

# **In the Name of Allah, the Most Gracious the Most Merciful**

## **Judicial Authority**

### **Superior Court- Kurdufan States Circuit**

**M/S. Judges**

**His Highness: Abdel Raheem Abdel Wahab Al-Tohamy**

**His Highness/ Hassan Ahmed Omar**

**His Highness/ Adam Ismail Adam**

#### **Trial: Hani Moussa Salem and others**

**No.: SC/ DSC/FG/11/2015 AD**

#### **Judgment**

##### **First Opinion:**

On 31/10/2014 AD, the accused/ Hany Moussa Salem and others appeared before El-Obeid Criminal Court to reply to a claim under articles 78 C of 1991, read with articles 12/175/149 C of 1991, that they on 27/09/2014 at night after 9:00 pm were drunk and attacked the complainant in a dark night outside the city between El-Obeid and Taqat, when the complainant was accompanied by a woman from his friends, and they threatened them, took financial amounts and a mobile and tried also to rape this woman.

- The court heard the entire criminal claim and questioned the accused, and the accused admitted that they were drunk but they claimed that they are not guilty in relation of participation in committing the robbery crime or trying to rape the woman, and they have not proof.

On 5 November 2014 AD, the court found them guilty under the accusation articles and imposed on them the following punishments:

1. Flogging (40) flogs under article no. 78C/1991.
  2. Imprisonment for eight years under article no.21/105 of 1991 as of 28/09/2014 AD.
  3. Imprisonment for five years under article 20/149C of 1991, which shall be valid sequentially.
  4. The delivery of the phones to their owners and eliminating the rest of exhibits.
- Under a request by the lawyer of the accused, the Appeals Circuit ruling was issued to northern Kordofan under no. AS/WSK/inspection/903 of 2014 dated 18/12/2014, and ruled with supporting the conviction and diminishing the punishment to become as follows:
    1. Reduction of the punishment under articles 21/175 C to become six months.
    2. Reduction of the punishment under articles 21/149 C of 1990 to become six months and be applicable in succession.
  - This court didn't satisfy the plaintiff, so the plaintiff lawyer, Ms. Nagwa Othman Ali applied for providing an examination request with us on 07/01/2007 AD, for interference and correcting the matters.
  - Since the date when the plaintiff knew the final ruling was on 31/12/2014 AD and submitted this request on 07/01/2014 meaning during the temporal enrollment and accepting it in form, there is no problem to intervene by examining the papers for

verifying the validity of the texts properly under the provisions of article 188, penal procedures of 1991.

**The applicant raised the following reasons:**

1. The Court of Appeal supported the conviction but adjusted the punishment.
2. The accused attacked the complainant by beatings and tore his clothes and robbed his cell phone and the phone of the first plaintiff witness. The accused confessed with the entire crime.
3. There is no basis for commutation.
4. It is required to cancel the appeal judgment regarding the punishment and restore the judgment of the trial court.

On 18/1/2015, Mr. Abdul Wahab Mohammed Al-Hassan Idris requested a criminal check on behalf of the convicts which lead later to ask for the cancellation of conviction and punishment because it is unfounded and in reserve for mitigating the punishment for the conditions of the convicted.

Since the request is originally a request for examination, so we will intervene through article 188 criminal proceedings of 1991 to fully ascertain the validity and application of the texts properly.

- On 31/12/2014, the complainant knew the final judgment and on 7/1/2014 he submitted his request during the time enrollment M 184 criminal proceedings of 1991, so it is acceptable in form and it is no problem to intervene under the examination factor as mentioned above.

**The defense request included:**

1. There is a serious doubt in the plaintiff lawsuit. His Highness referred that what he proved considers the book of ‘Ibn Kadamh Lelmoghanna’ – tenth section- paragraph 842, p 167-169 (it is not allowed to accept a witness of an adversary, or a person allowing or defending himself).
2. The registration of the judicial admission collectively contradicts with article 21 Proof of 1991 and article 50 Criminal Procedures of 1991.
3. If the Court of Appeal doesn’t attribute actions and the role of each accused.
4. The things occurred in the crime scene is a normal thing in this society when a group of youth surprised a man and a woman in these conditions.
5. This article focuses on the validity or non-validity of the proof stated against the accused.

**The summary of these facts:**

On 27/09/2014 at around 10 at night, the citizen/ Kabashi Ahmed Mohammed reported that his car- during his movement from Al Jalabiya area to El-Obeid city- broke off in the way, and he was accompanied by the first plaintiff witness/ Khadija Sulaiman Ebrahim, at their arrival the bay between El-Obeid and the space, they were faced by the six convicted who terrified them and could take their mobiles and a cash amount, and also tried to rap the witness.

- By reviewing the initial proceeding and the judgment of the Appeal Circuit and the submitted requests.
- The attack is proven from the accused on the two victims, and there was a violence based on the clothes that become torn by the accused.

- It is proven that the mobile phones of the victims and a cash amount are with the culprits.
- It is proven that the car of the complainant has been broken off, so he left it besides the watchman, accompanied by the plaintiff witness who is his niece.
- The defense lawyer agreed that the registration of the judicial admissions collectively contradicts to what is concluded by the criminal courts.
- The defense (accused) states that they found the victims in abnormal position under a tree, so they committed this action, but this defense is unfounded for the following:
  - 1- The woman is his niece.
  - 2- If the defense is reasonable, there shall be a legal irregularity committed by the culprits proved by their ability to lead them to the police station or action by opening an ordinance and prove the crime, the thing that didn't happen.
  - 3- The defense shall not be accepted due to the ignorance of the law against committing a crime.
  - 4- The exhibits are found in the possession of the accused.
  - 5- Due to the occurred violence, the defendants' clothes were torn up.
  - 6- It is found that the rescue and escape from the culprits' evils is to scream through which the plaintiff witness concluded that, so there is no doubt in the validity of the conviction.

**This is previously mentioned:**

Sudanese Government

Against

Amr Garbo Othman

SC/MKM 154/1977

P168

Magazine: 1977

In case of committing more than one crime by the convicted, the court must direct several convictions to him by the number of the committed crimes and discuss the items of each crime separately and imposing one punishment that is the most extreme punishment.

- I think that only one conviction may be directed, including in detail the content of article 145 Criminal Procedures of 1991 clearly as it stated: "if the single action formed more than one crime, the punishments overlap and only one punishment shall be applied that is the maximum punishment.
- Whereas the facts of this ordinance became clear and there is a strong connection that leads to a clear understanding that is they committed the crimes attributed to them, and it is proven before the judges and included in previous case of:

Sudanese Government

Against

Idris Ali Bilal

SC/MK/145/178

P384

Magazine: 1978

In total, if my two colleagues agreed, I see the following:

1. Supporting the conviction.
2. Cancelling the punishment applied by the lower courts.
3. Retaining the convicted in guardianship.
4. Returning the proceeding before the trial court to work on this memorandum.
- 5.

**Hassan Ahmed Omar**

**Superior Court Judge**

**24/01/2014 AD**

**Second Opinion**

After access to the proceeding and the rest of documents, I agree to the validity of the convictions under articles 78 and 21/175 CL of 1991, and to the validity of the punishment under article 78CL of 1991, and I see the following:

1. Court of Trial exceeded the punishment under article 175CL of 1988 and over passed the law because the punishment is the imprisonment not more than three years, in addition to any other punishment decided for the consequence of the action committed.
2. Court of Appeal diminished the punishment to the extent of neglecting the matter, in contradiction with article 39 of Criminal Law, which identified the controls of choosing the discretionary punishment in consideration of the ages of the convicted. All of them in their thirties and forties of age, and all of them have families and children. In addition, they drank wine and took night as a cover to commit their crime far away from the city. They are gang of six men against only a man and a woman, the thing that contradicts with virility and is strange to this region. This thing will forecast an extreme evil if it is not faced with prohibition and denial by applying the most extreme punishment for this kind of crimes which has no purpose but the corruption in land and disrespecting the honors and money.
3. Article 20 of the Criminal Law of 1991 states that “whoever commits a crime shall be punished by not more than the half of the maximum punishment decided for that, and if the committed action forms an independent crime, the culprit will be punished with the punishment decided for that”. Whereas the action attributed to the convicted which has been proved beyond the reasonable doubt is raping the victim/ Khadijah Sulaiman Ebrahim and tearing up her clothes and unveiling her hair in a trial to rape her in force, this action is a crime under article 151/2 CL of 1991- the outrageous acts without the satisfaction of the victim, which are punished with flogging by not more than 80 flogs, and are punished also with imprisonment for a period of not more than two years or a fine.

For all that, I see if my colleague the owner of the third opinion agreed, that our decision is as follows:

1. Supporting the conviction and punishment under article 78 CL of 1991.
2. Supporting the conviction under article 21/175 CL of 1991, cancelling the punishment and returning the papers to the trial court to reconsider it on this memorandum.
3. The conviction shall be modified to be under article 21/151/2 CL of 1991 instead of article 20/149 CL of 1991. The imprisonment punishment shall be cancelled for his location and the papers shall be returned to one of trial courts to apply the punishment guided by this ruling.
4. The convicted shall remain in prison pending the trial.

### **Third Opinion:**

After revision, I didn't find significant difference between the opinion concluded by my respected colleague, the first opinion holder and my respected colleague, the holder of the second opinion. Despite that and after access to the facts and submitted data, I found myself biased to my colleague, the holder of the second opinion in detail which I saw - with respecting the opinion concluded by my colleague the first opinion holder - to support the conviction of the convicted which is under articles 78 and 21/175 of the criminal law, fixed without doubt. The actions they committed against the victim as properly and legally detailed lead to their conviction under article 21/151 of Criminal Law.

**Abdel Raheem Abdel Wahab Al-Tohamy**

**Superior Court Judge**

**04/02/2015**

### **Final Decision:**

- The conviction and punishment are supported under article 78 of Criminal Law.
- The conviction is supported under article 21/175 of Criminal Law and the punishment is cancelled.
- The conviction of the convicted shall be modified to article 21/151 of Criminal Law and the punishment is cancelled.
- The documents shall be returned to a court for applying the punishment suitable for the conviction under the articles 21/175 and 21/151 according to the guides of this ruling.

**Abdel Raheem Abdel Wahab Al-Tohamy**

**Superior Court Judge and the Circuit Head**

**03/02/2015 AD**