AZIAKA CHARLES v. THE STATE

(2018) LPELR-43663(CA)

In The Court of Appeal of Nigeria

On Tuesday, the 13th day of February, 2018

CA/IB/330C/2016

Before Their Lordships

MONICA BOLNA'AN DONGBAN-MENSEM Justice of The Court of Appeal of Nigeria

HARUNA SIMON TSAMMANI Justice of The Court of Appeal of Nigeria

NONYEREM OKORONKWO Justice of The Court of Appeal of Nigeria

Between

AZIAKA CHARLES Appellant(s)

AND

THE STATE Respondent(s)

Other Citations

RATIO DECIDENDI

1. EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF: Burden of proof in a charge of rape of a minor

"If the Appellant contends that he reasonably believed that the child was of the age of 18 years and above, he had the onus to place before the Court facts which would enable the Court determine whether or not his belief was reasonable or unreasonable. Whatever conduct the prosecutrix exhibited which formed the basis of his belief cannot stand in view of the evidence before the Court. The Appellant, was her teacher but did not bother to investigate whether or not she was of the required age of consent. He was consumed with passion for the girl/child and therefore behaved relecklessly and wickedly. The result is that, the learned trial Judge found his believe to be unreasonable. I also hold that the Appellant failed to adduce credible evidence in support of his defence under Section 32(4) of the Child Rights Law of Ogun State. The prosecution only had the burden of adducing evidence to show that the prosecutrix was below the age of eighteen and that the Appellant had sexual intercourse with her. The burden would then shift to the Appellant to prove that he had reason to believe that she was eighteen (18) years or above. The Appellant failed to discharge that burden. See Phillips v. Eba Odan Commercial & Industrial Co. Ltd (2013) 1 NWLR (pt.1336) 618 and Okubuke v. Oyagbola (1990) 4 NWLR (pt.147) 723." Per TSAMMANI, J.C.A. (Pp. 17-18, Paras. B-C) (...read in context)

2. EVIDENCE - BURDEN OF PROOF/STANDARD OF PROOF: Burden of proof and standard of proof in criminal cases

"(See Igbi v. State (2000) 3 NWLR Pg. 192, on the burden and standard of proof on the prosecution in a trial case). The burden of proofing the guilt of an accused rests on the prosecution. The standard of proof required of the prosecution to discharge that burden has been settled as proof beyond reasonable doubt." Per DONGBAN-MENSEM, J.C.A. (P. 15, Paras. B-D) (...read in context)

3. APPEAL - INTERFERENCE WITH FINDING(S) OF FACT(S): Attitude of appellate courts to findings of fact made by a lower court

"In the case of Nziwu v. Onuorah (2002) 4 NWLR (Pt. 756) 22 SC states the attitude of an Appellate Court as ragards findings of fact by a lower Courts. The Supreme Court will not interfere with the concurrent findings of both the trial Court and the Court of Appeal except there is established fact of miscarriage of justice or violations of some principles of law or procedure. Similarly, this Court will not interfere with the findings of the trial Court with clearly established mis-application of the law on facts which were misconstrued by the trial Court. There is no miscarriage of justice or any violation at all as the Appellant did not raise any issue to that effect." Per DONGBAN-MENSEM, J.C.A. (Pp. 14-15, Paras. E-B) (...read in context)

4. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Circumstances where the defence of reasonable belief under Section 32(4) of the Child Rights Law of Ogun State will not avail an accuse person of the offence of rape

"It is an established fact of nature that some people may by reason of their stature or physical conditions or economic or social circumstances, look older or younger than their registry age. It is particularly, so when such people engage in physical or mental activities that give one the impression that they are of 'age'. The evidence in this case of the prosecutrix fits into this category and the question is whether appellant has reason, having regards to his antecedents with the prosecutrix to believe that she is of age - more particularly that she is above 18 years. It is factual scenario such as this that necessitated the inclusion of Section 32 (4) into the Child Rights Law of Ogun State which provides thus: "Notwithstanding anything contained in this section, it shall be a defence to prove the appellant believed on reasonable grounds that the child was of the age of eighteen years or above." Evidence in the case reveal some fiduciary relationship between the appellant and the prosecutix in the sense that appellant was a teacher of the Prosecutrix PW1 and by reason thereof was able to exercise undue influence over the girl. For a teacher to begin to have affairs with his JSS3 student over a period without involving the parents of the girl smacks more of taking undue advantage of the girl in a Pupil/Teacher relationship. The undue influence seems to me to negate the provision of Section 32(4) and so the appellant cannot reasonably believe the prosecutrix to be 18 years or above. By reason of the undue influence appellant exercised over the girl, the defence of Section 32 (4) cannot avail the appellant." Per OKORONKWO, J.C.A. (Pp. 18-20, Paras. E-A) (...read in context)

5. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Whether in an offence of rape a child who is under the age of 14 years is capable of giving consent

"...The contention of the Respondent is that the issue of consent cannot avail the Appellant as envisaged in the case of Isa v. The Kano State (2016) LPELR - 40011 SC Pg. 10-11. The fact of the case is that the Appellant raped a girl aged 8 years. The Appellant lured the prosecutrix with money to buy him pure water and upon bringing the pure water; the Appellant dragged her to an uncompleted building and raped her before she was rescued. At the conclusion of the trial, the Appellant was sentenced. The trial Court found the Appellant guilty as charged and convicted him accordingly to 10 years imprisonment. Dissatisfied, the Appellant appealed to the Court of Appeal, the Appellate Court affirmed the trial Court's decision. Dissatisfied the Appellant appealed to the Supreme Court. The Court held that the act of rape is by nature unlawful because the concept involves an aggressive carnal knowledge of a female without her consent. Consent in this context must be devoid of any form of external influence. A child who is under age is not however capable of giving consent. Rape by nature is grave, devastating and traumatic. It also reduces the totality of the victim's personality. Several definitions given to rape are all characterized by an absence of consent as a common feature. - Elias JSC. It was on this ground, that the appeal was dismissed." Per DONGBAN-MENSEM, J.C.A. (Pp. 13-14, Paras. A-B) (...read in context)

MONICA BOLNAAN DONGBAN-MENSEM, J.C.A.(Delivering the Leading Judgment):This is an appeal against the Judgment of the High Court of Ogun

State, Abeokuta Division delivered on the 28th June, 2016 by Hon. Justice O. O. Olopade.

On the 19th day of November 2015, the Appellant was arraigned on a sole charge of having sexual intercourse with a child. The offence is contrary to and punishable under Section 32(2) of the Child Rights Law, Laws of Ogun State 2016. The Appellant pleaded not guilty to the offence.

The Prosecution called three witnesses while the Defence also called three witnesses. The learned trial Court preferred the case of the prosecution and found the Appellant as an accused person, guilty and sentenced him to a term of ten years imprisonment.

The Appellant raised three issues while the Respondent formulated a sole issue. The issues respectively of the Appellant and the Respondent are as follows:

1. Whether the prosecution proved the offence for which the Appellant was charged with beyond reasonable doubt.
2. Whether the conviction by the lower Court was supported by the evidence.

3. Whether the sentence of 10 (Ten years) imprisonment with hard labour was too heavy having regard to the circumstances of this case.

1. Whether the prosecution has proved the offence of having sexual intercourse with a child against the Appellant beyond reasonable doubt, having regard to the evidence before the Court.

It is the case of the Appellant that the fact of the Appellant having sexual intercourse with the PW1 is not in contention. It was a consensual act, maintains the Appellant.

It is also not contested that the PW1, alleged victim was found at the residence of the Appellant upon a report made by the parents to the Police.

The argument of the Appellant is premised on the alleged age of the PW1 the evidence of which was established by a birth certificate admitted as Exhibit A at the trial. The said certificate puts the age of the Prosecutrix at 17years 3 months at the time of the alleged sexual exploit by the Appellant.
(Pg. 4 and 5 of the Appellants brief of Argument)

It is the submission of the Appellant that Prosecution tendered her Birth Certificate Exhibit A to prove that she was not yet eighteen as at December 5, 2010. According to Exhibit A, PW1 was seventeen years and 3 (three) months. The Birth Certificate as a document, the Appellant submits, is only a document of record but not proof of real age. However, if PW1 was really under eighteen years, the issue of consensual sexual intercourse does not arise.

That according to S. 32(4) of the Child Rights Law of Ogun State:

Notwithstanding anything contained in this section, it shall be a defence to prove the Appellant believed on reasonable grounds that the child was of the age of eighteen years above.

That the Appellant in his defence to the offence under Section 32(4) Child Rights Law above stated that the level of liberty and maturity exercised by the PW1 in her relationship with him led him to believe that she was older than eighteen years.

That it is common fact that girls these days grow bigger and older than their age and besides the level of liberty she exercised in the relationship suggested to the Appellant that PW1 was over eighteen.

That the testimony of DW2 and DW3 supported DW1s defence that he believed PW1 to be over eighteen. PW1 was ever ready to marry the Appellant and it was DW3 who suggested to her that the prospective husband will come and visit her parents for her hand (page 77 of the Record). PW1 refused to return home.

That the intention of the Appellant in the alleged offence was innocent. Submits that Section 32(4) of the Child Rights Law of Ogun State avails the Appellant a credible defence as he could not reasonably believe that PW1 was merely eight months short of her eighteenth birthday.

That the liberty, maturity and willingness coupled with the decision of PW1 to marry and settle down with DW1 are all reasonable grounds for DW1 to believe

PW1 was at least eighteen years. Her willingness, readiness and determination not to get pregnant is an unmistakable sign of adulthood on the part of PW1.

The Appellant also raised issues with the sentence of 10 years and submit that the sentence of 10 years imprisonment with hard labour is too severe in the circumstances of this case particularly as the Appellant reasonably believed that PW1 was over eighteen years old.

That both Appellant and PW1 developed this relationship with a joint intention that they would get married to each other.
That it is also in evidence that the Appellant was never cruel or hurtful to PW1.
That the Court should uphold the Appellants arguments.
That therefore urge this Honourable Court to hold that the Appellant is not guilty of the offence presently brought against him, discharge and acquit him accordingly.

The Appellant maintains that the Prosecution failed to establish that the Appellant acted with bad intention and knowing that the Prosecutrix is a child under the age of 18 years and therefore incapable of giving consent to a sexual relationship that the burden always lies with the Prosecution to establish its case beyond reasonable doubt. That the Prosecution failed to establish the vital ingredients of the offence including the identity of the Appellant.

Conversely, the Respondent maintains that the Prosecution proved the case against the Appellant beyond reasonable doubt and that the trial Court was right

in convicting and sentencing the Appellant as it did that the learned trial judge was right to have relied on Exhibit B, C and D which were confessional statement made by the Appellant. That the Prosecution proved the offence of having Sexual Intercourse with a child against the Appellant beyond reasonable doubt, the evidence of PW1 having being corroborated by Exhibits A and E.

The Respondent points to the evidence of the PW1, PW2, PW3 and Exhibit A, B, C, D, E, F and G which are uncontroverted as satisfying the burden placed on the Prosecution. Portions of the testimony PW1 were quoted to buttress the submission of the Respondent. Several cases were also cited, among which are: NAYAN UPAHAR & ANOR VS. THE STATE (2003) 6 NWLR (PT. 816) 230; OGUNBAYO VS. THE STATE (2007) 1 NWLR (PT. 1035) 157 @ 179; BONNIFACE ADONIKE VS. THE STATE (2015) LPELR-24281 (SC); ISA VS. THE STATE (2016) LPELR-40011 (SC) pg 10-11; NDIDI VS. STATE (2007) 13 NWLR (PT 1052) 633 (page 4-7).

It is further the submission of the Respondents that the argument of the Appellant to the effect that he had the consent of a child to have sexual intercourse with her is a defence not known to law. Refers to Section 32 (2) of the Child Rights Law 2006.

On the complaint of an excessive sentence, the Respondent argues that the punishment is life imprisonment but the learned trial Court applied discretion in the sentence of 10 years only. The Appellant should therefore not be heard to complaint about the sentence.

This appeal seems to be quite straight forward although the Appellant seems to be playing hide and seek in a Court of law.

In one breath, the Appellant would admit having sexual intercourse with the Prosecutrix and in another, he brings up other issues. He sighted the PW1 at school while she was under his tutelage. He was her French teacher in a secondary school, not a university nor a post graduate school.

The victim/prosecutrix testified as PW1. The testimony is very clear and graphic. I crave indulgence to reproduce part of the testimony extensively anon:
By Bible and states in English. He was my French Teacher. The first time I had an encounter with the Accused person was in my Secondary School. Taidob College, Abeokuta when I was in JSS3. When I was in SS2, he came to me and said he wanted to marry me, that he liked me. Then I was 16 years old. Afterwards he constantly asked that I come to his office for recording of Students marks. After that, he slept with me (i.e. had sexual intercourse with me). He inserted his penis inside my vagina in his office. On 5th December, 2010, it was a Sunday and Mr. Aziaka called me on phone and asked me to come and see him in his house and that he was going to describe the home address to me. I had never been to his house before that day. He asked his brother to pick me up at a junction. His brother took me to his house (i.e. Accused person's house) where he later joined me. At that time, I was 17 years old. When I got there, he constantly had sex with me, the same thing he did when I was in SS2. He inserted his penis into my vagina 5 times. Afterwards, he gave me a drug to use - Postinor 2. I used the drug. He did

not allow me to go back home. He locked me up in his house and changed my Card. On a particular day, he came in with a lady. I later discovered she was a Police Officer as she was not in uniform. He opened the door and came in with the lady. The lady ushered me down downstairs. In the car downstairs where my family members and my sister i.e. my Uncle's wife, the Driver and 2 sisters. We drove from his house to my Secondary School - Taidob College to see the Proprietor. From there we went to the Police Station at Obantoko. (From the record book page 33)

To buttress this, birth certificate of the PW1 was tendered as Exhibit A dated 21/11/2002. No contradictory document was tendered by the Appellant in challenge of the certificate.

The Appellant only made heavy weather on what a child means at the instance of S. 32(4) of the Child Right Laws of Ogun State to the effect that there is a reasonable belief that the child was of age eighteen at that material time. It should be noted that there was no documentary materials placed before the Court to support such assertion that the girl is of age at that material time. Appellant contends that there is consensual sexual intercourse.

Another defence of the Appellant is that the existing relationship between the duo and the liberty of the affairs suggest that PW1 was over 18 years. This is a mere assertion, as there was no further evidence adduced at the trial in support of such fact.

Evidence of DW1 (Appellant) at Pg. 55-75 of the record for this appeal. The Appellant stated as follows: inter alia My offence before this Court is that the parents of Jadesola found her in my house and said I took her away from them. When I got home, I met Jadesola and my brother watching film ..

Rather than take the PW1 back to her parents or invite them to come and take their ward home, the Appellant colonized her and turned her into sexual meal. He had sex with her each time he got back from work.
I was trying to drag her out for me to take her back home but she insisted..
.I had sex with her while she was with me. I had sex with her anytime I came back from work.

Under the cross examination at Pg. 72 DW1 testified as follows:
Yes I didnt know her age but I was planning to marry her. We had discussion together. I was the person that disvirgined Jadesola. I also gave her postinor 2 when she ran away from her house to my house. The postinor 2 was for her not to get pregnant.

At page 75 of the record
The evidence of DW2 Mr. Aloma Moloba Adisa testified as follows:
I stay in the same compound with the accused person . I welcomed Jadesola and went out and called the
Appellant and asked him when the girl will be leaving. He said that she would be going back on Monday (following day). I asked why she was there and he told me

she failed jamb and her mother threatened to deal with her mercilessly and so she ran away from home.

DW3 at page 77 testified as follows:
I asked her to go back to her Mummys house, she refused. I knelt down and begged her to go back home, she refused.

These pieces of evidence clearly show that the Appellant was out for unlawful intercourse with child. He knew she had parents under whose custody she was.

That the victim sleeping under the same roof with the Appellant suggest that the duo were having sex bearing in mind that the brother living with the Appellant was chased away. The evidence of DW1 at Pg. 60 of the record as follows in support of the above presumption of having unlawful sexual intercourse with the victim. DW1 at pg. 60 testified as follows:
The moment Jadesola came to my house, she asked me to tell him i.e. my brother to go and live with Aloma Adisa (my friend) since he was staying with me from morning till evening and after eating he will watch film with us and go and sleep with Aloma who was staying in the same building with me.

The assertion of the Appellant that girls of nowadays are bigger and grow older than their age as a justification for having unlawful sexual intercourse with the prosecutrix is a mere excuse since it cannot be supported by any fact or evidence.

Now to the evidence of DW1 as whether he had the knowledge of the fact the PW1 is over 18 years of age.
At page 73, DW1 testified At the time I harboured her, she was not my student. She had passed out then.
She was a young girl then, I did not ask her age before I had sex with her. I cannot believe she was 16 years when she was in SS2.

From the foregoing it can be seen that there is nowhere that the Appellant denies that PW1 is under the age of 18 years.

The further argument of the Appellant that no other students suffered the same inhumane treatment meted to the PW1 suggest that the action of the Appellant was indeed a cruel one and a maltreatment to a child as there was nothing placed before the Court to the contrary.
The burden requisite for establishing the offence against the Appellant was satisfied. Evidence led during the course of the trial by the prosecution witnesses satisfies the burden of proof. The contention of the Respondent is that the issue of consent cannot avail the Appellant as envisaged in the case of Isa v. The Kano State (2016) LPELR 40011 SC Pg. 10-11. The fact of the case is that the Appellant raped a girl aged 8 years. The Appellant lured the prosecutrix with money to buy him pure water and upon bringing the pure water; the Appellant dragged her to an uncompleted building and raped her before she was rescued. At the conclusion of the trial, the Appellant was sentenced. The trial Court found the Appellant guilty as charged and convicted him accordingly to 10 years imprisonment. Dissatisfied, the Appellant appealed to the Court of Appeal, the Appellate Court

affirmed the trial Courts decision. Dissatisfied the Appellant appealed to the Supreme Court.

The Court held that the act of rape is by nature unlawful because the concept involves an aggressive carnal knowledge of a female without her consent. Consent in this context must be devoid of any form of external influence. A child who is under age is not however capable of giving consent. Rape by nature is grave, devastating and traumatic. It also reduces the totality of the victims personality. Several definitions given to rape are all characterized by an absence of consent as a common feature. Elias JSC.

It was on this ground, that the appeal was dismissed.

The issue of identity raised by the Respondent in the course of his argument goes to no issue as the Appellant did not deny the fact that he slept with the PW1 repeatedly and that they knew each other very well. PW1 was found in the residence of the Appellant. (See Princent v. State (2002) 18 NWLR (Pt. 798) 49 SC).

The position of a Judge adjudicating in a case in Nigerian adversary system is that of an unbiased umpire.

In the case of Nziwu v. Onuorah (2002) 4 NWLR (Pt. 756) 22 SC states the attitude of an Appellate Court as ragards findings of fact by a lower Courts.

The Supreme Court will not interfere with the concurrent findings of both the trial Court and the Court of Appeal except there is established fact of miscarriage of justice or violations of some principles of law or procedure. Similarly, this Court

will not interfere with the findings of the trial Court with clearly established mis-application of the law on facts which were misconstrued by the trial Court.
There is no miscarriage of justice or any violation at all as the Appellant did not raise any issue to that effect.
(See Igbi v. State (2000) 3 NWLR Pg. 192, on the burden and standard of proof on the prosecution in a trial case).
The burden of proofing the guilt of an accused rests on the prosecution. The standard of proof required of the prosecution to discharge that burden has been settled as proof beyond reasonable doubt.

It has been proved by the prosecution that there was a case of having unlawful sexual intercourse by both parade and documentary exhibits too. The evidence of DW2 and DW3 did not exonerate the Appellant from the crime only to the extent that they are neigbhours and co-tenants and teachers respectively.

On the other hand the evidence of PW1, PW2 and PW3 are compelling enough to warrant the conviction of the Appellant as rightly done by the trial Court.

I find no good reason to interfere with the decision of the learned trial Court. The conviction and sentence of the Appellant is hereby affirmed.

HARUNA SIMON TSAMMANI, J.C.A.:I had the privilege of reading in advance a draft of the judgment delivered by my learned brother, Monica B. Dongban-Mensem, JCA.

The facts of this case are clear, lucid and uncomplicated. They reveal the sadistic attitude of a man saddled with the duty of tutoring a child/young girl placed in his care in one of our places of "learning". Instead of teaching and imparting knowledge and good morals in the unfortunate young girl, the Appellant decided to be the devil's advocate.

The Appellant did not deny the fact that he had sexual intercourse with her. In fact the Appellant admitted disvirgining the prosecutrix when she was in Junior Secondary School. He later, after her Senior Secondary School, lured her into his home, detained her on the pretext that he wanted to marry her.

If indeed, he had the intention of marrying her, why give her the pill to prevent her from getting pregnant. The conduct of the Appellant clearly evinced the attitude of a person who wanted to have good time with the prosecutrix and later on dump her. The crux of the matter, however, is that the Appellant had sex with the prosecutrix when she had not attained adulthood or the age of consent. Whatever "consent" the prosecutrix gave, as alleged by the Appellant was incontrovertibly negatived by the evidence placed by the prosecution before the Court. If the Appellant contends that he reasonably believed that the child was of the age of 18 years and above, he had the onus to place before the Court facts which would enable the Court determine whether or not his beliefwas reasonable or unreasonable. Whatever conduct the prosecutrix exhibited which formed the basis of his beliefcannot stand in view of the evidence before the Court. The Appellant, was her teacher but did not bother to investigate whether or not she was of the required age of consent. He was consumed with passion for the

girl/child and therefore behaved relecklessly and wickedly. The result is that, the learned trial Judge found his believe to be unreasonable. I also hold that the Appellant failed to adduce credible evidence in support of his defence under Section 32(4) of the Child Rights Law of Ogun State. The prosecution only had the burden of adducing evidence to show that the prosecutrix was below the age of eighteen and that the Appellant had sexual intercourse with her. The burden would then shift to the Appellant to prove that he had reason to believe that she was eighteen (18) years or above. The Appellant failed to discharge that burden. See Phillips v. Eba Odan Commercial & Industrial Co. Ltd (2013) 1 NWLR (pt.1336) 618 and Okubuke v. Oyagbola (1990) 4 NWLR (pt.147) 723.

For the above reasons and the other reasons admirably and lucidly laid out in the lead judgment, I have no doubt in my mind that this appeal is without merit. It is accordingly dismissed. I abide by the consequential orders made by my learned brother.

NONYEREM OKORONKWO, J.C.A.:It is an established fact of nature that some people may by reason of their stature or physical conditions or economic or social circumstances, look older or younger than their registry age. It is particularly, so when such people engage in physical or mental activities that give one the impression that they are of 'age'.

The evidence in this case of the prosecutrix fits into this category and the question is whether appellant has reason, having regards to his antecedents with the prosecutrix to believe that she is of age - more particularly that she is above 18 years.

It is factual scenario such as this that necessitated the inclusion of Section 32 (4) into the Child Rights Law of Ogun State which provides thus:

"Notwithstanding anything contained in this section, it shall be a defence to prove the appellant believed on reasonable grounds that the child was of the age of eighteen years or above."

Evidence in the case reveal some fiduciary relationship between the appellant and the prosecutix in the sense that appellant was a teacher of the Prosecutrix PW1 and by reason thereof was able to exercise undue influence over the girl.

For a teacher to begin to have affairs with his JSS3 student over a period without involving the parents of the girl smacks more of taking undue advantage of the girl in a Pupil/Teacher relationship. The undue influence seems to me to negate the provision of Section 32(4) and so the appellant cannot reasonably believe the prosecutrix to be 18 years or above.

By reason of the undue influence appellant exercised over the girl, the defence of Section 32 (4) cannot avail the appellant.

I agree with the lead judgment of my lord Monica Bolna'an Dongban-Mensem JCA in the lead judgment and the orders made therein.

Appearances:

Adeboye Adesanwo (held brief for L.A.O. Nylander)For Appellant(s)

B.A. Adebayo (Admin. Gen. & Public Trustee Ogun State Ministry of Justice) with F.E. Bolarinwa Adebowale (A.C.S.C) Ministry of JusticeFor Respondent(s)>

Appearances

Adeboye Adesanwo (held brief for L.A.O. Nylander)For Appellant

AND

B.A. Adebayo (Admin. Gen. & Public Trustee Ogun State Ministry of Justice) with

F.E. Bolarinwa Adebowale (A.C.S.C) Ministry of Justice For Respondent