention not drawn to the relevant document-the statement of P.W.1 to the police, but appellant's counsel never adverted to same even in his address. What is more the proviso to section 208 contemplates the exercise by the court of its power to seek and obtain production of the document for use during the

trial; not during the hearing of all appeal against the judgment delivered at the trial. It is therefore not open to appellant's counsel to seek to address the court below on the failure of the trial court to exercise its power under the proviso to section 208 of the Evidence Act, during the hearing of the appeal in the court below. The refusal of that court to give "detailed consideration" to any submissions urging it to set aside the judgment of the court of trial on that ground is therefore in my view correct. 5

Appellant's counsel has drawn attention to the fact that the learned trial Judge must be deemed to take judicial notice of the statement of P.W.1 in question. In support he cited *Osafire v. Odi* (No.1) (1990) 3 N.W.L.R. (Pt.137) 130 (158) where *Nnaemeka-Agu, J.S.C.* stated that 10

"I think it is fairly settled and not a matter for argument that a court will take judicial notice of its records and proceedings (note: *Italics mine*) 15

There is no doubt that the trial court must be deemed to have judicial notice of the P.W.1's statement. That however does not mean that the court, without its attention being drawn to it, is under any obligation to suo motu; call for its production and proceed to contradict P.W.1 with same, with or without admitting same in evidence, hold the testimony of P.W.1 in court as unreliable, and acquit and discharge the appellant. The court, be it remembered, under our adversary system operates as an umpire in proceedings before it. It cannot be faulted for failing to take action on a document not tendered in evidence before it, and/or to which its attention has not been drawn. Normally such evidence is not evidence on which it can act vide *Esangbedo v. The State* (1989) 4 N.W.L.R. (Pt. 113) 57 (66), where this court refused to look at extra judicial statements which had some contradiction with the sworn evidence of their makers during the trial, on the ground that they had not been produced, used to contradict the witnesses, and tendered in evidence. It was therein pointed out that an appellate court is bound to consider an appeal before it on the basis of legal evidence which the trial court saw, considered and acted upon. On the whole *Mukhatar, J.C.A.* was very right when she stated that: 20 25 30

"I will not give detailed consideration on counsel's submission on 35

the contradiction between P.W.1's evidence in court and a previous statement made to the Police. That submission should not even arise at all, because this statement counsel is relying heavily

on, and comparing with the evidence in court was not tendered in court and was thus not evidence before the court and did not form part of the record. In fact it is a non issue."

The answer to the second issue therefore is that the action of the court
5 below was right and that it did not violate the appellant's right to a fair trial.

In view of my decision on issue 1, I do not intend to further consider appellant's Issue 3 in this judgment.

Issue 4 complains that the learned trial Judge did not comply with
10 the preliminary test required by section 182 (1) of the Evidence Act before allowing P.W.1 a child of 10/11 years to testify. Furthermore, whether if there is such failure it should not result in quashing of conviction based on such evidence. It is the submission of the appellant that the preliminary
15 tests were not considered as required by law. For these to be properly considered, the process of examination and the result must be recorded. Counsel for the appellant relied on Mbele v. The State (1990) 4 N.W.L.R. (Pt. 145) 484, as to the procedure to be adopted for a proper examination. Whilst in Mbele's case there was evidence on which it could be held that the
20 required test was conducted, it is the submission of the appellant that no such evidence exists here. Two tests are required. The first is as to the required level of understanding and the need to tell the truth. This will justify the reception of the evidence of P.W.1 as unsworn evidence under section 182 (1). The second, is to ensure that the witness understands the
25 nature of an oath. This will make it possible to receive her evidence on oath under section 179 of the Evidence Act. It is the submission of appellant that neither of these investigations were conducted, and that the effect of such failure is to render the evidence of P.W.1. a nullity. No conviction can therefore be based on it, vital as it is in the present case. The appellant would therefore be entitled to an acquittal of the offence for which he was
30 convicted.

Again, in view of my decision on Issue 1, I do not propose to consider this issue in detail. Suffice it to say that the procedure require to be carried out under Section 159 of the Evidence Act, as properly detailed in
35 Mbele's case (supra) was not carried out here. The observation on the record, that

"P.W.1

Muslim a child of eleven years old who know the nature of an oath but does not know the consequences of telling a lie affirmed to speak the

is not sufficient compliance with the required procedure. Is such failure a mere irregularity or is it more fundamental? I am afraid I agree with the submission of the appellant that the effect of a failure to carry out both tests is not a mere irregularity but should result in making the evidence of P.W.1. one which the court below should have disregarded in considering the appeal. Without the evidence of P.W.1 as to what the appellant is alleged to have done to her, the foundation of the charge cannot be laid. No need for corroboration would arise. The appellant would therefore be entitled to an acquittal in respect of the offence for which he was convicted. The submission of appellant on Issue 4, therefore succeeds. There is also no need to consider issue 5 which deals with inconsistencies and contradictions in the evidence on record, in view of my decisions on Issues 1 and 4.

Accordingly this appeal succeeds and the decision of the Court of Appeal affirming the conviction and sentence of the trial court is hereby set aside. In its place I enter a verdict of not guilty in favour of the appellant who is consequently acquitted and discharged.

UWAIS JSC

I have had the privilege of reading in draft the judgment read by my learned brother Uche Omo, J.S.C. I agree that the evidence given by the prosecutrix has no probative value since she was not examined by the learned trial judge in order to satisfy the requirements of Section 183 sub-sections (1) and (2) of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990. Furthermore, even if her evidence has weight, there is no material evidence to corroborate it.

Consequently, the conviction of the appellant cannot stand. The appeal therefore succeeds and I agree that it should be allowed. The conviction is hereby quashed. The appellant is acquitted and discharged.

WALI JSC

I am privileged to have a preview of the lead judgment of my learned brother, Uche Omo, J.S.C. and I agree with his reasoning and his conclusion that the appeal be allowed.

The appellant was charged with committing rape against a ten year old girl, contrary to Section 282 punishable under section 283 of the Penal Code.

The facts of the case have been amply stated in the lead judgment of my learned brother, Uche Omo, J.S.C. and so need not be restated.

At the end of the trial, the appellant was found guilty of attempted rape, convicted and sentenced to a term of six (6) months imprisonment and also a fine of N1000.00 or in the alternative to serve an additional term of three (3) months imprisonment.

His appeal to the Court of Appeal, Jos Division was also dismissed.

The only issue that I want to comment upon is the admissibility of the evidence given by P.W.1 the victim of the offence. She was ten (10) years when the attempted rape was committed on her, but eleven (11) years when she gave evidence on affirmation. Being a minor, the learned trial Judge, after examining her recorded that she:-

"knows the nature of an oath but does not know the consequences of telling a lie"

Having done that, the girl was affirmed and she gave her evidence.

Section 179 (which now is 180) of the Evidence Act provides thus:

"Save as otherwise provided in sections 181 and 182 (which are now sections 182 & 183) all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths and Affirmation Act."

Section 182 (1) and (2) deals with taking the evidence of a child. It provides as follows:-

"(1) In any proceeding for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received though not given upon oath, if in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of telling the truth."

(2) If the court is of the opinion as stated in subsection (1), the deposition may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by all adult would be admissible."

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The learned trial Judge while considering the prosecution's evidence commented on the evidence of P.W.1. She said:

"Evidence as adduced by the prosecution has shown that the P.W.1 was 10 years of age at the time of the incidence, so her affirmed testimony which has satisfied the provision of section 154 (1) of the Evidence Law still requires corroboration."

10

Section 154 (1) which is now section 155 (1) of the Evidence Act states:-

"All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

15

The learned trial Judge, instead of conducting examination on strict conformity with the provisions of section 182 (1) & (2) of the evidence Act to find out whether P.W.1, not only knew the nature of an oath, but she must also know the duty of telling the truth as well as the consequences of telling a lie, she seems only to have examined her as to whether she knew the nature of an oath and the consequences of telling a lie. Although there was nothing on record to show that she was examined as regards her capability of giving rational answers to questions put to her, her evidence showed that she was possessed of intelligence to give rational answers to questions.

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It is therefore my view that her evidence is not a nullity but worthless since she did not know the consequences of speaking the truth or telling a lie. The learned trial Judge fell in grave error in acting on her evidence. And since she was the prosecutrix, the remaining evidence even if cogent (which is not) cannot corroborate the evidence that has no probative value.

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In John Okoye v. The State (1972) 12 S.C., this court dealt with the way and manner both sections 179 and 182 (1) and (2) which are sections 180 and 182 (1) and (2) respectively, particulars at P.126 to 127 where Coker, J.S.C. said:-

"The contention of learned counsel for the appellant is, in short, that it must be shown on the records that the child witness is capable of understanding the nature of an oath before he is allowed to take such oath. We point out that the section on which learned counsel relies makes no provisions for the situation postulated by his argument. It is as well the duty of counsel to raise an objection to any irregularity in the conduct of the proceedings and especially so when it is clear that a particular step ought to have been taken or a particular thing done. In the present case, the witness, Agnes Okoye, gave evidence under oath without any objection whatsoever from anybody and as her age does not necessarily import an incapability to understand the nature of an oath or any other form of incompetency the section relied upon to attack the proceedings is in our view unavailing."

It will be desirable, if not necessary for the Judge after examining a child to write whether he is satisfied that the child:

1. knows the nature of an oath;
 2. the duty of telling the truth; and
 3. is possessed of intelligence to give rational answers to questions put to him
- before taking his evidence under either section 182 (1) or 182 (2) of the Evidence Act.

It is for these and other reasons contained in the lead judgment of my learned brother, Uche Omo, J.S.C. that I also allow the appeal, set aside the conviction and sentence passed on the appellant, and in place thereof enter a verdict of acquittal and discharge.

30 **OLATAWURA JSC**

I will agree with the reasoning and conclusions reached by my learned brother, Uche Omo, J.S.C. that the appeal should be allowed.

This appeal forcefully demonstrates the thin line between justice and law. The facts as already stated in the lead judgment pointed to one conclusion that the appellant has taken advantage of the familiarity between the family of the prosecutrix and himself and consequently lured the prosecutrix into his room whereby he attempted to rape her. That in a nutshell was the case of the prosecution. Peculiar to the offence with which the appellant was charged is a requirement of the law that before the pros

ecution can secure a conviction, the evidence of the prosecutrix (P.W.1) must be corroborated in some material particular that sexual intercourse has taken place and that it was without her consent. The corroboration required is the evidence that implicates the accused in the commission of the offence. This is the requirement of law. It must therefore be justice according to law.

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With this at the background I will now comment on issues 1 and 4 of the issues raised for determination by the appellant. The two issues are:

- "(1) *Whether the Court of Appeal was right in law and on the facts in holding that there was evidence corroborating the evidence of the P.W.1 to sustain the conviction of the Appellant for attempted rape.*
- (4) *Is it not mandatory for a trial court to conduct the usual preliminary test as to the capability of a child to testify before receiving the child's evidence under section 182 (1) of the Evidence Act? If the answer is in the affirmative, whether the Court of Appeal should have quashed the conviction of the Appellant based on the evidence of the P.W.1 who is a child which evidence was received by the trial court without conducting the preliminary test."*

Mr. Oyetibo, the learned counsel for the Appellant has submitted that the nature of the evidence required under section 178 (5) and 182 (3) of the Evidence Act to sustain a conviction for attempted rape on the unsworn evidence of a child must be evidence that implicates the accused in the commission of the offence. Section 182 of the Evidence Act which deals with unsworn evidence of a child provides in sub-section 3 of that section as follows:

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"182(3) - A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.

The corroborating evidence required is some independent evidence which connects the accused with the offence charge: R. v. Ibe 4W.A.C.A.131/132.

In this case on appeal, it is not disputed that at the time the

offence was committed the prosecutrix was only ten years old and therefore she was a child. She cannot in law give her consent to sexual intercourse. Consequently her evidence must be corroborated. The record shows that her evidence was not in conformity with section 182 (1) of the Evidence Act as there was nothing to show how she was examined. The record merely
5 shows a conclusion of what happened; it ought to have stated how the learned trial Judge came to the conclusion that she "knows the nature of an oath but does not know the consequences of telling a lie". While the evidence of the child may be received, the court must be satisfied that the child is of sufficient intelligence and understands the duty of speaking the
10 truth. The section (S. 182 of the Evidence Act) appears to me mandatory so as to avoid a miscarriage of justice. Any witness whether an adult or a child who has no regard for truth should not be believed. It will be dangerous to convict on the evidence of such a witness. The primary duty of the court of trial is to ascertain the truth, but the appellate court is not pre-
15 cluded from ascertaining the truth once it is not based on the observation of demeanour of witnesses who invariably are not before the Appellate Court. Although demeanour is only a guide to the truth, there are sometimes other facts that will be taken into consideration.

20 In this case, there was no corroboration of the evidence of the prosecutrix. Her evidence of what happened and as related to her cousin and her cousin-in-law merely showed consistency. The evidence of the doctor in so far as corroboration is concerned has not satisfied the requirement of the law. To ground a conviction the unsworn evidence of the child must
25 be corroborated: *Olaleye v. The State* (1970) N.S.C.C. (Vol. 6) P. 250 (1970) 1; *Okpanefe v. The State* (1969) N.S.C.C. Vol. 6. P. 382 (1969) 1 All NLR 420; *The Queen v. Ekalagu* (1960) N.S.C.C.P. 144 (1960) SCNLR 488. It is therefore risky and in fact unsafe to convict an accused person on the corroborated evidence of a child. I cannot therefore accept the submission of the learned Director of Public Prosecutions that the statement of the
30 appellant, the evidence of the Medical Superintendent and the evidence of P.W.2 are sufficient evidence of corroboration.

I also think it is erroneous on the part of the lower court to rely on
35 circumstantial evidence to convict the appellant as such evidence was neither cogent, compelling and unequivocal.

There is no doubt that the behaviour of the appellant on that occasion was despicable, shameful and irritating when one considers his status in life. I cannot brush aside the law applicable in this case as justice can only do what the law allows.

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OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Uche Omo, J.S.C. just delivered. I agree with the conclusion reached by him that this appeal be allowed. I, however, want to add a few words of my own, particularly in respect of the evidence of the prosecu- 10
trix, that is, P.W.1.

The facts have been fully set out in the judgment of my learned brother, I need not go over them again. I am only limiting this judgment to the evidence of P.W.1. She gave evidence on oath on the 2nd of August, 1988. She was apparently examined by the learned trial Judge before being 15
called upon to testify. This became so due to her tender age - 11 years. For section 154 (1) of the Evidence Act (now section 155 (1) in the 1990 Edition of the Laws of the Federation of Nigeria) provides:

154(1) All persons shall be competent to testify, unless the court consid 20
ers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

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Before taking the evidence of P.W.1., the learned trial Judge after examining her suitability to testify, made the following note in her record:

*"Muslim a child of eleven years old who knows the nature of an oath but does (not) know the consequences of telling a lie. Af 30
firmed to speak the truth s/h"*

This examination would not appear to satisfy the requirements of the section. It would appear, however that from answers given by P.W.1, to questions by the learned trial Judge, the latter was satisfied that P.W.1 understood the nature of an oath. Thereafter, the witness gave evidence on oath. 35
The question now is: of what value is the evidence given by this witness? This question becomes pertinent in view of Issue 4 raised in Appellant's Brief. It is therein submitted as follows:

".....that before a trial Judge can form his opinion under Section 154(1) and 182(1) of the Evidence Act as to whether or not a child is possessed of sufficient intelligence to justify the reception of his evidence, there must be some materials upon which the court is to form its opinion. Although there is no specific question
 5 prescribed under Section 154 (1) and 182 (1) of the Evidence Act but over the years the courts have developed a line of questions to be asked from the child before the reception of his or her evidence. I refer to *LAW AND PRACTICE RELATING TO EVIDENCE IN NIGERIA* by T. AKINOLA AGUDA page 229 paragraphs 23-05.
 10 It is submitted that it is mandatory for the trial Judge to examine the child before forming his opinion. It will also be argued that it must be apparent and indeed expressed by the trial Judge on the record that the child was examined before the court formed its opinion. In the instant case, the trial Judge did not follow the
 15 provisions of the Evidence Act before receiving the evidence of the PW.1."

It is further submitted that there is nothing in the judgment of the trial court to show that PW.1 was examined before the reception of her evidence.

20 With respect to the learned counsel for the appellant, I do not share his view that there is nothing on record to show that PW.1 was examined by the trial Judge before her evidence was received. The note made by the learned trial Judge in the record - and earlier quoted by me in
 25 this judgment - is an indication that she must have examined PW.1 as to whether the witness understood the nature of an oath and whether the witness understood the consequences of telling a lie. Although this examination would appear not to be sufficient to meet the requirements of section 182 (1) of the Evidence Act now Section 183 (1) in the 1990 edition of
 30 the Laws of the Federation of Nigeria), having been satisfied, however, that the witness understood the nature of an oath, it was not necessary to comply with Section 182 (1). I refer in this regard to *Okaye v. The State* (1972) 12 S.C. 115, 125-126 where this court, per G.B.A. Coker, J.S.C., observed:

35 *"But, although the Judge is not bound to hold a preliminary inquiry, he is nonetheless required to form an opinion that the child does not understand the nature of an oath in order to make the section operative. The section has approached the problem in a*

negative way and obviously says nothing concerning the child produced and tendered as a witness who understands the nature of an oath. The section is aimed at a child who does not understand the nature of an oath and what it then says is that the sworn evidence of such a child may be received despite the provisions of section 179 if "in the opinion of the court" he has sufficient intelligence to justify his giving such evidence and understands the duty of speaking the truth. As the section does not contemplate a child who understands the nature of an oath, it is difficult to see how section 182 applies to the present case. We think it appropriate to observe however that where a Judge thinks that the case of a child-witness should be taken away from the provisions of section 182 (1), there should be recorded a note to that effect stating that in his opinion the child is capable of understanding the nature of an oath. A child is a young person in the formative period of life and whilst it is easy to see that a person of the age of 6 or 7 years does not understand the nature of an oath, it is impossible to be categorical on the capability or otherwise of a child of 13 years or more to understand the nature of an oath. A great deal depends on the opinion of the Judge who sees and hears the witness. Where the child is incapable of understanding the nature of an oath, the procedure in section 182 (1) must be followed so as to justify the necessary departure from the provisions of section 179. On the other hand, where the child is capable of understanding the nature of an oath, he must comply with Section 179 as is the case in the present proceedings."

Being satisfied, therefore, that P.W.1, understood the nature of an oath, the learned trial Judge rightly, in my view, applied section 179 (now Section 180) in receiving the evidence of the witness on oath. A reading of the record as a whole will suggest that P.W.1, testified on oath. Section 182 (1) provides:

"182 (1) In any proceeding for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received, though not given upon oath if, in the opinion of the court such child is possessed of sufficient intelligence justify the reception of the evidence, and understands the duty of speaking the truth."

Section 179 also provides:

179. Subject to the provisions of Sections 159, 169, 230 and

235 of the Criminal Procedure Code and save as otherwise provided in sections 181 and 182 of this Law all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oath and Affirmations Law or the Criminal Procedure Code, as the case may be."

Having said as much, it remains to consider the weight that ought to be put on the evidence of P.W.1, having regard to the remark by the learned trial Judge that "she does not know the consequences of telling a lie." In my respectful view, statutory provisions apart - and this I shall come to presently - the evidence of such a witness must be considered with very great caution and it would be desirable, indeed unsafe, to convict on her evidence without corroboration of the evidence on material particulars.

The offence with which the Appellant was charged, that is, rape, being a sexual offence, Section 178 (5) (now Section 179 (5) requires corroboration and the nature of the corroboration in my respectful view, must be one of some material particulars implicating the Appellant in the commission of the offence alleged. See: *Okafor v. C.O.P* (1964) 1 All NLR 302, 304 (1965) NMLR 89; *The Queen v. Ekpara* (1957) 2 FSCI, 3 (1957) SCNLR 1. My learned brother has adequately considered the evidence adduced at the trial in this case and has come to the conclusion, and quite rightly in my view, that there is no sufficient evidence as required by law corroborative of the evidence of P.W.1 to justify the verdict of guilt entered against the Appellant by the learned trial Judge and affirmed by the Court of Appeal. I agree entirely with his reasonings in this regard.

In conclusion, I too allow this appeal and set aside the judgment of both the trial High Court and the Court of Appeal and enter a verdict discharging and acquitting the Appellant of the offence for which he was convicted, that is, attempted rape.

Appeal allowed Conviction quashed Accused discharged and acquitted.