**SUNDAY JEGEDE v. THE STATE**

**(2000) LPELR-8163(CA)**

**In The Court of Appeal of Nigeria**

**On Tuesday, the 21st day of March, 2000**

CA/B/257/96

Before Their Lordships

SUNDAY AKINOLA AKINTAN Justice of The Court of Appeal of Nigeria

RAPHAEL OLUFEMI ROWLAND Justice of The Court of Appeal of Nigeria

KUMAI BAYANG AKAAHS Justice of The Court of Appeal of Nigeria

Between

SUNDAY JEGEDE Appellant(s)

AND

THE STATE Respondent(s)

Other Citations

Jegede v. State (2001) 1 NWLR (Pt.695)623

RATIO DECIDENDI

1. EVIDENCE - CORROBORATION: Whether corroboration is required where a child's evidence is recieved under oath

"It is also not the law that corroboration is required as a matter of law where a child whose evidence has been received even under oath is the accuser." Per AKAAHS, J.C.A. (P. 12, paras. A-B) (...read in context)

2. EVIDENCE - CORROBORATION: Nature of a corroborative evidence capable of grounding conviction on a charge of rape

"The nature of a corroborative evidence capable of grounding conviction on a charge of rape is that it must be cogent, compelling, and unequivocal as to show without more that the accused committed the offence charged. See: Igbine v. State (1997) NWLR (Pt.519) 101." Per AKAAHS, J.C.A. (P. 13, paras. F-G) (...read in context)

AKAAHS, J.C.A. (Delivering the Leading Judgment): The accused was arraigned before the High Court Benin for the offence of rape in charge No. B/8C/91. He was found guilty and sentenced to 5 years imprisonment. The charge reads as follows:-

"Statement of Offence:
Rape, contrary to section 358 of the Criminal Code, Cap. 48, Vol. 11, Laws of former Bendel State of Nigeria 1976 as applicable in Edo State of Nigeria.
Particulars of Offence
Sunday Jegede on or about the 24th day of May, 1989 in Benin City had carnal knowledge of Oghogho Ogunbor (f) without her consent"

To prove its case the prosecution called six witnesses namely, Dr. Suleman Abu (1st P.W) Oghogho Ogunbor, the prosecutrix (2nd P.W); Mr. Fidelis Erameh, headmaster of the University of Benin Staff School (3rd P.W); Vera Ezomo (4th P.W); Florence Oni (5th P.W) and Sgt. Samuel Freeborri (6th P.W) who was the Investigating Police Officer.
The accused gave evidence in person and called three other witnesses for the defence amongst whom was Irene Osagie who was present at the time the incident was alleged to have taken place. The prosecutrix ran to her and told her that one man wanted to rape her.
The learned trial Judge after reviewing the evidence adduced found the accused guilty as charged and sentenced him to 5 years imprisonment on 16th June, 1993. The accused was dissatisfied with his conviction and filed his notice and 2 grounds of appeal on 15th July, 1993. He will hereinafter be referred to as the appellant in this appeal.

Briefs of argument were filed after time was extended to do so had been granted. The appellant raised two issues for determination; so also the respondent. The issues formulated by the appellant are:-

(a) Whether on the totality of the evidence adduced in the trial court, a case of rape has been established against the appellant.

(b) Whether the learned trial Judge misplaced the onus of proof in a criminal case when she failed to consider the failure of the doctor to examine the appellant.

The issues which the respondent's counsel framed for determination are:-

(i) Whether the evidence adduced by the prosecution established a case of rape against the appellant beyond reasonable doubt.

(ii) Whether there are material contradictions in the case of the prosecution.

Appellant's arguments on the 1st issue centre around lack of corroboration.

It is the contention of Learned Counsel for the appellant that before the prosecution can secure a conviction the evidence of the prosecutrix (victim of the rape) must be corroborated in some material particular that sexual intercourse did take place and that it was without her consent and the corroboration required is the evidence that implicates the accused in the commission of the offence. He cited the case of Samba v. The State (1993) 6 NWLR (Pt. 300) 399 and section 179 (1) & (5) and section 183 Evidence Act in support of the argument. He contended that the legal proposition which postulates that "there is no positive rule of law that says that corroboration is required in sexual offences but as a matter of practice, the Judge warns himself that it is quite unsafe to convict an accused upon the uncorroborated evidence of one witness" only applies where the victim is not below the age of 16 years. In the instant case, where the victim is below the age of 13 years, corroboration is required as a matter of law. Relying on Akpan v. State (1967) NMLR 185 which was cited with approval by the Supreme Court in Shazali v. State (1988) 5 NWLR (pt. 93) 164, learned counsel submitted that corroboration is required as a matter of law where a child whose evidence has been received even under oath is the accuser. Contrasting the evidence of the prosecutrix with that of Irene Osagie on whether or not penetration was established, learned counsel was of the view that the evidence of D.W.3 should be preferred and it is to the effect that the prosecutrix ran to her and held her and said that one man wanted to rape her. Turning to the issue of the non-examination of the appellant by the doctor, learned counsel contended that if this had been done, it could have provided the necessary corroboration as to whether the appellant had the same bacteria called 'styphilocus areas' and some yeast cells which were found in the private part of the prosecutrix. Learned counsel next dwelt on the conflict and inconsistencies in the prosecution's case which he said were material and should have been resolved in favour of the

appellant. According to him the finding of distress made by the trial Judge was not supported by the evidence of the prosecution. On the issue of consent, he submitted that the evidence of the prosecution did not negative consent and so even if the accused had sexual connection with the prosecutrix, there is no evidence on record to support that she did not consent to the act. He contended that the age of the prosecutrix cannot be used to negative consent because in rape cases age is not a relevant factor for the determination of consent. He argued in the alternative that even if age is relevant to ascertaining whether the prosecutrix consented, her age was not strictly proved.

It is learned counsel's argument that the case of the prosecution suffers a great set back as a result of their inability to cross-examine any of the defence witnesses and the evidence given by these witnesses tallies with the appellant's testimony to the effect that the prosecutrix's father insisted that the police should prosecute him for demanding money from him (complainant's father) in the presence of his friend, an action which he felt was embarrassing. He submitted that where the story of the accused is not challenged, the defence ought to be accepted by the trial court and where a court disbelieves an accused, the court must give a strong reason for so disbelieving. He finally submitted on the first issue that the evidence adduced in the trial court cannot ground a conviction for attempted rape because there is no proximate act of the appellant established by the prosecution that can constitute an attempt. He argued that the mere fact that the prosecutrix told D.W.3 that somebody wanted to rape her does not of itself import attempt.

Making his submissions on issue No.2 learned counsel stressed that the omission on the part of the prosecution to carry out a test on the appellant to ascertain the state of his health with respect to venereal disease created a gap in the prosecution's case and relied on Okoyomon v. The State (1973) 1 All NLR (Pt.1) 16 (1972) 1 SC 21 for his submission. It was his view that the trial court placed the burden of proving his innocence on the appellant before the prosecution could prove its case and this is tantamount to a denial of fair hearing. He contended that this is a misdirection and submitted that where the trial court misdirects itself as to the onus of proof of the guilt of the appellant and subsequently convicts the appellant, an Appeal Court is bound to set aside the judgment as being contrary to the constitution. He therefore urged us to set aside the conviction of the appellant and to discharge and acquit him.

In her reply to issue No.1 learned counsel for the respondent submitted that the case of rape was proved beyond reasonable doubt against the appellant by the overwhelming evidence adduced by the prosecution. She stated that the accused/appellant was charged under section 358 of the Criminal Code and corroboration of P.W.2's evidence is not required as a matter of law before the appellant could be

convicted of the offence. She argued that the offence charged does not come within the purview of those offences for which corroboration is required under section 179(1) & (5) Evidence Act and it is only the evidence of an unsworn child as envisaged by section 183 Evidence Act that requires corroboration as a matter of law. She argued that this section does not apply to the case in hand as PW2 at the time was 13 years and she gave evidence on oath. She nonetheless conceded that in cases of this nature corroboration is only desirable and the judge only needs to warn himself before convicting the accused. In this particular case Learned counsel asserted that the Judge was conscious of such warning before convicting the appellant on the evidence of PW2. Learned counsel went on to argue that the evidence of PW2 was amply corroborated by pieces of evidence adduced by the prosecution witnesses, especially the evidence of PW5, PW3, and PW1 who said he found that PW2 had forceful penetration of the genital tract associated with attempted strangulation. She therefore contended that these pieces of evidence corroborated the evidence of PW2 that she was raped by the appellant. Since the appellant was actually seen in the school premises she argued, he had the opportunity to commit the act and he was apprehended and taken to the Police Station soon after the incident happened on 24/5/89. Making further submissions, learned counsel asserted that the prosecution established without doubt that there was unlawful carnal knowledge and submitted that the slightest degree of penetration is sufficient to establish carnal knowledge and that neither rupture of the hymen nor emission of semen need be proved. She referred to Brett & Maclean 2nd Edition page 757 paragraph 1966 for this proposition.

On issue of consent, she submitted that the conduct of PW2 clearly showed that she did not give consent to the act since the appellant held her neck and threatened to shoot her on her face coupled with the fact that she struggled with him before she ran away. There is also the evidence of PW1 who found swelling and linear abrasions on the front and sides of PW2's neck. She therefore submitted that the injuries sustained by PW2 support the fact that she did not give consent. Whether the appellant actually carried a weapon or not, the threat of such nature would be sufficient to frighten a child into submission.

On the argument by appellant's counsel that PW2 ran to Mrs. Irene Osagie and said one man wanted to rape her which suggested that PW2 was never raped, learned counsel for the respondent submitted that PW2 a young child of 11 years did not appreciate what happened to her as this was her first experience and the evidence of DW3 did not negative that of PW1 who found that there was penetration.

She contended that the failure of PW1 to examine the appellant so as to confirm whether he had same venereal disease as was found in PW2 is not fatal to the case of the prosecution. She pointed out that

since the appellant gave a different story in court from Exhibits A and B he cannot be believed and therefore had no defence.

On issue No.2, learned counsel for the respondent submitted that there were no material contradictions in the prosecution's case and referred to Nasamu v. The State (1979) 6 SC 153 and urged on us to disregard the said contradictions. She finally argued this court to dismiss the appeal and affirm the judgment of the trial court on the grounds that the case of rape was proved against appellant beyond reasonable ground; it was in evidence that the appellant was in the school premises and he had the opportunity to commit the offence and there are no material contradictions in the prosecution's case.

A consideration of this appeal must perforce start with the issue of corroboration. Is corroboration required as a matter of law as argued by appellant's counselor desirable as submitted by the respondent's counsel?

The particulars of the offence reproduced above is that the appellant had carnal knowledge of Oghogho Ogunbor (the prosecutrix). Section 357 of the Criminal code defines rape in these terms:-

"S.357 Any person who has 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 threats or intimidation of any kind, or by fear of 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, is guilty of an offence which is called rape"

The offence of rape as defined in section 357 of the Criminal Code and made punishable under section 358 of the same code is different from offences provided in sections 218 and 221 of the Criminal Code where it is specifically stated that a person cannot be convicted of any offence defined in these sections upon the uncorroborated testimony of one witness (see also section 179(5) Evidence Act). Section 183 of the Evidence Act deals with the unsworn evidence of a child and stipulates in sub-section 2 that the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by an adult would be admissible. Where this is done, such evidence must be liable to corroboration. It is so provided in section 183(3) Evidence Act which reads:-

"A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused"

On the statutory provisions and the decided case, I do not agree with the submission of learned counsel for the appellant that in rape cases, it is the law that before the prosecution can secure a conviction, the evidence of the prosecutrix (victim of the rape) must be corroborated in some material particular, that sexual intercourse did take place. PW2 gave sworn evidence and so could not come under the purview

of section 183 (3) Evidence Act; the charge itself was not laid under section 218 or 221 Criminal Code and at the time the incident occurred she was 11 years old but was 13 years of age at the time she testified. See: Okoyomon v. State (1973) 1 All NLR (Pt.1) 16; Sambo v. State (1993) 6 NWLR (pt.300) 399. It is also not the law that corroboration is required as a matter of law where a child whose evidence has been received even under oath is the accuser. The case of Akpan v. State (1967) NWLR 185 cited in Shazali v. State (1988) 5 NWLR (pt. 93) 164 did not lay down such a principle. Lewis J.S.C. in Akpan v. State supra at page 188 explained the statement of the law credited to Goddard L.C.J. in R. V Mitchell 36 Cr. App. R. 78 and R. v. Campbell (1956) 2 QB 432 thus:-

"In our view when Goddard L.C.J. used the word 'should' in the context of the last case cited, he must be taken to have meant that it was a desirable practice that this should be done, not that it was a requirement so that if it was not done the appeal court must allow the appeal."

I will agree with the stand taken by learned counsel for the respondent that corroboration is desirable in the instant case and not that it must be provided as a matter of law for the reasons already stated.

It is necessary to examine the evidence proffered by the prosecution to see if the desired corroboration of the evidence of PW2 can be found. The 1st PW; Dr. Suleman Abu who examined PW2 said that she told him that somebody forcefully had sex with her.

He stated in his evidence that "on examination, the vagina was very tender with some whitish brown discharge. The cervix and fornice were purplish blue on the mucosa, due to traumatic inflammation. I tried a swab for the vagina for examination. This showed a group of bacteria called staphylococcus area and a few yeast cells."

He then formed the opinion that the girl had forceful penetration of the genital tract associated with attempted strangulation. He admitted under cross-examination that the appellant was not taken to him for examination.

Learned counsel for the appellant has submitted following Okoyomon v. State supra that the prosecution had not established that the accused did have carnal knowledge of the prosecutrix in the sense that there had been penetration as required by section 299 of the Criminal Code.

I agree with this submission. The finding made by P.W.1 did not link the appellant directly with the condition of PW2's private part. If the appellant had been examined, this would have confirmed if he had a similar disease as found with PW2. I agree with appellant's counsel's submission that for the medical officer's evidence to qualify as corroboration of the fact that the appellant penetrated the vagina of the prosecutrix, it must point directly and irreversibly to the appellant. The nature of a corroborative evidence capable of grounding conviction on a charge of rape is that it must be cogent,

compelling, and unequivocal as to show without more that the accused committed the offence charged. See: Igbine v. State (1997) NWLR (Pt.519) 101. As in Igbine's case supra the evidence of PW1 shows that there was an act of rape but there is nothing in this evidence of PW1 to link the appellant with the offence: Okpanefe v. State (1969) I ALL NLR 420; Olaleye v. State (1970) 1 ALL NLR 300.

This is not the end of the matter. PW1 went further to state that there was forceful penetration of the genital tract of PW2 associated with attempted strangulation. This finding by PW1 has negatived the element of consent by PW2. In her evidence in chief PW2 stated that the appellant held her neck and threatened to shoot her on the face if she refused to remove her pants. Also testifying in-chief, 3rd PW Fidelis Erameh stated that at the Police Station the appellant gave him his name and he said he was sorry for what he had done and asked for his forgiveness since he (appellant) was a friend to 3rd PW's elder brother, Dr. Erameh. He then reminded him that he was accused of raping a schoolgirl but he denied raping her but tried to force her. This piece of evidence coupled with the evidence of Irene Osagie who testified as DW3 at page 27 of the records that:-

"The girl came and held me and said one man wanted to rape her."

are all pieces of evidence which point towards attempted rape. In Okoyomon v. State (supra) the Supreme Court in a similar situation as this one substituted the offence of attempted rape for the offence of rape which the trial court found proved.

It is rather unfortunate that the appellant who was arrested soon after the incident and taken to the Police Station was not subjected to medical examination. This may not be unconnected with the unexplained absence of the prosecutrix for two days despite the fact that she narrated her ordeal to her father on the same day that the incident occurred.

The second issue raised by the appellant does not merit any further consideration. I find that there are no material contradictions in the evidence of the prosecution witnesses concerning the offence of attempted rape.

In conclusion, I allow the appellant's appeal on his conviction for the offence of rape but would substitute it with attempted rape with five years imprisonment.

AKINTAN, J.C.A.: I had the advantage of reading a draft of the leading judgment prepared by my learned brother, Akaahs, J.C.A. The facts of the case and all the issues raised in the appeal are well set out and discussed in full. I do not intend to repeat them here. All I have to say is that, for the reasons given in the leading judgment, I too agree that the appeal partially succeeds in that the conviction for rape is reduced to one for attempted rape. I abide with the consequential order on sentence.

ROWLAND J.C.A.: I had the privilege of reading before now the judgment just delivered by my learned brother Akaahs. J.C.A. He has adequately dealt with all the issues raised and canvassed in this appeal. I therefore agree with his reasoning and conclusion. I also would allow the appeal of appellant's conviction for the offence of rape but would substitute it with attempted rape.

I endorse the order on sentence.

Appeal succeeds in part.

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Appearances

Mogbeyi Sagay Esq.,For Appellant

AND

O.S. Uwuigde, (Mrs)For Respondent