IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 8TH DAY JULY, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 6
SUIT NO: CR/213/2017

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA ---- PROSECUTION

AND

DAUDA SANI HALADU ---- DEFENDANT

JUDGMENT

The defendant is standing trial on a one count charge of Rape under the provisions of Section 1(2) of the Violence Against Persons (Prohibition) (VAPP) Act, 2015. The particular of the charge is as follows:

"That you Dauda Sani Haladu, (M), 42 years old, of Block 1b, Flat 5, NUC quarters Karu FCT, Abuja on or about 11/3/2017, at Block 1b, Flat 5, NUC quarters Karu, FCT, Abuja within the jurisdiction of this Court raped Judith James (F) 15 years old, without her consent, by intentionally penetrating her vagina with

your penis and hand and thereby committed an offence punishable under Section 1(2) of the Violence Against Persons (Prohibition) Act, 2015."

The defendant pleaded not guilty to the charge on the 11/12/2017 and the case proceeded to hearing. In proof of the allegation, the prosecution called three (3) witnesses and tendered two exhibits through PW3. They are:

- The confessional statement of the defendant marked as Exhibit A
- Medical report marked conditionally as Exhibit A1.

The victim testified as PW1. In her evidence she said the defendant brought her from the village to Abuja in 2016 to stay with him promising to put her in school. On that fateful day, the defendant, and his family were not at home. The defendant was the first to return and he met her (PW1) outside picking beans. He called her inside and he asked her to remove her pant, when she refused he forced her. In her own words:

"He used his hands to chook me inside my bom-bom. It was paining me but I was afraid of him and I could not shout. Blood was coming out and he told me not to tell anybody. That if I tell anybody he will kill me.

I went to school on Monday and I told one woman in my school who speak the same language with me. That Mr. Dauda Sani sleep with me and said I should not tell anybody. I gave her my brother number to tell him that I want to go, I do not want to stay with Mr. Dauda Sani again."

The witness said the woman took her to the class teacher who later took her to the school counselor. She was then taken to NAPTIP and later to hospital.

During cross examination, the witness said it was the defendant that removed her pant and then she put it back on after the defendant finished what he was doing. She later removed the pant and washed it. She however could

not remember the exact date the incident happened, or the period it took for the matter to be reported to NAPTIP. She could also not remember the name of the hospital she was taken to.

PW2, Priscilla Iordye is a teacher in Ayenakeyi Primary School Karu where the victim attended. She testified that one Monday morning, the victim PW1 came to school with red eyes crying. The victim told her that she wanted to tell her something that was bothering her. That was when the victim told her that her guardian the defendant, had raped her on Saturday, when her madam was not around, and that she wanted to return to her parents. PW2 said she took her to the teacher, and then to the school counselor and finally to NAPTIP.

When cross examined, the witness said the victim told her that she was raped in her guardians house.

PW3, Modupe Maduba is the Investigating Police Officer (IPO), She told the Court that a case of defilement

was reported to NAPTIP vide a letter of complaint from the school counselor at Ayenakeyi Primary School, Karu alleging that one of its pupil named Judith James was defiled by her uncle. Her team was assigned to investigate the matter. Statements of the victim and the defendant were taken and the victim taken to NAPTIP shelter for counseling and also for medical test at the Federal Medical Center Jabi, Abuja.

During cross examination, the witness said the victim was defiled and not raped. That she was defiled in the defendants house.

At the close of the prosecution case, the defendant filed a no case submission which was overruled. The defendant therefore opened his case on the 17/2/2020 with his wife testifying as DW1 and he testified as DW2.

DW1 Mrs. Ekwase Sani testified that on the fateful day the defendant went for a wedding while she went to get a birthday cake for their daughter. The defendant later called her to say that he was not feeling well and was on his way

home. She stopped what she was doing and tried to rush home. On getting home, she met the defendant on the three seater in the sitting room wanting to take his drugs. He asked the house help to get him water. On bringing the water he perceived some odour and was asking why she was smelling. That was when she came in.

Under cross examination, DW1 said her husband had just come in and asked the victim for water and that was when she came in. That she did not come in with the defendant, but she met him lying down.

In his evidence, the defendant testified as DW2. On the day in question, he said he came back from a wedding and asked for water to take his drugs. That was when the victim brought water in a cup for him. He then perceived a serious offensive odour when the victim knelt down to hand him the cup of water. He then asked her to stand up and immediately his wife came. PW1 then dropped the cup of water and went to collect the birthday cake that his wife

bought. That his wife joined him in asking PW1 why she was smelling. He (the defendant) then asked the victim to check herself as she was standing in front of him.

When cross examined, the defendant said it is true that he perceived the offensive smell that got him confused, but that he did not tell the victim to remove her pant. That he only told her to check herself.

At the conclusion of trial, W.Y. Mamman Esq for the defendant filed the address dated 10/2/2020. He formulated two issues for the Courts determination:

"1. Whether the prosecution has proved all the ingredients of the alleged offence and or any other offence(s) as the case may be.

2. Whether the oral and documentary evidence adduced by the prosecution had supported the charge against the defendant."

Learned counsel submitted that for the prosecution to secure conviction of the defendant on the alleged offence of rape, the ingredients have to be established. However, the x-ray of the evidence and ingredients of the offence showed that all the essential ingredients were not proved by the prosecution. He cited Ezigbo vs. State (2012) All FWLR (part 638) 847 at 849. Counsel added that the written statement of the PW1 does not form part of the record of this Court as it was not tendered in evidence, and the evidence of PW2 was hearsay evidence. Counsel posited that the evidence of PW3 showed that the victim was not raped but defiled, leading to contradiction and inconsistencies which needed corroboration. Reference was made to Galadima vs. State (2018) All FWLR (part 944) 663 at 670, Ibrahim vs. State (2015) All FWLR (part 770) 1401 at 1403, Posu vs. State (2011) All FWLR (part 565) 234 at 237.

Learned counsel further submitted that 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 an uncorroborated evidence of the complainant. He cited State vs. Ogwudiegwu (1968) NWLR 117, Okpaleke vs. State (1969) 1 All NLR 411, Sambo vs. State (1993) 6 NWLR (part 300) 399. He urged the Court to expunge the medical report as it was not tendered by the expert who made the report. He cited Damine vs. Akpan (2011) All FWLR (part 580) 1298 at 1301, Anyanwu vs. Sergani (2018) All FWLR (part 426) page 1995 at 1998, Kuti vs. Alashe (2005) All FWLR (part 284)

Learned counsel further submitted that the Court has no power to speculate as to the evidence placed before it in the light of the material inconsistencies. And where there is any doubt in the mind of the Court with respect to the prosecution evidence, such doubt should be resolved in favour of the defendant. He urged the Court to discharge and acquit the defendant. He cited Tony Anthony (Nig) Ltd vs. NDC (2010) All FWLR (part 598) 912, Sunday Udosen vs.

State (2007) All FWLR (part 336) ag 669, Abru vs. State (2011) 17 NWLR (part 1279, Tituma vs. State (2006) 10 NWLR.

Ja'afaru A. Ayitogo Esq filed the written address for the prosecution and formulated a sole issue for determination. The issue is:

"Whether the prosecution has proved the offence of rape to entitle this Court to convict the defendant."

Learned counsel submitted that PW1 has proved to the Court that she possessed sufficient intelligence as to justify reception of her evidence under oath. Therefore the fact that her extra-judicial statement was not tendered in evidence is of no moment. That extra-judicial statement however credible cannot be used as evidence in a trial. Reference was made to Afam Okeke vs. The State (2016) LPELR – 40024 (CA).

On the confessional statement of the defendant, learned counsel submitted that when an accused person does not object when his confessional statement is tendered, the only reasonable conclusion is that it was made voluntarily. No amount of retraction will vitiate its admission as a voluntary statement. That the Court can convict on confessional statement retracted at the trial if satisfied that the accused person in the circumstances gave credibility to the contents of the confession. Reference was also made to Bello Shurumo vs. State(2010) 19 NWLR (part 1226) 73, Nsofor vs. State (2002) 10 NWLR (part 775) 274 at 293.

On Exhibit A1 the Medical Report, learned counsel submitted that PW3, who tendered the document is the investigating officer, and its origin and authenticity is not in dispute. That nothing precludes an investigating officer to tender a report/document obtained during investigation. Reference was made to Obot vs. State (2014) LPELR –

23230(CA), Nwachukwu vs. State (2002) FWLR (part 123) 312.

On the testimony of PW3 making reference to 'defilement' counsel submitted that there is no doubt that PW3 investigated and testified to a case of rape. Making reference to defilement therefore goes to no issue.

Reading through the written addresses of counsel across the divide, it has become imperative for me to address some preliminary issues raised by counsel to the defendant before dealing with the substantive issue. The issues are:

(1) Failure to tender Extra-judicial statement of the victim;

(2) Retraction by the defendant of his confessional statement; and

(3) Admissibility of Exhibit A1 the Medical Report.

Learned counsel for the defendant submitted that the extra judicial statement of the victim, (PW1) was not tendered, therefore the Court should not place reliance on the evidence of PW1. Learned counsel to the prosecution has asked the Court to discountenance the submission of counsel for the defence.

In Okeke v The State (2016) LPELR-40024(CA), the Court per Ogunwumiju, JCA, (as she then was) had this to say:

> *"The extra judicial statement of a witness in a criminal trial is inadmissible as evidence for either side. The admissible evidence is evidence on oath in open Court by the witness which is subject to cross-examination by the adverse party. The only time when an extra judicial statement of a witness is admissible is where a party seeks to use it to contradict the evidence of a witness already given on oath. The defence witnesses will ask for the*

statement and give reasons to the Court for doing so."

See also <u>Agbanimu vs. FRN (2018) LPELR-43924(CA), Idoko vs. State (2018) LPELR – 45893 (CA).</u>

It seems to me, well established that in a criminal trial, the defence is entitled to see any written statement in the possession of the prosecution which was made by a witness called by the prosecution, and which relates to any matter on which the witness has given evidence, and to cross examine the witness on it and then tender it solely to impeach his credit.

In this instance, the learned defence counsel did not apply for the production of the extra-judicial statement of the victim to cross examine her on it, and to tender the statement in evidence if it is intended to impeach her credit. This would have enabled the Court to take an appropriate decision as to the admissibility of the extra-judicial statement. I hold therefore that the submission of

the defence counsel on this point is of no consequence, and it is hereby discountenanced.

Second is the retraction made by the defendant in evidence concerning some contents in his confessional statement.

The Court in Koku vs. The State (2019) LPELR – 48121 (CA) held thus:

> *"The law is settled that the fact that an accused person retracted his extra judicial statement at his trial does not make it unreliable. Once the statement is admitted in evidence, the task before the trial Court is to determine the weight to be attached to it. The Court shall evaluate the confession contained in the extra judicial statement, the oral evidence of the accused and other evidence adduced at the trial and thereafter come to a decision whether or not it was the accused person that committed the crime."*

See also the case of Adisa vs. The State (2019) 3 NWLR (part 1660) page 488 at 497 – 498, Dada vs. The State (2019) 3 NWLR (part 1659) 305 at 327 and Akpa vs. The State (2007) 2 NWLR (part 1019) page 500 at 529.

It is settled law that during trial, an accused/defendant who desires to impeach his statement is duty bound to establish that his earlier confessional statement cannot be true by showing any of the following: (i) that he did not in fact make any such statement as presented; or (ii) that he was not correctly recorded; or (iii) that he was unsettled in mind at the time he made the statement; or (iv) that he was induced to make the statement.

See Hassan vs. state (2001) 15 NWLR (Pt 735) 184, Kazeem vs State (2009) WRN 43 and Osetola vs state (2012) 17 NWLR (Pt 1329) 251.

Where the defendant does not challenge the making of his confessional statement but merely gives oral evidence which is inconsistent with or contradicts the contents of the

statement, the oral evidence should be treated as unreliable and liable to be rejected and the contents of the confessional statement upheld unless a satisfactory explanation of the inconsistency is proffered. See Mahmuda vs. State (2019) LPELR – 47974 (CA), Gabriel vs. State (1989) 5 NWLR (Pt 122) 457, Ogoala vs state (1991) 2 NWLR (Pt 175) 509, Egboghonome vs State (1993) 7 NWLR (Pt 306) 383, Oladotun vs state (2010) 15 NWLR (Pt 1217) 490, Federal Republic of Nigeria vs Iweka (2013) 3 NWLR (Pt 1341) 285.

The defendant herein stated that he only wrote what was dictated to him by the investigating officer, being the condition for his bail. PW3, the investigating officer in her evidence stated that the statement of the defendant was obtained under caution and he signed at the end of the statement.

It is noted that at the hearing, the document was shown to the defendant and he had no problem or any

complain regarding its admissibility. The contention now that he (defendant) only wrote what was dictated to him appears to me a mere afterthought. The belated retraction now clearly is of no effect as it does not adversely affect the statement once the Court is satisfied as to its truth. See Nwachukwu vs. The State (2007) All FWLR (part 390) 1380 at 1411. I hold that the confessional statement does not become inadmissible because the defendant retracted same. In effect retraction does not vitiate admissibility.

It is pertinent at this point to determine the admissibility of the Medical Report Exhibit A1 admitted conditionally. Counsel for the defendant submitted that the Report was not tendered by the Medical Doctor and therefore not admissible. On his part, the prosecution counsel urged the Court to admit the Report in evidence.

It is the law that it is not compulsory that a medical doctor or maker of medical report must testify in all cases where evidence of medical report is required. See Section

55(1) and (3) of Evidence Act 2011 and the case of John Mamudu Buba V. The State (1992) NWLR Pt 215, 1; Ozoemena vs. State (1998) 10 NWLR (Pt. 571) 632 @ 648; Chewmoh vs. State (1986) 2 NWLR (Pt. 22) 331.

Section 55(1) of the Evidence Act, 2011 provides:

"Either party to the proceedings in any criminal case may produce a certificate signed by a Government pathologist and the production of any such certificate may be taken as sufficient evidence of the facts stated in it."

The defendant in this case, only challenged the tendering of Exhibit A1 by PW3, (Investigating Officer of NAPTIP) on the ground that the document being tendered was not authored by her. But Section 55(1) of the Evidence Act, 2011 clearly allows the production of the certificate by either party in the absence of the maker, and production may be taken as sufficient evidence of the facts stated

therein. That is why Section 55(3) allows either party to request the presence of the maker for cross examination.

However, Section 55(3) will only avail a party who has requested the presence of the maker of the certificate 'to give evidence' before the Court and not merely to 'tender' the certificate.

In Usman vs. State (2018) LPELR – 46568 (CA) the Court of Appeal held that a medical report is admissible even if it is not tendered through the maker. See also Fulani M vs. State (2018) LPELR-45195(SC), SPDC vs. Ikontia & ors (2010) LPELR-4910(CA), Danjuma vs. Kano State (2018) LPELR – 44724 (CA). The defendant failed to invoke the discretionary power under Section 55(1), which Section has given power to the Court to accept the production of Exhibit A1 as full proof of facts contained in it even in the absence of the maker.

The objection of learned counsel to the defendant is therefore discountenanced, and I hold that the document Exhibit A1 was properly admitted in evidence.

Now to the substance of the case. The prosecution charged the defendant for rape by penetrating the vagina of PW1 with his penis and hand under Section 1(1) of the Violence Against Persons (Prohibition) Act, 2015. The Section is as follows:

"(1) A person commits the offence of rape if –

(a) He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or means of threat 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 the use of any sub stance or

additive capable of taking away the will of such person or in the case of married person by impersonating his or her spouse."

The law is that in a criminal trial, the prosecution must prove its case beyond reasonable doubt. Section 135(1),(2) and (3) of the Evidence Act, 2011 (as amended) especially subsection (1) of Section 135 provides as follows:

"(1) *If the commission of crime by a party to any proceeding is directly in issue in any proceeding Civil or Criminal, it must be proved beyond reasonable doubt."*

In the case of <u>The State vs. SQN Leader D.T. Onyeukwu, (2004) LPELR 3116,</u> the Court held:

"It must be stated and emphasized that proof beyond reasonable doubt does not mean or import or connote beyond any degree of certainty. The term strictly means that within the bound of evidence

adduced and staring the Court in the face, no tribunal of justice worth its salt would convict on it having regard to the nature of the evidence led and the law marshalled out in the case. It can be said that evidence in a criminal trial that it susceptible to doubt cannot be said to have attained the height or standard of proof that can be said to be beyond all reasonable doubt. Regardless of what one might think in a given state of affairs, neither suspicion nor speculation or intention can be a substitute for a proof beyond reasonable doubt. It is a proof that precludes all reasonable inference as assumption except that which it seeks to support and must have the clarity of proof that is readily consistent with the suit of the person."

In other words, proof beyond reasonable doubt is proof that precludes every reasonable hypothesis except that which it tends to support and it is proof, which is

wholly consistent with the guilt of the defendant and inconsistent with any other rational conclusion. Arising from the above, guilt of the defendant may be proved through one of the following:

- By confessional statement of the defendant,
- Evidence of eye witness,
- Circumstantial evidence.

See the cases of Sunday Udoce vs. State (2014) LPELR 23064 (SC), Darlington Eze vs. FRN (2017) LPELR 42097 (SC) and Emeka vs. State (2001) 14 NWLR (Part 734) page 666 at 683. Furthermore, by virtue of the provisions of Section 36(5) of the 1999 Constitution, every person who is charged with a criminal offence (no matter the gravity thereof) shall be presumed to be innocent until he is proved guilty beyond reasonable doubt by the due process of the law. See Gambo & anor vs. State (2010) LPELR – 45722 (CA), Abdulkar vs. State (2021) LPELR – 53535 (CA).

Being mindful of the well settled principles as espoused in the authorities cited in the foregoing, I shall proceed to examine the charge in the light of the evidence adduced by both prosecution and the defendant in order to determine whether or not the prosecution has established the charge against the defendant beyond reasonable doubt, or the threshold required by law.

Now it is indisputable that every criminal allegation which is statutorily provided for has basic and critical ingredients that the prosecution must prove in order to secure a conviction. As already stated at the beginning of this judgment, the defendant was arraigned before this Court for the offence of rape under Section 1(1) of the VAPP Act, 2015. Having regard to the charge, the prosecution was required to prove beyond reasonable doubt, that the defendant intentionally penetrated the vagina, anus or mouth of the prosecutrix with any part of his body or anything else without consent, or where such consent is

obtained by force or means of threat 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 the use of any substance or additive capable of taking away the will of such person or in the case of married person by impersonating his or her spouse. See Section 1(1)(a) – (c) of the Act.

The prosecution contends that the evidence is clear with respect to the fact that, the defendant not being a medical doctor intentionally put his hand into the vagina of the prosecutrix to check if there was pores coming out. There is also the confessional statement of the defendant.

On the other hand, learned defence counsel has seriously canvassed the point that there was no penetration and thus no sexual intercourse had occurred with the prosecutrix, relying on Section 282(1) of the Penal Code Law.

On record, the evidence of PW1 is clear on this point when she stated exactly what the defendant did to her. PW1 in her evidence stated that the defendant used his hand to chook her vagina (bom-bom) and threatened to kill her if she informed anybody. The evidence of PW1 was not at all discredited by way of cross examination by the defence. Her evidence was corroborated by the defendant in Exhibit A, his confessional statement.

The evidence of the defendant in Exhibit A give clarity as to what transpired that day. Exhibit A was made on the 27/3/2017 at NAPTIP office where the case was reported. The defendant stated thus:

> *"On this faithful Saturday, I came back from a friend wedding, entered into the house and saw Judith seating down quietly. I asked her of my wife, she said they went out to buy cake, I immediately called my wife on phone which she said they are through and very closed to the house. I sat down*

and asked Judith if she had eaten, she said yes, I told her to give me water to take my drugs, she brought the water and knelt down to give me, one very offensive odour came up on me which I became confused and asked Judith to pull down her pant and sit down let me see something. I tried to see if pores is coming out of her which I did not see anything like that, but noticed that her pant is dirty……."

Further in the statement the defendant said:

"She asked Judith what was wrong with you, she could not say anything, not until when they called one tiv woman which they spoke tiv language for a long time before Judith said I defile, which what I know is I just asked her to remove her pant, I used my hand to check if there is pores coming out of her, which may be the reason for the odour."

It is important to note that the defendant by his statement admitted in evidence as Exhibit A confessed that he put his hand to check if pores was coming out of the victim's vagina.

Although it is always desirable in law to have some evidence outside the confession in further proof of the offence, the absence of such additional evidence would not necessarily prevent a Court from convicting on the confessional statement alone provided the statement satisfies the test of being positive, direct and unequivocal as in this case. Thus, an accused person may be convicted on his confessional statement alone. He may also be convicted where the confession is consistent with other ascertained facts which has been proved. See Ikemson vs. State (1989) 3 NWLR (part 110) 445. It is trite that in a trial for rape, evidence of corroboration could come from the defendant himself. See Popoola vs. State (2013) LPELR – 20973 (SC).

I need to re-echo the position of the law that corroboration need not consist of direct evidence that the accused committed the offence charged, nor need it amount to a confirmation of the whole account given by the prosecutrix. It only needs to corroborate the said evidence in some respect material to the charge in question. It is also settled that corroborative evidence must in itself be completely credible. See Iko vs. State (2001) 7 SC (part 11) 115 where Kalgo, JSC succinctly captured the point of law thus:

> *"It is trite law that evidence in corroboration must be independent testimony, direct or circumstantial which confirms in some material particulars not only that an offence has been committed but that the accused had committed it."*

See also Okabichi vs. State (1975) 1 All NLR 71.

The defendant in his oral evidence sought to explain that what he stated in his statement Exhibit A was what the

IPO wanted him to write. That it will be a condition for his bail.

As stated earlier in this judgment, the above evidence of the defendant retracting his confessional statement is a mere afterthought intended to deflect from the veracity of Exhibit A. At the risk of sounding prolix, Exhibit A was shown to him in the open Court and he did not deny or express any concern about the manner the statement was taken. What is at stake therefore is the weight this Court will attach to the confessional statement. Is it direct and positive sufficient to ground a conviction? In other words the Court must subject the retracted confessional statement of the defendant to various tests by comparing it with the evidence on record.

The principles guiding evaluation of confessional statement as set out in Shurumo vs. The State (2010) 16 NWLR (part 1218) 65 at 118 are as follows:

"(a) Whether there is anything outside the confession to show that it is true;

(b) Whether the statement is corroborated;

(c) Whether the confession is consistent with other facts, and facts which have been ascertained and proved at trial;

(d) Did the accused have an opportunity of committing the offence;

(e) Is the accused confession possible'

(f) Are the facts stated in it true so far as can be tested."

See Akpa vs. The State (2007) 2 NWLR (part 1019) 500, Udofia vs. The State (1984) 12 SC 139, Nwaebony vs. The State (1994) 5 SCNJ 86.

The point to underscore is that the law is settled that a Court can even convict on the confessional statement alone of an accused without any corroboration. A free and voluntary confession which is direct and positive on its own

is enough to sustain a conviction generally without any need of other corroborative evidence so long as the Court is satisfied with its truth. See Odeh vs. FRN (2008) 13 NWLR (part 1103) 1, Ibrahim vs. State (2014) LPELR – 2329 (CA)

In this case, the testimony of the defendant corroborates in key material particulars, the content of the confessional statement. Medical evidence may also amount to corroboration. Now the Medical Report in this case becomes relevant and it is hereunder reproduced:

"FSHG/A111/NAPTIP

3rd April, 2017,

TO WHOM IT MAY CONCERN

Sir,

MEDICAL REPORT

RE: JUDITH JAMES, 15 YRS, FEMALE

The above named victim of alleged sexual assault was brought to our facility in company of NAPTIP staff. She was examined and following observations were made.

General conditions – Satisfactory

Urogenital System – Normal vulva/vagina

- *Nil Semen or blood clot*
- *Vaginal discharge ++*
- *Torn hymen with ragged edge*

Pregnancy test – Negative RVS: not done

Impression – – Sexual assault/molestation

Thank you

Yours faithfully

Signed

Dr. Achgbu P.O

Senior Medical Officer."

In this instance, the Medical Report which showed that there was injury to the private part of the victim, i.e. torn hymen with ragged edge sufficiently serves as corroborative evidence for the contents of the confessional statement and that the defendant had indeed committed the offence. The defendant who was alone in the house on the date of the incident had the opportunity of committing the offence knowing that his wife had gone out. This is why the defendant put a call to the wife to confirm that she was

nowhere near the house. Exhibit A is a free and voluntary confession of guilt by the defendant. It is direct and positive as to the role he played. The corroborative evidence stated above has removed all doubt and established the fact that the confession is true.

From the evidence on record, the defendant threatened to kill the prosecutrix if she dared informed anybody. PW1 stated that she was afraid of the defendant and could not shout. The defendant himself said he asked Judith *'to remove her pant for him to check if pores was coming out of her.'*

PW1 from the evidence did not give her consent to the defendant. The record showed that the defendant threatened to kill her if she told anybody. And that though it was paining her she could not shout as she was afraid of the defendant. It is noted that PW1 was not cross examined on this point.

As earlier noted the confessional statement was corroborated by evidence of PW1 and the Medical Report Exhibit A1. In all cases of rape, the prosecution must prove that there was penetration, and penetration no matter how slight is sufficient. In this instance, there was penetration when the defendant put his hand into the victim's vagina to check if pores was coming out.

I have considered the testimonies of the prosecution witnesses who testified in this case. Though PW3 in her evidence stated that the offence against the defendant was defilement, the evidence before the Court showed it was rape as envisaged under Section 1(1) of the VAPP Act, 2015.

Learned counsel for the defendant challenged the evidence of PW2 stating that it was hearsay and inadmissible. It is now elementary to repeat the fact that hearsay evidence is inadmissible in law. See Baba – Ahmed & anor vs. Adamu & ors (2008) LPELR – 3838 (CA). In Arogundade vs. The State (2009) 6 NWLR (part 1136) page

165 at 181 – 182, the Supreme Court stated what amounts to hearsay evidence as follows:

> *"In the case of Subramanian vs. Public Prosecutor (1956) 1 WLR 965 at 969, hearsay evidence was described in the following terms: 'Evidence of a statement made to a witness called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement, it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'"*

See First bank vs. Azifiaku (2016) LPELR – 40173 (CA).

In this instance, PW2 was perfectly in order to narrate to the Court what she heard from PW1, but the truth of the assertion that the defendant raped PW1 can only be recorded as original evidence coming from the victim

herself. I hold therefore that the evidence of PW2 was not hearsay and therefore admissible.

The defendant in his evidence stated that he returned from a friend's wedding and started feeling dizzy. Upon his return home he laid on the 3 seater and called that somebody should give him water to take his drugs. He said Judith brought him water and knelt down to give him when one serious offensive odour hit him. He then asked Judith to stand up and then his wife came in.

However, in his evidence to NAPTIP, the defendant gave a different account of what happened that day regarding the offensive odour which hit him. His testimony:

> *"….One offensive odour hit me and I became confused and asked Judith to pull down her pant and sit down let me see something…not up to five minutes my wife came in…which what I know is I just asked her to remove her pant, I used my hand to check if there is pores coming out of her…"*

The wife (DW1) also said her husband attended a wedding on that day but returned home because he was not feeling well. That she rushed back home and met the defendant on the 3 seater waiting to take his drugs. That she came in when her husband perceived the offensive odour on Judith's body.

Above only goes to confirm the fact that the defendants wife (DW1) was not at home for her to be able to know what transpired between the defendant and the prosecutrix. DW1 was not at home when the defendant asked PW1 to get him water. She was also not there at the time her husband (the defendant) perceived the offensive odour and asked Judith to remove her pant. In the same vain, I do not believe the story of the defendant that he only asked Judith to stand up when he perceived the serious offensive odour coming out of her. Defendant went further than that. He asked her to pull down her pant and put his hand to check if pores was coming out of her. I do not

believe the story of the defendant and that of his witness regarding what happened in this case, and appropriate more weight to the testimony of PW1 and other prosecution witnesses.

Section 1(1) of the VAPP Act has expanded the variety of actions that constitute penetration in rape. And expressly included the mouth and anus to the list of body parts in which the action of penetration can be performed, and also states that penetration may be performed by using any other part of the body or anything else. The Act further focuses on the violation of the person's body when viewing the act of rape, and is not restricted to the strict view that for it to be rape there must be penetration by a male genital. The 'instrument' of rape from the definition does not necessarily have to be a penis. Other parts of the body could be used e.g. the hand like in this case where the victim aid the defendant used his hand to chook her vagina. 'Chook' in Nigerian Pidgin English Dictionary means to

pierce, to poke to jab with an object such as a finger or a stick. The Act further states that objects could also be used as instruments of rape e.g. pencil, stick or pens. Thus the progressive nature of the VAPP Act cannot be glossed over as it has taken cognizance of the fact that sex now goes beyond the primary sex organs by extending the scope of rape to include other parts of the body.

Therefore, the submission of learned counsel for the defendant placing reliance on Section 282 of the Penal Code Law is unavailing in the circumstance. After all, the Act has gone beyond the scope of existing legislations. The superiority of the Act is provided in Section 45(1) and it provides as follows:

> *"Any offence committed in proceedings instituted before the commencement of this Act under the provisions of the-*
>
> *(a) Criminal Code Cap. LFN 2004*
>
> *(b) Penal Code Cap. LFN 2004*

(c) Criminal Procedure Code Cap. LFN 2004

(d) Any other law or regulations relating to any act of violence defined in this Act shall as the case may require be enforced or continue to be enforced by the provisions of this Act.

(2) Any provision of the Act shall supersede any other provision on similar offences in the criminal Code, Penal Code and Criminal Procedure Code."

Learned counsel for the defendant made heavy weather of the fact that there were contradictions in the evidence of the prosecution witnesses. While the offence was alleged to have been committed on the 11/3/2017, PW3 stated that it took them 2 days to get the Medical Report Exhibit A1 dated 3/4/2017. PW1 in her evidence said she could not remember the date of the incident.

It is not every material contradiction that can vitiate the case of the prosecution. Minor contradiction which did not affect credibility of witnesses will be of no avail. See <u>Musa</u>

vs. The State (2009) 15 NWLR (part 1165) 465 at 489. The law is well entrenched and established that it is not all contradictions in the testimony of the prosecution witness that are fatal. For any of such to be detrimental, it must be substantial and fundamental. See State vs. Salisu Babuga (1996) 7 NWLR (part 460) page 279.

In my view, the discrepancy or contradiction in dates by the prosecution witness is not material so as to discredit the evidence of PW1 that she was raped or by creating any doubt in the mind of the Court. See Oloye vs. State (2019) LPELR – 44775 (SC).

In Okoro vs. State (1988) 5 NWLR (part 94) 255, Karibi – Whyte JSC stated thus:

> *"The burden of the prosecution is only discharged when the essential ingredients of the offences have been established and the defendant is unable to bring himself within the defences allowed under the law or statute creating the offence."*

In this instance, the burden of the prosecution in my view has been discharged, and I hold that the prosecution has proved beyond reasonable doubt all the ingredients for the offence of Rape against the defendant under Section 1(1) of the Violence Against Persons (Prohibitions) Act 2015. I find him guilty as charged and convict him accordingly.

SENTENCE

This Court has listened to the mitigation plea made on behalf of the convict. The Court has been informed that the convict is a first offender, a family man with children. The Court has also considered that the convict has aged parents who are dependent on him.

However, this Court has a duty to exercise and the Court notes that incidents of sexual violence such as rape, sexual assault and the like in the society is particularly alarming. It is said that the society has degenerated to that level. By

Section 311(2) of the Administration of Criminal Justice Act (ACJA), 2015, the Court has to be guided by some specific objectives in sentencing. It could be reformation, retribution or deterrence. In all situations however, the Court has to be guided by the clear provisions of the law creating the offence and the punishment provided. In this instance, the punishment provided under Section 1(2) of the VAPP Act, 2015 is that upon conviction, a person shall be liable to imprisonment for life except:

a) Where the offender is less than 14 years, such offender is liable to a maximum of 14 years imprisonment.
b) In all other cases, to a minimum of 12 years without an option of fine.

I am inclined to exercise my discretion and give the convict the minimum sentence. This in my view would achieve the noble goals of deterrence and possible reformation of the convict.

Accordingly, I hereby sentence the convict to a term of 12 years imprisonment without option of fine.

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Hon. Justice M.A. Nasir

Appearances:

R.A. Enwusoyele Esq, with him Rebecca Elechi Esq and Ja'afaru A. Ayitogo Esq – for the Prosecution

W.Y. Mamman Esq with him Mohammed Sani Esq and Adam Nasir Esq – for the defendant