

SUPREME COURT OF NIGERIA
FRIDAY 10TH JUNE, 2016. SC. 842/2014
CORAM:- S. GALADIMA, O. RHODES-VIVOUR,
N. S. NGWUTA, M. D. MUHAMMAD, J. I. OKORO, JJSC

AFORLUCKY APPELLANT
V.
THE STATE RESPONDENT

RAPE - Consent - The purported consent relied on by appellant cannot avail him - As there is no evidence of such - That could bring PW1 within the exception in Criminal Code Law s. 30 (H1)

ALIBI - Defence - Condition - Plea of alibi must be unequivocal - As appellant must state the time, place and people with him at the material time - To enable the police verify same (H2)

RAPE - Corroboration - As there is proof of forceful penetration - Evidence of PW3 corroborated that of PW1 that the latter was raped - Within the intendment of Criminal Code Law s. 357 (H3)

RAPE - Proof - Failure of defence of alibi set up by appellant - Leads to the conclusion that he was at the crime scene - And had raped the prosecutrix (H4)

COURTS - Documents - Consideration of - While court is bound to consider all relevant and material exhibits - In arriving at its judgment - The same does not apply to every document in its file (H5)

RAPE - Conviction - Uncorroborated evidence - Accused can be convicted upon such evidence of prosecutrix - Provided court warned itself and is satisfied with truth of the evidence (H6)

APPEALS - Court's remark - Weight - Appellant's counsel erroneously interpreted the comment made by CA - As the same is an aside and was not the basis of its judgment (H7)

RAPE - Conviction - Sentence - Once court convicts accused for

rape as defined in CC s. 357 - It has no discretion but is bound to obey the law - By imposing a term of imprisonment for life (H8)

APPEALS - Sentence - Binding nature of - Appellate court cannot disturb sentence imposed - Unless there is an appeal against the sentence (H9)

FACTS

Accused/appellant was arraigned before the High Court of Delta State on one count charge of rape punishable under Section 358 of the Criminal Code Cap C 21 vol. 1 Laws of Delta State of Nigeria, 2006. Appellant pleaded not guilty to the charge. The case against appellant is that he had carnal knowledge of one Iruoghene Ogoto – PW1 without her consent. PW1 gave evidence that appellant raped her. Her evidence was corroborated by the medical doctor – PW3 who examined her after the incident.

Appellant's defence is that he was somewhere else at the time of the commission of the crime. Hence, he could not have been involved in the commission of the crime. Appellant however was not able to justify his defence of alibi at the trial. At the end of the trial, the court believed the evidence of prosecution witnesses that the offence of rape has been established beyond reasonable doubt against appellant. Appellant was therefore convicted and sentenced to five years imprisonment with an option of fine of N300,000.00. Aggrieved, appellant appealed to the Court of Appeal Benin Division. The court dismissed the appeal and upheld the judgment of the trial court. Aggrieved further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right to have held that Counsel for the appellant conceded that rape was committed.

2. Whether the Court of Appeal did not speculate when it held that the appellant had sexual intercourse with the prosecutrix (PW1).

3. Whether in the circumstances of this case the Court of Appeal was right in holding that the defence of alibi was not open to the appellant.

4. Whether the evidence of PW3 (Medical Doctor) can in the circumstances of the case amount to corroboration.

5. Whether allocution amounts to admission of guilty."

HELD (Unanimously dismissing the appeal per

NGWUTA JSC)

RAPE - Consent

1. Section 30 of the Criminal Code Law Cap C21 Laws of Delta State provides, inter alia:

“S.30 A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.”

The above provision shows that the PW1 who was 11 years old as at the time of the act on 7/4/2012 could not have been held criminally responsible for an act or omission. It follows that the PW1 could not have done anything to decriminalize an otherwise criminal act done to, or with her, on 7/4/2012.

At the material time she was doli incapax and contrary to the argument of learned Counsel for the appellant, the PW1 could not have given a consent which in law she did not possess. The purported consent on which the appellant’s Counsel relied to disprove rape cannot avail him, there being no evidence of such precocity that could bring the PW1 within the exception in Section 30 of the Criminal Code Law.

In the circumstances, I agree with the Court below that learned Counsel for the appellant conceded that rape was committed as the consent on which he relied to argue that the intercourse was consensual had crumbled. I resolve issue one against the appellant. (p. 2868 A)

ALIBI - Defence - Condition

2. Alibi ought to be raised by the accused himself. Witnesses in their statements/evidence could do no more than the accused’s evidence in relation to the facts he stated both in his statement to the Police and evidence in Court. Statements/evidence of DW1 and DW2 could not have supported the claim of the appellant as to his whereabouts at 4pm on 7/4/2012.

“Eventually” does not relate to any specific time. Appellant said he returned to take his meal at 12:45 pm. There is no way he could have worked with DW2 between 12noon to 1pm until 7pm as claimed by DW2.

To sustain the plea of alibi as a defence in criminal proceedings, it must be unequivocal and made during investigation. The time and place and the people with the accused at the material time must be stated to enable the police verify same.

Though proof of alibi is on the balance of probabilities the accused relying on same must give particulars of the place he was and the time he was there and the name of another person who can testify that he was there at the material time.

The offence was committed at 4 pm on 7/4/2012 at the house of the appellant’s mother. Appellant swore that he worked with his boss, DW2, till 7pm on 7/4/2012. DW2 confirmed that the appellant worked with him till 7pm on 7/4/2012. However, appellant failed to state when he left his mother’s house to work with his boss, DW2. Appellant claimed he returned to his mother’s house by 12:45pm to eat his lunch. Yet, DW2 claimed that “we began to work from between 12.00 noon to 1.00 pm until 7 pm.” This cannot be correct.

Appellant returned to his mother’s house about 12:45 pm, ate his lunch and “eventually” went to work with DW1 till 7pm. He did not state the time he left the house. The time he left the house is the crucial missing link in his chain of evidence in proof of his plea of alibi. The Court below did not speculate when it held that defence of alibi failed. I resolve issues 2 and 3 against the appellant. (p. 2870 F)

RAPE - Corroboration

3. The legal principle in respect of the offence of rape is that corroboration is evidence or pieces of evidence tending to show that the story of the prosecutrix that the accused raped her is true. Corroboration need not be direct evidence that the accused committed the offence charged. It need not amount to a confirmation of the whole account given by the prosecutrix. However, it must be completely credible evidence which

corroborates the prosecutrix's evidence in some aspect material to the charge.

It is my view; therefore, that the tearing of the hymen and the injury to the vaginal wall of the PW1 are not only consistent with forceful penile penetration of the PW1's vagina but also exclude other causes such as the riding of a bicycle. The evidence of the PW3 sufficiently corroborated the evidence of the PW1 that she was raped within the meaning and intentment of Section 357 of the Criminal Code Law Cap C21 Laws of Delta State of Nigeria 2008. In other words, the evidence of PW3 corroborated the evidence of the PW1 that she was raped. (pp. 2871 H/2872 H)

RAPE - Proof

4. In the case at hand, while there is ample corroborative evidence that the PW1 was raped there is no direct evidence, in my view, corroborating the evidence of the PW1 that it was the appellant who raped her. However, in his defence appellant set up a defence of alibi which was exhaustively considered and in my view rightly rejected by the two Courts below. I dealt with the appellant's plea of alibi in the resolution of issue 3 in the appellant's brief.

It is not helpful to have a repeat performance. Suffice it to say that the two Courts below rightly held that the appellant failed to substantiate the plea on the balance of probabilities. In the particular circumstances of this case, the plea of alibi set up by the appellant is a two-edged sword, as it were.

It could avail the appellant and ipso facto destroy the prosecutrix's case against him. On the other hand, it could crumble, and on the facts as I appreciate them corroborate the prosecutrix's case that about 4 pm on the 7th day of April, 2012 the appellant was at the locus criminis and violated her. If the plea had been sustained it would have meant that the appellant was somewhere other than the scene of crime and as he could not have been capable of being in two different places simultaneously, he could not have violated the PW1.

On the other hand, the fact that the appellant, by his

evidence and the evidence of his witnesses could not prove on the balance of probabilities that he was somewhere else and not at the scene of crime by 4 pm on 7/4/2012, a fact upon which he rested his case that he did not commit the offence, the reverse is the case, that he was at the scene at the material time and committed the offence as claimed by the PW1. The high watermark of the defence of the appellant that about 4 pm on 7/4/2012 he was somewhere other than at the scene of crime has become his undoing.

In my humble view, the failure of his plea of alibi on the facts of this case, leads to one inevitable conclusion that the appellant was at the scene of crime and had raped the PW1. The corroborative evidence could come from either side of the divide. In my view, there is corroborative evidence, not only that the PW1 was raped but also that it was the appellant who raped her. (p. 2874 C)

Documents - Consideration of

5. A Court's record is composed of various documents such as the statements of prospective witnesses in criminal cases, sworn declarations of witnesses and pleadings in civil cases. When any of the documents is lifted from the file and tendered and received in evidence it becomes an exhibit in the case.

An exhibit is defined, inter alia, as a document, record or other tangible object formally introduced as evidence in Court. See Black's Law Dictionary 8th Edition page 614. While a Court is bound to consider all relevant and material exhibits in arriving at its judgment, the same does not apply to every document in the Court's file.

The makers of the medical report and the Police investigation report testified in Court in line with their prepared documents. It was not necessary to tender the documents in evidence unless the counsel for the appellant needed them to impeach the credit of their authors. Having failed to tender the documents in evidence, learned Counsel for the appellant cannot be heard to complain that the Court did not consider the documents. The documents were not exhibits before the Court below and the invitation to this Court to consider them

has no legal or procedural basis. (p. 2875 F)

RAPE - Conviction - Uncorroborated evidence

6. In any case, it is not a rule of law but one of practice that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix. In such a case, the trial Court is required to warn itself that it is unsafe to convict on the uncorroborated evidence of the prosecutrix and could convict after paying due attention to the warning if it is satisfied with the truth of her evidence. B

So even without the evidence of the PW3 and the failed alibi of the appellant, the Court, having believed the evidence of the PW1, could have rightly convicted the appellant after warning itself that it is unsafe to convict on the uncorroborated evidence of the PW1. Issue 4 is resolved against the appellant. (p. 2876 C) C D

APPEALS - Court's remark - Weight

7. Learned Counsel for the appellant appears to have interpreted the comment made by the Lower Court in the plea of allocutus to mean that the Court held that the appellant at that stage changed his plea of not guilty to that of guilty. This is erroneous. Whatever impression learned Counsel for the appellant gathered from the Court's comment, the fact remains that under our law of criminal procedure an accused person cannot plead or change his plea by proxy. The plea is that of the accused, not that of his counsel. See Section 215 of the Criminal Procedure Law of Delta State (supra). E F

While learned Counsel may enter a plea in mitigation for his client who has been convicted of a criminal offence prior to sentencing, a plea or change of plea remain the prerogative of the accused person. G

Before the Court below made its reference to learned Counsel's plea in mitigation of sentence, the Court had already concluded that the prosecution proved its case against the appellant beyond reasonable doubt. It follows that contrary to the learned Counsel's argument the comment is an aside and was not the basis of the Lower Court's judgment. H

Though I am constrained to resolve the issue in favour of the appellant, the effect is a pyrrhic victory which in reality confers no benefit to the appellant. The issue is based on erroneous interpretation of the comment of the Lower Court. It was taken out of context. (p. 2877 B)

B

RAPE - Conviction - Sentence

8. The sentence imposed by the trial Court is not only a contradiction in terms of the Court's stated intention to rid his jurisdiction of the offences of rape and defilement, but a contemptuous and contumacious departure or derogation from, as well as a violation of the provisions of Section 358 of the Criminal Code (supra) under which the appellant was convicted. The mandatory provision reads:

C

"S.358: Any person who commits the offence of rape is liable to imprisonment for life."

D

Once the Court convicts an accused person for the offence of rape as defined in Section 357 of the Code, it has no discretion but is bound to obey the law by imposing a term of imprisonment for life. His Lordship did not state the source of his authority to rewrite the Criminal Code of Delta State by imposing a term of five years imprisonment with hard labour and an option of fine of three hundred thousand naira in place of the mandatory imprisonment for life prescribed in the Section pursuant to which the appellant was tried and convicted.

E

Rather than achieve the purpose set out in the preamble to the judgment, the sentence imposed is an invitation for defilement and rape within His Lordship's jurisdiction.

F

(p. 2878 C)

APPEALS - Sentence - Binding nature of

9. I was tempted to revisit the sentence in this case but that would have violated the principle that appellate Court cannot disturb a sentence imposed unless there is an appeal against the sentence. A violation of that principle would be as much as wrong as the punishment imposed on the appellant and there is a truism that two wrongs do not make one right.

G

In the case at hand appellant killed something in the

psyche in the life of PW1, leaving the poor girl devastated and with a permanent scar for life. The principle of inviolability of a sentence not appealed against which I am duty bound to apply herein most regrettably and painfully appears to give credence to the saying that the law is an ass. May be the asinine attribute is not inherent in the law but in the application of its provision as amply demonstrated in this case. B
(p. 2879 D)

NOTABLE POINTS OF INTEREST

NGWUTA JSC

1. Judgment – Allocutus – Meaning of

Allocutus is a plea in mitigation of the punishment richly deserved by appellant for the offence with which he was charged and for which he was tried and found guilty and convicted accordingly. (p. 2877 B) D

OKORO JSC

2. Rape – Proof – Ingredients of

The essential ingredients of the offence of rape which the prosecutrix must prove include the following: E

- (1) That the accused had sexual intercourse with the prosecutrix.
- (2) That the act of sexual intercourse was done without the consent or that the consent (if any) was obtained by fraud, force, F threat, intimidation, deceit or impersonation.
- (3) That the prosecutrix was not the wife of the accused.
- (4) That the accused had the means rea, the intention to have sexual intercourse with the Prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix con- G sented or not.
- (5) That there was penetration. (p. 2884 D)

REPRESENTATION

Ikhide Ehighelua with him, A. E. Alagun, for the Appellant H
Peter Mrakpo (A.G. Delta State) with him, O. F. Enenmo and C. O. Agbogun, for the Respondent

CASES REFERRED TO

- Ogundiyan v. State (1991) 3 NWLR (pt. 181) 519
State v. Gwonto (1983) All NLR 109
Azeez v. State (2005) 8 NWLR (pt. 927) 31
Hamza v. Kure (2010) 10 NWLR (pt. 1203) 630
B Dose v. State (2011) 3 NWLR (pt. 1324) 393
Iko v. State (2001) 14 NWLR (pt. 732) 195
Ogunbayo v. State (2007) 8 NWLR (pt. 1035) 157
Ogunzee v. State (1998) 58 LRCN 3512
Edumare v. State (1996) 3 NWLR (pt. 38) 530
C Posu v. State (2011) Vol. 193 LRCN 52
Jegade v. State (2003) 3 ACLR 84
Okosun v. A-G Bendel State (1985) 3 NWLR (pt. 12) 283
Adekunle v. State (1989) 5 NWLR (pt. 123) 505

D

STATUTES REFERRED TO

- Criminal Code Cap C 21 vol. 1 Laws of Delta State 2006, ss. 30, 357, 358
Criminal Procedure Law of Delta State, s. 215
E Evidence Act 2011, s. 135

LEAD JUDGMENT BY NGWUTA JSC

The one count information laid against the appellant reads:

“Statement of Offence:

- F Rape punishable under Section 358 of the Criminal Code Cap
C 21 Vol 1 Laws of Delta State of Nigeria, 2006.

Particulars of Offence:

- Afor Lucky (m) on or about the 7th day of April, 2012 at Oleh
G in Oleh Judicial Division had carnal knowledge of one Iruoghene
Ogodo without her consent.

- Appellant was tried and convicted as charged in the High Court
of Delta State, in the Oleh Judicial Division sitting at Oleh. After the
appellant was convicted by the trial Court, his learned counsel, S. O.
H Obaro, Esq., in allocutus pleaded, inter alia:

“...The accused is truly repentant of the offence and has vowed
never to find himself in this situation again...”

The learned trial Judge sentenced the appellant, thus:

“...this accused person is sentenced to a term of imprisonment

of five (5) years with hard labour or with an option of fine of three hundred thousand (N300, 000.00). ”

Appellant appealed to the Court of Appeal, Benin Judicial Division sitting at Benin City. The Court below dismissed the appeal on 17th November, 2014. Appellant appealed to this Court on six grounds of appeal. Though it was indicated that further/additional B Grounds of Appeal may be filed, upon the receipt of the record of the Lower Court, there is no evidence that additional grounds were filed.

From the six Grounds of Appeal, learned Counsel for the Appellant formulated these five issues for determination: C

“1. Whether the Court of Appeal was right to have held that Counsel for the appellant conceded that rape was committed. (Ground 1)

2. Whether the Court of Appeal did not speculate when it held that the appellant had sexual intercourse with the prosecutrix (PW1). (Ground 2) D

3. Whether in the circumstances of this case the Court of Appeal was right in holding that the defence of alibi was not open to the appellant. (Ground 3) E

4. Whether the evidence of PW3 (Medical Doctor) can in the circumstances of the case amount to corroboration. (Ground 4)

5. Whether allocution amounts to admission of guilty.”

In Paragraph 3.0 of his brief of argument headed “Issues for Determination”, learned Counsel for the Respondent said: F

“It is respectfully submitted that having regard to the judgment appealed against and the eight grounds of appeal filed by the appellant, one issue arise for the determination of this appeal.”

This was followed by “issue 1” which reads: G

“Whether having regard to the state of evidence on record the Lower Court was right when it held that the prosecution proved the offence of rape against the appellant beyond reasonable doubt.”

At page 128 of the record, learned Counsel for the appellant indicated that “Further/Additional grounds of appeal may be filed by the appellant upon the receipt of the records of the Lower Court.” Appellant received the records of the Lower Court and as stated earlier in the judgment no “further/additional grounds of appeal” were filed. H

May be that the learned Counsel for the Respondent erroneously attributed additional two grounds of appeal to the appellant.

Issue one in the appellant's brief is:

"Whether the Court of Appeal was right to have held that Counsel for the appellant conceded that rape was committed (Ground 1)." B

Arguing the said issue 1, learned Counsel for the appellant reproduced a portion of the judgment of the Court below where it was held that:

"Learned Counsel for the appellant conceded to the fact that from the fact as adduced in the Lower Court it is clear that rape had been committed." C

In juxtaposition of the above with the argument of learned Counsel for the appellant at page 71 of the record of the Court below that: D

"From the circumstances of this case, it is highly difficult to draw the conclusion that PW1 was raped, by the appellant and that assuming but without so conceding that there was penetration, the prosecution did not prove that it was done without the consent of the PW1." E

He submitted that the Lower Court was wrong to have drawn the conclusion that the Counsel for the appellant had conceded that the PW1 or complainant had been raped.

Learned Counsel argued that the wrong interpretation by the Lower Court of the submission of learned counsel led to a perverse decision by the Lower Court which in turn occasioned a serious miscarriage of justice. He referred to the Blacks Law Dictionary 6th Edition at page 289 for the definition of the word "concession". F

He argued that putting forward alternative argument by Counsel cannot amount to making concession on the facts. Learned Counsel referred to *Ogundiyan v. State* (1991) 3 NWLR (Pt. 181) 519; *The State v. Gwonto* (1983) All NLR 109; *Nima v. Zawa Native Authority* (1963) NWLR 97 at 92 and *Damma v. State* (1995) 8 NWLR (Pt.415) 546 and urged the Court to hold that the conclusion of the Court below on the submission of learned Counsel for the appellant led to a failure of justice. G H

Issues 2 and 3 argued together are:

"Issue 2: Whether the Court of Appeal did not speculate when

it held that the appellant had sexual intercourse with the prosecutrix (PW1) (Ground 2), and

(3) Whether in the circumstances of this case the Court of Appeal was right in holding that the defence of alibi was not open to the appellant (Ground 5). ”

Learned Counsel for the appellant impugned the judgment of the Court below that the appellant raped the prosecutrix. He argued further that the Court of Appeal erred in its decision that the defence of alibi did not avail the appellant. Counsel contended that the prosecutrix was never raped and that the appellant had shown that he was at a different location at the time of the alleged offence. He referred to the evidence and argued that the rape allegedly committed on 7/4/2012 was not disclosed until 9/4/2012 and that there was no evidence that the blood coming out of the private part of the PW1 was due to rape or puberty (menstrual cycle).

He referred to, and relied, on appellant’s extra judicial statement to the police and his testimony in Court and argued that the appellant maintained that he did not commit the offence on 7/4/2014 as alleged or on any other date. He contended that the conviction and sentence affirmed by the Court below were based on wrong principles of law. He impugned the decision of the Court below that the appellant did not prove his defence of alibi emphasising the assertion of the appellant that he “eventually went to work with his boss...”

He relied on the defence evidence that the appellant was not at the scene of the alleged crime at 4.00 pm on 7/4/2012. He relied specifically on the evidence of DW1 to the effect, inter alia, that “*While we were working the accused person was me throughout the day.*”

He relied on *Azeez v. The State* (2005) 8 NWLR (pt. 927) 31, (2006) All FWLR (pt. 337) 485, among others, in his submission that alibi is proved on a balance of probabilities and not beyond reasonable doubt. He said that the evidence led on behalf of the defence shows that the IPO drove away both PW1 and PW2 who would have substantiated the plea of the appellant, resulting to the defence of alibi not being investigated. He relied on the dictum of Nnaemeka-Agu, JSC in *Ogoala v. The State* (1991) 2 NWLR (Pt. 175) 509 in his contention that the Court below was in error to have concluded that the appellant did not show precisely where he was at 4.00 pm on 7/

4/2012. He showed that there is perversity in the concurrent findings of the two Courts below and urged the Court to set aside the judgment of the trial Court as affirmed by the Court below.

He relied on *Hamza v. Kure* (2010) 10 NWLR (Pt. 1203) 630 for the meaning of perverse finding. He urged the Court to resolve B issues 2 and 3 in favour of the appellant.

Issue 4 is whether or not the evidence of PW3 (Medical Doctor) can in the circumstances of the case amount to corroboration (Ground 4).

Arguing the issue learned Counsel said that Courts are warned C not to convict in case of rape on uncorroborated evidence of the prosecutrix. He relied on the dictum of Adekeye, JSC in *Dose v. The State* (2011) 3 NWLR (pt. 1324) 393 as well as the cases of *Iko v. The State* (2001) 14 NWLR (pt. 732) 195 and *Ogunbayo v. The State* (2007) 8 NWLR (Pt. 1035) 157 on the desirability of corroboration of the evidence of the prosecutrix in offences of sexual character. D

He referred to the evidence of PW1 and PW3 and argued that there is no independent evidence pointing to the appellant as the E one who committed the alleged offence. He called the authenticity of the Medical Report in issue, saying that PW3 said he saw and examined the PW1 on 10/4/2012 whereas the medical report indicates the examination was conducted on 9/4/2012.

Counsel said that the PW3, claimed that the PW1 came to the F hospital on 9/4/2012 and was discharged on 15/4/2012 whereas the statement to the Police was made on 12/4/2012 and IPO never said she got the statement of the PW1 on her hospital bed on 12/4/2012. He referred to the cross-examination of the PW3 and reminded the G Court that the witness said that the rupture of the hymen could have been caused by other causes and never identified the appellant as the person who ruptured the hymen of the PW1.

He contended that the evidence of PW3 cannot corroborate the evidence of the alleged victim, PW1. He urged the Court to re- H solve the issue in favour of the appellant.

Issue 5 is whether allocutus amounts to admission of guilt (Ground 5).

Learned Counsel argued that the Court of Appeal erred in relying on the allocutus made by Counsel for the appellant in the trial

Court to reach the conclusion that the appellant actually committed the offence with which he was charged. He reminded the Court that allocutus was that of the Counsel for the appellant and not that of the appellant. In reliance on *State v. John* (2013) 12 NWLR (pt. 1368) 337 he argued that allocutus comes after the finding of guilt and not before the judgment is read. B

He argued that it was a serious error to equate allocutus with a confession of guilt. He urged the Court to resolve the issue in favour of the appellant.

Finally, he urged the Court to allow the appeal for the following reasons: C

(a) Counsel for the appellant never conceded that there was a rape committed.

(b) The Court of Appeal based its decision on speculation.

(c) The defence of alibi was perfectly open to the appellant D and he ought not to have been convicted.

(d) The offence charged being the offence of rape there was no evidence to corroborate the evidence of PW1 prosecutrix.

(e) A plea of allocutus does not amount to an admission of guilt. E

The lone issue formulated by learned Counsel for the Respondent reads once more, permit me:

“Whether having regard to the State of evidence on record, the Lower Court was right when it held that the prosecution proved the offence of rape against the appellant beyond reasonable doubt.” F

Arguing the issue, learned Counsel for the Respondent submitted that having regard to the evidence on record, the Court below was right when it affirmed the finding of the trial Court that the prosecution proved the case of rape against the appellant beyond G reasonable doubt as required by law. He referred to Section 135 of the Evidence Act, 2011.

Learned Counsel relied on *Ogunzee v. The State* (1998) 58 LRCN 3512 at 3551, *Edumare v. The State* (1996) 3 NWLR (pt. 38) 530 at 531 for the interpretation of proof beyond reasonable doubt H to the effect that the prosecution must lead credible evidence to prove the ingredients of the offence charged. He said that evidential proof is either by:

(1) Credible evidence of witnesses.

- (2) Circumstantial evidence, or
- (3) By admission and confessions of the accused person.

He stated that in the case of rape, the prosecution has a duty to prove beyond reasonable doubt that:

- (a) the accused had intercourse with the prosecutrix;
- B (b) the act of sexual intercourse was done without the consent of the prosecutrix or the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;
- (c) the accused had the mens rea, the intention to have sexual
- C intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not, and
- (d) there was penetration.

He relied on the following cases: *Posu v. The State* (2011) Vol. D 193 LRCN page 52 at 73 para 74, *Jegede v. State* (2003) 3 ACLR 84 and *Iko v. State* (2003) 3 ACLR 49.

Learned Counsel referred to, and relied on, the evidence of PW1, PW2, PW3 and PW4 in his contention that the case against the appellant was proved beyond reasonable doubt. He said that the E evidence of PW1 established the fact of penetration and that the evidence of PW3 corroborated the evidence of PW1 that she was defiled.

He said that the evidence of PW4 corroborated the evidence F that the PW1 when she was brought to the Police Station, was bleeding from her vagina. Counsel argued that the facts of defilement of the PW1 were not contested by the appellant.

On the defence of alibi raised by the appellant, Counsel referred to a portion of the judgment of the trial Court to the effect that G the Court watched the PW1 give evidence, watched her demeanour, considered the evidence and came to the conclusion that the accused person and no one else raped the PW1 in this case.

He submitted that the prosecution discharged the burden of proof and the evidential burden shifted to the appellant. He H tended that contrary to the plea of the appellant that he was not at the scene of crime at the material time the prosecution led credible evidence pinning the appellant to the scene of crime on the day and time the crime was committed.

Relying on *Okosun v. Attorney General Bendel State* (1985) 3

NWLR (Pt.12) 283, Adekunle v. The State (1989) 5 NWLR (Pt.123) 505, learned Counsel argued that the mere fact that appellant put up a defence of alibi which he claimed was not investigated will not lead the Court to ignore stronger and credible evidence of witness to the effect that the defence of alibi was not available to the appellant.

He referred specifically to the conclusion drawn by the Court below that appellant gave *“a hazy and nebulous account of where he actually was during those crucial hours when the incident occurred...”* Learned Counsel stated that for the defence of alibi to avail an accused person he must raise the defence at the earliest opportunity in his extra judicial statement to the police to enable the police to investigate the plea; he must be specific as to where he was at the time of the offence.

He added that where the accused is pinned to the scene at the time of the crime the accused must lead evidence of those who were with him at the time the offence was committed and that if the Court believes the evidence of the prosecution putting the accused at the scene at the time of the offence, the plea of alibi is destroyed. He relied on Esangbode v. The State (1989) 4 NWLR (Pt.13) 57, Balogun v. A.G Ogun State (2002) 6 NWLR (Pt.4) 14.

He referred to the extra-judicial statement of the appellant and argued that the appellant did not state where he was at 4.00 pm when the offence was committed, nor did he mention the people who were with him at 4.00pm on 4/7/2012.

Learned Counsel for the respondent referred to the argument of learned Counsel for the appellant that the evidence of PW3 in Court runs contrary to the Medical Certificate he issued and argued that the PW3 was not confronted with the said report which was not tendered in Court and on which the Court cannot base its decision one way or the other. He invoked Esangbode v. State (supra).

Learned Counsel for the respondent dealt with each of the five issues argued for the appellant and urged the Court not to interfere with the concurrent findings of the two Courts below in absence of evidence on record that the findings were perverse or not based on the evidence before the Court. He urged the Court to dismiss the appeal.

In his reply brief, learned Counsel for the appellant limited the reply to Respondent’s Counsel argument at pages 7-8 of the

Respondent's brief. He referred to the contention of learned Counsel for the respondent that the Medical Certificate and investigation report which were not tendered in Court cannot be considered by the Court in its judgment.

B In reaction to the above, he submitted that the documents are parts of the record of the Court and that a Court can always have recourse to its own record and at times rely and act on same. He referred to *Nwana v. Nwabuere* (2012) AFWLR (Pt.613) 1824, *Texaco (Nig) Plc v. Lukoko* (1992) 6 NWLR (Pt.501) 7, *Hubband v. Vosper* (1972) 2 QB 84, among others.

C He argued that the Medical Report and the investigation report form parts of the record of the Court and ought to have been considered by the Court of Appeal. He urged the Court to look at the documents in its judgment. He urged the Court to allow the appeal.

RESOLUTION OF ISSUES:

Learned Counsel for the Respondent formulated a single issue and in the course of argument he traversed the five issues argued by learned Counsel for the appellant. It is therefore appropriate to deal E with the appeal on the five issues in the appellant's brief.

Issue 1 framed from Ground 1 of the Notice of Appeal is on whether the Court of Appeal was right to have held that Counsel for the appellant conceded that rape was committed.

F Learned Counsel built his issue one on a portion of lead judgment of the Lower Court to the effect that:

"Learned Counsel for the appellant conceded to the fact that from the fact as adduced in the Lower Court, it is clear that the offence of rape had been committed."

G Learned Counsel for the appellant vehemently denied the admission credited to him by the Court below. He contrasted the alleged admission with what he said he actually said, to wit:

H *"From the circumstances of this case it is highly difficult to draw the conclusion that the PW1 was raped by the appellant and that assuming but without so conceding that there was penetration, the prosecution did not prove that it was done without the consent of the PW1."*

The submission reproduced above, made by learned counsel for the appellant before the Court below, would appear to contradict

the finding of the Court as regards admission of guilt. Be that as it may, learned Counsel for the appellant has been economical on the issue of alleged admission made by him, withholding part of his submission upon which the Court below made the findings he complained of in his issue one before this Court.

Paragraphs 3.11 to 3.14 of the appellant's brief before the Court below are hereunder reproduced for ease of reference:

3.11 We submit that her desire to keep the affair secret is only indicative of the fact that she actually consented to what might have transpired on 7/4/2012.

3.12 We submit that the circumstances show clearly that PW1 gave her consent either tacitly or actively.

3.14 We submit that the failure of the PW1 to raise an alarm. She did not come out of the room crying and she never told any person that she was raped until blood was noticed on her body about two (2) days later is indicative of the fact that she was concealing what had allegedly happened on 7/4/2012."

Learned Counsel appeared to have jumped Paragraph 3.13 in the sequence of his paragraphs. Whether or not the appellant is bound by an admission of crime made on his behalf by his Counsel in his argument before the Court below is not the issue herein. Learned Counsel, in the paragraphs reproduced above, actually admitted not only that someone had sexual intercourse with the PW2 but also that it was the appellant who had sex with PW1.

He sought to excuse the fact of sexual intercourse by reliance on facts which he argued indicated that the PW1 consented to the act of intercourse with the appellant. In effect, learned Counsel for the appellant is ad idem with the Court below on the fact that appellant had sexual intercourse with the prosecutrix, PW1.

However, while their Lordships of the Court below said that the sexual intercourse was without the consent of the PW1, and ipso facto amounts to rape, learned Counsel for the appellant argued that the PW1 consented to the act.

Whether or not what learned Counsel admitted took place between the PW1 and his client at 4pm on 7/4/2012 amounts to rape revolves on the question of consent. There is evidence on record accepted by the Court that at the material time the prosecutrix was pre-teen, 11 year old female.

Section 30 of the Criminal Code Law Cap C21 Laws of Delta State provides, inter alia:

“S.30 A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.”

The above provision shows that the PW1 who was 11 years old as at the time of the act on 7/4/2012 could not have been held criminally responsible for an act or omission. It follows that the PW1 could not have done anything to decriminalize an otherwise criminal act done to, or with her, on 7/4/2012.

At the material time she was doli incapax and contrary to the argument of learned Counsel for the appellant, the PW1 could not have given a consent which in law she did not possess. The purported consent on which the appellant’s Counsel relied to disprove rape cannot avail him, there being no evidence of such precocity that could bring the PW1 within the exception in Section 30 of the Criminal Code Law.

In the circumstances, I agree with the Court below that learned Counsel for the appellant conceded that rape was committed as the consent on which he relied to argue that the intercourse was consensual had crumbled. I resolve issue one against the appellant.

Issue 2 is on whether or not the Court of Appeal speculated when it held that the appellant had sexual intercourse with the prosecutrix (PW1) distilled from Ground 2 of the Notice of Appeal.

Issue 3 with which Issue 2 was argued is on the propriety vel non of the Lower Court’s finding that the defence of alibi was not open to the appellant (distilled from Ground 3).

In spite of the fact that the appellant pleaded not guilty to the charge, saying he did not at any time have carnal knowledge of the prosecutrix his Counsel, in Paragraphs 3.11, 3.12 and 3.14 of his brief conceded that the appellant had carnal knowledge of the PW1 as charged but sought to justify the said act on alleged consent to the act by the PW1. It was demonstrated in the resolution of issue one that no such consent could have been given by the PW1 at the ma-

terial time.

In relation to issue one, learned Counsel for the appellant conceded the fact of sexual intercourse between the PW1 and the appellant and argued there was no rape because the PW1 consented to the act. At the tender age of 11 years, even if the prosecutrix (PW1) solicited the act of sexual intercourse with the appellant, the appellant would have had unlawful carnal knowledge with the prosecutrix if he had intercourse with her. It would have been unlawful carnal knowledge of a woman or girl without her consent for the PW1, in law, could not give consent. See *Posu & Anor v. State* (2011) 1-2 SC (Pt.1) 156 at 177, *Ogunbayo v. State* (2007) 3 SC (Pt.11) 71, *Ezigbo v. State* (2012) 6 SC (Pt.1) 163 at 183-184. B
C

In my view and based on the resolution of issue one, the Court below did not speculate but was on a firm ground when it held that the appellant had sexual intercourse with the prosecutrix. D

Alibi means “elsewhere”. The essence of the plea is that the accused person, at the time the offence was committed, was somewhere other than the locus in quo and could therefore not have committed same. See *Gachi v. State* (1965) NMLR 333, *Adisa v. State* (1991) 1 NWLR (Pt.108) 490, *Ifejirika v. State* (1999) 3 NWLR (Pt.593) 59. E

Do the evidence on record and the circumstances of this case sustain the plea that the appellant was “elsewhere” or some place other than the locus criminis at 4.00 pm on 7/4/2012? Let the record speak for itself. F

In his statement to the Investigating Police Officer, tendered, received and marked Exhibit D, the appellant stated, inter alia:

“We returned to... about 12:45 pm then I went to my mother’s house to eat about to eat my Oga Christian came and told me to go work with him, then I told him that after I might have finish eating I will meet him at Attasi round about... after that I went and met him at the place, after all I went to my mother’s house at about 7:20pm...” G

Appellant said he returned from his place of work to his mother’s house about 7:20 pm. He displayed consciousness of time. However, the time he left his mother’s house to join his master at work is conspicuous by its omission. And this statement was made when the facts were still fresh in his memory. In his evidence in Court he swore, inter alia: H

“...He said he was coming to pick me up and he came with a car and gave me an address where he was working and asked me to join up with him. I did eventually at Attasi roundabout to work we finished working at about 7pm...”

The word, “eventually”, is no substitute for the time he left his mother’s house to work with his master till 7pm.

DW1 said in his evidence:

“At about 1:00 pm the accused person accompanied me to work at Atasi roundabout in Oleh.”

This contradicts the evidence of the appellant that the DW1 “asked me to join up with him.” Appellant did not accompany the DW1 to his place of work. He joined him “eventually”. Appellant said he returned to eat his lunch at 12:45 pm. Could he have begun to work with DW1 “between 12 noon to 1.00 pm until 7pm?” He could not have taken his meal and traveled to the place of work within 15 minutes.

DW2 claimed that the appellant, her son, “came back between 12.00 noon and 1 pm - he eat again and left to work with his boss.” She said that the appellant came back about 7 pm. The witness did not state the time her son left to work with his boss. PW4, the Investigating Police Officer, admitted she did not record statements from either the DW1 or DW2.

I do not condone the refusal by the PW4 to take statements from the appellant’s prospective witnesses. But would their statements, if recorded, have been different from their testimonies in Court on oath? The answer is in the negative. They told the Court what they would have stated in their statements to the IPO.

Alibi ought to be raised by the accused himself. Witnesses in their statements/evidence could do no more than the accused’s evidence in relation to the facts he stated both in his statement to the Police and evidence in Court. Statements/evidence of DW1 and DW2 could not have supported the claim of the appellant as to his whereabouts at 4pm on 7/4/2012. “Eventually” does not relate to any specific time. Appellant said he returned to take his meal at 12:45 pm. There is no way he could have worked with DW2 between 12noon to 1pm until 7pm as claimed by DW2.

To sustain the plea of alibi as a defence in criminal pro-

ceedings, it must be unequivocal and made during investigation. The time and place and the people with the accused at the material time must be stated to enable the police verify same. See *Ozaki v. The State* (1988) 2 NSCC p.25, *Gachi v. State* (supra).

Though proof of alibi is on the balance of probabilities the accused relying on same must give particulars of the place he was and the time he was there and the name of another person who can testify that he was there at the material time. See *Nwabueze v. The State* (1988) 2 NSCC 389, *Obiode v. State* (1979) All NLR 35, *Chukwu v. The State* (1994) 7 NWLR (Pt.634) 686.

The offence was committed at 4 pm on 7/4/2012 at the house of the appellant's mother. Appellant swore that he worked with his boss, DW2, till 7pm on 7/4/2012. DW2 confirmed that the appellant worked with him till 7pm on 7/4/2012. However, appellant failed to state when he left his mother's house to work with his boss, DW2. Appellant claimed he returned to his mother's house by 12:45pm to eat his lunch. Yet, DW2 claimed that "we began to work from between 12.00 noon to 1.00 pm until 7 pm." This cannot be correct.

Appellant returned to his mother's house about 12:45 pm, ate his lunch and "eventually" went to work with DW1 till 7pm. He did not state the time he left the house. The time he left the house is the crucial missing link in his chain of evidence in proof of his plea of alibi. The Court below did not speculate when it held that defence of alibi failed. I resolve issues 2 and 3 against the appellant.

Issue 4 is whether the evidence of PW3 (Medical Doctor) can in the circumstances of the case amount to corroboration.

My Lords, I will consider issue 4 on corroboration, first, in relation to the complaint of the prosecutrix that she was raped and in relation to the allegation that it was the appellant who raped her.

The legal principle in respect of the offence of rape is that corroboration is evidence or pieces of evidence tending to show that the story of the prosecutrix that the accused raped her is true. See *Sambo v. The State* (1993) 6 NWLR (Pt.300) 399; *Upahor v. State* (2003) 6 NWLR (Pt. 816) 230. **Corroborate**

tion need not be direct evidence that the accused committed the offence charged. It need not amount to a confirmation of the whole account given by the prosecutix. However, it must be completely credible evidence which corroborates the prosecutrix's evidence in some aspect material to the charge.

B It is in the light of the above principle that I will settle issue 4 as regards the evidence of PW3. Dr. Obefor Benedict, testifying as PW3, stated that:

"I am a Medical doctor attached to the General Hospital, Oleh... I am a Chief Medical Officer. On that 10th April, 2012 she was still bleeding from her vagina. I examined her and there was bleeding from the vagina, where the hymen was torn. There was also an injury from the vagina wall. In my opinion the injury might be due to forceful penetration of the vagina. I took the PW1 to theatre where I sutured the injured wall of the vagina. The PW1 was discharged on the 15th day of April, 2012. I subsequently issued a Medical Report."

Under cross-examination, the PW3 stated, inter alia:

"Other causes could lead to the tearing of the vaginal wall other than forceful penile penetration. The ridding of a bicycle could cause a tearing of the hymen if it comes into contact with the sharp edge."

The PW3, a Chief Medical Officer, found as a fact that the PW1 was bleeding from her vagina and that the bleeding came from the torn hymen. This, the PW3 opined, might be due to a forceful penetration of the vagina. Cross-examined by learned Counsel for the appellant he said that other causes could lead to the tearing of the vagina, adding that the ridding of a bicycle could cause a tearing of the hymen if it comes into contact with a sharp edge.

In my view, the tearing of the hymen by causes other than forceful penile penetration of the vagina was completely eliminated by the fact that, as found by the PW3, there was also an injury on the vaginal wall, which injury the PW3 sutured. While the tearing of the hymen could have been caused by causes other than penile penetration by force there is no evidence that such other causes could have caused the injury on the vaginal wall which injury needed suturing by the PW3.

It is my view; therefore, that the tearing of the hymen and the injury to the vaginal wall of the PW1 are not only consistent with forceful penile penetration of the PW1's vagina

but also exclude other causes such as the riding of a bicycle. The evidence of the PW3 sufficiently corroborated the evidence of the PW1 that she was raped within the meaning and intentment of Section 357 of the Criminal Code Law Cap C21 Laws of Delta State of Nigeria 2008. In other words, the evidence of PW3 corroborated the evidence of the PW1 that she was raped. B

The next question is: Does the evidence of the PW3, having corroborated the complaint of the PW1 that she was raped, also corroborated the evidence of the PW1 that it was the appellant who raped her. C

In the judgment of the learned trial Judge, the above question appears to have been answered in the positive. Hear His Lordship of the trial Court in his judgment:

“...To my mind, the findings of the said PW3 clearly corroborates the evidence of the PW1 that the accused person identified by her was the one who forcefully penetrated her vagina. See the case of Saraki v. The Queen (1964) NMLR 30 where the Supreme Court held that the doctor’s evidence corroborated the prosecutrix (sic) story. I hold as such that what has been corroborated is that the accused with his penis had forceful penetration of the vagina of the prosecutrix in this case.” D E

The above finding was adopted by the Court below. With profound respect to His Lordship and to their Lordships of the Court below who agreed with the conclusion from the evidence of PW3, the evidence of the PW3 corroborated, as I demonstrated earlier on this issue, the evidence of the PW1 that she was raped. It did not corroborate the PW1’s story that it was the appellant who raped her. The evidence of PW3 alone and by itself corroborated not the totality of the PW1’s story that she was raped and that the appellant was the one who raped her. F G

The PW3 did not perform any test on the appellant to find a link between the appellant and the offence committed on the PW1. In the circumstances, the corroborative quality of the evidence of PW3 is limited to and does not exceed the fact that the PW1 was raped. The two Courts below, in my humble view, erred to have held that the evidence of PW3 corroborated the entire evidence of the PW1 that she was raped and that the rapist was the appellant. That H

the appellant was the one who raped the PW1 could only be ascertained on the totality of the evidence adduced by both sides before the trial Court.

My Lords, I will now consider the totality of the evidence before the trial Court to determine whether the evidence of the PW1 that it was the appellant who violated her was corroborated.

In a majority of cases where the rapist was not caught in the act and was not subjected to medical examination there is usually no direct evidence that the appellant raped the prosecutrix as alleged. Corroboration of the evidence of the prosecutrix that the appellant raped her can be gleaned from the pieces of evidence before the trial Court, or inference drawn from same.

In the case at hand, while there is ample corroborative evidence that the PW1 was raped there is no direct evidence, in my view, corroborating the evidence of the PW1 that it was the appellant who raped her. However, in his defence appellant set up a defence of alibi which was exhaustively considered and in my view rightly rejected by the two Courts below. I dealt with the appellant's plea of alibi in the resolution of issue 3 in the appellant's brief.

It is not helpful to have a repeat performance. Suffice it to say that the two Courts below rightly held that the appellant failed to substantiate the plea on the balance of probabilities. See Ntam v. The State (1968) 1 NMLR 86; Ozaki v. The State (1988) 2 NSCC 25. ***In the particular circumstances of this case, the plea of alibi set up by the appellant is a two-edged sword, as it were.***

It could avail the appellant and ipso facto destroy the prosecutrix's case against him. On the other hand, it could crumble, and on the facts as I appreciate them corroborate the prosecutrix's case that about 4 pm on the 7th day of April, 2012 the appellant was at the locus criminis and violated her. If the plea had been sustained it would have meant that the appellant was somewhere other than the scene of crime and as he could not have been capable of being in two different places simultaneously, he could not have violated the PW1.

On the other hand, the fact that the appellant, by his evidence and the evidence of his witnesses could not prove

on the balance of probabilities that he was somewhere else and not at the scene of crime by 4 pm on 7/4/2012, a fact upon which he rested his case that he did not commit the offence, the reverse is the case, that he was at the scene at the material time and committed the offence as claimed by the PW1. The high watermark of the defence of the appellant that about 4 pm on 7/4/2012 he was somewhere other than at the scene of crime has become his undoing.

In my humble view, the failure of his plea of alibi on the facts of this case, leads to one inevitable conclusion that the appellant was at the scene of crime and had raped the PW1. The corroborative evidence could come from either side of the divide. In my view, there is corroborative evidence, not only that the PW1 was raped but also that it was the appellant who raped her.

Learned Counsel for the appellant, in his reply brief, challenged the contention of learned Counsel for the Respondent that the Medical Certificate and the investigation report which were not tendered in evidence cannot be considered by the Court in its judgment. He submitted that the said documents were within the record of the Court and the law is trite that a Court can at all times have recourse to its record and rely on, and act on same.

He relied on *Nwora v. Nwabueze* (2012) All FWLR (pt. 613) 1824; *Saraki v. Kotoye* (2001) 4 WRN 1, among others in his contention that the medical certificate and the report of Police investigation which are parts of the Court's record ought to have been considered by the Court below in its judgment. He urged the Court to look at the said documents.

A Court's record is composed of various documents such as the statements of prospective witnesses in criminal cases, sworn declarations of witnesses and pleadings in civil cases. When any of the documents is lifted from the file and tendered and received in evidence it becomes an exhibit in the case.

An exhibit is defined, inter alia, as a document, record or other tangible object formally introduced as evidence in Court. See *Black's Law Dictionary* 8th Edition page 614. While a Court is bound to consider all relevant and material exhibits

in arriving at its judgment, the same does not apply to every document in the Court's file.

The makers of the medical report and the Police investigation report testified in Court in line with their prepared documents. It was not necessary to tender the documents in evidence unless the counsel for the appellant needed them to impeach the credit of their authors. Having failed to tender the documents in evidence, learned Counsel for the appellant cannot be heard to complain that the Court did not consider the documents. The documents were not exhibits before the Court below and the invitation to this Court to consider them has no legal or procedural basis.

In any case, it is not a rule of law but one of practice that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix. In such a case, the trial Court is required to warn itself that it is unsafe to convict on the uncorroborated evidence of the prosecutrix and could convict after paying due attention to the warning if it is satisfied with the truth of her evidence. See *Sunmonu v. IG* (1957) WRMLR 23; *R v. Graham* (1910) 4 CR App Rep 218; *R v. Pitts* (1914) 8 CR App Rep 65; *Reckie v. The Queen* 14 WACA 501; *Ibeakanma v. The Queen* (1963) 2 SCNLR 191 at 195.

So even without the evidence of the PW3 and the failed alibi of the appellant, the Court, having believed the evidence of the PW1, could have rightly convicted the appellant after warning itself that it is unsafe to convict on the uncorroborated evidence of the PW1. Issue 4 is resolved against the appellant.

Issue 5 is whether or not allocutus amounts to admission of guilt?

The issue reproduced supra is built on the concluding portion of the lead judgment of the Court below, reproduced hereunder:

"I shall for purposes of clarification and emphasis reproduce the allocutus as proffered by learned Counsel for the appellant after the latter had been convicted as charged: 'On behalf of the accused person I hereby make this allocutus. He is a first offender. A young man who is an apprentice deserved the leniency of Court. The accused is fully repentant of the offence and has vowed never to find

himself in this situation again. We plead that Court be lenient my Lord’.

From the totality of all of the above findings and conclusions, it is my humble view that this appeal is totally lacking in merit and I do dismiss it accordingly. The conviction and sentence of the appellant is hereby upheld.” B

Allocutus is a plea in mitigation of the punishment richly deserved by appellant for the offence with which he was charged and for which he was tried and found guilty and convicted accordingly.

Learned Counsel for the appellant appears to have interpreted the comment made by the Lower Court in the plea of allocutus to mean that the Court held that the appellant at that stage changed his plea of not guilty to that of guilty. This is erroneous. Whatever impression learned Counsel for the appellant gathered from the Court’s comment, the fact remains that under our law of criminal procedure an accused person cannot plead or change his plea by proxy. The plea is that of the accused, not that of his counsel. See Section 215 of the Criminal Procedure Law of Delta State (supra). C D

While learned Counsel may enter a plea in mitigation for his client who has been convicted of a criminal offence prior to sentencing, a plea or change of plea remain the prerogative of the accused person. E

Before the Court below made its reference to learned Counsel’s plea in mitigation of sentence, the Court had already concluded that the prosecution proved its case against the appellant beyond reasonable doubt. It follows that contrary to the learned Counsel’s argument the comment is an aside and was not the basis of the Lower Court’s judgment. Though I am constrained to resolve the issue in favour of the appellant, the effect is a pyrrhic victory which in reality confers no benefit to the appellant. The issue is based on erroneous interpretation of the comment of the Lower Court. It was taken out of context. F G H

I will not end this judgment without a comment on the sentence imposed by the trial Court. The record of the trial Court shows:

“SENTENCE: The crime of rape and defilement in this jurisdiction is fast assuming a frightening dimension. It is the duty of Court

to send the right signal to would be rapists and their like that this jurisdiction would simply not contain them. I have listened to the passionate plea for leniency made on behalf of the accused person by learned Counsel. But the only way out can discourage the rampancy of this widespread crime would be to punish those found guilty severely. To this end, this accused Person is sentenced to a term of imprisonment of five (5) years with hard labour or with an option fine of three hundred thousand (=N=300,000.00)."

This was signed by the learned and Honourable trial Judge Fred O. Oho, PhD (Judge) on 24/9/2013.

The sentence imposed by the trial Court is not only a contradiction in terms of the Court's stated intention to rid his jurisdiction of the offences of rape and defilement, but a contemptuous and contumacious departure or derogation from, as well as a violation of the provisions of Section 358 of the Criminal Code (supra) under which the appellant was convicted. The mandatory provision reads:

"S.358: Any person who commits the offence of rape is liable to imprisonment for life."

Once the Court convicts an accused person for the offence of rape as defined in Section 357 of the Code, it has no discretion but is bound to obey the law by imposing a term of imprisonment for life. His Lordship did not state the source of his authority to rewrite the Criminal Code of Delta State by imposing a term of five years imprisonment with hard labour and an option of fine of three hundred thousand naira in place of the mandatory imprisonment for life prescribed in the Section pursuant to which the appellant was tried and convicted.

Rather than achieve the purpose set out in the preamble to the judgment, the sentence imposed is an invitation for defilement and rape within His Lordship's jurisdiction.

On the purpose of punishment imposed by the Court, Samuel Johnson said:

"Since revenge for its own sake cannot be justified, it will follow that the natural justice of punishment, as of every other act of man to man, must depend solely on its utility, and that its only lawful end is some good more than equivalent to the evil which it necessarily produces."

Speaking of prison terms for crimes committed, Michael Howard at Conservative Party Conference of October, 1993 said:

"Prison works. It ensures that we are protected from murders, muggers and rapists and it makes many, who are tempted to commit crime think twice." For both, see Alex McBride's *Defending the Guilty*, page 194. B

With respect to His Lordship, the sham of prison term he imposed on the appellant is an attack on law and moral basis for prison term. The young and old, who have their brains between their legs and who have a miserable sum of three hundred thousand naira to throw about can ravage young mothers at will. Not only that the brute violently, as in armed robbery, took away the pride of that innocent girl, the act of rape is a major dent on her psyche and will so remain for life. C

One has only to turn the pages of National Newspapers to appreciate the enormity and frequency of immoral acts perpetrated against women and helpless young people, including incest committee on toddlers by men approaching their graves. D

I was tempted to revisit the sentence in this case but that would have violated the principle that appellate Court cannot disturb a sentence imposed unless there is an appeal against the sentence. A violation of that principle would be as much as wrong as the punishment imposed on the appellant and there is a truism that two wrongs do not make one right. E

A portion of the judgment of this Court in the case of Nafiu Rabi v. The State (1990) 11 SC 130 at 177 pays quotation. Idigbe, JSC in his concurrence with the unanimous judgment of a seven man panel of this Court said: F

"There being no appeal or cross-appeal against sentence this Court ought not to interfere with the sentence passed by the Court of Appeal. My Lords I would therefore make it clear that it is with considerable regret that I am unable to disturb the sentence of 4 years imprisonment for this offence... which appears to call for a much more severe punishment." G

Though the appellant in the above case strangled his own wife, he got away with a four year term of imprisonment. H

In the case at hand appellant killed something in the psyche in the life of PW1, leaving the poor girl devastated and

with a permanent scar for life. The principle of inviolability of a sentence not appealed against which I am duty bound to apply herein most regrettably and painfully appears to give credence to the saying that the law is an ass. May be the asinine attribute is not inherent in the law but in the application of its provision as amply demonstrated in this case.

In conclusion, having resolved the five issues, except one, against the appellant I dismiss the appeal for want of merit. The judgment of the Court below which affirmed the judgment of the trial Court is hereby affirmed.

Appeal dismissed.

GALADIMA JSC

I have been obliged a copy of the lead judgment of my learned brother NGWUTA, JSC.

I entirely agree with him that this Appeal is lacking in merit and ought to be dismissed.

The facts and circumstances exposed in this appeal are sordid and unfortunate. For the Appellant an adult to have carnal knowledge of underage girl (11 years old) who was incapable of given consent is very callous, wicked and barbaric. Since he is of dangerous species and of low moral pedigree, he must be kept out of public circulation. I wish the punishment meted to him was more severe so as to serve as deterrent.

There is clear evidence on record and accepted by the trial Court that at the material time the prosecutrix was raped, she was 11 years old and so was not capable of giving consent by dint of the provisions of Section 30 (a) and (b) of the Criminal Code Law Cap C. 21, Laws of Delta State. The Appellant cannot rely on her unproven consent: See ADENIKE v. STATE (2015) EJCSC (vol. 10) 1-2004.

I have carefully considered the pieces of evidence of the prosecutrix PW1 and the Medical Director PW3 vis-à-vis Exhibit 'A'. The evidence of PW3 in the circumstances amounts to corroboration. The law is that corroboration need not be direct evidence that the accused committed the offence charged. However, it must be completely credible evidence which corroborates the prosecutrix's evi-

dence in some aspect material to the charge.

Dr. Obefor Benedict, who examined the prosecutrix testified thus:-

"I am a Medical Director attached to the General Hospital Oleh... I am a Chief Medical Officer... On that 10th April, 2012 she was still bleeding from her vagina. I examined her and there was bleeding from the vagina, where the hymen was torn. There was also an injury from the virginal wall. In my opinion the injury might be due to forceful penetration of the vagina. I took the PW1 to theatre where I sutured the injured wall of the vagina. The PW1 was discharged on the 15th day of April, 2012. I subsequently issued a Medical Report"

Under cross-examination, the PW3 state, inter alia:

"Other causes could lead to the tearing of the virginal wall other than forceful penile penetration. The ridding of a bicycle could cause a tearing of the hymen if it comes into contact with the sharp edge."

In my respectful view, the foregoing findings of the Chief Medical Officer that the prosecutrix was "still bleeding from her vagina" three days after being defiled by the Appellant is credible and unsailable. The tearing of the prosecutrix's hymen and the injury found on her virginal wall are not only consistent with forceful penile penetration but these factors also exclude other causes that could be attributable to such hymen excision.

In my view the evidence of the Medical Officer and PW4, in a way, corroborated the evidence of the prosecutrix herself that the Appellant could have been the one that raped her within the meaning and intendment of Section 357 of the Criminal Code (supra).

Agreeing with my learned brother, I am too at pains, when this Appellant who has effrontery to complain that the case against him was not proved beyond reasonable doubt, has forgotten that sentence handed down to him was fantastically ridiculous, for the offence of rape. He would have had the fullest sentence if he dared to appeal against the "sham of the prison term". The saving grace is that he did not. This Court cannot disturb the sentence imposed on him, as there was no appeal against it. This erudite and concise comments admirably made by my learned brother in his lead judgment is commendable. May the misapplication of the provision of the relevant law on the point, as demonstrated by the trial Court, never be re-

peated. May the principle guiding the measure of punishment to be meted to hardened criminals as enunciated by IDIGBE, JSC in the case of NAFIU RABIU v. THE STATE (1990) 11 SC at 177 etc, be well observed, particularly the trial Court.

In sum, the appeal lacks merit. It is dismissed. The judgment of the Court below which affirmed that of the trial Court is hereby affirmed.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment of my learned brother Ngwuta, JSC. So completely do I agree with it that I hesitated but finally decided to add a few words of mine.

This is a case of lawful carnal knowledge of the prosecutrix, aged 11 at the time the offence was committed. For the prosecution to succeed in a charge for rape there must be proof beyond reasonable doubt that:

- (a) The Appellant had unlawful carnal knowledge with the prosecutrix;
- (b) Intercourse occurred without the consent of the prosecutrix;

The prosecutrix gave evidence that the Appellant had sexual intercourse with her. It was confirmed by PW3, the Medical Doctor that there was penetration of the prosecutrix's private part. That in law is unlawful carnal knowledge, and rape is complete upon proof of penetration. At the time the Appellant had unlawful sexual intercourse with the prosecutrix, she was only 11 years old, and so incapable of giving consent in view of the provisions of Section 30 of the Criminal Code (a) and (b) above have been proved beyond reasonable doubt.

Finally, I must observe that in sexual offences it is not safe to convict on the uncorroborated evidence of the prosecutrix, but the Court can go ahead and convict if satisfied that the prosecutrix evidence is true. See *Summonu v. Police* 1957 WRNLR P23

In cases of an under-aged prosecutrix, e.g., a charge under Section 218 (Defilement of girls under thirteen years) corroboration is required. Whether any particular evidence can be corroboration is for the judge to decide and also to decide the weight to be attached

to it. In this regard the distressed condition of the prosecutrix soon after the unlawful sexual intercourse may amount to corroboration. See *R v. Redpath* (1962) 46 Arp R p. 319.

Corroboration in this case means evidence that supports the evidence of the prosecutrix. Corroboration is not restricted only to evidence of a witness pointing to the appellant as the person who committed the offence. This is not the position of the law. Sex is usually not performed in the presence of a third party. In most cases it is a hidden act performed behind closed doors, away from prying eyes. It is rare to get a witness to give evidence on oath that he saw the appellant have sex with the prosecutrix.

Compelling and uncontradicted evidence from PW3, the Medical Doctor, that he examined the prosecutrix and found her hymen ruptured corroborated the evidence of the prosecutrix that she was defiled. PW4's evidence that when the prosecutrix was brought to the Police Station she was bleeding of the prosecutrix that she was defiled in my view that the prosecutrix testimony on oath is true. I attach much weight to the evidence of PW 1, 3, and 4 and in the circumstances I am satisfied with my learned brother, Ngwuta, JSC that there is no merit in this appeal. It is dismissed.

MUHAMMAD JSC

I was obliged before now the lead judgment of my learned brother Sylvester Ngwuta JSC, just delivered. I agree with the reasoning and conclusion therein that the appeal lacks merit. I adopt the reasoning in the lead judgment as mine and on their basis dismiss the appeal. I abide by the consequential orders made in the lead judgment as well.

OKORO JSC

I read the illuminated judgment of my brother, Sylvester Ngwuta, JSC just delivered. It is incisive in diction and thorough in its delivery. I agree with the reasons marshaled to reach the conclusion that this appeal lacks merit and ought to be dismissed.

The offence of rape under Section 338 of the Criminal Code Cap C 21 Vol. 1 Laws of Delta State of Nigeria, 2006 under which

the appellant was charged means a forcible sexual intercourse with a girl or a woman without her giving consent to it or with her consent if the consent is obtained by force or by means of threat of intimidation of any kind or by fear or harm or by means of false and fraudulent representation as to the nature of the act. See *Posu & Anor v. The State* (2011) 3 NWLR (Pt) 393, *Ogunbayo v. The State* (2007) 1 NWLR (Pt 1035) 157, *Iko v. The State* (2001) 7 SC (PT 11) 15, (2001) 14 NWLR (Pt 732) 195.

In the instant case, the victim of the rape, an eleven year old girl testified that the appellant lured her into his room after buying “pure water” (sachet water) for him and forcibly had sex with her. Nobody saw when the act took place. And of course, nobody could have seen it since sexual intercourse is not usually done in public. However, the evidence of PW3, the Medical Doctor corroborated the evidence of the prosecutrix that there was penetration.

The essential ingredients of the offence of rape which the prosecutrix must prove include the following:

- (1) That the accused had sexual intercourse with the prosecutrix.
- (2) That the act of sexual intercourse was done without the consent or that the consent (if any) was obtained by fraud, force, threat, intimidation, deceit or impersonation.
- (3) That the prosecutrix was not the wife of the accused.
- (4) 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.
- (5) That there was penetration. See *Ndewenu Posu & Anor v The State* (Supra).

As I stated earlier both the prosecutrix and PW3 the Medical Doctor testified that there was penetration. Although the Doctor would not know who did the penetration, the prosecutrix provided the evidence. Even if it was argued that the prosecutrix consented to the act, I will agree that such consent is not tenable. What does an eleven year old girl know in matters of sex or issue of consent? As the Courts below held, there was no consent at all.

On the issue of corroboration in rape cases, I am satisfied to express the view that where an accused person denies the charge,

the evidence of corroboration which the Court must look for is the medical evidence showing injury to the vagina or to other parts of the body of the prosecutrix which may have been occasioned in a struggle and semen stains on the clothes of the prosecutrix or that of the accused or on the place where the offence was alleged to have been committed. See *Posu v. The State* (Supra). The evidence of PW3 firmly corroborated the evidence of the prosecutrix. The evidence led at the trial properly fixed the appellant to the offence which he was charged. B

My only worry is the sentence passed on the appellant. Although there is no appeal against the sentence, which I think there ought to have been one in view of the punishment prescribed by law for the offence of rape. By Section 358 of the Criminal Code (Supra), any person who commits rape is liable to imprisonment for life. The law recognizes the severity and barbaric nature of the offence of rape and thus prescribes life imprisonment for any offender. I am aware that the art of sentencing is still problematic in this country. Although a trial Court takes into consideration some extenuating factors such as the age of the convict, whether he is a first offender or not, the notoriety and prevalence of the offence in the locality, when considering appropriate punishment to impose on a convict, I am of the view that sentencing the appellant to five years only for the offence of rape made a mockery of the entire trial, the fine of N300,000 alternative notwithstanding. D

In my opinion, a conviction for rape ought to attract the maximum punishment prescribed by law. It should no longer be handled with kids gloves. The appellant is lucky that the law does not permit me to tinker with the sentence imposed on him as there is no appeal on it before this Court. Let him not be over joyed. He may not be so lucky next time if he does not change and stop putting other people's daughters in perpetual pain. A word, they say, is enough for the wise. F

On that note, I agree with my learned brother, Ngwuta, JSC that this appeal is devoid of any scintilla of merit and deserves an order of dismissal. This appeal is hereby dismissed by me. H