

SHUAIBU ISA v. KANO STATE

(2016) LPELR-40011(SC)

In The Supreme Court of Nigeria

On Friday, the 29th day of January, 2016

SC.35/2013

Before Their Lordships

IBRAHIM TANKO MUHAMMAD Justice of The Supreme Court of Nigeria

MUHAMMAD SAIFULLAHI MUNTAKA-COOMASSIE Justice of The Supreme Court
of Nigeria

OLABODE RHODES-VIVOUR Justice of The Supreme Court of Nigeria

CLARA BATA OGUNBIYI Justice of The Supreme Court of Nigeria

CHIMA CENTUS NWEZE Justice of The Supreme Court of Nigeria

Between

SHUAIBU ISA Appellant(s)

AND

KANO STATE Respondent(s)

Other Citations

RATIO DECIDENDI

1. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Nature of the offence of rape

"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 is by nature grave, devastating, 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. A number of such definitions include those arrived at by this Court in the case of *Posu V. State* (supra) at page 414 where Fabiyi (JSC) held same as: "An unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man forcibly and against her will. It is the act of sexual intercourse committed by a man with a woman who is not his wife without her consent." Adekeye (JSC) also at page 416 sees rape in legal parlance as: "an unlawful carnal knowledge of a woman or girl without her consent or with her consent if the consent is obtained by force or by means of threat or intimidation of any kind or by fear or harm, or by means of false and Fraudulent representation as to the nature of the act or in the case of a married woman by personating her husband." In summary therefore, rape can be interpreted as an unlawful carnal knowledge or non-consensual sex; that is, penetration without consent." Per OGUNBIYI, J.S.C. (Pp. 10-11, Paras. D-D) (...read in context)

2. CRIMINAL LAW AND PROCEDURE - CONFESSORIAL STATEMENT: Effect of failure to object to the admission of as of a confessional statement

"If an accused person does not object when his confessional statement is being tendered, the only reasonable conclusion is that it was made voluntarily. See *Bello Shurumo V. the State* (2010) 19 NWLR (Pt 1226) 73 wherein it was held that the failure to object the two confessional statements when they were tendered and admitted as exhibits was held as conclusive evidence that they were both made voluntarily. This is more so when a counsel stands by and allows exhibits to sail smoothly through without any objection." Per OGUNBIYI, J.S.C. (Pp. 20-21, Paras. E-A) (...read in context)

3. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: What is the most essential ingredient in the proof of rape

"In proof of rape therefore, the most essential ingredient of the offence is penetration, the extent no matter how slight will serve sufficient proof. It is well accepted and settled that penetration, with or without emission, is sufficient even where the hymen is not ruptured. The slightest penetration has served as sufficient to constitute the act of sexual intercourse. Again see *Iko V. State*, *Ogunbayo V. State* and *State V. Ojo* all under reference (supra) also *Jegade V. State* (2001) 14 NWLR (Pt.733) 264." Per OGUNBIYI, J.S.C. (P. 12, Paras. D-F) (...read in context)

4. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Whether partial or incomplete penetration is sufficient proof of the offence of rape

"In proof of penetration, the law is trite as submitted by respondent's counsel that partial or incomplete penetration is sufficient proof of the offence of rape and authorities both at Common Law and also under our statutes are in unison on this point. The authorities cited by the learned counsel for the appellant therefore, all, support the case of the Respondent on the foregoing principle as enunciated. A prominent authority in support is the case of *Ogunbayo V. State* (supra) where this Court said thus at pages 182 182:- "The important and essential ingredient of the offence of rape is penetration. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. Therefore, proof of the rupture of hymen is unnecessary to establish the offence of rape." " Per OGUNBIYI, J.S.C. (Pp. 13-14, Paras. F-E) (...read in context)

5. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: What amounts to sufficient penetration in proof of rape

"It is settled that sexual interference is deemed complete, upon proof of penetration of the penis into the vagina. It was held in the English case of *R. U. Marsden* (1891) 2 QB 149 at 150, per Lord Coleridge, C.J. that emission is not a

necessary requirement. Our Nigerian Case law is replete with authorities that even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, even where penetration was proved but not of such a depth as to injure the hymen, it has been held to be sufficient to constitute the crime of rape. See: *The State v. Ojo* (1980) 2 NCR 391 at 395; *Jegede V The State* (2001) 7 SCNJ 135 at 141. Thus, discharge of "whitish", "greenish", "reddish" or whatever colour of fluid in a rape offence, is not considered credible evidence for establishing the offence of rape." Per MUHAMMAD, J.S.C. (P. 30, Paras. B-E) (...read in context)

6. CRIMINAL LAW AND PROCEDURE - CORROBORATION IN THE OFFENCE OF RAPE: What amounts to corroboration in the offence of rape

"Corroboration in a rape case, is that evidence which tends to show that the story of the victim, the prosecutrix, it is the accused that committed the crime. Such evidence need not to be direct. It suffices if it corroborates the said evidence in some material particular to the charge in question. *Ezegbo V State* NCC 7 page 426. Secondly, where the child is a minor of some discernable age, her sworn evidence need no further corroboration. This Court, in the case of *Okoyomon V. The State* (1973) NSCC, held per Elias, CJN. as follows: "We may observe that in the very recent case of *DPP V. Hester* (1992) 3 WLR 869, in which there is an authoritative review of nearly all leading authorities on the subject in English Law, the House of Lords held that the unsworn evidence of a child could amount to corroboration of the sworn evidence of another child." This was in a case where conviction was based mainly on the sworn evidence of two young girls. The

prosecutrix was between the age of 11 and 12 years of age." Per MUHAMMAD, J.S.C. (Pp. 31-32, Paras. B-A) (...read in context)

7. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Ingredients which the prosecution must prove to sustain the conviction of the offence of rape

"The law is settled and well grounded that the prosecution has the burden and duty to prove the accused person guilty of the following ingredients in order to sustain the conviction of the offence of rape: (a) that the accused had sexual intercourse with the prosecutrix; (b) that the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;(c) that the prosecutrix was not the wife of the accused; (d) that the accused had the mensrea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.(e) that there was penetration. See Ogunbayo V. State (2007) 8 NWLR (Pt 1035) 157; Upahar v. State (2003) 6 NWLR (pt 816) 230; State V. Ojo (1980) 2 NCR 391; Okoyomon V. State (1973) 1 SC 21; State V. Anolue (1983) 1 NCR 71 and Iko V. State (2001) 14 NWLR (Pt.732) 221.' Per OGUNBIYI, J.S.C. (Pp. 11-12, Paras. E-C) (...read in context)

8. CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Statutory provision as regards the offence of rape and its punishment

"Section 282 and 283 of the Penal Code. No. 18 of 1959, designated as Cap 89 in the Laws of Northern Nigeria, 1963, relate to the offence of rape and its

punishment. The Sections provide as follows:282(1) A man is said to commit rape who, save in the case referred to in Sub-Section (2). Has sexual intercourse with a woman in any of the following circumstances:(a) against her will:(b) without her consent;(c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;(e) with or without her consent, when she is under fourteen years of age or of unsound mind;(2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.(283) Whoever commits rape, shall be punished with imprisonment for life or for any less term and shall also be liable to fine." Per MUHAMMAD, J.S.C. (P. 28, Paras. A-F) (...read in context)

9. EVIDENCE - CORROBORATION: Whether it is desirable to have corroborative evidence in support of an offence

"On the issue of corroboration of the offence, it should be noted that no law in Nigeria, as of now that says that corroboration is necessary. It is however, desirable to get the evidence of the prosecution strengthened by other implicating evidence against the accused See: Reekie V. The Queen (1954) 14 COACA 501 at 502; State V. Ojo (1980) 2 NCR 391; Ogunbayo V. State (2007) 8 NWLR (Pt.1035) 157." Per MUHAMMAD, J.S.C. (Pp. 30-31, Paras. F-A) (...read in context)

10. EVIDENCE - CONFESSION: When a confession will amount to an admission of guilt

"The law is well settled also that for a confession to amount to an admission of guilt, it must be positive, direct and unequivocal as to the commission of the offence for which the accused is charged. See Patrick Joven and Ors. V. The State (1973) 5 SC 17." Per OGUNBIYI, J.S.C. (P. 20, Paras. D-E) (...read in context)

11. EVIDENCE - : Whether the sworn evidence of a minor requires corroboration

"...The law is trite and well settled that Pw1, though a minor needed no corroboration of her evidence which was sworn on oath. See again the case of Ogunbayo v. The State (supra) where it was held that a sworn evidence of a minor requires no corroboration." Per OGUNBIYI, J.S.C. (P. 16, Paras. C-D) (...read in context)

12. EVIDENCE - CONFESSION: Whether a voluntary confessional statement is deemed to be relevant fact against the person who made it

"By virtue of the provision of Section 27(a) of the Evidence Act, a confession, if made voluntary is deemed to be relevant fact as against the person who made it." Per OGUNBIYI, J.S.C. (P. 20, Paras. C-D) (...read in context)

CLARA BATA OGUNBIYI, J.S.C. (Delivering the Leading Judgment): The appeal herein is against the decision of the Court of Appeal, Kaduna Division delivered on the 4th June, 2012 in appeal No. CA/K/247/2010. The appellant, at the Court below appealed against his conviction and sentence by the High Court of Kano State sitting at Kano on a charge of rape as follows:-

CHARGE:-That you Shuaibu Isa "m" of Unguwa Uku Quarters Kano within Kano Judicial Division on U/5/2005 at Unguwa Uku committed rape on one Aigha Ado "f" of 8 years old and thereby committed an offence punishable under Section 283 of the Penal Code.

STATEMENT OF FACTS:-

Pursuant to Section 211 of the 1999 Constitution and Section 7 of the Criminal Procedure Code, Cap 37, Laws of Kano State, the respondent proffered the foregoing lone count charge of rape against the appellant punishable under Section 283 of the Penal Code.

The prosecution listed seven (7) witnesses but called six (6) including the mother of the prosecutrix and a medical doctor from Aminu Kano Teaching Hospital Kano. The appellant defended himself. The proceedings commenced in the trial Court with the affirmation of one Abubakar Gezawa as interpreter of the proceedings from English into Hausa and vice-versa.

The evidence in the trial Court started off with PW1 (the victim of the rape). She was twelve years old at the date of giving evidence and affirmed to speak the truth. She narrated her ordeal which dated back to three years prior to the date

of giving evidence; that on her way from her mothers place at Unguwa Uku, she met the appellant who pleaded and gave her money to buy him pure water and which she obliged him as requested; that upon bringing the pure water, the appellant held her hand, dragged her to an uncompleted building, removed her wrapper and pants. In her own words as recorded by the trial Court. "He also removed his trousers and he put his penis into my vagina. I then shouted and someone came to my aid, and we, that is myself and the accused were taken to the police station," See pages 6 - 7 of the record.

PW1 was cross examined by the defence; the learned trial judge also in further cross examination asked the following question:-

"Court to PW1: What made you to shout attracted the person who came to your aid

Witness (Pw1): I shouted because the (sic) of penis open penetration."

See page 6 of the record.

PW2 is one Ismaila Zubairu who upon receiving an information of the suspicious criminal act entered the uncompleted building where he saw both the appellant and Pw1; that which the appellant's trousers were at the knee level with him trying to dress up, the victim had her pants down; that the witness met both the appellant and PW1 facing each other while standing. The witness testified also that he refused to accept the appellant's gift of money but insisted that both the appellant and PW1 were brought out and exposed where people were gathered; that the appellant and his victim were subsequently taken to the police station. The witness was also cross examined.

PW3 is the mother of the PW1 (the victim). She was told the incident and that was hearsay. She went with PW1 to the hospital and in company of the appellant. The witness was cross examined.

PW4 is the Investigating Police Officer (IPO). He conveyed PW1 the victim, to Aminu Kano Teaching Hospital where she was admitted. The appellant volunteered a statement which was recorded by the witness in English and translated same into Hausa language and the appellant agreed and signed.

The statement was confessional wherein the appellant admitted having committed the offence of rape alleged. This was endorsed by a superior Police officer the person of CSP Yusuf Sani who also signed the statement. While Exhibit 'A' was the medical report, Exhibit 'B' was the appellant's confessional statement. The witness PW4 was also cross examined.

PW5 is the Medical Doctor who examined PW1 and issued a report Exhibit 'A'. In his evidence this was what he said of Pw1's hymen "In this case it is incompletely broken which suggest partial penetration." It is also the witness's evidence that he saw a small discharge from the vagina of PW1 but found no organism or sperm cells; that the HIV test also proved negative. The witness was cross examined on his evidence.

PW6 is the 2nd Investigating Police Officer (IPO) who took another statement from the appellant. The statement was admitted as Exhibit 'C'.

THE DEFENCE

The appellant testified in his own defence as Dw1 and denied knowing PW1 and the entire allegation and incident. His testimony was that PW1 solicited for money and upon his refusal to oblige her, a man met them and inquired to know what they were doing; that the man held him, (appellant) called his other friends who beat up the witness and was eventually taken to the police station in a vehicle.

Under cross examination the witness identified PW1 as the alleged victim, who begged him for money. He admitted being interrogated by PW4 at Mariri Police station.

Sequel to appraising the evidence for both the prosecution and the defence, the learned trial judge found the appellant guilty as charged and convicted him accordingly. The Court, following the allocutus, proceeded and sentenced the appellant to a ten year term of imprisonment commencing from the date of the commission of the offence charged. The Court also imposed a fine of N10,000.00 on the appellant and in default of payment of which he was to serve an additional one year jail term.

An appeal to the Lower Court was dismissed by a unanimous decision of that Court which affirmed the judgment of the trial High Court. The appellant was

dissatisfied again with the outcome of his appeal and hence his filing the notice of appeal to this Court on the 4th July, 2012 and containing five grounds.

In compliance with the Rules of this Court, briefs were duly filed and exchanged between parties. While the appellant's brief and reply brief were settled by Tuduru Ede Esq. on the 28th February, 2013 and 11th June, 2014 respectively, that of the respondent was also settled by Mukhtar Sani Daneji, Solicitor-General/Permanent Secretary Kano State on the 23rd October, 2013.

On the 5th November, 2015 when the appeal came up for hearing, learned counsel representing the respective parties adopted and relied on their briefs of arguments. On the one hand, Mr. Ede who represented the appellant urged in favour of allowing the appeal. On the other hand and on behalf of the respondent however. Mr. Daneji urged for a dismissal of the appeal as lacking in merit.

The two issues formulated by the appellant's counsel are as follows:-(a) Were the learned Justices of the Court of Appeal not wrong holding that the charge of rape was proved Grounds 1, 2, 5.

(b) Were the learned Justices of the Court of Appeal not wrong in holding that the question put to the witness Pw1 had no negative impact on the trial of the appellant Ground 3.

Ground 4 of the notice of appeal was abandoned by the appellant's counsel and same is hereby struck out. It is noteworthy to say at this point that the two issues formulated by the appellant are also adopted verbatim by the respondent.

1st Issue:-

It is the contention on behalf of the appellant that the charge of rape against him was never proved and hence the complaint that the learned Justices of the Court of Appeal were clearly wrong when they held at page 139 of the record thus:-"I hold that the charge of rape was proved beyond reasonable doubt against the appellant"

It is the counsel's submission that to prove the offence of rape, there must be evidence of penetration as an essential element, and which must be linked to the accused, that is the appellant this case; that in the instant appeal, the evidence offered by the prosecution in proof of penetration was those by the PW1 and PW5 which totality, counsel argues could have pointed to rape, but that it did not link the appellant to raping of the PW1. Furthermore, counsel submits as wrong for the Court to have relied on those pieces of evidence as proof of penetration by mere insertion of penis into PW1's vagina. Counsel cites the authority in the case of *Okoyomon V. The State* (1973) 1 SC 21, (1973) 1 NMLR 392, 296 297 per Elias CJN, that insertion of penis into vagina is not proof of penetration. He submits therefore that PW5's evidence ought to have linked the appellant to the alleged breaking of the hymen; that the only credible means of linking the appellant with the partial penetration would have been through the whitish discharge which opportunity had been lost.

In further submission, the learned counsel for the appellant, opposed vehemently the evidence of PW1 on the ground that it was never corroborated by anything or by any witness; that while PW5 did not link the appellant to the offence, PW2 only saw appellant's trousers at his knee level. The counsel concluded on PW3's evidence as hearsay and that whereas, PW4 who took the Hausa version of appellant's statement never produced it in Court but tendered exhibit 'B' while PW6 tendered exhibit 'C'; that the pieces of evidence adduced by the prosecution are not corroborative of each other within the meaning of Section 178(5) of the Evidence Act. Counsel urged that the issue should be resolved in favour of the appellant.

Submitting in response and on behalf of the respondent, the learned counsel Mr. Daneji re-iterates as proved that appellant is not disputing that the victim (Pw1) was raped; rather that the fact of partial penetration leaves to question the appellant's link to the commission of the crime Counsel relates to exhibit 'A', the medical report which he submits shows clearly that with the breaking of the hymen, the evidence and surrounding circumstances all point to the fact that the appellant and nobody else was responsible. Copious reference was made to the testimonies of PW1 and PW2; that contrary to the argument on behalf of the appellant, the whitish discharge is not the only reason linking him (appellant) with the partial penetration but that there is sufficient corroborative circumstantial evidence that makes him culpable; that the two cases of *Okoyomon v. State* (1973) 1 SC 21 (1973) 1 NMLR 292, 296 297 per Elias CJN and *Jos N.A. Police V. Allah Na Gani* (1968) NMLR 8 were quoted out of context and do not support the case of the appellant as each case is to be determined on its own peculiar

circumstance. Further reference in support is, again the case of *Posu V. State* (2011) 2 NWLR (Pt.11234) 393; that the Lower Court was right when it held that there was penetration going by the evidence of PW1 and PW5. On proof of corroboration counsel cites with great reliance on the case of *Dagayya V. State* (2006) 7 NWLR (Pt 980) 367 SC; that there were concurrent findings in respect of both penetration and corroboration and that the appellant has failed to show that the concurrent findings of facts are either unsupported by evidence or are perverse so as to make it necessary for the Court to set aside same, Counsel cites again the case of *Egwumi V. The State* (2013) 2 SCNJ 875; that the said issue should in the circumstance be resolved against the appellant.

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 is by nature grave, devastating, 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. A number of such definitions include those arrived at by this Court in the case of *Posu V. State* (supra) at page 414 where Fabiyi (JSC) held same as:-"An unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man forcibly and against her will. It is the act of sexual intercourse committed by a man with a woman who is not his wife without her consent."

Adekeye (JSC) also at page 416 sees rape in legal parlance as: "an unlawful carnal knowledge of a woman or girl without her consent or with her consent if the

consent is obtained by force or by means of threat or intimidation of any kind or by fear or harm, or by means of false and Fraudulent representation as to the nature of the act or in the case of a married woman by personating her husband." In summary therefore, rape can be interpreted as an unlawful carnal knowledge or non-consensual sex; that is, penetration without consent.

The law is settled and well grounded that the prosecution has the burden and duty to prove the accused person guilty of the following ingredients in order to sustain the conviction of the offence of rape:

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

See Ogunbayo V. State (2007) 8 NWLR (Pt 1035) 157; Upahar v. State (2003) 6 NWLR (pt 816) 230; State V. Ojo (1980) 2 NCR 391; Okoyomon V. State (1973) 1 SC 21; State V. Anolue (1983) 1 NCR 71 and Iko V. State (2001) 14 NWLR (Pt.732) 221.

In proof of rape therefore, the most essential ingredient of the offence is penetration, the extent no matter how slight will serve sufficient proof. It is well

accepted and settled that penetration, with or without emission, is sufficient even where the hymen is not ruptured. The slightest penetration has served as sufficient to constitute the act of sexual intercourse. Again see Iko V. State, Ogunbayo V. State and State V. Ojo all under reference (supra) also Jegede V. State (2001) 14 NWLR (Pt.733) 264.

At page 139 of the record of appeal, their Lordships at the Court below held and said:-

"Under cross-examination, the appellant gave a graphic and lucid account of his journey and of his co-travellers to the hospital. It beats one's imagination how a person not in his proper senses would give such a clear, lucid and detailed account of such an event. It is no wonder; the learned trial judge did not believe him. I do not believe him either. His account during the examination - in chief is nothing other than an after - thought. I hold that the charge of rape was proved beyond reasonable doubt against the appellant."

The appellants counsel in his submission concedes that in order to prove the offence of rape, penetration is an essential element and which must be linked to the accused person; that the totality of the evidence by PW1 and Pw5 on the insertion of penis into vagina is not conclusive proof of penetration. Also that the contents of exhibit 'A' (the medical report) issued by Pw5 as well as the evidence of Pw1 could have pointed to rape, but that they all fell short of linking the appellant to the rape of Pw1.

In proof of penetration, the law is trite as submitted by respondent's counsel that partial or incomplete penetration is sufficient proof of the offence of rape and authorities both at Common Law and also under our statutes are in unison on this point. The authorities cited by the learned counsel for the appellant therefore, all, support the case of the Respondent on the foregoing principle as enunciated. A prominent authority in support is the case of *Ogunbayo V. State* (supra) where this Court said thus at pages 182 182:- "The important and essential ingredient of the offence of rape is penetration. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. Therefore, proof of the rupture of hymen is unnecessary to establish the offence of rape."

In the instant appeal, the evidence of Pw1 (the prosecutrix), PW2, Pw5 and Exhibit 'A' are very relevant. PW1 for instance said thus in her evidence:-

"He held my hand and dragged me to an uncompleted building. He removed my wrapper and also removed my pant. He also removed his trouser and he put his penis into my vagina. I then shouted."

Pw2 also gave evidence and confirmed the year of incident as stated by Pw1. The witness in his statement in chief said."I went and saw the accused person and the girl (Pw1). The trouser of the accused was at the knee level and was trying to dress up, while the girl had her pant down. As at the time I met them they were

both standing facing each other. The accused person attempted to give me some money but I refused to accept. I brought the accused and the victim out, by which time people have gathered. They asked the accused whether he had sex with the girl, and he said yes."

Pw5 the Medical Doctor in his testimony also said:-

"When we examined the vagina (sic) of the girl the main covering was found to be incompletely broken in the centre. Our conclusion is that the victim was raped."

It is imperative to state that the evidence of Pw1 is sworn on oath. The record shows that the learned trial judge conducted proper investigations on the prosecutrix (a minor) before allowing her to give evidence on oath after finding her intelligent enough to understand the proceedings and also appreciating the implication of oath taking. It is noteworthy to restate that the prosecutrix, who was raped at the age of nine years, gave evidence at the time she was twelve years of age. Evidence is borne out to that effect on the record and which was unchallenged.

In this appeal, the appellant's major grouse challenges the absence of corroboration on the evidence by PW1. In other words, that assuming (without conceding) that penetration was proved, the evidence of PW1 linking him appellant) to the crime has not been corroborated. The law is trite and well settled that Pw1, though a minor needed no corroboration of her evidence which was sworn on oath. See again the case of Ogunbayo v. The State (supra) where it was held that a sworn evidence of a minor requires no corroboration.

It is intriguing that inspite of the overwhelming evidence adduced by the prosecution, the appellant has persistently held out and resisted that the prosecution had linked him with the offence of rape proved.

On a careful perusal of exhibit 'B' and 'C', the statements made by the accused person at both Mariri Division of the Nigeria Police and the State C.I.D Bompai Kano, the revelation becomes obvious that the appellant confessed to raping the victim (Pw1) when in exhibit 'B' at the last line on page 1 to line 3 of the second page he said:- "... but when I put my penis into her private part, it did not go inside as I want, then I removed my penis because I did not enjoy the situation."

Also in exhibit 'C', at page 2 lines 7 - 10 the appellant had this to say: "I then dragged her into the uncompleted building. She removed one leg of her pant, while I removed the other one. She then stands on a block, while I tried to have sex with her, but I could not penetrate into her vagina. When I heard she was about to cry, I then left her and gave her N40.00 she demanded."

On the question of corroboration sought by the appellant, same cannot be at large, but should be defined in the context of the case of *Odofin Bello V. The State* (1966) 1 All NLR 223 at 230 wherein it was held that:-

"Corroborative evidence is evidence which shows or tends to show not merely that the crime has been committed but that it was committed by the accused."

It is the appellant's contention that as a minor the victim's evidence needed corroboration. With Pw1's evidence having been sworn, the law dictates and is settled that such evidence of a child needs no corroboration for the Court to act thereon. Again see *Daggaya V. State (2006) (Supra)*. In the circumstance, the appellant is wrong therefore in contending that the testimony of Pw1 had to be corroborated.

I seek to say further that for all intents and purposes, the totality of Exhibits 'B' and 'C' is a corroboration of the evidence of Pw1, wherein the appellant confessed and maintained that he had sexual intercourse with the victim (Pw1). In other words in taking exhibits 'B' and 'C' read together, the totality will give one explanation, that there was indeed Penetration even though it's not complete, In consequence, the cases cited by the appellant on the proposition that there has to be complete penetration do not support the principle that penetration even if slight would ground conviction. In the case of *Jegade V. The State (supra)*, it was held that "whether the prosecutrix was a minor or an adult, there must first be proof of penetration and that penetration of the vagina must be linked with the appellant." *Belgore, JSC (as he then was)*]. Penetration however slight is sufficient and it is not necessary to prove an injury or the rupture of the hymen to constitute the crime of rape - *Kalgo, JSC in Iko V. The State (supra)*.

The two Exhibits 'B' and 'C' are voluntary statements made by the appellant, who did not object to their admissibility in evidence. As rightly held by the two Lower Courts, conviction on them was proper without further corroboration. See the case of *Emeka V. State (2001) 5 M.J.S.C P1 at 5*. The fact that the victim was under

the age of 14 years when the criminal act was committed is not contradicted and therefore deemed admitted on the authority of the case of Ukegbu V. I.G.P. (2003) MJSC Page 13 at 19.

The third Ingredient is the proof that the woman or victim in question is not the wife of the accused person. On a graphic analysis of the evidence by the appellant as Dw1, it is a confirmed fact that his testimony under cross examination at page 21 of the record is not contradicted that Pw1 is not his wife.

The last Ingredient to prove has to do with the question of penetration which had been proved scientifically through the the evidence of Pw5, the Medical Doctor whose portion of his testimony reads thus:- "The main covering of the hymen was found to be broken incompletely in its centre. Between the incompletely broken hymen and the surrounding skin, a small discharge was seen. Our conclusion was that rape was committed."

Under cross examination by the defence, Pw5 maintained thus: "In this case the hymen was incompletely broken which suggest partial penetration."

By virtue of the provision of Section 27(a) of the Evidence Act, a confession, if made voluntary is deemed to be relevant fact as against the person who made it.

The law is well settled also that for a confession to amount to an admission of guilt, it must be positive, direct and unequivocal as to the commission of the

offence for which the accused is charged. See Patrick Joven and Ors. V. The State (1973) 5 SC 17.

If an accused person does not object when his confessional statement is being tendered, the only reasonable conclusion is that it was made voluntarily. See Bello Shurumo V. the State (2010) 19 NWLR (Pt 1226) 73 wherein it was held that the failure to object the two confessional statements when they were tendered and admitted as exhibits was held as conclusive evidence that they were both made voluntarily. This is more so when a counsel stands by and allows exhibits to sail smoothly through without any objection.

In the case at hand, the learned counsel sought and obtained the permission of the trial Court to confer with the appellant, when the prosecution sought to tender exhibit 'B' evidence. The counsel thereafter did not object to the admissibility of the confessional statement of his client which was admitted as Exhibit 'B'. In respect of exhibit 'C' and contrary to exhibit 'B', however, the counsel simply admitted same in evidence as an Exhibit without making any reference to his client.

At page 137 of the record, their Lordships of the Lower Court per Belgore, JCA in his lead judgment therefore had this to say:-

"I have gone through both Exhibits 'B and 'C' and I found them to be positive, direct and unequivocal as to the commission of the offence of rape for which the appellant was charged. I also found the contents of Exhibits 'B' and 'C' to be consistent with the evidence of Pw1 and Pw2 and Exhibit 'A'. Exhibit 'B' and 'C'

corroborate the evidence of Pw1 and link the appellant to the offence for which he was charged because the two exhibits give credence to the evidence of Pw1 and Pw2 that the appellant committed the offence of rape. The two exhibits effectively and effectually connect the appellant with the offence of rape for which he was charged and convicted."

I cannot agree more with the findings of their learned Lordships supra but also endorse their view held and resolve the 1st issue against the appellant.

The 2nd issue relates to the question and answer session put by the Court to Pw1. In other words, it is alleged on behalf of the appellant that the view held by the Lower Court at page 143 of the record is contrary to its subsequent finding which the counsel submits did work a miscarriage of justice against his client and therefore should void the conviction and sentence imposed.

At page 143 of the record, the Lower Court held thus and said:-"On the other hand, it was wrong for the learned trial judge to have interjected after the cross examination without allowing the defence to further cross examine the witness on the point."

Closely following also and in another tone, their Lordships proceeded and concluded

that:- "the question and answer added no value to the case of the prosecution."

It is the contention of the learned counsel for the appellant that the Lower Court having held that the learned trial judge descended into the arena and therefore proceeded to expunge the offending question and answer session held, ought to have also held that there occurred a procedural unfairness and injustice meted to the appellant; that the Lower Court was wrong when it failed to see the miscarriage of justice, which counsel argues is contrary to Section 237 of the Criminal Procedure Code and also Section 223 of the Evidence Act. The counsel cited in support the cases of *Akinfe V. The State* (1988) 3 NWLR (Pt.85) 729; *R. V. Igwe* (1959) 5 JSC 206 and *Karim V. Nigerian Army* (2002) 4 NWLR (Part 758) 716. Counsel submits that in the circumstance, the question and answer worked great disadvantage to the appellant and resulted into the dismissal of his appeal. In other word' that the session resulted in a breach of the appellant's right to fair hearing and this is without regard to how well conducted the proceeding was, In summary, counsel urges that the issue should be resolved favour of the appellant and that the appeal should be allowed while the conviction and sentence of the appellant should be set aside.

In response to the second issue raised, the learned counsel for the respondent submits a contrary view and argues vehemently that the question and answer session complained against did not occasion any miscarriage of justice as it did not add any value to the case of the prosecution. Counsel urged that the issue should also be resolved against the appellant.

The issue under consideration deals with the question put by the learned trial judge to the witness Pw1 and which situation is not the same as in the case of Karim, cited by the appellant's counsel (supra) where it was held that the trial Court went on a voyage of discovery in the examination of the prosecution and the defence witnesses.

To the contrary, the case at hand, the single question put by the trial Court did not in the circumstance occasion any miscarriage of justice. For all intents and purposes, even if the singular question and answer were to be discarded, the case of the prosecution would still remain intact as there is enough evidence upon which to convict the

accused/appellant. The question and answer session in contention between the Court and Pw1 went as follows:-"Court to Pw1: What made you to shout attracted (sic) the person who came to your aid

Witness (Pw1): (sic) I shouted because of the penis (sic) penetration."

For purpose of comparison also, I wish to make reference to the testimony of PW1 in chief wherein she said affirmatively as follows on her ordeal from the appellant.

"He also removed his trouser, and he put his penis into my vagina, I then shouted, and someone came to my aid....."

The trial Court's judgment spans over pages 48 - 75 of the record and at page 74 this is what his Lordship said:-

"In the end I am quite satisfied that the prosecution has proved the offence of rape under Section 283 of the Penal Code against the accused person beyond reasonable doubt. The accused Shuaibu Isa is hereby convicted as charged."

The Lower Court, while endorsing the view held by the trial Court had this to say also:-"I have gone through the entire record and could not find where the learned trial judge made use of this question and answer. Learned counsel for the appellant also failed to pin point where it was put into use in convicting the appellant..."

I have no reason to depart from the erudite conclusion arrived thereat by the Lower Court. In other words, the learned counsel for the respondent had rightly submitted that, contrary to the assertion by the appellant, the answer to the question posed by the trial Judge was not different from what the witness Pw1 said in her evidence in chief, which clearly pointed to the fact that it was the insertion of the penis by the appellant into her vagina that caused her to shout. Therefore, the question and answer did not occasion any miscarriage of justice as wrongly conceived by the appellant's counsel. In other words, it did not add any value to the prosecution case as rightly pointed out by the Lower Court.

I wish to state in passing however that the error of interjection after cross-examination which, the Lower Court ascribed to the trial Court was as to the procedure adopted which did not affect the substance and justice of the case

whatsoever. In other words, whether or not the question/answer session is expunged, the criminality of the appellant had conclusively been proved beyond reasonable doubt. The said 2nd issue is also resolved against the appellant.

With the two issues having been resolved against the appellant, the appeal is devoid of any merit and is hereby dismissed.

The concurrent findings of the two Lower Courts in convicting and sentencing the appellant are also affirmed by me. The sentencing of the appellant Shuaibu Isa to 10 years imprisonment beginning from the 17th of May, 2005 is hereby affirmed. He should also pay a fine of N10,000.00 in default of which he is to serve a further one year jail term.

Appeal is hereby dismissed while the concurrent conviction and sentence of the appellant are affirmed.

IBRAHIM TANKO MUHAMMAD, J.S.C.: A rapist is worse than an animal. He has no moral rectitude. He throws overboard, the limit of his legal rights and he can, shamelessly, deprive another person (more painfully, female children of under age) of their God given rights of protecting the chastity and sanctity of their body and mind. He is all out to pollute such chastity and sanctity. He has no respect for human beings! He can commit any atrocity. He is a cancer in the society. What a shame!

My expression as above is not sentimental. Far from it. It is agitated by the facts and findings of the Courts below relating to the appeal on hand. My learned brother, Ogunbiyi, JSC, has treated the issues in the appeal to my satisfaction. I adopt her reasoning and conclusion in dismissing the appeal.

Section 282 and 283 of the Penal Code. No. 18 of 1959, designated as Cap 89 in the Laws of Northern Nigeria, 1963, relate to the offence of rape and its punishment. The Sections provide as follows:

282(1) A man is said to commit rape who, save in the case referred to in Sub-Section (2). Has sexual intercourse with a woman in any of the following circumstances:

(a) against her will:

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;

(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

(e) with or without her consent, when she is under fourteen years of age or of unsound mind;

(2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.

(283) Whoever commits rape, shall be punished with imprisonment for life or for any less term and shall also be liable to fine.

In the notes on the Penal Code Law, made by Richardson, it is explained that in the definition of rape as above, the first paragraph operates where the woman is in possession of her senses and therefore capable of consenting; the second, where she is insensible or so imbecile that she is incapable of consenting; the third and fourth where there is consent but it is not such consent as to excuse the offender because in the one case it is extorted and in the other it is obtained by deception: and the fifth, where the intercourse is with a girl so young that consent is immaterial.

For the prosecution to sustain a conviction of the appellant under Section 283 as above, the ingredients of the offence must be established. that is to say

(a) that the accused had sexual intercourse with the woman in question.

(b) that the act was done in circumstances falling under any of the five paragraphs in Section 282(1) of the Penal Code.

(c) that the woman was not the wife of the accused or if she was, she had not attained puberty;

(d) that there was penetration.

My Lords, penetration in a case of rape is very important. My Learned brother, Ogunbiyi, resounded the position of the law that penetration, however slight, suffices. The medical doctor who testified as PW5 started that there was partial penetration. The most important ingredient in rape is penetration. It is settled that sexual interference is deemed complete, upon proof of penetration of the penis into the vagina. It was held in the English case of *R. U. Marsden* (1891) 2 QB 149 at 150, per Lord Coleridge, C.J. that emission is not a necessary requirement.

Our Nigerian Case law is replete with authorities that even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, even where penetration was proved but not of such a depth as to injure the hymen, it has been held to be sufficient to constitute the crime of rape. See: *The State v. Ojo* (1980) 2 NCR 391 at 395; *Jegade V The State* (2001) 7 SCNJ 135 at 141. Thus, discharge of "whitish", "greenish", "reddish" or whatever colour of fluid in a rape offence, is not considered credible evidence for establishing the offence of rape.

On the issue of corroboration of the offence, it should be noted that no law in Nigeria, as of now that says that corroboration is necessary. It is however, desirable to get the evidence of the prosecution strengthened by other implicating evidence against the accused See: *Reekie V. The Queen* (1954) 14 COACA 501 at 502; *State V. Ojo* (1980) 2 NCR 391; *Ogunbayo V. State* (2007) 8 NWLR (Pt.1035) 157.

Corroboration in a rape case, is that evidence which tends to show that the story of the victim, the prosecutrix, it is the accused that committed the crime. Such evidence need not to be direct. It suffices if it corroborates the said evidence in some material particular to the charge in question. *Ezegbo V State* NCC 7 page 426. Secondly, where the child is a minor of some discernable age, her sworn evidence need no further corroboration. This Court, in the case of *Okoyomon V. The State* (1973) NSCC, held per Elias, CJN. as follows: "We may observe that in the very recent case of *DPP V. Hester* (1992) 3 WLR 869, in which there is an authoritative review of nearly all leading authorities on the subject in English Law,

the House of Lords held that the unsworn evidence of a child could amount to corroboration of the sworn evidence of another child."

This was in a case where conviction was based mainly on the sworn evidence of two young girls. The prosecutrix was between the age of 11 and 12 years of age.

In the appeal on hand, there was a finding that the prosecutrix was of the age of 12 years when she was victimised. PW2 gave evidence and gave vivid picture of what and how he saw the appellant and his victim on arriving at an uncompleted building where he saw the appellant and the prosecutrix, with the trouser of the appellant at his knee level and was trying to drag it up. The prosecutrix had her pants down. Both were facing each other. Is this not enough corroboration Yes. It is. The Court below found that exhibits B and C were consistent with the evidence of PWS 1 and 2, and corroborated the evidence of the prosecutrix. This is enough to sustain the conviction of the appellant.

For the above and the fuller reasons given by my learned brother, Ogunbiyi, JSC I too find no merit in the appeal which I equally dismiss.

MUHAMMAD SAIFULLAHI MUNTAKA-COOMASSIE, J.S.C.: This is an appeal against the concurrent decisions of the two Lower Courts, the Kano State High Court and the Court of Appeal Kaduna respectively.

The appellant as an accused person in the High Court of Kano State was convicted for rape punishable under Section 283 of the Penal Code.

Six witnesses testified for the prosecution including the mother of prosecutrix and a medical Doctor.

The trial Court found the appellant guilty and convicted him. After considering the allocutus the Judge proceeded to sentence the appellant to ten years imprisonment commencing from the date of the commission of the offence charged. The trial Court in addition imposed a fine of N10,000.00 on the appellant and in default of payment of which he was to serve an additional one year jail term.

The appellant, un-successfully appealed to the Court of Appeal Kaduna Division herein called the Lower Court. In a unanimous decision of the Lower Court it affirmed the decision of the trial Court and dismissed the appeal.

The appellant still aggrieved and filed a notice of appeal to the Supreme Court. Briefs were duly filed and exchanged.

Both counsel, on behalf of their respective clients adopted their briefs of argument. Two issues each were formulated by the two parties.

My learned brother Ogunbiyi JSC allowed me to have a preview before today of the lead judgment. I entirely agree with her reasoning and reasons for dismissing the appeal.

I too find no merit in the appeal and is hereby dismissed. The concurrent judgments of the two Lower Courts are hereby affirmed. Appeal dismissed.

OLABODE RHODES-VIVOUR, J.S.C.: I read in draft the leading judgment delivered by my learned brother Ogunbiyi, JSC. I agree with my lord that both Courts below were correct to convict the Appellant for rape. I intend to say a few words of mine.

Section 282 and 283 of the Penal Code Law states on rape as follows:

"282 (1). A man is said to commit rape, who save in the case referred to in Sub-Section (2) has sexual intercourse with a woman in any of the following circumstances-

(a) against her will;

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt;

(d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(e) with or without her consent, when she is under fourteen years of age or of unsound mind.

(2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty."

"283. Whoever commits rape shall be punished with imprisonment for life or for any less term and shall also be liable to fine."

See *Okoyomon v State* (1973) 1 SC p.21

Under the Penal Code, applicable in the Northern part of Nigeria the offence of rape is committed if a man has sex with a female without her consent. The offence is established once the man's penis penetrates the vagina of the female, no matter how slight the penetration rape is committed. The emission of semen into the vault of the vagina is unnecessary, and if the female is under the age of fourteen her consent is immaterial.

PW1, the young girl raped by the Appellant was raped when she was 9 years old. The identity of the rapist is not in doubt. The Appellant and the young girl were arrested and taken to the Police Station while in the act. See the testimony of PW2. Exhibit A, the Medical Report reveals that PW1's hymen was partially broken. This shows penetration to some extent.

The offence of rape was complete when the Appellant's erect penis slightly penetrated the vault of PW1's vagina and partially ruptured her hymen. The issue of whether PW1 consented is

irrelevant since she was unable to consent, being only 9 years old at the time. It is only if PW1 was 14 years or over that the issue of consent becomes relevant. On the facts before the Courts this is a clear case of rape.

For this, and the more detailed reasoning in the leading judgment, both Courts below were correct in finding the Appellant guilty of rape. Appeal dismissed.

CHIMA CENTUS NWEZE, J.S.C.: My Lord, Ogunbiyi, JSC, obliged me with the draft of the leading judgment just delivered now. I agree with the reasoning and conclusion.

The appellants principal plank for impugning the concurrent judgments of the two Lower Courts was that the testimony of the prosecutrix was not corroborated. This is rather curious for, quite apart from her evidence, PW2's testimony confirmed the allegation of the PW1. Indeed, the testimony of PW5, the Medical Doctor, overwhelmingly, confuted the appellants contention. Hear the role of the PW5 in the rape saga: When we examined the vagina of the girl, the main covering was found to be incompletely broken in the centre. Our conclusion is that the victim was raped.

Now, prior to the amendment of Nigeria's Evidence Act in 2011, scholars and other text writers had greeted, with forceful disapprobation, the practice which required corroboration of the evidence of a rape victim, Justice Ngozi Oji, "Proof of Sexual Offences in Nigeria," in UNIZIK Law Journal, Vol 7, No 1, 2010, 302-326; Y. Osinbajo, *Cases and Materials on Nigerian Law of Evidence* (Lagos: Macmillan Nigeria Publishers Ltd. 1992) 326; T. A. Aguda, *Criminal Law and Procedure of the Six Southern States of Nigeria*, 756-757; O. S. Oyelede, "Corroboration," in Akintola and Adedeji (eds), *Nigerian Law of Evidence: A Book of Readings* (Ibadan: University of Ibadan Press, 2006) 116 etc.

Their well-taken reservations, notwithstanding, Courts, still, clung to the practice of requiring corroboration of the evidence of such a prosecutrix, *Okpanefe v. State* (1969) ANLR 411; *Igbine v State* (1997) 9 NWLR (pt 519) 101; *Iko v State* [2001] 14 NWLR (pt 732) 221; *Afolalu v State* [2010] 16 NWLR (pt 1220) 584; *Ndidi v State* (2005) 17 NWLR (pt 953) 17. In passing, we acknowledge the beneficial provision of Section 204 of the Evidence Act, 2011 which has, effectively, bowdlerised sexual offences from the corroboration requirement.

Interestingly, in *Habibu Musa v State* (2013) LPELR -19932 (SC), this Court noted, most perspicaciously, that:

...It has to be restated that in offences of a sexual nature it is very desirable that the evidence of the prosecutrix or complaint (sic, complainant) is buttressed by other pieces of evidence implicating the accused in a substantial way. This does not detract from the fact that the Court is not hindered from convicting an accused on the uncorroborated evidence of the complainant. In the use or corroborative evidence however little or slight it may be there is no rule as to what a corroborative piece of evidence is and how it can be applied. This is because the trial judge is best suited to make use of the evidence being well situated and having the opportunity and singular privilege of hearing firsthand the witnesses, considering their demeanour including that of the appellant. Also, where there was enough on ground from which the trial judge can reach a decision then there is no need to warn itself of the danger of acting on the uncorroborated evidence of the prosecutrix. That in this case anyway it is not necessary since there was corroborative evidence in the confessional statement,

the medical report and even the other prosecution witnesses' testimonies which had a flow showing the credibility and veracity in those testimonies. Therefore, in terms of corroboration, there were many to solidify the evidence of prosecutrix. (italics supplied)

The Court cited, with approval, the decision in *Ogunbayov. The State* (2007) 8 NWLR (pt. 1035) 157. In that case (*Ogunbayo v State*), Tobi JSC, painstakingly, surveyed the chequered trajectory of rape jurisprudence. His Lordship espoused the beneficial view in *Iko v The State* [2001] 14 NWLR (pt. 732) 221 that it was not the law that an accused person in a charge of rape could not be convicted on the uncorroborated evidence of the prosecuting. In His Lordship's esteemed view, the proper direction was that it was unsafe to convict on the uncorroborated evidence of the prosecuting. He, first, observed that:

There are two dimensions to the issue of corroboration as decided by the Courts. First, the Courts hold that rape is not an offence in which corroboration is required by law and procedure. But the Court should warn itself of the danger of convicting an accused on rape in uncorroborated evidence. Second, an accused person cannot be convicted unless the evidence of the prosecuting is corroborated.

I take the case law in that order. In *The State v. Ogwudiegwu* (1968) NMLR 117, it was held that the offence of rape, in order to secure a conviction, corroboration of the evidence of the complainant implicating the accused is not essential, but a Judge must warn himself of the risk of convicting on the uncorroborated evidence of the complaint.

In *Okpanefe v The State* (1969) 1 All NLR 420, it was held that by Section 178(5) of the Evidence Act, the Court cannot convict an accused on a charge of rape

without corroboration, and in this regard an early report of the commission of the offence is not tantamount to corroboration. Similarly, in *Sambo v. The State* [1993] 6 NWLR (Pt.300) 399, this Court held ... that it is the law that before the prosecution can secure conviction for the offence of rape, the evidence of the prosecuting (the victim of the rape) must be corroborated in some material particular that sexual intercourse did take place and that it was without her consent.

It was also held that a piece of evidence offered as corroboration for the offence or rape must be (a) cogent, compelling, and unequivocal as to show without more that the accused committed the offence charged:

(b) an independent evidence which connects the accused with the offence charged; and (c) evidence that implicates the accused in the commission of the offence charged. See also *Upahar v State* (2003) 6 NWLR (Pt.816) 230.

The eminent jurist pointed out most insightfully that:

In *Iko v. The State* (2001) 14 NWLR (Pt.732) 221 in 2001, eight years after the decision in *Sambo*, it was held that it is not the rule of law that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecuting. The proper direction is that it is not safe to convict on the uncorroborated evidence of the prosecuting. The Court may, after paying due attention to the warning, nevertheless convict the accused person if it is satisfied with the truth of her evidence. This Court also held that the fact that the prosecutrix says that an accused inserted his penis into her vagina is not ipso facto sufficient proof of penetration in the absence of corroboration. Let me take

here the 'warning business' that the appellate Courts have been given to the trial Judge. (Italics supplied for emphasis)

His Lordship turned to the justification of the English practice on this matter [that was before the amendment of the law in England]. He explained that:

In England where the principle emerged and is applicable, the trial by jury is in force. In view of the fact that the jury convicts, the procedure is that the Judge should warn the Jury of the danger of convicting on the uncorroborated evidence of the complainant. Is that really necessary in Nigeria where the Jury System is no more? What is the practical effect of the law expecting the trial Judge to warn himself of the danger of convicting without corroboration? If he does not warn himself in reality and writes down in his judgment that he did, how useful is that? In the entire truth searching process, is our adjectival law not pretentious here? And can law afford to be pretentious?

He advanced reasons why the corroboration requirement was unnecessary. Listen to His Lordship's incisive reasoning on this matter: I am not comfortable with the case law that corroboration is necessary to secure conviction of the offence of rape. This is because I see no statute foisting on the prosecution evidence of corroboration before convicting an accused. Section 350 of the Criminal Code Act, Cap. 77 Laws of the Federation of Nigeria, 1990 which is similar to the States Criminal Codes, does not provide that evidence of corroboration is necessary for conviction. And the Criminal Code specifically provides for offence where corroboration is necessary. Rape is not one of such. The above apart,

neither the Evidence Act nor the Criminal Procedure Act or Code provides for corroboration in the offence of rape. I therefore ask, where did we get that law

The eminent Jurist advanced clues as to the materials from which corroboration could be gleaned. In his views:

...If our adjectival law requires corroboration (a point I am not prepared to concede), then corroboration could be deduced from inter alia the denials of the accused, the last opportunity the accused had to commit the offence, medical evidence of the examination of the prosecuting confirming the allegation of recent forcible coitus and the existence of recent semen in the vagina of the prosecuting directly traced or traceable to the accused.[Italics supplied]

In the instant appeal, the appellant would appear to have underrated the probative value of the unchallenged evidence of PW5, the Medical Doctor. Be that as it may, his attitude to that evidence is immaterial for, in my humble view, the Lower Courts, rightly, concluded that the Prosecution proved the offence of rape under Section 283 of the Penal Code against the appellant beyond reasonable doubt.

It is for these, and the more detailed, reasons in the leading judgement that I, too, shall dismiss this appeal as being unmeritorious. I abide by the consequential orders in the leading judgement.

Appearances

Tuduru U. EdeFor Appellant

AND

Mukhtar Sani Daneji (SG) Kano State with him, Aisha Mahmoud (CSC) and Zainab

Mudi (PSC)For Respondent