

**SUPREME COURT OF NIGERIA**  
13TH JULY, 2001. SC. 177/2000  
**CORAM:- E. O. OGWUEGBU, A. I. IGUH, A. I. KATSINA-ALU,**  
**U. A. KALGO, A. O. EJIWUNMI, JJSC.**

EDET OKON IKO ..... APPELLANT  
V.  
STATE ..... RESPONDENT

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***APPEALS** - Rape - Acquittal - The contradictions in this case - Are not sufficient by themselves - To entitle the appellant to an acquittal - As they are not material (H 4)*

***CRIMINAL LAW** - Corroboration - Classes of criminal cases - In which corroboration is required (H 7)*

***CRIMINAL LAW** - Rape - Consent - The lower courts rightly held - That there was no consent - Based on the evidence before them (H 2)*

***CRIMINAL LAW** - Rape - Definition and elements of the offence (H 1)*

***CRIMINAL LAW** - Rape - Penetration - The lower courts wrongly accepted the evidence of penetration - By the prosecutrix - In the absence of medical or other corroborative evidence (H 11)*

***EVIDENCE** - Corroboration - Essential characteristics of good corroborative evidence (H 6)*

***EVIDENCE** - Corroboration - Meaning of corroboration (H 5)*

***EVIDENCE** - Corroboration - Rape - The finding of corroboration by the trial court - Was wrongly affirmed - As the items of corroboration listed by the trial court - Does not amount to corroboration of rape (H 9)*

**EVIDENCE** - Corroboration - Sexual offences - Corroboration in such cases are not mandatory - But expedient in practice - As the trial court rightly held (H 8)

**EVIDENCE** - Rape - Contradictions - There were some contradictions - In the evidence of the witnesses - As outlined in this case (H 3)

**EVIDENCE** - Rape - Corroboration - The circumstances of this case - Warranted corroboration of prosecutrix evidence - Which burden was not discharged (H 13)

**RAPE** - Penetration - No matter how slight is sufficient to constitute the offence - And if not proved - The prosecution must fail (H 10)

**RAPE** - Penetration - The evidence of the prosecutrix - As to penetration - Is not ipso facto sufficient proof of same - In the absence of corroborative evidence (H 12)

### **FACTS**

On 2nd May 1982, Asuquo Etim Nyong the PW2 handed over his daughter Grace Asuquo Etim, PW1 to the appellant a taxi driver to take her to Uyo from Creek town Calabar where they lived. He paid the appellant and asked him to drop the daughter at Itam Junction. On that day, the appellant reached Uyo at 6p.m. but failed to drop PW1 but carried her with other passengers to another village Ikot Efre Itak village before bringing her back to Uyo at 8 pm. According to PW1, the appellant drove her to his house at Effiong Ukpong Street and on her refusal to enter his house drove her again to Akpan Essien Street instead of Akpan Etuk Street where she lived. As it was by then raining she pleaded with him to drive her home but instead he locked up the vehicle and forcibly raped her inside.

He finally drove her back to his house and packed her luggage into his house. When he had gone to pack his car PW1 ran out of the house into the appellant's neighbour's house and narrated her ordeal to a

woman (PW4) and her husband. She also slept in their house till morning. The matter was reported by PW1 to her father the next day and the appellant was subsequently arrested and charged with rape at the Uyo High Court. At the conclusion of trial the trial judge sentenced the appellant to 7 years imprisonment with hard labour. His appeal to the Court of Appeal was dismissed and he has further appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Whether the learned Justices of the Court below were right in holding that from the evidence adduced at the trial court, the testimony of PW1 contained no serious contradictions and was only amply corroborated in all material respects including the question whether or not there was consent."*

**HELD** (Unanimously allowing the appeal per lead judgment of **KALGO JSC**)

***Rape - Definition and elements of***

1. "Rape" in legal parlance means a forcible sexual intercourse with a girl or a woman without her giving consent to it. The most important and essential ingredient of the offence is penetration and consent of the victim is a complete defence to the offence. (p. 2432 F)

***Rape - Consent was not given***

2. The Court of Appeal also agreed with him on his assessment of the evidence before him and found that there was no consent by PW1 and that everything that happened to her on that day was done against her will. I have also carefully examined the evidence adduced at the trial and find myself in complete agreement with the lower courts that there was nothing to indicate from the evidence that the issue of consent has arisen in this case. (p. 2433 A)

***Rape - There were some contradictions***

3. There is no doubt that there were some contradictions in the evidence of PW1 and PW2, her father, on the question of whether she was to be dropped at Itam Junction or Uyo town. The next item of contradiction

also centered around the pant of PW1. This was mentioned in the evidence of PW3 and PW4. PW1 said her pant was torn and PW3, the investigating Police Officer said she told him that her pant was not torn. The 3rd item of contradiction mentioned in the appellant's brief is in the evidence of PW4 when she said that on 2/5/82, she was in her uncle's house, whereas PW1 said she met her (PW4) in her husband's house on that day at No. 5 Effiong Ukpong Street. (p. 2433 C/2434 A)

***Rape - Contradictions are not material***

4. From all the 3 items of contradictions I examined above, there is none of them which appears to me to be of any vital importance or of such substance as to affect the conviction of the offence of rape. I also agree with the Court of Appeal when it held on P. 105 of the record that:-

*"The learned trial judge had a proper and full appraisal of all the evidence before him and found that there was no material contradiction..."*

in the evidence of the prosecution. It is now well settled that for contradictions on evidence of witnesses for the prosecution to affect conviction, they must be sufficient to raise doubt as to the guilt of the accused. In the instant case the minor discrepancies in the evidence of the prosecution witnesses are not in my view, sufficient, by themselves, to entitle the appellant to an acquittal. See Ogoala v State (1991) 2 NWLR (Pt.175) 509 at 525. (p. 2434 C)

***Evidence - Corroboration - Meaning***

5. "Corroboration" in my understanding simply means "confirming or giving support to" either a person, statement or faith. What then constitutes corroboration in law? In R V Baskerville (1916 - 17) ALL E.R. Reprint 38 at 43, Lord Reading CJ defined what evidence constitutes corroborative evidence for the purpose of the statutory and common law rules when he said:-

*"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or contending to connect him with the crime. In other words, it must be evidence which impli-*

*cates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute.*" (p. 2435 E) B

### ***Corroboration - Essential characteristics***

6. The above two quotations put together would appear to mean that while corroborative evidence must be independent and capable of implicating the accused in relation to the offence charged, it must be credible and must go to confirm and support that evidence which is sufficient, satisfactory and credible whether the case is one in which it is required by statute or by rule of practice. (p. 2436 C) C D

### ***Corroboration - Classes of criminal cases***

7. I now come to consider the class of criminal cases in which corroboration is required to prove the guilt of the accused. It is common ground that in all cases where the law provides that corroboration is necessary, a conviction of an accused can only be valid when there is such corroborative evidence. That is the case where statutory corroboration is required. But there are other cases in which though there is no statutory requirement for corroboration, yet as a matter of practice, corroboration though not essential, is almost always required before conviction. The latter is mostly in cases of complainants in sexual offences, accomplices or where children give evidence on oath. Any witness in any of these categories would conveniently be regarded as "*suspect*" witness and that is why the law requires that if any conviction is to be based on their evidence, the judge must warn himself or the jury as the case may be, of the danger of convicting on the uncorroborated evidence of such witness. (p. 2436 D) E F G H

### ***Corroboration - Sexual offences***

8. The learned trial judge has quite properly recognised the issue of

corroboration in sexual offences like this one when on P. 50 of the record he said:-

"Corroborative evidence is such evidence that goes to support or strengthen the assertions of the complainant. There is no statutory provision in this country that makes such corroboration mandatory. It has however been considered expedient that, as a matter of practice, the Courts should be very slow to convict on the uncorroborated evidence of the complainant. This has been the view held in quite a number of cases decided in this country." (Underlining mine)

I agree entirely with the learned trial judge that what he said is the correct legal position in this country on the issue of corroboration of the evidence of a complainant in a sexual offence. It would also appear to me that by that statement, he had warned himself of the danger of convicting on the uncorroborated evidence of the complainant (PW1) in this case. (p. 2437 C)

**Evidence - Corroboration finding was wrongly affirmed**

9. With due respect to the Court of Appeal, I think they were wrong to affirm that the trial judge's finding of corroboration as listed by him properly constituted ample corroboration of the offence of rape on PW1. The only 2 items of corroboration listed by the learned trial judge were:-

(i) *the fact that the appellant admitted bringing PW1 to his house; and*

(ii) *that PW1 ran away from the house when the appellant went to park his vehicle.*

What have these 2 items got to do with the confirmation that PW1 was actually raped? There was no doubt or dispute that PW1 was in the appellant's house on the night in question and she ran away to the house of PW4 where she spent the night. The appellant did not dispute this in his evidence at the trial. It is also true that PW1 told PW4 and her husband what happened between her (PW1) and the appellant. This will not, in my respectful view, constitute corroboration of the material aspect of rape, but can be evidence of the consistency of the conduct of the PW1 with her evidence at the trial.

It is trite law that evidence in corroboration must be independent testimony, direct or circumstantial, which confirms in some material particular not only that an offence has been committed but that the accused has committed it. See R. V Baskerville (supra). In this case the evidence which the learned trial judge found to be corroboration and which was confirmed by the Court of Appeal is not such evidence. I find no such other evidence in this case. (p. 2438 G)

***Rape - Penetration - No matter how slight is sufficient***

10. The essential and most important ingredient of the offence of rape is penetration and unless penetration is proved the prosecution must fail (See R V Hill, 1 East P.C. 439). But penetration however slight, is sufficient and it is not necessary to prove an injury or the rupture of the hymen to constitute the crime of rape. See R. V Allen 9 C & P 31). (p. 2440 B)

***Penetration evidence was wrongly accepted without corroboration***

11. In the instant appeal, P.W. 1 testify that:-

*"There in the van, he had carnal knowledge of me. When the accused over powered me, he inserted his penis into my vagina and had carnal knowledge of me once."*

The learned trial judge believed this evidence and held that:-

*"What is required is evidence that the accused inserted his penis into the victim's vagina. Once that has been proved, the insertion, no matter how slight, is sufficient penetration in law."*

The Court of Appeal also agreed with this finding by the trial judge and confirmed the conviction of the appellant. I am of the view, that both the trial court and Court of Appeal are wrong on this point. There was no medical or other evidence to support the evidence of penetration apart from what PW1 said. The two pieces of evidence which the learned trial judge found to be corroborative evidence are in my view not corroboration of the crime of rape in law. The circumstantial evidence in this case is not sufficient at all to connect the appellant with the actual commission of the offence. (p. 2440 C)

***Penetration - Evidence of prosecutrix not sufficient***

12. The fact that PW1 said that the appellant inserted his penis into her vagina is not ipso facto sufficient proof of penetration in the absence of corroborative evidence in a case of this nature. This is because as I said earlier, the evidence of the prosecutrix, PW1 in this case needs in practice to be corroborated in material particular implicating the appellant before he could be found guilty of rape. (p. 2440 G)

***Rape - Corroboration is necessary in this case***

13. From all what I have said above, I am of the firm view that there is need to corroborate the evidence of PW1 in material particular in the circumstances of this case as a matter of practice and that 2 items listed by the learned trial judge in his judgment as constituting such corroboration cannot amount to corroboration in this case. The Court of Appeal was therefore wrong to accept them as ample corroboration. I resolve the only issue for determination in this appeal in favour of the appellant. (p. 2441 G)

**NOTABLE POINTS OF INTEREST**

**IGUHJSC**

***1. Proof of rupture of hymen - Is unnecessary to establish rape***

It has, however, been held that any, even the slightest penetration will be sufficient to constitute the act of sexual intercourse. The fact that a prosecutrix who is alleged defiled is found to be virgo intacta (i.e. a virgin) is not inconsistent with partial sexual intercourse and the court will be entitled to find that sexual intercourse has occurred if it is satisfied on that point from all the evidence led and the surrounding circumstances of the case. Where a penetration was proved but not of such a depth as to injure the hymen, it was held sufficient to constitute the crime of rape. See R. v. M'Rue 8 C & P 641, R. v. Allen 9 C & P 31 etc. Proof of the rapture of the hymen is therefore unnecessary to establish the offence of rape. See R. v. Hughes 2 Mood 190. (p. 2446 B)



2. *Corroboration must identify the accused with the crime materially*

The law is however settled that the required corroboration must not merely establish that a crime has been committed but must go to identify the accused with the crime in some material particular. (p. 2447 G)

B

3. *Rape - What corroborative evidence must confirm*

On a charge of rape, for example, the corroborative evidence must confirm in some material particulars that:-

(1) Sexual intercourse has taken place, and

(2) that it took place without the consent of the woman or girl, and also

(3) that the accused person was the man who committed the crime. (p. 2447 H)

D

4. *Suspicion cannot ground criminal responsibility*

In this respect, I must stress that suspicion, no matter how high, cannot ground criminal responsibility. In my view, the facts that the appellant admitted that he drove PW1 to his house and that PW1 ran away from the house of the appellant when he went to park his vehicle are neutral facts which do not necessarily and conclusively point to any specific criminal conduct on the part of the appellant. I cannot, therefore, accept that these two pieces of evidence corroborate the essential elements of the offence of rape with which he was charged. In my view the Court of Appeal was in error when it affirmed the finding of the trial court that the evidence of PW1 was amply corroborated by the two pieces of evidence in issue. (p. 2448 D)

G

5. *Warning by the court on danger of convicting on uncorroborated evidence of complainant*

On the issue of the warning, it is settled that no particular form of words need be used by the court but the Judge must use simple and plain language that will, without doubt, convey to the jury that there is a danger in convicting on the complainant's evidence alone. The jury should then be told that bearing that warning well in mind, they must look at the particu-

lar facts of the case and if, having given full weight to the warning that it is dangerous to convict, they came to the conclusion that in the particular case the complainant is, without any doubt, speaking the truth, then the fact that there is no corroboration, as I have already stated, cannot be any matter of great moment and they are entitled to convict the accused accordingly. Even where there is such a warning but matters are suggested by the trial court as being corroborative of the relevant evidence which are not in fact so, the conviction, in a proper case, may be quashed on appeal. See R. v. Phillips 18 Cr. App Rep. 115, etc. It will be necessary later in this judgment to revert to this aspect of the law with regard to corroboration. (p. 2449 A)

6. *Admission of an offence by the accused would amount to sufficient corroboration*

It is crystal clear that the above testimony of PW2, if believed, was sufficient corroboration of the evidence of the prosecutrix. This is because it is not only an admission that sexual intercourse had taken place between the appellant and the prosecutrix, it is also an affirmation that the sexual intercourse took place without the consent of the prosecutrix and that the appellant was the person who committed the crime. Admission of an offence by an accused person to other persons may amount to sufficient corroboration in law. So in R. v. Francis Kufi (1960) W. N. L. R. 1, the accused was charged with indecent assault against a young girl of 10 years. It was held, and rightly in my view, that the admission of the offence by the accused to the father of the girl was sufficient corroboration in law. (p. 2450 D)

7. *When an appellate court can properly evaluate and ascribe value to evidence*

It cannot be over-emphasised that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified in the witness box. It is only where an appellate court is in as good a position as the trial court to evaluate evidence which has been

given in a case, such as where the issue is essentially a matter of inference that can be drawn from proved facts, not resting on the credibility of witnesses as a result of their demeanour in the witness box or of the impression of them by the trial court that it must not hesitate to do so. (p. 2451 B)

B

### **KATSINA-ALU JSC**

#### *8. Type of corroboration to look for in an offence of rape*

The nature of the corroboration must necessarily depend on the peculiar facts of each case. Where rape is denied by the accused the sort of corroboration the courts must look for is medical evidence showing injury to the private part of the complainant, injury to other parts of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed. (p. 2454 G)

C

D

### **REPRESENTATION**

O. R. Ulasi, Esq. for the Appellant.

E

C. J. Udoh, Esq., Senior State Counsel, Ministry of Justice, Akwa-Ibom State for the Respondent.

### **CASES REFERRED TO**

Ogoala v. State (1991) 2 NWLR (pt. 175) 509 at 525

F

Nwosisi v. State (1976) 6 SC 109

Ejigboderu v. State (1978) 9-10 SC 81

Atano v. A.G. Bendel State (1988) 2 NWLR (pt. 75) 201

Ayo Gabriel v. State (1989) 5 NWLR (pt. 122) 468-469

G

Francis Okpanede v. The State (1969) 1 ALL NLR 420 at 423-424

R. v. Barry (1925) 18 Cr. A.R. 65

R. v. Graham (1910) 4 Cr. A.R. 218

Sunmonu v. Police (1957) W.R.N.L.R. 23

H

R. v. Baskerville (1916-17) All E.R. Reprint 38 at 43

D.P.P. v. Hester (1972) 57 Cr. A. R. 212 at 229

R. v. Lillyman (1896) 2 QB 167

R. v. Osbarrie (1905) 1 K. B. 551

R. v. Hedges 3 Cr. APP. R 263

Ibeakanma v. Queen (1963) 2 SCNLR 191 at 194-195

B

**LEAD JUDGMENT BY KALGO JSC**

The appellant, Edet Okon Iko, was charged with the offence of rape contrary to section 358 of the Criminal Code of the then Cross River State. He was tried by Nkop J. (as he then was) at Uyo High Court in the Uyo Judicial Division. He was found guilty of the offence at the end of the trial and was sentenced to 7 years imprisonment with hard labour. He appealed to the Court of Appeal Calabar which heard and dismissed his appeal. He now appeals to this court.

The facts of this case as I understand them would appear to be as follows; PW2, Asuquo Etim Nyong, is the father of PW1, Grace Asukwo Etim, the prosecutrix and victim of the offence. On 2nd of May 1982, PW2 who was then living at Creek Town, Calabar with his family handed over his daughter PW1, to the appellant a taxi driver to take her to Uyo. PW1 was then a student of the Christian Secondary Commercial School Uyo. PW2 told the appellant to drop PW1 at Itam Junction. He gave the appellant N5 and asked him to give PW1 N1 on dropping her at Itam Junction so that she could use the amount for her transport fare to a house at Uyo before proceeding to the school.

On that day, the appellant arrived at Uyo at about 6p.m. He did not drop PW1 there but took her with other passengers to Ikot Efre Itak village where he dropped all the passengers except PW1. He came back to Uyo with PW1 where they arrived at 8pm. PW1 said that on their way back to Uyo from Ikot Efre Itak village, the appellant asked her to spend the night in his house at Uyo that night. She said no; but the appellant drove his vehicle with her to his house at No. 2 Effiong Ukpang Street. There, PW1 refused to enter the house, came out of the vehicle, removed all her luggages from the vehicle (comprising of a bag of gari, a bag containing books and her clothes) and wanted to take a motor cycle to her house. The appellant took back the luggages into his vehicle and promised to take her direct to her house at Akpan Etuk Street. PW1 then

entered the vehicle and the appellant took her to Akpan Essien Street instead of Akpan Etuk Street, and asked her to come down and go home. PW1 said she then cried and begged the appellant to take her home. It was raining heavily at this time. The appellant wound up the glasses of the vehicle doors and locked the vehicle with only him and PW1 inside. B The appellant struggled with PW1 inside the vehicle and finally overpowered her, removed her pant and had sexual intercourse with her. He then drove her back to his house where he again off-loaded her luggages and put them in his house. He told PW1 to wait for him as he was going to C park his vehicle. He then drove away. This was after 9.00pm.

PW1 then ran out of the house (leaving her luggages in the appellant's house) and entered No. 5 Effiong Ukpong Street (appellant's neighbours). PW1 said she narrated her ordeal to a woman (PW4) and her husband whom she found in the house where she slept until the D following morning. The following morning, PW1 reported the incident to her father PW2, who in turn reported the matter to the Police in Uyo and the appellant was later arrested. This is the gist of what happened in this case as narrated by the witnesses at the trial. E

In this Court, the parties filed and exchanged briefs of argument as required by the rules of Court. The appellant raised only one issue for determination of this Court which reads:-

*"Whether the learned Justices of the Court below were right in F holding that from the evidence adduced at the trial court, the testimony of PW1 contained no serious contradictions and was only amply corroborated in all material respects including the question whether or not there was consent."*

For the respondent, 5 issues were formulated as follows:- G

1. *"Whether there is a material contradiction in the evidence of PW1 and PW2 in respect of the prosecutions's case sufficient in law to impugn the appellant's conviction."*

2. *Whether there is material contradiction in the evidence of H PW1 and PW4 in the prosecution's case sufficient in law to impugn the appellant's conviction.*

3. *Whether in the circumstance of this case, failure to call a*

*medical Doctor by the prosecution to testify is sufficient in law to impugn the appellant's conviction.*

4. *Whether the evidences (sic) of PW1 was sufficiently corroborated so as to merit the conviction of the appellant.*

B 5. *Whether in the circumstances of this case, the conduct of PW1 amounts to consent."*

C Looking at the grounds of appeal filed by the appellant in his notice of appeal in this case, it is clear to me that the only issue raised by him was properly distilled from the grounds of appeal. On the respondent's issues, it appears to me that issue 3, was not supported by any ground of appeal filed by the appellant and since there was no cross appeal by the respondent, that issue cannot be argued in this appeal and is hereby struck out in the only issue raised by the appellant.

D The charge against the appellant in the trial court reads:-

"STATEMENT OF OFFENCE

RAPE CONTRARY to section 358 of the Criminal Code.

PARTICULARS OF OFFENCE

E EDET OKON IKO on the 2nd day of May, 1982 at Akpan Essien Street, Uyo Judicial Division had carnal knowledge of GRACE ASUQUO ETIM without her consent.

F The appellant pleaded not guilty to the charge after it was read and explained to him in Ibibio the language he understood. The prosecution called 4 witnesses to prove their case and the appellant gave evidence in his own defence but called no witness. Counsel for the parties addressed the trial court before the case was adjourned for judgment.

G **"Rape" in legal parlance means a forcible sexual intercourse with a girl or a woman without her giving consent to it. The most important and essential ingredient of the offence is penetration and consent of the victim is a complete defence to the offence.**

H Let me first deal with the question of consent. PW1 emphatically denied that she consented to the appellant having sexual intercourse with her throughout his testimony. He maintained complete innocence all through. The learned trial judge, after considering the sequence of events in the case, came to this conclusion on P.49 of the records:-

*"I am unable in the circumstances to agree that little girl consented to the ordeal she passed through with the accused person, that evening."*

**The Court of Appeal also agreed with him on his assessment of the evidence before him and found that there was no consent by PW1 and that everything that happened to her on that day was done against her will. I have also carefully examined the evidence adduced at the trial and find myself in complete agreement with the lower courts that there was nothing to indicate from the evidence that the issue of consent has arisen in this case.**

I shall now examine the question of contradictions in the evidence of the prosecution witnesses. **There is no doubt that there were some contradictions in the evidence of PW1 and PW2, her father, on the question of whether she was to be dropped at Itam Junction or Uyo town.** Whereas PW2 maintained that his instructions to the appellant was to take PW2 to Itam Junction as he (the appellant) was not going direct to Uyo. PW1 said that the instruction was that she should be taken to Uyo. And although the learned trial judge did not resolve the contradiction as such, he believed the evidence of PW1 that she was to be dropped at Uyo motor-park.

**The next item of contradiction also centered around the pant of PW1. This was mentioned in the evidence of PW3 and PW4. PW1 said her pant was torn and PW3, the investigating Police Officer said she told him that her pant was not torn.** PW4 said that when PW1 came to her in the night in question. PW1 looked as if she was holding her pant, but PW1 did not show the pant to her. On this issue, the evidence of PW4 did not contradict the evidence of PW1 or PW3, but the evidence of PW1 and PW3 contradicted each other on whether the pant was torn or not. Unfortunately the pant was not produced in Court as Exhibit and the trial court did not use it in coming to its decision. In fact the learned trial judge considering this evidence said:-

*"It is not possible to resolve this conflict since the pant was not tendered in evidence. However, failure to tender the pant, to my mind, is not sufficient to demolish the case for the prosecution ...."*

I agree with him on this point.

**The 3rd item of contradiction mentioned in the appellant's brief is in the evidence of PW4 when she said that on 2/5/82, she was in her uncle's house, whereas PW1 said she met her (PW4) in her husband's house on that day at No. 5 Effiong Ukpong Street.** The learned trial judge believed PW1 that she spent the night in question with PW4 in the latter's house. PW4 confirmed this in her testimony; she was not asked and she did not say that No. 5 Effiong Ukpong Street was her Uncle's, and there was no suggestion that it was not. What is important in her testimony was the fact that PW1 came to meet her in the house on 2/5/82 in the night and spent the night with her in the house. PW4 confirmed this.

**From all the 3 items of contradictions I examined above, there is none of them which appears to me to be of any vital importance or of such substance as to affect the conviction of the offence of rape. I also agree with the Court of Appeal when it held on P. 105 of the record that:-**

*"The learned trial judge had a proper and full appraisal of all the evidence before him and found that there was no material contradiction..."*

**in the evidence of the prosecution. It is now well settled that for contradictions on evidence of witnesses for the prosecution to affect conviction, they must be sufficient to raise doubt as to the guilt of the accused. In the instant case the minor discrepancies in the evidence of the prosecution witnesses are not in my view, sufficient, by themselves, to entitle the appellant to an acquittal. See Ogoala v State (1991) 2 NWLR (Pt.175) 509 at 525; Nwosisi V State (1976) 6 SC 109; Ejigbodero V State (1978) 9 -10 SC 81; Atano V A.G. Bendel State (1988) 2 NWLR (Pt.75) 201; Ayo Gabriel V State (1989) 5 NWLR (Pt. 122) 457 at 468 - 469.**

I shall now consider the question of corroboration raised in the appellant's issue for determination. The learned counsel for the appellant submitted in his brief that the Court of Appeal erred in affirming the views of the learned trial judge that the evidence of PW1 was amply



corroborated. Counsel further submitted that the fact that the appellant took PW1 to his house and asked her to wait for him while he went to park his vehicle and PW1 ran away to the house of PW4 where she told PW4 and her husband what happened to her, cannot constitute corroboration in law. He cited the case of Francis Okpanede V The State (1969) B 1 ALL NLR 420 at 423 - 424.

The learned counsel for the respondent however submitted in her brief that although as a rule of practice courts always insist that it is unsafe to convict on the uncorroborated evidence of a prosecutrix like PW1, the court can still convict without it, if the court is fully satisfied of the truth of the evidence of the prosecutrix. She cited the cases of R V Barry (1925) 18 Cr. A.R. 65; R.V. Graham (1910) 4 Cr. A. R. 218 and Sunmonu V Police (1957) W.R.N.LR 23. Learned counsel further submitted that in this case the learned trial judge was satisfied of the truth of the PW1's evidence which he found to be amply corroborated before he convicted the appellant. She referred to the trial judge's findings on pp. 50-51 of the record and the views of the Court of Appeal on them on P. 105 of the records.

**"Corroboration" in my understanding simply means "confirming or giving support to" either a person, statement or faith. What then constitutes corroboration in law? In R V Baskerville (1916 - 17) ALL E.R. Reprint 38 at 43, Lord Reading CJ defined what evidence constitutes corroborative evidence for the purpose of the statutory and common law rules when he said:-**

**"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or contending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute."**

(Underlining mine)

It therefore follows, in my view, to ask what is the purpose of corroborative evidence? In D.P.P. V Hester (1972) 57 Cr. A.R. 212 at 229, Lord Morris said:-

"The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible, and corroborative evidence will only fill its role if it itself is completely credible evidence."

(Underlining mine)

**The above two quotations put together would appear to mean that while corroborative evidence must be independent and capable of implicating the accused in relation to the offence charged, it must be credible and must go to confirm and support that evidence which is sufficient, satisfactory and credible whether the case is one in which it is required by statute or by rule of practice.**

**I now come to consider the class of criminal cases in which corroboration is required to prove the guilt of the accused. It is common ground that in all cases where the law provides that corroboration is necessary, a conviction of an accused can only be valid when there is such corroborative evidence. That is the case where statutory corroboration is required. But there are other cases in which though there is no statutory requirement for corroboration, yet as a matter of practice, corroboration though not essential, is almost always required before conviction. The latter is mostly in cases of complainants in sexual offences, accomplices or where children give evidence on oath. Any witness in any of these categories would conveniently be regarded as "suspect" witness and that is why the law requires that if any conviction is to be based on their evidence, the judge must warn himself or the jury as the case may be, of the danger of convicting on the uncorroborated evidence of such witness. Lord Diplock in D.P.P. V Hester (Supra) explained the danger sought to be cleared by this rule when he said on P. 244 of the report that:-**

*"The danger sought to be obviated by the common law rule in*

*each of these three categories of witnesses is that the story told by the witness may be in-accurate for reasons not applicable to other competent witnesses: whether the risk be of deliberate inaccuracy, as in the case of children and some complainants in cases of sexual offences. What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged."*

In the instant appeal, we are dealing with the first category of those witnesses i.e. complainants in a sexual offence. Rape is a sexual offence and PW1 is the prosecutrix and the complainant in the case.

**The learned trial judge has quite properly recognised the issue of corroboration in sexual offences like this one when on P. 50 of the record he said:-**

*"Corroborative evidence is such evidence that goes to support or strengthen the assertions of the complainant. There is no statutory provision in this country that makes such corroboration mandatory. It has however been considered expedient that, as a matter of practice, the Courts should be very slow to convict on the uncorroborated evidence of the complainant. This has been the view held in quite a number of cases decided in this country."*

*(Underlining mine)*

**I agree entirely with the learned trial judge that what he said is the correct legal position in this country on the issue of corroboration of the evidence of a complainant in a sexual offence. It would also appear to me that by that statement, he had warned himself of the danger of convicting on the uncorroborated evidence of the complainant (PW1) in this case.**

The learned trial judge then proceeded in his judgment to ask a pertinent question. He said:-

*"The question to examine now is whether there is anything outside the evidence of the PW1 to corroborate her evidence."*

By saying this, it appears to me very clearly that he had heeded to the warning and that he did not intend to convict on the evidence of

PW1 alone. He would look for corroborative evidence. What then did he find as corroborative evidence? On P. 50 of the record from lines 16-25, he dealt with the issue of the pant when he said:-

"The PW1 swore that the under pant she wore at the material  
 B time was torn during the struggle. The police who investigated the case  
 swore that he was told by the PW1 that the pant was torn. It is not  
 possible to resolve this conflict since the pant was not tendered in evi-  
 C demolish the case for the prosecution, because there is more other evi-  
dence which serve as corroboration."

He then proceeded on the same page to list what he found to be corrobor-  
 ration thus:-

"First, the Accused himself admitted he took the PW1 to his  
 D house and asked her to wait there while he went to park the vehicle.  
 Secondly, the PW1 said she ran away from the house of the Accused  
 person into the house of the PWIV at No. 5 Effiong Ukpang Street. This  
 has been confirmed by the Accused when he said that by the time he  
 E return (sic) from where he went to park the car, the PW1 had left his  
 house to a place he did not know. She ran and left her luggages in the  
 house of the Accused. It was the following day that she went with her  
 father and took the bags away.

F These are the only pieces of evidence which the learned trial judge found  
 to be corroborative evidence and of which he was satisfied before con-  
 victing the appellant. The Court of Appeal agreed with the learned trial  
 judge that this constituted ample corroboration of the evidence of PW1  
 that she was raped and refused to interfere with the judge's findings.

G **With due respect to the Court of Appeal, I think they were wrong  
 to affirm that the trial judge's finding of corroboration as listed by  
 him properly constituted ample corroboration of the offence of rape  
 on PW1. The only 2 items of corroboration listed by the learned  
 H trial judge were:-**

- (i) *the fact that the appellant admitted bringing PW1 to his house; and*
- (ii) *that PW1 ran away from the house when the appellant*

went to park his vehicle.

What have these 2 items got to do with the confirmation that PW1 was actually raped? There was no doubt or dispute that PW1 was in the appellant's house on the night in question and she ran away to the house of PW4 where she spent the night. The appellant did not dispute this in his evidence at the trial. It is also true that PW1 told PW4 and her husband what happened between her (PW1) and the appellant. This will not, in my respectful view, constitute corroboration of the material aspect of rape, but can be evidence of the consistency of the conduct of the PW1 with her evidence at the trial. See R V Lillyman (1896) 2QB 167, R V Osbarrie (1905) 1 K.B. 551; R V Hedges 3 Cr. APP. R 263.

It is trite law that evidence in corroboration must be independent testimony, direct or circumstantial, which confirms in some material particular not only that an offence has been committed but that the accused has committed it. See R. V Baskerville (supra). In this case the evidence which the learned trial judge found to be corroboration and which was confirmed by the Court of Appeal is not such evidence. I find no such other evidence in this case.

It is my respectful view, and having regard to the authorities I have quoted earlier in this judgment that although corroboration of the evidence of the complainant in a rape case is not essential in law, it is always looked for in practice. In the case of Ibeakanma V Queen (1963) 2 SCNLR 191 at 194 - 195 this Court said:-

*"It is an established practice in criminal law that though corroboration of the evidence of the prosecutrix in a rape case is not essential in law, it is, in practice always looked for and it is also the practice to warn the jury against the danger of acting upon her uncorroborated testimony."*

(Underlining mine)

In the Ibeakanma's case (supra) the appellant was charged with rape in that he had sexual intercourse with a married woman against her will. The appellant denied the offence. The trial judge relied on the scar

on the appellant's shoulder as result of a bite by the complainant during the intercourse, as corroborative evidence and he convicted the appellant. The Supreme Court found that in the absence of any other evidence implicating the appellant on the offence of rape, the scar on the appellant's B shoulder alone did not constitute corroboration. The appellant was discharged and acquitted.

**The essential and most important ingredient of the offence of rape is penetration and unless penetration is proved the prosecution must fail (See R V Hill, 1 East P.C. 439). But penetration C however slight, is sufficient and it is not necessary to prove an injury or the rupture of the hymen to constitute the crime of rape. See R. V Allen 9C & P 31).**

**In the instant appeal, P.W. 1 testify that:-**  
D *"There in the van, he had carnal knowledge of me. When the accused over powered me, he inserted he penis into my vagina and had carnal knowledge of me once."*

**The learned trial judge believed this evidence and held that:-**  
E *"What is required is evidence that the accused inserted his penis into the victim's vagina. Once that has been proved, the insertion, no matter how slight, is sufficient penetration in law."*

**The Court of Appeal also agreed with this finding by the trial judge and confirmed the conviction of the appellant. I am of F the view, that both the trial court and Court of Appeal are wrong on this point. There was no medical or other evidence to support the evidence of penetration apart from what PW1 said. The two pieces of evidence which the learned trial judge found to be corroborative G evidence are in my view not corroboration of the crime of rape in law The circumstantial evidence in this case is not sufficient at all to connect the appellant with the actual commission of the offence.**

**The fact that PW1 said that the appellant inserted his penis H into her vagina is not ipso facto sufficient proof of penetration in the absence of corroborative evidence in a case of this nature. This is because as I said earlier, the evidence of the prosecutrix, PW1 in this case needs in practice to be corroborated in material particular**

**implicating the appellant before he could be found guilty of rape.** I find support in this view in the case of Simon Okoyomon V The State (1973) 1 SC 21 at p. 33. In that case the accused was charged with the offence of having unlawful carnal knowledge (rape) with a girl under 14 years without her consent. The evidence was that "*the accused fell her down, removed her pant and his own pair of shorts, and started to have carnal knowledge of her. She shouted and hailed PW3, the accused covered her mouth with a piece of cloth. She was lying on her back as the accused lay on her and inserted his penis into her vagina, shaking his waist up and down on her.*" The Supreme Court considered the whole evidence and finally found that there was no evidence of penetration just because the complainant said the accused inserted his penis into her vagina. The Court held on P. 33 of the report:-

(a) "*That we are of the view that the prosecution had not established that the accused did have unlawful carnal knowledge of the prosecutrix in the sense that there had been penetration as required by section 300 of the criminal Code. It was not enough that the prosecutrix alleged the insertion of the accused's penis into her vagina or that he lay on her.*" See Jos N. A. Police V Allah Na Gani (1968) N.M.L.R. 8.

(Underlining mine)

In the Okoyomon's case, (supra) the evidence of the complainant PW4 was substantially corroborated by that of PW3 who was together with her before the accused took PW4 away to where he had sexual intercourse with her. In fact she saw the accused on top of PW4 during the act. That was why in the absence of proof of penetration, the accused was found guilty of attempted rape - (a lesser offence) by the Supreme Court.

**From all what I have said above, I am of the firm view that there is need to corroborate the evidence of PW1 in material particular in the circumstances of this case as a matter of practice and that 2 items listed by the learned trial judge in his judgment as constituting such corroboration cannot amount to corroboration in this case. The Court of Appeal was therefore wrong to accept them as ample corroboration. I resolve the only issue for determination**

**in this appeal in favour of the appellant.**

For all the reasons stated above, this appeal must succeed and I allow it. I find that there are good and substantial reasons for me to interfere with the concurrent findings of the trial court and the Court of Appeal in the circumstances of this case. I so do.

Accordingly, this appeal succeeds and it is allowed. The conviction and sentence passed on the appellant by the trial court and affirmed by the Court of Appeal are hereby set aside. The appellant is acquitted and discharged.

### OGWUEGBU JSC

I have read in advance the judgment of my learned brother Kalgo, JSC just delivered and for the reasons given by him which I hereby adopt, I, too, allow the appeal.

Though corroboration is not required in law it is considered unsafe to convict of rape on the uncorroborated testimony of the prosecutrix. See INSPECTOR GENERAL OF POLICE V. SUNMONU (1957) WRNLR 23 and R.V. JOHN ALEXANDER GRAHAM (1910)4 CR. APP. R.218. The learned trial judge recognised the legal principles laid down by this court on corroborative evidence in sexual offences and when he proceeded to ask himself whether there is anything outside the evidence of P.W.1 which corroborated her evidence, I understand it to mean that it was not safe to convict on the evidence of p.w.1 alone. He listed two circumstances which he held to be independent testimony connecting the appellant with the crime:

- (i) The admission by the appellant that he took P.W..1 to his house and;
- (ii) The fact P.W.1 ran away from his house when the appellant went to park his vehicle.

These cannot be the independent testimony which affects the appellant by connecting or implicating him with the crime. See R.V. BASKERVILLE (1916/17) ALL E.R. (Reprint) 38. The court below was therefore in error in affirming the conclusion of the learning trial judge



that the circumstances set out above corroborated the evidence of P.W.1. There was indeed no corroborative evidence direct or circumstantial implicating the appellant with the offence charged.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Kalgo, JSC, I allow this appeal and set aside the judgment of the court below. The appellant is acquitted and discharged.

### IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kalgo, J.S.C. and I am in agreement that there is merit in this appeal and that the same ought to be allowed.

It is not necessary for me to recount all over again the unpleasant facts of this case as the same have been fully taken care of in the leading judgment. It is enough to say that the appellant was at the High Court of Justice of the former Cross River State of Nigeria, holden at Uyo charged with the offence of rape contrary to section 358 of the Criminal Code. The particulars of the offence were that the appellant on the 2nd day of May, 1982 at Akpan Essien Street, Uyo in the Uyo Judicial Division had carnal knowledge of the prosecutrix, Grace Asuquo Etim, without her consent. He was at the conclusion of his trial on the 30th day of May, 1986 found guilty as charged by the trial court and sentenced to 7 years imprisonment with hard labour. His appeal to the Court of Appeal, Calabar Division, was on the 11th day of May 2000 dismissed. He has now appealed to his court.

The main issue upon which this appeal turned is whether the evidence of PW1, the prosecutrix, was sufficiently corroborated to warrant the conviction of the appellant.

In this regard the learned trial Judge was satisfied that the essential particulars of the evidence of the prosecutrix were corroborated. He said he:-

*"The evidence of the PW1 does not require hundred per cent corroboration, and that of course is not possible. All that is needed is*

*that the most essential particulars of the evidence be corroborated. That has been done in this case and I am satisfied with it."*

I will return to this finding of the trial court later in this judgment. I need only state at this stage that the learned trial Judge, having found the evidence of the prosecutrix fully corroborated had no difficulty in accepting the same as true. He said:-

"Accused reached the Uyo Motor Park, but refused to drop the PW1 there when the PW1 asked him to drop her there. He took her to his house at No. 2 Effiong Ukpong Street. Accused said he took the PW1 to his house because the PW1 would not like to go back home on a motor-cycle. I do not believe this. I believe that he just took her home against her wish. There at home, the PW1 removed her luggages, but the Accused collected them from her and put them back into the vehicle. He deceived her, he was taking her back to where she lived. Instead, he took her to an isolated Akpan Essien Street in that rainy evening. There he stopped, wound up the glass in the door of the vehicle. He started to struggle with the PW1. The PW1 resisted, but the resistance was short-lived for it was not long before Accused over-powered her and removed her pants, inserted his penis into her vagina and had carnal knowledge of her. He drove her back to his house and was prepared to make her spend the night there even after the first round of sexual intercourse. He left her in his house and went to park his vehicle. During that time, the PW1 ran away into the house of the PW IV at No. 5 Effiong Ukpong Street, and there she slept till the following morning. The following morning, she went to her father at Calabar and reported all that happened to her, to him. I wish to say here that I believe all that this witness has said. I do not believe the Accused person. When this sequence of events is carefully considered, it is difficult to agree with the defence Counsel that the victim in this case had given her consent to the sexual intercourse between her and the Accused. Here was a girl who, as alleged in the charge before it was amended, was under the age of 16 years, exposed to this type of hazard, in a cold rainy night and on a dark road where houses were not nearby. What was the poor little girl to do, either than to yield to the mounting pressure from the Accused? This does not

*show that she did it with consent. If she did with consent, she would have stayed on in the house with the Accused that night. She would not have run out to No. 5 Effiong Ukpomg Street. She would not even have rushed to her father the following day to report the incident. She would have kept it to herself. I am unable in the circumstances to agree that the little girl consented to ordeal she passed through with the Accused person, that evening."* B

I think it is necessary to observe that the learned trial Judge in accepting the above evidence of PW1 did warn himself of the danger of convicting the appellant on the uncorroborated evidence of the prosecu- C  
trix. He was, however, able to identify two pieces of evidence which, with respect, he conceived amounted to corroboration of the most es-  
sential particulars of the evidence of PW1.

Enumerating the two pieces of evidence which he found were D  
corroborative of the evidence of PW1, the learned trial Judge stated:-

*"The question to examine now is whether there is anything out-  
side the evidence of PW1 to corroborate her evidence.*

*First, the Accused himself admitted he took the PW1 to his house E  
and asked her to wait there while he went to park his vehicle.*

*Secondly, the PW1 said she ran away from the house of the  
Accused person into the house of the PW IV at No 5 Effiong ukpomg  
street. This has been confirmed by the accused when he said that by the F  
time he returned from where he went to park the car, the PW1 had left his  
house to a place he did not know. She ran and left her luggages in the  
house of the Accused. It was the following day that she went with her  
father and took the bags away. The evidence of the PW1 does not require  
hundred percent corroboration, and that of course is not possible. All G  
that is needed is that the most essential particulars of the evidence be  
corroborated. That has been done in this case and I am satisfied with it."*

I will later in this judgment consider to what extent these two pieces of  
evidence corroborated the essentials particulars of the evidence of PW1 H  
in this case and whether the court below was right when it held that the  
evidence of PW1 as found by the trial court, was "*amply corroborated*".

In legal parlance, any person who has unlawful carnal knowl-

edge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act is guilty of the offence of rape. See section 357 of the said Criminal Code. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. See *R v. Marsden (1891) 2 Q.B. 149*, *Rutherford V. Rutherford (1923) A.C. 1*. It has, however, been held that any, *even the slightest penetration* will be sufficient to constitute the act of sexual intercourse. The fact that a prosecutrix who is alleged defiled is found to be *virgo intacta* (i.e. a virgin) is not inconsistent with partial sexual intercourse and the court will be entitled to find that sexual intercourse has occurred if it is satisfied on that point from all the evidence led and the surrounding circumstances of the case. Where a penetration was proved but not of such a depth as to injure the hymen, it was held sufficient to constitute the crime of rape. See *R. v. MRue 8 C & P 641*, *R. v. Allen 9 C & P 31* etc. Proof of the rapture of the hymen is therefore unnecessary to establish the offence of rape. See *R. v. Hughes 2 Mood 190*.

Adverting now to the evidence of the prosecutrix on the question of what happened between the appellant and herself, she testified thus:-

"It was after the Accused had indicated his willingness to drop me at Akpan Etuk Street that I entered the vehicle. At Akpan Essien Street, The Accused stopped and asked me to get down from the vehicle. I then cried and begged him to take me to our house. At that time it was really dark and it was raining. The Accused wound up the glass of the vehicle, and locked the vehicle. The Accused started to struggle with me and attempted to remove my pants. I refused and resisted. After a prolonged struggle inside the van, the Accused over-powered me and removed my pants. There in the van, he had carnal knowledge of me. When the Accused over-powered me, he inserted his penis into my vagina and had carnal knowledge of me once. After the sexual intercourse the Accused took me back to his house at No. 2 Effiong Ukpung Street. By that time, it was past nine (9) P.M. There he removed my loads and put

*them into his house. He asked me to wait for him at his house to enable him go and park his vehicle. He did not tell me where he was going to park his vehicle. He did not park it in his compound. When he left the house to go and park his vehicle, I ran out of his room to No. 5 Effiong Ukpong Street where I spent the night."*

Without doubt, the above description of what the prosecutrix was allegedly subjected to by the appellant would constitute the clearest case of rape if appropriately believed and/or corroborated. The learned trial Judge, as I have already indicated, after duly warning himself found the evidence of PW1 satisfactorily corroborated. Accordingly, he was obliged to accept the entire evidence of the prosecutrix as true. It is now convenient to consider whether, as found by the learned trial Judge and affirmed by the Court of Appeal, the most essential particulars of the evidence of PW1 were corroborated as required by law or at all.

I should, perhaps, start by stating that the word "*corroboration*" has been held not to be a technical term of art and means no more than evidence tending to confirm, support and strengthen other evidence sought to be corroborated. See D.P.P. v. Kilborne (1973) A.C. 729 at 758. Corroboration of the testimony of a witness must be offered by independent evidence which affects the accused person by connecting or tending to connect him with the offence charged. See R. v. Baskerville (1916) 2 K.B. 658 at 667 (C.C.A.) R. v. Jones (1939) 27 Cr. App. Rep. 33 (C.C.A.), R. v. Hartley (1941) 1 K.B. 5 (C.C.A.). The corroboration need not consist of direct evidence that the accused person committed the offence, nor need it amount to a confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge in issue. See R. v. Rice (1963) 1 Q.B. 857, r. V. Goldstein (1914) 11 Cr. App. Rep. 27 (C.C.A.). The law is however settled that the required corroboration must not merely establish that a crime has been committed but must go to identify the accused with the crime in some material particular. See R. v. Mumuna and another (1938) 4 W.A.C.A. 39 at 41, R. v. Baskerville 12 Cr. App. Rep. 81, R. v. Preprah and others 4 W.A.C.A. 34 at 36, R. v. Nkelagu (1960) 5 F.S.C. 217. On a charge of rape, for example, the corroborative evi-

dence must confirm in some material particulars that:-

- (1) Sexual intercourse has taken place, and
- (2) that it took place without the consent of the woman or girl, and also

B (3) that the accused person was the man who committed the crime.

See James v. R. (1971) 55 Cr. App. Rep. 299 (P.C.).

C Reverting once again to the two pieces of evidence which the trial court found were corroborative of the testimony of PW1 and affirmed by the court below, these constitute as follows:-

- (i) *That the appellant admitted he took PW1 to his house and*
- (ii) *That PW1 ran away from the house of the appellant when the said appellant went to park his vehicle.*

D And I ask myself whether these two pieces of evidence are unequivocally referable to or confirm that the prosecutrix had definitely been raped without any shadow of doubt. I think not.

E In this respect, I must stress that suspicion, no matter how high, cannot ground criminal responsibility. In my view, the facts that the appellant admitted that he drove PW1 to his house and that PW1 ran away from the house of the appellant when he went to park his vehicle are neutral facts which do not necessarily and conclusively point to any F specific criminal conduct on the part of the appellant. I cannot, therefore, accept that these two pieces of evidence corroborate the essential elements of the offence of rape with which he was charged. In my view the Court of Appeal was in error when it affirmed the finding of the trial court that the evidence of PW1 was amply corroborated by the two G pieces of evidence in issue.

H I think I ought to state at this stage that it is not a rule of law that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix. The proper direction which is now a well established rule of practice is that it is not safe to convict on the uncorroborated evidence of the prosecutrix; and the court may after paying due attention to the warning nevertheless convict the accused person if it is satisfied with the truth of her evidence. See *Summonu v.*

*Inspector-General of Police (1957) W.R.N.L.R. 23, R. v. Graham (1910) 4 Cr. App. Rep. 218, R. v. Pitts (1914) 8 Cr. App Rep. 126, R. v. Berry (1924) 18 Cr. App. Rep. 65 etc.* On the issue of the warning, it is settled that no particular form of words need be used by the court but the Judge must use simple and plain language that will, without doubt, convey to the jury that there is a danger in convicting on the complainant's evidence alone. The jury should then be told that bearing that warning well in mind, they must look at the particular facts of the case and if, having given full weight to the warning that it is dangerous to convict, they came to the conclusion that in the particular case the complainant is, without any doubt, speaking the truth, then the fact that there is no corroboration, as I have already stated, cannot be any matter of great moment and they are entitled to convict the accused accordingly. Even where there is such a warning but matters are suggested by the trial court as being corroborative of the relevant evidence which are not in fact so, the conviction, in a proper case, may be quashed on appeal. See R v. Phillips 18 Cr. App Rep. 115, R. v. Whitehead (1929) 1 K. B. 99, 21 Cr. App. Rep. 23, R. v. Henry Ross 18 Cr. App Rep. 141, R. v. Keeling 28 Cr. App. Rep. 121 etc. It will be necessary later in this judgment to revert to this aspect of the law with regard to corroboration.

In the present case, there can be no doubt that the learned trial Judge duly warned himself of the danger of convicting the appellant on the uncorroborated evidence of the prosecutrix. But he erroneously relied on two pieces of evidence already set out as being corroborative of the evidence of the prosecutrix. I think there lies the flaw on the judgment of the learned trial Judge which, with respect, was erroneously affirmed by the Court of Appeal.

Perhaps, I should observe that I did carefully examine the entire evidence led on behalf of the prosecution in the case and observed that PW2, the father of the prosecutrix, testified under cross-examination that the appellant admitted the offence when he came to his house with his father and the owner of his vehicle to beg for his forgiveness. His evidence ran thus:-

*"Q.Q: What did your daughter tell you when she came back to*

you?

*Ans. She told me that you forced her and had sexual intercourse with her inside your vehicle.*

*Q.Q Did PW1 show you any torn dress which she said was torn as a result of this incident?*

*Ans. She brought a torn pant and showed to me, I don't know where she kept it.*

*Q.Q: Did I and my father and the owner of the vehicle come to your house to see you?*

*Ans. Yes. You came to beg me.*

*Q.Q: Did you tell my father that I forced your daughter and had sex with her on that day?*

*Ans. Yes, and that was why he brought you to my house to beg."*

*D It is crystal clear that the above testimony of PW2, if believed, was sufficient corroboration of the evidence of the prosecutrix. This is because it is not only an admission that sexual intercourse had taken place between the appellant and the prosecutrix, it is also an affirmation E that the sexual intercourse took place without the consent of the prosecutrix and that the appellant was the person who committed the crime. Admission of an offence by an accused person to other persons may amount to sufficient corroboration in law. So in R. v. Francis Kufi (1960) F W. N. L. R. 1, the accused was charged with indecent assault against a young girl of 10 years. It was held, and rightly in my view, that the admission of the offence by the accused to the father of the girl was sufficient corroboration in law.*

*G The real problem in the present case, however, is that the learned trial Judge gave no consideration whatsoever to the above piece of material evidence led against the appellant by PW2. All that the learned trial Judge did was to set out the relevant evidence tendered before the court by PW1, the prosecutrix. At the end of this exercise, the learned trial H Judge as he was entitled to do, believed the evidence of the prosecutrix. Having fully set out the relevant evidence of PW1, the learned trial Judge observed:-*

*"I wish to say here that I believe all that this witness has said."*



He did not, however, give any consideration whatever to the said vital piece of evidence of PW2. He neither indicated whether that piece of evidence was reliable and established nor did he as much as mention it, even in passing, throughout his judgment.

It cannot be over-emphasised that the evaluation of evidence B and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified in the witness box. See Akinloye and Another v. Eyiola and others (1968) N.M.L.R. 92 AT 95, Woluchem v. Gudi (1981) 5 S.C. 291 at 320 etc. It is only where an appellate court is in as good a C position as the trial court to evaluate evidence which has been given in a case, such as where the issue is essentially a matter of inference that can be drawn from proved facts, not resting on the credibility of witnesses as a result of their demeanour in the witness box or of the impression of D them by the trial court that it must not hesitate to do so. See Okafor v. Idigo 111 (1984) 5 S.C. 1 at 36, The Registered Trustees of the Apostolic Faith Mission and Another v. James and Another (1987) 2 N.W.L.R. (Part 61) 556 at 567. E

In the present case, whether or not the testimony of PW2 is true on the issue of his evidence that the appellant came to beg him for the rape on his daughter is entirely a matter that rests on the credibility of the witness which this appellate court is not in a position to resolve. I think F in the absence of a definite finding on the issue by the trial court it would be entirely speculative for this court to hold that the piece of evidence in question is reliable and therefore corroborative of the evidence of the prosecutrix on the issue rape for which the appellant was charged.

The position, as I see it, is that this is a case in which the learned G trial Judge after duly warning himself erroneously identified two pieces of evidence as corroborative of the testimony of the prosecutrix. It was on this basis that he proceeded to accept her entire testimony on the issue of rape as true. Those two pieces of evidence are, in fact, no corroborations, no matter how remotely, of the evidence of PW1. Without doubt, if H the learned trial Judge after warning himself, frankly held that there was no corroboration of the evidence of the prosecutrix and that in the ab-

sence of such corroboration, it would be unsafe to convict but that he was nevertheless satisfied with the truth of her evidence and convicted the appellant, it may well have been that the conviction would have been unassailable. But his mind was left with the belief that he found certain matters to be corroboration, whereas they were not. In such circumstance, there may be no other option open to this court than to allow the appeal. See R. v. Parker (1925) 18 Cr. App. Rep. 115. This is because although the necessary warning relating to corroboration was clearly given by the learned trial Judge, that exercise was rendered nugatory by the trial Judge himself by enumerating matters as corroboration which were in fact not so. In such a situation, it cannot be possible for this court to say with any degree of certainty that, with a proper direction, the court must still have come to the same conclusion as it did. See R. v. Phillips (supra).

So, too, in R. v. Ross 18 Cr. App. Rep. 141 at 142, Hewart L.C.J. on facts which are not too dissimilar to those in the present case had this to say, namely:-

*"In a case of this kind, corroboration of the story of the prosecutrix, though not essential in law, is required in practise. It is the well-settled practice to warn juries that it is not safe to convict on the uncorroborated testimony of the prosecutrix. To tell the jury that something is corroboration which is not corroboration may have a more unfortunate result than the omission of any warning on the matter. Here a matter was treated as corroboration which was not corroboration. The conviction must be quashed."*

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Kalgo, J.S.C. that this appeal succeeds and it is hereby allowed. The conviction and sentence passed on the appellant are hereby set aside and it is ordered that he be acquitted and discharged.

**KATSINA-ALU JSC**

I have had the privilege of reading in draft the judgment of my learned brother Kalgo, JSC in this appeal. I entirely agree with it.

The appellant stood trial in the High Court, Uyo, on a charge of B rape contrary to section 358 of the Criminal Code. The particulars of the offence were that at Akpan Street, Uyo, on the 2nd of May 1982 he had carnal knowledge of one Grace Asuquo Etim without her consent.

At the trial the prosecutrix and three other witnesses testified for C the prosecution. The appellant also gave evidence in his defence, he called no other witness.

The prosecutrix Grace Asuquo Etim testified as PW1. Part of her evidence-in-chief reads as follows:

*"On that day, the Accused brought passengers to Creek Town, D from Uyo. My father saw him and hired him to take me from Creek Town to Uyo. My father paid the Accused the sum of N5.00 (five Naira). On other occasions I used to pay a fare of four Naira from Creek Town to Uyo. My father had instructed the Accused to hand-over the balance of E one Naira to me when we reached Uyo. I entered the vehicle to Creek Town and the Accused drove the vehicle to Uyo. The vehicle was a pick-up van. When we arrived at the Uyo Motor Park, I asked the Accused to drop me there but he refused. I had known the number of the vehicle at F the time of this incident but I have now forgotten it. We arrived at Uyo at about 6 p.m. I wanted to go to No. 26 Akpan Etuk Efre Itak where he dropped some other passengers. There at Itak, all the passengers dropped. I was the only passenger remaining in the van. The accused drove back to Uyo. We arrived at Uyo at about 8 p.m. The Accused suggested to me on G our way back to Uyo that I should come with him and spend the night at his house. I told him I would not come with him. The accused drove to No. 2 Effiong Ukpang Street where he lived and there he said he was going to give me something to eat. I came out of the van. I removed my H load comprising a bag of garri, a bag containing my clothes and my books. I wanted to take a motor-cycle and go home. The Accused came and collected the loads back from me and put in his van. He did not tell*

me why he did this. He then turned to the direction of our street and said he would take me to our house. It was after the Accused had indicated his willingness to drop me at Akpan Etuk Street that I entered the vehicle. At Akpan Essien Street, The Accused stopped and asked me to get down from the vehicle. I then cried and begged him to take me to our house. At that time it was really dark and it was raining. The Accused wound up the glass of the vehicle, and locked the vehicle. The Accused and I were at that time inside the vehicle. One man on a bicycle came and asked what the problem was but the Accused did not say anything. I was still crying inside the vehicle. Since the Accused did not say anything to the man, the man left. I said nothing to the man. The Accused started to struggle with me and attempted to remove my pants. I refused and resisted. After a prolonged struggle inside the van, the Accused overpowered me and removed my pants. There in the van, he had carnal knowledge of me. When the Accused overpowered me, he inserted his penis into my vagina and had carnal knowledge of me once. After the sexual intercourse the Accused took me back to his house at No. 2 Effiong Ukpong Street. By that time, it was past nine (9) P.M.. There he removed my loads and put them into his house. He asked me to wait for him at his house to enable him go and park his vehicle, I ran out of his room to No. 5 Effiong Ukpong Street where I spent the night."

This witness disclosed that the Police took her to St. Luke's Hospital, Anua, Uyo where she was examined by a Doctor. The Doctor was not called to give evidence nor was the report of his findings tendered in evidence.

It is an established practice in criminal law that though corroboration of the evidence of the complainant in a rape case is not a statutory requirement, it is, in practise always looked for. In other words, it is now a well established practice, by the courts in Nigeria, that in cases of rape the evidence of the complainant must be corroborated. The nature of the corroboration must necessarily depend on the peculiar facts of each case. Where rape is denied by the accused the sort of corroboration the courts must look for is medical evidence showing injury to the private part of the complainant, injury to other parts of her body which

may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed.

Where the prosecution evidence is not sufficiently strong to warrant a conviction, it would be unsafe to convict merely on the accusation of the woman who alleges that she has been raped. The judge must warn himself against the danger of convicting a man on such uncorroborated testimony. See Ibeakanma V. Queen (1963) 2 SCNLR 191 at 195, Reekie V. Queen 14 WACA 501. In the latter case the West African Court of Appeal held at P. 502 as follows:

*"In cases of a sexual character it is eminently desirable that the evidence of the complainant should be strengthened by other evidence implicating the accused person in some material particular. It is true that there is nothing in law to prevent the court from convicting on the uncorroborated evidence of the complainant, but it is an established rule that the presiding judge must direct himself and the assessor in such a case on the desirability of there being corroboration of the complainant's evidence"*

In Ibeakanma's case this court held at P. 195 thus:

*"In the present case the learned trial Judge attached importance to the scar which he said the complainant's bite had left the shoulder of the appellant. The appellant's explanation was that it was a bite inflicted on him by one of his children five days before the date on which he was alleged to have raped the complainant."*

*The Police witness stated in his evidence that he took the appellant to the hospital and that he was examined by the doctor. As the appellant did not deny that the mark on his shoulder was caused by a human bite, it must be assumed that the object of the appellant being taken to the doctor for examination was for the purpose of determining whether the bite was inflicted on the previous day or five days earlier. The doctor's evidence or report would have enabled the Court to determine whether the complainant's story was the correct one or whether the appellant's was. As this was not done, we think it was wrong and a misdirection on the part of the learned trial Judge to have concluded that*

*it was the complainant's bite which left the scar on the appellant's shoulder. It was equally wrong in the circumstances to have treated the bite as a corroboration for the complainant's evidence."*

In the present case, although PW1 claimed she was examined by a doctor, no medical evidence was called. Again, in answer to a question in cross-examination she said *"my pants were torn"*. Her said pants was not tendered in evidence. Yet again, she said under cross-examination that she did not know the exact spot where the offence was alleged to have been committed. So that the evidence of PW1 that she was raped by the appellant was not corroborated in any way whatsoever. The trial judge rightly warned himself against the danger of convicting the appellant solely on the evidence of the complainant. He therefore found corroboration of the evidence in the fact that *"First, the accused himself admitted he took the PW1 to his house and asked to wait there while he went to park his vehicle. Secondly, the PW1 said she ran away from the house of the accused person into the house of the P.W. IV at No. 5 Effiong Ukpang Street."* With all due respect, the trial judge was wrong to have treated these facts or circumstances as corroboration of the complainant's evidence.

I find myself unable, on the facts and circumstances of this case to accept that the guilt of the appellant was proved with the satisfaction required in criminal cases. I am therefore in complete agreement with my learned brother Kalgo, JSC. that this appeal has merit and must be allowed. Accordingly I, too, allow this appeal and set aside the conviction and sentence of the appellant. The appellant is acquitted and discharged.

### EJIWUNMI JSC

I have before now been privileged to have read in advance the judgment just delivered by my learned brother Kalgo JSC. The facts of this case have been carefully set out in the said judgment, and for reasons given the appeal was found meritorious. I also agree that the appeal should succeed, but I would add a few words of my own.

The basic facts in this case are not in dispute. The appellant was charged for the offence of rape contrary to section 358 of the Criminal Code, in that on the 2nd day of May, 1982, he unlawfully had carnal knowledge of Grace Asuquo Etim without her consent. At the end of the trial at the High Court, he was found guilty of the offence and sentenced B to a term of imprisonment of 7 years with hard labour. He appealed to the Court below against that decision of the trial Court, but his appeal was dismissed. He has now appealed to this Court. Pursuant thereto, his learned counsel filed two grounds of appeal, which I do not consider necessary to set down here. However, on these two grounds of appeal C his learned counsel in the brief filed on his behalf raised only one issue for the determination of the appeal. Though the learned counsel for the respondent also filed a respondent's brief in which issues were also raised for the determination of the appeal, but it is not necessary to refer to D them. This is because, the only issue germane to this appeal is that raised in the appellant's brief. It reads:-

*"Whether the learned Justices of the Court below were right in holding that from the evidence adduced at the trial Court, the testimony E of PW1 contained no serious contradictions and was only amply corroborated in all material respects including the question whether or not there was consent."*

Undoubtedly for the offence of rape to be established by the F prosecution it is a cardinal requirement that the prosecutrix did not give her consent to the act of the appellant. In other words the unlawful carnal knowledge of the prosecutrix by the appellant must be proved beyond a shadow of doubt that it was without the consent of the prosecutrix. Before considering whether that ingredient of the offence was G established, I will dwell briefly upon another aspect of a necessary ingredient of the offence of rape. This aspect of the proof of the offence of rape is that there must be evidence that there was intercourse in the sense H that the penis of the appellant entered the vagina of the prosecutrix. It is pertinent in this context to refer to the provisions of section 357 of the Criminal Code. It reads:-

*"Any person who has unlawful carnal knowledge of a woman or*

girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape."

As I have said above, sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. See R v. Marsden (1891) 2 Q.B. 149; Rutherford v. Rutherford (1923) A.C. 1. It has also been held that the slightest penetration will be sufficient to constitute the act of sexual intercourse.

In the instant case it became therefore the duty of the prosecution to establish that there was the act of sexual intercourse as explained above and that without the consent of the prosecutrix.

The trial Court in coming to its conclusion reviewed the evidence before the Court. I do not need to restate those facts as they have been sufficiently reviewed in the lead judgment of my learned brother Kalgo JSC. The narration of the event leading to the alleged rape of the prosecutrix clearly showed that the appellant, a motor driver who was charged for a fee to take the prosecutrix to a particular point in Uyo and drop her there chose to drive her to several places before the alleged rape took place.

The learned trial judge after a consideration of all these events then said at page 47 of the Record of Proceedings; thus:

*"I am unable in the circumstances to agree that the little girl consented to the ordeal she passed through with the accused person, that evening."*

From this observation, the question that has been of some concern to me is whether the learned trial judge was there considering all that happened to the enforced movement of the girl by the appellant in his vehicle or the offence of rape for which he was charged.

I do not confess to some difficulty in ascertaining the thrust of the observation of the learned trial judge in all the circumstances. Though it is manifest that references were made to what constitute rape as charged, but I do, and with the greatest respect to the learned trial judge that had



the offence of rape for which the appellant was charged was addressed directly, then the errors that the Court fell into with regard to the corroborative evidence which reliance was placed upon to convict the appellant would perhaps have been avoided. In this context, I refer to the items of corroboration identified by the learned trial judge. These were: B

(i) *the fact that the appellant admitted bringing PW1 to his house; and*

(ii) *that PW1 ran away from the house when the appellant went to park his vehicle.*

Now, it is settled that evidence which would be acceptable as corroborative of the evidence of the prosecutrix must be such evidence as would support the consistency of the evidence of the prosecutrix, or such evidence as would show that the offence was committed, but it must also identify the appellant in some material particular with the commission of the offence. See R v. Rice (1963) 1 Q.B. 857; R v. Goldstein (1914) 11 C.R. App. Rep. 27 (C.C.A.); R v. Baskerville 12 C.R. App. Rep. 81; R v. Preprah & others 4 W.A.C.A 34 at 36; R v. Mumuna & Another (1939) 4 W.A.C.A. 39 at 41 and R v. Nkelagu (1960) 5 F.S.C. E 217. C D

With the greatest respect to the learned trial judge, having regard to the established principles, discussed in those cases and other dealing with situations of this kind, I fail to see how those items listed above can be said to be corroborative of the story of the prosecutrix that she was raped as alleged by the appellant. The Court below also in my humble view also fell into error in upholding the judgment of the trial Court. F

I think also that it must be borne in mind that in all criminal cases, the prosecution has throughout the burden to prove beyond reasonable doubt the guilt of the person charged. See Miller v. Minister of Pensions (1947) 2 ALL. E.R. 372, 273; Lori v. STATE (1980) 8-11 S.C. 81; Ameh v. STATE (1978) 6 - 7 SC. 27. G

In the instant case, there was no evidence that proved beyond H reasonable doubt that the appellant raped the prosecutrix as alleged. I therefore must reverse the judgment of the Court below and the trial Court convicting the appellant of this offence of rape. The judgments of

the Court below affirming the judgment of the trial Court is hereby set aside.

The appellant is hereby discharged and for the above reasons and fuller reasons given in the judgment of my learned brother Kalgo B JSC.

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