

SUPREME COURT OF NIGERIA
FRIDAY 30TH JANUARY, 2015. SC. 168/2013
CORAM:- M. MOHAMMED CJN,
M. S. MUNTAKA-COOMASSIE, B. RHODES-VIVOUR,
N. S. NGWUTA, J. I. OKORO, JJSC

BONIFACE ADONIKE APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Conviction - Validity - Appellate court will not set aside conviction made under a repealed law - If at the time there was existing law under which the conviction should have been made (H1)

RAPE - Ingredients - Proof - Prosecution must prove that accused had sex with prosecutrix - That it was done without her consent - That she was not wife of accused - And that there was penetration (H2)

RAPE - Proof - Corroboration - Evidence from PW3 and exhibit A support case of PW1 that she was violated by appellant - Hence the lower courts were right that both evidence confirm that of PW1 (H3)

EVIDENCE - Contradiction - Weight - Evidence by PW2 about date of the crime was a discrepancy that did not affect his credibility - For a contradiction must be material to affect prosecution's case (H4)

FACTS

Before the High Court of Delta State Issele-Uku Judicial Division, accused/appellant was arraigned for the offence of defilement punishable under section 218 of the Criminal Code Cap. 48 Volume II, Laws of the Defunct Bendel State 1976 (as applicable in Delta State). It is of note that the above law has been repealed at the time of commission of the offence. However at that time, there is an existing law in the State i.e. Criminal Code Law Cap C21 Laws of Delta State 2008. The case against appellant was that he had carnal knowledge of a little girl of five years. In order to perfect his evil deed, appellant had sent the girl on an errand and upon her return

he lured and eventually defiled her in his room.

Appellant was arrested in connection with the crime. At the trial, appellant pleaded not guilty. Prosecution/respondent called witnesses to establish its case against appellant. Appellant testified for himself and called no witness. In his judgment, the learned trial Judge although had earlier rejected respondent's request to amend the charge in line with the existing law, relied on the provisions of the same existing law in convicting and sentencing appellant. Not satisfied, appellant appealed to the Court of Appeal Benin City Division. The appeal was heard and dismissed. Aggrieved further, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the appellant's trial and conviction for the offence of defilement, under section 218 of the Criminal Code Cap 48 Vol. II Laws of the defunct Bendel State 1976, as applicable to Delta State, which the respondent began more than two months after the offence was committed, is not a nullity.

3. Whether the respondent proved the offence of defilement against the appellant beyond reasonable doubt."

HELD (Unanimously dismissing the appeal per OKORO JSC)

CRIMINAL PROCEDURE - Conviction - Validity

1. This court has in its wisdom laid down the principle that an appellate court will not set aside the conviction of an appellant merely on the complaint that he was tried and convicted under a repealed law if at that time there was an existing law which he should have been tried and convicted. That principle of law is as sound today as it was in 1992 when the case of *Yabugbe V. COP* (supra) was decided by this court. Although the facts of that case are not the same as in the instant appeal, yet the principles laid down in it cannot be departed from in this case.

In the circumstance of this case, and having regard to the principle enunciated in this court in the case of *Yabugbe V. COP* (supra) and relying on Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and Section 166 of the Criminal Procedure Law, Cap. C 22 Laws of Delta State, 2006, I am satisfied

that both the trial court and the court below were right to rely on Section 218 of the Criminal Code Law, Cap. C21 Laws of Delta State 2008 to convict and sentence the appellant. This is so because as at 2010 when the appellant was arraigned, tried, convicted and sentenced for the offence of defilement, there was in existence a written law to wit: the Criminal Code Law Cap. C 21 Laws of Delta State 2008 and in particular S.218 thereof which defined the said offence and prescribed punishment for it.

I see no merit in this issue and I have no hesitation in resolving it against the appellant. It does not avail him at all. So be it. (pp. 22 D/25 A)

RAPE - Ingredients - Proof

2. It is trite that in a charge of rape or unlawful carnal knowledge of a female without her consent, the prosecution has a bounded duty to prove the following ingredients:

- a. that the accused had sexual intercourse with the prosecutrix;
- 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.

In the instant case, it must also be shown that the prosecutrix was below the age of eleven years.

The PW1 (the victim) in this case, clearly identified the appellant as the man who forcefully had carnal knowledge of her. The medical report shows that there was penetration. Also, the medical doctor's evidence supports the fact that the prosecutrix was indeed violated. Both the evidence of the medical doctor and the medical certificate support the evidence of the PW1 that the appellant had unlawful carnal knowledge of her.

(p. 28 D)

RAPE - Proof - Corroboration

3. In the instant case, the prosecutrix gave direct evidence against the appellant. Both the PW3 (the medical Doctor) and Exhibit A (the medical report) support the case of PW1 that she was violated by the appellant. I agree with both the trial High Court and the Court below
B that these two pieces of evidence support and confirm the evidence of PW1 in this respect. There is no doubt about this. (p. 29 C)

EVIDENCE - Contradiction - Weight

C 4. The learned counsel for the appellant made much weather on issue of contradiction of prosecution witnesses on the date the offence was committed. In this case, the learned trial judge held, and was affirmed by the court below that the piece of evidence by the PW2 that the offence occurred on 20th June, 2012 which she said was a Saturday, instead of Sunday, was a discrepancy and did not destroy
D the credibility of the PW2. I have no reason to disagree with the conclusion by the two courts below on this issue. For a contradiction to affect the case of the prosecution, it must be material and go to the root of the charge against the accused person. This court has held severally that where there are differences in the narration of events
E by prosecution witnesses, especially as to recounting or recollecting the date of events, which are mere discrepancies, that would not avail the accused person, because some of such discrepancies are expected as being natural. There is no doubt that the prosecution proved the
F charge against the appellant beyond reasonable doubt. This issue, accordingly is resolved against the appellant. (p. 29 D)

NOTABLE POINTS OF INTEREST

OKORO JSC

G **1. Principles of law – Objectives of**

Every principle of law is meant to streamline and clarify issues arising from any law in force and particularly the particular provision in question. It is also meant to guide the court, litigants and counsel.
(p. 22 C)

H **2. Options open to accused tried under a repealed law**

There is a window of opportunity or a way of escape for an appellant who complains that he was tried and convicted under a repealed law.

The first opening is for the appellant to show that he was misled or that his counsel was misled in the process of being tried under the repealed or non-existent law. OR that there was a miscarriage of justice arising from the trial. Unfortunately in this case, the appellant failed woefully to show that he was so misled or that there was any miscarriage of justice. (p. 24 G) B

3. Criminal procedure – Burden of proof

My Lords, I think a most convenient place to start in resolving this issue is to state categorically that in criminal proceedings, the onus is always on the prosecution to establish the guilt of the accused beyond reasonable doubt. The prosecution will readily achieve this result by ensuring that all the necessary and vital ingredients of the charge are proved by evidence. It has to be noted that under our system of criminal justice, an accused person is presumed innocent until he is proved guilty. There is therefore no question of an accused person proving his innocence before a law court. The duty of the prosecution is to prove the charge against an accused person beyond reasonable doubt. I must emphasize that it is not proof beyond every shadow of doubt but beyond reasonable doubt. (p. 27 B) C D E

4. Corroboration – Meaning of

It was contended by the appellant that there was nothing to corroborate the evidence of the prosecutrix. This court in *Oludotun Ogunbayo v. The State* (2007) 8 NWLR (Pt.1035) 157 held that corroboration is not a technical term or art, but means no more than evidence, tending to confirm, support and strengthen other evidence sought to be corroborated. It was further held that it needs 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. (p. 28 H) F G

REPRESENTATION

E. Ohwovoriolè, Esq., with E. Mudiaga-Odje, Esq., for the Appellant Respondent unrepresented though properly served with hearing notice. H

CASES REFERRED TO

- Yabugbe v. COP (1992) 4 NWLR (pt. 234) 152
Karim v. N. A. (2001) 4 NWLR (pt. 758) 716
Madukolu v. Nkemdilim (1962) 2 SCNLR 341
Iko v. State (2001) 14 NWLR (pt. 732) 221
B Rabi v. State (2005) 7 NWLR (pt. 925) 491
Ogoala v. State (1992) 1 NWLR (Pt.175) 509
Akpabio v. State (1994) 7 NWLR (pt. 359) 635
Pasu v. State (2011) 39 LRCN 52
C Ogunbayo v. State (2007) 1 NWLR (pt. 1035) 157
Dibie v. State (2007) 3 SCNJ 160
Ogbu v. State (2007) 2 SCNJ 319
Alpa v. State (2010) 8 LRCN 70
Onubogu v. State (1974) 9 SC 1
Williams v. State (1992) 10 SCNJ 74
D Yongo v. COP (1992) 4 SCNJ 113

STATUTES REFERRED TO

- Criminal Code Cap. 48 Vol. II Laws of Defunct Bendel State 1976
(applicable to Delta State), s. 218
E Criminal Code Law Cap. C21 Laws of Delta State 2008, s. 218
Constitution of Federal Republic of Nigeria 1999 (as amended), s. 36(12)

LEAD JUDGMENT BY OKORO JSC

- F This is an appeal against the judgment of the Court of Appeal sitting in Benin delivered on 15th March, 2013 wherein the Lower Court affirmed the judgment of the High Court of Delta State which convicted and sentenced the appellant to six years imprisonment with six strokes of the cane for the offence of defilement.

- G As I can garner from the record of appeal, the facts reveal that on or about the 16th day of June, 2010, the appellant invited and requested a child of 5 years of age to buy pure (sachet) water for him. On her return, the appellant lured her into his room, pulled her pant and had carnal knowledge of her. The appellant was arrested and charged to court for prosecution. The charge read as follows:-

- H “STATEMENT OF OFFENCE:
COUNT 1:

Defilement punishable under Section 218 of the Criminal Code Cap. 48 Volume II, Laws of the Defunct Bendel State 1976 as applicable in Delta State.

PARTICULARS OF OFFENCE

Boniface Adonike (m) on or about the 16th day of June, 2010 in Issele-Mkpitime Village within the Issele-Uku Judicial Division had carnal knowledge of one Iwebunor Gabriel (f) aged 5 years without her consent.”

At the trial High Court, the appellant denied the charge and pleaded not guilty to same. The prosecution called four witnesses. The appellant testified for himself and called no witness. Counsel for both the prosecution and defence addressed the court. At the end the learned trial judge convicted the appellant and sentenced him to 6 (six) years imprisonment and with 6 (six) strokes of the cane.

Not satisfied with the judgment handed down by the learned trial judge, the appellant appealed to the Court of Appeal, Benin Division. Without much ado, the appellant’s appeal at the Lower Court was dismissed. Still dissatisfied the appellant has appealed to this court.

Two notices of appeal were filed by the appellant on 20th March, 2013 and 3rd April, 2013 respectively. At the hearing of this appeal, the appellant abandoned the notice of appeal filed on 20th March, 2013 and adopted the one filed on 3rd April, 2013. The said notice has five grounds of appeal, out of which the appellant’s learned counsel, Ekeme Ohwovoriole Esq has distilled three issues for the determination of this appeal. The three issues are as follows:-

“1. Whether the appellant’s trial and conviction for the offence of defilement, under section 218 of the Criminal Code Cap 48 Vol. II Laws of the defunct Bendel State 1976, as applicable to Delta State, which the respondent began more than two months after the offence was committed, is not a nullity.

2. Whether the Lower Court did not wrongly affirm the trial court’s admission of Exhibit B, said to be the appellant’s extra-judicial statement and if the answer is affirmative, whether the trial court relied on the document to convict the appellant.

3. Whether the respondent proved the offence of defilement against the appellant beyond reasonable doubt.”

In the respondent’s brief settled by O. F. Enemuio Esq., two

issues are formulated as hereunder reproduced.

“1. Whether having regard to the state of evidence before the court, the Court of Appeal was right in law when it affirmed the judgment of the trial court,

2. Whether the Lower Court erred in law when it affirmed
B the conviction of the appellant based on section 218 Criminal Code Law Cap. C.21 Law of Delta State.”

I intend to determine this appeal based on the three issues formulated by the appellant, after all it is his appeal.

C Arguing the first issue, the learned counsel for the appellant submitted that the appellant’s trial for the offence of defilement under Section 218 of the Criminal Code Cap. 48 Vol. II Laws of the Defunct Bendel State 1976 as applicable in Delta State was a nullity because the trial court lacked jurisdiction to entertain the charge which the prosecution began outside the period of two months prescribed for
D the respondent to begin the prosecution for the offence.

It is his contention that from the findings of fact by the court below that the trial of the appellant was commenced more than two months against as stipulated by Section 218 of the Criminal Code Laws of Bendel State 1976 as applicable in Delta State, the Lower
E Court ought to have allowed the appeal. Learned counsel faulted the reliance by the Lower Court on the case of Yabugbe Vs COP (1992) 4 NWLR (Pt.234) 152. According to him, the facts of the instant case are distinguishable from the facts in Yabugbe’s case and
F that the Lower Court was wrong the way it applied the principle in Yabugbe’s case (supra).

Learned counsel opined that a careful reading of Yabugbe’s case shows that the mere existence of another law under which the accused could have been charged is not enough to bestow legality on the trial. That in addition to the existence of another law, it must
G be shown that the accused and his counsel are not misled and no objection is raised to the defective charge and that there has been no miscarriage of justice. That in this case, the appellant raised an objection and an attempt to amend the charge was refused by the court saying that it would occasion injustice on the appellant.

H It was a further argument of the appellant that following the trial court’s dismissal of the respondent’s application to amend the charge, the prosecution continued under the provisions of the

Criminal Code of the Defunct Bendel State up to and including when the trial court delivered its judgment in the matter. Learned counsel submitted that beyond taking judicial notice of the laws of Delta State only at the ultimate stage of delivering judgment, the learned trial judge did not do anything with or show how those laws impacted on the charge that the respondent was prosecuting against the appellant. B That merely stating that judicial notice was taken of the laws of Delta State, without demonstrating its effect, if any, on the trial, was not enough to validate the trial.

In conclusion, learned counsel opined that the issue in this appeal goes beyond the appellant merely understanding the charge and pleading thereto. That the pith of the issue lies in the fact that it was legally impossible to convict the appellant under the provisions of Section 218 of the Criminal Code of the Defunct Bendel State. It is his submission that however well the proceedings are conducted or not is a matter entirely extrinsic to the question of defect in competence of the court, citing the case of Karim V. N. A. (2001) 4 NWLR (Pt. 758) 716 at 729 para H; Madukolu V. Nkemdilim (1962) 2 SCNLR 341. He urged that it be held that the trial court's holding that the appellant understood the charge and pleaded "not guilty" cannot and did not breathe life into the offence that became moribund after the expiration of a period of two months from the 16th day of June, 2010 when the offence was said to have been committed. E

In response, the learned counsel for the respondent submitted that the trial court recognized the fact that the appellant was charged under a repealed law but did not close her eyes to the existence of a similar provision in an existing law which is Section 218 of the Criminal Code, Laws of Delta State, 2008. He submitted that an appellate court cannot set aside the decision of a trial court brought under a repealed, moribund law of a state that is defunct unless it can be shown that the accused was in fact misled by such error or a miscarriage of justice has been occasioned. He placed reliance on the case of Yabugbe V. COP (1992) 4 NWLR (pt. 234) 152 and Section 166 of the Criminal Procedure Law Cap. C22 Laws of Delta State 2006. F G H

On the submission by the appellant that he had raised an objection to his trial under a wrong law, the learned counsel for the respondent submitted that contrary to the provisions of Section 167

of the Criminal Procedure Law Cap. C.22 Laws of Delta State which requires him to raise such objection immediately after the charge has been read over to him, he raised it at the close of his final address. He further argued that the appellant's quarrel in this case is that the trial court did not decline jurisdiction to determine this case having
B refused the prosecution's application to amend the charge. He submitted that the issue for determination in this appeal is not whether the trial court had jurisdiction to determine the case but whether the conviction of the appellant is void in view of the fact that he was
C tried under the repealed law and convicted under an existing law. He urged this court to resolve this issue in favour of the respondent.

There is no doubt that the appellant herein was charged at the High Court of Delta State in 2010 with the offence of defilement contrary to Section 218 Vol. II Laws of the Defunct Bendel State, 1976 as applicable in Delta State. It is also a fact known to both
D parties that as at the time of the commission of the offence and arraignment of the appellant there was in existence the Criminal Code Law Cap. C21. Laws of Delta State 2008. It is in evidence that when the prosecution realized its mistake, it brought a motion on notice to amend the charge to reflect the proper law against which the appellant
E committed the offence and under which he was standing trial but the learned trial judge refused to grant the application. The reason given was that such an amendment would work injustice on the accused person. But curiously, the learned trial judge took judicial notice of
F the existence of the Criminal Code of Delta State and used same to convict the appellant herein, an exercise he had earlier refused to act positively. Be that as it may, this is not an issue before this court. The main issue in this appeal to which issue No. 1 encapsulates is whether the conviction of the appellant is void in view of the fact that he was tried under the repealed law of the old Bendel State and
G convicted under the existing laws of Delta State.

Section 218 of the Criminal Code, Cap 48 Vol. II Laws of the Defunct Bendel State, 1976 under which the appellant was charged states:

“218. Any person who has unlawful carnal knowledge of a
H girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for life, with or without caning.

Any person who attempts to have unlawful carnal knowledge

of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning.

A prosecution for either of the offences defined in this section must be begun within two months after the offence is committed.

A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness.” B

Now, the pith and substance of the above provision which is the kernel of this issue is that the prosecution of an accused who is alleged to have committed the offence of having unlawful carnal knowledge of a girl under the age of eleven years or an attempt to do so, must be begun within two months of the commission of the offence. C

The appellant herein is alleged to have had unlawful carnal knowledge of the PW1 - a girl of five years, on or about the 16th of June, 2010. The trial of the appellant did not commence until November, 2010, clearly above the two months prescribed by the law under which the appellant was charged. D

Ordinarily, the law would have been allowed to take its course. But that is not the case here. The learned counsel for the respondent both at the court below and in this court had relied on the case of Yabugbe V. COP (supra) and Section 166 of the Criminal Procedure Law Cap. C22 Laws of Delta State. Under Section 218 of the Delta State Criminal Code Law Cap. C21, 2008, there is no provision for time limit within which prosecution must commence in an offence of defilement. This is contrary to the requirement in the defunct Bendel State Law. E F

In the instant case, this is how it all started. On page 43, lines 15 - 23 of the record of appeal the learned trial judge held as follows:

“In respect of the law under which the accused was charged, I take judicial notice of the laws of Delta State that came into effect in 2008. This offence was committed on the 19/6/2010. G

I am of the view that no miscarriage of justice has been occasioned by the accused pleading to Section 218 of the Criminal Code of the old law. The accused understood the charge against him and he pleaded NOT GUILTY to the charge.” H

The Lower Court in its judgment on page 104 of the record agreed with the learned trial judge in the following words:

“I deeply perused the authority of Yabugbe V. COP (supra)

relied upon heavily by the prosecution. The facts of that case are not the same with the facts of this case. However, that authority clearly established that where an accused person was convicted under a repealed law of a defunct State, but under an existing law, an appellate court cannot set aside such a conviction”

B Every principle of law is meant to streamline and clarify issues arising from any law in force and particularly the particular provision in question. It is also meant to guide the court, litigants and counsel. This court has in its wisdom laid down the principle that an appellate court will not set aside the conviction of an appellant merely on the complaint that he was tried and convicted under a repealed law if at that time there was an existing law which he should have been tried and convicted. That principle of law is as sound today as it was in 1992 when the case of Yabugbe V. COP (supra) was decided by this court. Although the facts of that case are not the same as in the instant appeal, yet the principles laid down in it cannot be departed from in this case.

The learned Justice Akpata, JSC who wrote the lead judgment held on page 172 paragraph of the law report cited above as follows:-

E “I do not agree with the learned counsel that the conviction of the appellant is null and void. Section 22 (10) of the 1963 Constitution was not breached. The Section states that no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law. The offence for which the appellant was convicted is defined and the penalty therefore is prescribed in a written law. The written law at the time of trial was either the 1959 law or the 1978 law. The wording of Section 355 of the 1978 Law is ipsissimis verbis with that of Section 296 of the 1959 Law”

On the same page, His Lordship continued:

G “Section 166 of the Criminal Procedure Act states that no error in stating the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission. I will like to sum up thus: where an offence known to law is prescribed in a charge and the penalty for the offence is prescribed in a written existing law and the charge is erroneously brought under a wrong section of an

existing law or under a law which has been repealed or has ceased to exist, and both the accused and his counsel are not misled and no objection is raised to the defective charge, a conviction for the offence disclosed in the charge will not be set aside on appeal if there has been no miscarriage of justice.”

Let me also bring in the views expressed in the matter by His Lordship, M. L. Uwais, JSC (as he then was) on page 176 of the report. His Lordship stated emphatically that:

“The offence of assault is common, though to a different degree, to both criminal codes. See Section 351 and 296 respectively. It is, therefore, a fallacy and idle to argue that the appellant was convicted of an offence that was not known to law or that the charge of unlawful assault was based on a non-existent law. It does not matter as to when Cap. 30 came into force. The fact is that the appellant has not shown that there was a time when neither code applied to the areas that constitute Oyo State.

Moreover, a conviction under the wrong law is not fatal if there is the provision of another law under which conviction can stand - See Falobi V. Falobi (1976) NMLR 169 at 177 and Henry Stephens Engineering Ltd v. Complete Home Enterprise Ltd. (1987) 1. NWLR (pt.47) 400- at 448 - unless it can be shown that the accused was in fact misled by such error or a miscarriage has been occasioned by the reason of the error - See Section 1-66 of the Criminal Code Law, Cap 31 Laws of Oyo State, 1978.”

As was rightly observed by the court below, Section 166 of the Criminal Code Law, Cap 31, Laws of Oyo State alluded to in the quotation above is in pari materia with Section 166 of the Criminal Procedure Law Cap. C22 Laws of Delta State, 2006. Also, Section 22 (10) of the 1963 Constitution made reference to in his judgment by Akpata, JSC is in pari materia with Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), which provides that:

“36 (12) Subject as otherwise provided by this Constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of the law”

I have had to bring to the fore the extant laws and principles governing the appellant's case in this appeal in order to make it very crystal clear the position taken by both the trial court and the court below. There is no doubt that the appellant was arraigned, tried, convicted and sentenced for the offence of defilement under Section B 218 of the Criminal Code, Cap. 48, Laws of the Defunct Bendel State 1976 which had ceased to exist in Delta State in 2010 when the appellant committed the offence. As at that time, the extant law in Delta State was the Criminal Code, Cap C. 21, Laws of Delta C State which took effect from 2008. Section 218 of the extant law defines the offence of defilement and prescribes punishment for the same offence. The provision is in pari materia with Section 218 of the Criminal Code, Cap. 48 Laws of the defunct Bendel State 1976 which was applicable to Delta State before it enacted the 2008 version of the law.

D Although the appellant was tried under a repealed law, there was indeed in existence a written law in Delta State which defined the offence of defilement in Section 218 thereof and also prescribed the punishment for it as required under Section 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The E said 2008 Criminal Code of Delta State (supra) has no provision for time limit within which to initiate a criminal prosecution against a person accused of the offence of defilement.

There is a window of opportunity or a way of escape for an F appellant who complains that he was tried and convicted under a repealed law. The first opening is for the appellant to show that he was misled or that his counsel was misled in the process of being tried under the repealed or non-existent law. OR that there was a miscarriage of justice arising from the trial. Unfortunately in this case, the appellant failed woefully to show that he was so misled or that G there was any miscarriage of justice.

In the circumstance of this case, and having regard to the principle enunciated in this court in the case of Yabugbe V. COP (supra) and relying on Section 36 (12) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and Section 166 of the Criminal Procedure Law, Cap. C 22 Laws of Delta State, 2006, H I am satisfied that both the trial court and the court below were right to rely on Section 218 of the Criminal Code Law, Cap. C21 Laws

of Delta State 2008 to convict and sentence the appellant. This is so because as at 2010 when the appellant was arraigned, tried, convicted and sentenced for the offence of defilement, there was in existence a written law to wit: the Criminal Code Law Cap. C 21 Laws of Delta State 2008 and in particular S.218 thereof which defined the said offence and prescribed punishment for it. B

I see no merit in this issue and I have no hesitation in resolving it against the appellant. It does not avail him at all. So be it.

On page 13 of the appellant's brief, the learned counsel for the appellant submits as follows: C

"In the light of the findings by the Lower Court that the trial court did not rely on Exhibit B to convict the appellant the appellant hereby abandons ground 3 of the notice of appeal and our issue two herein." See page 111 lines 11 - 12 of the record of appeal where the Lower Court held as follows: D

"Hence the conviction of the appellant was predicated mainly on Exhibit A and the evidence of PW3 and not Exhibit B"

Having abandoned ground three of the grounds of appeal, and issue two distilled therefrom, both the said ground 3 and issue two distilled from it, are hereby struck out. I am now left with issue No. 3. E

In this last issue the appellant is asking this court to determine whether the respondent proved the offence of defilement against the appellant beyond reasonable doubt. For this, the learned counsel F for the appellant submitted that the prosecution failed to provide evidence of corroboration before the appellant was convicted. According to him, the piece of evidence relied upon by the trial court and affirmed by the Lower Court was not the type required to corroborate the evidence of the prosecution. He cited the case of Iko V. The State (2001) 14 NWLR (pt.732) 221. and Rabi V. State (2005) 7 NWLR (Pt.925) 491, at 511 Paras B -F. G

It was the argument of learned counsel that Exhibit A, the medical report did not show that the prosecutrix i.e. PW1 had been penetrated by the appellant. Exhibit A, according to him, was not H good corroboration.

Learned counsel further contended that the respondent's case was replete with material contradictions especially on the date the offence was committed. According to him whereas the information

stated that the offence took place on or about 16/6/2010, PW1 said it was on 20/6/10 and to make it worse, PW3 and PW4 said it was on 19/6/10. Learned counsel submitted that three dates put forward amount to material contradiction. He relied on the case of *Ogoala V. State* (1992) 1 NWLR (Pt. 175) 509 at 523. Learned Counsel
 B concluded that the three dates should create doubt in the mind of the court which ought to be resolved in favour of the appellant, relying also on the case of *Akpabio V. State* (1994) 7 NWLR (Pt.359) 635 at 670. He urged this court to resolve this issue in favour of the
 C appellant.

In his response, the learned counsel for the respondent, after reviewing the evidence led at the trial and the judgment of the two courts below, submitted that Exhibit A is medical result of examination conducted on the PW1 and as such, there is no way the name of the appellant could have featured as he was not the person examined
 D by the PW3 - the Medical Doctor.

Learned counsel referred to the uncontradicted evidence of the PW1 that it was the appellant who forced her to have carnal knowledge of her. That the evidence of PW3 and the tendering of the medical report Exhibit A, is in line with laid down principles of law
 E on the issue, relying on the case of *Pasu V. State* (2011) 39 LRCN (52 at 76) and *Ogunbayo v. State* (2007) 1 NWLR (Pt.1035) 157.

On the issue of contradiction in date, learned counsel submitted that the said contradiction did not affect the credibility of witnesses
 F and their evidence on the core issue of the defilement of the minor. According to him, where there are differences in the narration of events by the prosecution witnesses, especially as to recounting or recollecting the date of events which are mere discrepancies. It will not avail the accused because some of such discrepancies are expected as being natural. He placed reliance on the cases of *Golden Dibia & Anor V. The State* (2007) 3 SCNJ 160 at 170 & 178, *John Ogbu & Anor. V. State* (2007) 2 SCNJ 319 at 334 - 335, *Alpa V. The State* (2010) 8 LRCN 70 and, *Onubogu V. State* (1974) 9 SC 1.
 G

He then urged this court to hold that the prosecution proved the offence of defilement against the appellant beyond reasonable doubt. He also urged this court to resolve this issue against the ap-
 H appellant.

My Lords, I think a most convenient place to start in resolving

this issue is to state categorically that in criminal proceedings, the onus is always on the prosecution to establish the guilt of the accused beyond reasonable doubt. The prosecution will readily achieve this result by ensuring that all the necessary and vital ingredients of the charge are proved by evidence. It has to be noted that under our system of criminal justice, an accused person is presumed innocent until he is proved guilty. There is therefore no question of an accused person proving his innocence before a law court. The duty of the prosecution is to prove the charge against an accused person beyond reasonable doubt. I must emphasize that it is not proof beyond every shadow of doubt but beyond reasonable doubt. See Uche Williams V. The State (1992) 10 SCNJ 74, Yongo V. COP (1992) 4 SCNJ 113, Ogundiyani V. The State (1991) 3 NWLR (Pt.181) 519.

In this appeal, the learned counsel for the appellant had argued extensively that there was no corroborative evidence upon which the learned trial judge relied upon to convict the appellant. Let me approach the record of appeal and see the evidence the learned trial judge used to convict the appellant. On page 44 of the record, the learned trial judge held as follows:

“I am satisfied from all the evidence led most especially the evidence of PW1 and the Medical evidence of the Doctor that sexual intercourse had occurred. Penetration has also been proved by the evidence of rupture of the hymen, Exhibit A is the Medical Report - “A young girl in sail mood with blood stains on the vulva and around the hymen, bruises around the vagina especially posterior. Child has a waddling gait (sway in walking as a duck) a diagnosis of rape forceful penetration made.

The medical report among other things confirmed the bruises and the torn hymen. In this case of outright denial by the accused, the evidence of corroboration I have found is the medical evidence showing injury to PW1’s private part i.e. Exhibit “A” and the testimony of PW3”.

The grouse of the appellant is that although the PW3 and his medical report shows that the prosecutrix was completely bruised and ravaged, the report did not mention the appellant as the one who violated the young girl. I think the appellant has made a mistake here. The examination of the PW1 by the medical doctor and the medical report generated therefrom was meant to confirm whether there was

indeed sexual intercourse on the minor as alleged. The Doctor was not present when the offence was committed. Therefore, he would not include in the report that it was the appellant who had sex with the young girl.

- It is trite that in a charge of rape or unlawful carnal knowledge of a female without her consent, the prosecution has a bounded duty to prove the following ingredients:
- a. that the accused had sexual intercourse with the prosecutrix;
 - 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.

In the instant case, it must also be shown that the prosecutrix was below the age of eleven years.

- The PW1 (the victim) in this case, clearly identified the appellant as the man who forcefully had carnal knowledge of her. The medical report shows that there was penetration. Also, the medical doctor's evidence supports the fact that the prosecutrix was indeed violated. Both the evidence of the medical doctor and the medical certificate support the evidence of the PW1 that the appellant had unlawful carnal knowledge of her.

- It was contended by the appellant that there was nothing to corroborate the evidence of the prosecutrix. This court in *Oludotun Ogunbayo v. The State* (2007) 8 NWLR (Pt.1035) 157 held that corroboration is not a technical term or art, but means no more than evidence, tending to confirm, support and strengthen other evidence sought to be corroborated. It was further held that it needs 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 also *Iko v. The State* (2001) 14 NWLR (pt. 732) 221.

In the instant case, the prosecutrix gave direct evidence against the appellant. Both the PW3 (the medical Doctor) and Exhibit A (the medical report) support the case of PW1 that she was violated by the appellant. I agree with both the trial High Court and the Court below that these two pieces of evidence support and confirm the evidence of PW1 in this respect. There is no doubt about this. B

The learned counsel for the appellant made much weather on issue of contradiction of prosecution witnesses on the date the offence was committed. In this case, the learned trial judge held, and was affirmed by the court below that the piece of evidence by the PW2 that the offence occurred on 20th June, 2012 which she said was a Saturday, instead of Sunday, was a discrepancy and did not destroy the credibility of the PW2. I have no reason to disagree with the conclusion by the two courts below on this issue. For a contradiction to affect the case of the prosecution, it must be material and go to the root of the charge against the accused person. This court has held severally that where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the date of events, which are mere discrepancies, that would not avail the accused person, because some of such discrepancies are expected as being natural. See John Ogbu & Another V. The State (2007) 2 SCNJ 319, Golden Dibia & Ors V. The State (2007) 3 SCNJ 160. There is no doubt that the prosecution proved the charge against the appellant beyond reasonable doubt. This issue, accordingly is resolved against the appellant. C D E F

The appellant herein was sentenced to six years imprisonment with hard labour and six strokes of the cane. I wish it was more than this and unfortunately, there is no appeal against the sentence. This type of case should be an opportunity for sentencing authorities to really come out vehemently to show that society abhors the type of conduct exhibited by the appellant on this innocent young girl of just five (5) years. Imagine the trauma (both physical and mental) the young girl was subjected to as a result of the insatiable urge of the appellant for mischief which he has invoked from the pit of hell. Violating a girl of just five years by the appellant in the manner he did is condemnable, barbaric, immoral and is devoid of any reasoning whatsoever. I wish I have the power to increase his punishment. I could have done it in order to serve as deterrence to would-be rapists. G H

Be that as it may, if he does not repent, he may not be as lucky as he was in this case.

Having said this and in view of the fact that the two issues have been resolved against the appellant it remains to be stated that this appeal is devoid of any scintilla of merit and is hereby dismissed.

B I uphold the decision of the court below which affirmed the judgment of the trial High Court.

Appeal dismissed.

C

MOHAMMED CJN

This appeal is against the judgment of the Court of Appeal Benin Division given on 15th March, 2013 in which that Court affirmed the judgment of the trial High Court of Delta State sitting at Issele-Uku delivered on 8th February, 2012 convicting the Appellant of the offence of defilement for which the Appellant was sentenced to a term of imprisonment for 6 years with 6 strokes of the cane. Part of the judgment of the trial Court containing the findings on the evidence before the Court at pages 44 - 45 of the record reads -

D

“I am satisfied from all the evidence led most especially the evidence of P.W.1 and the Medical evidence of the Doctor that sexual intercourse had occurred. Penetration has also been proved by the evidence of rupture of the hymen.

E

Exhibit “4” is the Medical Report - “A young girl in sad mood with blood stains on the vulva and around the hymen, bruises around the vagina especially posteriorly. Child also has a waddling gait. (Sway in walking as in duck) a diagnosis of rape forceful penetration made.”

F

The medical report among other things confirmed the bruises and the torn hymen. In this case of outright denial by the accused, the evidence of corroboration, I have found the medical evidence showing injury to P.W.1’s private part i.e. Exhibit “A” and the testimony of P.W.3.

G

In conclusion, the defence is an afterthought. I hold that the prosecution has proved the essential ingredients of rape and I find the charge of defilement against the accused proved beyond reasonable doubt. I do not have slightest doubt that the accused was the culprit who molested the 5 years old girl. I find the accused person guilty and convict him accordingly.”

H

After carefully considering the 3 issues raised by the Appellant and the Respondent in their respective briefs of argument, the court below in its judgment after hearing the Appellants appeal, entirely agreed with these findings of the trial court in dismissing the Appellant's appeal.

The question is whether the Appellant in his further appeal to this court against the concurrent findings of the two courts below, has shown any valid and strong circumstances to interfere with these concurrent findings of facts. My answer is certainly in the negative. See *Shorumo v. The State* (2010) 12 S.C. (Pt.1) 73 at 102 and *Igwe v. The State* (1932) 9 S.C.114. On the face of overwhelming evidence in support of the concurrent findings of facts of the two Lower Courts and in the absence of any apparent and substantial error on the face of the record of this appeal upon which the findings are based, the said findings not being perverse and there being no miscarriage of justice or special circumstances to justify the reversal of the concurrent findings, I have no option but to uphold the judgments of the two courts below. In this respect, I have found myself in full agreement with my learned brother Okoro JSC in his lead judgment which I have had the privilege of reading earlier that this appeal by the Appellant must be dismissed.

Accordingly I also dismiss the appeal and further affirm the conviction and sentence passed on the Appellant by the trial High Court and affirmed on appeal by the Court of Appeal.

MUNTAKA-COOMASSIE JSC

Having had the advantage of a preview of the lead judgment of my learned Lord John Inyang Okoro, JSC, just delivered. I am in entire agreement with his reasoning and conclusion that this appeal lacks merit; same therefore deserves to be dismissed. However, I wish to chip in a little in support of the lead judgment thus:

Before the High Court of Issele-Uku in Delta State, presided over by Honourable Justice Philome Obanor, Appellant stood charged as follows:

STATEMENT OF OFFENCE: COUNT 1:

Defilement punishable under Section 218 of the Criminal Code Cap. 48, Volume II, Laws of the Defunct Bendel State, 1976, as applicable in Delta State.

PARTICULARS OF OFFENCE:

BONIFACE ADONIKE (M) on or about the 16th day of June, 2010 in Issele-Mkpitime village within the Issele-Uku Judicial Division had carnal knowledge of one Iwebunor Gabriel (f) Aged 5 years without her consent. See page 1 of the record of Appeal.

B The Appellant pleaded not guilty to the charge. At the trial, the prosecution called four (4) witnesses and tendered two (2) exhibits. After the close of the prosecution’s case, the Appellant gave evidence in his defence but called no other witness or witnesses.

C The case against the Appellant is that he had asked a five year old child (girl) to buy pure water for him. The girl (PWI) agreed and bought the pure water for him. On her return Appellant lured her into his room, pulled down her pant and forcefully had carnal knowledge of her.

D The defence of the Appellant was a total denial of the offence charged. At the conclusion of trial, the learned trial judge found the Appellant guilty as charged. He accordingly convicted the Appellant and sentenced him to 6 (six) years imprisonment with hard labour and 6 strokes of the cane.

E Aggrieved by the decision of the learned trial judge Appellant appealed to the Court of Appeal, Benin, that is the Lower Court.

F The Lower Court in a unanimous decision rendered by Tom Shaibu Yakubu, who read the leading judgment and supported by Ogunwumiju and Lokulo-Sodipe (JJCA) dismissed the appeal on the 15th day of March, 2013. See pages 92 to 124 of the record.

G Still dissatisfied with the decision of the Lower Court, appellant lodged two (2) notices of appeal; one dated and filed on 20th March, 2013 (see pages 125-127) of the record and the other dated and filed on 3rd of April, 2013 (pages 128- 13 of the record), both with the 30 days period allowed an aggrieved party to file his notice of appeal against the judgment of the court of Appeal.

H However, in his brief appellant indicated his wish to abandon the first notice of appeal contained on pages 125 to 127 of the record. Appellant also indicated his wish to rely on and make use of the notice of appeal contained on pages 128 to 131 of the record of appeal. In fact it is on the basis of the latter notice that the appellant anchored his brief of argument. This is in order. It is allowed for an appellant to file two or more notices of appeal within the period

allowed or prescribed by relevant status and make an election one of the two or multiple notices and then based his brief of argument on it. See *Tukur v Governor of Gongola State* (1988) 1 NWLR page 68 p.39.

In the second notice of appeal, there are 5 (five) grounds of appeal, thus: B

GROUND 1:

The learned Justices of the Court of Appeal erred in law when they held that the appellant's trial which was commenced outside the time prescribed by the law under which the appellant was arraigned C was a valid trial.

PARTICULARS:

The appellant was tried under the provisions of the Criminal Code of the defunct Bendel State which required the prosecution for offence of defilement to begin within two months after the offence D is committed. The prosecution for the offence began more than two months after the offence was allegedly committed.

The appellant was not tried under the criminal code Law in Delta State which did not prescribe time limit for beginning the prosecution. E

GROUND 2:

The learned Justices of the court of Appeal erred in law when they held that "It had not been demonstrate4d of shown by the appellant that a miscarriage of justice was occasioned by his trial under the provisions of the law under which he was tried and convicted". F

PARTICULARS:

At the trial the appellant objected to his arraignment and trial under the provisions of the criminal code Law of the defunct Bendel State. The respondent applied to amend the charge to bring G the offence under the Criminal code Law of Delta State. The trial court held that the grant of an amendment at that stage during the trial would occasion injustice to the appellant.

GROUND 3:

The learned Justice of the Court of Appeal erred in law when they held that the trial court rightly "admitted into evidence the extra-judicial statement which was said to be made by the appellant in Exhibit B" H

PARTICULARS

The appellant denied being the maker of the statement

The statement was written in English language

The appellant is an illiterate and there is no evidence that the statement was interpreted to him.

GROUND 4:

B The learned Justices of the Court of Appeal erred in law when they held that the medical report in “Exhibit A” was corroborative evidence which connected the appellant with the offence in question and proved the offence against the appellant beyond reasonable
C doubt.

PARTICULARS:

The medical evidence of the PW1 was not corroborated

The medical report in Exhibit A did not go to the identity of the appellant.

GROUND 5:

D The learned Justices of the Court of Appeal erred in law when they held that the contradictions by the prosecution witnesses on the date that the offence was allegedly committed were mere discrepancies.

PARTICULARS:

E The prosecution gave three different dates as the dates on which the offence was committed.

The appellant denied being present at the date on which the offence was allegedly committed.

F The date of the alleged offence is at the root of the offence.

In this court briefs were filed and exchanged by the parties. At the hearing of the appeal parties adopted the said briefs.

Appellant has formulated three (3) issues thus:

G “1) Whether the appellant’s trial and conviction for the offence of defilement, under Section 218 of the Criminal Code Cap. 48 Vol. II Laws of the Defunct Bendel State 1976, as applicable to Delta State, which the respondent began more than two months after the offence was committed, is not a nullity. (Grounds 1 and 2)

H 2) Whether the Lower Court did not wrongly affirm the trial court’s admission of Exhibit B, said to be the appellant’s extra-judicial statement and if the answer is in affirmative; whether the trial court relied on the document to convict the Appellant (Ground 3)

3) Whether the respondent proved the offence of defilement

against the appellant beyond reasonable doubt (Grounds 4 and 5)”

On its part, Respondent formulated the following two (2) issues:

“i. Whether having regards to the state of evidence before the trial court, the court of appeal was right in law when it affirmed the judgment of the trial court? B

ii. Whether the Lower Court erred in law when it affirmed the conviction of the appellant based on section 218 of the Criminal Code Law Cap 21 Law of Delta State?

Having regard to the grounds of appeal, I am inclined to adopt the issues formulated by the appellant. Accordingly I will proceed to consider the merit or otherwise of the appeal by treating the issues formulated by the appellant. C

In issue one, the contention of the appellant is that the appellant was charged under Section 218 of the Criminal Code Cap 48 Vo. II Law of the defunct Bendel State 1976. D

Appellant drew the attention of the court to the provisions of Section 218 aforesaid which states:

“218. Any person who has unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for life, with or without caning. E

Any person who attempts to have unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning. F

A prosecution for either of the offences defined in this section must be begun within two months after the offence is committed.

A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witnesses.”

Based on the above premises, appellant argued that in the circumstance of this case in which the prosecution had alleged that the appellant had unlawful carnal knowledge of PWI, a girl of 5 (five years) on or about the 16th day of June, 2010, prosecution for the alleged offence should have commenced not later than two (2) months after 16th day of June, 2010. H

Appellant has also argued that there is no dispute as to the fact that prosecution in the case began more than two months from or after the date of the incident, i.e. defilement.

Appellant also attacked the judgment of the court below which

affirmed the decision of the High Court on its recourse to Section 218 of the Criminal Code of Delta State, 2008. The High Court had taken judicial notice of the existence of Section 218 of the Criminal Code of Delta State, 2008, which did not prescribe a time limit for the initiation of a Criminal trial for the offence of defilement.

B Secondly, the Lower Court had held (upholding the judgment of the High Court in that regard) that the appellant had not demonstrated how he was misled as a result of recourse to another law this time, the criminal law of Delta State, 2008. But differently that C the appellant had not shown that a miscarriage of justice had been occasioned by a recourse to the provision of Section 218 of Criminal Code, Law of Delta State, 2008 above decision. Appellant attacked the above decision of the court below on the foregoing grounds. What particularly irked the appellant is that the High Court had earlier ruled in his favour when he raised the issue of having been charged D under Section 218 of the Criminal Code Law of Bendel State 1976. When the objection was raised at the trial court, prosecution had sought, unsuccessfully, to amend the charge to read or show that the appellant, who was an accused in that court, was being tried under Section 218 of Criminal Code Law of Bendel State 1976 applicable E to Delta State on the ground that it would be unfair to allow such an amendment.

Respondent did not appeal against the ruling of the trial court in this regard. Appellant had argued that having not appealed F against the ruling of the trial court it is binding on the parties. He placed reliance on the cases of: on

(i) *Kaza v The State* (2008) 7 NWLR part (1085) page 125 at 189

(ii) *Saidu vs Abubakar* (2008) 12 NWLR part (1100) page 201 at 261

G Counsel finally submitted that since the criminal initiation was based upon a non-existing charge the entire proceeding was a nullity. He placed reliance on *Onyegbu v. State* (1995) 4 NWLR part 39 page 570 at 523 and *Moses Okoro v IGP* (1953) WACA 370 which in summary says “since the appellant was arraigned on a non-existent H charge, we took the view that the trial must be regarded as void ab initio” per Foster Sutton P.

The respondent on the other hand, submitted that the court

below was right as it recognized the fact that the learned trial judge appreciated the fact that the appellant was charged under a repealed law but did not close her eyes to the existence of a similar provision in an existing law, that is Section 218 of the Criminal Code Law, Cap C21 Laws of Delta State.

Respondent submitted that the court below was right because it recognized that it could not set aside the decision of the trial court brought under a repealed, moribund law of a state that is defunct, unless it can be shown that the accused, in this case, the appellant, has infact been misled by such effort or a miscarriage of justice has become thereby occasioned. He cited the:

1) Yabugbe v COP (1992) 4 NWLR part 232 page 153 at 176 per Uwais JSC (as he then was) and page 172-H- per Aklata JSC.

2) Section 166 Criminal procedure Law Cap C 22 Laws of Delta State, 2006

Respondent has also argued that the issue involved is not one of jurisdiction. Rather, the issue is whether the conviction is void in view of the fact that the appellant was tried under the repealed law and convicted under an existing law. Still on this point, Respondent has submitted that the submission of the appellant on the limitation clause in the old law seems to be oblivious of the word “as applicable to Delta State” contained in the information after Section 218 of the Law of Bendel State under which the appellant was charged.

Finally on this point counsel submitted that as at the date the appellant committed the alleged offence, the applicable law is Section 218 Criminal Code Law of Delta State and that the cases which the appellant cited represent the principles enunciated by the appellant in his brief are still good law but that they are in applicable to the facts of this case.

From the facts contained in the printed records and the briefs exchanged by the parties, it is common ground that the arraignment and prosecution of the appellant was for the charge of defilement pursuant and contrary to “Section 218 of the Criminal Code Cap.48 Vol. II laws of the Defunct Bendel State 1976”.

That law provides that:

“218. Any person who has unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, und is liable

to imprisonment for life, with or without caning.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without canning.

A prosecution for either of the offences defined in this section must be begun within two months after the offence is committed.

A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witnesses.”

The foregoing provision puts it beyond doubt, that the prosecution of any person accused of having committed the offence of having had unlawful carnal knowledge of a girl under the age of eleven years or attempted to have unlawful carnal knowledge of a girl under the age of eleven years, must begin or commence within two months after the offence has been committed. In the circumstances of this case, where the prosecution alleged that the appellant had an unlawful carnal knowledge of PW1 - a girl aged five years, on or about 16th June, 2010, the prosecution of the appellant ought to have been begun, not later than two months after 16th June, 2010. In other words the prosecution of the appellant was supposed to have begun not later than above 16th August, 2010. The respondent has not contested the fact that the trial of the appellant was begun after the expiration of two months from the commission of the offence of defilement on or about 16th June, 2010. Learned Deputy Director of Public Prosecution, for the respondent, submitted that: “an appellate court cannot set aside the decision of a trial court brought under a repeal (Sic), repealed, moribund law or under the law of state that is defunct as it is in this case, If the conviction was based on an existing law, unless it can be shown that the accused was misled by such error or a miscarriage of justice has been occasioned.”

He relied on Yabugbe v. C.O.P. (Supra) and Section 166 of the Criminal Procedure Law, Cap. C22 Laws of Delta State.

Irrefutably, the appellant was arraigned, tried, convicted and sentenced by the learned trial judge, pursuant to S. 218 of the Criminal Code Cap.48, Laws of the Defunct Bendel State, 1976 as applicable to Delta State. At page 43 lines 15-23 of the record of appeal, the learned trial judge held, to wit:

“In respect of the law under which the accused was charged. I take judicial notice of the Laws of Delta State that came into effect

in 2008. This offence was committed on the 19/6/2010.

I am of the view that no miscarriage of justice has been occasioned by the accused pleading to Section 218 of the Criminal Code of old law. The accused understood the charge against him and he pleaded NOT GUILTY to the charge.”

Learned counsel to the appellant, submitted in respect of the finding of the learned trial judge above, thus: B

“We will not be shy to draw the attention of this honourable court to the laws of Delta state of which the learned trial judge took judicial notice, particularly the criminal code of Delta State, although we humbly note that his Lordship did not specifically mention that said Criminal Code of Delta State. C

Those Laws came into effect on 30th April, 2008 and from that date; the Laws of the Defunct Bendel State ceased to have effect in Delta State. Therefore, at the time the crime was allegedly committed, Criminal Code of Delta State was in force in Delta State. The said Criminal Code of Delta State is to be found in Cap. C21 of the Laws of Delta State and its Section 128 defines the offence of defilement. Notably, unlike Section 218 of the Criminal Code does not prescribe a condition precedent for time, within which the prosecution of the offence should begin.” E

The question whether the court can take judicial notice of the Criminal Code of Delta State, 2008 as it has done in this case appears to me to be the thorny question and turning point in this matter. The point is that if the case is resolved in favour of the appellant, the implication is that it would have been more than two months after the commission of the offence, that the appellant was put to trial. The corollary effect is that there was no law under which the appellant could have been tried and the offence cannot be brought up again. This appears to be the implication of Section 218 of the Criminal Code of Bendel State as it is a provision on limitation of action, that is, prosecution for the offence of defilement. G

I hold the view that the authority of *Yabugbe V. C.O.P. (Supra)* clearly establishes that where an accused person was convicted under a repealed law of a defunct state, but under an existing law, an appellate court cannot set aside such a conviction. H

“I do not agree with learned counsel that the conviction of the appellant is null and void. Section 22 (10) of the 1963 consti-

tution was not breached. The Section states that no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law. The offence for which the appellant was convicted is defined and the penalty therefore is prescribed in a written law. The written law at the time of trial was either the 1959 Law or the 1978 Law. The wording of Section 355 of the 1978 Law is *ipsissimis verbis*.”

His Lordship continued:

“Section 166 of the Criminal Procedure Act states that no error in stating the offence or the particulars required to be stated in the charged (Sic) and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission. I will like to sum up thus: Where an offence known to law is disclosed in a charge and the penalty for the offence is prescribed in a written existing law and charge is erroneously, brought under a wrong section of an existing law under a law which has been repealed or has ceased to exist, and both the accused and his counsel are not misled and no objection is raised to the defective charge, a conviction for the offence disclosed in the charge will not be set aside on appeal if there has been no miscarriage of justice.”

In his own contribution, M. L. Uwais, JSC (as he then was) was emphatic, when he held thus:

“The offence of assault is common, though to a different degree, to both Criminal Code see Sections 351 and 296 respectively. It is, therefore, a fallacy and idle to argue that the appellant was convicted of an offence that was not known to law or that the charge of unlawful assault was based on a non-existent law. It does not matter as to when Cap. 30 came into force. The fact is that the appellant has not shown that there was a time when neither code applied to the area that constitutes Oyo State. Moreover, a conviction under the wrong law is not fatal if there is the provision of another law under which the conviction can stand- See *Falobi V. Falobi* (1976) NWLR 169 at 177 and *Henry Stephens Engineering Ltd v. Complete Home Enterprises Ltd* (1987) 1 NWLR (Pt.47) 400 @ 48 - unless it can be shown that the accused was in fact misled by such error or a miscarriage has been occasioned by the reason of the error- See Section 166 of the Criminal Code Law. Cap.31 Laws of Oyo State.

It is instructive and worthy of note, that Section 166 of the Criminal Code Law, Cap 31 of Oyo State is in pari material with Section 166 of the Criminal Procedure Law Cap.22 Laws of Delta State, 2006. Furthermore, Section 22(10) of the 1963 Constitution, is in pari material with Section 36(12) of the 1999 Constitution of the Federal republic of Nigeria as amended, which provides that, thus: B

36(12)- Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National C Assembly or a Law of State, any legislative or instrument under the provision of the law.”

In the circumstances of this case. In am satisfied that as at the time of the arraignment, trial, conviction and sentence of the appellant in 2010, for the offence of defilement under section 218 D of the Criminal Code Cap. 48 Laws of the defunct Bendel State, 1976, the said law had ceased to exist in Delta State. The extant law in Delta State from 2008 was the Criminal Code Cap. C21 Law 2 of Delta State which defines defilement in its Section 218. It is in pari material with Section 218 of the Criminal Code, Cap. 48 Laws of E the Defunct Bendel State 1976 which was applicable to Delta State, prior to the latter’s Criminal Code, C21 laws of Delta State, 2008.

In effect, as at 2010 when the appellant was arraigned, tried, convicted and sentenced by the learned trial judge under Section F 218 of the Criminal Code, Cap. 48 Laws of the Defunct Bendel State 1976 which had ceased to be in force in Delta State, there was and still in existence, a written law in respect of the offence of defilement defined and a punishment therefore prescribed in Section 218 of the Criminal Code, Cap. C21 Laws of Delta State, 2008. And the G latter prescribed no time limit for the initiation of a criminal trial of an accused person in respect of the offence of defilement.

Furthermore, it has not been demonstrated or shown by the appellant that in fact, a miscarriage of justice was occasioned by the error in charging and trying him under Section 218 of the Criminal H Code, Cap.48 Laws of the defunct Bendel State, 1976. See Yakubu v. C.O.P (Supra).

In this case, not a shred of fact or evidence of miscarriage of justice, however minute, was made out by the appellant who pleaded

not guilty to the charge, and who not only had counsel at the trial court but also participated actively in the trial without mention of miscarriage of justice. Having regard to the foregoing I am inclined to accept the reasons and decision of the court below which has admirably addressed the issue.

B In sum, therefore, I resolve issue one in favour of the respondent and against the appellant.

Arguing issue two, learned counsel to the appellant submitted that since the appellant objected to the admission in evidence of Exhibit B, his extra-judicial statement, which he denied being the maker, the learned trial judge ought not to have admitted it in evidence and relied upon it in convicting him. Appellant's counsel further submitted that since there is no indication in Exhibit B that was unreliable. He relied on *Ahmed v. The State* (1991) 7 NWLR (Pt.612) 641 at 685, where his Lordship Kalgo, JSC, held thus:

D "In my view, a caution statement to be reliable must be recorded in the language of the accused and then translated into the language of the court. If it becomes necessary to record it with English by automatic or direct translation from the language spoken by the accused, then it must be done in the first person singular and not in the form of a reported speech." See *Queen vs Sapele and Ors* (1957) 2 F.S.C. 24: (1957) SCNLR 307.

In effect I hold the view that the trial and conviction of the appellant for the offence of defilement under Section 218 of the Criminal Code Cap. 48 vol. II, Laws of the Defunct Bendel State, 1976 as applicable to Delta State which the respondent began more than two months after the offence was committed is not a nullity. I also hold the view that the trial to the effect confirmed by the court below, to the effect that she could and indeed took judicial notice of the extent law, is good law. This is in view of the fact that there was in existence a provision of the law to cover the offence alleged.

ISSUE 2

This issue has to do with the decision of the court below affirming the position of the High Court which admitted Exhibit B.

On page 13 of his brief, however, appellant said:

H "In the light of the finding by the Lower Court that the trial court did not rely on Exhibit B to convict the appellant, the appellant hereby abandons grounds 3 of the notice of appeal and our issue

two herein. See page 111 lines 11-12 of the record of appeal where the Lower Court held as follows:

“Hence the conviction of the appellant was predicated mainly on Exhibit A and the evidence of PW3 and not Exhibit B”

Since the appellant himself has abandoned issue two, it is useless saying anything on it except to help burry the issue. Issue two is, therefore, deemed abandoned and struck out. B

ISSUE 3

Issue 3 has to do with whether the prosecution has proved the offence of defilement against the appellant beyond reasonable doubt. This issue is said to raise from grounds 4 and 5. C

Appellant has hinged his submission on this issue on lack of absence of corroboration which, according to him, is a statutory requirement. He posited further that the pieces of evidence relied upon by the trial court and which the court below approved was not of the type required to corroborate the evidence of the prosecutrix. According to the appellant, the case of Iko v State (2001) 14 NWLR part 732 page 221 makes it clear that the corroboration required is evidence which confirms in some material particular not only that the crime has been committed but also that the accused committed same. D E

Appellant submitted further that in this case, the evidence which the trial court relied upon and which was affirmed by the Lower Court was the medical report, Exhibit A. that Exhibit A only showed that the prosecutrix had been penetrated without at all mentioning the appellant as the person who caused the penetration. In short, that there is nothing to connect the appellant with either PW3's medical report-Exhibit A of his medical evidence thereon. F

On his part, learned counsel to the respondent, submitted that with the evidence of PW1, PW3 and Exhibit A, the prosecution's case was proved beyond reasonable doubt. He referred to *Pesu v The State* (2011) 193 LRCN 52 at 73-74; *Idowu v. The State* (2000) 12 NWLR (Pt.680) 48 at 88; *Iko v. The State* (2001) 14 NWLR (Pt.732) 21, *Ogunbayo v. The State* (2007) 1 NWLR (Pt.1035) 157. G H

Let me start the consideration of this issue by reiteration the well known position of the law that 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 followings:

(a) That the accused had intercourse with the prosecutrix,
 (b) That the act of sexual intercourse was done without her consent or the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation,

B (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;

C (e). That there was penetration.

I am at one with the court below that the learned trial judge at page 44 of the record of appeal, after a consideration of the pieces of evidence proffered by the prosecution witnesses, particularly the PW1, PW3 and with Exhibit A, the medical report on the Pw1 by the Pw3, the medical doctor who examined the prosecutrix, came

D to the following conclusion, inter alia:

“I am satisfied from all the evidence led most especially the evidence of Pw1 and the medical evidence of the doctor that sexual intercourse had occurred. Penetration has also been proved by evidence of rupture of hymen. Exhibit “A” is the medical Report- a young girl in sad mood with blood stains on the vulva and around the hymen, bruises around the vagina especially posterior. Child also has a waddling gait (swaying walking as in duck) a diagnoses of rape forceful penetration made. The medical report among other things
 E confirmed the bruises and the torn hymen. In this case of outright
 F denial by accused, the evidence of corroboration, I have found in the medical evidence showing injury to PWI’s private part i.e. Exhibit “A” and the testimony of PW3. Prosecution proved the offence of defilement as charged beyond reasonable doubt.”

I, too, have painstakingly perused the pieces of evidence;
 G particularly by the prosecutrix Pw1 and the medical doctor PW3 vis-à-vis Exhibit A. I cannot possibly find any merit in the submission of learned counsel to the appellant that the medical evidence by the pw3 did not connect the appellant with the offence in question. Pw3 did not just give evidence in vacuo. His evidence was in connection with his examination of Pw1 who was represented to him after Pw1
 H was allegedly raped by the appellant. The Pw1 was unshaken in her evidence as to the fact that it was appellant who rape her. She said:

"I know the accused on the date in question the accused asked me to buy pure water when I came backed (Sic) he pulled my pant and put his penis in my yansh." See page 7 of the record.

Therefore, in consideration the evidence of the Pw3, it must be viewed through the prism of the Pw1's evidence with respect to what the appellant did to her. So, in finding corroborative evidence, the independent evidence, such as that of the Pw3, must either connect or tend to connect the accused person with the defilement of the Pw1. B

This court in Iko v. The State (supra) relied upon by both counsel herein, at pages 240-241 of the record of appeal, made the point clearer, when my Lord, Kalgo, JSC, held thus: C

"Corroboration in my understanding simply means confirming or giving support to a person, statement or faith. When then constitute corroboration in law? In R v. Baskerville (1916-17) ALL ER D reprints 38 at 43, Lord Reading CJ define what evidence constitutes corroborative evidence for the purpose of statutory and common law rules when he said:

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

In the circumstances of this case, can it be said that the evidence of Pw3 with Exhibit A, support or confirm the evidence of the Pw1 that she was sexually tempered with and messed up by the appellant? I answer the question in the affirmative. Exhibit A clearly proved penetration, as rightly found by the learned trial judge. I cannot fault any of its findings. I affirm them. F

The next point which I wish to treat before I draw the curtain on this issue is to consider the contention of the appellant's counsel that there were contradictions in the evidence of the prosecution witnesses, particularly in respect of the date of the commission of the offence on the Pw1. The learned trial judge, at page 43-44 of H

the record of appeal found that the piece of evidence by Pw2 that the offence occurred on 20th June, 2012 which she said a Saturday, instead of Sunday, was a discrepancy and did not destroy the credibility of the Pw2. I agree with the well-reasoned opinion of the learned trial judge. The court below also affirmed this.

B I have given very critical consideration to the contention of the appellant on this point but I regret to say that I do not find any power to tamper with the judgment of the court below.

C It is settled law that a material contradiction must go to a material point. That is, to the root of the charge against the accused person. Therefore, where there are differences in the narration of events by prosecution witnesses, especially as to recounting or recollecting the dates of events, which are mere discrepancies that would not avail the accused person, because some of such discrepancies are expected as being natural. See *Golden Dibia & Ors. V. The State* (2007) 3 SCNJ 160 @ 170 & 178; *John Ogbu & Anor v. The State* (2007) 2 SCNJ 319 @ 334 - 335.

D In the end, I resolve issue three in favour of the respondent. Having resolved the issues in this appeal against the appellant, I hold that this appeal lacks merit. I dismiss it. Accordingly, the well considered judgment of OBANOR J., on the Charge No. HCI/10C/2010, delivered on 8th February, 2011, which was affirmed by the court below is further affirmed and confirmed by me.

E “The appellant, a pedophile deserved no less than to be kept out of circulation for a while, so that his pedophile instinct may cool off. He is of dangerous specie and of low moral pedigree. The conduct of the appellant herein is as bad as that of the appellant in *Akindine v. The State* (2012) 16 NWLR (Pt.1326) 318, so I need re-echo what his Lordship, Muhammad J.S.C. said at page 331 of the report, to wit:

G “The facts revealed in this appeal are sordid and can lead to a conclusion that a man can turn into a barbaric animal. When the appellant was alleged to have committed the offence of rape, he was 32 years. His two young victims: Ogechi Kelechi, 8 years old and Chioma Kelechi, 6 years old were, by all standards, under-aged. What did the appellant want to get out of these under-aged girls? Perhaps the appellant forgot that by nature, children, generally are like animals. They follow anyone who offers them food. That was

why the appellant, tactfully induced the young girls with ice cream and zobo drinks in order to transfer his hidden criminal intention to reality, damning the consequences. Honestly, for an adult man like the appellant to have carnal knowledge of under aged girls such as appellant's victim is very callous and animalistic. It is against God and the state. Such small (under-aged) girls and indeed all females of acts of age need to be protected against callous acts of criminal minded people of the appellant's class. I wish the punishment was heavier so as to serve as deterrent."

I also lend my voice to this very important pronouncement especially against the backdrop of then rise in rape cases nowadays. Lucky appellant, who has not appealed against the sentence! Had the trial judge and indeed the court below, by chance sentenced the Accused/Appellant to death or life imprisonment I would have kept mum.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment of my learned brother, OKORO, JSC and I agree with his lordship that there is no merit in the appeal.

The learned trial judge found that on the 16th day of June, 2010 the appellant lured the 1st PW (a 5 years old girl) into his room and had canal knowledge of her. On these facts the learned trial judge found the appellant guilty under Section 218 of the Criminal Code of Delta State.

Section 218 supra creates the offence of Defilement of a Girl under the age of 11 years. To succeed the prosecution must prove beyond reasonable doubt:

(a) that the accused/appellant had sex with the child who was under the age of 11 years.

(b) that there was penetration into the vault of the virginal

(c) the evidence of the child must be corroborated.

The evidence for defilement is the same as in rape expect that for defilement it is immaterial whether the act was done with or without the consent of the child. This is the well laid down position of the law, that a girl under the age of 11 is a child and so is not capable to consenting to sex. The court would hold that she did not

consent even if she did consent. A child cannot consent to sex, that is the position of the law.

Exhibit A is the Medical Report while PW5 is the Medical Doctor who examined the child, (PW1), prepared exhibit A and gave evidence in court. PW1 (the child) gave evidence, that on the 16th day of June 2010 the appellant lured her into his room and forcibly had sex with her.

Was this evidence corroborated?

When a child gives evidence and says that the accused/appellant had sex with her the court cannot convict the accused/appellant on the uncorroborated testimony of the child alone. The evidence given by the child must be corroborated. Corroboration is independent evidence that confirms or makes more certain the testimony of the child. Admission by the accused person that he committed the offence may amount to corroboration. See

State v. Essien (1974) 4 University of Ife L.R.P. 127

Circumstantial evidence, Medical evidence may also amount to corroboration. The evidence given by the child (PW1) that the appellant forcibly had sex with her was corroborated by the evidence of PW5 and Exhibit A, the Medical Report which showed injury to the private part of the child. That together with the positive identification of the appellant by the child (PW1) that it was he who lured her into his room and had sex with her is conclusive that the evidence of the child was corroborated.

The court would be satisfied that there was penetration even if the hymen was not ruptured or if there was no emission of semen. The slightest penetration is sufficient to conclude that there was penetration.

Exhibit A which shows that there was injury to the private part of a 5 years old girl is conclusive evidence that the injury was a result of repeated thrusts by the appellant's penis.

Finally the fact that the prosecutrix was 5 years old, well under 11 years was never an issue. It is thus clear that the PW1 was a child of 5 years old. Before a verdict of guilty in a criminal charge is pronounced the court must be satisfied of the guilt of the accused person beyond reasonable doubt. Proof beyond reasonable doubt was explained by Lord Denning J (as he then was) in *Miller v. Minister of Pension* 1947 2 ALL E.R. p.372 and adopted by this court in *Lori*

& Anor v. State (1980) 12 NSCC p.269.

His Lordship said that Proof beyond reasonable doubt: “does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted of fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt but not short of that will suffice.” B

The offence of defilement is complete when the court is satisfied that the person defiled was under the age of 11 at the time the appellant committed the act. There was penetration of the child’s private part by the penis of the appellant, and the evidence of the child was corroborated by independent evidence. The case against the appellant has been proved beyond reasonable doubt. C D

The Supreme Court will rarely upset the findings of fact made by the trial court and affirmed by the Court of Appeal.

This is so because such findings were arrived at after cross-examination, observation of the witnesses by the trial judge. Such concurrent findings of the two courts below ought to carry much weight in an appeal court which did not have the opportunity or advantage of the trial court. But this court will not hesitate to set aside concurrent findings by the Lower Courts if satisfied: E

(a) that the findings of fact are perverse or cannot be supported by the evidence led in the trial court; F

(b) that the findings of fact amount to a travesty of justice if not corrected;

(c) that the findings if left uncorrected amount to a miscarriage of justice or violation of some principle of law or procedure. G

See: R-Benkay Nig. Ltd v. Cadbury Nig Plc (2012) 3 SC (Pt. iii) p.169

Military Gov. of Lagos State & 4 Ors v. Adeyiga & 6 Ors (2012) 2 SC (pt.i) p.68.

ACN v. Lamido & 4 Ors (2013) 2 SC (Pt.ii) p.163 H

The trial court found as a fact that on the 16th day of June 2010 the appellant asked the prosecutrix, a child of 5 years old to buy a sachet of water for him (in local parlance pure water). When the child returned with the sachet of water, he lured her into his room and

forcibly had sex with her. These facts were affirmed by the Court of Appeal. They are concurrent findings of fact of the two courts below, now before this court.

My Lords, the appellant has been unable to show that concurrent findings of fact are untrue or perverse, or cannot be supported by evidence led, or that the findings if left as they are would lead to miscarriage of justice. Rather concurrent findings of fact are compelling and true since the prosecutrix positively identified the appellant as the person who defiled her, an assertion supported by the testimony of the Medical Doctor who examined her and tendered a Medical Report which was consistent with the testimony of the prosecutrix.

I am firmly of the view that this is a conclusion to which both courts below were entitled to come and I see no reason whatsoever to hold that their findings were wrong.

For this, and the more detailed reasoning in the leading judgment the appeal is dismissed.

NGWUTA JSC

I read in draft the lead judgment just delivered by my learned brother, Okoro, JSC.

On the totality of the evidence before it, the trial Court was satisfied that the appellant committed the offence with which he was charged and tried. The decision of the trial Court was affirmed by the Court of Appeal.

Appellant did not prove any perversity in the concurrent finding of facts of the two Courts below and ipso facto there is no miscarriage of justice. In the circumstances, this Court cannot disturb the said findings. See *Balogun v. Agboola* (1974) 1 All NLR (Pt.11) 66, *Chikwendu v. Mbamali* (1980) 3-4 SC 31, *Ibodo v. Enarofia* (1980) 5-7 SC 42.

Appellant cannot escape the consequences of his crime against an infant by resort to technicality. The appellant was convicted of an offence known to law. The issues raised by the appellant are within the ambit of the provision of s.166 of the Criminal Procedure Act. And moreover, the appellant cannot say he was misled at any stage in the proceeding.

For the above and the fuller reasons in the lead judgment,

I also dismiss the appeal for lack of merit. The judgment of the
Court of Appeal is affirmed.
Appeal dismissed.

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