

**THE OFFENCE OF RAPE UNDER THE NIGERIAN LAWS: EMPHASIS ON THE  
VIOLENCE AGAINST PERSONS (PROHIBITION) ACT, 2015.**

**BY**

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**A LONG ESSAY SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF BENIN  
IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF  
BACHELOR OF LAWS (L.L.B.) DEGREE**

**MAY 2021**

## **CERTIFICATION**

I, **Elo-oghene Esther AGBA** with Matriculation Number **LAW1604602**, hereby certify that apart from the reference made to other persons works which have been duly acknowledged, the entire work is the product of my personal research and that this project has neither in whole or in part been presented for another degree elsewhere

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## APPROVAL

We certify that this project was completed by **Elo-oghene Esther AGBA** with Matriculation Number **LAW1604602**, in partial fulfillment of the requirements for the award of the Bachelor of Laws Degree (L.L.B.).

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## **DEDICATION**

This work is dedicated to my family who has been by me right from the first day of acquiring my Bachelor of Laws (L.L.B.) Degree.

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## TABLE OF CONTENT

Title page	-	-	-	-	-	-	-	-	-	-	i
Certification	-	-	-	-	-	-	-	-	-	-	ii
Approval	-	-	-	-	-	-	-	-	-	-	iii
Dedication	-	-	-	-	-	-	-	-	-	-	iv
Acknowledgment	-	-	-	-	-	-	-	-	-	-	v
Table of Content	-	-	-	-	-	-	-	-	-	-	vi
Table of Cases	-	-	-	-	-	-	-	-	-	-	viii
Table of Statutes	-	-	-	-	-	-	-	-	-	-	ix
List of Abbreviations	-	-	-	-	-	-	-	-	-	-	x
Abstract	-	-	-	-	-	-	-	-	-	-	xi

## CHAPTER ONE: GENERAL INTRODUCTION

1.1 Introduction	-	-	-	-	-	-	-	-	-	-	1
1.2 Methodology	-	-	-	-	-	-	-	-	-	-	4
1.3 Statement of problem	-	-	-	-	-	-	-	-	-	-	4
1.4 Aims & objectives of study	-	-	-	-	-	-	-	-	-	-	6
1.5 Contributions to knowledge	-	-	-	-	-	-	-	-	-	-	6
1.6 Summary	-	-	-	-	-	-	-	-	-	-	7

## CHAPTER TWO: RAPE

2.1 Introduction	-	-	-	-	-	-	-	-	-	-	8
2.2 Definition of Rape	-	-	-	-	-	-	-	-	-	-	9
2.3 Types of Rape	-	-	-	-	-	-	-	-	-	-	13
2.4 Causes of Rape	-	-	-	-	-	-	-	-	-	-	18
2.5 Effect of Rape	-	-	-	-	-	-	-	-	-	-	25
2.6 Distinction between Rape and Defilement	-	-	-	-	-	-	-	-	-	-	27
2.7 Summary	-	-	-	-	-	-	-	-	-	-	39

### **CHAPTER THREE: LAWS ON RAPE**

3.1	The Criminal Code	-	-	-	-	-	-	-	-	33
3.2	The Penal Code	-	-	-	-	-	-	-	-	35
3.3	The Criminal Laws of Lagos	-	-	-	-	-	-	-	-	37
3.4	The Child Rights Act	-	-	-	-	-	-	-	-	38
3.5	The Violence Against Persons (Prohibition) Act, 2015	-	-	-	-	-	-	-	-	39
3.6	Summary	-	-	-	-	-	-	-	-	42

### **CHAPTER FOUR: CONSENT**

4.1	Introduction	-	-	-	-	-	-	-	-	44
4.2	Definition of Consent	-	-	-	-	-	-	-	-	45
4.3	Types of Consent	-	-	-	-	-	-	-	-	48
4.4	The Legal role of Consent	-	-	-	-	-	-	-	-	49
4.5	Capacity to consent	-	-	-	-	-	-	-	-	51
4.6	Withdrawal of Consent	-	-	-	-	-	-	-	-	57
4.7	Establishment of Rape	-	-	-	-	-	-	-	-	59
4.8	Defences	-	-	-	-	-	-	-	-	65
4.9	Summary	-	-	-	-	-	-	-	-	67

### **CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION**

5.1	Recommendations	-	-	-	-	-	-	-	-	68
5.2	Conclusion	-	-	-	-	-	-	-	-	69
	Bibliography	-	-	-	-	-	-	-	-	72

## TABLE OF CASES

<i>Adeoti v State</i> (2009) All FWLR (pt 454) 1450	-	-	-	-	-	-	61
<i>Adonike v state</i> (2015) All FWLR (pt 772) 1631-1840	-	-	-	-	-	-	29, 101
<i>Ahamefule v. Imperial Medical Centre</i> (2005) 5 NWLR (pt 917) 57	-	-	-	-	-	-	40
<i>Ajakaiye v FRN</i> (2010) 11 NWLR (pt 1206) -	-	-	-	-	-	-	21
<i>Alhaji Yakubu Sanni v State</i> (1993) 4 NWLR (pt 286) 99	-	-	-	-	-	-	60
<i>Charles Ekpo and Another v State</i> (1976) NSCC 265	-	-	-	-	-	-	44,64,60
<i>DPP v Morgan</i> (1976) AC 182	-	-	-	-	-	-	64
<i>Hemba Ukershima v The State</i> (2003) NWLR (pt 137) 1117	-	-	-	-	-	-	60
<i>Kazeem Popoola v State</i> (2013) 17 NWLR (pt 1382) 96	-	-	-	-	-	-	47
<i>Idris Rabiu v. State</i> (2002) 15 NWLR (pt 789) 76	-	-	-	-	-	-	48
<i>Iko v. State</i> (2001) All FWLR (pt 68) 1161-61, 70	-	-	-	-	-	-	62,70
<i>Lucky v State</i> (2016) All FWLR 570 -	-	-	-	-	-	-	32,38,59
<i>Musa v State</i> (2013) 9 NWLR (pt 1359) 214	-	-	-	-	-	-	60
<i>NPS v Adekanye</i> (No 1) (2002) 15 NWLR	-	-	-	-	-	-	21
<i>Okafor v C.O.P.</i> (1965) NMLR 89	-	-	-	-	-	-	61
<i>Okoh v. State</i> (All FWLR) (pt 963) 1743-1912 Nigerian Army	-	-	-	-	-	-	66
<i>Posu v State</i> (2011) 3 NWLR (pt 1234) 393	-	-	-	-	-	-	64
<i>R v Cooper and Schaub</i> (1994) Crim. LR 531	-	-	-	-	-	-	59
<i>Raymond Igboanugo v The State</i> (1992) 3 NWLR (pt 128) 259	-	-	-	-	-	-	61
<i>Simon Okoyoman v The State</i> (1973) 1 SC 21	-	-	-	-	-	-	52
<i>The State v Audio Agiri</i> (1972) UILR (pt 4) 503	-	-	-	-	-	-	53,64
<i>The State v Audu</i> (1972) NSCC 436	-	-	-	-	-	-	53
<i>The State v Muhammed Masiga</i> (Tsolo) (2018) 8 NWLR 383 S.C.	-	-	-	-	-	-	57,62
<i>Yari v Zaria N.A.</i> (1967) NNLR 85	-	-	-	-	-	-	60

## TABLE OF STATUTE

Child Rights Act, 2003										
Section 31	-	-	-	-	-	-	-	-	-	19, 38,51
Children and Young Persons Act, Laws of the Federation of Nigeria, 2004 -										
										34
Criminal Code Act, Cap C38, LFN, 2004										
Section 30	-	-	-	-	-	-	-	-	-	34
Section 218	-	-	-	-	-	-	-	-	-	28
Section 221	-	-	-	-	-	-	-	-	-	52
Section 357	-	-	-	-	-	-	-	-	-	1,2,8,34,63
Criminal Code Law of the Defunct Bendel State, 1976										
Section 218	-	-	-	-	-	-	-	-	-	29
Section 299	-	-	-	-	-	-	-	-	-	52
Criminal Code, Cap C21, Volume 1, Laws of Delta State										
Section 358	-	-	-	-	-	-	-	-	-	38
Criminal Laws of Lagos State, C17, 2011										
Section 137	-	-	-	-	-	-	-	-	-	28
Section 260	-	-	-	-	-	-	-	-	-	37,45
Section 261	-	-	-	-	-	-	-	-	-	28,37
Section 264 of the Criminal Laws of Lagos State	-	-	-	-	-	-	-	-	-	68
Criminal Procedure Act										
Section 176	-	-	-	-	-	-	-	-	-	21
Penal Code, Cap 89, Laws of Northern Nigeria, 1963										
Section 50	-	-	-	-	-	-	-	-	-	53
Section 282	-	-	-	-	-	-	-	-	-	9,43
Police Act, Cap P19, LFN, 2004										
	-	-	-	-	-	-	-	-	-	21
Sexual Offences Act, 2003 of the U.K.										
	-	-	-	-	-	-	-	-	-	46
Violence Against Persons (Prohibition) Act, 2015.										
	-	-	-	-	-	-	-	-	-	46
Section 1	-	-	-	-	-	-	-	-	-	- 5,8,9,11,33,40,61,70

## **LIST OF ABBREVIATIONS**

AC.	-	Appeal Cases
ANLR	-	All Nigeria Law Report
CCA	-	Criminal Code Act
CLL	-	Criminal Law of Lagos State
CR. APP R.	-	Criminal Appeal Review
CRA	-	Child Rights Act
CRIM. LR.	-	Criminal Law Report
CPA	-	Criminal Procedure Act
FIDA	-	Federacion Internacional de Abogadas
FWLR	-	Federal Weekly Law Report
LFN	-	Laws of the Federation of Nigeria
NAPTIP	-	National Agency for the Prohibition of Trafficking in Persons
NGO	-	Non Governmental Organisation
NMLR	-	Nigeria Monthly Law Report
NSCC	-	Nigeria Supreme Court Cases
NWLR	-	Nigeria Weekly Law Report
PA	-	Police Act
PC	-	Penal Code
QB	-	Queens Bench
SC	-	Supreme Court
UILR	-	University of Ibadan Law Report
UNICEF	-	United Nations Children Funds
VAPP	-	Violence Against Persons (Prohibition) Act
WHO	-	World Health Organisation
WARSHE	-	Women Against Rape Sexual Harassment and Sexual Exploitation

## **ABSTRACT**

This essay focuses on the offence of rape with respect to the position of the law under the Violence Against Persons (Prohibition) Act, 2015 which states that the offence of rape has gone beyond only men being capable of committing the offence of rape.

The medium through which rape can be committed is the vagina, mouth and anus which is unlike the position of the law under the Criminal Code Act, Child Rights Act, Criminal Laws of Lagos State and the Penal Code which states that the offence of rape could only be committed through penetration of the vagina. Also, section 1(1)(a) of the Violence Against Persons (Prohibition) Act provides that the penis is not the only instrument of rape. The instruments of rape includes objects, such as, pens, pencils and dildos.

This project expands the offence of rape under the Violence Against Persons (Prohibition) Act, 2015 and is to the aim that the Violence Against Persons (Prohibition) should be domesticated by every states in Nigeria and the definition of the offence of rape should be amended in various legislations which defines the offence of rape.

# CHAPTER ONE

## GENERAL INTRODUCTION

### 1.1 Introduction

Rape is defined as unlawful sexual activities especially intercourse with a person usually a female without consent and by force or threat of injury.<sup>1</sup> It could also be defined as;

*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 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 in the case of a married woman by impersonating her husband, is guilty of an offence which is called rape.*<sup>2</sup>

The World Health Organisation defines rape as physically forced or otherwise coerced penetration even if there is slight penetration of the vulva or anus by the penis or other body parts or object.

Before now the offence of rape in Nigeria was an isolated incident. It occurred once in a while and when it did, it was greeted with incredulity and surprise. Despite the fact that the offence carries a term of imprisonment, it has now become a daily occurrence in Nigeria.

Rape dates back to the history of man's creation. The first recorded incidence of rape was from the Bible which is evidenced in the book of Genesis<sup>3</sup>. Indeed biblically, rape was a constant feature among men and at a point it was a thing of shame not on the victim but on the family of

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<sup>1</sup> The Blacks Law Dictionary

<sup>2</sup> Section 357 of the Criminal Code Act

<sup>3</sup> Genesis 34:1-2 Good News Bible

the master of the person raped<sup>4</sup>. However, under the Violence Against Persons Prohibition Act, 2015, the offence of rape is not only committed by males but also by females and could be done through the vagina, anus, or mouth. Section 1 (1) (a) of the Violence Against Persons Prohibition Act provides that a person commits the offence of rape if 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.

In Nigeria, the offence of rape is a heinous offence and the drafters of the Criminal Code deemed it fit for life imprisonment upon conviction<sup>5</sup>. At this point, it is important to note that the offence of rape under the Violence Against Persons Prohibition Act is different from that of the Criminal Code, Penal Code, Criminal Laws of Lagos State and the Child Rights Act, in the sense that the offence in the former legislation could be committed by a male or female but in the latter legislation could only be committed by a male. Another important difference is that the offence could be committed not just only by penetration of the vagina but of the anus or mouth as stated in the former legislation but in the later laws, it could only be committed by the penetration of the vagina. In African Culture, it is an offence which stands on the same pedestal with the offence of murder since a suspect accused of rape is expected to go into hiding while his people make effort to cleanse the shame on the face of the family of the rape victim.

Despite all these, the offence of rape in Nigeria seems to be on the increase<sup>6</sup>. The question is, what is the cause? Does it mean that the punishment stipulated for it in the extant law is no longer heavy enough to deter would-be rapists or are there factors which ostensibly offer more incentives for rape than the risk of its punishment? It is suggested therefore, that for the offence

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<sup>4</sup> Genesis 34:3-13

<sup>5</sup> Section 357 of the Criminal Code

<sup>6</sup> Michael Joseph and Toluwani Bamgbose, 'Rape under the Nigerian Laws and the Need for Amendment, Legalpedia, <Legalpedia line.com> 13 April 2021

of rape to be on the increase instead of on the decline, it appears the legal system in Nigeria is not doing what it is expected to do.

Though, there may be problems with current modes of prosecution and it is not being suggested that the current system is perfect, contemporary rape legislation and criminal procedures in Nigeria are more logical than they have been throughout history<sup>7</sup>. In an English legal system characterised by capital punishment, modes of proof that are retrospectively ridiculous (trial by ordeal, trial by battle etc) and raging inequality of the sexes, the laws approach to sexual offences similarly left a lot to be desired.

In England, rape was considered serious. It was a capital offence until 1841. it was extremely difficult to get cases to court, thanks to a string of societal and procedural barriers<sup>8</sup>. Lest we forget that in the past, women could not vote, divorce their husbands or inherit under Wills<sup>9</sup>. The culture of that time dictated that rape was not an appropriate matter for resolution through prosecution, instead, there were an unlawful lot of out-of-court settlements ( victims were married off to rapists or paid off)<sup>10</sup>

Those complainants who were keen on seeing their attacker prosecuted had the onus to prove their case. While this gels nicely with modern concepts of the burden of proof, immediate actions had to be taken to signal the authorities that the offence occurred. Bloody clothing, torn garments and medical reports were one of the best ways to do this, which meant that the rape of virgins or rapes of demonstrable violence were most likely to reach the courtroom.

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<sup>7</sup> Katie King, 'The History of Rape Laws: Some Might Find it Hard to Believe, but the Law is a lot Better now', 2017, Legal Cheek,< [www.legalcheek.com](http://www.legalcheek.com)> 18 September 2017

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> *Ibid*

However many victims were barred from accessing justice if the case managed to get to court, it was difficult to obtain a conviction because of the embryonic rules of evidence, the fear of miscarriage of justice weighed heavy on the courts' shoulders.<sup>11</sup>

In this research, it will be very essential to understand the offence of rape from different Nigerian laws . The fact that rape can be committed by females and rape cannot only be done through vagina penetration but through the anus or mouth will equally be emphasised.

## **1.2 Methodology of the Study**

Analytical and normative research methods have been adopted in writing this project in order to achieve the objectives. The project is primarily library-based as this area of research is statutes inclined and lots of cases occur everyday. The statute has been interpreted by relevant cases and amended to give a wider scope. Both primary and secondary sources of information will be relied upon as sources of information for the purpose of this research. The primary resource shall comprise of statutes and national legislation. The secondary source of information is based on research through journals, articles, internet and textbooks, particularly on rape issues in Nigeria.

## **1.3 Statement of Problem**

Rape cases are so widespread in Nigeria that it may be regarded as endemic to Nigeria life. United Nations Children Funds (UNICEF) reported in 2015 that one in four girls and one in ten boys in Nigeria had experienced sexual violence before the age of 18.<sup>12</sup> According to a survey by Positive Action for Treatment Access carried out in Nigeria in the 2012 in Rivers State, over

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<sup>11</sup> Michael Joseph and Toluwani Bamgbose, 'Rape under the Nigerian Laws and the need for Amendment', legal pedis, < legalpediaonline.com > 13 April 2021

<sup>12</sup> 'Child Sexual Abuse in Nigeria', Wikipedia, < <https://en.m.wikipedia.org/wiki> > 13 April 2021

31.4 percent of girls said that their first sexual encounter had been rape or forced sex of some kind.<sup>13</sup> Despite the widespread outcry over the rising cases of rape in Nigeria, there seems to be no end to the nemesis. There is no day in the country without a reported case of sexual violence especially rape in the media. One contestable reason for the apparent rise of rape in Nigeria could be that rape victims are becoming more encouraged to report such crimes. However, it could also be that there is an increase in the rate of rape in Nigeria. The recent sexual violation and murder of a 22 year University of Benin undergraduate named Vera Uwaila Omozuwa have fanned the embers of the growing awareness and condemnation of sexual violence in the Nigeria society.

According to a poll conducted by NO. POLLS in July 2019, it was revealed that most Nigerians (85%) believe that there is a high prevalence of rape in Nigeria. About three in ten Nigerians (26%) disclose that they know someone who has been raped in the past and the rape victims were particularly minors and young adults aged between 1-15 years (72%) and 16-25 (24%) respectively.

Though the rape of women and girls is on the high side, men and boys are also raped. Rape is not only done through the vagina as was known prior to the enactment of the Violence Against Persons (Prohibition) Act ( VAPPA), but through the anus or mouth<sup>14</sup>. Also, rape is not only done with the penis but with objects such as pens, pencils and dildos.<sup>15</sup>

Some of the questions said to be considered in the course of this write up are:

What are the causes of rape?

What are the types of rape?

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<sup>13</sup> Is'haq Modibbo Kawu, 'Nigeria's Troubling Epidemic of Rape', *Vanguard* , 23 May 2013

<sup>14</sup> Section 1(1) (a) of the Violence Against Persons Prohibition Act

<sup>15</sup> *Ibid*

What are the effects of rape?

When can it be said that consent is given and some other questions which would be answered subsequently in other chapters.

#### **1.4 Aims and Objectives of Study**

The goal of this study is to bring to your notice therefore that the position of the law which states that only women can be raped and the instrument of rape is penis has now been expanded. The objectives are:

- I) Looking at the offence of rape from the Criminal Code, Child Rights Act, Criminal Laws of Lagos State, Penal Code and the Violence Against Persons (Prohibition)
- II) Comparing the above legislations as regards the offence of rape
- III) Stating how the Violence Against Persons (Prohibition) Act has revolutionised the offence of rape

#### **1.5 Contribution to Knowledge**

The offence of rape has gone beyond penetration of a woman's vagina. It could be committed by penetration of the anus or mouth. It can also be committed by a man or a woman. The offence of rape has been revolutionised by the Violence Against Persons Prohibition Act in five ways which would be discussed in chapter 3 subsequently. The ways in which the offence has been revolutionised are;

- a. Women and men can be raped
- b. Instruments of rape does not have to be only penis, it could be any part of the body such as fingers or objects such as dildos and pens
- c. Financial compensation for victims

d. Sex offenders registers

All these were not provided for in previous laws. The Violence Against Persons Prohibition Act is the first legislation which expanded the scope and meaning of rape.

## 1.6 Summary

The offence of rape under the Nigerian laws is the most serious kind of sexual assault which is punishable with imprisonment for life with or without whipping<sup>16</sup>. Rape has been there right from the Bible which is evidenced in the book of Genesis and it's not a pleasant experience by anyone<sup>17</sup>. There is no society or culture where the offence of rape is accommodated and it is punishable in every culture. Before the enactment of the Violence Against Persons Prohibition Act, the offence of rape was recorded in the Nigerian laws as being committed against women and girls. However, this position of the law has been amended by the Violence Against Persons Prohibition Act, which expressly states that the offence of rape could be committed against males also. It expanded the offence of rape as to be committed not only with the penis but through the hand or objects.

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<sup>16</sup> *Ibid* (no 3)

<sup>17</sup> *Ibid* (no 2)

## CHAPTER TWO

### RAPE

#### 2.1 Introduction

Historically, the law of rape was particularly concerned with virginity. The law was more concerned in protecting virgins from being raped. It is important to recognize some realities about the offence of rape. Firstly, the offence is the most serious of the sexual offences. Secondly, the victims of rape are mostly females. This is not to say that males are not sexually assaulted. Infact, in looking at the offence of rape from the Violence Against Persons Prohibition Act, 2015,<sup>18</sup> it is possible for males to be raped. Thirdly, it is well established that rape cases are the most underreported of all serious crimes.

While experts offer numerous reasons for this underreporting, most agree that the trauma and stigma that often attend the formal investigation and prosecution of sex crime may lead victims to fear of being victimised by the justice system.

The offence of rape is committed when a person 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 threat or intimidation of a 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 impersonating her husband<sup>19</sup>. In addition to the foregoing ingredients of the offence of rape, under the Penal

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<sup>18</sup> Violence Against Persons Prohibition Act, 2015

<sup>19</sup> Section 357 of the Criminal Code Act, Cap C38, Laws of the Federal Republic, 2004

Code,<sup>20</sup> even if her consent is obtained, so long as she is under fourteen years, it still amounts to rape.<sup>21</sup>

There are different types of rape. Some of them are listed in the Blacks Law Dictionary, such as spousal, statutory, marital rape etc. These different types of rape and the causes of rape would be considered.

Rape has an effect or effects on the victims with psychological effect as the most common amongst all. It is pertinent to note that there is a difference between rape and defilement. Defilement means having sexual intercourse with a child under the age of 13 years. It is a criminal offence under the Sexual Offences Act and Child Rights Act. While rape is when a person intentionally penetrates the vagina, anus or mouth of another person with any part of his or her body or anything else.<sup>22</sup>

## **2.2 Definition of Rape**

The offence of rape is a very serious offence in Nigeria and the world at large. This offence occurs in every society. In its ordinary parlance, rape is defined as the crime of forcing somebody to have sex, especially using violence<sup>23</sup>, Osborne's Concise Law Dictionary states that a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the

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<sup>20</sup> Section 282 (e) Penal Code, Cap 89 Laws of Northern Nigeria, 1963

<sup>21</sup> *Ibid*

<sup>22</sup> Section 1(1)(a) of the Violence Against Persons Prohibition Act

<sup>23</sup> Oxford advanced learner's dictionary

intercourse does not consent, knowing that she does not consent or being reckless as to whether she consents<sup>24</sup>.

At common law, rape is an unlawful sexual intercourse committed by man with a woman not his wife through force and against her will<sup>25</sup>. The Common law crime of rape required at least a slight penetration of the penis into the vagina. Its an unlawful sexual activity with a person usually with a female without consent and usually by force or threat of injury.<sup>26</sup>

According to the Criminal Code, rape is defined as;

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 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<sup>27</sup>

In the case of *Lucky v State*,<sup>28</sup> it was held that the offence of rape is complete upon penetration and the prosecutrix must prove the essential ingredients which include the following:

i) That the accused had sexual intercourse with the prosecutrix

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<sup>24</sup> According to Longman Dictionary of Contemporary English, rape is the act of having sexual intercourse or other sexual activity upon another person without their consent and/or against their will.

<sup>25</sup> Thukral, Enakahi Ganguly, 'Still out of Focus: Status of India's Children', < <https://lawshelf.com> > 26 January, 2021

<sup>26</sup> Blacks Law dictionary

<sup>27</sup> *Ibid* (no 19)

<sup>28</sup> (2016) All FWLR (pt 857) @ 581

- ii) That the act of sexual intercourse was done without the consent or that the consent (if any) was obtained by fraud, force, threat, intimidation, deceit or impersonating
- iii) That the prosecutrix was not the wife of the accused
- iv) That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent
- v) That there was penetration

However, in looking at the definition given by the Violence Against Persons Prohibition Act, there is a difference in the definition of rape given by the Violence Against Persons Prohibition Act and other laws in Nigeria, such as the Penal Code<sup>29</sup> , Criminal Code<sup>30</sup>, Child Rights Act <sup>31</sup>etc. Under the Violence Against Persons Prohibition Act, rape is defined as when a person “intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else<sup>32</sup>”

The offence of rape is given a wider scope in the Violence Against Persons Prohibition Act. It is not only females who can be raped but men. The offence of rape is not only when there is a penetration of the vagina but of the anus, mouth or any other part of the body. The implication of the definition given by the Violence Against Persons (Prohibition) Act includes the fact that objects could be used in committing the offence of rape. Mere penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

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<sup>29</sup> *Ibid* (no 20)

<sup>30</sup> *Ibid* (no 19)

<sup>31</sup> Section 31 , 2003

<sup>32</sup> Section 1(1) (a) of the Violence Against Persons Prohibition Act, 2015

Even though Section 357 of the Criminal Code commences with the phrase “any person” that does not mean a woman can rape another woman under the Code. Both under the Penal Code and the Criminal Code, the accused must be a man, which means a male of full criminal capacity can commit rape. The victim must also be a woman or girl. However, under the Violence Against Persons (Prohibition) Act, it includes the fact that a woman can rape a woman with objects which could penetrate her vagina. The accused could be a woman.

Different definitions have been given for rape as said above. It is imperative at this point to refer to the Criminal Code's definition of 'carnal knowledge' since this is the key word in the offence. According to section 6 of the Criminal Code, the offence of rape is complete upon penetration.

Lots of issues arise with this definition. First is the emphasis that the only person to be raped is a woman. This ostensibly may be as a result of the addendum that the offence of rape is complete upon penetration, she can therefore not be guilty of or capable of rape. Further, it may be argued that a woman is imbued with a vagina and to that extent she can be penetrated. These issues ask for clarification. In the world of science and technology, is it not possible for a woman to actually penetrate a man through the anus or even for a woman to penetrate another woman? As this question is raging, there is also the need to clearly understand the status of a woman who procured another man to rape a woman. Will such a party be liable under section 7 (d) of the Criminal Code?

Furthermore, will the penetration of a woman's vagina with a stick or other instrument not suffice as rape or must the offence of rape be committed when the penetration is with or by the penis? This is a position of the law which the Violence Against Persons (Prohibition) Act seeks to amend.

In the definition of rape given by the Violence Against Persons (Prohibition) Act, it is imperative to observe that rape is not just about carnal knowledge without consent; it includes penetration of the vulva, vagina, anus or even mouth with a penis or even with any part of the body not being the penis. A man and a woman can equally commit the offence of rape.

The offence of rape is not limited to a particular gender in the course of its commission. It shows that rape is not just the penetration of the vagina with a penis but includes more. In the United States, 'rape' has been defined as penetration no matter how slight, of the vagina and anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim<sup>33</sup>

### **2.3 Types of Rape**

Different types of rape have been provided for, most especially in the Blacks Law Dictionary. Rape can be categorized in different ways: for example, by reference to the situation in which it occurs, by the identity or characteristics of victim, and by the identity or characteristics of the perpetrator. These categories are referred to as types of rape.

The types of rape described below are not mutually exclusive: a given rape can fit into multiple categories. For example, by being both a prison rape and gang rape, or both a custodial rape and the rape of a child.

- a. Marital rape: It is a non-consensual sex between married partners. It is also known as wife rape, husband rape, partner rape, domestic rape or intimate partner rape. It is not recognized in Nigeria as it is usually not reported and even when it is, it is considered a domestic problem that can be settled domestically.

At common law, marital rape was not a crime but under modern statutes, the marital exemption no longer applies and in most jurisdictions, a husband can be prosecuted for raping his wife.<sup>34</sup>

Historically, research has shown that often women do not believe that non-consensual sexual acts within a marriage constitutes rape.

- b. Date rape: It involves non-consensual sex between two people that are in a dating relationship. It is also referred to as “hidden rape” because it is often not considered as a rape by the offender, and members of the public, while the victims usually would rather not report because “he is my boyfriend”<sup>35</sup>

In Nigeria, this is a common type of rape that is grossly underreported because of the burden of proof. The victim will rarely get sympathy in this type of rape once it is established that she is in a dating relationship with the offender.

- c. Statutory rape: According to the Blacks Law Dictionary, it is an unlawful sexual intercourse with a person under the age of consent ( as defined by statute) regardless of whether it is against that person’s will. Governments cited an interest in protecting young people from sexual exploitation by treating any sexual contact with such a person as an offence (not always categorized as “rape”, even if he or she agrees to or initiates the sexual activity).

The offence is often based on the fact that people under a certain age do not have the capacity to give consent. The age at which individuals are considered competent to give consent is called the age of consent and it varies in different countries and religions.

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<sup>34</sup> The jurisdictions which marital rape is punishable are, Rwanda, Serbia, Greece etc

<sup>35</sup> Richard A. Aborisade, 'Crime and Delinquency: A Sociological Introduction', Ibadan University Press, 2016

Sexual activity that involves age of consent law, but is neither violent nor physically coerced, is sometimes described as “statutory rape”<sup>36</sup>

- d. Gang rape: It occurs when a group of people participate in the rape of a single victim. Rape involving two or more violators (usually at least three)<sup>37</sup> is widely reported in many parts of the world. This could be by violators that are known to the victim or by complete strangers.

This type of rape is more common among students of post primary institutions in the country, especially institutions with cult gangs.<sup>38</sup> It is also common within neighbourhood with prevalence of street gangs.<sup>39</sup> Gang rape is usually more violent as there is likelihood of a greater resistance from victims than individual sexual assault. Therefore, this type of rape has greater consequences on the victims.

One study showed that offenders and victims in gang rape incidents were younger with a higher possibility of being un-employed. Gang rape involved more alcohol and other drug use, night attacks and severe assault outcomes and less victim resistance and fewer weapons than individual rapes.<sup>40</sup>

- e. Rape of children: It’s a form of child sexual abuse. When committed by another child (usually older or stronger) or adolescent, it is called child-on-child sexual abuse<sup>41</sup>. When

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<sup>36</sup> 'Types of Rape', Wikipedia, < <https://en.m.wikipedia.org> > 26 January, 2021

<sup>37</sup> *Ibid* (no 6)

<sup>38</sup> *Ibid* (no 36)

<sup>39</sup> *Ibid*

<sup>40</sup> Ullman, S.E (1999). “A Comparison of Gang and Individual Rape Incidents” Violence and Victims.

<sup>41</sup> *Ibid* (no 35)

committed by a parent or other close relatives such as grandparents, aunts and uncles, it is called incest and can result in serious and long term psychological trauma.<sup>42</sup>

This is a growing problem in Nigeria as the news of reported child sexual abuse is on the increase. When a child is raped by an adult who is not a family member, but is a caregiver or in a position of authority over the child, such as school teachers, religious authorities, sports trainers or therapists, to name a few, in whom the child is dependent, the effects can be similar to incestual rape.

- f. Prison rape: It is commonly between people of the same sex . Since prisons are usually separated by sex, the attacker does not identify as homosexual. This phenomenon is much less common in the western world. This is partly because of the difference in the structure of the prison system in the United States as compared to the prison systems in Canada, Australia and Europe.

Statistically, there is a higher prevalence of mentally ill individuals who are in prisons, instead of psychiatric facilities.<sup>43</sup> The attacker is most commonly another inmate

- g. Serial rape: It's a rape committed by a person over a relatively long period of time and committed on a number of victims and follows a specific and predictable pattern of targeting and assaulting victims.<sup>44</sup>

Serial rapists show a “ high degree of criminal sophistication” and use less force against the victim<sup>45</sup>. The more criminally sophisticated the rapist was, the more sexual acts were performed. A perpetrator that has criminal sophistication means that the perpetrator is

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<sup>42</sup> *Ibid*

<sup>43</sup> Downer, Allison V. Trestman, Robert L., 'The Prison Rape Elimination Act and Correctional Psychiatrist', American Academy of Psychiatry and the Law < <https://en.m.wikipedia> > 26 January, 2021

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid*

more likely to remove any evidence that might assist enforcement in their investigation. For example, fingerprints, semen and weapons.

- h. Payback rape: It's also called "punishment rape" or "revenge rape". It is a form of rape specific to certain cultures, particularly the Pacific Islands.<sup>46</sup> It consists of the rape of a female, usually by a group of several males, as revenge for acts committed by members of her family, such as her father or brothers. The rape is meant to humiliate and bring shame upon the father or brothers, as punishment for their prior behaviour towards the perpetrators.<sup>47</sup> Payback rape is sometimes connected to tribal fighting.<sup>48</sup>
- i. Stranger rape: This is when the sex offender is not known to the victim. It is either they are both unknown to each other, or the offender knows the victim while the victim might just be at the right place at the wrong time.<sup>49</sup> For example, walking along a bushy lonely path alone in the night, the lady might be unfortunate to meet an opportunist or motivated sex offender.
- j. Acquaintance rape: It can occur between two people who know one another usually in social situations, between people who are dating as couple and have had consensual sex in the past, between two people who are starting to date, between people who are just friends, and between acquaintances, providing they are dating. They include rape of co-workers, school mates, family friends, teachers and other acquaintance.

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<sup>46</sup> 'Types of Rape', Wikipedia, < <https://en.m.wikipedia.org>> 26 January, 2021

<sup>47</sup> Supplement to the Handbook for Legislation on Violence Against Women: 'Harmful Practices against Women'. 2012

<sup>48</sup> 'Many Voices, One Message', Amnesty International Australia, < <https://en.m.wikipedia.org> > 26 January, 2021

<sup>49</sup> *Ibid* (no 35)

- k. Rape by means of fraud: An instance of sexual intercourse that has been induced by fraud. Authorities are divided on the question whether rape can occur when a woman is induced by fraudulent statement to have sexual intercourse.<sup>50</sup> But the term rape by means of fraud is not uncommon in legal literature.<sup>51</sup> Usually the victim's consent is gotten through fraud.
- l. Corrective rape: It is a targeted rape against heterosexuals as a “punishment for violating gender roles”<sup>52</sup>. It is a form of hate crime against mainly lesbians in which the rapist justifies the act as an acceptable response to the victim’s perceived sexual or gender orientation and a form of punishment for being gay.<sup>53</sup>

Often the stated argument of the corrective rapist is that the rape will turn the person straight, “correcting” their sex or gender, ie make them conform to societal norms.<sup>54</sup>
- m. Custodial rape: It’s perpetrated by a person employed by the state in a supervisory or custodial position, such as a police officer, public servant or jail or hospital employee. It includes rape of children in institutional care such as orphanages.<sup>55</sup>

## 2.4 Causes of Rape

The only cause of rape is the rapist. However, there are some factors that catalize or contribute to the increasing number of rape cases in Nigeria. The state of Nigeria’s poorly defined criminal laws and weak law enforcement creates an environment where rape is committed with freedom<sup>56</sup>.

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<sup>50</sup> *Ibid*

<sup>51</sup> *Ibid* (no 26)

<sup>52</sup> Battle, E.E (2000). “Lesbians and [“Lesbians and Hate Crime a” Journal of Poverty.](#)

<sup>53</sup> *Ibid*

<sup>54</sup> *Ibid* (no 40)

<sup>55</sup> Thukral, Enakahi Ganguly, 'Still Out of Focus: Status of India’s Children', < <https://en.m.wikipedia.org>> 26 January, 2021

<sup>56</sup> Amnesty International 2006

As a result of the inadequacy of the law in solving this problem, women advocates are presently trying to prevent future rapes by educating the public, ensuring that quality services are provided to victims in order to encourage accountability and ensure that the perpetrators are brought to justice. According to the Child Rights Act<sup>57</sup> in Nigeria enacted by the federal government in May 2003, anyone convicted for rape is liable to life imprisonment. Unfortunately, few people seem to be focusing on agitating for enforcement of the law and reducing the difficulties encountered by prosecution for a fair case in court. Rather, culprits are being discharged and acquitted regularly. Thus, women and girls continue to be raped and molested. Nigeria's economic and political conditions, as well as social norms support stereotypical divisions between men and women<sup>58</sup>. Other causes of rape include alcohol and drug abuse, idleness, pornography, psychological disorder, and bad company.<sup>59</sup> At any rate, experts, in considering the persistent nature of these rape cases in Nigeria advance the following causes for the unfortunate reality:

i. Exposure to Modernity:

Adolescents in Nigeria today are being bombarded by various modern influences. They read about sex in novels, books, magazines and newspapers. It is said that the adolescents also "Watch various types of pornographic movies aside from being exposed to sexually overloaded advertisements in newspapers and the television. All these and the sexually graphic music, movies, obscene literature directed at the adolescents arouse their interest in sex. Some parents allow their wards to spend too much time watching television programmes where sex is used by most manufacturers to advertise their products. These adverts help put the younger generation

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<sup>57</sup> Section 31(2) of the Child Rights Law

<sup>58</sup> Chiazor I.A., Ozoga M.I., Udume M., Egharevba M.E., Taming the Rape Scourge.

<sup>59</sup> 'Rape under the Nigerian Laws and the Need for Amendment', Legal Pedia, <<https://legalpediaonline.com>> 13 April, 2021

under terrific pressure to go into sex by all means. As a result of this exposure, the adolescents are perpetually under pressure to experiment with sex, even if it means raping.

ii. Peer Pressure/Influence:

Some literature posits that most adolescents are led into sexual promiscuity by peer influence<sup>60</sup>. Peer group is an important factor in the upsurge of rape cases in Nigeria. Innocent youths who keep regular company of rapists may easily learn their evil ways, no matter how careful they think they are. Most adolescents, in trying to remain relevant and to gain the continued approval of their friends try to experiment with sex, even if it is through rape. It is often said that children who are more influenced by their parents are more likely to adopt socially acceptable sexual behaviour than those who are more influenced by their peers.<sup>61</sup>

iii. The weakness of the Nigerian Criminal Justice System:

It is pertinent to look at the Nigerian criminal justice system and through its lens to look also at the Nigerian society which seems to encourage the offence of rape. It is a statement of fact to say that the Nigerian criminal justice system rests on a tripod comprising the police, the judiciary and the prison. The institution saddled most with the problems of criminal justice administration is the Police. The Nigerian Police prosecutes over 70% of criminal matters in the various courts across the land<sup>62</sup>. Indeed, section 23 of the Police Act<sup>63</sup> empowers the Police to prosecute criminal offences in all courts in Nigeria. This statutory provision has received judicial blessings

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<sup>60</sup> *Ibid*

<sup>61</sup> *Ibid*

<sup>62</sup> *Ibid*

<sup>63</sup> Police Act, Cap P19, Laws of the Federation of Nigeria, 2004.

in a plethora of cases<sup>64</sup> With this power, the Nigerian Police is not only vested with the powers to investigate and arraign, they are also imbued with the power to prosecute. Now, for a complainant in Nigeria, the theoretical provision of the law is that she is at best a witness to the crime and the wrong was done to the society for which the society is expected to exact revenge adopting any of the rationale for sentencing available in law. However, the reality on the ground is that the victim is the arrow-head of the prosecution both financially and materially. It therefore follows that where the victim is not financially buoyant to move the case, the case may suffer an immediate miscarriage. Basically, a victim of a crime is expected to lodge a complaint to the Police who in turn will take it up from there. Of course the lodging of the complaint does not attract any fee<sup>65</sup>.

In today's Nigeria, the victim is expected to lodge the complaint with a certain amount of money. Then she provides some more money to enable the authorities to investigate the matter. In a crime of rape, when the victim rushes to the Police station to make a complaint, she is derided and in some cases she is likely to be asked question which further increases the pains. When she eventually succeeds in making the report, she will be given a medical paper and asked to go for a test. This test is also at her expense. Most times at the hospital, she meets with a male doctor who further makes inquiries that may even increase the pain of the rape. From there she is sent back to the Police station where she is made to cough out money to initiate the case at the courts and she also has to pay the prosecuting counsel<sup>66</sup>. This scenario can better be imagined if the

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<sup>64</sup> *NPS v Adekanye* (No 1) (2002) 15 NWLR (pt 790) @ 318, *Ajakaiye v FRN* (2010) 11 NWLR (pt 1206) @ 526

<sup>65</sup> *Ibid*

<sup>66</sup> *Ibid*

defendant is a wealthy man who can afford whatever amount that is required of him.<sup>67</sup> From this point, the victim through the prosecutor is squared against the defendant who is comfortable enough to procure a sound lawyer as his counsel of choice.

- iv. The size of a woman's/man's dress: This factor is very important when it comes to the causes of rape. Do the dresses provoke? Are women clothed in sarees and burqas not raped? There are instances where men sexually abuse animals.<sup>68</sup> Should we cloth animals too? These questions need to be answered. What would make a man to be raped? What would he wear that would be so provoking as to result to his rape?
- v. Make up: This is one oft-cited reason why women are raped<sup>69</sup>. Rapists allege that women apply heavy makeup especially lipstick to lure men. How do you explain rape on minors, infants, old and aged women suffering from unsoundness of mind, women in comma or those hospitalized with severe ailments, rape of men? What could they have done to catch a rapists fancy? Earlier men kept sex slaves, now they hire escort girls<sup>70</sup>. Prostitution is the world's oldest profession<sup>71</sup>. Sugar daddies- "I sponsor you" is a common western concept fast gaining in popularity in our sub-continent. Wife swapping is a notorious fact. People rape their daughters, sisters and sometimes their mothers. What causes such extreme depravity?

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<sup>67</sup> *Ibid*

<sup>68</sup> <https://www.google.com/amp/s/www.bbcafrica>

<sup>69</sup> Vageshaws Deswal, ' What Causes Rape?', Toi Opinion, < <https://timeofindia.indiatimes.com>> 26 January, 2021

<sup>70</sup> *Ibid*

<sup>71</sup> *Ibid*

- vi. Desire to control: Rape is a power crime. Narcissistic tendencies are common in celebrities, especially among actors and sportspersons<sup>72</sup>. Their popularity among females causes them to mistake themselves as demigods whom women are dying to please in bed. Men like to boast about their sexual encounters equating them with conquests. Sex requires a man to be aggressive, he feels superior and in control. It is all about the need to control and assert power. Husbands sometimes rape their wives and seek to justify it as a means of punishment to her or to put her in her place or simply to vent out their frustrations<sup>73</sup>. Spurned suitors, jilted lovers and all those who believe the woman to be their “cannot take no for an answer” and force sex to punish or avenge.

People rape their girlfriends, live-in partners, friends and acquaintances. There is patriarchy fueled male desire to dominate. Men are scared of a woman’s sexuality so that needs to be suppressed. She evokes the need in them, there is a dislike for the passive yet undeniable power that she wields over them. Most times the accused are not even aware that what they have done amounts to rape. They admit to forced sex but refuse to accept it as an act of rape.

- vii. Lack of sex education: Adolescent boys have an urge to explore. A skewed sex ratio, lack of accessibility and negligence interaction with people of the opposite sex play havoc on impressionable minds fed with easy access to porn. The profanity of using vulgar lyrics in songs need to be curbed. There are instances where females are projected as no more than an object of desire. This causes females to be viewed as commodities meant to be consumed and ravished. Sexually obsessed rapists don’t consider women as beings but as an object that can be violated with impunity.

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<sup>72</sup> *Ibid*

<sup>73</sup> *Ibid*

Education, gender sensitisation and legal awareness are indispensable to control rapes. We need better policing and Close circuit television mapping of desolate areas. Behavioural and emotional intelligence is very different from academic intelligence. There is a need to question the accused and not the victim. Sensible sensitivity is essential to counter this crime which is rightly classified as the 'worst crime against womanhood'

- viii. Anger and rage: The goal of rapists is to humiliate, debase and hurt their victims. They express their contempt for their victim through physical violence and profane language. For these rapists, sex is a weapon to defile and degrade the victim, rape constitutes the ultimate expression of their anger. This rapist considers rape the ultimate offence they can commit against the victim<sup>74</sup>.

Anger rape is characterized by physical brutality, much more physical force is used during the assault that would be necessary if the intent is simply to overpower the victim and achieve penetration<sup>75</sup>. This type of offenders attack their victim by grabbing, striking and knocking the victim to the ground or beating them<sup>76</sup>. The experience for the offender is one that is of conscious anger and rage.

- ix. Poor parenting: As a result of Modernity, some parents pamper their children by not enforcing strict disciplines on them. The parents themselves engage in extra-marital affairs before them, and so they are more likely to foster children that are rude, arrogant

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<sup>74</sup> 'Causes of Sexual Violence' <<https://en.m.wikipedia.org>> 9 April, 2021

<sup>75</sup> *Ibid*

<sup>76</sup> *Ibid*

and wayward. Children groomed in this kind of setting (particularly male children) form a biased opinion of the opposite sex and may become rapists<sup>77</sup>.

- x. Stigmatisation: In Nigeria, the woman is frequently victimized twice. First by the violence she endures and by the failure of the governments to bring her abusers to justice. There seems to be a culture of silence surrounding rape in Nigeria.<sup>78</sup>

The social stigma associated with rape across the globe forces female victims in Nigeria to conceal rape assaults in order to save themselves from shame and public embarrassment<sup>79</sup>. Even parents of the raped often find it difficult to come out publicly to report such cases. Another reason for not taking bold steps in reporting such cases could be for the victim's family to maintain the ever existing cordial relationship with the parents of the perpetrator of the heinous crime. This situation encourages potential rapists to go into raping since people who indulge in it go scot-free.

## **2.5. Effect of Rape**

Sexual violence is a common phenomenon which occurs world wide. The most common and lasting effects of rape involves mental health.<sup>80</sup> It leads to both short and long term psychological effects of rape.

- a. Self-blame: Victims use self-blame as an avoidance-based coping tool. Self-blame shows or in many cases stops the healing process<sup>81</sup>. Wallowing in self-pity never

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<sup>77</sup> *Ibid* (no 59)

<sup>78</sup> *Ibid*

<sup>79</sup> *Ibid*

<sup>80</sup> Oyetade Elizabeth Module, ' Rape and it's Effects on Society', Scouts, <<https://www.scout.org>> 29 January, 2021

<sup>81</sup> *Ibid*

solves it. Rape victims often blame themselves for the occurrence of rape, believing that the incident was their fault through something they did or did not do or there is something wrong with them which made them to be raped. After being molested and abused sexually, the raped victim develops shame and loss of self esteem. Shame as a result of rape therefore has destructive effects like, lack of motivation to seek help, lack of empathy, cutting themselves off from other people, anger and aggression. In extreme cases suicide is committed. The experience of being raped can lead to suicidal behaviour.

- b. Physical effects: It includes cases of vagina and/or anal bleeding which also result in infections. This will ultimately affects the woman's ability to engage in any form of vagina penetration and may occasion chronic pelvic pain in addition to urinary tract infection. Besides unwanted pregnancy is likely to occur from rape, as, often times, when rape occurs, there is the absence of use of contraceptives<sup>82</sup>.
- c. Post-traumatic Stress Disorder (PTSD): One of the most common psychological ailments that occur after a rape is PTSD. When something traumatic like a rape occurs, many victims will replay the scenario over and over in their minds and relieve it on a regular basis. As a result, they may experience severe anxiety, hyper-arousal and difficulty in sleeping.<sup>83</sup>
- d. Rape leaves behind a big scared on the mind of the victim. Many rape victims suffer trauma and depression and these affect their education and work may have implications for how other people treat them. Some raped victims can develop

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<sup>82</sup> Bamgbose O, 'A Reflection on the Past, Present and Future of Rape Law' 2002, Vol 11 JPBL, p-128

<sup>83</sup> 'Effecta of Sexual Violence', <<https://www.rainn.org>> 26 January, 2021

- perpetual fear or hatred of men and may not want to have intimate relationship with men, which is an indication that the sexual health of such person is affected.<sup>84</sup>
- e. Depression: Rape victims often experience sadness and hopelessness for a long time after the incident. This can affect every area of the victim's life and make it difficult for her/him to eat, sleep, go to work or school or engage with friends and family. This can make recovery even more difficult.
  - f. Borderline personality disorder: This is a long term pattern of abnormal behaviour characterized by unstable relationships with other people, unstable sense of self and unstable emotions. There is frequent dangerous behaviour and self-harm.
  - g. Sleeping disorder: This had to do with changes in sleeping pattern or habits that can negatively affect health. Seven out of ten raped victims have difficulty in sleeping or staying asleep.
  - h. Eating disorder: This is characterized by abnormal or disturbed eating habits. This may include inadequate excessive food intake which can ultimately damage an individual's well-being.

## **2.6 Distinction between Rape and Defilement**

What is rape? What is defilement? In defining rape, the Violence Against Persons (Prohibition) Act would be used since it is of emphasis. Section 1(1) of the Violence Against Persons (Prohibition) Act states that “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

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<sup>84</sup> Alibi Eni Eja, 'Criminal Law and Sexual Offences in Nigeria', Princeton and Associates, 2016

- 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 fraud and fraudulent representation as to the nature or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.

The Criminal Code defines defilement as;

Any person who has unlawful carnal knowledge of a girl under the age of 13 years is guilty of a felony is liable to imprisonment for life with or without caning.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of 13 years is guilty of a felony and is liable to imprisonment for 14 years with or without caning.<sup>85</sup>

The Criminal Laws of Lagos State defines defilement as any person who has sexual intercourse with a child commits felony and is liable on conviction to imprisonment for life.<sup>86</sup>

Also Criminal Laws of Lagos State does not define rape the way the Violence Against Persons (Prohibition) Act defines it. However it defined sexual assault by penetration as;

Any person who penetrates sexually, the anus, vagina or any other opening in the body of another person with a part of his body or anything else, without the consent of the person commits a felony and is liable on conviction to imprisonment for life.<sup>87</sup>

This definition is similar to the definition of rape given by the Violence Against Persons (Prohibition) Act.

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<sup>85</sup> Section 218 of the Criminal Code Act

<sup>86</sup> Section 137 of the Criminal Laws of Lagos State

<sup>87</sup> *Ibid*; section 261

Defilement means having any sexual intercourse with a child under the age of 13 years. It is a criminal offence under the Sexual Offence Acts and Child Rights Act. Defilement simply means to violate someone's chastity. The offence of defilement involves a girl under 13 while rape involves a male or female at or above 13. It is a well laid down position of the law that a child below 13 cannot be raped.

However, the age bracket differs from jurisdiction to jurisdiction. It is important to know that under the Criminal Code, Penal Code,, Child Rights Act, rape can only occur when the vagina of the woman is penetrated. This is not to say that anal or unlawful sexual intercourse is allowed. This is a crime and covered under different descriptions in each legislation.

In the case of *Adonike v State*<sup>88</sup> the appellant was alleged to have sent a girl child of 5 years to buy sachet water for him and on her return, had lured her into his room and had carnal knowledge of her. He was therefore arrested and arraigned in the High court of Delta State on a one-count charge of defilement, punishable under Section 218 of the Criminal Code, Laws of the Defunct Bendel State, 1976 as applicable to Delta State. The prosecution tendered in evidence medical report establishing the defilement of the prosecutrix. The appellant was convicted on the offence of defilement.

It was stated that the evidence for defilement is the same as in rape, except that for defilement, it is immaterial whether the act was done with or without the consent of the child. A girl under the age of 11 is a child and not so capable of consenting to sex. The court would hold that she did not consent even if she did consent. A child cannot consent to sex. The court would be satisfied that there was penetration even if the hymen was not ruptured or if there was no emission of semen. The slightest penetration is sufficient to conclude that there was penetration. In the

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<sup>88</sup> (2015) All FWLR (pt 772) 1631-1840

instant case, where the prosecution established that the appellant had carnal knowledge of the prosecutrix who was under 11 years as at the time he was properly convicted.

## **2.7 Summary**

The offence of rape is a heinous crime which is not just committed by males alone but also females and it is punishable under the Nigerian law. However, the punishment depends on whether the victim is below 13 or above 13. It is committed when a person has unlawful carnal knowledge of a woman or even a man by penetrating the vagina, anus or mouth of another person with any other part of his or her body or anything else.

According to Section 30 of the Criminal Code, a male person under the age of 12 years is presumed to be incapable of having carnal knowledge. It follows from this that he cannot be guilty of the offence of rape or attempted rape although on such a charge he may be convicted of indecent assault.

The Violence Against Persons (Prohibition) Act contains a wider scope of the offence of rape. The Criminal Laws of Lagos State which talks about indecent assault which definition is similar to the definition of rape in the Violence Against Persons Prohibition Act.

There are different types of rape but the type of rape which occurred would be dependent by reference to the situation in which it occurs, by the identity or characteristics of the victim, and by the identity or characteristics of the perpetrator.

Under the Nigerian Law, a husband cannot rape his wife. However, this privilege or immunity is of limited effect. If the marriage has been dissolved, or if a competent court has made a separation order restraining a clause that the wife be no longer bound to cohabit with her husband then the implied consent to intercourse given by the wife at marriage is thereby revoked

and while the order is in force it will be rape for the husband to have intercourse with the wife without her consent. The mere fact that a wife has presented a petition for divorce does not by itself revoke the implied consent to intercourse. Although, a husband may not be guilty of rape upon his wife, yet if he uses force or violence to exercise his right to intercourse, he may be guilty of assault. Also a woman cannot be guilty of committing rape upon a man because according to Section 357 of the Criminal Code, the offence can only be committed upon a woman or girl. However, this is not the position under the Violence Against Persons Act and the Criminal Laws of Lagos State.

In looking at the causes of rape which has been explained above, could it be said that the perpetrators have a valid reason for committing such a serious crime against a fellow human being?

Rape affects the victim psychologically. Most victims become scared, can't eat or sleep after such an awful experience because the event replays in their head and this is why some victims end up killing themselves.

Rape and defilement are two separate terms even though both are provided for in the Nigerian Law. The offence of rape is committed when it has to do with a person who is at the age of 13 or above, while the offence of defilement has to do with a person who is below the age of 13. Even though consent was obtained from a child who is below the age of 13, the perpetrator would be convicted of the offence of defilement which is unlike rape, where consent is said to be obtained and the perpetrator would not be convicted of the offence of rape.

In the case of *Lucky v State*<sup>89</sup>, the appellant raped the prosecutrix, an 11 year old girl and was therefore arraigned in the High Court of Delta State on a one-count charge of rape punishable under Section 358 of the Criminal Code, Cap. C21, Volume 1, Laws of Delta State. In his defence, the appellant raised the defence of alibi and further stated that the prosecutrix gave her consent. The appellant was convicted of rape.

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<sup>89</sup> (2016) All FWLR 570

## CHAPTER THREE

### LAWS ON RAPE

#### 3.1 Introduction

The legal definition of the offence of rape has been given in chapter two. In a nutshell, rape is non-consensual sexual intercourse. When a man has sex with a woman without her consent ( in Nigeria- apart from in the Federal Capital Territory, Abuja, Anambra, Bauchi, Ekiti, Enugu Kaduna and Oyo, only women are capable of being raped).

The Laws on rape which would be considered are the Criminal Code Act, Child Rights Act, Criminal Laws of Lagos State, Penal Code and the Violence Against Persons (Prohibition) Act. The first four laws have the same definition of rape but the fifth expanded the definition of rape. The Violence Against Persons (Prohibition) Act includes instruments which would be used for rape and the offence of rape does not only occur when the vagina is penetrated but also when the anus or mouth is penetrated.<sup>90</sup>

In this chapter, our focus is on 5 specific Laws that deal with rape:

#### 3.2 The Criminal Code Act (CCA)

Under the Criminal Code, rape is where any person has sexual intercourse with a woman or girl without her consent, or incorrectly obtained consent. Consent can be incorrectly obtained where it is obtained:

- a) by force/ threat/ intimidation
- b) by means of false and fraudulent representation as to the nature of the act

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<sup>90</sup> Section 1 of the Violence Against Persons (Prohibition) Act

c) by a person impersonating a married woman's husband in order to have sex.<sup>91</sup>

A male under the age of 12 years is presumed to be incapable of having carnal knowledge.<sup>92</sup> Presumption is only a legal inference or assumption that a fact exists based on the known or proven existence of some other facts or group of facts, it also shifts the burden of production of persuasion to the opposing party who may then attempt to overcome the presumption by adducing other evidence, that means, in the case of a child under 12 years whom the Law presumes cannot commit the offence of rape, if evidence is available that though he is under 12, he possesses the capability to commit the offence of rape, necessary legal consequence would follow.<sup>93</sup>

However, a child under the age of 7 years cannot commit any offence in the eye of the law.<sup>94</sup> The presumption here is irrefutable. In the case of rape, the Law demands clear evidence of absence of consent, because of this, most investigators think they have come to the end of investigation as soon as evidence of any injury is seen on the victim. This cannot be correct. It has been observed with respect to rape that because of the Law demands clear evidence of a lack of consent that injuries become an important aspect of the evidence. It must be noted that even where there are injuries, they cannot alone prove lack of consent. Sec can be indifferent to physical hurt, accompanied by dangerous squeezing of the neck at the risk of suffocation. A girl may suffer 'love bites' or bruises that must not be allowed to be put forward in sole support of a rape charge.

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<sup>91</sup> Section 357 of the Criminal Code Act, Cap C38, Laws of the Federation of Nigeria, 2004.

<sup>92</sup> Section 30 of the Criminal Code Act, Cap C38, Laws of the Federation of Nigeria, 2004.

<sup>93</sup> Children and Young Person's Act, Laws of the Federation of Nigeria, 2004.

<sup>94</sup> *Ibid* (no 92)

The investigator must look further for additional evidence apart from injuries suffered by the victim. However, if injuries suffered by the victim are outside the limit of “sex play”, serious presumption is created that the victim was raped.

Sexual intercourse with under ages girls or people with unsound mind is the offence of defilement, and so technically a person could be charged for rape and defilement.

According to Section 357 of the Criminal Code, any person who commits the offence of rape is liable to imprisonment for life, with or without caning<sup>95</sup>. Any person who attempts to commit the offence of rape is guilty of a felony, and is liable to imprisonment for 14years with or without caning. A person who has an unlawful carnal knowledge of a girl under the age of 13years is guilty of a felony, and is liable to imprisonment for life, with or without caning.<sup>96</sup> Whoever defiles a girl under 16 and above 13 and who defiles idiots is guilty of a misdemeanour, and is liable to imprisonment for 2 years with or without caning upon corroborated testimony of one witness.<sup>97</sup>

### **3.3 The Penal Code (PC)**

Under the Penal Code, Section 282 exempts perpetrators of rape within marriage from punishment. Spousal rape is inconceivable and a husband cannot be charged with marital rape. Once the marriage is subsisting and the wife has attained puberty then any sexual intercourse with her is never rape..

Section 282 of the Penal Code which is applicable in the Northern part of Nigeria defines rape as follows;

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<sup>95</sup> Section 359 of the Criminal Code, 2004

<sup>96</sup> Section 218 of the Criminal Code, 2004

<sup>97</sup> Section 221 of the Criminal Code, 2004

“ 1) A man is said to commit rape who...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 14 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

The definition presumes only penetration of a vagina by a penis and discriminates against women and girls who may have been raped by use of a foreign object or who have been penetrated orally or anally by the penis. It also discriminates against men and boys who may have been raped by women, girls or even fellow men.

The definition in Section 282 is not gender neutral and is based on the concept that only women can be raped.

Further, under the Penal Code, sex with a girl under 14 years of age or who is of unsound mind is rape irrespective of whether there is consent.

According to Section 283 Penal Code, whoever commits rape shall be punished with imprisonment for life or for any less term and shall also be liable to fine.

### **3.4 The Criminal Laws of Lagos State (CLL) :**

This law is only applicable in Lagos State. Under the Criminal Laws of Lagos State, rape is when a man has sexual intercourse with a woman or girl without her consent, or with incorrectly obtained where it is obtained:

- a) by force, impersonation, threat or intimidation of any kind
- b) by means of false and fraudulent representation as to the nature of the act.<sup>98</sup>

As with the Penal Code, the Criminal Laws of Lagos State explicitly states that sexual intercourse by a man with his wife cannot be unlawful, and therefore a man cannot rape his wife.

It is important to note that in all three Laws; rape can only occur when the vagina of the woman is penetrated. However, this does not mean that anal unlawful sexual intercourse is allowed. This is a crime, and is covered under different descriptions in each legislation. The penalty for rape across all the Laws is life imprisonment, however, this is not mandatory sentence in all of them.<sup>99</sup>

### **3.5 Child Rights Act (CRA)**

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<sup>98</sup> Section 260 of the Criminal Laws of Lagos State, C17

<sup>99</sup> Section 261 of the Criminal Laws of Lagos State

The Child Rights Act provides that sex with a child is rape, and anyone who has sexual intercourse with a child is liable to imprisonment for life upon conviction.<sup>100</sup>

According to the Child Rights Act, it is immaterial whether the perpetrator believed that the child who he raped is or above the age of 18 years or the child consented.

In the case of *Adonike v State*,<sup>101</sup> the appellant raped a girl child of 5 years and was convicted under the Criminal Laws of Delta State for defilement. However, in proving the rape of a child, the testimony of the child needs to be corroborated. In the instant case, the evidence given by the prosecutrix was corroborated by evidence of other witnesses and the medical report.

Also in the case of *Lucky v State*,<sup>102</sup> the appellant raped the prosecutrix, an 11 year old girl and was therefore arraigned in the High Court of Delta State on a one-count charge of rape punishable under Section 358 of the Criminal Code, Cap. C21, volume 1, Laws of Delta State. In his defence, the appellant raised the defence of alibi and further that the prosecutrix gave her consent. The appellant was convicted of rape

It is not a rule of law, but one of practice that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix. The legal principle in respect of the offence of rape is that corroboration is evidence or pieces of evidence tending to show that the story of the prosecutrix that the accused raped the victim is true. Corroboration need not be direct that the accused committed the offence charged. It need not amount to a confirmation of the whole account given by the prosecutrix. However, it must be completely credible evidence which corroborates the prosecutrix's evidence in some aspect material to the charge.

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<sup>100</sup> Section 31 of the Child Rights Act, 2003

<sup>101</sup> (2015) All FWLR (pt 772) 1631-1840

<sup>102</sup> (2016) (pt 857) 419-616

### **3.6 The Violence Against Persons (Prohibition) Act (VAPPA):**

The Violence Against Persons Prohibition Act defines rape as when a person intentionally penetrates the vagina, anus or mouth of another person with any other part of his/her body or anything else without consent, or with incorrectly obtained consent. Consent can be incorrectly obtained where it is obtained:

- i) by force/ threats/ intimidation
- ii) by means of false and fraudulent representation as to the nature of the act
- iii) by the use of substance capable of taking away the will of that person
- iv) by a person impersonating a married woman's husband in order to have sex<sup>103</sup>

The Violence Against Persons Prohibition Act is a very progressive piece of legislation. It contains a wider scope of definition of rape. Unfortunately, the Law is only applicable in the Federal Capital Territory, Abuja. It does not apply in other States of the Federation.

A person convicted of the offence of rape is liable to imprisonment for life. However, if the offender is less than 14 years of age, he would be liable to maximum of 14 years imprisonment. Where it is a rape by a group of persons, the offenders would be liable to a minimum of 20 years imprisonment without an option of fine.<sup>104</sup>

In 2015, the Nigerian National Assembly passed the Violence Against Persons Prohibition Act also known as the VAPP Act.

This Law is a very important piece of legislation for a number of reasons which will be discussed below. However, before we go into the discussion there is one very important piece of

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<sup>103</sup> Section 1(1) of the Violence Against Persons Prohibition Act

<sup>104</sup> Section 1(2) of the Violence Against Persons Prohibition Act

information that needs to be known. The Violence Against Persons Prohibition Act is only applicable in the Federal Capital Territory, Abuja. This is because even though it was made by the National Assembly, it was only made applicable in the Federal Capital Territory, and only the High Court of the Federal Capital Territory had jurisdiction over crimes created in the Violence Against Persons Prohibition Act. However, a number of States around the country have now passed their own versions of the Law applicable in the respective States. These States are Anambra, Bauchi, Ekiti, Kaduna and Oyo.

How exactly has this Law revolutionised the offence of rape in Nigeria?<sup>105</sup>

- a. Women and men can be raped : Prior to this Law, only women could be 'raped' in the legal definition of the word. However, this Law now provides that men can be raped. The Violence Against Persons Prohibition Act is the first piece of legislation in Nigeria which recognises that men are capable of being raped.<sup>106</sup> All previous Laws only define the offence in relation to women. In the definition of rape in other Criminal statutes, reference is made to penetration of the vagina. Since only women have vaginas, only women can be raped. The Violence Against Persons (Prohibition) Act acknowledging that men can be raped is therefore very revolutionary. In other rape Laws, only vagina penetration could be classified as 'rape'. This Law states that unlawful anal or oral sex can be rape. This is the first piece of legislation to classify both acts as rape and not sexual assault.
- b. Instrument of rape: The Laws states that the instrument of rape does not have to be penis only, it can be another part of the body e.g, hand, or an object which dildo or

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<sup>105</sup> ' Five Ways the Violence Against Persons (Prohibition) Act has changed the Offence of Rape in Nigeria', Law Padi, <<https://lawpadi.com>> 26 January, 2021

<sup>106</sup> Section 1(1) (a) of the Violence Against Persons Prohibition Act

- even objects like pens, pencils etc. The other Laws that deal with rape specify that a penis must have vagina penetration for it to be the offence of rape. Therefore we can see that the Violence Against Persons Prohibition Act is focusing on the violation of the person's body when reviewing the act of rape and not a strict view of the fact that for it to be rape there must be penetration by a male genital.
- c. Minimum penalty for rape: In other Legislations like Criminal\_Code, the law provides for a maximum penalty, which means that the judge had the discretion to sentence an offender to less than the maximum penalty. The Violence Against Persons Prohibition Act takes away this discretion to some extent, it states that once the crime of rape is proven, the offender must be sentenced to a minimum penalty of 12 years for rape. However, the judge still has discretion to sentence the offender to more than 12 years
  - d. Financial compensation for victims: The Law recognises the rights of the victim to financial compensation. Financial compensation for victims welcome trend. It helps the victim in rebuilding their life after an act of rape. For example, the victim might need to go for therapy etc after being raped. This would normally have been paid by the victim, but no the offender can be made to pay for this.
  - e. Sex offenders register: The Law also provides that rapist when convicted will have their details entered into a sex offenders register. A sex offender's register is a system designed to allow government authorities to keep track of the residence and activities of sex offenders, including those who have completed their criminal sentences. The National Agency for the Prohibition of Trafficking in Persons (NAPTIP) has created an offender register and can be accessed at the Nigeria Sexual Offenders Database

As can be seen from the above points, the Violence Against Persons Prohibition Act is indeed revolutionary as regards the Law of rape, and we hope the agencies of government charged with the responsibility of implementing the Law will do so properly.

### **3.7. Summary**

In looking at the different Laws which deals with rape in Nigeria, they all provide that only a woman can be raped, this provision differs from the Violence Against Persons Prohibition Act which states that a man could also be raped. It is not only a penis that could be used in raping, objects like dildos, pens and pencils could also be used. By a careful consideration of the Violence Against Persons Prohibition Act, it could be said that a woman can also rape a woman, she could do this not only through the vagina but anus or mouth by using objects, tongues or fingers. Also a man can also rape man through the anus or mouth by using his penis or objects and would be convicted of there is no consent. The Violence Against Persons Prohibition Act is an expansion on the Laws of rape, so men could be tried and prosecuted for the offence of rape although the it is only applicable in the States which have enacted this law.

The Laws explained above provides a penalty for the offender and they apply to different jurisdictions. The Criminal Code is applicable to Nigeria as a whole; the *Penal Code* is applicable to the Northern States; the Child Rights Act is applicable to children/minors and every state has enacted this Law; the Criminal Laws of Lagos State is applicable to only Lagos State; while the Violence Against Persons Prohibition Act is applicable in Abuja, Anambra, Bauchi, Ekiti, Enugu, Kaduna and Oyo. The Violence Against Persons Prohibition Act has revolutionised the offence of rape in Nigeria.

Under these different Laws, spousal rape is inconceivable and a husband cannot be charged with the marital rape.<sup>107</sup> Once the marriage is subsisting and the wife has attained the age of puberty, then any sexual intercourse with her is never rape.

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<sup>107</sup> Section 282 of the Penal Code, Cap 89, Laws of Northern Nigeria, 1963

## CHAPTER FOUR

### CONSENT

#### 4.1 Introduction

In my opinion, consent in rape means approval given by the victim to the perpetrator to have sexual intercourse with the victim. Consent could be used as a defense when charged with the offence of rape. There are different types of consent which would be discussed subsequently and they are, explicit consent, implicit consent and opt-out consent.

Consent is primarily a legal concept that has its origin in three different doctrines of law. The first is informed consent, legal capacity to consent and the third aspect of concept arises from criminal law, and covers amongst other things 'victimless crimes'<sup>108</sup>.

There is actually no single legal definition of consent. Each state sets its own definition either in law or through court cases. In looking at consent, the necessary question would be whether the person has the legal capacity to consent? Where consent is given and the person does not have the legal capacity to consent, the perpetrator would be convicted of the offence of rape. Consent in such scenario would be immaterial.

In the case of *Charles Ekpo and Another v The State*,<sup>109</sup> the defendant forcibly had sexual intercourse with the prosecutrix but the prosecutrix recalled by leave after the last prosecution witness recanted her testimony that she consented, that the first defendant had previously given her money for that purpose and that was why she went to his house in her sleeping gown, and that the second defendant too gave her money. It was held that in a case of rape, the person

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<sup>108</sup> Ewulum et al, 'Rising Cases of Rape offences in Nigeria: New Measures to the Rescue', <<https://www.google.com>> 26 January, 2021

<sup>109</sup> (2005) 5 NWLR (pt 917) 57

ravished is a competent witness and her evidence is always vital in deciding the most important element in the case, namely, whether sexual intercourse was by force and without her consent, and the evidence of the prosecutrix that she consented to having sexual intercourse with the defendant ought to have led to the irresistible inclusion that the prosecution had failed to establish absence of consent.

During a sexual assault intercourse, can consent be withdrawn? My answer is in the positive. A withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become nonconsensual sexual intercourse.

In establishment of rape, sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. The slightest penetration will be sufficient to constitute the act of sexual intercourse<sup>110</sup>. It is not necessary to prove an injury or rupture of the hymen to constitute the crime of rape. Penetration however slight is sufficient. An accused person may rely on the following defence to exonerate himself/herself in a charge of rape;

- I) Existence of consent
- II) Lack of penetration
- III) Marriage
- IV) Insanity

#### **4.2 Definition of Consent:**

According to the Blacks Law Dictionary, consent is an agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person; legally effective assent.

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<sup>110</sup> Section 260 (4) of the Criminal Laws of Lagos State

In the case of *Ahamefule v Imperial Medical Centre*<sup>111</sup>, consent was defined by the court thus: consent in legal parlance involves an element of volition, a voluntary agreement which is the deliberate and free act of the mind.

Under the Nigerian law, 'consent' is not clearly defined in the Criminal Code or Penal Code. It presupposes that the meaning of the term 'consent' can be found elsewhere outside the ambit of the Criminal Code. Under the Sexual Offences Act, Section 74<sup>112</sup> seeks to define consent as a situation where the person offers his agreement by choice and at the same time has the freedom and capacity to make that choice. It follows that in prosecuting such a matter, the prosecutor must ensure that the complainant had the capacity to make a choice about whether or not to take part in the sexual activity at the time in question and secondly, establishment that the choice was made freely and not in any way constrained or obtained by coercion. Where these two are satisfactorily established, then it can be said that it is consensual sex.

Consent is one necessary factor which is needed in establishing rape. The absence of consent to a sexual intercourse upon proof would make the perpetrator guilty of the offence of rape. Rape is committed where sexual intercourse takes place with a female against her will, without her consent, by force, intimidation, threats, or coercion or with her consent when the consent was procured by deception.

In the case of *DPP v Morgan*<sup>113</sup>, the trial judge directed that by force it does not mean there has to be a fight or blows that have to be inflicted. It means that there has to be some violence used

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<sup>111</sup> (2005) 5 NWLR (pt 917) 57

<sup>112</sup> Sexual Offences Act, 2003 of the UK

<sup>113</sup> (1976) AC 182

against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is overborne.

The inevitability of lack of consent for culpability in a rape charge was underscored by the Supreme court in *Kazeem Popoola v The State*<sup>114</sup>. In that case, on 29<sup>th</sup> January 2004 at about noon, the prosecutrix was urinating at the school farm of Abeokuta Grammar School, Abeokuta, Ogun State when the appellant accosted her and threatened to report her to the school authority on the ground that students had been barred from defeating in the school farm. The prosecutrix pleaded with him but the appellant demanded for money which the prosecutrix said she did not have and in the process of further threat of reporting the prosecutrix, the appellant grabbed her, dragged her further into the farm, overpowered her, and raped her before fleeing the scene.

The court held that it is an essential ingredient of the offence that the intercourse must be without the woman's consent. In other words, a man will be said to have committed rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. Even when consent is obtained by force or 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, the offence can be committed.

Rape is an act of sexual violation which takes place without the consent of the victim. Consent is the central issue in offence because the lack of consent is the crux of this criminal behaviour. It is one individual forcing another to undergo an experience against her will. It is a violation of the victim's independence and liberty to choose how and with whom she would want to share any kind of erotic experience. There has been a distinction over the years between consensual and

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<sup>114</sup> (2013) 17 NWLR (pt 13821 – 220)

nonconsensual sex. That distinction highlights the absence or presence of consent which demarcates, broadly and imperfectly, sex that should be regarded as criminal from that which should not.

Consent sufficient to obliterate the offence of rape must be freely given, may be withdrawn at any time and cannot be obtained in situations involving force, fraud or intimidation. Thus, for the prosecution to succeed on a charge of rape, he must prove that the accused had carnal knowledge of a woman or girl without her consent.

The question always is: Did the woman or girl willingly agree to the sexual intercourse at the time it took place?

To have carnal knowledge of a sleeping girl amounts to rape because while asleep, her consent would not have obtained. In the case of *Idris Rabiu v The State*, the court defined rape as an act of sexual intercourse committed when the woman's resistance is overcome by force or fear or under other prohibitive conditions. The underlying theme from the foregoing is that consent is central to the nature of the offence of rape. Where there is consent from the woman or girl to the sexual intercourse, then the charge of rape must fail. But where there is absence of consent, and there is penetration of the vagina, however slight the penetration, the offence of rape is established. To succeed therefore the prosecution must prove lack of consent on the part of the woman or girl.

### **4.3 Types of Consent**

The three types of consent are;

- I) Explicit consent: it is referred to as that which the individual has informed knowledge about what information he or she is giving. The victim has the option to give or not to give consent required. It is the type of consent required in a sexual matter. It can also

be taken as informed consent. It is offered of the person's own freewill, without being obtained by fraud, coercion, violence or threat of violence.

- II) Implicit consent: This is consent that is implied from your conduct. It suffices to say that a person reads from your conduct the fact that you said yes or no. This kind of consent is the one that is operational in Nigeria especially when sex is involved. This is so because the general opinion is that a woman's 'no' means 'yes'. In other words, it has been argued that a woman's 'no' is indirectly a 'yes' and that from her conduct while saying 'no' she desires the sexual act. This type of consent is wrong and cannot be used to measure consent in sexual matters.
- III) Opt out consent: it entails that the person in question has only one option and that is to withdraw consent. So when faced with the 'opt out' consent, the person is expected to withdraw consent and not to give it. Simply put, in 'opt out' consent, the individual is expected to withdraw consent only. From the analysis, it is imperative to hold that 'explicit' consent should be the one required in any sexual offence as the other two types of consent cannot justify the offence of rape or in any event any other sexual offence.

#### **4.4 The Legal Role of Consent:**

Consent occurs when the person voluntarily agrees to the proposal or desires of another. For example, a person with a mental disorder, a low mental age, or under the legal age of sexual consent in any willingly engage in a sexual act that still fails to meet the legal threshold for consent as defined by the applicable law.

Consent is an agreement between people to engage in a sexual activity. Consent means freely choosing to say 'yes' to a sexual activity. It is needed for any kind of sexual activity, from touching, kissing to intercourse.

Consent cannot be deemed given by individuals who are underage, intoxicated or incapacitated by drugs or alcohol or asleep or unconscious.

In the case of *Idris Rabiu v The State*,<sup>115</sup> it was stated that to have carnal knowledge with a sleeping girl amounted to rape because her consent could not be obtained.

To determine the legal role of consent means that consent was obtained from the victim without duress, fraud and the person must be someone who is capable of giving consent. Unequal power dynamics, such as engaging in sexual activity with an employee or student, also means that consent cannot be freely given.

When engaging in sexual activity, consent is about communication. It should happen every time for every type of activity. Consenting to one activity, one time does not mean someone gives consent for other activities or for the same activity on other occasions. For example, agreeing to kiss someone does not give that person permission to remove your clothes. It's important to discuss boundaries and expectations with your partner prior to engaging in any sexual behaviour.

Consent plays an important role in determining whether an act is legally considered a crime. There are three main ways that states analyse consent in relation to sexual acts<sup>116</sup>:

Affirmative consent: Did the person express over the actions or words indicating agreement for sexual acts? It must be informed, voluntary, and active, meaning that, through the demonstration

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<sup>115</sup> *Ibid* (no 114)

<sup>116</sup> 'Legal Role of Consent', Rainn, <<https://www.rainn.org>> 29 January, 20219

of clear words or actions, a person has indicated permission to engage in mutually agreed upon sexual activity.

- a. Freely given consent: Was the consent offered of the person's own free will, without being induced by fraud, coercion, violence, or threat of violence? Where the consent was not freely given, the perpetrator would be guilty of rape.
- b. Capacity to consent: Did the individual have the capacity or legal ability to consent? If the answer is in the negative then the perpetrator would be convicted of rape. This would be discussed extensively below.

#### **4.5 Capacity to Consent**

A person's capacity, or ability, to legally consent to sexual activity can be based on a number of factors which often vary from state to state. In a criminal investigation, a state may use these factors to determine if a person who engaged in sexual activity had the capacity to consent. If not, the state may be able to charge the perpetrator with a crime. Examples of some factors that may contribute to someone's capacity to consent include:

- i. Age: Is the person at or above the age of consent for that state? Does the age difference between the perpetrator and victim affect the age of consent in that state? A person who has sexual intercourse with a child is liable on conviction to imprisonment for life. It is immaterial whether the perpetrator believed to person to be of or above the age of 18 years or the sexual intercourse was with the consent of the child.<sup>117</sup> This is to say that under the Child Rights Act, the age of consenting to sexual intercourse is 18 and above.

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<sup>117</sup> Section 31 of the Child Rights Act

Under the Criminal Code, a person who attempts to have unlawful carnal knowledge of a girl being below 16 years of age cannot be convicted of rape or defilement upon the uncorroborated testimony of one witness.<sup>118</sup> Also, according to Section 30 of the Criminal Code, a male person under the age of 12 years is presumed incapable of having carnal knowledge. Therefore no evidence is allowed to show that a boy is in fact physically fit and capable of committing the act. However, where a boy under the age of 12 years but above the age of 7 years, aids or abets a male in having sexual intercourse of a female, he can be liable for rape by virtue of Section 7(b) of the Criminal Code.

In the case of *Simon Okoyomon v The State*,<sup>119</sup> the defendant was charged with and convicted of rape contrary to *Section 299* of the Criminal Code of the Western State now *Section 385* of the Criminal Code. In that case, the prosecutrix, a girl between 11 and 12 years of age, testified that falling her down in the bush the defendant lay on her forcibly inserted his penis into her vagina. The medical evidence was that her hymen had been torn and she was suffering from venereal disease, and that the doctor had examined the defendant to see whether he was capable of having sexual intercourse. The eye witness evidence was that the defendant was on top of the prosecutrix apparently having carnal knowledge of her.

It was held that there was no sufficient evidence to convict the defendant of the offence of rape and as the prosecution failed to establish satisfactorily that there had been penetration as required by *Section 299* of the Criminal Code now *Section 385* of the Criminal Code, the proper offence of which the defendant can be convicted is attempted rape and not rape.

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<sup>118</sup> Section 221 of the Criminal Code, Cap C38, Laws of the Federation of Nigeria, 2004.

<sup>119</sup> (1973) ANLR 14

A girl of below 14 years of age is legally presumed to be incapable of lawfully consenting to sexual intercourse.<sup>120</sup> Even where she actually consented it is deemed to be statutory rape. In *The State v Adio Agiri*<sup>121</sup>, the victim, a girl of 9 years old, testified that the accused stuffed her mouth with a piece of clothing and forcibly had connection with her. The court held that the prosecutrix, a fragile and timid girl of 9 was incapable of determining when she was confronted by the accused hence she started to cry. The court stated that : “ The law is quite certain on this point that a girl of tender years who submitted to an adult whom she could not obviously resist cannot be regarded as giving her consent. The accused was convicted of rape and sentenced to 10 years imprisonment with hard labour.

Under the English Theft Act, 1968, the word 'doli incapax' is retained and, it is conclusively presumed under that Act that a child under the age of 10 years cannot be guilty of an offence.<sup>122</sup> Such persons will obviously lack the capacity to form, construct, premeditate, evaluate and effectuate the mental and physical elements of crime. This presumption cannot be rebutted by any evidence to the contrary.

Can the presumption that a male under the age of 12 years is incapable of having carnal knowledge? Does this mean that such a person cannot be charged for rape even if in fact and indeed he actually raped a girl? According to Okonkwo, it follows from this that he cannot be guilty of the offence of rape or attempted rape. The learned author predicated his position on the position of the Criminal Code which is to the effect that if on any trial for an offence under

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<sup>120</sup> *The State v Audu* (1972) NSCC 436

<sup>121</sup> (1972) UILR (pt 4) 503

<sup>122</sup> The same is the position under Section 50 (a) of the Penal Code and Section 30 of the Criminal Code. Under these codes the age is 7 years. However, under Section 50 (c) of the Penal Code and proviso to Section 30 of the Criminal Code a child under 12 years may be criminally responsible if it is shown that such a child has developed a mischievous or serious disposition.

Section 221 of the Criminal Code, the facts proved in evidence warrant a conviction for an indecent assault and not the offence where which the accused is charged, the accused may be convicted of indecent assault although he was not charged with that offence. The implication of this is that a male under 12 years of age is incapable of committing rape under the Nigerian law. If this theory is accepted, it will mean that if it is alleged that a boy below 12 years committed rape, as soon as it is established that a boy is below 12 years, the case may be dismissed for lack of jurisdiction, even if he has attained puberty. He may however be punished for indecent assault.

There is no doubt that a boy of 11 years can sustain an erection and therefore can penetrate a small girl to have unlawful carnal knowledge. This is more so possible in view of the rapidity with children growth and developing physiologically. The absence of word like “cannot” or “shall” or “is not” in the section establishing the presumption is suggestive of the fact that it can be disproven. Evidence that the accused has reached his full state of puberty notwithstanding his age coupled with definite evidence of penetration may sway the opinion that of the court against the accused and permit a rebuttal of the presumption.

However, under the Penal Code, there is no presumption that a male person under 12 years old is presumed incapable of having carnal knowledge. There is therefore nothing to stop the prosecution from charging a child over 7 years of age for rape if it can be shown that he has attained a sufficient maturity of understanding to judge the nature and consequence of his act.<sup>123</sup> More circumspection is needed by the courts in interpreting the code in this respect otherwise

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<sup>123</sup> Section of the Penal Code Act, Cap 89, Laws of Northern Nigeria, 1963. This section provides that no act is an offence which is done by a child under 7 years of age or a child above 7 years of age, but under 12 years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act. This a child of 7 years and 12 years is protected from criminal prosecution where it is shown that such a child who has been accused of a criminal act, such as rape, had not reached a standard of maturity sufficient to justify a court convicting him.

deviants will hide under the nebulous provision of the law to perpetrate and sustain crime. It seems an entirely indefensible position to make this presumption irrefutable.

- a. Developmental disability: It's a condition due to impairment in physical learning, language, or behaviour areas. These conditions begin during the developmental period, may impact day-to-day functioning, and usually last through a person's lifetime. The question here is, does the person have a developmental disability or other form of mental incapacitation, such as traumatic brain injury? Individuals with mental impairments related illness or disability can consent to sex but deserve special consideration. The individual must have knowledge, rationality, and voluntariness with respect to the decision to engage in specific sexual activity. If you aren't sure, it's best to wait until you are.
- b. Intoxication: It is the term used to describe any change in perception, mood, thinking processes and motor skills that results from the effect of a drug or alcohol on our central nervous system. Was the person intoxicated? Different states have different definitions of intoxication, and in some states it matters whether you voluntarily became intoxicated. Someone who is clearly incapacitated is by definition unable to give consent.<sup>124</sup>

Some factors that should be considered when determining someone's ability to consent can include:

- a) Is this person coherent?
- b) Does this person have a full grasp of what is happening around them
- c) Is this person able to communicate clearly?

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<sup>124</sup> *Ibid* (no 116)

If the answer to any of these questions is in the negative, then, the person is not capable of giving consent. These questions could help prevent a situation in which someone engages in a sexual encounter after a night of heavy drinking and had no memory of the act the next day. If one or both parties are drunk, you cannot have consensual sex.

When a complainant becomes intoxicated involuntarily, for instance by being drugged, “courts tend to be very generous in terms of what level of intoxication would be sufficient to amount to incapacity”

- i. Physical disability: It is a physical condition that affects a person’s mobility, physical capacity, or stamina. This can include brain or spinal cord injuries, multiple sclerosis, cerebral palsy, respiratory disorders, epilepsy, hearing and visual impairments etc. Individuals with physical disability can consent but deserve special consideration.
- ii. Mental incapacity: It’s defined as a condition existing at the time of the sex which prevents a person from understanding the nature or consequences of the act of sexual intercourse. Individuals with mental impairments related to illness or disability can still consent to sex but deserve special consideration. The individual must have knowledge, rationality and voluntariness with respect to the decision to engage in specific sexual activity.

However, a person who has an unsound mind will not be able to give consent because he is not in full control of his thinking faculty and is not conscious of what’s going on. He is prevented from understanding the nature or consequences of the act of sexual intercourse and as such a perpetrator would be guilty of rape.

- IV) Relationship of victim/perpetrator: Was the alleged perpetrator in a position of authority, such as a teacher or correctional officer?
- V) Unconsciousness: Was the person sleeping, sedated, strangled, or suffering from physical trauma? If the answer is in the positive, then the perpetrator is guilty of rape because consent to the sexual intercourse was not obtained due to the fact that the victim was unconscious.
- VI) Vulnerable adults: Is the person considered a vulnerable adult, such as an elderly or ill person? Is this adult dependent on others for care? If the answer is in the positive, then the perpetrator would be guilty of rape. In *The State v Masiga*<sup>125</sup>, the respondent was alleged to have had an unlawful sexual intercourse in an uncompleted building with Amina, a girl age 11 who was an imbecile, by luring her with sweets. The medical officer in the medical report stated that there was no bleeding and/or bruises in the vagina of the victim and that her private part was normal. The respondent said he was unable to penetrate Amina's vagina because it was closed. It was held that since there was no penetration, the appellant was guilty of attempted rape.

#### 4.6 Withdrawal of Consent

The question here would be, can consent be withdrawn during sex? The answer is in the positive. Consent to sexual intercourse can be withdrawn at any time<sup>126</sup>. A person does not give up her

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<sup>125</sup> (2018) 8 NWLR (pt 1622) 383 S.C.

<sup>126</sup> Candile Jalili, 'Way too many women believe they can't take back consent during sex', Elite daily, <<https://www.elitedaily.com>> 29 January, 2021

right to end a sexual intercourse at whatever point she chooses. In other words, when a man or woman tells her partner to stop, and he forces her to continue, he is guilty of rape.<sup>127</sup>

Many women have experienced all sorts of sexual assault and harassment, and an alarming number of them have felt powerless in the aftermath. At common law, a woman cannot withdraw her consent after penetration. This is to say that if these women were to start having sex with someone and, halfway through the act, they decided that they would rather not be doing this, they believe they do not reserve the right to revoke their consent by saying they don't wish to continue.

It should be noted that the fact that the accused have had sex previously with the victim is not evidence of consent although it may operate to create doubts in the mind of the judge<sup>128</sup>.

Where a woman does not give consent at the beginning, later decides to consent to sexual intercourse. Can it be said that there is rape? Can consent be withdrawn or given at the middle of sexual intercourse? Can it be said that there is rape in any of the situations? Under the Nigerian law, it is doubtful if rape can be successfully proved in any of the cases because "consent" is not clearly defined in the Criminal Code or Penal Code. However, under the UK's Sexual Offences Act, consent is extensively defined and it amounts to rape. If a man continues sexual intercourse after a woman withdraws her consent or starts a sexual intercourse where there is no consent, not minding the fact that consent is given midway.

An initial consent may be withdrawn in the course of sexual intercourse, and where a man continues sexual intercourse after the initial consent to penetration has been withdrawn, it

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<sup>127</sup> *Ibid*

<sup>128</sup> 'What consent looks like', <<https://www.org>> 2 February, 2021

amounts to rape.<sup>129</sup> This is akin to a trespasser who remains upon premises after his initial welcome had ceased. The question is, however, not withdrawal when the woman asks the man to withdraw, but how quickly must the man desist to avoid prosecution for rape? It is submitted that it is a question of fact whether the accused person withdrew as he should when he was asked to desist, or whether the victim's real objection is not as to intercourse but that the accused person should not ejaculate inside her. Evidence of initial consent may affect the credibility of the prosecutrix.

#### **4.7 Establishment of Rape**

The basic element required in proving rape under the Nigerian law are the following:

- 1) Sexual intercourse or penile penetration
- 2) Intention to have sexual intercourse with the victim;
  - a) Against her will, or
  - b) Without her consent, or reckless disregard for the consent of the victim, or
  - c) With her consent when she is under-aged.<sup>130</sup>

In establishing the offence of rape in Nigeria, the Supreme Court in the case of *Iko v State*<sup>131</sup> stated that: 'Rape' in legal parlance means forcible sexual intercourse with a girl or woman without her giving consent to it. The most important and essential ingredient of the offence is penetration and consent of the victim is a complete defence to the offence.<sup>132</sup>

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<sup>129</sup> *R v Cooper and Schaub* (1994) Criminal LR 531

<sup>130</sup> *Lucky v State* (2016) All FWLR 570-573

<sup>131</sup> (2001) All FWLR (pt 68) 1161

<sup>132</sup> *Ibid*; per Kalgo JSC

- a. Corroboration: The prosecution shall prove penetration and the absence of consent of the prosecutrix before an accused can be convicted of rape. The evidence of rape also requires corroboration.<sup>133</sup> The corroborative evidence necessary to sustain a charge of rape must be cogent, compelling and unequivocal as to guilt. The nature of the corroborative evidence varies from case to case.<sup>134</sup>

Corroborative evidence maybe derived from the confessional statement of the accused, medical report, the testimony of other prosecution witnesses, etc<sup>135</sup> Before a judge could rely on a piece of evidence as corroborative of another, a judge must look at the evidence as a whole.

In *Alhaji Yakubu Sanni v The State*,<sup>136</sup> the prosecutrix testified that the appellant raped her and that as a result she bled from her vagina; that she suffered some bruises to her private part, and that she wiped the blood with her wrapper. The doctor who examined her however testified that he saw no signs of bruises or bleeding in the private part of the prosecutrix which in fact admitted a finger quite freely. He stated that he saw a whitish discharge coming out of the private part which could be due to infection. He testified that it was impossible for him to conclude that the prosecutrix was raped. The Court of Appeal held that the case of the prosecution was filled with contradictions and gaps and the prosecution did not tender the part of the alleged victim which the appellant allegedly kept, the five naira note the appellant was said to have given her,

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<sup>133</sup> *Yari Zaria N.A* (1967) NNLR 85

<sup>134</sup> *Hamba Ukershima v The State* (2003) NWLR (pt 137) 1117

<sup>135</sup> *Habibu Musa v The State* (2013) 9 NWLR (pt 1359) 214

<sup>136</sup> (1993) 4 NWLR (pt 285) 99

and the blood stained wrapper. The court held therefore that all the prosecution achieved was to prove suspicion and that suspicion cannot give evidence the quality of corroborative evidence.<sup>137</sup>

In the case of *Raymond. Igboanugo v The State*,<sup>138</sup> it was stated that where medical evidence discloses the use of force and the police found the prosecutrix in a distressed condition, lies by the accused about what transpired between him and the prosecutrix may qualify as corroboration.

- c) Carnal knowledge/ penetration: Unlawful carnal knowledge is defined as carnal connection which takes place otherwise than between husband and wife. The Violence Against Persons Prohibition Act, requires that there must be carnal knowledge or connection of or with the victim within the context contemplated by the law before an accused person can be convicted for the offence of rape, and furthermore that carnal knowledge is complete upon penetration of the vagina, anus or mouth.<sup>139</sup>

In *Adeoti v State*<sup>140</sup>, the appellants were arraigned before the High Court for the offence of rape. At the end of trial, the appellants were convicted as charged and sentenced to 3 years imprisonment with option of fine. Aggrieved by the conviction, the appellants appealed to the Court of Appeal which quashed their conviction. The court emphasised that the essential ingredient and most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution must fail.

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<sup>137</sup> *Okafor v C.O.P.* (1965) NMLR 89 @ 90-91

<sup>138</sup> (1992) 3 NWLR (pt 128)259

<sup>139</sup> Section 1 (1) (a) of the Violence Against Persons Prohibition Act

<sup>140</sup> (2009) All FWLR (pt 454) 1450

In *The State v Masiga*<sup>141</sup>, the respondent could not penetrate the prosecutrix because her vagina was closed. The court held that the most important ingredient in establishing rape is penetration and since there was no penetration, the respondent could not be convicted of the offence of rape but that of attempted rape.

Penetration under the Nigerian law must be via the vagina and not the anus or any other part.<sup>142</sup> However under the Violence Against Persons Prohibition Act, it could be through the vagina, anus or mouth.

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. There need not be emission of semen for penetration to constitute rape. The slightest penile penetration is sufficient and there need not be rupture of the female's hymen. It was held in *Simon Okoyomon v The State*<sup>143</sup> that penetration with or without the emission of semen, even when the hymen was not ruptured is sufficient to prove sexual intercourse or unlawful carnal knowledge.

Once there is penetration, it is complete to found a charge of rape and needless for the prosecution to prove injury or rupture of the hymen. Under the Nigerian law, penetration must involve the penis and a woman cannot rape a man but under the Violence Against Persons Prohibition Act, it is the opposite. The question is can a transgender male rape a woman under the Nigerian law? On utilitarian grounds there is little reason why a gender male should not be liable for rape. A woman who undergoes a sex transplant should not be liable for rape. It should therefore be noted that intercourse for purposes of rape under Nigerian law does not include anal

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<sup>141</sup> (2018) 8 NWLR (pt 1622) 383 S.C.

<sup>142</sup> *Iko v State* (no 17)

<sup>143</sup> (1973) 1 S.C. 21

or oral penetration, fellatio or cunnilingus. However, under the Violence Against Persons Prohibition Act, a transgender male could rape a woman or even a man because the act of rape is not only done through the penile penetration but could be done orally or anally. Penetration with the finger or with any other object other than the penis is still sexual intercourse.

Also a husband cannot rape his wife in Nigeria. Under the Nigerian law, a husband cannot rape his wife because of the fact of marriage implies consent to sexual intercourse. But this implied consent could be revoke by an order of court or by a separation agreement.

d) Consent:

Rape is committed where sexual intercourse takes place with a female/male against his/her consent, by force, intimidation, threats, or coercion or with her consent when the consent was procured by deception.

The prosecution must prove that the accused had carnal knowledge of or sexual intercourse with the victim without consent.

Consent is not real if it is obtained by force. This is also the case, where consent is obtained by fear of harm like where the victim is in the hands of a person who is most likely to harm her. The fact that the victim did not scream or attempt to escape does not imply consent.

Consent given under a mistake as to the nature of the act or as to the identity of the person is not real consent. It is rape to have sexual intercourse with or have carnal knowledge of a woman forcibly and against her will.<sup>144</sup> This requirement places emphasis on lack of consent and not on the use of force. Where the victim is a prostitute and had consented on previous occasion,

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<sup>144</sup> Section 357 of the Criminal Code

consent is still needed for subsequent sexual intercourse. Where a prostitute does not consent, it would be rape.

In *Charles Ekpo and Another v State*<sup>145</sup>, the prosecutrix testified that she consented to intercourse because she had been paid. The Supreme Court held that the promiscuous nature of the spree left no alternative than the conclusion that she had not been forced to have sexual intercourse to ground the charge of rape. But in *Posu v The State*<sup>146</sup>, the evidence of PW1 and PW2 overwhelmingly showed that the appellant forcibly had carnal knowledge of PW2 after slapping her, falling her, falling her to the ground and then inserting his penis in her vagina while she was held down by the second accused person. The medical evidence indicated bruises on her thighs, semen in her vulva and tiny bruises at the entrance her vagina. The Supreme Court held that the medical evidence corroborated the testimony of the prosecutrix that she was raped.

Generally absence of consent would amount to the offence of rape but where it has to do with a child even though there is consent, it would still amount to rape. A girl of below 14 years of age is legally presumed to be incapable of lawfully consenting to sexual intercourse. Even where she actually consented it is deemed to be statutory rape. *The State v Audio Agiri*,<sup>147</sup> the victim, a girl aged 9 years, testified that the accused stuffed her mouth with a piece of cloth and forcibly had connection with her. The court stated that: The law is quite certain on this point that a girl of tender years who submitted to an adult whom she could not obviously resist cannot be regarded as giving her consent. The accused was convicted of rape.

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<sup>145</sup> (1976) NSCC 265

<sup>146</sup> (2011) 3 NWLR (pt 1234) 393

<sup>147</sup> (1972) UILR (pt 4) 503

## 4.8 Defences to Rape

According to a bill passed by the senate July 14, 2020, the senate removed the statute of limitation on bringing an action for rape, which means there would be no time limit for when a rape matter can be decided. It seeks to eliminate a time frame for prosecuting cases of sexual abuse by increasing the period from two months to as many years as the victim decides to seek action. However when rape cases are reported timorously, the proximity in time between when the offence is committed and when they are reported helps the police in managing investigation better, because the memories are fresher in the mind of the victim, the crime scene is less contaminated, it is easier to pick up traces in pieces of evidence from the crime scene and forensic investigations are easier and better handled.

In a prosecution for defilement of the girl of an attempt to defiles the girl is commenced within two months after either of the offences are committed if not, the accused can no longer be prosecuted. Time begins to run from the day the offence was committed.

Three main defenses can be used to fight a rape charge: innocence, consent, and insanity.

- a. Innocence: An innocent claim is a fundamental defense for all crimes, including rape. The innocent defense for all crimes, including rape. The innocent defense is simply stating that the defendant did not do the allegedly criminal action. One way an innocent claim can arise is in the context of an alibi defense. With an alibi defense, the defendant asserts that they were at a different location at the time the alleged crime took place. Witnesses can be presented to confirm the defendant's whereabouts at the time in question. Other evidence such surveillance footage, store receipt, and vehicle GPS data, can also be used to support the alibi.

A defendant can also claim that they were missing identified by the victim or that the alleged victim is simply lying, perhaps due to some underlying motive to harm the defendant. If DNA evidence is available, it can help establish with a high degree of certainty whether the defendant was involved or even present at the scene of the alleged crime.

- b) Consent: The focal point of sexual offences is often consent. Sometimes with this defence, the defendant will not deny having sexual relations were consensual. In the consent defence, it is crucial to establish the will of the complainant. If the alleged crime involves a child or a teenager under the age of 16, or a person with mental illness, consent is no defence even if everyone agrees that the activity was consensual. Minors and persons with mental illness cannot give consent.

In *Okoh v Nigerian Army*,<sup>148</sup> the appellant a soldier in the Nigerian Army was alleged to have raped PW1 under the guise of borrowing a torch from her. He was arrested and arraigned before the general court martial in Lagos State on a charge of rape. The appellant in his defence stated that PW1 had consented to the sex and it was not rape. It was held by the Supreme Court that the appellant did not obtain PW1 consent before having sex with her forcefully.

Also in the case of *Charles Ekpo and Another v The State*,<sup>149</sup> it was held that the fact that the prosecutrix consented to having sexual intercourse and there was evidence led to the irresistible conclusion that the prosecution had failed to establish absence of consent.

- c) Insanity: A defendant can also claim that a mental illness has impaired or affected their ability to use moral judgment, preventing them from 'seeing' the

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<sup>148</sup> (2018) All FWLR (pt 963) 1743-1912

<sup>149</sup> *Ibid* (no 145)

act as a crime. In the insanity defence, it must be established that the defendant, at the time the alleged crime took place, suffered from a mental defect and as a result did not understand the nature and consequence of the act, and could not distinguish between right and wrong and therefore cannot be held responsible for the crime.

#### **4.9. Summary**

The obtainment of consent in a sexual intercourse could discharge a perpetrator from being convicted of rape. However the obtainment of consent from a child would not discharge the perpetrator of the offence of rape or defilement.

There are some set of persons who do not possess the legal capacity to consent to sexual intercourse such as children, vulnerable adults, those with mental illness.

The fact that a person consents to sex does not mean that consent has been given for other subsequent sexual activities. Each sexual activity has its own consent and if not obtained legally, it would be deemed as rape except it is a case between a husband and wife. The consent could be withdrawn at anytime even where the victim is a prostitute.

In proving rape, the prosecution has to prove that there was penetration or unlawful carnal knowledge, presence of consent and corroboration of the victims testimony. Penetration, no matter how slight would be deemed as rape. The testimony of the victim must be corroborated not necessarily by an eye witness but could be corroborated by medical evidence

In bringing an action for rape, there is no statute of limitation while in defilement, it must be within two months from the date the offence occurred.

## CHAPTER FIVE:

### RECOMMENDATIONS AND CONCLUSION

#### 5.1 Recommendations

In this project, rape was defined as the absence of consent which states that renders an otherwise consensual sex a crime. The issue of rape in the Nigerian context is not holistic. However, under the Violence Against Persons (Prohibition) Act, it is holistic. With increase in rape cases in Nigeria, the following are my recommendations:

- i. A person found guilty of the offence of rape should be sentenced to death either by hanging, firing squad, lethal injection, electrocution etc.
- ii. Closed trial should be carried out. In Nigeria, rape cases are in open court. With the fear that people will be staring at the victim and also shame, a victim may not be willing to report the matter to the police or other established bodies.
- iii. There is a need for the review of the law on rape in Nigeria to expand the definition and make it an offence for both sexes.
- iv. Consent should be defined in the Criminal Code and other relevant statutes<sup>150</sup> the process of trial of a rape offence should be reviewed and special courts should try offences of rape and where possible, in camera to protect the virtues or dignity of the victims.
- v. The law of both the Federal and state level should work towards ensuring that the Violence Against Persons (Prohibition) Act 2015

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<sup>150</sup> Section 264 of the Criminal Laws of Lagos State defines consent for the purpose of the definition of rape in the law

1. Closed trial
2. Definition of the offence
3. Definition of Consent
4. Special Court for sexual offences nationwide
5. Castration
6. Domestication of the Violence Against Persons (Prohibition) Act, 2015
7. Awareness and campaigns against rape and other forms of sexual abuse
8. It is recommended that a government established centre be put in place to report rape and sexual offences rather the police station.
9. Parents should use the same effort and energy used in raising the female child to raise the male child into becoming a responsible adult in the society. Children should be taught everything they need to know about consent from an early age. The family is a fundamental unit of the society and it will be hard to instill certain values that have not been taught at home.

If these measures are adopted, the rising incidents of rape may be reduced.

## **5.2 Conclusion**

In looking at the offence of rape under the Nigerian authorities, it is worthy of note that the Nigerian authorities at the Federal and State levels have failed to address adequate gender-based violence, including rape. The provisions relating to rape are not adequately enforced in the Nigerian criminal justice system. The provisions which are inadequate are, the Criminal Code Act, Child Rights Act, Penal Code, Criminal Laws of Lagos State. The provisions are in some cases outdated and urgent legislative reforms are needed to ensure conformity with Nigeria's obligations under International human rights law.

Different legal systems coexist in Nigeria; the Penal Code,<sup>151</sup> Criminal Code Act<sup>152</sup>, Criminal Laws of Lagos State<sup>153</sup>, Child Rights Act<sup>154</sup>, Violence Against Persons Prohibition Act<sup>155</sup>.

This write up contains the history of rape<sup>156</sup>, definition<sup>157</sup>, causes, effects, types of rape, difference between rape and defilement<sup>158</sup>, the laws on rape<sup>159</sup>, when consent can be given and withdrawn, establishment of rape and defences<sup>160</sup>.

The laws on rape which were considered in this write up are the Criminal Code Act, Penal Code, Criminal Laws of Lagos State, Child Rights Act and Violence Against Persons Prohibition Act. The first four laws speak in the same manner about the offence of rape. The offence of rape under the Violence Against Persons Prohibition Act could be committed by both male and female.<sup>161</sup> Secondly, the instrument of rape is not only the penis, it could be hand or objects such as pencils or dildos. Lastly, it is not only upon penetration of the vagina that the offence of rape

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<sup>151</sup> Cap 89, Laws of Northern Nigeria, 1963, applicable in Northern states only

<sup>152</sup> CCA (Nigeria), Cap C38, LFN, 2004

<sup>153</sup> Cap C17,2011, applicable in Lagos state only

<sup>154</sup> CRA, 2003, applicable in only 25 states in Nigeria

<sup>155</sup> 2015, applicable in Federal Capital Territory, Abuja. Adopted by Anambra, Bauchi, Enugu, Kaduna and Oyo states.

<sup>156</sup> Genesis 34:1-2

<sup>157</sup> Section 357 of the Criminal Code Act, Section 1(1) (a) of the Violence Against Persons Prohibition Act, Section 282 of the Penal Code and Section 260 of the Criminal Laws of Lagos State

<sup>158</sup> *Adonike v State* (2015) All FWLR (pt 772) 1642-1643

<sup>159</sup> Criminal Code Act, Child Rights Act, Penal Code Act, Criminal Laws of Lagos State, Violence Against Persons Prohibition Act

<sup>160</sup> *Iko v State* (2001) FWLR (pt 68) 1161

<sup>161</sup> Section 1(1) of the Violence Against Persons (Prohibition) Act

is complete. Where the mouth or anus is penetrated without consent, rape could be said to be established<sup>162</sup>.

In establishing rape, there must be proof that there was penetration of the vagina, anus or mouth of the victim. Where there is no penetration or even a slight penetration, the appellant would be guilty of attempted rape. Where consent is said to be established, it would vitiate the offence of rape. However, where it is sexual intercourse with a child and consent was given, it would not vitiate the offence of rape.

The Violence Against Persons (Prohibition) Act and other legislations provide for the offence of rape and its punishment, however, there are differences between these legislations as regards the offence of rape. Under the Violence Against Persons (Prohibition) Act, the offence of rape could be committed by males and female while in other legislations, it could only be committed by males. Also, under the Violence Against Persons (Prohibition) Act, it's not only through penetration of the vagina that the offence of rape could be committed. It could be committed through the anus or mouth<sup>163</sup> but in other legislations, the offence of rape could be committed only through penetration of the vagina<sup>164</sup>.

The Violence Against Persons (Prohibition) Act has revolutionised the offence of rape by being the first legislation in Nigeria which recognises the following:

- I) that men are capable of being raped<sup>165</sup>,

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<sup>162</sup> *Ibid* (a)

<sup>163</sup> *Ibid*

<sup>164</sup> Section 357 of the Criminal Code Act, Section 282 of the Penal Code and Section 269 of the Criminal Laws of Lagos State and section 31 of the Child Rights Act

<sup>165</sup> *Ibid* (no 12)

- II) the instrument of rape doesn't have to be only penis, it can be another part of the body. For example, hand, pencil or an object<sup>166</sup>
- III) in other legislations like the Criminal Code, the law provides for a maximum penalty which the judge had the discretion to sentence an offender to less than the maximum penalty but the Violence Against Persons (Prohibition) Act takes away that discretion to some extent, it states that once the crime of rape is proven, the offender must be sentenced to a minimum penalty of 12 years imprisonment. However the judge still has discretion to sentence the offender to more than 12 years.
- IV) the law recognises the rights of the victim to financial compensation.
- V) Rapists when convicted will have their details entered into a sex offenders register.

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