MUHAMMAD ALI v. KANO STATE

(2018) LPELR-44201(CA)

In The Court of Appeal of Nigeria

On Wednesday, the 28th day of February, 2018

CA/K/26c/2011

Before Their Lordships

IBRAHIM SHATA BDLIYA Justice of The Court of Appeal of Nigeria

OBIETONBARA O. DANIEL-KALIO Justice of The Court of Appeal of Nigeria

AMINA AUDI WAMBAI Justice of The Court of Appeal of Nigeria

Between

MUHAMMAD ALI Appellant(s)

AND

KANO STATE Respondent(s)

Other Citations

RATIO DECIDENDI

1. WORDS AND PHRASES - "SPECULATION" "INFERENCE": Meaning of "speculation" and "inference"

"A finding is said to be speculative when it is not based on facts or knowledge of its details but on guesses or conjectures but not when as in the case at hand, it is based on or derivable from the evidence on record. Whereas speculation is a mere variant of imaginative guess which, even when it appears plausible should never be allowed by a Court of law to fill any hiatus in the evidence before it, an inference is a reasonable deduction from facts available before the Court. See IVIENAGBOR VS OSATO BAZUAYE & ANOR (1999) 6 SC (PT. 1) 149 per Uwaifo JSC. Thus, the said finding by the learned trial

Judge which is based on evidence on record and reasonable inference from the evidence, is a finding of fact and not a finding based on speculation as strenuously but erroneously argued by the learned Appellant's Counsel." Per WAMBAI, J.C.A. (Pp. 27-28, Paras. E-B) (...read in context)

2. EVIDENCE - CONTRADICTION IN EVIDENCE: Whether court can speculate or proffer explanation when there are contradictions in the testimonies of prosecution's witnesses on material facts and the contradictions are not explained by the prosecution

"While it is trite that where there are contradictions in the testimonies of prosecution witnesses on a material fact and the contradictions are not explained by the prosecution through any of its witnesses, the Court should not speculate on or proffer the explanation for such contradictions and is precluded from picking and choosing which it would believe, see MUKA & ORS VS THE STATE (1976) 9 & 10 SC 305 AT 325, whereas in this case the trial Judge adverted his mind to the contradiction/discrepancy but found same satisfactorily explained, his findings based upon the explanation offered by the prosecution witnesses cannot be said to be speculative nor can the contradiction be said to be unresolved." Per WAMBAI, J.C.A. (Pp. 28-29, Paras. C-A) (...read in context)

3. CRIMINAL LAW AND PROCEDURE - CONVICTION FOR LESSER OFFENCE: Position of the law as regards conviction for lesser offence

"The pith of the Appellant's contention on this issue is mainly two fold viz: (a) that the offence of gross indecency is not a lesser offence of rape within the contemplation of Section 217 Criminal Procedure Code which must be read together with Section 216 and (b) that the failure to frame a new charge for the offence of gross indecency for which the Appellant was convicted after being discharged and acquitted of rape, breached the Appellant's right to fair hearing. Admittedly, as argued by the learned Appellant's Counsel, Section 217 by its wordings must be read together with Section 216 of the same Criminal Procedure Code. Section 217 Criminal Procedure Code provides:- "If in the case mentioned in Section 216 the accused is charged with one offence and it appears in evidence that he committed a different offence with which he might have been charged under the provisions of that Section, he may be convicted of the offence which he is shown to have committed although he was not charged with it." A reading together of Sections 216 and 217 shows that where from a single or series of acts committed by an accused person it is doubtful which of the several (related) offences the facts which may be

proved may constitute, the accused person may be charged with all such several offences or any or more of such offences or may be charged in the alternative. If pursuant to Section 216 the accused is charged with one (of such) offences but it appears in evidence that he committed a different offence which he might have been charged with, he may be convicted of the offence which the evidence reveals he has committed though not so charged. In the instant case the Appellant was charged with the offence of rape but at the end of trial the most important ingredient of rape, penetration, was not proved. The argument for the Appellant is that the residue of the particulars of rape after deleting the unproved particulars of "penetration" and "sexual intercourse" do not constitute or form the particulars of the offence of gross indecency. Going by the combined reading of Sections 216, 217 and 218 of the Criminal Procedure Code, I disagree with the learned Counsel's submission. This is because the offence of rape is only an aggravated offence of gross indecency which includes sexual assault. It is the none proof of "penetration" of the Penis in the Vagina that reduced the offence to gross indecency, which is an offence in the class of sexual assault. Both the aggravated offence of rape and the reduced or lesser offence of gross indecency share the ingredient of sexual assault or unlawful tempering with female private part, and in the presence of the components of absence of consent or will, constitutes either the aggravated offence of rape or the reduced or lesser offence of indecent assault otherwise known as gross indecency. It thus follows that the residue of the particulars of rape after deleting the particulars of penetration in rape, constitutes a lesser offence of gross indecency and sufficiently satisfies the attempted guide of what constitutes a lesser offence as set out in TORHAMBA VS POLICE (Supra) or at least a reduced offence contemplated in Section 218 (2) of the same Criminal Procedure Code. In his commentary or annotation to Section 217 of the Criminal Procedure Code of Northern States of Nigeria 2nd Edition applicable in Kano State, the great author Jerry Richard Jones in his illustration of what constitutes a lesser offence under the said Section, gave 3 examples, one of which is that: "(c) A. is charged with rape and it is proved in evidence that he committed an act of gross indecency. A may be convicted of committing an act of gross indecency although he was not charged with that offence." This illustration by the great author, is very much in consonance with the decided cases referred to and with what I have tried to expound of the said provisions in this judgment. I therefore discountenance the Appellant's submission and hold that the conviction of the Appellant under Section 285 is within the contemplation of a lesser offence in Section 217 for which he could be convicted without the need to frame a new charge. Furthermore on the 2nd arm of the argument that failure to frame a new charge infringes on the Appellant's constitutional right to fair hearing, I find it difficult to subscribe to that submission and see it as an attempt to impute into the provisions of Sections 217 and 218 (2) of the

Criminal Procedure Code a condition not so imposed by the statue. There is no requirement, by their plain and ordinary meaning, for the framing of a new charge or that the accused be put on notice where the Court decides to invoke its powers to convict the accused for a proved lesser offence consisting of some particulars of the offence charged. The lesser offence is in fact implicit in the greater or aggravated offence for which the Appellant is deemed to have notice of the lesser offence revealed by evidence. It must be borne in mind that the lesser offence of gross indecency for which the Appellant was convicted arose from the evidence led in support of the more serious offence of rape in respect of which the Appellant was charged. Obviously, the Appellant had notice of the lesser offence of gross indecency for which he could be convicted. He is indeed deemed to have had notice of the lesser offence. In NWACHUKWU VS THE STATE (Supra) while interpreting the provisions of Section 179 of the C.P.A., which is in pari materia with Sections 217 and 218 of the Criminal Procedure Code under consideration, the Supreme Court per Karibi-Whyte JSC at pages 400 - 401 lines 25 - 3 held: "Thus where the accused has notice of an aggravated offence, he also has notice of the lesser offence for which he could be convicted. The assumption which is legitimate, is that accused would have challenged the more serious offence and must be fully aware of the case against him in respect of the lesser offence." Similarly, by Section 218 (1) when a person is charged with an offence consisting of several particulars, and a combination of some of the particulars which constitute a complete lesser offence is proved but the remaining particulars are not proved, the accused may be convicted of the lesser offence though he was not charged with it. Additionally or alternatively, by Sub-section 2 of the same Section 218, where a person is charged with an offence and the facts proved reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with that offence. In the light of this I also discountenance, as unfounded the argument that the failure to frame a charge of act of gross indecency and call upon the Appellant to defend that charge amounts to denial of fair hearing. That submission has no legal or judicial blessing and its untenable. It is for this and the preceding reasons that I also resolve this issue against the Appellant. In conclusion, from the evidence on record, the learned trial Judge cannot be faulted when he held at page 104 of the record that: "On the whole I am unable to find any evidence on the side of the defence that has created reasonable doubt in my mind that it was the accused who committed the act of gross indecency on the PW6". After all, where at the entire evidence adduced before a trial Court, that Court is left with no doubt that the offence was committed by the accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld even if it is on credible evidence of a single witness." Per WAMBAI, J.C.A. (Pp. 35-42, Paras. E-C) (...read in context)

4. EVIDENCE - CORROBORATION/CORROBORATIVE EVIDENCE: Definition and nature of corroborative evidence

"Evidence in corroboration is an independent testimony which affects the accused by connecting or tending to connect him with the crime in some respects material to the charge in issue but it needs not consist of direct evidence that the accused committed the offence, nor amount to a confirmation of the whole account given by the witness. It is sufficient if it corroborates the evidence in some respects material to the charge. See EZIGBO V. STATE (2012) LPELR - 7855 (SC); R. VS BASKETVILLE (1916-17) ALL ER REPRINT 38 AT 43; IKO VS STATE (2001) 14 NWLR (PT. 732) 221 AT 241. Indeed corroborative evidence is confirmatory evidence or additional evidence to that already given. It is supplementary evidence that tends to strengthen or confirm the evidence already given which it is to corroborate. It is an additional evidence of a different character on the same point. See Blacks Law Dictionary, 6th Edition page 344 and MUSA VS THE STATE (2013) ALL FWLR (PT. 692) B - C. In STATE VS GWANGWAN (2015) LPELR 504/2012 (SC) the Supreme Court held that corroboration means or entails the act supporting or strengthening the statement of a witness and it does not mean that the witness corroborating the evidence must use the exact or very like words used by the witness whose evidence is to be corroborated. Additionally, corroborative evidence, it must be emphasized is sufficient even if it is circumstantial in nature so long as it connects or tends to connect the accused to the commission of the offence. See DURUGO VS THE STATE (1992) NWLR (PT. 255 525; OGUNBAYO VS THE STATE (2007) LPELR - 2323 (SC)." Per WAMBAI, J.C.A. (Pp. 18-19, Paras. D-F) (...read in context)

5. EVIDENCE - CORROBORATION/CORROBORATIVE EVIDENCE: Whether the unsworn evidence of a child requires corroboration to warrant a conviction

"Learned Appellant's Counsel has argued that the unsworn evidence of PW6 a child of 5 years of age requires corroboration and that neither the above evidence of PW3 nor that of PW4 corroborates her evidence. I quite agree with the learned Counsel that the unsworn evidence of PW6, a child below the age of 14 years, requires corroboration both as a matter of law as stipulated in Section 209 (1) and (3) of the Evidence Act and by established practice as a matter of prudence. See OBRI VS THE STATE (1997) LPELR - 2194 (SC); DAGAYYA VS THE STATE (2006) LPELR - 912 (SC)." Per WAMBAI, J.C.A. (P. 18, Paras. A-D) (...read in context)

6. EVIDENCE - DOCTRINE OF LAST SEEN: When the doctrine of last seen can be invoked

"The undisputed evidence on record is that the Appellant who is a neighbour to PW6's father (PW2) and enrolled PW6 in the school where he teaches, sometimes takes her to and back from school. On the fateful day, 11th June, 2013 the Victim was seen by most staff of the school including PW7, the Head Teacher of the school, playing on the Appellant's motor-cycle and when told to go home, she said she was waiting for her uncle, the Appellant. The Appellant admitted he dropped her at home as confirmed by his wife, DW2 and PW6's mother, PW4. She was hale and hearty when last seen in school and soon as Appellant dropped her at home and she went into the toilet to ease herself, her mother, PW4 heard her crying, and upon being examined, noticed that her private part had been tempered with. Between the time she was last seen in school hale and hearty and the time she was dropped by the Appellant at home and her mother heard her crying and her vagina blood stained, was such a short time that appropriately fits the applicability of the doctrine of "last seen" a doctrine that has gained global application and acceptability. The doctrine of last seen as explained in HARUNA VS ATTORNEY GENERAL OF THE FEDERATION (2012) 9 NWLR (PT. 1306) 419 (SC) per Adekeye JSC, means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. This doctrine applies when the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small or short that the possibility of any person other than the accused being the author of the crime becomes impossible, so said ARIWOOLA JSC at Pages 51 - 55 paragraphs F - D in MADU VS THE STATE (2012) LPELR - 7867 (SC). In such circumstances the onus shifts squarely to the accused person to offer an explanation, a plausible explanation, showing that he was not the person responsible. In NWAEZE VS THE STATE (Supra). Adio JSC had this to say: "... the position then is that if Mr. A was last seen with or in company of Mr. B and the next thing that happened was the discovery of the corpse of Mr. A then, irresistible inference is that Mr. A was killed by Mr. B the onus will be on Mr. B to offer explanation for the purpose of showing that he was not the one that killed Mr. A". Though the above cases involve charge of murder or culpable homicide, the law applies with equal force in a situation such as the one at hand where the Victim was last seen with the Appellant in healthy condition and the next thing was that she was seen with blood stained vagina and inflammation. The burden was shifted to the Appellant with whom she was last seen healthy, to offer a plausible

explanation of the cause of her new condition." Per WAMBAI, J.C.A. (Pp. 20-23, Paras. F-C) (...read in context)

7. CRIMINAL LAW AND PROCEDURE - GUILT OF AN ACCUSED PERSON: How to establish/prove the guilt of an accused person

"It has been established over time that the prosecution may establish the guilt of an accused person either by the confessional statement of the accused; by circumstantial evidence; or by the evidence of eye witness account of the commission of the crime. See IGABELE VS THE STATE (2009) 6 NWLR (PT. 975) 100; ADEKOYA VS THE STATE (2012 VOL. 3 M JSC (PT. 11) 77; NIG. NAVY & 2 ORS VS LT. COMMANDER S.A. IBE LAMBERT (2007) ALL FWLR (PT. 396) 574, AT 586." Per WAMBAI, J.C.A. (P. 15, Paras. B-D) (...read in context)

8. CRIMINAL LAW AND PROCEDURE - OFFENCE(S): Meaning and ingredients of the offence of gross indecency

"Now, the Appellant was charged with the offence of rape punishable under Section 283 of the Penal Code but was at the end of trial, discharged and acquitted of the rape but convicted of the offence of gross indecency punishable under Section 285 of the same Penal Code. The Section provides: "Whoever commits an act of gross indecency upon the person of another without his consent or by use of force or threats compels a person to join with him in the commission of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine: Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this Section". The essential ingredients which the prosecution must prove beyond reasonable doubt are: a. that the accused committed an act of gross indecency upon the person of another; (b) that the other person did not consent to the act; or (c) that the accused compelled that person by the use of force or threats to join him in the commission of the grossly indecent act. It is unquestionable that to secure or sustain a conviction for the offence, the prosecution must positively prove beyond reasonable doubt, each and every listed ingredient of the offence. It is needless to emphasize that failure to prove any of the ingredients means failure to prove the offence even if the other ingredients are proved beyond shadow of doubt and ultimately, the accused will be entitled to a

discharge and acquittal. See BELLO VS THE STATE (2012) 8 NWLR (PT. 1302) 207, 237; UTUK VS THE STATE (2010) 34 NWLR 171 AT 179; HARUNA VS A.G. (2012) 9 NWLR (PT. 1306) 419, 444 - 445 PARA G. Act of gross indecency has not been defined by the Penal Code but the Blacks Law Dictionary 7th Edition at page 771 defines indecency as "the condition or state of being outrageously offensive especially in a vulgar or sexual way. Indecent assault involves sexual assault". Indecent assault is an offence of aggravated assault and overlaps with sexual assault. It follows that an act of gross indecency denotes an aggravated assault that is grossly or grievously offensive in a vulgar or sexual way. It is an unlawful and unacceptable sexual activity or behaviour forced upon another person against his or her will or consent and includes the act of inserting one's hand or finger in the vagina of the other without that other's consent or against her will. In other words, act of gross indecency includes any unlawful sexual activity or behaviour short of penetration of the penis." Per WAMBAI, J.C.A. (Pp. 12-15, Paras. F-B) (...read in context)

9. CRIMINAL LAW AND PROCEDURE - OFFENCE(S): Position of the law on proof of consent in the offence of gross indecency

"On the remaining ingredient, a read through the Section makes it unarguable clear that the subsequent ingredients of the offence after the preceding ingredient of the grossly indecent act, are disjunctive and not conjunctive. In other words, the succeeding ingredients of absence of consent, use of force or threats are in the alternative and not conjunctive as the connecting word used is "or" and not "and". The prove of any one of the listed ingredients of the offence if co-exists with the preceding ingredient of grossly indecent act, completes the offence. The Section (285) provides: - "Without his (the other person's) consent "or" by use of force "or" threats compels a person to join within him in the commission of such act". Thus, to succeed, the prosecution needs not prove all the 3 variables that the other person did not consent to the act, that the accused forced the other person, and compelled the other by threats to join in the commission of the offence. It is sufficient if the prosecution proves either, (a) that the other person did not consent to the act "or" (b) that the accused person by use of force or threats compelled the other person to join him in the commission of the offence. As to what constitutes consent or when the other person will be said to have given his consent resort must be had to the proviso which provides: Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall

not be deemed to be a consent within the meaning of this Section." Per WAMBAI, J.C.A. (Pp. 29-30, Paras. C-E) (...read in context)

10. EVIDENCE - PROOF BEYOND REASONABLE DOUBT: Meaning of proof beyond reasonable doubt

"Proof beyond reasonable doubt is not proof beyond a shadow of doubt. It is not, proof beyond all possible or imaginary doubt. It is proof to moral certainty, as satisfies the judgment and conscience of the Judge as a reasonable man, and applying his reasons to the evidence before him, that the crime charged has been committed by the accused and so satisfies him as to leave no other reasonable conclusion possible. See AFOLALU VS THE STATE (2010) ALL FWLR (PT. 538) 812 - 828 G - B." Per WAMBAI, J.C.A. (P. 42, Paras. C-E) (...read in context)

AMINA AUDI WAMBAI, J.C.A. (Delivering the Leading Judgment): This appeal before us emanated from the decision of Hon Justice Dije Abdu Aboki of the Kano State High Court delivered on the 26th March, 2015, wherein the Appellant was convicted and sentenced to 7 years imprisonment and a fine of N100, 000 or eighteen months imprisonment in default of payment of the fine for the offence of act of gross indecency under Section 285 of the Kano State Penal Code Law.

The Appellant who was charged for the offence of rape punishable under Section 283 of the Penal Code pleaded not guilty to the charge. In proof of its case, the prosecution called 7 witnesses and tendered 2 Exhibits while the Appellant called 5 witnesses including himself as DW1.

The prosecutions case is that the Appellant is a next door neighbour of Salisu Abubakar (PW2) and a teacher at Police Childrens School Chalawa, Kano where PW2s daughter, Hajara aged 5 years, is a Nursery Pupil. Sometimes the Appellant drops Hajara (the Victim of the offence) at home from school with his motor-cycle. On the 11th June 2013 after the closing hours, at about

1:30p.m, the Appellant picked the Victim (PW6) with his motor-cycle and left the school, and by a tree near the school, raised her leg and put his hand in her private part. He fingered her and she felt pain and cried.

Upon being dropped at home the Victim PW6, went to the toilet and her mother, PW4, Aisha Abdullahi, heard Hajara crying in the toilet. Upon examination of PW6, PW4 saw blood and some whitish substance stains in between the thighs of PW6. The matter was reported to the school, then to the Police and the Victim (PW6) was taken to the Aminu Kano Teaching Hospital, Kano (AKTH) where she was examined by Dr. Imam Usman Haruna (PW3) who concluded that the Victim was raped. The Appellant both in his statement to the Police Exhibits A & B and in his evidence before the Court and as offered by his witnesses denied being responsible but that it was a pupil in the school who did that to the Victim, as initially stated by the Victim herself.

At the conclusion of trial and upon considering the evidence both for the prosecution and the defence, the learned trial Judge found that the charge of rape under Section 283 of the Penal Code was not proved

beyond reasonable doubt against the Appellant, and accordingly discharged and acquitted him for that offence. However, the Court found as proved beyond reasonable doubt, a case of gross indecency under Section 285 of the Penal Code and pursuant to Sections 217 and 218 (1) & (2) of the Criminal Procedure, convicted the Appellant for that offence although he was not so charged.

It is against his conviction and sentence for the said offence of act of gross indecency that the Appellant being unhappy with, commenced this appeal by a Notice of Appeal filed on 18/05/2015 predicated upon 7 grounds.

In the Appellants brief of argument dated and filed on the 22nd December, 2016 and settled by Hassan U. El-Yakub Esq. two issues were distilled from 6 of the 7 grounds of appeal, ground 4 being abandoned. The issues are:

a. WHETHER FROM THE TOTALITY OF THE EVIDENCE ADDUCED IN THIS CASE, THE TRIAL COURT WAS RIGHT WHEN IT HELD THAT THE PROSECUTION HAS SUCCEEDED IN PROVING THE OFFENCE OF GROSS INDECENCY BEYOND REASONABLE DOUBT IRRESPECTIVE OF THE APPARENT CONTRADICTIONS IN THE EVIDENCE ADDUCED BY THE PROSECUTION ON MATERIAL POINTS AND THE

UNCORROBORATED EVIDENCE OF THE PROSECUTRIX.

b. WHETHER THE TRIAL COURT WAS RIGHT WHEN AFTER DISCHARGING AND ACQUITTING THE APPELLANT OF THE CHARGE OF RAPE, IT RELIED ON SECTIONS 217 AND 218 (1) AND (2) OF THE CRIMINAL PROCEDURE CODE (CPC) IN CONVICTING THE APPELLANT FOR THE OFFENCE OF GROSS INDECENCY WITHOUT ACCORDING HIM A FAIR HEARING.

In the Respondents brief of argument filed on 25th September 2017, Amina Yusuf Yargaya Esq., the Director of Legal Services, Kano State Bureau for Land Management, who settled the Respondents brief, also identified two issues differently cast as follows:

1. Whether from the totality of the evidence adduced in this case the prosecution has succeeded in proving the offence of act of gross indecency contrary to Section 285 beyond reasonable doubt.
2. Whether the trial Court was right in convicting the Appellant for a lesser offence than the one charged as provided under Sections 217 and 218 of the Criminal Procedure Code.

At the hearing of the appeal on the 24/01/2018, while the learned Appellants Counsel urged us to allow the appeal and set aside the decision of the lower

Court, learned Respondents Counsel urged upon us to dismiss the appeal and affirm the judgment of the lower Court.

I have perused the issues formulated by both Counsel for determination of this Court and consider the two issues distilled by the learned Respondents Counsel more concise and apt.

I shall consider this appeal on the Respondents two issues but shall recast issue No. 2 as follows:
Whether having been discharged and acquitted of the charge of rape the Appellant was accorded fair hearing when the learned trial Judge invoked Sections 217 and 218 of the Criminal Procedure Code to convict him for the offence of act of gross indecency though not so charged.

ISSUE NO. I

On this issue which is whether on the totality of the evidence adduced, the prosecution succeeded in proving the offence of act of gross indecency against the Appellant, the contention of the learned Appellants Counsel is that the prosecution did not discharge its unshifting burden of proving conjunctively each of the 3 ingredients of the offence of gross indecency under Section 285 of the Penal Code as mandatorily required, calling in

aid the cases of AFOLALU VS THE STATE (2010) ALL FWLR (PT. 538) 812, 832 B C and EBEINWE VS THE STATE (2011) ALL FWLR (PT. 566) 413 AT 425 426 G B. It was submitted that the evidence of the Victim (PW6) who is a child of 5 years of age, on the 1st ingredient of the offence, that the Appellant put his hand in her private part and she felt pain and cried, requires corroboration by virtue of Section 209 (1) and (3) of the Evidence Act but same was not so corroborated by the evidence of PW3 heavily relied upon and whose evidence is that PW6 was sexually assaulted and raped. The evidence of PW3 which is mutually exclusive of and none complimentary to the evidence of PW6 and does not link the Appellant to the sexual assault or rape, learned Counsel argued, cannot corroborate the evidence of PW6, as neither the evidence of PW3 nor of PW6 can independently sustain the Appellants conviction. He also submitted that the evidence of what PW2, PW4 and PW5 on what PW6 told them, is inadmissible hearsay evidence.

Similarly, on the 2nd and 3rd ingredients of the offence, which are the absence of consent of the other person or that the other

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person was compelled by the accused person to join him in the commission of the grossly indecent act, it was submitted that the learned trial Judge also relied solely on the unsworn and uncorroborated evidence of PW6 that the Appellant threatened to beat her if she said he (the Appellant) was the one who put his hand in her private part.

The corroboration required to sustain the Appellants conviction for the offence, he submitted, must be direct, strong, cogent and unequivocal which implicates the Appellant in the commission of the offence, citing the case of SAMBO VS THE STATE (1993) 7 SCNJ (P. 1) 128 and that the learned trial Judge failed to make any finding as required by law as to whether the evidence of PW3 corroborated that of PW6, citing in support the case of SANNI VS THE STATE (1993) 4 NWLR (PT. 285) 99. He submitted that where corroboration is required by law as in the instant appeal but none was provided, the accused should be acquitted, citing in support the cases of MBELE VS THE STATE (1990) 4 NWLR (PT. 145) 484; IKO VS THE STATE (2001) ALL FWLR (PT. 68) 1161 among others.

On what amounts to the required corroboration and its

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nature, the cases of MUSA VS THE STATE (2013) ALL FWLR (PT. 692) 1688, 1708 PARAS B C; ADONIKE VS THE STATE (2015) ALL FWLR (PT. 772) 1631, 1659 1660 G- A and SAMBO VS THE STATE (1993) 7 SCNJ (PT. 1) 128 were cited.

Learned Counsel also complained of improper evaluation of evidence by the trial Court and that if the Court had properly evaluated the evidence, it would have seen the material and unresolved contradiction in the prosecutions evidence as to who actually committed the act, and that the attempt made by the learned trial Judge at P. 103 of the record to resolve the contradiction was speculative and cannot take the place of facts; that the pieces of circumstantial evidence upon which the finding that the facts and circumstance point irresistibly at the accused is based are not cogent, compelling and unequivocal.

For circumstantial evidence to ground a conviction, he submitted, it must lead to only one irresistible conclusion of the guilt of the accused but in the instant case the evidence of PW4 & PW5 is not such as would lead to irresistible conclusion that the Appellant committed the offence but leaves room for a

doubt which must be resolved in favour of the Appellant. For this he relied on the cases of OKETAOLEGUN VS THE STATE (2015) ALL FWLR (PT. 797) 677, 692 693 H A; ZUBAIRU VS THE STATE (2015) ALL FWLR (PT. 794) 179, 195, E F.

Also that the invocation of Section 167 (d) of the Evidence Act against the Appellant for failure to call his mother as a witness to rebut the evidence of PW2 that the Appellants mother pleaded with PW2 to withdraw the case is wrong and does provide direct, cogent and compelling evidence to ground a conviction or serve as corroboration.

We were urged to hold that the prosecution did not prove its case beyond reasonable doubt against the Appellant and to resolve the issue in Appellants favour.

Submitting per contra and insisting that the prosecution proved all the ingredients of the offence of gross indecency beyond reasonable doubt, the learned Respondents Counsel submitted that the evidence of the Victim of the offence (PW6), a girl of 5 years of age who narrated her ordeal how the Appellant raised her leg near a tree and put his hand in her vagina; that she felt pain and cried,

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and which evidence was corroborated by the unchallenged and un-contradicted evidence of the Medical Doctor PW3 and her mother, PW4 of their findings on PW6s vagina, corroborate the evidence of PW6, corroboration being no more than evidence that confirms, supports or strengthens other evidence sought to be corroborated, citing the case of AHMED VS NIG. ARMY (2011) 1 NWLR (PT. 1277) 87. Such corroborative evidence, he argued, needs not consist of direct evidence that the person committed the offence nor a confirmation of the whole act so long as it corroborates the evidence in some respect material to the charge, citing DAGAYYA VS THE STATE (2006) NWLR (PT. 980) 647.

She maintained that the evidence of PW6 was corroborated by that of PW3, and that the learned trial Judge impartially analysed the evidence of PW3 and found that rape was not proved but found the offence of gross indecency proved. Moreover, in sexual offences, learned Counsel contended, corroboration is only a matter of practice and not a requirement of law, buttressing his submission with the case of MUSA VS THE STATE (2013) LPELR-19932 (SC).

On the 2nd and 3rd ingredients, that the

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other person did not consent to the act or that the Appellant compelled that person by use of force or threat to join him in the commission of the offence, learned Counsel submitted that by the proviso to the Section, the Victim (PW6) a girl of 5 years of age is in law incapable of giving her consent to the grossly indecent act done by the Appellant under whose care she was and to whom she was entrusted; who enrolled her in school, takes her to and back from school to the house. The purport of the proviso she argued, is to protect such vulnerable children put under the care of people like the Appellant from being abused or violated and that the uncontradicted evidence that Appellant threatened to beat her if

she revealed to anyone that he was the person who did that to her, proved the ingredients beyond reasonable doubt.

On circumstantial evidence, it was submitted that the evidence of DW4, DW2 and the contents of Exhibit B show that the Appellant who was with the Victim had the opportunity to commit the offence. That the evidence of DW4, the Head Teacher of the School, shows that most of the staff saw the Victim on that day after closure of their classes

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playing on the Appellants motor-cycle and Appellant took her on the motor-cycle away from the school around 1:30pm. DW2 as well as the Appellant in Exhibit B also confirmed that the Appellant who used to drop the Victim at school and back, also brought her back on his motor-cycle that 11/06/2013 urging us to hold that the Appellant committed the act.

Another circumstantial evidence Counsel argued is that the Appellant pleaded with the Victims father (PW2) to leave the issue to God and subsequently the Appellants Mother and Mother in law also made the same plea. All these pieces of un-contradicted and unchallenged evidence points unequivocally and irresistibly at the Appellant and that the learned trial Judge was right in relying on same to convict the Appellant citing in support the cases of KABELE VS THE STATE (2008) 2 SCNJ 124, 137 ratio 30; NWAEZE VS THE STATE (1996) 2 SCNJ 42 and urging us to hold that the prosecution proved all the ingredients of the offence beyond reasonable doubt against the Appellant and resolve the issue in favour of the Respondent.

Now, the Appellant was charged with the offence of rape punishable under

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Section 283 of the Penal Code but was at the end of trial, discharged and acquitted of the rape but convicted of the offence of gross indecency punishable under Section 285 of the same Penal Code. The Section provides:

Whoever commits an act of gross indecency upon the person of another without his consent or by use of force or threats compels a person to join with him in the commission of such act, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine:

Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this Section.

The essential ingredients which the prosecution must prove beyond reasonable doubt are:

a. that the accused committed an act of gross indecency upon the person of another; (b) that the other person did not consent to the act; or (c) that the accused compelled that person by the use of force or threats to join him in the commission of the grossly indecent act.

It is

unquestionable that to secure or sustain a conviction for the offence, the prosecution must positively prove beyond reasonable doubt, each and every listed ingredient of the offence. It is needless to emphasize that failure to prove any of the ingredients means failure to prove the offence even if the other ingredients are proved beyond shadow of doubt and ultimately, the accused will be entitled to a discharge and acquittal. See BELLO VS THE STATE (2012) 8 NWLR (PT. 1302) 207, 237; UTUK VS THE STATE (2010) 34 NWLR 171 AT 179; HARUNA VS A.G. (2012) 9 NWLR (PT. 1306) 419, 444 445 PARA G.

Act of gross indecency has not been defined by the Penal Code but the Blacks Law Dictionary 7th Edition at page 771 defines indecency as the condition or state of being outrageously offensive especially in a vulgar or sexual way. Indecent assault involves sexual assault.

Indecent assault is an offence of aggravated assault and overlaps with sexual assault.

It follows that an act of gross indecency denotes an aggravated assault that is grossly or grievously offensive in a vulgar or sexual way. It is an unlawful and unacceptable sexual

activity or behaviour forced upon another person against his or her will or consent and includes the act of inserting ones hand or finger in the vagina of the other without that others consent or against her will. In other words, act of gross indecency includes any unlawful sexual activity or behaviour short of penetration of the penis.

It has been established over time that the prosecution may establish the guilt of an accused person either by the confessional statement of the accused; by circumstantial evidence; or by the evidence of eye witness account of the commission of the crime. SeeIGABELE VS THE STATE (2006) 6 NWLR (PT. 975) 100; ADEKOYA VS THE STATE (2012 VOL. 3 M JSC (PT. 11) 77; NIG. NAVY & 2 ORS VS LT. COMMANDER S.A. IBE LAMBERT (2007) ALL FWLR (PT. 396) 574, AT 586.

In the case at hand, the prosecution relied on the evidence of the Victim, circumstantial evidence and to some extent the statement of the Appellant.

What is the evidence on record?
The evidence of PW6, the Victim of the offence, as recorded at pages 25 26 of the record runs thus:
My name is Hajara Salisu. We live in

Panshekara. I know the accused he is by name Baban Fatima. He is in our school. The accused raised my leg by a tree near our school. He then put his hand in my private part.
Court: The witness pointed to her private part. I felt pain I cried. The accused told me to say that its one boy that did that to me if I am asked. That if I said its him he will beat me up. When I went home my private part was paining me.
Court: Witness was unable to answer any further question and started crying.

PW4, the Victims mother testified inter alia: -

On 11/06/2013 at about 1:00pm I peeped outside my house and saw the accused dropped my daughter Hajara from school. Hajara younger sister went out to them and the accused told Hajara to go into the house with her younger sister on coming into the house Hajara removed her Hijab and entered the toilet. I heard her crying and I came and asked her what happened. She said she want to ease herself but was unable to, because of pains I asked her where was the pain, she said in her vagina. I asked her what happened. I looked at her vagina I saw blood and some whitish substance in between her

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thighs . She then said it was Baban Fatima (accused) that did that to her and told her that if she is asked. She shall say it was a boy in the school. I then asked her what he did to her. She said he raised her leg and inserted his finger into her vagina I then told PW2.

The evidence of the Medical Doctor who examined PW6 inter alia, is that:

They came with a complaint of alleged sexual assault and that the girl had difficulty in passing urine and was unable to pass excretion. I examined her she was crying in pains agitated before her mother calmed her . My examination revealed no external evidence of bruises around her body but I found severe stains on her, though my genital examination of the girl revealed the whole entratoris which is the open (sic) into the female germen (sic) tract was hyperemic which means an increase blood supply to an area result (sic) from trauma resulting into inflammation. I also found a bruises along the inner aspect of the labia menorah which is a smelt fold as Hymen that cover the opening of the female gentala I also found a small tear on the hymen at the 6 Oclock position when

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the hymen is used as a clock.

Learned Appellants Counsel has argued that the unsworn evidence of PW6 a child of 5 years of age requires corroboration and that neither the above evidence of PW3 nor that of PW4 corroborates her evidence.

I quite agree with the learned Counsel that the unsworn evidence of PW6, a child below the age of 14 years, requires corroboration both as a matter of law as stipulated in Section 209 (1) and (3) of the Evidence Act and by established practice as a matter of prudence. See OBRI VS THE STATE (1997) LPELR 2194 (SC); DAGAYYA VS THE STATE (2006) LPELR 912 (SC).

Evidence in corroboration is an independent testimony which affects the accused by connecting or tending to connect him with the crime in some respects material to the charge in issue but it needs not consist of direct evidence that the accused committed the offence, nor amount to a confirmation of the whole account given by the witness. It is sufficient if it corroborates the evidence in some respects material to the charge. See EZIGBO V. STATE (2012) LPELR 7855 (SC); R. VS BASKETVILLE (1916-17) ALL ER REPRINT 38

AT 43; IKO VS STATE (2001) 14 NWLR (PT. 732) 221 AT 241.

Indeed corroborative evidence is confirmatory evidence or additional evidence to that already given. It is supplementary evidence that tends to strengthen or confirm the evidence already given which it is to corroborate. It is an additional evidence of a different character on the same point. See Blacks Law Dictionary, 6th Edition page 344 and MUSA VS THE STATE (2013) ALL FWLR (PT. 692)1688 B C. In STATE VS GWANGWAN (2015) LPELR-24837(SC) SC.504/2012 the Supreme Court held that corroboration means or entails the act supporting or strengthening the statement of a witness and it does not mean that the witness corroborating the evidence must use the exact or very like words used by the witness whose evidence is to be corroborated.

Additionally, corroborative evidence, it must be emphasized is sufficient even if it is circumstantial in nature so long as it connects or tends to connect the accused to the commission of the offence. See DURUGO VS THE STATE (1992) NWLR (PT. 255 525; OGUNBAYO VS THE STATE (2007) LPELR 2323 (SC).

Relating these principles of law to the evidence of PW3 and PW4

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can it be said that the evidence of PW3 and PW4 corroborate the evidence of PW6 on the first ingredient of the offence?

The evidence of PW3 and PW4 upon their examination of PW6 after the incident reveal that her vagina was tempered with, the opening into her genital track was hyperaemic and inflamed as a result of trauma. These pieces of evidence of PW3 and PW4 in material respect corroborate the evidence of PW6 that a hand or finger was inserted into her vagina; her vagina was tempered with, which evidence is in consonance with the findings of PW3 and PW4. In other words, both the evidence of PW3 and PW4 corroborate and materially strengthens the evidence of PW6 that a hand or finger was inserted into her vagina; that she was sexually assaulted or violated.

Furthermore, apart from the evidence of PW4 of what PW6 told her that it was the Appellant who did that to her, the circumstantial evidence on record, I agree with both the learned trial Judge and the learned Respondents Counsel, are direct, strong, cogent and unequivocally points irresistibly at the Appellant. The undisputed evidence on record is that the Appellant who is a neighbour to

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PW6s father (PW2) and enrolled PW6 in the school where he teaches, sometimes takes her to and back from school. On the fateful day, 11th June, 2013 the Victim was seen by most staff of the school including PW7, the Head Teacher of the school, playing on the Appellants motor-cycle and when told to go home, she said she was waiting for her uncle, the Appellant. The Appellant admitted he dropped her at home as confirmed by his wife, DW2 and PW6s mother, PW4. She was hale and hearty when last seen

in school and soon as Appellant dropped her at home and she went into the toilet to ease herself, her mother, PW4 heard her crying, and upon being examined, noticed that her private part had been tempered with. Between the time she was last seen in school hale and hearty and the time she was dropped by the Appellant at home and her mother heard her crying and her vagina blood stained, was such a short time that appropriately fits the applicability of the doctrine of last seen a doctrine that has gained global application and acceptability. The doctrine of last seen as explained in HARUNA VS ATTORNEY GENERAL OF THE FEDERATION (2012) 9

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NWLR (PT. 1306) 419 (SC) per Adekeye JSC, means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. This doctrine applies when the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small or short that the possibility of any person other than the accused being the author of the crime becomes impossible, so said ARIWOOLA JSC at Pages 51 - 55 paragraphs F D in MADU VS THE STATE (2012) LPELR 7867 (SC). In such circumstances the onus shifts squarely to the accused person to offer an explanation, a plausible explanation, showing that he was not the person responsible. In NWAEZE VS THE STATE (Supra). Adio JSC had this to say:

the position then is that if Mr. A was last seen with or in company of Mr. B and the next thing that happened was the discovery of the corpse of Mr. A then, irresistible inference is that

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Mr. A was killed by Mr. B the onus will be on Mr. B to offer explanation for the purpose of showing that he was not the one that killed Mr. A.

Though the above cases involve charge of murder or culpable homicide, the law applies with equal force in a situation such as the one at hand where the Victim was last seen with the Appellant in healthy condition and the next thing was that she was seen with blood stained vagina and inflammation. The burden was shifted to the Appellant with whom she was last seen healthy, to offer a plausible explanation of the cause of her new condition.

It was the evidence of DW4 the Appellants colleague at the school, that
on the day of the incident most of the staff were there when the child was busy playing. She (Victim) was carried home by the accused around 1:32pm . At the meeting (after the incident) the conclusion was that the case was not done in the school but outside.

Furthermore, the evidence of PW2 and PW4 that the Appellant and his mum and mother in law pleaded that PW2 should withdraw the matter and leave everything to God cannot also be ignored as

another circumstantial evidence that lends credence to the other established pieces of evidence implicating the Appellant in a material respect. The circumstantial evidence on record, I am in agreement with the learned Respondents Counsel, is direct, cogent and unequivocally and irresistibly points to the accused as the person who committed the offence.

On this the learned trial Judge at pages 103 104 of the record held inter alia:
The prosecution Counsel pointed out which I find to be correct that the evidence in this case particularly that of DW4 and DW5 showed that the offence could not have been committed within the school as the pupil in PW6s class are closely guarded when they close before the whole school close. The PW7 who was the head teacher at the time of the incident also testified that he saw the PW6 playing after their class had closed. The accused himself testified that when PW6s class closed at 12:00 noon they are gathered in one place and have access to toilet only with the head of nursery in attendant and not by themselves.
Therefore what other reasonable conclusion can this Court make

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since it was the accused who had contact with the PW6 alone when he picked her from school that day and brought her home.

The above finding and conclusion is unassailable. It cannot be faulted and I have no reason to fault same.

The learned trial Judge was also accused of improper evaluation of evidence of PW4 & PW6, that if she had properly evaluated their evidence she would have seen material and unresolved contradiction therein as to whether it was the Appellant who committed the act or a boy in the school as earlier stated by PW6 to PW4 before changing her position, a contradiction which he argued, the learned trial Judge did not consider.

The evidence of PW4 referred to is contained in pages 25 26 of the record when she stated in cross examination:
I said Hajara was brought home at 1:40pm. Yes from that time till when we went to the hospital I kept asking her who did that to her and she kept saying it was a boy in the school. Hajara was frightened by the accused that was why she did not state earlier on it was him and she said he told her to say it was a boy in school. Yes Hajara said the accused put his finger in

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her vagina.

In her own evidence PW6 also explained why she had earlier stated it was one boy in the school who did that to her. Her words:-

the accused told me to say that its one boy that did that to me if I am asked. That if I said its him he will beat me up

In evaluating the probative value of the evidence of PW6, the learned trial Judge found her evidence in Court clear, credible, unchallenged and unshaken that it was the Appellant who did that to her. In addressing the circumstances leading to PW6s earlier statement that it was one boy in the school who did that to her, the learned trial Judge at page 103 of the record held:

The PW6 has also stated the circumstances in which she earlier first stated that it was a boy in her school that did the act to her.

Given the close relationship between her family, herself and the accused person who is a teacher in her school, who enrolled them in the school who sometimes brings her back home from school and who is their next door neighbour whose house they frequent as the accuseds wife herself stated in Court, it is not

hard to see that the accused person will have such authoritative effect on the PW6 as someone she looks upon and will not disobey so easily. This is buttressed by the way and manner in which she divulged the information of what really happened to her mother when she first extracted the mothers assurance that she will not tell the accused or any other person.

The above finding made by the learned trial Judge based on the evidence on record, cannot be said to be speculative. It is based on the evidence on record as found by the learned trial Judge, that the two families are next door neighbours; appellant sometimes takes PW6 to and from School back home, and PW6 looks upon and even calls the Appellant her Uncle in the School.

A finding is said to be speculative when it is not based on facts or knowledge of its details but on guesses or conjectures but not when as in the case at hand, it is based on or derivable from the evidence on record. Whereas speculation is a mere variant of imaginative guess which, even when it appears

plausible should never be allowed by a Court of law to fill any hiatus in the evidence before it, an inference

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is a reasonable deduction from facts available before the Court. See IVIENAGBOR VS OSATO BAZUAYE & ANOR (1999) 6 SC (PT. 1) 149 per Uwaifo JSC. Thus, the said finding by the learned trial Judge which is based on evidence on record and reasonable inference from the evidence, is a finding of fact and not a finding based on speculation as strenuously but erroneously argued by the learned Appellants Counsel.

Similarly, it can also not be argued that the contradiction was not explained by evidence. While it is trite that where there are contradictions in the testimonies of prosecution witnesses on a material fact and the contradictions are not explained by the prosecution through any of its witnesses, the Court should not speculate on or proffer the explanation for such contradictions and is precluded from picking and choosing which it would believe, see MUKA & ORS VS THE STATE (1976) 9 & 10 SC 305 AT325, where as in this case the trial Judge adverted his mind to the contradiction/discrepancy but found same satisfactorily explained, his findings based upon the explanation offered by the prosecution witnesses cannot be said to be speculative

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nor can the contradiction be said to be unresolved. I therefore discountenance the Appellants submission that the contradiction was unresolved and the finding of the lower Court thereon is speculative. In the result, in agreement with the learned Respondents Counsel, I also find that the prosecution proved the first element or ingredient of the offence beyond reasonable doubt against the Appellant.

On the remaining ingredient, a read through the Section makes it unarguable clear that the subsequent ingredients of the offence after the preceding ingredient of the grossly indecent act, are disjunctive and not conjunctive. In other words, the succeeding ingredients of absence of consent, use of force or threats are in the alternative and not conjunctive as the connecting word used is or and not and. The prove of any one of the listed ingredients of the offence if co-exists with the preceding ingredient of grossly indecent act, completes the offence. The Section (285) provides: -

Without his (the other persons) consent or by use of force or threats compels a person to

join within him in the commission of such act.

Thus, to succeed, the prosecution needs not prove all the 3 variables that the other person did not consent to the act, that the accused forced the other person, and compelled the other by threats to join in the commission of the offence. It is sufficient if the prosecution proves either,

(a) that the other person did not consent to the act or

(b) that the accused person by use of force or threats compelled the other person to join him in the commission of the offence.

As to what constitutes consent or when the other person will be said to have given his consent resort must be had to the proviso which provides:

Provided that a consent given by a person below the age of sixteen years to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be a consent within the meaning of this Section.

It is an admitted and proved fact that the other person who is the victim of the offence, PW6 a girl of about 5 years of age, was by a simple calculation, a person below the age of sixteen

years. Also common ground is the fact that the Appellant was a teacher in the school where PW6 was a pupil and to whom she looked up to as her guardian in school whom she calls her Uncle.

These uncontested, admitted and proved facts alone, as above stated, prove the 2nd ingredient of the offence beyond reasonable doubt that PW6 did not consent to the act, being a child below the age of 16 years of age against whom the act was committed by her teacher/guardian, the Appellant. In the light of the foregoing, I resolve this issue against the Appellant and in favour the Respondent.

I now turn to the 2nd issue.

On this issue, it was submitted for the Appellant that in the facts and circumstances of this instant appeal, it was inappropriate and the learned trial Judge was in error to have invoked the provisions of Sections 217 and 218 of the Criminal Procedure Code (CPC) to convict the Appellant for the offence of gross indecency because Section 217 draws inspiration from Section 216 and must be read together, the effect of which is that before invoking Section 217, there must be no doubt as to the facts but a doubt as to the law or appropriate charge

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to be framed as to which of the several offences the facts constitute, citing EDU VS COMMISSIONER OF POLICE 14 WACA 163 at 167and contending that where as in this case, the Appellant was charged with a single offence of rape and without any indication that the prosecution was in any doubt as to the offence the Appellant committed, but at the end of trial it became doubtful that rape was committed, but an offence of a different nature was disclosed, neither the trial Court nor the Appellate Court can substitute a conviction for any other offence, the Appellant having defended only the charge of rape and being misled by the none framing of a new charge. He found support for this preposition in the case of EKECHUKWU VS COMMISSIONER OF POLICE (1966) NNLR 96, AT 101.

On the condition for the applicability of Section 218 Criminal Procedure Code learned Counsel set out the ingredients of the offences of rape under Section 283 and act of gross indecency under Section 285 and submitted that in convicting the Appellant for the offence of act of gross indecency, the learned trial Judge did not apply the red pencil rule laid down in TORHAMBA VS COMMISSIONER OF POLICE

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(1956) NRNLR 87 AT 94, for if he had done so, he would have realized that the residue of the remaining ingredients of rape after deleting the two unproved ingredients, do not constitute or form the particulars of the offence of gross indecency. A lesser offence for which an accused can be convicted is one that particulars are carved out of the particulars of the offence charged. He relied on the case of OKWUWA VS THE QUEEN (1965) NMLR 53 AT 55 and QUEEN VS NWOGUGUA AGUMADU (1963) 1 ALL NLR 203.

The failure of the learned trial Judge to frame a new charge and invite the Appellant to take his plea for the offence of act of gross indecency after discharging and acquitting him of the offence of rape, learned Counsel profusely argued, contravened the cardinal principle of Natural Justice and the provisions of Section 36 (4) (5) (6) and (9) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) thereby infringing on the Appellants right to fair hearing, citing in support the cases of ADEYEMI VS THE STATE (2015) ALL FWLR (PT. 790) 1201, 1209 B - D and ALABI VS NATIONAL ASSEMBLY (2015) ALL FWLR (PT. 803) 1830 AT 1855 B

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C.

He also submitted that the said Sections 217 and 218 of the Criminal Procedure Code which empower a trial Court to convict an accused person without any charge, to the extent of their inconsistency with the

constitutional provisions, should be declared unconstitutional, null and void and must give way to the Section 36 (4) (5) (6) and (9) of the Constitution. For this, he cited the case of OCHALA VS FEDERAL REPUBLIC OF NIGERIA (2014) ALL FWLR (PT. 758) 869, 882, C D.

In response, it was submitted for the Respondent that where a person is charged with an offence consisting of several particulars or the offence proved is less than the offence charged, the Courts are empowered by Section 217 and 218 of that Criminal Procedure Code to convict for the lesser offence though not charged and that there is no legal requirement in framing a new charge for the lesser offence as long as the trial Court as in the instant case, follows the due processes laid down. She cited the cases of BABALOLA VS THE STATE (1989) 4 NWLR (PT. 115) 264; KADA VS THE STATE (1991) 22 NSCC (PT 11) 592.

Learned Counsel disagrees that convicting an accused for a lesser

offence without framing a charge violates Section 36 (4) (5) (6) and (9) of the Constitution and infringes on the Appellants right to fair hearing, submitting that the Supreme Court in the case of NWACHUKWU VS THE STATE (1986) 4 SC 378 has decided that a person charged with a greater and gravier offence is deemed to have been given notice of the lesser offence though not charged with the offence.

He also referred to OKWUWA VS THE STATE (1964) 1 ALL NMLR 366 by the same Court.

It was further submitted that contrary to the submission of the learned Appellants Counsel, Section 216 does not have to be read together with Section 217 of the same Criminal Procedure Code before invoking the Section and that all Appellants argument to the contrary be discountenanced. We were urged to resolve this issue also in favour of the Respondent.

The pith of the Appellants contention on this issue is mainly two fold viz:

(a) that the offence of gross indecency is not a lesser offence of rape within the contemplation of Section 217 Criminal Procedure Code which must be read together with Section 216 and
(b) that the failure

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to frame a new charge for the offence of gross indecency for which the Appellant was convicted after being discharged and acquitted of rape, breached the Appellants right to fair hearing.
Admittedly, as argued by the learned Appellants Counsel, Section 217 by its wordings must be read together with Section 216 of the same Criminal Procedure Code. Section 217 Criminal Procedure Code provides: -
If in the case mentioned in Section 216 the accused is charged with one offence and it appears in evidence that he committed a different offence with which he might have been charged under the provisions of that Section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.
A reading together of Sections 216 and 217 shows that where from a single or series of acts committed by an accused person it is doubtful which of the several (related) offences the facts which may be proved may constitute, the accused person may be charged with all such several offences or any or more of such offences or may be charged in the alternative. If pursuant to Section 216 the accused is

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charged with one (of such) offences but it appears in evidence that he committed a different offence which he might have been charged with, he may be convicted of the offence which the evidence reveals he has committed though not so charged.
In the instant case the Appellant was charged with the offence of rape but at the end of trial the most important ingredient of rape, penetration, was not proved.

The argument for the Appellant is that the residue of the particulars of rape after deleting the unproved particulars of penetration and sexual intercourse do not constitute or form the particulars of the offence of gross indecency.

Going by the combined reading of Sections 216, 217 and 218 of the Criminal Procedure Code, I disagree with the learned Counsels submission. This is because the offence of rape is only an aggravated offence of gross indecency which includes sexual assault. It is the none proof of penetration of the Penis in the Vagina that reduced the offence to gross indecency, which is an offence in the class of sexual assault. Both the aggravated offence of rape and the reduced or

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lesser offence of gross indecency share the ingredient of sexual assault or unlawful tempering with female private part, and in the presence of the components of absence of consent or will, constitutes either the aggravated offence of rape or the reduced or lesser offence of indecent assault otherwise known as gross indecency. It thus follows that the residue of the particulars of rape after deleting the particulars of penetration in rape, constitutes a lesser offence of gross indecency and sufficiently satisfies the attempted guide of what constitutes a lesser offence as set out in TORHAMBA VS POLICE (Supra) or at least a reduced offence contemplated in Section 218 (2) of the same Criminal Procedure Code.

In his commentary or annotation to Section 217 of the Criminal Procedure Code of Northern States of Nigeria 2nd Edition applicable in Kano State, the great author Jerry Richard Jones in his illustration of what constitutes a lesser offence under the said Section, gave 3 examples, one of which is that:

(c) A. is charged with rape and it is proved in evidence that he committed an act of gross indecency. A may be convicted of committing an act

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of gross indecency although he was not charged with that offence.

This illustration by the great author, is very much in consonance with the decided cases referred to and with what I have tried to expound of the said provisions in this judgment.

I therefore discountenance the Appellants submission and hold that the conviction of the Appellant under Section 285 is within the contemplation of a lesser offence in Section 217 for which he could be convicted without the need to frame a new charge.

Furthermore on the 2nd arm of the argument that failure to frame a new charge infringes on the Appellants constitutional right to fair hearing, I find it difficult to subscribe to that submission and see it as an attempt to impute into the provisions of Sections 217 and 218 (2) of the Criminal Procedure Code a condition not so imposed by the statue. There is no requirement, by their plain and ordinary meaning, for the framing of a new charge or that the accused be put on notice where the Court decides to invoke its powers to convict the accused for a proved lesser offence consisting of some particulars of the offence charged. The

lesser offence is in fact implicit in the greater or aggravated offence for which the Appellant is deemed to have notice of the lesser offence revealed by evidence.

It must be borne in mind that the lesser offence of gross indecency for which the Appellant was convicted arose from the evidence led in support of the more serious offence of rape in respect of which the Appellant was charged. Obviously, the Appellant had notice of the lesser offence of gross indecency for which he could be convicted. He is indeed deemed to have had notice of the lesser offence. In NWACHUKWU VS THE STATE (Supra) while interpreting the provisions of Section 179 of the C.P.A., which is in pari materia with Sections 217 and 218 of the Criminal Procedure Code under consideration, the Supreme Court per Karibi-Whyte JSC at pages 400 401 lines 25 3 held:

Thus where the accused has notice of an aggravated offence, he also has notice of the lesser offence for which he could be convicted. The assumption which is legitimate, is that accused would have challenged the more serious offence and must be fully aware of the case against him in respect of the

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lesser offence.
Similarly, by Section 218 (1) when a person is charged with an offence consisting of several particulars, and a combination of some of the particulars which constitute a complete lesser offence is proved but the remaining particulars are not proved, the accused may be convicted of the lesser offence though he was not charged with it.
Additionally or alternatively, by Sub-section 2 of the same Section 218, where a person is charged with an offence and the facts proved reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with that offence.

In the light of this I also discountenance, as unfounded the argument that the failure to frame a charge of act of gross indecency and call upon the Appellant to defend that charge amounts to denial of fair hearing. That submission has no legal or judicial blessing and its untenable. It is for this and the preceding reasons that I also resolve this issue against the Appellant.
In conclusion, from the evidence on record, the learned trial Judge cannot be faulted when he held at page 104 of the record that:
On the whole I am

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unable to find any evidence on the side of the defence that has created reasonable doubt in my mind that it was the accused who committed the act of gross indecency on the PW6.
After all, where at the entire evidence adduced before a trial Court, that Court is left with no doubt that the offence was committed by the accused person, that burden of proof beyond reasonable doubt is discharged and the conviction of the accused person will be upheld even if it is on credible evidence of a single witness.

Proof beyond reasonable doubt is not proof beyond a shadow of doubt. It is not, proof beyond all possible or imaginary doubt. It is proof to moral certainty, as satisfies the judgment and conscience of

the Judge as a reasonable man, and applying his reasons to the evidence before him, that the crime charged has been committed by the accused and so satisfies him as to leave no other reasonable conclusion possible.
See AFOLALU VS THE STATE (2010) ALL FWLR (PT. 538) 812 828 G B.

The Appellant has not shown any cogent reason for me to interfere with the decision of the learned trial Judge.
Further, before I drop my

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pen, permit me my Lords to express my worry over the incessant cases of rape or sexual assault especially against children, which sadly appears to be on the increase unabated. This despicable and sad act which inflicts terror and trauma on the Victims must be adequately punished to send the right signal to all such like minded persons. This is why I also endorse the imposition of the maximum term of 7 years imprisonment by the learned trial Judge. I say no more.

In the result, I dismiss the appeal as lacking in merit and affirm both the conviction and sentence of the Appellant by the learned trial Judge in his judgment delivered on 26th March, 2015.

IBRAHIM SHATA BDLIYA, J.C.A.: I have had the advantage of reading in draft the judgment just delivered by my lord, AMINA AUDI WAMBAI, J.C.A. I entirely agree with the reasoning and conclusion arrived at in dismissing the appeal for lacking in merit.

OBIETONBARA O. DANIEL-KALIO, J.C.A.: I have read the draft judgment of my lord AMINA AUDI WAMBAI JCA and I agree that the appeal lacks merit. I therefore dismiss the appeal and affirm the judgment of the lower Court.

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Appearances:

HASSAN U. EL-YAKUB, Esq.For Appellant(s)

AMINA YUSUF YARGAYA Esq.For Respondent(s)>

Appearances

HASSAN U. EL-YAKUB, Esq.For Appellant

AND

AMINA YUSUF YARGAYA Esq.For Respondent