

In the name of God the most gracious the most merciful

**NATIONAL SUPREME COURT**  
**Criminal Circuit**

**Before:**

Mohamed Hamad Abu Sin	Presiding judge
Mahgoub Al Amin Al Faki	Member
Al Rasheed Al Tom Mohamed Khair	Member

Trial of Osman Saleh Khair  
No. life imprisonment/16/2011

**JUDGMENT**

The criminal case the subject matter of these proceedings was filed against the accused **Osman Saleh Khair** (19 years old) on the ground that he has raped **Amona Mohamed Tahir** (17 years old) and got her pregnant through fornication.

He was therefore brought forward before Kasala Criminal Court for trial under Article (146) of the Criminal Act. The Criminal Court charged the said accused under Article (82/d) of Child Act for 2010 on the ground that the victim was a child.

The Criminal Court delivered under such Article a judgment convicting the accused and sentencing him to life imprisonment with effect from 07/02/2011 along with a fine in a sum of 500 pounds, and in the event of nonpayment, he should be imprisoned for another three months consecutively and ordered to send the papers to the Supreme Court for upholding the judgment under Article (181) of Criminal Procedures Act.

The judgment was upheld by Kasala Appeal Court. The accused applied to the Circuit of the Supreme Court of Red Sea and Kasala States challenging such judgment. The Court referred the papers to the Judgments Affirmation Circuit so as to consider upholding this judgment.

It should be said in the first place that the National Supreme Court Circuits in the States have the jurisdiction over upholding life imprisonment judgments on the assumption that they are upheld by a 3 judge circuit. No regulatory circular or a directive restricting the affirmation of life imprisonment judgments to the National Supreme Court in absence of its circuits in the States.

The Judgments Affirmation Circuit of the National Supreme Court was formed in pursuance to the provision of Article (17/2) of the Judiciary Law as amended for 1995, composed of 5 judges and having the jurisdiction over the consideration of upholding the death penalties (on basis of punishable penalties, qisas and discretionary basis) and the judgments of cutting off hands and feet from the opposite sides.

Such trial should have not been referred to the National Supreme Court through its Circuit in Red Sea and Kasala States since it has the jurisdiction over the same.

However, as long as the papers have been brought forward before us combined with a petition from the convict, and since we have the general jurisdiction over the same, we adjudicate in respect of whatsoever raised in the petition in the course of exercising our powers in the affirmation of judgments under Article (181) as an objection to the judgment for withholding the affirmation thereon.

The convict expressly provided in his petition that he has been since two years in an extensive relationship with the victim who was 20 years old, and repeatedly performed sex with her motivated by her consent. Such sexual intercourse cannot be deemed a rape, which in the first place amends the description of crime and the Child Act is not applicable to the facts of the criminal case.

The following points should be adjudicated, thereby resulting in legal effects:

1. Was the victim a child?

If the answer is NO, was the sexual intercourse performed by her consent or was it a rape?

2. Is the application of Child Act on the assumption that the conviction is valid, require imposition of the penalty prescribed in such Act only without imposing Sharia punishable penalty prescribed for adultery?

Firstly: Nevertheless, Article (3) of Child Act defines the child every person who has not exceeded eighteen years of his age. But this definition is absolute as we are in the process of a non-child criminal responsibility which is based on adulthood, completion of eighteen years or reach eighteen years of age, and on the examination of same matter on the victim`s part if the consent is an object of investigation and important in determining the criminal responsibility for committing a shameful act like rape, particularly the victim was 17 years old and reached puberty as evidenced by her pregnancy. So, can we say that she was a child simply because she has not attained eighteen years of age and hence the performance of the sexual intercourse with her is deemed to be a rape? Accordingly the criminal responsibility of the accused raises this question.

The main source and reference of the Child Act has not determined a specific age for the child that is the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). Section (1) to the General Principles of such Rules provides a specific definition for the juvenile being a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.

This means that the matter relates to the issue of the child and handling his delinquency, and ensures that Beijing Rules have not determined the age of criminal responsibility as it is left to each country in the table which ratified such rules to determine the suitable age

according to the local cultural conditions (the matter here relates to the application Islamic Sharia). Beijing Rules, however, stated that the age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Needless to say Beijing Rules lost a great deal of their importance as to their satisfaction in determining a minimum age for the criminal responsibility (which is based on adulthood and mind).

Even the Child Act is not safe from contradiction as Article (5/2) thereof found to be in contradiction with the Criminal Act which is best for the child`s interest, when it provided that the child shall not be criminally held responsible unless he reaches the twelve years of age whereas the criminal responsibility in the Criminal Act is given upon adulthood and completion of fifteen years of age or attaining eighteen years of age, and whoever below the fifteen years or at the seventeen years of age without apparent adulthood physical signs shall not be criminally held responsible. It also contradicts with Beijing Rules which provide for the application of the national legislation or what is best for the child`s interest.

I conclude from the foregoing that the 17 years old victim who was pregnant as a result of performing a sexual intercourse by the convict is not a child in accordance with the Criminal Act which has been derived from Islamic Sharia the main source of legislations applicable nationwide among which is the Child Act. It is applicable to the States of North Sudan according to Article (5/1) of the transitional Constitution for 2005.

We are neither in the process of the victim`s criminal responsibility nor the application of the Child Act thereto. The victim has not been brought forward before the Court as an accused despite her attainment of puberty, pregnancy and admission in the investigation record of adultery by her consent in pursuit of the convict.

The Prosecution ignored charging the victim and the trial court omitted listening to her statements. We will discuss this later as we are in the process of the convict`s criminal responsibility and the judgment delivered against him in connection with a crime the punishment of which is a Sharia punishable penalty whether adultery by her consent or rape with the addition of a discretionary penalty in the latter case.

We cannot say that her sexual intercourse was a rape simply because she has not attained eighteen years of age according to Child Act i.e. without her consent despite her attainment of adulthood and got pregnant.

Nevertheless, the consent upon which the Criminal Act relies in Article (3) thereof which is a consent based on the fact that the present accused being a man must decide on his responsibility in accordance with the provisions of the Criminal Act which provides for otherwise the application of the provisions of the Child Act, which are punishable only, and considers the victim`s sexual intercourse as a rape despite her admission, may impose the discretionary penalty provided for in Article (86) of the Child Act and disabling the

application of the Sharia punishable penalty prescribed for adultery which the convict admits even in his petition brought forward before us. Obviously, the application of Article (149) beside Article (86) is forbidden because the rule here is to apply the strongest description and no room for the application of Article (86) of the Child Act in isolation from Sharia punishable penalty.

I conclude from the foregoing that the victim is not a child so that the Child Act may be applicable to the convict. This has been wrongfully excluded from indictment sheet by the Prosecution. There is no way for remedying this and it should not have been excluded from listening to the claim despite the importance of her statements if the sexual intercourse is a rape.

Finally, the Criminal Court, in view of the convict`s admission of adultery together with the adoption of his admission and convicting him, has committed an error when it omitted the application of the provision of Article (144) of Criminal Act.

Until the trial proceedings are corrected, I am of the opinion that the Appeal Court judgment and the judgment of the Criminal Court in terms of conviction and punishment must be cancelled and order to rearrest the convict along with returning the papers to the criminal Court for listening to the victim`s statements and proceed with the trial procedures taking the contents of this memorandum as a guidance.

Mahgoub Al Amin Al Faki  
Supreme Court Judge  
26/04/2011

I agree and add that the trial judge Sayed Ahmed Yousef should have to be praised for his searching and diligence but we reply to him that although he relied upon Para (4) to Article 6 (4) and the general provisions for 1974, Para (2) of the same Law provides that if any provision in any law is in contradiction with any of the constitution provisions, the provisions of the constitution shall prevail to the extent which removes such contradiction. Article (5) of Sudan Transitional Constitution for 2005 establishes the sources of legislations as Para (1) of the said Article provides that Sharia and consensus are the sources of legislations which are enacted at the national level and applied to the States of North Sudan.

Article (8) of the Law provides that responsibility shall only be undertaken by the competent person and the competent person is the mature and sane person.

Article (9) of the same Law provides that the young who is immature shall not be deemed to have committed a crime. The word “mature” according to Article (3) of the Law means the person whose attainment of puberty is proved by physical signs and has completed fifteen years of his age, and whoever completes the eighteen years of his ages shall be regarded as mature even though the physical signs have not appeared thereon.

It is evident from the foregoing that Article (4) of the Child Act for 2010 which defined the Child by saying “means every person who has not exceeded eighteen years of age” is in contravention of the Articles of the Criminal Act referred to in this connection and violating the Constitution accordingly.

Mohamed Hamad Abu Sin  
Deputy Chief Justice  
26/05/2011

I am completely in agreement with both my colleagues over the 1<sup>st</sup> and 2<sup>nd</sup> opinions after legal deliberation and discussion which we provided. I also share the opinion of my colleague on the 2<sup>nd</sup> opinion over praising the great effort exerted by the trial judge in supporting his view despite being in disagreement in terms of opinion.

Al Rasheed Al Tom Mohamed Khair  
Supreme Court Judge  
29/05/2011

Final Order:

1. To cancel the adjudication of both trial and appeal courts.
2. To return the papers to the trial court so as to proceed with the procedures in light of the memorandum.
3. To rearrest the accused.

Mohamed Hamad Abu Sin  
Deputy Chief Justice  
30/05/2011