

SUPREME COURT OF NIGERIA

9TH MARCH 2007 SC. 272/2005

**CORAM:- I. L. KUTIGI CJN, A. I. KATSINA-ALU, N. TOBI,
G. A. OGUNTADE, I. F. OGBUAGU, JJSC**

OLUDOTUN OGUNBAYO APPELLANT
V
THE STATE RESPONDENT

CRIMINAL LAW - Rape - Meaning in legal parlance - Essential ingredients of the offence - Include penetration and lack of the woman's consent (H1)

CRIMINAL PROCEDURE - Evidence - Corroboration - Meaning and nature of - Must be an independent testimony - That confirms the accused person has committed the offence (H2)

CRIMINAL PROCEDURE - Rape - Corroboration - Though available in this case - Accused can be convicted - On the uncorroborated evidence of the victim (H3)

CRIMINAL PROCEDURE - Rape - Contradiction - In prosecution's case - Where minor and not related to the material issue of rape - It is not fatal to the case (H4)

CRIMINAL PROCEDURE - Rape - Appeals - Evidence - Was properly evaluated by two lower courts - In finding that prosecution proved case beyond reasonable doubt (H5)

APPEALS - Issues - Relevance - Allegation that trial judge's comment - Occasioned miscarriage of justice - Is of no relevance and is struck out (H6)

FACTS

This is an appeal from the decision of the Court of Appeal, Ibadan Division, delivered in May, 2002. Appellant was before the High Court charged with the offence of rape of a 13 year old girl. The incident was alleged to have taken place at Oke-Ijebu, Abeokuta, on 23-12-1987. The girl (PW1) gave evidence of how appellant forcefully dragged her into a room in spite of her resistance and shouting, and forcefully had sexual intercourse with her. Appellant, (27 years old) who claimed to be an Actor or Dramatist denied the allegation. He claimed that PW1 had been his girlfriend for 8 months before the date of the incident. That he had never had any sexual intercourse with the PW1. He said PW1 visited him at about 3:15 pm on the day in question to solicit his assistance concerning her result in an examination that had been taken. He narrated how PW1's father caused him to be beaten up because being poor, he has no moral right to befriend his daughter, PW1.

The trial Judge found the appellant guilty of the charge and sentenced him to term of 7 (seven) years imprisonment with hard labour, or N5,000.00 fine in lieu. Appellant's appeal to Court of Appeal was dismissed. Still aggrieved, he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the evidence of PW1 required any corroboration before the court can act on it and if so whether the evidence was corroborated by the evidence of PW5 or any of the prosecution witnesses. (Distilled from Ground One).

2. Whether there are material contradictions in the case of the prosecution which ought to have been resolved in favour of the Appellant failure of which occasioned miscarriage of justice. (Distilled from ground two).

3. Whether the prosecution proved the case against the Appellant beyond reasonable doubt. (Distilled from Ground Three)

4. Whether the trial Judge by his comments and by raising and determining issues suo motu has not descended into the arena of conflict in a way that cannot guarantee fair hearing and thereby occasion (sic) miscarriage of justice. (Distilled from Ground 4)".

HELD (Unanimously dismissing the appeal per **OGBUAGU JSC**)

Rape - Meaning in legal parlance

1. Now, Kalgo, JSC, in his lead Judgment in the case of *Iko v. The State* (supra) at page 393 of the SCNJ report, stated that ‘Rape’ in legal parlance, means a forcible sexual intercourse with a girl or a woman without her giving consent to it. That the most important and essential ingredient of the offence, is penetration. That the consent of the victim, is a complete defence, to the offence.

It is now settled that in legal parlance, 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, is guilty of the offence of rape.

I will pause here to state that the important and essential of the offence of rape, is penetration. It is also settled that sexual interference, is deemed complete, upon proof of penetration of the penis into the vagina. See the cases of *R. v. Marsden (1891) 2 Q.B. 149 @ 150* - per Lord Coleridge, C.J. that “emission”, is not a necessary requirement. It has however, been held, that any, even the slightest penetration, will be sufficient to constitute the act of sexual intercourse. This is why, even where penetration was proved, but not of such a depth as to injure the hymen, it has been held to be sufficient to constitute the crime of rape. See *R. v. Allen 9 C & P. 31*. Thus, proof of the rupture of the hymen is unnecessary, to establish the offence of rape. (p. 1185 B/ 1190 A)

Corroboration - Meaning and nature of

2. It is also settled that evidence in corroboration, must be an independent testimony, direct or circumstantial, which confirms in some material particular, not only that an offence has been committed, but that the accused person has committed it. Although corroboration is desirable, but it is settled that whether a particular evidence, can be corroboration, is for the trial Judge to decide.

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. Also settled, is that corroboration, need not consist of direct evidence that the accused person committed the offence, nor need it amount to a confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge.

It need be stressed that corroboration, 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. (p. 1185 G/ 1186 C)

Corroboration - Though available in this case

3. I hold therefore, that the evidence of the PW1, was adequately corroborated by the available evidence as required in practice including that of PW2 and PW5. My answer therefore, to Issue 1 of the Appellant and that of the Respondent - first arm, is that corroboration, is not necessarily required because, it is not a rule of law that an accused person, cannot be convicted on uncorroborated evidence of the prosecutrix. In respect of the second arm, my answer, is definitely in the affirmative. (p. 1190D)

Rape - Contradiction - In prosecution's case

4. I note that this issue of contradiction, was raised and argued at the court below. At page 147 of the Records, the court below, stated inter alia, as follows:

“The other complaints of contradiction and inconsistencies by appellant are not substantial as they were not only minor but also they were not contradictory to the, material issue of rape as the offence had already been committed before the complaint of assault on appellant as alleged by appellant against 2nd PW and his five drivers, which was reported at Ijemo Agbadu confirmed by the 3rd PW but not recorded in the crime book at the station. The piece of evidence carried no weight.

I agree. I affirm the above pronouncements. I too, find no substance or merit in this issue which I also, resolve against the Appellant. This is because, it is now firmly settled that it is not every minor contra-

diction, that is fatal to the prosecution's case. (p. 1190 F/ 1191 D)

Rape - Appeals - Evidence

5. The learned trial Judge from the totality of the evidence before him and its evaluation, found that the prosecution had proved its case beyond reasonable doubt. His Lordship, at page 77 of the Records, stated inter alia, as follows:

"To thereby end this considered judgment, I have with some sadness come to return an overall verdict of guilt as regards the conduct of accused in the charge of rape he faces in this prosecution and without hesitation proceed thereby to convict him accordingly."

The court below reviewed and evaluated the evidence before the trial court and meticulously and substantially in my humble but respectful view, reproduced the submissions of both the learned counsel for the Appellant and the Respondent and stated at page 151 of the Records inter alia, as follows:

"From the foregoing Respondent proved the two essentials of unlawful carnal knowledge of 1st PW by appellant and that she was ravished and this was without her consent were proved beyond reasonable doubt".

[the underlining mine]

I am unable to fault this finding of fact and holding by the court below as they are borne out eloquently by from the Records. (p. 1191 E)

APPEALS - Issues - Relevance

6. Issue 4 of the parties, with respect, is of no moment. It does not improve the real issue of the charge of rape against the Appellant, which the prosecution proved beyond reasonable doubt. At the worst, the said comment, is a comment and at best, is an *obiter dictum* - i.e. a comment which is just by the way, a casual and passing expression, an observation of the learned trial Judge which has nothing relevant to do with the live issue before him. But if I must decide on the issue, I hold that it is of no relevance to the real issue already canvassed by the parties in this appeal. I therefore, ignore it or having so found as a fact that it is a non-issue, I

hereby and accordingly strike out the said issue and all the arguments in respect thereof. (p. 1192 H)

NOTABLE POINT OF INTEREST

B TOBI JSC

1. Rape - Corroboration - Conflicting case law situation

I am not comfortable with the case law that corroboration is necessary to secure conviction of the offence of rape. This is because I see no statute foisting on the prosecution evidence of corroboration before convicting an accused. Section 350 of the Criminal Code Act, Cap. 77 Laws of the Federation of Nigeria, 1990 which is similar to the States Criminal Codes, does not provide that evidence of corroboration is necessary for conviction. And the Criminal Code specifically provides for offences where corroboration is necessary. Rape is not one of such. The above apart, neither the Evidence Act nor the Criminal Procedure Act or Code provides for corroboration in the offence of rape. I therefore ask, where did we get that law?

In all practicality, what evidence of corroboration is really needed in the offence of rape? In most cases, the offence is committed in private. Although in some cases, the shout and call for assistance of the prosecutrix attract the public, that is not a regular phenomenon. After all, the prosecutrix herself may not like to be seen by the public when the act of rape is committed. She would rather prefer reporting the rape after the act. And so, it is difficult to secure corroboration from evidence of an eye witness. That is the more reason why it is difficult to secure evidence of corroboration that the accused inserted his penis into the vagina of the prosecutrix.

If our adjectival law requires corroboration (a point I am not prepared to concede), then corroboration could be deduced from *inter alia*, the denials of the accused, the last opportunity the accused had to commit the offence, medical evidence of the examination of the prosecutrix confirming the allegation of recent forcible coitus and the existence of recent semen in the vagina of the prosecutrix directly traced or traceable to the accused.

I realize that the law of corroboration in the offence of rape is in some flux or state of confusion. It is hoped that this court will have an opportunity in the future to look at the decisions on the issue. As this is not such an opportunity, I will leave the issue hanging. (p. 1196 E)

B

REPRESENTATION

Oladipo Okpeseyi for the Appellant.

A. A. Babawale (Mrs.) (Director, Public Prosecution, Ogun State) for the Respondent.

C

CASES REFERRED TO

Queen v. Francis Kufi (1960) WNLR 1

R. v. Harling (1938) 2 All E.R. 307; 26 CAR 127 C.A

R. v. Baskerville (1916) 2 K.B. 658 @ 667; (1916 -17) All E.R. 38 @ 4 D

R. v. Jones (1939) 27 CAR. 33

Reekie v. The Queen (1954) 14 WACA 501 @ 502

D.P.P. v. Kilborne (1973) A.C. 729 @ 758

R. v. Goldstein (1914) 11 CAR. 27

E

Sunmonu v. Inspector General of Police (1957) WRNLR 23

R. v. Marsden (1891) 2 Q.B. 149 @ 150

The State v. Ojo (1980) 2 NCR (Nigerian Criminal Report) 391 @ 395

Jegade v. The State (2001) 7 SCNJ. 135 @ 141; (2001) 7 S.C. (Pt.1) F
122 @ 125

R. v. Hughes 22 Mood 190

Theophilus v. The State (1996) 1 NWLR (Pt.423) 139 @ 155

Sele v. The State (1993) 1 SCNJ. 15 @ 22-23

Isibor v. The State (2002) 4 NWLR (Pt.758) 741 @ 751; (2002) SCNJ. G
162

STATUTES REFERRED TO

Criminal Code Cap. 29 Vol. II Laws of Ogun State of Nigeria 1978, ss. H
357, 358

Evidence Act ss. 179(1), 178(5)

LEAD JUDGMENT BY OGBUAGU JSC

This is an appeal from the decision of the Court of Appeal, Ibadan Division, (hereinafter called “the court below”), delivered on 2nd May, 2002 affirming the conviction and sentence of the Appellant to seven (7) years imprisonment with hard labour with an option of fine of N5,000.00 (five thousand naira) by the trial court on 3rd December, 1991 in respect of the rape charge against the Appellant.

Dissatisfied with the said decision, the Appellant has appealed to this Court on four grounds of appeal which without their particulars, read as follows:

“(a) GROUND ONE

The learned trial judge and the lower court erred in law when they held that there corroborate on of evidence of PW1 by that of PW5 (the Medical Doctor) consequent upon which it convicted and sentenced the Appellant for committing the offence of rape and thereby occasioned miscarriage of justice.

[the underlining mine]

(b) GROUND TWO

The Honourable Court was in error when it affirmed the judgment of the lower court despite contradiction in the case of the prosecution thereby occasioned miscarriage of justice.

(c) GROUND THREE

The Court of Appeal was in error when it affirmed the trial court’s judgment that the prosecution had proved the case of rape against the Appellant with the offence before the Court thereby occasioned miscarriage of justice”.

I will with respect, fault Ground One of the appeal as it is incompetent. This is because, this Court, does not deal with an appeal against the decision of a trial court, but with that against the decision of the Court of Appeal. This is so, by virtue of the provisions of Section 233 (1) of the Constitution of the Federal Republic of Nigeria, 1999 which provides as follows:

“The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the

Court of Appeal".

[the underlining mine]

As can be seen, the provision which is clear and unambiguous, is mandatory. In other words, it is the finding/findings of the Court of Appeal, and not that of a trial court, that is appealable to this Court. See the cases of *Guobadia v. The State* (2004) 2 SCNJ. 55 @ 63; *Harriman v. Chief Harriman* (1987) 3 NWLR (Pt.60) 244 @ 257; (1987) 6 SCNJ. 218; and (2004) 2 S.C. (Pt. II) 1; *Ogoyi v. Umagba & anor.*, (1995) 2 NWLR (Pt.24) 581; (1995) 10 SCNJ. 55; and *Engu v. Agbi v. Barrister Alabi* (2004) 6 NWLR (Pt.868) 78 @ 143-144; and (2004) 2 SCNJ. 1 @ 52.

Even from paragraphs 5.1.20 and 5.1.26 of the Appellant's Brief, the learned counsel for the Appellant - Okpeseyi, Esqr., was still referring to the learned trial Judge. Paragraph 5.1.20, reads as follows;

"We submit with respect to the trial Judge and the learned. Justices of the Court of Appeal, 5th PW did not blame the Appellant for the laceration of the hymen of 1st PW1 (sic) nor did he say that seminal fluid was found in her vagina (sic): In fact what the medical doctor 5th PW E said is completely at variance with the strange conclusion of the trial judge".

[the underlining mine].

In paragraph 5.1.26, the learned counsel, still submitted,

"On the totality of the above therefore, the learned trial judge and of Justices of the Court of Appeal are in error when they convicted..... based on an uncorroborated evidence of a rape victim based on lack of proper analysis of the available evidence hence the per-verse conclusion which occasioned miscarriage of justice".

[the underlining mine]

I was minded to strike out this ground one (1) of appeal and all the submissions in respect thereof, but since an important point or issue of the law on/of corroboration, has been raised or is involved, I will deal with the merits of the said ground.

The facts of this case leading to the instant appeal, according to the prosecution/the Respondent, briefly stated, are that the Appellant raped

and had carnal knowledge of the PW1 - one Kemi Adekunle (a girl of thirteen (13) years of age), without her consent at Oke-Ijebu, Abeokuta, Ogun State on 23rd December, 1987 contrary to Section 357 of the Criminal Code Cap. 29 Vol. II, Laws of Ogun State of Nigeria, 1978 and punishable under Section 358 of the same Law. Five (5) witnesses, testified for the prosecution and twelve (12) Exhibits were tendered. The case for the prosecution, is that on 23rd December, 1987, while PW1 - the prosecutrix, was stooling in their own garden toilet, the Appellant surprisingly, opened the door of the said toilet and rained slaps on her face. He then dragged her from the said toilet, through the open boundary/fence of the Appellant's house and their own house where the PW1 was living. The P.W.1 swore that she was struggling with the Appellant, but she was overpowered by the Appellant. She shouted in the process of her being so dragged. The Appellant dragged her into a room where he undressed by removing his trousers and floored her on the bare floor of the said room and forcefully had carnal knowledge of her i.e. sexual intercourse with her after forcefully removing her pants. That it was in the process of being dragged on the ground, that her dress - Exhibit "B", was/became smeared with mud dirt. That after the act of having sexual intercourse with her, that the Appellant, warned her that if she continued shouting for help, he would open the room door and expose her nakedness to the world or household so as to shame her.

That shortly thereafter, one of her sisters by name Yemisi, came to knock on the door of the said room and told her that her father wanted to see her. That when she got up from the floor and came out of the room reeling with pains, she came face to face, with her father who was coming in her direction. She there and then, reported the entire incident to him of how the Appellant forcefully had sexual intercourse with her and that her father enquired from her, the whereabouts of the Appellant. She took the father to the said room where the Appellant was. That at the sight of her father, the Appellant bolted away or fled. That her father beat her up and took her to the police station where he reported the ugly incident of the forcible sexual intercourse with her by the Appellant. She identified the dresses - (Buba and native trousers) worn by the Appellant

at the time of the incident, which were tendered and marked Exhibits A and B respectively.

The Appellant who claimed to be an Actor or Dramatist, denied the allegation or charge and claimed that the PW1, had been his girl friend for eight (8) months before the date of the incident. That he had never had any sexual intercourse with the PW1. That PW1 visited him about 3.15 p.m. on the day in question to solicit for his assistance to find out from her school teacher, whether she had indeed failed in her examination which result was being expected. That while in the bathroom, he heard the voice of the PW2 - the father of the PW1 asking about his (Appellant's) whereabouts. That PW2 met him in the bathroom in company of some others and gave him "unexpected" slaps and then, ordered his drivers (two of whom he knew very well) to beat him up. That he was thoroughly beaten up by PW2 and the five (5) drivers. That they tore his dress - Exhibit K. That he enquired from the PW2 why he chose to beat him up assisted by his drivers. That some neighbours came and enquired from PW2 why he was being beaten. That 2nd PW stated that he had no moral right to befriend his daughter Kemi since he was poor when the likes of Oba Oyebade Lipede's sons who are rich and eligible, have/had not dared. That he succeeded to escape and went to his father's house at Ijemo Agbadu to explain what happened to him in the hands of PW2 to his brother who lives there. That his said brother, treated him for his pains and advised him to lodge a report with the Police of the incident at the Police Station which he did - accusing the PW2 of assault. That a police corporal was assigned to him to go to the house of PW2 to invite him to the police station, but that they did not meet him in his house. That the only time he was naked was on 23rd December, 1987, when he struggled to escape from the clutches of the PW2 and his five (5) drivers after they had beaten him up and tore the dress he wore during the said beating. He called two (2) witnesses which did not include his said brother and some of the said neighbours.

At the close of the defence, the learned counsel for the parties, addressed the court. In a considered Judgment delivered on 3rd December, 1991, the learned trial Judge - Somolu, J. (as he then was), found the

Appellant guilty of the charge and sentenced him to a term of seven (7) years imprisonment with hard labour or in its lieu, to a fine of N5,000.00 (five thousand naira).

Dissatisfied with the conviction and sentence, the Appellant, appealed to the court below that dismissed the appeal, hence the appeal to this Court.

The Appellant, has formulated four (4) issues for determination, namely,

C “1. *Whether the evidence of PW1 required any corroboration before the court can act on it and if so whether the evidence was corroborated by the evidence of PW5 or any of the prosecution witnesses.* (Distilled from Ground One).

D 2. *Whether there are material contradictions in the case of the prosecution which ought to have been resolved in favour of the Appellant failure of which occasioned miscarriage of justice.* (Distilled from ground two).

E 3. *Whether the prosecution proved the case against the Appellant beyond reasonable doubt.* (Distilled from Ground Three)

F 4. *Whether the trial Judge by his comments and by raising and determining issues suo motu has not descended into the arena of conflict in a way that cannot guarantee fair hearing and thereby occasion (sic) miscarriage of justice.* (Distilled from Ground 4)”.

The Respondent stated that it adopted the said issues formulated in the Appellant’s Brief but as slightly modified by it. I note that only Issues 1 and 3, were adopted in their entirety, but Issues 2 and 4, read as follows:

G “2. *Whether there were material contradictions in the case of the prosecution, which ought to have been resolved in favour of the Appellant.*

H 4. *Whether any comment made by the learned trial Judge can be said to have occasioned miscarriage of justice to the Appellant”.*

Since the modified Issues 2 and 4 are substantially similar with those of the Appellant, I will deal with the Issues as formulated by the Appellant.

ISSUE NO. 1

The submission of the learned counsel of the Appellant in substance, is whether the evidence of the victim - PW1 which required corroboration, was corroborated by the evidence of the PW5 - the Medical Doctor or any of the prosecution witnesses. It is the submission that there was no corroboration of the evidence of the PW1 either by the evidence of the PW5 or of any of the other prosecution witnesses. Learned counsel referred to the meaning of corroboration as defined or stated in the case of *Igbine v. The State* (1997) 9 NWLR (Pt.519) 101 @ 108 C.A. thus:

“Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses”.

He concedes that it is trite that the evidence of one solitary credible witness can establish a case beyond reasonable doubt and that it is said that truth is not discovered by a majority vote. He referred to the case of *Onafowokan v. The State* (1987) 2 NSCC 1099 @ 1111 - (it is also reported in (1987) 7 SCNJ. 233 - per Oputa, JSC and Section 179 (1) of the Evidence Act which provides thus:

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

I wish to say with respect, that this case and Section 179(1) of the Evidence Act, are quite irrelevant to the issue of corroboration which is the crux or plank in this matter. It is however, further conceded by the learned counsel, that the general rule, is that corroboration of evidence, is not required except where the law demands it. Both learned counsel for the parties, have cited and relied on the case of *Iko v. The State* (2001) 14 NWLR (Pt. 732) 221 @ 424. (it is also reported in (2001) 7 SCNJ. 382 @ 396) to the effect, that in a sexual offence such as rape (as in the instant case), it is desirable that the evidence of the victim of rape, should be corroborated.

Most conveniently, the learned counsel for the Appellant, has reproduced the portion of the Judgment in the above case that is also not in doubt, but salutary.

B “The danger sought to be obtained by the common law rule in each of the three categories of witnesses stated in 14 above is that the story told by the witness may be inaccurate for reasons not applicable to the other competent witnesses: whether the risk be of deliberate inaccuracies 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”.

C [the underlining mine]

D My research shows that the above pronouncement was extracted from the decision in the case of *D.P.P. v. Hester (1972) Cr. A.R. @ 212 @ 229* - per Lord Morris. Lord Diplock at page 244, stated, the danger sought to be cleared by this rule.

E The learned counsel for the Appellant at page 6 of their Brief paragraph 5.1.5, submitted that in any of offence of rape like in the instant case, a corroborative evidence, must confirm in some material particulars that:

F “(a) *Sexual intercourse has taken place, and*
(b) that it took place without the consent of the woman or girl, and
(c) that the accused person was the man who committed the crime”.

See also the English case of *James v. R. (1971) 55 C.A.R. 299 @ 302 (P.C.)* - per Viscount Dilhorne.

G He referred again to *Iko v. The State* case (supra) at page 252. He again submitted “that evidence of the P W1, does not or did not, corroborate that of the 1st PW” (sic). From paragraphs 5.1.7 to 5.1.18 of the Brief, he dealt with the three requirements which he described as “Tests One, Two and Three” respectively and submitted, that there was no evidence to support what he described as “the strange and perverse conclusion of the trial Judge” which he reproduced at page 10 paragraph 5.1.19 of the Brief.

The Learned Counsel concedes at paragraph 5.1.5, of their Brief, that it is an established practice in criminal law, that though corroboration

of the evidence of the victim in a rape case, is not essential in law, that it is in practice, always looked for and that it is also the practice for the jury or the Judge, to warn himself against the danger of acting upon an uncorroborated testimony. My research, shows that the above principle or proposition, is/was lifted from the case of *Ibeakanma v. The Queen* (1963) 2 SCNLR 191 @ 194, 195. In other words, evidence of corroboration, is not required as a matter of law, but it is required in practice.

Now, Kalgo, JSC, in his lead Judgment in the case of *Iko v. The State* (supra) at page 393 of the SCNJ report, stated that ‘Rape’ in legal parlance, means a forcible sexual intercourse with a girl or a woman without her giving consent to it. That the most important and essential ingredient of the offence, is penetration. That the consent of the victim, is a complete defence, to the offence. As regards consent or non-consent and proof of it. See the cases of *The Queen v. Francis Kufi* (1960) WNLR 1; *R. v. Harling* (1938) 2 All E.R. 307; 26 CAR 127 C.A.; *DPP v. Morgan* (1975) All E.R. 147 and *R. v. Morgan* (1976) A.C. 182.

It is now settled that in legal parlance, 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, is guilty of the offence of rape. See Section 357 of the Criminal Code.

Query - Does it mean that a husband, can rape his wife? I think this is debatable.

It is also settled that evidence in corroboration, must be an independent testimony, direct or circumstantial, which confirms in some material particular, not only that an offence has been committed, but that the accused person has committed it. See the cases of *R. v. Baskerville* (1916) 2 K.B. 658 @ 667; (1916 -17) All E.R. 38 @ 43 - per Lord Reading, C.J.; 12 CAR. 81; *R. v. Jones* (1939) 27 CAR. 33 and *R. v. Hartley* (1941) 1 K.B. 5. **Although corroboration is desirable, but it is settled that whether a particular evidence, can be**

corroboration, is for the trial Judge to decide. See the case of *Reekie v. The Queen (1954) 14 WACA 501 @ 502* where the following appear, inter alia:

In the 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 assessors in such a case on the desirability of their being corroboration of the complainant's evidence"

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 the case of *D.P.P. v. Kilborne (1973) A.C. 729 @ 758*. **Also settled, is that corroboration, need not consist of direct evidence that the accused person committed the offence, nor need it amount to a confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge.** See the case of *R. v. Goldstein (1914) 11 CAR. 27*.

It need be stressed that corroboration, 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. See the case of *Sunmonu v. Inspector General of Police (1957) WRNLR 23*.

The learned counsel for the Appellant has forcefully made heavy weather as to the evidence of PW2 - the father of PW1 and PW5 - the Medical Doctor. As rightly submitted in the Respondent's Brief in paragraph 4.06, the evidence of PW1, was adequately corroborated by the evidence of PWs 2 and 5. Now, PW2 swore at page 36 lines 3 to 25 of the Records as follows:-

"I then met 1st PW as she was coming out of accused's house but had expressions of pain over her and was unsteady in her walk. 1st PW was holding on to the lower part of her abdomen. Then I enquired from 1st PW what had happened, she informed me that the accused came to her

where she was stooling and slapped her many times before he dragged her into a (his) room in their house at where he forcefully had unlawful sexual intercourse with her. 1st PW then pointed to accused where he was in the room in complete nakedness. I then grabbed accused while still naked and shouted on the other neighbours to help. When some women of the house were responding to my shout for help, 1st PW slumped to the ground groaning in pain and was still holding to her lower abdomen which she said was paining her severely. At this point I looked towards her direction on the floor where she slumped and accused seized the opportunity of my relaxed grip on him to violently release himself from my grip and then bolted away after he has picked up a stick around to scare us away from attempting to re-arrest or hold on to him anymore. He subsequently ran away while still naked".

I then left the scene to lodge a report of the incident at the Police Station".

P.W.5 - the Medical Doctor at page 49 of the Records, testified inter alia, as follows:

"..... on the 23/12/87 when 1st PW was referred to me.....complaining of pain in the lower part of her abdomen. I then examined her medically 1st PW had no bruises on her body but her dress was soiled.

The general condition of 1st PW when I saw and examined her was to be described as a stable.

The lower part of 1st PW's abdomen showed some tenderness. I also examined the organ (vagina) (sic) of 1st PW and found that the hymen was freshly lacerated. I then obtained some specimen of the deep of her vagina and examined it through the microscope for sperm cells but none was found to be present. There was a pathologist with me also who examined the fluid specimen which I extracted from high up inside the vagina of 1st PW What I found was a few puss cells.

I then admitted 1st PW as an in-patient for her pain and because she appeared traumatized generally in her condition. I then treated the pus cells with antibiotics and analgesin. 1st PW was later discharged in about five (5) weeks of her admission since 23/12/87. The fresh lacera-

tion observed on 1st PWs vagina could have been caused by the insertion of any object generally falling astride a sharp object”.

There is also the evidence of the PW5 under cross-examination, that he also saw in the vaginal cavity of the PW1, presence of a thick yellowish (pungent) secretions which showed she had been infected. Surprisingly, the learned counsel, did not consider these evidence of PW2 and PW5 as sufficiently amounting to corroboration of the evidence of the PW1. I wonder! If the PW2 had framed the case of sexual assault or intercourse by the Appellant because, according to the Appellant, he did not like or want the relationship of the Appellant with his daughter - the PW1, what of the evidence of the PW5 who saw and examined the PW1 on the same day 23rd December, 1987? I or one may ask. Did PW5, a Professional Gynecologist on in-service Post Graduate Course at the University College Hospital Ibadan, conspire with the PW1 and PW2 also, to frame up the Appellant? I or one may ask. I think not. Of course, the learned trial Judge dismissed the evidence of the Appellant in respect thereof at pages 73 to 75 of the Records.

Said he at page 74 of the Records inter alia, as follows:

“..... I will now affirm in this Judgment and hold it true that prosecutrix who is 1st PW in this case was sexually illicitly assaulted with an unlawful carnal knowledge of her by accused on the day in question in this prosecution without her consent. See R. v. KUFU (1960) W.N.L.R. 1. The medical evidence which I accept and hold as true if any more is needed beyond, the testimony of prosecutrix alone is the medical corroboration of her state and condition on the 23/12/87 which resulted in her being admitted into hospital for 5 weeks thereafter.....”.

At page 75 thereof, His Lordship stated as follows, inter alia:

“Presence of seminal fluid in the vagina of 1st P. W. and fresh laceration of her hymen prove penetration by the penis of defendant each on its own and eliminates any other cause of damage to the hymen or content of her vagina.....”

His Lordship at page 77 of the Records, expressed his sadness or sorrow over the event, as follows:

“..... My expression of sadness or sorrow relate to the apparent

lack of regard for the youth of prosecutrix at the age of 13, the disturbance possibly of her future educational career, the trauma of any future recollection of the events leading to this prosecution with her continued residence with accused in that same neighbourhood of theirs and ultimately the realization that someone in the position of accused a much more matured adult of 27 years of age can evince such sexual desperation over a 13 year old when he obviously is surrounded in his chosen vocation as a leader of a play or theater group by adults only to prefer for his rape victim a secondary school girl of tender age whose future can be thus ruined.....".

The court below, at page 155 of the Records, stated inter alia, as follows:

The learned trial Judge found as a fact that appellant had unlawful carnal knowledge of 1st PW on 23/12/57 and without the consent of the 1st PW. The learned trial judge also found as fact that prosecution established penetration of the vagina of 1st PW by appellant through his penis. The above findings established the ingredients of proving the offence of rape, and applying the above legal authorities in the cases mentioned above as to what constitutes prove (sic) beyond reasonable doubt in law the prosecution in this case established the charge of rape of 1st PW by the appellant on 23rd December, 1987 beyond reasonable doubt as required under Section 138(1) EVIDENCE ACT supra.

The findings of fact of unlawful carnal knowledge of 1st PW by appellant without her consent and the penetration of the penis of the appellant into the vagina of 1st PW on 23/12/87 are borne out from the evidence which after careful consideration are not perverse and being evidence based on the credibility of witnesses in which the learned trial Judge accepted and believed the 1st PW whilst he disbelieved and rejected the evidence of the appellant by advancing reasons as an appellate court there are no legal basis or justification to disturb the said findings of facts more also as they were based on the credibility of witnesses. Therefore issue (iv) in appellants brief is unmeritorious for the reasons advanced above is hereby resolved against appellants with the result that the appeal is dismissed on this issue".

I agree.

I will pause here to state that the important and essential of the offence of rape, is penetration. It is also settled that sexual interference, is deemed complete, upon proof of penetration of the penis into the vagina. See the cases of *R. v. Marsden* (1891) 2 Q.B. 149 @ 150 - per Lord Coleridge, C.J. that “emission”, is not a necessary requirement; *The State v. Ojo* (1980) 2 NCR (Nigerian Criminal Report) 391 @ 395 and *Jegede v. The State* (2001) 7 SCNJ. 135 @ 141; (2001) 7 S.C. (Pt.1) 122 @ 125; - per Belgore, JSC, (as he then was). It has however, been held, that any, even the slightest penetration, will be sufficient to constitute the act of sexual intercourse. This is why, even where penetration was proved, but not of such a depth as to injure the hymen, it has been held to be sufficient to constitute the crime of rape. See *R. v. Allen* 9 C & P. 31. Thus, proof of the rupture of the hymen is unnecessary, to establish the offence of rape. See the case of *R. v. Hughes* 22 Mood 190.

I hold therefore, that the evidence of the PW1, was adequately corroborated by the available evidence as required in practice including that of PW2 and PW5. My answer therefore, to Issue 1 of the Appellant and that of the Respondent - first arm, is that corroboration, is not necessarily required because, it is not a rule of law that an accused person, cannot be convicted on uncorroborated evidence of the prosecutrix. In respect of the second arm, my answer, is definitely in the affirmative.

ISSUE 2 OF THE PARTIES

I note that this issue of contradiction, was raised and argued at the court below. At page 147 of the Records, the court below, stated inter alia, as follows:

“The other complaints of contradiction and inconsistencies by appellant are not substantial as they were not only minor but also they were not contradictory to the, material issue of rape as the offence had already been committed before the complaint of assault on appellant as alleged by appellant against 2nd PW and his five drivers, which was reported at Ijemo Agbadu confirmed by the 3rd PW but not recorded in

the crime book at the station. The piece of evidence carried no weight.

As for the nakedness of appellant in the bathroom the learned trial judge found as a fact that:

“Curiously somehow and strange too, it was never put to 1st PW and or 2nd PW when they testified that defendant had wrapped around his waist any towel beyond Exhibit K (a native Buba)”

Being findings of fact by the learned trial Judge they were not perverse as an appellate court hence the findings of facts were not perverse (sic). There is no legal basis or justification to disturb the findings. For the above reasons Issue 2 in the appellant’s brief of argument (which is the same Issue 2 in this Court) lack substance and unmeritorious therefore resolved against appellant”.

[the underlining mine]

I agree. I affirm the above pronouncements. I too, find no substance or merit in this issue which I also, resolve against the Appellant. This is because, it is now firmly settled that it is not every minor contradiction, that is fatal to the prosecution’s case. See the cases of *Theophilus v. The State* (1996) 1 NWLR (Pt.423) 139 @ 155; *Jizurumba v. The State* (1976) 3 S.C. 89; *Sele v. The State* (1993) 1 SCNJ. 15 @ 22-23 and *Isibor v. The State* (2002) 4 NWLR (Pt.758) 741 @ 751; (2002) SCNJ. 162.

The learned trial Judge from the totality of the evidence before him and its evaluation, found that the prosecution had proved its case beyond reasonable doubt. His Lordship, at page 77 of the Records, stated inter alia, as follows:

“To thereby end this considered judgment, I have with some sadness come to return an overall verdict of guilt as regards the conduct of accused in the charge of rape he faces in this prosecution and without hesitation proceed thereby to convict him accordingly.”.

The court below reviewed and evaluated the evidence before the trial court and meticulously and substantially in my humble but respectful view, reproduced the submissions of both the learned counsel for the Appellant and the Respondent and stated at page 151 of the Records inter alia, as follows:

“From the foregoing Respondent proved the two essentials of unlawful carnal knowledge of 1st PW by appellant and that she was ravished and this was without her consent were proved beyond reasonable doubt”.

B *[the underlining mine]*

I am unable to fault this finding of fact and holding by the court below as they are borne out eloquently by from the Records.

C It stated at page 152 of the Records rightly in my view, that in the case of rape, that the law, does not require the prosecution to prove the emission of semen. That proof of the slightest penetration, will be sufficient. It referred to the Book authority of THE CRIMINAL LAW AND PROCEDURE OF THE SIX SOUTHERN STATES OF NIGERIA by MADARIKAN AND AGUDA 2nd Edition paragraph 1986 at page 756-757.

It continued as follows:

E *“..... Hence it was not material whether it was seminal fluid or sperm cells that was seen in the vagina of the 1st PW what was material was that Appellant had carnal knowledge of 1st PW and this was without her consent.*

F *Prosecution adequately discharged the burden through the evidence of 1st PW which was corroborated by 2nd PW and 5th PW. The solitary reason that the 2nd PW is the father of 1st PW could hardly be enough to label him as done by appellant as tainted witness.....”.*

G I agree. I therefore, render my answer to this issue, in the Affirmative. For the last sentence above, see also the cases of *Ishola v. The State* (1978) 9 -10 S.C. 81; *Onyegbu v. The State* (1994) 1 NWLR (Pt.320) 328 @ 348-349 C.A. and *Akalonu v. The State* (2002) 6 SCNJ. 332 @ 336.

ISSUE 4

H As for me, in my humble but respectful view, the determination of the three (3) issues in this Judgment, takes care of this appeal. **Issue 4 of the parties, with respect, is of no moment. It does not improve the real issue of the charge of rape against the Appellant, which the prosecution proved beyond reasonable doubt. At the worst, the said**

comment, is a comment and at best, is an *obiter dictum* - i.e. a comment which is just by the way, a casual and passing expression, an observation of the learned trial Judge which has nothing relevant to do with the live issue before him. See the observation or pronouncement of Tobi JCA (as he then was) in the case of Onagoruwa B v. The State (1993) 7 NWLR (Pt.303) 49 @ 99-100 cited and relied on in the Respondent's Brief. **But if I must decide on the issue, I hold that it is of no relevance to the real issue already canvassed by the parties in this appeal. I therefore, ignore it or having so found as a fact that it is a non-issue, I hereby and accordingly strike out the said issue and all the arguments in respect thereof.** C

Before concluding, this Judgment, I wish to observe that the sentencing of the Appellant to imprisonment with an option of fine is not correct. The fine comes first and in default, the imprisonment takes effect and not the other way round. D

Firstly, I note that there are concurrent findings of facts by the two lower courts and the attitude of this Court not to interfere, is now firmly settled. See the cases of *Dominic Princet & anor. v. The State* (2002) 12 SCNJ. 280 @ 300 and *Ubani & ors. v. The State* (2003) 12 SCNJ. III @ 127 - 128 just to mention but a few. This is because, that it is now firmly settled, that findings of fact when it relates to demeanour of witnesses and ascribing weight, it is within the exclusive preserve of a trial court and therefore an Appellate Court, will not interfere. See recently, the case of *Owie v. Ighiwi* (2005) 1 SCNJ, 189 @ 194, 197, 208; (2005) 1 SCNJ. (Pt.II) 16. F

In the final result, I hold that this appeal, is completely and hopelessly unmeritorious. It fails and it is accordingly dismissed. I hereby affirm the said decision of the court below affirming the judgment of the trial court. G

H

KUTIGI CJN

I have had the privilege of reading before now the judgment just delivered by my learned brother Ogbuagu, J.S.C. He has comprehen-

sively dealt with the issues raised before us. I agree with his reasoning and conclusions. The appeal is accordingly dismissed.

B

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Ogbuagu, JSC. I entirely agree with it and, for the reasons which he has given, I too, would dismiss this appeal and affirm the decision of the courts below.

C

TOBI JSC

D This is another appeal on rape. The case of the respondent can be briefly summarized. On 23rd December, 1987, in the afternoon, PW1, the prosecutrix, was pounced upon by the appellant when she was stooling beside the shed toilet in the compound of their house. The appellant violently dragged the prosecutrix through the compound of her house into E an empty and bare room in the house of the appellant. Appellant slapped the prosecutrix many times on the face. She shouted but to no avail. Appellant forced his way through. He had, in the words of the trial Judge “*forcible sexual knowledge of her*”. After the rape, the appellant threat- F ened to open the door and expose the nakedness of the prosecutrix to the public if she continued to shout for help. The prosecutrix reported the incident to her father. The appellant bolted away. He was later arrested and charged for the offence of rape.

G

The appellant told quite a different story. He said that PW1 was his girl friend of over eight months. He denied the charge of rape. In an answer to a question from the court, the appellant said that he never had sexual intercourse with PW1 in their relationship of eight months. The learned trial Judge convicted the appellant to a term of seven years or *in H lieu* to a fine of N5,000.00. The appellant’s appeal to the Court of Appeal was dismissed. He has appealed to this court.

“Appellant formulated four issues for determination. So too the respondent. The crux of the case of the appellant is that the evidence of

PW1, the prosecutrix, ought to have been corroborated and that there were material contradictions in the evidence of the prosecutrix. It is also his case that the learned trial Judge raised issues suo motu thereby descending into the arena of the contest. Finally, he argued that the case was not proved beyond reasonable doubt. I will deal only with the issue of corroboration because the law on it is not stable. B

There are two dimensions to the issue of corroboration as decided by the courts. First, the courts hold that rape is not an offence in which corroboration is required by law and procedure. But the court should warn itself of the danger of convicting an accused on rape in uncorroborated evidence. Second, an accused person cannot be convicted unless the evidence of the prosecutrix is corroborated. C

I take the case law in that order. In The State v. Ogwudiegwe (1968) NMLR 117, it was held that the offence of rape, in order to secure a conviction, corroboration of the evidence of the complainant implicating the accused is not essential, but a Judge must warn himself of the risk of convicting on the uncorroborated evidence of the complainant. D

In Akpanefe v. The State (1969) 1 All NLR 420, it was held that by section 178(5) of the Evidence Act, the court cannot convict an accused on a charge of rape without corroboration, and in this regard an early report of the commission of the offence is not tantamount to corroboration. Similarly, in Sambo v. The State (1993) 6 NWLR (Pt. 300) 399, this court held in 1993 that it is the law that before the prosecution can secure conviction for the offence of rape, the evidence of the prosecutrix (the victim of the rape) must be corroborated in some material particular that sexual intercourse did take place and that it was without her consent. It was also held that a piece of evidence offered as corroboration for the offence of rape must be (a) cogent, compelling, and unequivocal as to show without more that the accused committed the offence charged; (b) an independent evidence which connects the accused with the offence charged; and (c) evidence that implicates the accused in the commission of the offence charged. See also Upahar v. State (2003) 6 NWLR (Pt. 816) 230. E F G H

In Iko v. The State (2001) 14 NWLR (Pt. 732) 221 in 2001, eight

years after the decision in Sambo it was held that it is not the 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 is that it is not safe to convict on the uncorroborated evidence of the prosecutrix. 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. This court also held that the fact that the prosecutrix says that an accused inserted his penis into her vagina is not *ipso facto* sufficient proof of penetration in the absence of corroboration.

Let me take here the “warning business” that the appellate courts have given to the trial Judge. In England where the principle emerged and “is applicable, the trial by jury is in force. In view of the fact that the jury convicts, the procedure is that the Judge should warn the Jury of the danger of convicting on the uncorroborated evidence of the complainant. Is that really necessary in Nigeria where the Jury System is no more? What is the practical effect of the law expecting the trial Judge to warn himself of the danger of convicting without corroboration? If he does not warn himself in reality and writes down in his judgment that he did, how useful is that in the entire truth searching process? Is our adjectival law not pretentious here? And can law afford to be pretentious?

I am not comfortable with the case law that corroboration is necessary to secure conviction of the offence of rape. This is because I see no statute foisting on the prosecution evidence of corroboration before convicting an accused. Section 350 of the Criminal Code Act, Cap. 77 Laws of the Federation of Nigeria, 1990 which is similar to the States Criminal Codes, does not provide that evidence of corroboration is necessary for conviction. And the Criminal Code specifically provides for offences where corroboration is necessary. Rape is not one of such. The above apart, neither the Evidence Act nor the Criminal Procedure Act or Code provides for corroboration in the offence of rape. I therefore ask, where did we get that law?

In all practicality, what evidence of corroboration is really needed in the offence of rape? In most cases, the offence is committed in private. Although in some cases, the shout and call for assistance of the

prosecutrix attract the public, that is not a regular phenomenon. After all, the prosecutrix herself may not like to be seen by the public when the act of rape is committed. She would rather prefer reporting the rape after the act. And so, it is difficult to secure corroboration from evidence of an eye witness. That is the more reason why it is difficult to secure evidence of corroboration that the accused inserted his penis into the vagina of the prosecutrix.

If our adjectival law requires corroboration (a point I am not prepared to concede), then corroboration could be deduced from *inter alia*, the denials of the accused, the last opportunity the accused had to commit the offence, medical evidence of the examination of the prosecutrix confirming the allegation of recent forcible coitus and the existence of recent semen in the vagina of the prosecutrix directly traced or traceable to the accused.

I realize that the law of corroboration in the offence of rape is in some flux or state of confusion. It is hoped that this court will have an opportunity in the future to look at the decisions on the issue. As this is not such an opportunity, I will leave the issue hanging.

Let me take the issue in the light of the submission of counsel for the appellant. He did not see any corroboration in the evidence of the prosecutrix. PW2, the father of PW1, the prosecutrix, said in his evidence in-chief:

“I then met 1st PW as she was coming out of accused house but had expressions of pain over her and was unsteady in her walk. 1st PW was holding on to the lower part of her abdomen. Then I enquired from 1st PW what had happened, she informed me that... accused had unlawful sexual intercourse with her. 1st PW then pointed to accused where he was in the room in complete nakedness. I then grabbed accused while still naked and shouted on the other neighbours to help.”

PW 5, the Medical Doctor said in his evidence in-chief:

“I also examined the organ (vagina) of 1st PW and I found that the hymen was freshly lacerated... I then admitted 1st PW as an in-patient for her pain and because she appeared traumatized generally in her condition. 1st PW was later discharged in about five: (5) weeks of her admis-

sion since the 23/12/87.”

Can the above evidence not stand the test of corroboration? PW2, the father saw her in pains almost immediately after the act of rape. After narrating her ordeal to the father, he went into the room and saw the appellant naked. While a naked condition of a man per se cannot be translated to the commission of the offence of rape, it corroborates the evidence of the prosecutrix who told PW2, the father, that the appellant raped her and that she left him in the room naked. PW2 really saw the appellant naked. The above apart, the evidence of PW5, the medical doctor, in my view, is corroboration of the rape.

I am taken aback by the submission of learned counsel for the appellants that PW5, the medical practitioner, never linked the appellant with any of the observations he made while examining PW1 and there is nothing in his evidence that suggested a penetration of the vagina of PW1 by the penis of the appellant. How can PW5 give such evidence? Was he present at the *locus* to enable him give such evidence? Does the law require PW5 to give such evidence? How can PW5 link the act of forcible sexual intercourse with the appellant? Is PW5 God to know, when he was not present, that the appellant raped the prosecutrix? I think that submission is hollow.

I indicated that I will take the issue of corroboration only. I think I can stop here. It is for the above reasons and the more comprehensive reasons given by my learned brother, Ogbuagu, JSC, that I too dismiss the appeal. I affirm the judgment of the Court of Appeal.

G

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Ogbuagu J.S.C. It is my view, that on the facts, as found by the trial court and the court below, the prosecution succeeded in establishing against the appellant a case of rape as per the charge brought against him. I would also dismiss the appeal as in the lead judgment. I affirm the conviction of the appellant and sentence imposed.

H