

SUPREME COURT OF NIGERIA

13TH JULY, 2001. SC. 133/2000

**CORAM:- S. M. A. BELGORE, M. E. OGUNDARE, U. MOHAM-
MED, O. ACHIKE, A. O. EJIWUNMI, JJSC.**

SUNDAY JEGEDE APPELLANT
V.
STATE RESPONDENT

CRIMINAL LAW - Attempted offence - Meaning - The end to which the accused arrived - Must have been substantially attained - But for unanticipated intervention (H 4)

CRIMINAL LAW - Rape - Penetration - There must be proof of penetration - Which must be linked with the appellant - Before he is convicted (H 2)

CRIMINAL LAW - Rape - Proof - The evidence of the pathologist - Is not sufficient proof - To convict for rape (H 1)

CRIMINAL LAW - Rape - When committed - The offence cannot be said to have been committed - In the circumstances of this case (H 3)

EVIDENCE - Rape - Corroboration - The evidence of PW3 - Based on hearsay cannot be corroboration of evidence of the prosecutrix (H 6)

RAPE - Attempted Rape - Evidence - There was no conclusive evidence - To justify the conviction for attempted rape (H 5)

FACTS

The appellant was charged with the offence of rape in the High Court of Bendel State. He was alleged to have raped the prosecutrix, a school girl of under 13 years within the premises of University of Benin staff school on 24th May, 1989. The prosecution alleged that the prosecutrix thought the appellant was a teacher at the staff school and had

volunteered to help him at his request to count the bad toilets at the school and that it was in the process that the appellant had raped her. The appellant however denied the charge and alleged that the prosecutrix and her elder brother were his pupils at a private tuition school and still owed him unpaid fees. The prosecutrix denied this and witnesses were called on both sides in proof of the allegations.

The trial court convicted the appellant of the offence of rape and sentenced him to 5 years imprisonment. On appeal the Court of Appeal set aside the conviction for rape and substituted it with attempted rape. The appellant has therefore appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether given all circumstances of the case, the prosecution proved the offence of rape or attempted rape, more so when the evidence of the prosecutrix (P.W.2) relied heavily upon by both trial Court and Court of Appeal was inadmissible as having been received contrary to Section 155(1) and 183(1) of the Evidence Act.

2. Whether the court can properly convict the Appellant on the evidence of PW3?

3. Whether having regard to finding of the lower court that the evidence of PW1 did not link the Appellant with the offence of rape, whether it was still open to the Court of Appeal to use the same evidence to convict the Appellant for attempted rape.

4. Whether the Court of Appeal was right in law and fact to hold that there was no need to corroborate the evidence of P.W.2 the victim of the alleged attempted rape?"

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

Rape - Proof - Evidence of pathologist

1. The evidence of PW1, a pathologist was devoid of some essentials to prove rape. All he found was tender virginal with purplish blue mucosa. He opined that it might be due to traumatic inflammation and that a swab showed some evidence of styphycoccus and yeast cells. He also believed the girl (i.e. prosecutrix) had "forceful penetration of the genital tract"

and that by his experience the injuries could have been there for as far back as forty-eight to sixty hours to the time he examined her. He was never afforded the opportunity of examining the appellant immediately after the alleged rape. The questions left unanswered by PW1 are: what is the age of the prosecutrix? Was her hymen torn during the alleged rape? Was the prosecutrix a virgin? The evidence of PW1 thus has not satisfied proof necessary to secure a conviction for rape. (p. 2532 H)

Rape - Evidence - Proof of penetration

2. Whether the prosecutrix was a minor or an adult there must first be proof of penetration and that penetration of the virgina must be linked with the appellant. There was no evidence before trial court to satisfy these requirements. The Court of Appeal was perfectly right to hold there was no evidence of rape. Whether by dilateriness of the police and or of the father of the prosecutrix the prosecutrix was not taken for medical examination not until 26th may 1989, more than 48 hours after the alleged attack. The opinion of the pathologist has not been scientifically conclusive as to rape. As the written record of proceedings stands the evidence that the accused had any carnal knowledge of the prosecutrix is superficial and therefore inconclusive. (p. 2533 C)

Criminal law - Rape - When committed

3. The offence of rape is

"the 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 this case of a married woman, by personating her husband."

Thus rape is only committed in circumstances set out above with clear evidence of penetration and who was responsible for it. The whole case is based on the evidence of the prosecutrix and PW3, the headmistress of the school she was attending. PW3 relied entirely on hearsay and the prosecutrix herself never gave convincing evidence. The delay in sending her to PW1 for medical examination and the evidence of the doctor

himself left a great gap in credibility. (p. 2533 F)

Attempted offence - Meaning

4. Then what is the offence of attempt under our Law? If a person
B intends to commit an offence, and in the process of putting his intention
into execution by means he has adopted to its fulfillment, and thereby
manifests his intention by some overt act, but actually falls short of his
intention to commit that offence intended either through an intervening
C act or involuntary obstruction he is said to commit the attempt of the
offence intended. (See S. 6 of Criminal Code). The end to which the
accused arrived must have been substantially attained but for interven-
tion which he never volunteered to meet or anticipated which prevented
the commission of the full offence intended (See Orija V. Police (1957)
D NRNLR 189. (p. 2534 B)

Attempted rape - Evidence

5. There is no evidence to show conclusively that the appellant attempted
E to rape or even assaulted the prosecutrix. The substitution of the offence
of attempted rape is therefore not justified. (p. 2534 D)

Evidence - Rape - Corroboration

F 6. The issue of whether the evidence of prosecutrix was admissible
because of her age does not arise in this matter. Certainly evidence of
PW3 is based entirely on hearsay and it is no corroboration of prosecutrix's
evidence. The appellant has not been linked with any rape or attempted
G rape. (p. 2534 E)

REPRESENTATION

Mogbeyi Sagay Esq. for the Appellant

V.O.A. Oviawe, Chief Legal Officer, Ministry of Justice, Edo State, for
H the Respondent.

CASES REFERRED TO

Orija v. Police (1957) NRNLR 189

Police v. Fowowe (1957) WRWLR 198

Igbine v. State (1997) 9 NWLR (pt. 519) 101

Okpanese v. The State (1969) 1 All NLR 420

Olaleye v. State (1970) 1 All NLR 300

Ozigbo v. Commissioner of Police (1976) ANLR 109 at p. 115

B

Hope v. Brown (1954) 1 WLR 250

Adeosun v. State (1975) 9-11 S.C. 1

Reg v. Engleton (1855) Dears C. C. 505, 538

R. v. Robinson 11 Cr. App. R. 124

C

Comer v. Bloomfield 55 Cr. App. R. 305

STATUTES REFERRED TO

Criminal Code Law of Bendel State SS.359, 258

Criminal Code S.6

D

LEAD JUDGMENT BY BELGORE JSC

The appellant was charged with the offence of rape contrary to S.258 of Criminal Code Law of Bendel State. He was alleged to have raped the prosecutrix, a school girl of under thirteen years within the premises of University of Benin Staff School on 24th May, 1989. The prosecution further alleged that the prosecutrix thought the appellant was a teacher at the same staff school and that she at his behest volunteered to help to count the bad toilets at the school. It was while doing this that the appellant grappled her and raped her. The appellant, on his side maintained he never committed any offence; all that happened, according to him, was the prosecutrix and her elder brother were his pupils at a private tuition school and that their father still owed him unpaid fees. At the time of the alleged offence the prosecutrix's age was put at eleven years, being born in August 1978. She denied being appellant's pupil at any time in 1989, much less her father owing him any outstanding fees. The prosecutrix maintained she told her father what happened to her the same day when he came to pick her up but he did nothing on that day. The trial court convicted the appellant of the offence of rape and sentenced him to five years imprisonment. On appeal to Court of Appeal the conviction

for rape was set aside and that of attempted rape was substituted. Thus the appeal to this court.

The appellant formulated four issues for determination in this appeal as follows:

B *"1. Whether given all circumstances of the case, the prosecution proved the offence of rape or attempted rape, more so when the evidence of the prosecutrix (P.W.2) relied heavily upon by both trial Court and Court of Appeal was inadmissible as having been received contrary to Section 155(1) and 183(1) of the Evidence Act.*

C *2. Whether the court can properly convict the Appellant on the evidence of PW3?*

D *3. Whether having regard to the finding of the lower court that the evidence of PW1 did not link the Appellant with the offence of rape, whether it was still open to the Court of Appeal to use the same evidence to convict the Appellant for attempted rape.*

E *4. Whether the court of appeal was right in law and fact to hold that there was no need to corroborate the evidence of P.W.2 the victim of the alleged attempted rape?"*

F It must be pointed out that the prosecutrix never raised any alarm or complained at the alleged scene of the crime, during or immediately after the alleged assault. She testified that later when her father came to pick her home she complained to him that the appellant had raped her. The witnesses from the school never noticed anything unusual when the prosecutrix and the appellant were moving from one section to another looking for prosecutrix's brother. The prosecutrix's father was not called at the trial to testify as important as his evidence would have been. The G PW1, Dr. Suleman Abu, worked in the same hospital with prosecutrix parents. Her father was a medical consultant and her mother was a Chief Matron. It was several hours after the alleged sexual attack that the police were called in on 24th may 1989. It was on 26th May, 1989 H that PW1 medically examined the prosecutrix. **The evidence of PW1, a pathologist was devoid of some essentials to prove rape. All he found was tender virgina with purplish blue mucosa. He opined that it might be due to traumatic inflammation and that a swab**

showed some evidence of staphylococcus and yeast cells. He also believed the girl (i.e. prosecutrix) had "forceful penetration of the genital tract" and that by his experience the injuries could have been there for as far back as forty-eight to sixty hours to the time he examined her. He was never afforded the opportunity of examining the appellant immediately after the alleged rape. The questions left unanswered by PW1 are: what is the age of the prosecutrix? Was her hymen torn during the alleged rape? Was the prosecutrix a virgin? The evidence of PW1 thus has not satisfied proof necessary to secure a conviction for rape. Whether the prosecutrix was a minor or an adult there must first be proof of penetration and that penetration of the vagina must be linked with the appellant. There was no evidence before trial court to satisfy these requirements. The Court of Appeal was perfectly right to hold there was no evidence of rape. Whether by dilatoriness of the police and or of the father of the prosecutrix the prosecutrix was not taken for medical examination not until 26th May, 1989, more than 48 hours after the alleged attack. The opinion of the pathologist has not been scientifically conclusive as to rape. As the written record of proceedings stands the evidence that the accused had any carnal knowledge of the prosecutrix is superficial and therefore inconclusive. The medical evidence has left many holes uncovered. The offence of rape is

"the 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 this case of a married woman, by personating her husband." Thus rape is only committed in circumstances set out above with clear evidence of penetration and who was responsible for it. The whole case is based on the evidence of the prosecutrix and PW3, the headmistress of the school she was attending. PW3 relied entirely on hearsay and the prosecutrix herself never gave convincing evidence. The delay in sending her to PW1 for medical exami-

nation and the evidence of the doctor himself left a great gap in credibility.

The Court of Appeal set aside the conviction for rape because there was insufficient evidence to justify it. But it went ahead and convicted for the offence of Attempted Rape under S.359 of Criminal Code Law of Bendel State. **Then what is the offence of attempt under our Law? If a person intends to commit an offence, and in the process of putting his intention into execution by means he has adopted to its fulfillment, and thereby manifests his intention by some overt act, but actually falls short of his intention to commit that offence intended either through an intervening act or involuntary obstruction he is said to commit the attempt of the offence intended. (See S. 6 of Criminal Code). The end to which the accused arrived must have been substantially attained but for intervention which he never volunteered to meet or anticipated which prevented the commission of the full offence intended (See *Orija V. Police* (1957) NRNLR 189, *Police V. Fowowe* (1957)(WRWLR 198). There is no evidence to show conclusively that the appellant attempted to rape or even assaulted the prosecutrix. The substitution of the offence of attempted rape is therefore not justified.**

The issue of whether the evidence of prosecutrix was admissible because of her age does not arise in this matter. Certainly evidence of PW3 is based entirely on hearsay and it is no corroboration of prosecutrix's evidence. The appellant has not been linked with any rape or attempted rape. The net result is that this appeal has great merit and I allow it. I set aside the verdict of Court of Appeal on attempted rape. I enter a verdict of discharge and acquittal.

OGUNDARE JSC

I read in advance the judgment of my learned brother Belgore H JSC just delivered. I agree with him that this appeal deserves to succeed. I too allow it, set aside the judgment of the Court below. I enter a verdict acquitting the Appellant of the offence of attempted rape of which he was convicted by the Court below. I set aside the term of five years

imprisonment passed on him. He is discharged and acquitted. I have a few comments to make in addition to the reasoning of my learned brother.

The Appellant was charged in the High Court of the now defunct Bendel State of Nigeria with the offence of rape contrary to section 358 of the Criminal Code of Bendel State in that he, on or about the 24th October, 1989 had carnal knowledge, of Oghogho Ogunbor without her consent. He pleaded 'not guilty' to the charge. At the ensuing trial the prosecution called six witnesses and closed its case. The Appellant gave evidence in his defence and called three witnesses. After addresses by learned counsel for the parties, the learned trial judge in a reserved judgement found the appellant guilty as charged and sentenced him to five years imprisonment.

The Appellant appealed to the Court of Appeal. That Court, in the lead judgment of Akaahs JCA with which Akintan and Rowland JJCA agreed, allowed the appeal on the conviction for the offence of rape but substituted it with attempted rape with five years imprisonment. In coming to this conclusion Akaahs JCA had reasoned:

"Learned counsel for the appellant has submitted following OKOYOMON V. STATE (supra) that the prosecution had not established that the accused did have carnal knowledge of the prosecutrix in the sense that there had been penetration as required by section 299 of the Criminal Code.

I agree with this submission. The finding made by PW1 did not link the appellant directly with the condition of PW2's private part. If the appellant had been examined, this would have confirmed if he had a similar disease as found with PW2. I agree with Appellant's counsel's submission that for the medical officer's evidence to qualify as corroboration of the fact that the Appellant penetrated the vagina of the prosecutrix, it must point directly and irreversibly to the Appellant. The nature of a corroborative evidence capable of grounding conviction on a charge of rape is that it must be cogent, compelling, and unequivocal as to show without more that the accused committed the offence charged. See: IGBINE V.STATE (1997)9 NWLR (pt. 519) 101. As in IGBINE's case (supra) the evidence of pw1 shows that there was an act of rape but

there is nothing in this evidence to link the appellant with the offence: OKPANESE V. STATE (1969) 1 ALL NLR 420; OLALEYE V. STATE (1970) 1 ALL NLR 300."

One would think that on this reasoning the logical conclusion would be an acquittal. But the learned Justice of the Court of Appeal went on to say:

"This is not the end of the matter. PW1 went further to state that there was forceful penetration of the genital tract of PW2 associated with attempted strangulation. This finding by PW1 has negated the element of consent by PW2. In her evidence in chief PW2 stated that the appellant held her neck and threatened to shoot her on the face if she refused to remove her pants. Also testifying in-chief, 3rd P.W Fidelis Erameh stated that at the police Station the appellant gave him his name and he said he was sorry for what he had done and asked for his forgiveness since he (appellant) was a friend to 3rd P.W.'s elder brother, Dr. Erameh. He then reminded him that he was accused of raping a school girl but he denied raping her but tried to force her. This piece of evidence coupled with the evidence of Irene Osagie who testified as DW3 at page 27 of the records that -

"The girl came and held me and said one man wanted to rape her."

are all pieces of evidence which point toward attempted rape. In OKOYOMON V. STATE (supra) the Supreme Court in a similar situation as this one substituted the offence of attempted rape for the offence of rape which the trial court found proved."

The Appellant has further appealed to this Court upon 3 grounds of appeal. And in the Appellant's brief filed pursuant to the rules of this Court, the following 4 issues are formulated for the determination of the appeal:

"1. Whether given all circumstances of the case, the prosecution proved the offence of rape or attempted rape, more so when the evidence of the prosecutrix (P.W.2) relied heavily upon by both trial Court and Court of Appeal was inadmissible as having been received contrary to Section 155 (1) and 183(1) of the Evidence Act.

2. *Whether the court can properly convict the appellant on the evidence of P.W3.*

3. *Whether having regard to the finding of the lower court that the evidence of PW1 did not link the Appellant with the offence of rape, whether it was still open to Court of Appeal to use the same evidence to convict the Appellant for attempted rape.* B

4. *Whether the Court of Appeal was right in law and fact to hold that there was no need to corroborate the evidence of P.W.2 the victim of the Alleged Attempted rape?"*

The Respondent's three issues are subsumed in the above issues placed before us. Issues 1-3 above taken together are, in my respectful judgment, sufficient to dispose of this appeal. Issue 3 as framed appears to be rather inelegantly drafted and does not cover all the Appellant's complaint in ground (1) of his grounds of appeal upon which the issue is predicated. I will, therefore, reframe it thus: D

Whether the facts upon which the court of Appeal convicted the Appellant are sufficient to establish the offence of attempted rape.

ISSUES 1-3:

The facts of this case are fully stated in the judgment of my learned brother Belgore JSC. I don't think it is necessary for me to go over them again in detail. It is sufficient for the purpose of this judgment to state that the case for the prosecution was that on the 24th May 1989, the Appellant went to the University of Benin Staff School where he met the prosecutrix (PW2), a girl of about 11 years old at the time. He requested the girl to help him count the number of the bad toilets in the school. The girl did not know the Appellant before that day but thinking he was a teacher in the school she obliged. When they were around the toilet area at a place where there were some bad chairs, the Appellant grabbed the girl on the neck and asked her to remove her pant or else he would shoot her. The Appellant removed the girl's pant by himself and had sexual intercourse with her. The girl's father, a medical practitioner (and head of the General Hospital Benin at the time) called later to pick his daughter from school. The girl narrated to him what happened. Strangely, however, the doctor/father took his daughter home and did not produce E F G H

her for police investigation and medical examination until the third day when Dr. Abu of the General Hospital Benin (PW1) examined the prosecutrix and found:

"On general appearance she was depressed looking. She told me somebody forcefully had sex with her. On examination the vagina was very tender with some whitish brown discharge. The cervix and fornix were purplish blue on the mucosa, due to traumatic inflammation. I tried a Swab for the vagina for examination. This showed a group of bacteria call staphylococcus areas and few yeast cells. In my opinion I consented (sic) that this girl has forceful penetration of the genital tract associated with attempted strangulation.

The injuries for (sic) my own observation and experience were between 48 hours and 60 hours old."

According to PW1, both Dr. Ogunbor and Mrs Ogunbor worked at the General Hospital Benin as Consultant and staff nurse respectively.

The Appellant denied committing the offence. According to him, the prosecutrix and her elder brother were his pupils in the private classes he used to organise. When the two pupils left his classes their father was owing him part of their fees. Their father took offence when he asked him for the money and promised to punish him. The charge was trumped up. He admitted seeing the girl on the day of the incident and that the girl led him to look for her brother. On the said day the Appellant had gone to the University of Benin Staff School to drop a passenger he carried on his motor bike. He saw the prosecutrix and asked her about the money she and her brother were owing him. He asked her to lead him to her brother who was in primary 6 in the school. The girl led him round the school but could not find her brother. The Appellant accused the girl of deceiving him knowing that her brother was not in school. There was an altercation between the two. The girl shouted "thief," and ran away. People on hearing the girl's shout ran to the scene carrying cudgels, etc and were about to lynch the Appellant in the belief that he was a thief. On explaining to the mob what happened, they left him. Some came back and accused him of trying to rape a girl and he was taken to the police station.

The Appellant called DW1 and DW2 who confirmed that they as well as the prosecutrix and her brother were pupils in Appellant's private classes and that latter were owing him some fees. Another witness, DW3 testified that when the incident happened the prosecutrix ran to her and held her that somebody wanted to rape her. The evidence of DW1, DW2 B and DW3 remained unchallenged.

It was on these facts that the learned trial judge convicted the Appellant of rape. The court below found that the verdict was erroneous and acquitted the Appellant of rape but convicted him of attempted rape. C There has been no appeal against the acquittal for rape. On the contrary, it is the Appellant who has appealed against his conviction, by the court below, of attempted rape. As there has been no appeal against the acquittal for rape that finding must be taken, rightly or wrongly, as correct for the purpose of this appeal. D

In convicting for attempted rape, the court below relied on OKOYOMON V. THE STATE (1973) 1 ALL NLR (pt.1) p.16; (1973) ANLR 14. While I agree that this case supports the finding of the court below that the Appellant in the case on hand was not guilty of the offence of rape, I do not, however, with profound respect to their Lordships, that that case supports their finding that the Appellant was guilty of attempted rape. In OKOYOMON V. THE STATE, this Court found there was corroboration by an eye witness of the evidence of the prosecutrix that the accused was on top of her and that she shook her legs in resistance. There was no such evidence in the present case. Moreover, the trial judge in that case was found to be in some doubt as to whether the ingredients of the offence of rape which was the subject-matter of the charge had been unequivocally established when the learned judge G found:

"I believe that when accused and Rose reached a certain spot in the bush, the accused felled her down, pulled off her pant, pull down his own pair of shorts and then started to have (or attempted to have) carnal knowledge of Rose Ibori." H

This Court, per Elias, CJN observed:

"It is essential that the offence of which the accused is being

convicted should be indicated with sufficient particularity by the trial judge. In this case, the judge should have made it clear whether he found proved against the accused 'carnal knowledge or only 'attempted carnal knowledge.'

B *For the foregoing reasons we think that the proper charge of which the appellant can be convicted is one of attempted rape and not rape, as the ingredients of the latter offence has not been satisfactorily established."*

C Thus, on the evidence given in OKOYOMON, it was not difficult to find that the offence of attempted rape was proved. There was the evidence of PW1 (an eye witness) in that case to effect that-

When I saw the accused on top of Rose as he was apparently having carnal knowledge of her, I saw Rose shaking her legs in resistance."

In regard to this piece of evidence Elias, CJN observed:

"the evidence of PW1 has only a limited probative value in corroborating the prosecutrix's story that the accused was on top of her but not as corroborating the actual act of penetration."

There was not such evidence in the case on hand corroborative of the story of the prosecutrix (PW2) as to what happened at the scene.

F I have earlier quoted a passage from the judgment of Akaahs JCA detailing his reasoning for convicting for attempted rape. He considered the following facts:-

(1) That the medical officer, PW1 who examined the prosecutrix, Oghogho stated that there was forceful penetration of the genital tract of PW2 associated with attempted strangulation;

G (2) That this finding by PW1 had negated the element of consent by PW2;

(3) That PW2 in her evidence stated that the Appellant held her neck and threatened to shoot her on the face if she refused to remove her H pants;

(4) That PW3, Fidelis Eramah stated at the police station that the Appellant gave him his name and he said he was sorry for what he had done and asked for forgiveness. PW3 reminded the Appellant that

the (Appellant) was accused of raping a school girl; the Appellant denied raping her but admitted trying to force her.

(5) That DW1, Irene Osagie testified to the effect that
"the girl came and held me and said one man wanted to rape her."

At this stage I need to set out the provision of the Criminal Code of Bendel State relevant to this case. They are:

"375. 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 he husband, is guilty of an offence which is called rape."

358. Any person who commits the offence of rape is liable to imprisonment for life, with or without caning.

359. Any person who attempts to commit the offence of rape is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning

4. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he said to attempt to commit the offence."

The same consideration apply to the charge of attempt as to the charge of the particular offence - see R V. AKINPELU AJANI & ORS. 3 WACA 3.

In OZIGBO V. COMMISSIONER OF POLICE (1976) ANLR 109 at p.115, this Court, per Alexander, CJN, declared-

"To constitute an attempt the act must be immediately connected with the commission of the particular offence charged and must be something more than mere preparation for the commission of the offence."

See also ORIJA V. INSPECTOR GENERAL OF POLICE (1975) NRNL 189, Where,as in OZIGBO, R.V. EAGLETON, Dears, 515, 538; 169 ER

826, 835 was followed. In EAGLETON, Parke, B declared as long ago as 1855 the law on attempt to be this:

"The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are;...."

This dictum has been regarded as the correct law on the subject and has been followed ever since by the courts both in England and in this country.

In HOPE V. BROWN (1954) 1 WLR 250, Lord Goddard, L.C.J. Acknowledge R.V. EAGLETON as the *locus classicus* of what amounts to an attempt. Smith, J. delivering the judgment of the High Court of Northern Nigeria in ORIJA V. INSPECTOR GENERAL OF POLICE (supra) observed at pages 192-193:

"But it is not necessarily the last act in every case which proves the attempt. All that is required is an act immediately connected with the particular offence which clearly shows that the offender was attempting to commit it. That is what section 4 of the Criminal Code requires, i.e, an overt act which clearly manifests the intention but which does not amount to its fulfilment. It may be last of a series of overt acts because up to that point it is not clear whether the offender is attempting to commit the particular offence charged or some other offence. It may be the first act because that act was unequivocally an attempt to commit the particular offence and no other. The test in EAGLETON is applicable to section 4 of the Criminal Code because it is necessary to ascertain the acts immediately connected with the crime in order to decide which overt act or acts clearly manifest the intention to commit that crime. But a more practical test is that suggested by the learned author of Russell on Crime (10th Ed. p. 170): 'the prosecution must prove that the steps taken by the accused must have reached the point when they indicate beyond reasonable doubt what was the end to which they were directed.'"

I agree entirely with the above dictum of Smith J.

Learned counsel for the Appellant has in his brief meticulously

examined the facts relied on by the court below in convicting the Appellant of attempted rape and submitted that the evidence available did not prove the offence beyond reasonable doubt.

Learned counsel for the Respondent, on the other hand, argued that the prosecution established the charge of rape or attempted rape and urged the Court to dismiss the appeal. B

I will now consider the facts upon which the court below convicted the Appellant of attempted rape. As regards (1) and (2), there could be no question that whatever happened to Oghogho on the fateful day, that is if anything at all happened to her, could not have been with her consent. As was rightly found by the court below when dealing with the offence of rape, these two facts do not link the Appellant to the offence of rape. Nor could they have linked him with the offence of attempted rape either. C D

As to (3), there was no evidence that the Appellant had a gun on him at the time with which he could have carried out the alleged threat. PW6, the police investigator testified:

"I did not see any torn shirt on the accused. I did not see any finger nail scratches on his face. I did not see any weapon on him that day." E

This witness's evidence must throw some doubt on the credibility of the evidence of the prosecutrix, PW2 who in her testimony on oath had said: F

"He removed my pant by himself and started sexing me. I then tore shirt and ran away."

In any event, the removal of the pant of the prosecutrix without more will not suffice to prove attempted rape. In R.OFFIONG, 3 WACA 83 there was evidence that the accused entered the room of complainant uninvited, took off his clothes and expressed a desire to have sexual connection with her and actually caught hold of her. The West African Court of Appeal, per kingdom, C.J. (Nigeria) held, allowing the appeal of the accused: G H

"These acts clearly fall short of an attempt to commit rape. They are merely acts which indicate that accused wanted to have and had made preparation to have connection with complainant."

I now turn to the 4th factor taken into consideration by the court below. It would appear that PW3 was called to show that Appellant made a confession to him. The witness testified thus:

"At the police station that Accused Sunday Jegede, gave me his name and said he was sorry for what he had done and I should forgive him because he was a friend to my late brother Dr. Erameh. I told him he was accused of raping my school girl. He said he didn't do anything to the girl but he tried for (sic) force her."

Cross-examined he deposed-

"The Accused told me he was sorry for what he did before I made a statement to the police. It was in the compound. I did not write all that in my statement to the police."

What credibility could be ascribed to the evidence of this witness? one may ask. He made a statement to the police on 24th may 1989 when the matter was still fresh but did not say in that statement that the Appellant made some admissions to him on that day. He only remembered about the admission two and half years later when he was giving evidence in court! Surely if the evidence in this case had been looked at dispassionately, neither the evidence of PW2 nor that of PW3 would have been considered credible. Be that as it may, what did the Appellant confess to? That he tried to force the prosecutrix? Force her to do what? There was no answer to this question. And is that sufficient evidence of attempted rape? I rather think not. The evidence of PW3 is lacking in clarity and unambiguity; it is not unequivocal.

The last factor the court below put into consideration in convicting the Appellant of attempted rape is the evidence of DW1 to the effect that the prosecutrix came to her, held her and told her that one man wanted to rape her. This pieces of evidence, without more, cannot be evidence to sustain a charge of attempted rape. It would appear that the court below lost sight of the reason for calling this witness. It was to discredit the evidence of the prosecutrix in that at the first opportunity she had, she did not say that she was raped but rather that one man wanted to rape her. In any event, the evidence of DW1 could not be sufficient evidence to sustain a conviction for attempted rape.

In my respectful view, neither any nor all of the factors taken together would suffice to establish a case of attempted rape. They simply did not meet the required standard in law to constitute an attempt to commit rape. The Appellant was wrongly convicted and his conviction will not be allowed to stand; it will be set aside. Consequently I answer Issues 1-2 and Issue 3 as reframed by me in the negative. And with this conclusion I do not see the necessity to consider the fourth issue placed before us. B

It is for the reasons given herein and the other reasons contained in the judgment of my learned brother, Belgore, JSC that I too allow this appeal and set aside the judgment of the court below in so far as it relates to the conviction of the Appellant for attempted rape. His acquittal by that court on the charge of rape is affirmed. I order that he be discharged and acquitted. C D

MOHAMMED JSC

I agree that this appeal has merit. I have had the preview of the judgment of my learned brother Belgore, J.S.C, in draft, and I have nothing more to add. I allow the appeal and set aside the judgment of the court of Appeal. The appellant is discharged and acquitted. E

ACHIKE JSC

I have had the privilege of reading in advance the judgment of my learned brother, Belgore, JSC just delivered. I too allow it, set aside the judgment of the court below. His acquittal by that court on the charge of rape is affirmed. I order that he be discharged and acquitted. F

EJIWUNMI JSC

I was privileged to have read in its draft form the judgment just delivered by my learned brother Belgore JSC. I am in full agreement with him that this appeal deserves to succeed. I therefore also allow the appeal for the reasons given in the said judgment. H

However, it is necessary to observe further that the lower Court did not apparently consider carefully when a person charged with a full

offence may be convicted for an attempt to commit the same offence.

In this case the appellant was charged for the offence of rape, contrary to section 358 of the Criminal Code, Cap.48 Vol. II, Laws of former Bendenl State of Nigeria. He was tried and convicted of that offence by the Learned trial judge. Following his conviction the learned trial judge Aiwerioghene J., sentenced him to serve a term of five years imprisonment on the 16th June 1995.

Being very dissatisfied with that judgment, the appellant appealed to Court of Appeal. His appeal to that Court was partially successful. This is because the court below upheld his appeal for his conviction for the offence of rape, but found him guilty of the offence of attempted rape.

To reach this conclusion, it is pertinent to refer to the reasoning of the Court of Appeal, per Akass JCA:-

"This is not the end of the matter. PW1 went further to state that there was forceful penetration of the genital tract of PW2 associated with attempted strangulation. This finding by PW1 has negated the element of consent by PW2. In her evidence in chief PW2 stated that the appellant held her neck and threatened to shoot her on the face if she refused to remove her pants. Also testifying in -chief, 3rd PW, Fidelis Erameh stated that at the police Station the appellant gave him his name and he said he was sorry for what he had done and asked for his forgiveness since the appellant was a friend to 3rd PW's elder brother, Dr. Erameh. He then reminded him that he was accused of raping a school girl but he denied raping her but tried to force her. This piece of evidence coupled with the evidence of Irene Osagie who testified as DW3 at page 27 of the record that:-

"The girl came and held him and said one man wanted to rape her."

are all pieces of evidence which point towards attempted rape. In Okomoyon v STATE (1973) ALL. N.L.R. 14 which the supreme Court in similar situation substituted the offence of attempted rape for the offence of rape which the trial court found proved.

It is rather unfortunate that the appellant who was arrested son

after the incident and taken to the police Station was not subjected to medical examination. This may not be unconnected with the unexplained absence of the prosecutrix for two days despite the fact that she narrated her ordeal to her father on the same day that the incident occurred.

The second issue raised by the appellant does not merit any further consideration. I find that there are no material contradictions in the evidence of the prosecution witness concerning the offence of attempted rape."

The question then from the above narration from the judgment of the lower Court is whether the Court below gave adequate consideration to the evidence before it before the conclusion was reached that the appellant could properly be found guilty of the offence of attempted rape.

The definition of what elements of the facts of case that might be relied upon to constitute an attempt to commit the main offence for which an accused was charged has not been without judicial authority in this Court and other common Law jurisdictions. For present purposes I will refer to the decision of House of Lords in England in DPP v. Stonehouse 1978 A.C.55 where lord Diplock at page 68, said:-

"The constituent element of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence. Acts that merely preparatory to the commission of the offence such as in the instant case, the taking out of the insurance policies are not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so. As it was put in the locus classicus Reg v. Engleton (1855) Dears C.C.505,538:

"The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are...."

In other words the offender must have crossed the Rubicon and burnt his boats."

In this court, Fatai-Williams,JSC (as he then was) in Adeosun v. STATE (1975) 9-11 S.C.1, delivering the judgment of the court at pages 15 - 16, observed thus:-

"Returning to the question whether an accused person can be convicted of an attempt to commit an offence which the prosecution has failed to proved to be an offence, the answer is that no such conviction can be sustained. Any other conclusion to my mind, would not only be impractical, it would also constitute an affront to common sense."

And in Ozigbo v. C.O.P. (1976) 2 S.C. 67; (1967) N.S.C.V. 124, Alexander CJN delivering judgment of the Court at page 128,said:-

"To constitute an attempt,the act must be immediately connected with the commission of the particular offence charged and must be something more than mere preparation for the commission of the offence. See R v. Eagleton, Dears, 515; R.v. Robinson 11 Cr. App. R. 124; Comer v. Bloomfield 55 Cr. APP.R. 305."

In the instant case, it was conclusively found that the prosecution failed absolutely to prove the charge of rape against the appellant. The resort to the conviction of the inchoate offence of an attempt to commit the same offence was indeed unfortunate. It is unfortunate in the sense that if due consideration had been given to the evidence, it is my view that nothing was proved against the appellant that he took any stops to rape the prosecutrix.

As was said in the case of DPP v. Stonehouse (supra), there must be such evidence as would show that the offender must have crossed the Rubicon and burnt his boats. This statement, if I may explain further, only means that the action proved against the offender must be such as would show that the offender had done all he needed to do complete the act before he was stopped.

As this appeal is clearly meritorious, I would also allow for the reasons given above and the fuller reasons given in the lead judgment of my learned brother Belgore JSC. I also enter a verdict of discharge and acquittal.