

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 2011. SC. 134/2010
CORAM:- M. MOHAMMED, J. A. FABIYI, O. O. ADEKEYE,
S. GALADIMA, B. RHODES-VIVOUR, JJSC

NDEWENU POSU		
OKE SEGUN	APPELLANTS
V.		
THE STATE	RESPONDENT

CRIMINAL LAW - Rape - Ingredients - The most essential ingredient of rape - Is penetration - However slight (H1)

EVIDENCE - Rape - Proof of penetration - Evidence of PW2 showed that appellants penetrated her - Which evidence is confirmed by the doctor's report (H2)

EVIDENCE - Documents - Exhibit C - Genuineness - In the absence of evidence to the contrary - Exhibit C is presumed to be genuine - By section 44 of Evidence Act (H3)

EVIDENCE - Crime - Defence - Evaluation - Where appellants' evidence differed from their extrajudicial statements - And no explanation was given for such discrepancy - Trial judge was right - To hold their defence as an after thought (H4)

EVIDENCE - Burden of proof - Beyond reasonable doubt - Discharge of - Where on the evidence adduced - The court is left with no doubt of accused person's guilt - The burden is discharged (H5)

CRIMINAL LAW - Parties to an offence - Accomplice - Status - Unless it can be shown that a person did something - To further or aid the commission of an offence - He cannot be said to be an accomplice to that offence (H6)

CRIMINAL LAW - Words & phrases - Conspiracy - Meaning - It consists of intention of two or more persons by agreement - To do an unlawful act - Or to do lawful act by an unlawful means (H7)

CRIMINAL PROCEDURE - Rape - Testimony of victim - Source of corroboration - Court may seek corroboration from doctor's report - Or other real evidence - Like the torn dress of victim - As was done in this case (H8)

FACTS

Appellants were arraigned and tried before the High Court of Ogun State holden at Ilaro of conspiracy to commit rape and rape contrary to sections 516 and 358 respectively, of the Criminal Code, cap 29, Laws of Ogun State. The case for the prosecution was that the appellants forcefully had carnal knowledge of PW2 on 12/12/06, at about 7.30 pm, in the presence of PW1. According to PW1, the appellants were his friends. The three of them were going to 1st appellant's house on the fateful day when they met PW2 on the road. PW1 started jesting with PW2 but when the 1st appellant came close enough to observe the identity of PW2, 1st appellant exclaimed that he had been looking for her since. Immediately, 1st appellant slapped PW2 on the face and pushed her to the ground. PW1's attempt to save PW2 was thwarted by the 2nd appellant who slapped him on the face and went ahead to help 1st appellant by holding PW2 while 1st appellant mounted on her and raped her. Thereafter, 2nd appellant also took his turn on PW2.

The matter was subsequently reported to the police who took PW2 to hospital for examination. Exhibit C - a doctor's report - was eventually written by one Dr. Itoken Michael, who conducted the examination but was not available to give oral testimony at the trial. Exhibit C noted inter alia, that there were bruises on the thighs of PW2, semen in her vulva and tiny bruises at the entrance of her vagina. At the end of trial, the court found appellants guilty as charged and sentenced each to one and three years imprisonment respectively for conspiracy to commit rape and for rape. Aggrieved, appellants appealed to the Court of Appeal but their appeal was dismissed. Still dissatisfied, appellants have each appealed to the Supreme Court against their respective conviction and sentence. It is their contention that PW1 was an accomplice and as such his evidence and that of PW2, required independent corroboration for the charge to be proved beyond reasonable doubt.

ISSUES FOR DETERMINATION

“1. Whether penetration, an Ingredient factor in a charge of rape, was proved in this case.

2. Whether PW1 is not an accomplice to put his evidence and that of the complainant under caution that requires corroboration.

HELD (Unanimously dismissing the appeal per **GALADIMA JSC**) **CRIMINAL LAW - Rape - Ingredients**

1. The state of the law, as correctly stated by the learned counsel for the Respondent is that the most essential ingredient of the offence of rape is penetration, however slight.

The evidence of PW1 and PW2 is quite overwhelming on the senseless and callous sexual assault on the prosecutrix. In his evidence, PW1 narrated vividly how the appellants forcibly had carnal knowledge of PW2. (p. 486 E)

EVIDENCE - Crime - Rape - Proof of penetration

2. The Doctor’s findings as noticed and indicated in Exhibit ‘C’ were bruises on the thighs of PW2, semen in her vulva and tiny bruises at the entrance of her vagina. It is not a deal and in no way a contested fact that Exhibit ‘C’ as I have stated is the report of doctor’s observation and treatment, issued by one Dr. Itokem Michael of Ipokia General Hospital, to PW2.

There is evidence from PW2 that the appellants inserted their penis into her vagina and had sex with her. The evidence was not controverted. The content of the exhibit confirms the testimony of PW2 to the effect that she was raped by the appellants. (p. 487 B/F)

EVIDENCE - Documents - Exhibit C - Genuineness

3. PW4 testified that he was on National Youth Service at the hospital, at all times material to this case when he examined PW2 and issued Exh. ‘C’. He had since completed his service and left the hospital to an unknown place. By section 44 of the Evidence Act, the court shall, in the absence of evidence to the contrary presume that the signature to Exh. ‘C’ is genuine and that Dr. Itokem Michael who signed it held the office which he professed at the time when he signed it. I must therefore give Exhibit ‘C’ the consideration it deserves, having regard to the other evidence on record and the cir-

cumstances of this case. (p. 487 D)

EVIDENCE - Defence - Evaluation

4. The Appellants’ evidence is contrary to their extra judicial statements in Exhibits ‘D’ and ‘E’.

B This discrepancy in their evidence was not explained. The Appellants also raised a common defence that they were implicated. It was the 1st appellant who alleged that he was implicated because of the land dispute between PW2’s father and his father. The 2nd Appellant said he was implicated because of his friendship with the 1st Appellant. C Apart from the ipsi dixit of the 1st appellant, no evidence was produced to substantiate the allegation. The learned trial judge was right when he agreed with the learned counsel for the Respondent in her submission that the defence was an after thought. (p. 487 H)

D **Burden of proof - Beyond reasonable doubt - Discharge of**
 5. I have no reason whatsoever to disagree with those concurrent findings of the two courts below on the role of the appellants in the commission of the offence as charged. The law is quite clear on the requirement of proof beyond reasonable doubt to secure conviction for any criminal offence by virtue of section 138 (1) of the Evidence Act. Cap. 112 of the laws of the Federation, 1990, applicable at the time of the trial of the appellants. Therefore, if on the entire evidence adduced before a trial court, the court is left with no doubt that the offence was committed by accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld, even if it is the credible evidence of a single witness.

F
 G As I have observed and held earlier, the learned trial Judge had considered the entire evidence before him and was left in no doubt that the appellants committed the offence of rape to justify their conviction and sentence. Accordingly, I resolve this issue in favour of Respondent. (p. 489 A/E)

H **Parties to an offence - Accomplice - Status**
 6. Section 7 of the Criminal Code Law, Laws of Ogun State provides thus:

“when an offence is committed, each of the following persons

is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actual committing it; that is to say:

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any (sic, thing) for the purpose of enabling or aiding another person to commit the offence. ^B

(c) every person who aids another person in committing the offence.

(d) any person who counsels or procures any other person to commit the offence.”

From the evidence adduced during the trial, it is difficult to categories PW1 as one of the persons listed above. Agreed, PW1 was the person that started the conversation with PW2, but it has not been shown that it was aimed at furthering, enabling or aiding the appellants to commit the offence of rape against PW2. Nothing to suggest that PW1 had any previous discussion about PW2 with the appellants. For these reasons, PW1 can never be an accomplice to the crime of rape committed by the appellants. (p. 489 G) ^C

CRIMINAL LAW - Words & phrases - Conspiracy - Meaning ^E

7. Conspiracy means the meeting of the minds of conspirators. It consists of intention of two or more and agreement by them to do an unlawful act or do lawful act by an unlawful means. Conviction for conspiracy is usually predicated on circumstantial evidence, which must be of such a quality that irresistibly compels the court to make an inference as to the guilt of the accused. (p. 490 E) ^F

Rape - Testimony of victim - Source of corroboration

8. The assertion of the appellants that the learned trial judge relied on the evidence of PW1 to find corroboration for the evidence of PW2, cannot be true. The learned trial judge, apart from considering the evidence of PW1 to ground corroboration, also sought corroboration from Exhibit ‘C’ (supra) as well as Exhibit ‘A’, the torn pant of PW2 and Exhibit ‘B’, her torn dress and the circumstance under which the crime was said to have been committed. ^G ^H

In the result, as the two issues submitted by the Appellants for the determination of this appeal have failed, having been resolved against them, the appeal itself fails. Accordingly, Appellants’ appeal is

hereby dismissed. (p. 490 H)

NOTABLE POINTS OF INTEREST
MOHAMMED JSC

1. The sentences were light – But there was no appeal against it

B The fact the Appellants, in a rather militant manner and reckless circumstance, had sexual intercourse by force in turn with the prosecutrix, PW2, without her consent, is quite plain from the oral evidence of PW1 and PW2, the torn pants and dress of the prosecutrix removed by force by the Appellants, Exhibits A and B and the medical
C evidence showing laceration on the inner thighs, bruises at the entrance to the vagina and semen in the vulva of the prosecutrix. My only concern is the manner with which the trial court treated the Appellants who committed this very serious offence by giving them
D very light sentences. All the same, in the absence of any appeal against the sentence, there is nothing that can be done. (p. 491 D)

FABIYI JSC

2. Rape is a sexual intercourse without consent

E Rape is an unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man forcibly and against her will; the act of sexual intercourse committed by a man with a woman who is not his wife without her consent.
F (p. 492 G)

ADEKEYE JSC

3. Rape - Forced consent is not consent

Rape in legal parlance means an unlawful carnal knowledge of a
G woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind or by fear of harm, or by means of false and fraudulent representation as to the nature of the act or in the case of a married woman, by personating her husband. (p. 494 F)

H

4. Nature of corroboration varies from case to case

Evidence of corroboration of the evidence of the victim in a rape case, is not required as a matter of law; it is now a well-established practice by the courts in Nigeria. The nature of the corroboration

must depend on the peculiar facts of each case. Where rape is denied by the accused, the evidence of corroboration that the court must look for is for instance -

(a) Medical evidence showing injury to the private part or to other parts of her body which may have been occasioned in a struggle.

(b) Semen stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed. B

In the circumstance of this case, the evidence available supported the conviction and sentence of the two appellants.

(p. 495 G)

C

REPRESENTATION

Olusola O. Idowu Esq. with A. Ebofin Esq. for the Appellants.

P. F. Oduniyi (Mrs.) DPP (Ministry of Justice, Ogun State) with O. Ogunsansanwo (Principal State Counsel, Ministry of Justice, Ogun State) for the Respondent. D

CASES REFERRED TO

JOSHUA v. GANI (1968) NMLR. 80

IKO v. THE STATE (2001) 14 NWLR (pt. 732) 221

STATE v. DANJUMA (1997) 5 NWLR (pt. 506) 512

SIMON OKOYEMON v. THE STATE (1973) 1 SC 21

EJEZIE v. ANUWU (2008) 12 NWLR (Pt. 1101) 446 at 490

UTB v. OZOEMENA (2007) 3 NWLR (pt. 1022) 448 at 471

THE STATE v. OJO (1980) 2 NIG. CRIME REPORT 391 at 395

AFOLALU v. STATE (2010) ALL FWLR (PART 538) 812 at 828

FOTOYIMBO v. ATT- GEN, WESTERN NIGERIA (1966) WNLR 4

ALONGE v. INSPECTOR-GEN. OF POLICE (1959) SC NLR 516

ACB PLC. v. N.T.S. (NIG) LTD. (2007) 1 NWLR (pt. 1016) 596 at G 628

STATUTES REFERRED TO

Evidence Act, Cap. 112, L. F. N, 1990, ss. 44 & 138

Criminal Code Law, Cap. 29, Laws of Ogun State, ss. 7, 516 & 358

LEAD JUDGMENT BY GALADIMA JSC

This appeal is against the judgment of the Ibadan Court of

Appeal delivered on 11th day of February, 2010 affirming both the conviction and sentence passed on the Appellants by the trial High Court of Ogun State, Ilaro Judicial Division.

The Appellants, as accused persons, on 15th day of October, 2008, were arraigned before the trial court on two counts charge of conspiracy to commit a felony, to wit; Rape and Rape contrary to section 516 and 358 of the criminal Code Cap 29, Laws of Ogun State of Nigeria respectively.

After the two count charges were read and explained to the accused persons they pleaded not guilty. At the trial the prosecution called four witnesses and tendered five exhibits. At the close of prosecution's case, the Appellants gave evidence in their defence without more. Thereafter both the prosecution and the defence counsel addressed the trial court. In his well considered judgment the learned trial judge found the appellants guilty and they were convicted and sentenced to one and three years imprisonment respectively for conspiracy to commit rape and rape itself.

Not being satisfied with the judgment of the trial court; the Appellants filed an appeal at the Ibadan Division of the Court of Appeal. On 11th February, 2010, their appeal was dismissed.

By the leave of the Court of Appeal given on 15th day of April, 2010, the appellants further filed separate Notices of Appeal to this Court dated and filed on 15th day of April, 2010. The two Notices of Appeal containing identical two grounds of appeal without the particulars read thus:

“GROUND ONE:

The learned Justices of the Court of Appeal erred In law when they held that PW1 “on the day of the incident neither aid nor abet or assist the 1st and 2nd accused/appellants in their dealings with PW2 on the day of the incident” and therefore was not an accomplice

GROUND TWO

The learned Justices of the Court of Appeal erred in law when they held that penetration which is essential ingredient of the charge of Rape was proved

Hence, the present appeal is against the affirmation of the conviction and sentence of the appellants by the Court of Appeal. The

Appellants identified two issues from the two grounds of Appeal in their brief for the determination of the appeal as follows:

“1. Whether penetration, an Ingredient factor in a charge of RAPE was proved in this case.

2. Whether PW1 is not an accomplice to put his evidence and that of the complainant under caution that requires corroboration.” B

The Respondent on other hand, couched slightly different their two issues for determination thus:

“1. Whether prosecution proved the charge of conspiracy and rape against the Appellant beyond reasonable doubt.

2. Whether the lower Courts were right to have relied on the Evidence of PW1 as the required corroboration in this case.” C

On 11th November, 2010, when this appeal was heard, learned counsel for the appellant, identified the Appellants’ brief of argument and having adopted same, he urged this Court to allow the appeal. D In effect to set aside the judgment of the Court of Appeal which confirmed the conviction and sentence of the appellants. However, it is urged on behalf of the Respondent by the Learned Director of Public Prosecution, Ogun State Ministry of Justice, that the appeal be dismissed for lacking in merit. E

On the first issue, which relates to ground 2 on the respective Notices of Appeal of the Appellants, it was argued for the Appellants that for a charge of rape to be successfully proved, the prosecution must prove penetration of the penis into the vagina of the victim. F That the Courts have warned in a number of cases about undesirability of relying solely on the uncorroborated evidence of the prosecutrix to find penetration, Reliance was particularly placed on the case of *SIMON OKOYEMON v. THE STATE* (1973) 1 SC 21 AND *IKO v. THE STATE* (2001)14 NWLR (pt. 732) 221. G

It is submitted by the Learned Counsel for the Appellants that penetration, as essential ingredient of offence was not proved in this case by the prosecution. That PW1 is not an independent witness that can provide the required corroboration. He relied on the cases of *THE STATE v. OJO* (1980) 2 NIG. CRIME REPORT 391 at 395 H and *JOSHUA v. GANI* (1968) NMLR. 80.

It is finally submitted that the court below was in error when it concluded that the bruises in the inner thighs showed lack of consent and that the appellants forced their way into the prosecutrix. That

this was mere speculation which is not permitted in law. Reliance was placed on the cases of:- EJEZIE v. ANUWU (2008) 12 NWLR (Pt. 1101) 446 at 490, UTB v. OZOEMENA (2007) 3 NWLR (pt. 1022) 448 at 471; and ACB PLC. v. N.T.S. (NIG) LTD. (2007) 1 NWLR (pt. 1016) 596 at 628.

B For the Respondent, the learned counsel, while agreeing with the State of the law regarding the definition of offence of rape in the cases of OKEYOMON v. THE STATE (supra) and IKO v. THE STATE (supra), explained that penetration with or without emission is sufficient, even where the hymen was not ruptured. He contended that the prosecution has proved that on 12th December, 2008, the appellants had carnal knowledge of PW2 at about 7.30 p.m. in the presence of PW1. That, it is equally in evidence that on the same night the incident took place, the matter was reported to the police who immediately took PW2 to the Hospital where examination was conducted and the report which was admitted as Exh. 'C' confirmed the testimony of PW2 to the effect that she was raped by the appellants.

D It is finally submitted on this issue, that all the circumstances must be taken into consideration to determine proof of the offence of rape against the appellants beyond reasonable doubt.

E ***The state of the law, as correctly stated by the learned counsel for the Respondent is that the most essential ingredient of the offence of rape is penetration however slight.*** See IKO V. STATE (Supra) and OGUNBAYO V. THE STATE 5 SCN 154 at 158.

F ***The evidence of PW1 and PW2 is quite overwhelming on the senseless and callous sexual assault on the prosecutrix. In his evidence PW1 narrated vividly how the appellants forcibly had carnal knowledge of PW2.*** He stated thus:

G *"I know the accused persons; they are my friends. I am in Court to testify about an incident that happened on 12/12/06 at about 7.30pm ... I and the two accused persons were going to the 1st accused person's house. Along the way, we saw the girl called DUPE. We started joking with her that we would marry her. She said she had no time for us. At that point, the 1st accused said to the girl, so it was you; I have been looking for you a long time. I catch you today. At that point, the 1st accused slapped Dupe on the face and felled her on the ground. He tore her dress and pant. The second accused*

person held her hands and the 1st accused inserted his penis in her vagina. I told him to leave the girl alone but the 2nd accused person slapped my face. When the 1st accused got up from the girl, the 2nd accused person mounted her and also insert (sic) his penis into her vagina."

PW1 told the court that on the same night the incident took place, the matter was reported to the police who immediately took PW2, soaked with blood, to the hospital for examination in the early hour of 13/12/2008. ***The Doctor's findings as noticed and indicated in Exhibit 'C' were bruises on the thighs, of PW2; semen in her vulva and tiny bruises at the entrance of her vagina. It is not a deal and in no way a contested fact that Exhibit 'C' as I have stated is the Report of Doctor's observation and treatment, issued by one Dr. Itokem Michael of Ipokia General Hospital, to PW2. PW4 testified that he was on National Youth Service at the Hospital, at all times material to this case when he examined PW2 and issued Exh. 'C'. He had since completed his service and left the hospital to an unknown place. By section 44 of the Evidence Act, the Court shall, in the absence of evidence to the contrary presume that the signature to Exh. 'C' is genuine and that Dr. Itokem Michael who signed it held the office which he professed at the time when he signed it. I must therefore give Exhibit 'C' the consideration it deserves having regard to the other evidence on record and the circumstances of this case.***

There is evidence from PW2 that the appellants inserted their penis into her vagina and had sex with her. The evidence was not controverted. The content of Exhibit confirms the testimony of PW2 to the effect that she was raped by the appellants.

I have observed and noted keenly, that the defence of the appellants was outright denial of the offences charged. Though they admitted that they were at the scene of the incident on the day in question and saw the PW1 and PW2, they alleged that it was PW1 that was fighting with PW2 and their plea to him to leave PW2 alone was ignored so they had to leave them. The Appellants however did not state the extent of the quarrel or fight between the PW1 and PW2. ***The Appellants' evidence is contrary to their extra judi-***

cial statements in Exhibits ‘D’ and ‘E’. The 1st Appellant in Exhibit ‘D’ said he saw PW1 arguing with one lady and he told him to leave her alone, while the 2nd accused in Exhibit ‘E’ said they met PW1 talking with one girl. They also testified on oath contrary to their statements that they knew the PW2 long before the incident.) ***This***
 B ***discrepancy in their evidence was not explained. The Appellants also raised a common defence that they were implicated. It was the 1st appellant who alleged that he was implicated because of the land dispute between PW2’s father and his father. The 2nd Appellant said he was implicated because of his***
 C ***friendship with the 1st Appellant. Apart from the ipsi dixit of the 1st appellant, no evidence was produced to substantiate the allegation. The learned trial judge was right when he agreed with the learned counsel for the Respondent in her submission that the defence was an after thought.***
 D

The contention of their brief of argument (paragraph 5.04) is that mere presence at the scene of crime without more will not amount to being a participant to a crime. That is trite Law. The mere fact that the PW1 beckoned on the PW2 for a discussion will never amount to
 E initiating a crime process. Besides, the appellants herein met PW1 and PW2 at the scene of crime and high jacked the discussion and found it convenient to perpetrate their evil intentions. This they did. From the available evidence and as well as the circumstances of this
 F case, I do not see how PW1 could be said to have stood by while the appellants went about committing the crime of rape. Rather he commendably tried his best to prevent the appellants from raping the PW2. Every case is determined by its peculiar circumstance. The trial court found and the court below also found that a crime of rape was
 G committed by the appellants after hearing the evidence of the prosecution witnesses as well as considering the defence of the appellants. He found corroboration of PW2’s testimony in the evidence adduced by the PW1, and the medical report as well as the circumstances under which the entire crime took place. The trial court observed the
 H demeanor of prosecution witnesses as well as the testimony of the appellants before coming to the conclusion that the prosecution had proved its case beyond reasonable doubt. The Court of Appeal on its part went through the records as well as the submissions of the learned counsel in the case and was able to also agree with the findings of the

trial court judge. ***I have no reason whatsoever to disagree with those concurrent findings of the two Courts below on the role of the appellants in the commission of the offence as charged. The law is quite clear on the requirement of proof beyond reasonable doubt to secure conviction for any criminal offence by virtue of section 138 (1) of the Evidence Act. Cap. 112 of the laws of the Federation, 1990, applicable at the time of the trial of the appellants. Therefore, if on the entire evidence adduced before a trial court, the court is left with no doubt that the offence was committed by accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld, even if it is the credible evidence of a single witness.*** On the other hand, where the court considers the totality of the evidence and a reasonable doubt is created, the prosecution would have failed in its duty to discharge the burden of proof which the law vests upon it, thereby entitling the accused person the benefit of the doubt resulting in his discharge and acquittal: AFOLALU v. STATE (2010) ALL FWLR (PART 538) 812 at 828. FOTOYIMBO v. ATT- GEN, WESTERN NIGERIA (1966) WNLR 4; ALONGE v. INSPECTOR-GEN. OF POLICE (1959) SC NLR 516 AND STATE v. DANJUMA (1997) 5 NWLR (pt. 506) 512. ^B ^C ^D ^E

As I have observed and held earlier, the learned trial Judge had considered the entire evidence before him and was left in no doubt that the appellants committed the offence of rape to justify their conviction and sentence. Accordingly, I resolve this issue in favour of Respondent. ^F

In the second issue it is the contention of the appellants that it was PW1 that initiated the confrontation with PW2 and for this reason he should be held as an accomplice to the crime committed by them. ^G

For the Respondent, it was argued that the PW1 was an independent witness and not an accomplice.

Section 7 of the Criminal Code Law, Laws of Ogun State provides thus: ^H

“when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actual committing it; that is to say:

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any for the purpose of enabling or aiding another person to commit the offence."

(c) every person who aids another person in committing the offence.

(d) any person who counsels or procures any other person to commit the offence.

From the evidence adduced during the trial, it is difficult to categories PW1 as one of the persons listed above. Agreed, PW1 was the person that started the conversation with PW2, but it has not been shown that it was aimed as furthering, enabling or aiding the appellants to commit the offence of rape against PW2. Nothing to suggest that PW1 had any previous discussion about PW2 with the appellants. For these reasons, PW1 can never be an accomplice to the crime of rape committed by the appellants. Both the trial court and the court below were right when they held that PW1, from the evidence on record never advised or encourage the appellants in their dealing with PW2 on the day of incident and cannot rightly be called an accomplice. It is quite clear to me that from the record that PW1 met PW2 and had started a discussion before the appellants met them; as such it cannot be said that he conspired with them. ***Conspiracy means the meeting of the mind of conspirators. It consists of intention of two or more and agreement by them to do an unlawful act or do lawful act by an unlawful means. Conviction for conspiracy is usually predicated on circumstantial evidence, which must be of such a quality that irresistibly compels the court to make an inference as to the guilt of the accused.*** There is evidence from PW2 corroborated by PW1 that the 1st appellant slapped PW2, fell her to the ground and tore her pant and dress. These were tendered and admitted at the trial as Exhibits 'A' and 'B' respectively. There is evidence also that after the 1st appellant was done, the 2nd appellant also had unlawful carnal knowledge of PW2.

The assertion of the appellants that the learned trial judge relied on the evidence of PW1 to find corroboration for the evidence of PW2, cannot be true. The Learned trial judge apart from considering the evidence of PW1 to ground corrobora-

tion; also sought corroboration from Exhibit 'C' (supra) as well as Exhibit 'A', the torn pant of PW2 and Exhibit 'B' her torn dress and the circumstance under which the crime was said to have been committed.

In the result, as the two issues submitted by the Appellants for the determination of this appeal have failed having been resolved against them, the appeal itself fails. Accordingly, Appellants' appeal is hereby dismissed. It has no merit. The conviction and sentence of the appellants on the two count charge of conspiracy and rape by the Ogun State High Court, Ilaro and affirmed by the Ibadan Division of the Court of Appeal are hereby further affirmed.

MOHAMMED JSC

I have been privileged before today, of reading in draft the judgment of my learned brother Galadima JSC which has just been delivered. I agree with him that there is no merit at all in this appeal. I may in fact go further to say that the appeal is frivolous. The fact the Appellants, in a rather militant manner and reckless circumstance, had sexual intercourse by force in turn with the prosecutrix, PW2 without her consent, is quite plain from the oral evidence of PW1 and PW2, the torn pants and dress of the prosecutrix removed by force by the Appellants, Exhibits A and B and the medical evidence showing laceration on the inner thighs, bruises at the entrance to the vagina and semen in the vulva of the prosecutrix. My only concern is the manner with which the trial Court treated the Appellants who committed this very serious offence by giving them very light sentences. All the same, in the absence of any appeal against the sentence, there is nothing that can be done.

Accordingly, I also dismiss this appeal and affirmed the judgment of the trial Court as affirmed by the Court of Appeal for the conviction and sentences passed on the Appellants for the offences for which they were charged.

FABIYI JSC

I have read before now the judgment just delivered by my

learned brother – Galadima, JSC. I agree with the conclusion that the appeal is devoid of merit and deserves to be dismissed. The appellants were arraigned before the trial High Court on charges of conspiracy to commit a felony to wit: rape as well as the substantive offence of rape contrary to sections 516 and 358 of the Criminal Code, Cap. 29 Laws of Ogun State of Nigeria, 1978, respectively.

The learned trial judge garnered evidence on both sides of the divide. He was duly addressed by learned counsel on both sides. In his considered judgment handed out on 31st March, 2009, the learned trial judge found the two appellants culpable and sentenced each of them to one year imprisonment for the offence of rape; with sentences to run concurrently.

The appellants felt unhappy with the stance posed by the learned trial judge. Each of them filed separate Notices of Appeal at the Court of Appeal, Ibadan Division ('the court below' for short). The court below dismissed their appeal on 11th February, 2010. This is a further appeal to this court.

Briefs of argument were exchanged by the parties. The two issues couched for determination by the appellants read as follows:-

"1. Whether penetration, an ingredient factor in a charge of rape was proved in this case.

2. Whether P.W.1 is not an accomplice to put his evidence and that of the complainant under caution that requires corroboration."

On behalf of the respondent two issues were also formulated. They read as follows:

"(1) Whether prosecution proved the charge (sic) of conspiracy and rape against the appellants beyond reasonable doubt.

(2) Whether the lower courts were right to have relied on the evidence of P.W.1 as the required corroboration in this case."

Rape is an unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man forcibly and against her will; the act of sexual intercourse committed by a man with a woman who is not his wife without her consent. See: *The State v. Lora* 213 Kan. 184, 515 P. 2d, 1086, 1093; *Black's Law Dictionary*, Sixth Edition at page 1260.

It has been held that the most important ingredient of the offence of rape is penetration. However, penetration with or without emission is sufficient even where the hymen was not ruptured. The

slightest penetration will be sufficient to constitute the act of sexual intercourse. See: *Iko v. The State* (2001) 14 NWLR (Pt. 732) 221; *Ogunbayo v. The State* (2007) 5 SCM 154; *Rutherford v. Richardson* (1923) A. C. 1.

It is in evidence that each of the appellants had forceful carnal knowledge of P.W.2 - the prosecutrix without her consent. The evidence of P.W.2 was supported by that of P.W.1. Exhibit C, the medical report indicates that bruises in the inner thighs, semen in the vulva and tiny bruises at the entrance to vagina of P.W.2, were noticed. B

The learned trial judge found the offence of rape proved. He found corroboration of the testimony of P.W.2 in the evidence adduced by P.W.1, the medical report as well as the circumstance under which the offence was perpetrated. C

The court below agreed with the trial judge. It was found that P.W.2's pant got torn and she was pushed to the ground and while shouting, each of the appellants mounted on her and in turn, had intercourse with her. P.W.2 said that blood was coming out of her body and there were lacerations on her thigh which were inflicted by the appellants when trying to tear her pant. She said that each of the appellants forcibly inserted his penis into her vagina in turns and it was P.W.1 who pulled 2nd appellant away from her. The appellant pinned P.W.2's hands down while the 1st appellant carried out his illicit sexual activity. E

I completely agree with the findings of the two courts below. The evidence of P.W.2 has adequate corroboration from the observations in the medical report Exhibit C. Semen was found in the vulva as well as tiny bruises at the entrance to the Vagina. With the bruises at the entrance of P.W.2's vagina as noticed in Exhibit C, it is idle to suggest, as done on behalf of the appellants that there was no penetration. If there was no penetration of some dangerous objects into the private part of P.W.2, what then caused the bruises at the entrance of same? In the prevailing circumstance of this matter it must be presumed that appellants' disgraceful and untoward sexual acts of inserting their genitals into the private part of P.W.2 without her consent caused the bruises. In short, penetration was clearly established by the two courts below. It will be idle to find otherwise. I agree with the reasonable stance posed by each of the two courts below. F G H

The reasonable findings of the trial court and the court below are concurrent findings. This court will not interfere unless compelling reasons are shown. In this matter, none has been depicted; even remotely. I shall not interfere. See: *Kale v. Coker* (1982) 12 SC 252; *Seatrade v. Awolaja* (2002) 2 SC (Pt. 1) 35;

B Oduntan v. Akibu (2000) 7 SC (Pt. 2) 106;
Seven-Up Bottling and Co. v. Adewale (2004) 4 NWLR (Pt.
862) 183.

Before I draw the curtain, I need to say it that the despicable action of the appellants in carrying out the crime of rape is most unheard of in a sane society. Even curs would not embark upon such a savage act. The appellants deserve their conviction and sentence. Such will serve as an adequate deterrence to other would be assailants with similar negative frame of mind.

D For the above reasons and those set out in the lead judgment, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly. I affirm the judgment of the court below.

E **ADEKEYE JSC**

I had the advantage of reading in draft the judgment just delivered by my learned brother, Suleiman Galadima JSC. I agree with his reasoning and conclusion, after a meticulous consideration of the issues formulated for determination that the appeal is devoid of merit.

Rape in legal parlance means an 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 threat or intimidation of any kind or by fear or harm, or by means of false and fraudulent representation as to the nature of the act or in the case of a married woman by personating her husband.

In a charge of rape or unlawful carnal knowledge of a female without her consent, it is the duty of the prosecution to prove the following -

H (a) That the accused had sexual intercourse with the prosecu-
trix.

(b) That the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation.

(c) That the prosecutrix was not the wife of the accused.

(d) That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.

(e) That there was penetration. B

Ogunbayo v. The State (2007) 8 NWLR pt. 1035 pg. 157.

Upahar v. The State (2003) 6 NWLR pt. 816 pg. 230.

State v. Ogo (1980) 2 NCLR 391.

Okeyamor v. The State (2005) 1 NCC pg. 499 C

State v. Anolue (1983) 1 NCR 71.

Iko v. State (2005) 1 NCC pg. 499.

The most important and essential ingredient of the offence of rape is penetration. The court will deem that sexual intercourse is complete upon proof of penetration of the penis into the vagina. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Emission or the rupture of the hymen is unnecessary to establish the offence of rape. D

State v. Ojo (1980) 2 NCR 39.

Jegede v. State (2001) 14 NWLR pt. 723 pg. 264. E

Ogunbayo v. State (2007) 8 NWLR pt. 1035 pg. 157.

In the course of trial, the prosecution tendered three Exhibits as follows: Exhibit A - a torn pant belonging to the prosecutrix, Exhibit B - also her torn dress and Exhibit C - a medical Report which among other things confirmed the bruises on her body. There was an eye witness account of the incident which described the way and manner the prosecutrix was sexually assaulted by the two appellants. The account adequately corroborated that of the victim of the rape. Evidence of corroboration of the evidence of the victim in a rape case, is not required as a matter of law; it is now a well-established practice by the courts in Nigeria. The nature of the corroboration must depend on the peculiar facts of each case. Where rape is denied by the accused, the evidence of corroboration that the court must look for is for instance - F

(a) Medical evidence showing injury to the private part or to other parts of her body which may have been occasioned in a struggle. G

(b) Semen stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed. H

In the circumstance of this case, the evidence available supported the conviction and sentence of the two appellants.

With the fuller reasons given in the lead judgment, I also dismiss the appeal and confirm the conviction and sentence. I cannot but remark that the sentencing policy of judicial officers needs to be revisited. The purpose of the criminal law is to prevent harm to the society. The offence of rape is by every standard a grave offence which often leaves the victim traumatised and dehumanised. A light sentence as in the case of the appellants must never be imposed. This may have the unsavoury effect of turning rape into a past-time by our flippant youths.

RHODES-VIVOUR JSC

This is an appeal from the judgment of the Court of Appeal delivered on the 11th of February, 2010, confirming the conviction and sentence of the appellants by the Ilaro High Court in Ogun State. Both appellants were charged with conspiracy and rape contrary to Sections 516 and 358 of the Criminal Code, Cap. 29 Laws of Ogun State of Nigeria. There are concurrent findings of fact by the two courts below that on the 12th of December, 2006, both appellants took turns to rape the prosecutrix in full view of PW1. Concurrent findings by the court below will not be disturbed by this court except there are exceptional circumstances, such as:

- (a) The findings are perverse,
- (b) There was miscarriage of justice or some principle of Law or procedure was not followed.

See *Ogbu v. State* 1992 8 NWLR pt. 259 p. 255

Igago v. State 1999 14 NWLR pt. 637 p. 1

Adeyemi v. State 1991 1 NWLR pt. 170 p.679

Hon. Justice S. Galadima made a thorough review of evidence led and came to the conclusion that the appeal should be dismissed.

I agree with his lordship. I would though say a thing or two on the offence of Rape, Corroboration and the Sentence in this case.

A person commits the offence of rape if:

- (a) He intentionally penetrates the vagina with his penis, and
- (b) The prosecutrix did not consent to the penetration.

That is to say the offence of rape is complete when a penis is

inserted into the vault of the vagina without the consent of the prosecutrix. Evidence of rupture of the hymen or emission of semen is not necessary. Rape can thus be said to be unlawful carnal knowledge, or non consensual sex. Penetration without consent.

Corroboration:

Corroboration means evidence which confirms the evidence of the prosecutrix. As a rule of prudence and the settled course of practice is for the court to seek for Corroboration in all cases of rape. This is so because it has been found to be unsafe to convict for the offence of rape on the uncorroborated testimony of the prosecutrix. See Inspector General of Police v. Sunmonu 1957 W.R.N.L.R. p 23.

State v. John Ogwudiegwu and anor. 1968 N.M.L.R. p.s 113.

There is corroboration of the evidence of the prosecutrix by the testimony of PW1 and Exhibit C. The evidence of PW1 runs thus:

"I know the accused persons; they are my friends. I am in court to testify about an incident that happened on the 12th of December, 2006, at about 7.30pm. I and two accused persons were going to the 1st accused persons house. Along the way, we saw the girl called Dupe we started joking with her that we would marry her. She said she had no time for us. At that point the 1st accused said to the girl, so it was you, I have been looking for you a long time. I catch you today. At that point, the 1st accused slapped Dupe on the face and fell her on the ground. He tore her dress and pant. The 2nd accused person held her hands and the 1st accused inserted his penis in her vagina. I told him to leave the girl alone but the 2nd accused person slapped my face. When the 1st accused got up from the girl, the 2nd accused person mounted her and also insert (sic) his penis into her vagina."

A report was made to the Police thereafter and the Police took the prosecutrix to Hospital for examination. The Doctor examined the prosecutrix and found bruises on her thighs, semen in the vault of her vagina and lacerations on her vagina. The Doctor prepared Exhibit C, the Doctors Report on his examination of the prosecutrix. The testimony of PW1 and exhibit C corroborates the testimony of the prosecutrix that she was raped, and in the circumstances it was safe to convict both appellants. Concurrent findings of fact by the two courts below are not perverse in the light of overwhelming evidence by PW1 and Exhibit C to corroborates the prosecutrix testi-

mony that the appellants took turns to rape her in full view of PW1, Section 358 of the Criminal Code reads as follows:

“Any person who commits the offence of rape is liable to imprisonment for life, with or without whipping.”

B The appellants were sentenced to three years in prison. Since
there was no cross-appeal there is nothing that can be done on the
strange sentence. The prosecutrix suffered an, ordeal that was the
stuff of nightmares. A ferocious and indiscriminate attack by two cal-
lous, wicked men. To my mind, where as in this case there is over-
C whelming compelling evidence that two men took turns to rape a
defenseless young girl in degrading and horrific circumstances, I think
the appellants should forfeit their place in a decent society for a much
longer period. Three years in prison cannot be adequate for such an
act.

D For this and the fuller reasoning in the leading judgment, this
appeal has nothing in it to reverse the court below. The appeal is
dismissed.

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