

**ESTABLISHING THE OFFENCE OF RAPE IN NIGERIA: CHALLENGES AND
PROSPECTS**

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BENIN CITY

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**A PROJECT WORK WRITTEN IN, AND SUBMITTED TO THE FACULTY OF
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REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR IN
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2019/2020 SESSION

CERTIFICATION

I, **Elochukwu Chijioke NWOLISA**, with Matriculation Number **LAW1504361**, do hereby certify that, apart from references made to other people's works, which have been duly acknowledged, this entire project work is the product of my personal research and has neither in whole nor in part been presented elsewhere for any other degree.

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APPROVAL

We the undersigned, certify that this project work was written and completed by **Elochukwu Chijioke NWOLISA**, with Matriculation Number **LAW1504361**, in partial fulfillment of the requirements for the award of the degree of Bachelor of Laws (LL.B)

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DEDICATION

This work is dedicated first to God almighty, the source of all things good, in whom I have found help and then to all the victims of violence especially those who have been molested or raped, in sincere hope that the Law would give them the Justice they deserve.

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AC	Appeal Cases
KB	Kings Bench
QB	Queens Bench
NWLR	Nigerian Weekly Law Report
NNLR	Northern Nigeria Law Report
LPELR	Law Pavilion Electronic Law Report
NMLR.	Nigerian Monthly Law Report
All NLR.	All Nigerian Law Report
WRNLR	Western Region of Nigeria Law Report
SCNLR.	Supreme Court of Nigeria Law Report
VAPP Act	Violence Against Persons (Prohibition) Act

Abstract

Crime generally is a violation of societal rules of behavior as interpreted and expressed by a criminal legal code created by people holding social and political power. At common law, rape is defined as an unlawful sexual intercourse with a woman against her will, with the essential elements of sexual penetration, force and lack of consent. The provisions of the Criminal and the Penal cover the offence of rape generally in the Southern and Northern parts of Nigeria respectively. These codes make provisions for the offence of rape and its establishment (proof) but their provisions only cover the establishment of rape as it concerns the girl child and women basically.

This work takes a close look at the offence of rape, particularly as provided for in the Criminal and Penal codes and Violence Against Persons (Prohibition) Act, 2015 (VAPP Act). It beams a torchlight on their provisions as to the establishment of the offence of rape. The aim of this is to critically examine the challenges inherent with the establishment of the offence of rape as it pertains to corroborating the evidence of the prosecutrix and to proffer solutions to the challenges identified.

This research work utilizes the analytical method of research. It finds that corroboration is a major challenge in establishing the offence of rape in Nigeria. It recommends that the VAPP Act be given a wider coverage in Nigeria; that is states should domesticate the VAPP or make laws similar to the provisions of the VAPP Act as it relates to the crime of rape. Furthermore, this work states that uncorroborated evidence of the Prosecutrix should be allowed by the courts of Nigeria to stand as proper evidence needed for an offender to be brought to book.

CHAPTER ONE

THE CRIME OF RAPE

1.0 Introduction

Rape is one of the oldest crimes in human history. Right from biblical times, the bible gives account of Amnon, King David's son who fell in love with his sister, Tamar and subsequently raped her out of obsession. Consequently, Tamar lived a lonely and sad life; Amnon was murdered by Absalom, her brother¹. Another biblical record was that of Lot who was raped by his two daughters which incident led to the birth of two children – Moab and Benammi which became the fore fathers of the Moabites and the Ammonites.² Rape is a crime in all countries of the world but definition and punishment differ from place to place. It has also been noticed that rape cases are reported (to the authorities) more in the Western world than many other parts of the globe. For example, in Africa and Asia, rape victims usually lack the courage to speak out or report their experiences to the law enforcement agencies due to negative societal attitude prevalent in such climes. Rape thrives in secrecy and in a culture where victims are even blamed for what happens to them, instead of the perpetrators.³ The abhorrence associated with it spans across jurisdictions and different generations. The meaning and method of committing rape appeared to be settled. The word rape originates from the Latin verb *rapere* which means: 'to siege or take by force'. The word originally had no sexual connotation and is still used generically in English language. The history of rape, and the alteration of its meaning is quite complex.⁴

¹ Genesis 34:1-7 Holy Bible (KJV)

² Genesis 19:30-38, Holy Bible (King James Version)

³ Kehinde Adegbite, 'Rape Under the Nigerian Law'

<https://nlii.org/files/RAPE_UNDER_THE_NIGERIAN_LAW_by_Adegbite.pdf> accessed 14 April, 2020.

⁴ Obi Peter Okonkwo, 'Conceptual Differentiation in the Definitions of Law of Rape' (2017) 20 Nig LJ, 91 <<https://heinonline.org/HOL/PDFsearchable?handle=hein.journals/nlj20&collection=journals§ion=8&id=&print=section§ioncount=1&ext=.pdf&nocover=>> accessed 14 April, 2020

In Roman law, rape was classified as a form of *crimenvis* (crime of assault). The definition of rape varies both in different parts of the world and at different times in history. In ancient history, rape was not viewed as a type of assault on the female, rather as a serious property crime against the man to whom she belonged, typically the father or husband. The loss of virginity was a serious matter.⁵

1.1 Rape

Generally, Rape is defined at Common law as unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will. The Black's Law dictionary⁶ defined rape as the 'unlawful sexual activity or intercourse with a person, usually a female, without consent and usually by force or threat of injury. Furthermore, rape was defined as a sexual intercourse between a man and a woman or a girl against the will or consent of the female partner.⁷

The *Criminal Code Act*⁸ which applies to the Southern part of Nigeria, under section 357 defines rape thus:

Any person who has unlawful carnal knowledge⁹ of a woman or a girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature, or, in the case of a married woman, by personating her husband, is guilty of an offence, which is called rape.

⁵ *ibid*

⁶ Black's Law Dictionary, (8th edn 2004)3952

⁷ Kehinde Adegbite, Esq., LL.M., BL, 'Rape Under the Nigerian Law', pg 1

⁸ Cap C38 Laws of Federation of Nigeria

⁹ *Ibid*, s 6 provides that unlawful carnal knowledge means carnal connection which takes place otherwise than between husband and wife

The courts have a settled position as to the definition of rape; this is as seen in the Appeal Court case of *Akpan v State*¹⁰ where CentusNweze JCA stated that ‘the settled position of the law, as endorsed in several decisions too numerous to be cited is that rape is unlawful carnal knowledge of a girl or woman without her consent.’¹¹

In the decided case of *EdetOkonIko v State*,¹²Kalgo, J.S.C., in his judgment defined rape as forcible sexual intercourse with a girl or a woman without her giving consent to it. He went further to state that the most important and essential ingredient of the offence of rape is penetration and consent of the victim is a complete defense to the offence.¹³

For the offence of rape to be ascertained, it must have the *mensrea* (guilty mind) and the *actusreus*(guilty act) except strict liability offence. In the offence of rape, the *mensrea* is the lack of consent of the victim while the *actusreus* is the unlawful carnal knowledge of the victim. Even when the victim has consented willfully and during the act the victim withdraws her consent, he is bound to stop. Where he continues the act, he is guilty of the offence of rape.¹⁴

¹⁰(2004)LPELR-22740C <<https://lawpavilionplus.com/view/judgments/?suitno=CA%2FC%2F159C%2F2009>> accessed 15 April, 2020

¹¹ ibid

¹²(2001)LPELR-1480SC <<https://lawpavilionplus.com/view/judgments/?suitno=SC.177%2F2001&from=Az7HLmmQTTtoqoz393%2BHIo%2FrSEc6uv2WYAcjQ7YvbksD4vhIZ7vLbu1%2BSXh9mPdOz%2F%2FIJYOGeeoEvAF2cFUjS57c9iPNGuDaX7J7NSCUAkAJvzUhyIlpho8CEWo%2FG1cRcVfSQRjcDfctECTKPXXxMkohei6Q4%2BN8RaddOTFpRPTA%3D#4646>> accessed 26/04/2020

¹³ Ibid, Per KALGO, JSC

¹⁴Bohjua, ‘Rape’(Saturday, 20 August 2011) <<http://bohjua.blogspot.com/2011/08/rape.html?m=1>> accessed 21/4/2020

1.2 Ingredients Of The Offence Of Rape

1.2.1 Non Consent

An essential ingredient of the offence of rape is that intercourse must be without the woman's consent.¹⁵ The *University Of Michigan Policy Of Procedures on Students sexual and Gender-Based misconduct and other forms of interpersonal Violence* defines consent as 'a clear and unambiguous agreement, expressed outwardly through mutually understandable words or actions, to engage in a particular activity.'¹⁶

Consent can be withdrawn by either party at anytime.¹⁷ It is possible that a woman who gives her consent to a sexual intercourse at the course of the "act" withdraw it and it is also possible that a woman who does not consent at the beginning may decide later to consent to it. Can it be said that there was rape in any of the situations? Under the Nigerian laws, it is doubtful if rape can be successfully proved in any of the two cases because "consent" is not clearly defined in the Criminal and Penal codes.¹⁸ Under the UK's Law, 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, notwithstanding the fact that consent is given midway.¹⁹ Consent must be voluntarily given and may not be valid if a person is being subjected to actions or behaviors that elicit emotional, psychological, physical, reputation, financial pressure, threat, intimidation, or fear (coercion or force).²⁰

¹⁵ Ibid

¹⁶ The University of Michigan Policy and Procedures on Student <<https://hr.umich.edu>> default >filesPDF> accessed 20/04/2020

¹⁷ 'What is Consent' <<https://sapac.umich.edu/article/49>> accessed 20/04/2020

¹⁸ Ibid (n1) 3-4

¹⁹ Sexual offences Act 2003, ss75-76

²⁰ *R v Olugboja* (1982) QB 320 CA, here the case showed that although Jayne did not resist, struggle or scream, her compliance was out of fear. The court held in this case that consent or absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follow that a mere submission involves consent <www.e-lawresources.co.uk/cases/R-v-olugboja.php> accessed 20/04/2020

Also, consent to engage in one sexual activity, or past agreement to engage in a particular sexual activity cannot and should not be presumed to constitute consent to engage in a different sexual activity or to engage again in a sexual activity. Consent cannot be given by a person who is incapable of giving their consent.²¹ In the case of *R v Flattery*, the defendant told a woman with learning difficulties that he was performing surgery on her when in fact he was performing sexual intercourse. It was held that her consent was vitiated by fraud as to the nature and quality of the act.²² Consent can also not be freely given if it flows from threats to personal safety or threats to harm others.²³ At the heart of consent is the idea that every person has a right to personal sovereignty: the rights to not be acted upon by someone else in a sexual manner unless they give that person clear permission.²⁴ The defence of consent is a defence that applies to crimes for which lack of consent is an essential element of the crime. Thus, since the offence of rape requires that the victim did not consent to the sexual conduct occurring, the defence of consent may be available.²⁵

1.2.2 The Importance of Consent

A common factor in all types of rape is the lack of consent by the victim. This element is crucial to a rape finding. Even when an individual believes that his or her partner or friend is willing to have sex, an affirmative acknowledgement of consent is needed. Assuming a young man and woman go out on a date and had a few drinks. The woman invites the man to her apartment to spend the night, but then she blacks out from the drinks she has consumed. Her date cannot assume that she is willing to have sex with him because she invited him back. Without her consent, the act of sexual intercourse would be rape.²⁶ This is also true in any

²¹ *ibid*

²² (1887) 2 QB410 <www.e-lawresources.co.uk/cases/R-v-Flattery.php> accessed 20/04/2020

²³ 'What is consent' <<https://sexuadu-ca/consent/what-is-consent/>> accessed 20/04/2020

²⁴ 'What is Consent' <<https://sapac.umich.edu/article/49>> accessed 20/04/2020

²⁵ 'Consent and Rape' <www.justia.com/criminal/defenses/consent/> accessed 18/04/2020

²⁶ *ibid*

other circumstance. Indeed, in certain contexts, a victim below the age of consent is considered legally unable to provide consent, and thus any sexual intercourse with the victim is statutory rape.²⁷

1.2.3 Penetration

Another basic and most important ingredient to prove in any rape case aside force and absence of consent is penetration. For there to be rape, there must be the penetration of the vagina by the accused.²⁸In *Ogunbayo's case*, the court Per Ogbuagu JSC stated that

...the important and essential ingredient of the offence of rape is penetration. It is also settled that sexual intercourse is deemed complete, upon proof of penetration of the penis into vagina. Emission is not a necessary requirement. It has however been held, that any, even the slightest penetration, will be sufficient to constitute the act of sexual intercourse. This is why, even where penetration was proved but not of such a depth as to inure the hymen, it has been held to be sufficient to constitute the crime of rape. Thus, proof of the rupture of the hymen is unnecessary to establish the offence of rape.²⁹

So, if the accused claims that the act was not rape, another ingredient to consider as have been given credence in decided cases is whether there was penetration. The issue appears settled that rape is completed upon penetration of the vagina of the female victim by the defendant. This view is adequate if considered merely for the purpose of determining that once there is penetration of a female sex organ, rape has been committed. For the purpose of determining the relevance to be attached to penetration vis-à-vis when the offence is

²⁷ ibid

²⁸Ogunbayo v State (2007) LPELR-2323 SC, (2007) 8 NWLR (Pt.1035) 157 <<https://lawpavilionplus.com/view/judgments/?suitno=SC.272%2F2005&from=Az7HLmmQTTtoqoz393%2Bhlo%2FrSEc6uv2WYAcjQ7YvbksCfJKXg9lZmu3VRGzF%2FBOXRKuo%2B%2B6IcAInQ2tr4hf2cZd463WdnWMrBP1Y353Gl%2F0GGRRM%2Fhl0afWNtO0Hcui1011bNAYsnJSZvErmVpR%2BaQ9uOmXVx8M8ZSAeflW6XkTI%3D>> accessed 19/04/2020

²⁹ ibid

completed, there is the need to consider the purpose and objective of the law of rape and the materiality of the object used for the penetration³⁰. Historically, the definition of rape, like every other crime, was based on the notion of protecting the interests of the society in avoiding unchaste behavior rather than the protection of the interests of rape victims. The focus of the protection transited from protecting the property rights of men over women, in the patriarchal societies, to protecting the rights of women who were considered weaker.³¹ At present, rape should be viewed in the light of the rights of a victim, such as the right to bodily integrity and security of the person as well as the right to be protected from degradation and abuse. For instance, where the accused failed to achieve an erection, had a limp or flaccid penis, or an oversized penis which could not fit into the victim's vagina or anus, after exercising violence, fraud, misrepresentation, threat or intimidation, has he not sexually assaulted the victim?³² The decisions finding a case for rape even if the attacker's penis merely touched the external portions of the female genitalia were made in the context of the presence or existence of an erect penis capable of full penetration.³³ Where the accused failed to achieve an erection, had a limp or flaccid penis, or an oversized penis which could not fit into the victim's vagina, the Court nonetheless held that it was rape on the basis of the victim's testimony that the accused repeatedly tried, but in vain, to insert his penis into her vagina and in all likelihood reached the labia of her pudendum as the victim felt his organ on the lips of her vulva, or that the penis of the accused touched the middle part of her vagina.³⁴ The law of rape as it relates to criminalising nonconsensual penetration of the vagina of a female by a male penis is legitimate and necessary for prohibiting unacceptable social conduct. Nevertheless, a strict insistence on the occurrence of penetration of the private part

³⁰ *ibid* (n2) 105

³¹ *ibid*

³² *ibid*

³³ *ibid*, *People v De La Pena*, GRN NO 104947, 30 June 1994, 233 SCRA 573

³⁴ *ibid*

of the victim will negate the purpose and objective of the law. The dignity sought to be protected is the dignity of the person of the victim and not his/her private part. Moreover the traditional view forbade penetration of the female by a male penis.³⁵ But penetration for purposes of getting sexual satisfaction can now be done in several ways depending on what gives the "penetrator" the excitement. Apart from vaginal penetration, there can be oral penetration, anal penetration, digital penetration (penetration with fingers) or penetration with object. Victims of rape may react differently to different nonconsensual penetrations: but the humiliation, degradation and physical harm associated with the unlawful acts are the same.³⁶ Including the other kinds of penetration in the definition of rape would not only harmonise the law on rape with the spirit, purpose and objectives of human rights: it would also reflect a societal rejection of sexual violence in general. Considering the prevalence of homosexual practice, the law of rape should be developed to include nonconsensual penetration against any person by whatever means.³⁷

1.3 Types Of Rape

As stated earlier, rape is a violent crime that is defined as unwanted sexual intercourse that is accomplished by force or threat of force. While women make up a significant percentage of rape victims, rape may be perpetrated against either men or women and may arise in same-sex or opposite-sex relationships.³⁸

The most commonly recognized form of rape is forcible rape, which involves the victim being physically forced into sexual intercourse with the perpetrator. Forcible rape can occur between two individuals who know each other or are in a relationship, or it can be committed by a total stranger. A forcible rape may be committed even if no actual physical force or harm

³⁵ *ibid*

³⁶ *ibid*

³⁷ *ibid*

³⁸ 'Rape' <www.justia.com/criminal/offenses/violent-crimes/rape/> accessed 20/04/2020

occurs to the victim.³⁹ In addition to forcible rape, rape can occur when the victim is unable to resist sexual intercourse due to drug or alcohol intake. This often occurs in the context of date rape, when a victim may be given drugs that heavily impair his or her ability to make decisions or resist the advances of another person.⁴⁰

Another form of rape occurs when a perpetrator uses his or her authority, or pretends to be in a position of authority, in order to coerce or fraudulently convince the victim into agreeing to sexual intercourse. For instance, a perpetrator may pretend to be a law enforcement officer pulling a victim over for a traffic violation and may threaten to arrest the victim unless he or she agrees to have sex. In the English case of *R v Williams*, the defendant was a singing coach. He told one of his pupils that he was performing an act to open her air passages to improve her singing. In fact, he was having sexual intercourse with her. It was there held that her consent was vitiated by fraud as to the nature and quality of the act.⁴¹

With each of these types of rape, it is important to remember that the actual act of rape occurs with even the slightest act of sexual penetration. Thus, the offence of rape can occur if sexual consent is limited or fleeting.⁴²

The Violence against Persons (Prohibition) Act 2015 for all intent and purposes is a good law and makes provisions as it concerns violence against persons of which rape is among. Below we take a look at the VAPP Act and its provisions.

1.4 Violence Against Persons (Prohibition) Act, 2015

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ (1923)1KB340 <www.e.lawresources.co.uk/cases/R-v-Williams.php> accessed 26/04/2020, *R v Flattery* (n17)

⁴² *ibid*, (n18)

In 2015, the 7th Assembly of the federal legislature in Nigeria, a few days to its dissolution enacted amongst others a specific legislation seeking to prevent violence against persons generally being the *Violence against Persons (Prohibition) Act 2015* (VAPP Act). The Act in its Explanatory Memorandum stated thus: ‘This Act prohibits all forms of violence against persons in private and public life and provides maximum protection and effective remedies for victims and punishment of offenders’.⁴³

This presupposes that the law is prima facie a good law, legislative asset and welcome development in relation to cases of violence generally. The VAPP Act was passed into law on the 23rd day of May after over ten years of legislative process. It has been submitted that the Act is the result of 14 years of activism by civil society. Starting just after the transition to democracy with the formation of Legislative Advocacy Coalition against Women (LACYAW) in 2001, activists consistently pushed for national legislation prohibiting violence against women. The content of the Act is home grown, reflecting the realities of violence in Nigeria today. The Act is an amalgamation of different laws/bills and an attempt to do away with anachronistic laws and improvement on the Criminal and Penal Codes. As a bill, it was first presented as Violence against Women (Prohibition) Bill, but the passage of the bill proved difficult arguably because of the significantly masculine make-up of both Houses of the National Assembly. The male-dominated body resisted issues relating to marital rape and a more receptive step was taken when it was re-named the Violence against Persons (Prohibition) Act and led to its somewhat easy and hurried passage which may account for the questionable challenges contained in the statute otherwise referred to as legislative liabilities⁴⁴. The VAPP Act is made up of 48 sections and 9 schedules consisting of six forms.

⁴³ Violence Against Persons (Prohibition) Act 2015

⁴⁴Felix Chukwuemeka Amadi, Rivers State University of Science and Technology, ‘the Violence against Persons (Prohibition) Act, 2015: Legislative Asset or Liability?’ [2018] Vol 5, Issue 1, Unimaid Journal of Public Law, 145 <www.researchgate.net/profile/Felix-Amadi3/publication/332978449_THE_VIOLENCE_AGAINST_PERSONS_PROHIBITION_ACT_2015_LEG

According to the long title of the Act, the object of the VAPP Act as stated earlier is to eliminate violence in private and public life, by providing maximum protection and effective remedies for victims and punishment of offenders.⁴⁵ The VAPP Act is only applicable in the Federal Capital Territory, Abuja.

The VAPP Act opens in section 1 with Rape. It there defines rape thus:

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; the other person does not consent to the penetration; or the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any 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.⁴⁶

Section 1(1) of the VAPP Act provides a novel definition of Rape. A person commits rape whenever he or she intentionally uses any part of his/her body or thing to penetrate the vagina, anus or mouth of another person, provided the other person did not consent or the consent was obtained by fraud or by any other unlawful means.⁴⁷The traditional concept of rape is restricted to non consensual penetration of the vagina by the penis. Traditional here means as provided in the Criminal and the Penal⁴⁸ Codes respectively. Before the enactment of the VAPP Act, no law specifically criminalized analrape. However, it is submitted that anal rape can be punished under section 214, of the *Criminal Code Act* and section 284 of the *Penal*

[ISLATIVE_ASSET_OR_LIABILITY/LINKS/5cd508ea92851c4eab91225f/THE-VIOLENCE-AGAINST-PERSONS-PROHIBITION-ACT-2015-HEGSLATIVE-ASSET-OR-LIABILITY.pdf?origin=publication-detail](https://www.iiste.org/Journals/index.php/JLPG/article/download/29658/30451)> accessed 18/04/2020

⁴⁵Prof. Anthony N. Nwazuoke (LL.B, LL.M, Ph.D), Faculty of Law, Ebonyi State University, Abakaliki, ‘A Critical Appraisal of the Violence Against Persons (Prohibition) Act, 2015’ [2016] Vol 47, Journal of Laws, Policy and Globalization <www.iiste.org/Journals/index.php/JLPG/article/download/29658/30451> accessed 14/04/2020

⁴⁶ Violence Against Persons (Prohibition) Act, 2015, s1(1) (a) - (c)

⁴⁷Ibid (n42)

⁴⁸ Penal Code Act Cap P3, Laws of the Federation of Nigeria 2004

Code Act, which is *inparimateria*(similar) with the former. Section 214 of the Criminal Code Act provides *inter alia* that any person who has carnal knowledge of any other person against the order of nature is punishable with 14 years imprisonment. It is immaterial that the other person consent to the act. The phrase “against the order of nature” has been defined in *Mogaji v Nigerian Army*⁴⁹, to mean anal intercourse. In this case, Major Mogaji was convicted by the General Court Martial on a charge of sodomy under section 81(1) (a) of *the Armed Forces Decree No. 105 of 1993*⁵⁰, for having had carnal knowledge of four males. The General Court Martial sentenced him to 7 years imprisonment, which sentence was reduced to 5 years imprisonment by the confirming authority. On subsequent appeal to both the Courts of Appeal and the Supreme Court, the Courts affirmed the decision of the General Court Martial.⁵¹ The infraction of section 1 (1) of the VAPP Act is punishable with life imprisonment. However, this is not a mandatory sentence. This is born out of paragraphs (a)–(c) of section 1 (2) which gives the judge discretion to impose sentences less than life imprisonment. Where the offender is below 14 years, he may be sentenced to a maximum of 14 years imprisonment.⁵² Offenders who are 14 years and above are liable to a minimum of 12 years imprisonment.⁵³ In the case of gang rape, the offenders are jointly and severally liable to a minimum of 20 years imprisonment.⁵⁴ There is no doubt that the VAPP Act has expanded the Nigerian criminal jurisprudence on rape. It has introduced the concept of oral rape by the penis and the non consensual penetration of the vagina, anus and mouth by any other part of a person’s body or object. Furthermore, the Act imposes severe punishment for rape than the existing Criminal Code Act and Penal Code Act. Under the VAPP Act, apart from cases of children below 14 years, the minimum sentence for rape is 12 years

⁴⁹ (SC 204/2004) [2008] 10 (07 March 2008) <<https://nigerialii.org/ng/judgement/supreme-court/2008/10-5>> accessed 14 April, 2020

⁵⁰ Now Armed Forces Act Cap A2 LFN 2010, s 81 (1) (a)

⁵¹ *ibid* (n46)

⁵² *ibid*, s 2(a)

⁵³ *ibid*, s 2 (b)

⁵⁴ *ibid*, s 2 (c)

imprisonment.⁵⁵ The VAPP act apart from its provision and expansion on the definition of rape also made clear provisions for other sexual offences and other offences or violence against persons. For example, *section 22* of the Act makes it an offence for anybody to intentionally administer a substance to another person with the intention of overpowering or stupefying such person, so as to enable any other person to engage in sexual activity with that person. The offence is punishable on conviction to a term of imprisonment not exceeding 10 years or to a fine of N500,000.00 or both.⁵⁶

1.4.1 Jurisdiction of the Court

Section 27 gives the High Court of the Federal Capital Territory Jurisdiction to entertain matters arising from the VAPP Act or to grant an application made pursuant to the said Act.⁵⁷ The confirmation of jurisdiction on the High Court of the Federal Capital Territory by the VAPP Act means that no other Court can exercise jurisdiction at first instance over the provisions of the VAPP Act. One reason which may be adduced for this is that under the concurrent legislative list both the National Assembly and the State Houses of Assembly could legislate on issues of crime. Thus, the national assembly could not confer jurisdiction on a state high court in respect of the Act. However, the VAPP Act could have vested jurisdiction over its provisions on the Federal High Court since the jurisdiction of the Federal High Court under section 251 of the *Constitution of the Federal Republic of Nigeria* as amended may be extended to such other jurisdiction as may be conferred upon it by an act of the National Assembly. By so doing persons in every state in Nigeria would be able to enforce the VAPP Act.⁵⁸

⁵⁵ Ibid (n49)

⁵⁶ Ibid, VAPP Act, s 22(2)

⁵⁷ Ibid

⁵⁸ Ibid, (n42)

1.4.2 Protection Order and Offences

Section 23 of the VAPP Act provides for a protection order. A protection order has been defined in the interpretation section⁵⁹ of the Act as an order issued by a judge and which restrains a person, whether a private person or a State actor from further abusive behaviour towards the victim. An application for a protection order can be made at anytime, since there is no time restriction within which the application should be made.⁶⁰ Any complainant may, in the prescribed manner, apply to the Court for a protection order.⁶¹ If the complainant is not represented by counsel, the police officer with whom a complaint of violence has been lodged shall inform the complainant of the remedies he or she may be entitled to under the Act including the right to lodge a criminal complaint against the respondent if a criminal offence has been committed under the Act.⁶² Notwithstanding the provisions of any other law, the application may be brought on behalf of the complainant by any other person, including a police officer, a protection officer, an accredited service provider, a counselor, health service provider, social worker or teacher who has interest in the well-being of the complainant.⁶³ However, the victim must give his consent in writing before anybody can act on his behalf.⁶⁴ In the proviso to section 28(4), it is stated in effect that the requirement of consent becomes of no consequence in cases where the victim is a minor, mentally retarded or unconscious.⁶⁵ Interestingly, under section 28(5) of the VAPP a minor or a person acting on behalf of a minor can apply for a protection order without the consent or assistance of the minor's parents or guardian.⁶⁶ Where notice of proceedings for a grant of a protection order has not been served on the respondent, the court may issue an interim protection order if it is satisfied

⁵⁹ VAPP Act, s 46

⁶⁰ *ibid*, s 28 (1)

⁶¹ *ibid*, s 28 (2)

⁶² *ibid*, s 28 (3)

⁶³ *ibid*, s 28 (4)

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ *ibid*, (n 42) 74

that there is a prima facie evidence that the respondent is committing, has committed or there is an imminent likelihood that he or she might commit an act of domestic violence.⁶⁷ Domestic violence is defined in the Act as an act “perpetrated on any person in a domestic relationship. Where such act causes harm or may cause imminent harm to the safety, health or well being of any person.”⁶⁸ From the definition, domestic violence can only arise within the family setting. It is with respect to this kind of violence that an interim protection order will be issued. So much has been said about the VAPP Act and so much remains to be said. It will be most expedient at this point to move on to the next matter but it would profit us to here to state that the act also provides that where a person has been convicted more than once for a sexual offence or for a sexual offence with a child, the Court shall declare such a person ‘a dangerous sexual offender.’⁶⁹ It seems that the intention of the VAPP Act is that the court shall maintain a single blacklist of dangerous sexual offenders, which shall be available for public inspection.

1.5 Conclusion

Rape as an offence have been defined and explained and the ingredients of the offence (non consent, force and penetration), another thing remains and that is the establishment of the offence in the courts of Nigeria. In doing this, this work hope to give cogent answers to the ‘how’ of establishing rape. It is not just for a person (victim of rape) to know that he/she has been raped but it is also important to prove to the court through the eyes of the law and decided cases that a victim has been raped. This, this work hopes to deal with extensively as the work progresses in other chapters. The VAPP Act as seen in this chapter is the most recent Act on the violation of rights of individuals in Nigeria. As seen, the VAPP Act gives a

⁶⁷ *ibid*

⁶⁸ *ibid*, VAPP Act, s 46

⁶⁹ *Ibid*, s 43 (a) –(c)

wider consideration as to the definition of the offence making it clear that rape victim can also be a male. The Act also moves from the traditional definition of penetration when in its definition it stated 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.

CHAPTER TWO

CONCEPTUALISING THE CRIME OF RAPE

2.0 INTRODUCTION

The offence or crime of rape is a punishable offence under the Nigerian legal system. In this chapter we will look at the laws already in existence before the VAPP Act of 2015, having our focus on the provisions they make as it concerns the definition of the offence of rape.

Every year, millions of people are raped or sexually abused and researches have shown that young people are the primary target of these rapists. It is estimated that in the United States, about half of all rape victims are under 18 years of age.⁷⁰ Rape as we have seen from the previous chapter is one of the most grievous sexual offences, it violates the victim's sexual autonomy and integrity, and it inflicts violence on the person and erodes the victims of self esteem. This is not without long term psychological trauma on the victim. There are situations where the resultant effect is distrust for the opposite sex induced by fear of re victimization. For others the trauma suffered leads to depression which later metamorphoses into the victim isolating herself from the company of others thereby making her withdraw from social and economic activities.

The concept of rape has been defined or conceptualized in diverse legal documents but our focus under this heading shall be the following:

1. Criminal code
2. Penal code
3. Child rights Act

2.1 The Definition of Rape under the Criminal Code⁷¹

⁷⁰ Jehovah witness publication; ("Questions Young People ask: answers That Work") vol. 1

⁷¹ Cap C38, Laws of the Federal Republic of Nigeria

The Criminal code operates in the Southern part of Nigeria. *Section 357* it defines rape as follows;

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent but obtained by force or by means of threat or intimidation of any kind or by fear from harm or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of an offence called rape.

From this section, it can be deduced that “person” under the Act means and only means a male person (and not any person, which means either a girl or a boy in the Literal sense of the word), can be guilty of rape. It makes it gender specific. Under the Act, only a man (a boy over 12 Years) can commit rape. This can be justified partly because of the physical requirement of the offence; forcible penetration; and partly because males are the sexually aggressive species.⁷² Under the Criminal code, the only way a woman can be guilty of rape is by complicity under *section 7* of the Act; for example where she instigates a man to rape another woman or give him assistance in doing so. The Act also implies that a husband cannot be accused of rape under *section 6* where it is states that: ‘unlawful carnal knowledge means carnal connection which takes place otherwise than between a husband and wife.’

Therefore, under the criminal code, marital rape is not an offence. A legal immunity is coffered on the husband.

2.1.1 Carnal Knowledge

⁷² S.O Ukhuegbe, “Assault Offences Part B” (Criminal Law Lecture, Outline No.7, Faculty Of Law, University Of Benin, 2015) page 56

The external or physical element (*actus reus*) of rape is penile-vaginal penetration. Simply put the slightest penetration of the vagina with the penis, even without ejaculation is sufficient for the offence to be committed.⁷³

2.1.2 What then is unlawful carnal knowledge?

Unlawful carnal knowledge is the carnal knowledge of a woman without her consent. Unlawful carnal knowledge means any intercourse which takes place otherwise than between a husband and wife. So where a husband forces himself to perform fellatio on her, it was no offence as he could not be guilty of indecent assault against her.⁷⁴ Although a husband may be criminally responsible for grievous harm or wound inflicted on the wife as a result of forcible intercourse, but the husband can never be guilty of rape.⁷⁵

Also it can be deduced from *section 357* of the Criminal code that the phrase “of a woman or girl” undoubtedly means only a woman or girl can be raped under the code. Thus forcible sexual intercourse between men is not rape under the Criminal code but it is recognized as assault with the intent to commit sodomy with the punishment of fourteen (14) years imprisonment.⁷⁶ It is only recognized as assault with the intent to commit sodomy with the punishment of fourteen years imprisonment. It must of all importance be noted that it is the lack of consent that makes the intercourse fall within the realm of rape. This means that consent can vitiate rape. Most often the fact that there was a sexual intercourse is not disputed; the issue usually turns out to be whether or not it was with the consent of the woman. Also, there are instances where consent maybe obtained but such consent is invalid. These instances include threat or intimidation of any kind or fear of harm, or by any means of false

⁷³ Section 6

⁷⁴ R v Caswell (1984) Crim. LR 111

⁷⁵ R v Miller (1954) All ER 529

⁷⁶ Section 352

and fraudulent representation as to the nature of the act, where the husband of the woman is impersonated.⁷⁷

2.2 Penal Code⁷⁸

The Penal code applies to the Northern states of Nigeria. The provisions of the Penal code on rape are similar to the provisions of the Criminal Code, although with a little modification.

Section 282 provides that;

A man is said to commit rape, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances;

- a. Against her will.
- b. Without her consent.
- c. With her consent when her consent has been obtained by putting her in fear of death or of hurt.
- d. With her consent, when the man knows that he is not her husband and that her consent is given because she believe that he is another man who she is or believes herself to be lawfully married.
- e. With or without her consent, when she is under fourteen (14) years of age or of unsound mind.

The provisions of the Penal code were stated in the case of *Isa v Kano*⁷⁹ where Mohammad JSC stated that:

A rapist is worst than an animal. He has no moral rectitude... the section provides as follows: A man is said to commit rape who save in the case referred to in *subsection 2* has sexual intercourse with a woman in any of the following

⁷⁷ Section 357

⁷⁸ Cap 89, Laws of the Federation of Nigeria

⁷⁹ (SC. 35 (2013))[2016] NGSC 62 (29 January 2016)

circumstances; against her will; without consent: with her consent when her consent has been obtained by putting her in fear of death or of hurt;

Provided that whoever commits rape, shall be punished with imprisonment for life or for any less term and shall be liable to fine.⁸⁰

Just as in the Criminal Code, so also under the Penal code, the offence of rape is complete upon penetration. In the case of *Idris Rabiu v The State*,⁸¹ it was alleged that the appellant conspired with one Awalu Garba to have and indeed had carnal knowledge of an eleven year old girl forcefully. When the prosecutrix was taken to the hospital as a result of her bleeding, medical report indicated that she bled as a result of virginal rupture occasioned by forceful penetration. The court of Appeal held that by virtue of *section 282 (1), Penal Code*, the following ingredients are necessary for the offence of rape:

- a. "That a man, the accused had sexual intercourse with a woman, the victim;
- b. That the act of intercourse was unlawful, not being between husband and wife.
- c. That in giving the evidence of intercourse, complete penetration must be proven
- d. That the accused had the mensrea that is, intention to have intercourse with a woman without her consent or that the accused recklessly, not caring whether the woman consented or not
- e. Also, the prosecution must give evidence to corroborate the complaint made by the victim and although this is not required as a matter of law, it is required in practice."

Subsequently, the appellate court set aside the sentence and discharged the accused. It must be noted that the reason the appellate court set aside the sentence of the trial Court is not

⁸⁰ Section 283

⁸¹ (2005) 7 NWLR (pt 925) 491 CA

because the accused was not found guilty but because the trial court sentenced the accused to death, whereas the *section 283 Penal Code*, does not provide death penalty for the offense of rape but life imprisonment. The error in judgment caused the Prosecutrix her case against the alleged rapist.

Also in the case of *Na'anUpahar v The state*,⁸² the prosecutrix who was then 12 years old, had gone to the village streak to fetch water on her way home, the appellate accosted her at a crossroads and pushed her into the bush. The 1st appellant removed his shirts; 2nd appellant held her legs wide to allow 1st appellant forcibly had carnal knowledge of her. The appellant contended that they were only being made victims if circumstances in grounds of longstanding dispute over land between both families and that they never committed the alleged offence. At the final analysis, the court held that on the one hand, the 1st appellant was guilty of attempted rape, while on the other hand the court set aside the conviction of the appellants by the learned trial Judge for conspiracy to commit rape, they were each given a 3 years jail term. The court also stated inter alia that in a charge of rape or unlawful carnal knowledge of a female without her consent, it is the duty of the prosecution to prove the following:

- a. That the accused had sexual intercourse with the prosecutrix
- b. That the act of sexual intercourse was done in circumstances falling under anyone of the five paragraphs in *section 282 (1) Penal Code*.
- c. That the prosecutrix was not the wife of the accused or if she was she had not attained the age of puberty;
- d. That the accused had the mensrea that is, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not; and

⁸² (2003) 6NWLR (pt 816)230 CA

e. There was penetration.

As lofty as the above Ingredients are, there is one problem with the third paragraph. The problem is on the strength of *section 282 Penal code* which provides that a husband can only have sex with his wife, only when she has reached puberty. By implication, if a wife has not attained puberty and the husband had sex with her, this is equivalent to defilement. The issue that will be raised is what puberty is and at what stage or age will a girl be deemed to have reached puberty. Secondly, in the northern part of Nigeria, which dominantly practices Islamic religion, child marriage is permissible. This is even evident in *paragraph (e) of section 282 of the Act*, where consent can only be invalid when she is under fourteen years and above. She is not only capable of giving valid consent to sexual intercourse but also capable of getting married.

Also, the second is sure, which borders on a Muslim exercising his Islamic belief in getting married to a child below the puberty age, it is noteworthy that the religion does not in any way frown at child marriage, the founder of the Islamic religion got betrothed to one of his wives, Aisha, when she was six (6) years old and the marriage was consummated when she was nine (9) years old.⁸³ This is made possible as the *Constitution Of The Federal Republic Of Nigeria 1999* by virtue of *section 38(1)*; nothing stopped any member of any religion from practicing or propagating his religious beliefs.

The section provides as follows:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

⁸³ Muhammad's Wives <https://en.m.wikipedia.org/wiki/Muhammad's_wives#Muhammad's_marriages> Accessed 25 February, 2021

2.3 The offence of Rape under the Child right Act⁸⁴

The Child Rights Act came into force on the 31st, 2003. The Act was formerly applicable to the Federal Capital Territory (FCT) but 16 states have adopted it. It is also now in the Laws of the Federal Republic of Nigeria 2010. The Child Rights act straightforward and unambiguously provides in *section 31* that no person shall have sexual intercourse with a child; a person who contravenes the provision of *subsection (1)* of this section commits an offence of rape and is liable to conviction imprisonment for life; where a person is charged with an offence under this section, it is immaterial that the offender believed the person to be of or above the age eighteen years or the sexual intercourse was with the consent of the child.

By this provision, sexual intercourse with a child with or without her consent is rape. The question that follows immediately is “who is a child?” *Section 277 of the Act* provides that a child is a person under the age of 18 years. The implication of this is that sexual intercourse with a girl below 18 years is rape and it is immaterial whether or not the girl consented. What is more, the issue whether or not the use of force was utilized to have carnal knowledge of a child does not arise; this is invalid or does not matter. What matters is proof that the child is below the age of 18 years. Basically, the provisions of this Act should be applauded because it has to a large extent sufficiently protected the right of the child. The same cannot be said of the Penal code or even the criminal code.

CHAPTER THREE

RAPE UNDER THE VIOLENCE AGAINST PERSONS (PROHIBITION) ACT 2015

⁸⁴ The Child Right Act 2003

3.0 Introduction

Violence against persons is not a new occurrence in Nigeria. For instance, since the early age of the Nigerian Civil War which itself was characterized by Violence, it has been observed that violence against persons was one of the root cause of war. This no doubt stems from the obvious tribal coloration of ethnic dichotomy of the country in its nature among the factors, resulting in the killing of perceived and recognized opponents. To condemn this act of violence after the civil war and subsequently maintain the freedom of everyone and stability of peace, Nigeria has kept pace with various enactments ranging from the pre and post civil war laws. Nevertheless, in all these it will not be out of place to say that these laws have not been able to holistically address the subject matter of violence against persons in both domestic and public sphere.

The *Violence Against Persons (Prohibition) Act 2015*, which has come to address this age long issue covers a wide scope of the status of every person in Nigeria who is or may be a victim of any form of violence. With the ratification and enactment of this novel Act, it cannot be denied that the Government's effort to develop and expand the citizen's freedom from all forms of violence against persons has given equal opportunities to all irrespective of sex, ethnic diversity and any other form of status. In addition to its uniqueness, it is an amplification of the existing regulatory framework prohibiting violence against persons in Nigeria, most especially the relevant chapters of the Constitution.

The Act from its start makes provisions for the Offence of Rape. This it does in Section 1 of the Act. Unlike the provisions of the *Criminal Code* and the *Penal Code*, the *Violence Against Persons (Prohibition) Act 2015* made a paradigm change to the definition of rape. This chapter aims at showing what the Act has done as it concerns the offence of Rape.

3.1 Definition of Rape under the Act

Section 1 of the 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
- c. The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any 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

Section 2 of the Act provides thus:

1. A person convicted under this subsection (1) of this section is liable to imprisonment for life except-
 - a. Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years;
 - b. In all other cases, to a minimum of 12 years imprisonment without an option of fine; or
 - c. In the case of rape by a group of persons, the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine.

Section 3 is to the effect that:

The court shall also award appropriate compensation to the victim as it may deem fit in the circumstance.

Section 4 states that;

A register for convicted sexual offenders shall be maintained and accessible to the public.

From the above definition of rape under the Act it is very clear that the Act made a radical change to definition of rape and the fact that the Act itself opens up in Section 1 looking at the offence of rape as a violent act against persons shows that the Act intends to really deal with offenders.

The Act aims at eliminating violence in private and public life, prohibiting all forms of violence including physical, sexual, psychological, domestic, harmful traditional practices, discrimination against persons and to provide maximum protection and effective remedies for victims and punishment for offenders. The VAPP Act comprehensively deals with one of the most vexed form of sexual violence which is rape from which existing penal laws protected only females and limited to vaginal penetration. It has also expanded the scope of rape to protect females and males alike and to include anal and oral sex as well as to protect the identity of rape victims.

Nigeria has witnessed rising cases of gender based violence, rape across the country. This trend has called for agitation from people across the country, mostly women. They are the end victims of the rape cases and often lead to devastation, at times, death. A quick search trend on Google shows that the word rape became rampant in Nigeria with the year 2020, reaching its peak in the last week of May 2020 and first week of June. During this period, rape cases had involved minors (a person under a certain age before adulthood. It is less than 18 years in Nigeria). For instance, a 12 year old girl was raped by four masked men in her home in Ajah, Lagos. The incident occurred few days after Uwaila Vera Omozuwa, a UNIBEN student and Barakat Bello, a student of the department of Science Laboratory

Technology (SLT), federal College of Animal Health and Production, were raped and killed.⁸⁵

3.2 Innovations In The Violence Against Persons (Prohibition) Act 2015 On Rape

The VAPP as a Violence against Persons legislation does not deal with the offence of rape alone. It is an Act that covers other act of violence against persons. The major concern of this work as it concerns the VAPP Act is as it provides for the offence of rape.

In *Section 1* rape was defined thus:

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; the other person does not consent to the penetration; the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any 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.

One of the very notable and commendable provisions of the Act is its expansion of the meaning of rape and its prohibition thereof. While other existing laws limited their scope of rape to protect only females in relation to vaginal penetration without consent⁸⁶ since only females had vaginas, the VAPP Act has taken a giant stride to expand the meaning and scope of rape. By virtue of the Act, rape is 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 without consent, or where such consent is obtained by force or means of threat or intimidation of

⁸⁵AderemiOjekunle 'It's not freedom for Women in Nigeria as 23 States hold back signing on the Violence Against Persons (prohibition) Act' <<https://www.dataphyte.com/development/gender-development/its-not-freedom-for-women-in-nigeria-as-23-states-hold-back-signing-on-the-violence-against-persons-prohibition-act/>> accessed 23 March, 2020

⁸⁶ Section 357 Criminal Code Cap C38, LFN 2004

any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse. By this definition, both males and females are protected against rape. The issue of rape being gender biased has been a jurisprudential issue in Nigeria for a while because our law, as it then was, does not recognize situations wherein a man would or could be raped. Thus, instances such as the one reported in Daily Post on the 17th of July, 2012 where a man was allegedly “raped” to death by his wives, was not classified as rape but manslaughter. In that case as reported by this news house, Trouble started on Tuesday morning, precisely 3am when Uroko returned from Ochanja, a popular joint in the small community of Ugbugbu and headed to the room of his youngest wife. The other wives who according to the youngest wife, Odachi had a meeting before Uroko returned home invaded her room with knives and sticks, demanding that their husband have sex with all of them at once. Uroko who resisted their attack was overpowered by the women who ordered that the sex march begin with the youngest wife and to continue in that order to the top. Their correspondent reported that Uroko stopped breathing when the fifth woman was making her way to the bed. “Suddenly, my husband stopped breathing, and they all ran out, still laughing, but when they saw that I could not resuscitate him, they all ran into the forest. When contacted, the village head, Mr. OkpeOdoh affirmed that the matter had been reported to the police and investigation was ongoing even as the youth of the community are helping the police in search of the escaped wives. As at the time this report was filed, 2 of the wives have been arrested.⁸⁷

⁸⁷ Six women rape man to death in Benue State <<https://dailypost.ng/2012/07/18/six-women-rape-man-death-benue-state/>> accessed 23 March, 2021

The above incident as against what the court had held it to be, that is, manslaughter, if the case had been determined under the auspices of Section 1 of the VAPP is a classical case of rape, in this instance, the rape of a full grown man. It was clear that the provision of the Act was met completely from the part of threat to the final perpetration of the offence.

Also were the VAPP Act had been in existence before the case of *EdetOkonlko v State*, the definition of the court in the case where Kalgo, J.S.C., in his judgment defined rape as forcible sexual intercourse with a girl or a woman without her giving consent to it and further stated that the most important and essential ingredient of the offence of rape is penetration and consent of the victim is a complete defence to the offence, would have been stated differently.⁸⁸

From the above section 1's definition of rape, it is clear that it revisited the definition of rape in Nigeria, making it gender neutral. Thus, under the Act a woman may be a rape victim or a perpetrator, likewise a man. Additionally, the VAPP includes as rape, penetration of the vagina, and anus or mouth with any part of the body or anything else unlike the Criminal code and Penal code that only requires penile – vaginal penetration and nothing less. The law states that the instrument of rape does not have to be a penis; it can be another part of the body. For example, dildo or even objects like pens or pencil etc could pass for objects for rape. Therefore, we can see that the VAPP Act is focusing on the violation of the person's body when viewing 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. This is radical change as to what defines penetration.⁸⁹

⁸⁸(2001)LPELR-1480 SC

<<https://lawpavilionplus.com/view/judgments/?suitno=SC.177%2F2001&from=Az7HLmmQTToqoz393%2BHo%2FrSEc6uv2WYAcjQ7YvbksD4vhIZ7vLbu1%2BSXh9mPdOz%2F%2FIJYOGeeoEvAF2cFUjS57e9iPNGuDaX7J7NSCUAkAJvzUhyIlpho8CEWo%2FG1cRcVfSQRjcDfctECTKPXXxMkohei6Q4%2BN8RaddOTFpRPTA%3D#4646>> accessed 23 March, 2021

⁸⁹ 5 WAYS THE VAPP HAS CHANGED THE OFFENCE OF RAPE IN NIGERIA <https://lawpadi.com/5-ways-vapp-changed-offence-rape-nigeria/> accessed 23 March, 2021

Furthermore, the VAPP does not preserve the immunity of the husband from being charged with rape of his wife. A wife may also be charged with rape of her husband. Thus under the VAPP, there could be rape within marriage if either party is not consenting. Another point worth noting here is that under the VAPP Act male rape whether by a man or a woman is possible. The VAPP also preserves the restriction to marriage relationship but a woman may be guilty of rape by deceiving a man that they are married.

As regards sentencing, the VAPP Act has introduced the following changes to rape sentencing:

A person convicted under this subsection (1) of this section⁹⁰ is liable to imprisonment for life except- Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years; In all other cases, to a minimum of 12 years imprisonment without an option of fine; or in the case of rape by a group of persons, the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine.

Offenders under 14 years: the Act in section 2 provides that offenders less than 14 years of age convicted of rape are liable to a maximum of 14 years imprisonment unlike the Criminal Code which provides that a boy under 12 years of age cannot be convicted of rape

Minimum sentence: persons above the age of 14 years that are convicted of rape are liable to a minimum of 12 years imprisonment without an option of fine.

Gang Rape: persons convicted of gang rape are liable to a minimum of 20 years imprisonment without an option of fine.

In other legislations like the 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 VAPP takes away this discretion to some extent; it states that once the crime of

⁹⁰ Section 2

rape is proven, the offender must be sentenced to a minimum penalty of 12 years for rape. However, the judge still has the discretion to sentence the offender to more than 12 years

The Act did not stop at sentencing like other Acts did, it went further to provide that a court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such person has more than one conviction for a sexual offence; been convicted of a sexual offence which was accompanied; or been convicted of a sexual offence against a child.⁹¹

It also provides that rapists when convicted will have their details entered into a sex offender's register. A sex offender 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.⁹² The National Agency for Prohibition of Trafficking in Persons (NAPTIP) is the body saddled with that responsibility by the Act to enforce the provisions of the Act in collaboration with other stakeholders including faith based organization.⁹³ This makes the Offence of rape and other violent acts against persons as provided in the VAPP Act to be seen and taken as a serious National issue.

To crown the provisions of the VAPP Act as it concerns the offence of rape, it provides in Section 1(3) that the Court shall also award appropriate compensation to the victim as it may deem fit in the circumstance. Financial compensation for victims is a 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 victim, but now the offender can be made to pay for this.

⁹¹ Section 43

⁹² Section 1(4)

⁹³ Section 44

It is clear here that the Violence Against Persons (Prohibition) Act 2015 is a good law as it concerns the offence of rape this is because it did a thorough change not just to the matter of the persons who can be victims of rape but also as it touches the matter of Penetration which is a salient matter as it concerns the proof of the offence of rape.

CHAPTER FOUR

CHALLENGES INHERENT IN THE ESTABLISHMENT OF THE OFFENCE OF RAPE

4.0 Introduction

Corroboration remains one of the major challenge in establishing the offence of rape. Although the *Violence Against Persons (Prohibition) Act 2015* does not say anything about the matter of corroboration, as long as it concerns the establishment of the offence of rape as provided in the VAPP, corroboration must be discussed. In *Igbine v State*,⁹⁴Muntaka-Coomassie J.C.A (as he then was) defined corroboration as confirmation, ratification, verification and validation of existing evidence from another independent witness or witnesses. To a lay man, corroboration can simply mean to support, verify or substantiate piece of information. To corroborate a piece of evidence may also mean to authenticate it by giving an additional supporting or supplementary evidence as backup. Lord Reid stated that in a formal sense and from the perspective of defined legal principle, corroboration is confirming, enforcing and reinforcing independent evidence supporting another evidence of the same fact.⁹⁵

A very controversial issue regarding sexual offences especially those involving teenage girls and boys is the requirement of corroboration. Corroborative evidence is that evidence that shows that a crime has been committed and it has been committed by the accused. It must however be noted that corroborative evidence or testimony is not repetitive of the confession of the accused but a confirmation of witness evidence by an independent testimony by showing that a crime has actually been committed by the accused charged. Corroboration is

⁹⁴(1997) 9 NWLR (Pt 519) 107

⁹⁵*DPP v Kilbourne* (1973) AC 729 at 750

independent evidence which affects the accused by connecting him/her to the offence. It is that which confirms in some material particular not only the evidence that the offence had been committed, but also that the defendant committed the offence. Corroboration requirement is predicated upon some reasons. These reasons are here under considered.⁹⁶

In Nigerian law, the general rule is that no particular number of witnesses is required for the proof of any fact⁹⁷ and generally speaking a person can be convicted of any offence (including rape) on the oath of a single witness without any other evidence. This does not mean, however that the court must act on the evidence of a single witness and it is perhaps fair to say that the court will be exceedingly careful in convicting an accused person on the evidence of a single witness without more especially for serious offences.⁹⁸

Therefore, a court cannot take into account the number of witnesses who have given evidence for each side as a relevant factor in deciding which side should succeed. What is of primary important is the quality and not the quantity of evidence.⁹⁹ Thus to the general rule that no particular number of witnesses is required in order to discharge the onus of proof which lies upon a party, there are a number of exception including some sexual offences such as defilement of girls between 13 and 16 years of age and of idiots, procurement and procuring the defilement of women by threats or fraud or administering drugs.¹⁰⁰

The law is that evidence in corroboration must be an independent testimony, direct or circumstantial which confirms in some material particular not only that an offence, for example rape, has been committed but that the accused person committed it.¹⁰¹ It is pertinent

⁹⁶ E.E Alopo, Criminal Law and Sexual Offences in Nigeria (1st Edition, Princeton and associates Publishing co. Ltd, 2016) 197

⁹⁷ Section 175 (1) Evidence Act 2011

⁹⁸ *Ibeakanma v Queen* (1963) 2 SCNLR191

⁹⁹ *BakoBabor v Yauri N.A Police* (1970) N.N.L.R 107

¹⁰⁰ This is as provided under sections 218, 221, 223, 224 Criminal Code

¹⁰¹ Section 200 (1) Evidence Act 2011

to note that corroboration need not consist of direct evidence that the accused person committed the crime or does it amount to a confirmation of the whole account given by the witness, provided that such corroborative evidence confirms in some material particular of the evidence of the prosecutrix implicating the accused person for the offence of rape with which he is charged. It appears settled that corroboration is not required as a matter of law in any other sexual offence and therefore in such cases, any conviction based entirely on the uncorroborated evidence of the prosecutrix will be sustained. But it would appear that the Nigerian courts, following English courts, had taken the view that in the case of sexual offences where corroboration is not required as a matter of law, it would be required as matter of practice of the court.¹⁰²

4.1 Corroboration of Evidence of the Prosecutrix

The practice of requiring corroboration in sexual offences has been, since time immemorial, applied haphazardly with some decisions holding that conviction cannot be had without corroboration whereas in others there is a converse position that conviction can be had but only where the trial court warns itself of the danger of convicting on the uncorroborated evidence of the complainant. Thus the position of the Nigerian courts as to the prerequisite of corroboration in rape cases was not well established until recently. There were two sides to the issue of corroboration decided by the courts. Firstly, the courts held that rape is an offence in which corroboration is a prerequisite by law and procedure and thus the court should warn itself of the danger of convicting an accused of rape on the uncorroborated evidence of the prosecutrix.¹⁰³

¹⁰²*The State v John Ogwudiegwu & Anor* (1965) N.M.L.R 113

¹⁰³*Ibid*(n -2) 196

Secondly, some other decisions are of the interpretation that an accused person cannot be convicted unless the evidence of the prosecutrix is corroborated.¹⁰⁴ We will now look at cases where the courts have decided based on these two perspectives, starting from the second viewpoint.

In *Sambo v State*¹⁰⁵, the Supreme Court underscored the indispensability of corroboration in rape case. In upholding the appeal and acquitting the accused, the court held that it is the law that before the prosecution can secure conviction for the offence of rape, the evidence of the prosecutrix must be corroborated in some material particular that a piece of evidence offered as corroboration for the offence of rape must be:

- i. Cogent, compelling, and unequivocal as to show without more that the accused committed the offence charged.
- ii. An independent evidence which connects the accused with the offence charged; and
- iii. Evidence that implicates the accused in the commission of the offence charge.

The facts that elicited this unfortunate decision were that the appellant was charged in the trial court for raping a ten year old girl in his bedroom. The case of the prosecution was that the young girl was asked to fetch water for the accused which she did. But as she brought the pail of water, the accused invited her to his room, lock the door and put on his music set. He then removed the girl's dress, forced her into his bed and tried unsuccessfully to put his genitals into her vagina. When the girl started crying, he unlocked the door of his room and let her go. The girl later narrated the incidence to her elder sister who then reported to the police. The accused who regrettably is a legal practitioner was eventually arrested and charged to court. The accused admitted sending the girl to fetch water and that he started dancing with her thereafter. He denied forcing himself on the girl. The medical evidence from

¹⁰⁴Okpanefe v State [1969] ANLR 411; Afolalu v State [2010] 16 NWLR (Pt 1220) 584

¹⁰⁵ [1993] 6 NWLR (Pt. 300) 399

the general hospital where the girl was treated showed evidence of blood in her private part but the court did not consider this as corroboration.

Consistent with this line of authority is the case of *State v Akingbade Gabriel*,¹⁰⁶ where the accused having been charged with the offence of rape of a 20 year old girl was later discharged and acquitted despite being found to have raped the victim. The court predicated its decision on lack of corroboration of the victim's statement. The court held in that case, that corroboration is evidence which shows or tends to show that the crime has been committed, but that it was committed by the accused. The court therefore went further to hold:

that in applying the test, it is difficult to discover the necessary corroborative evidence in this case. The girl's prompt report or complaint to her parents is certainly not the corroborative evidence. That complaint and both the girl and her father's evidence of it satisfied the court that she did not consent to sexual intercourse by the accused with her. In the result, the prosecution must fail and I regrettably discharge and acquit the accused.¹⁰⁷

In *Edet Okonlko v State*¹⁰⁸ the Supreme Court overturned the decision of the Court of Appeal on the basis that the evidence admitted as corroboration of the testimony of the victim did not amount to corroboration and that corroboration in rape cases is required as a mandatory practice. The facts of this case are that Auquo Etim Nyong, father of the victim of the offence on the 2nd of May 1982, handed over his daughter the victim, to the appellant, a taxi driver, to take her to Uyo. The victim was then a student of the Christian Secondary commercial school, Uyo. He told the appellant to drop the victim at Itam junction. He gave the appellant N5 and asked him to give the victim N1 on dropping her at Itam Junction so that she could use the amount for her transport fare to a house at Uyo before proceeding to the school. On

¹⁰⁶ (1971) All NLR 508 <<https://nigerialii.org/ng/judgment/high-court/1971/10-11>> accessed 24, May 2021.

¹⁰⁷ Ibid (n -13), Per Odesanya, J., giving the Lead Judgment.

¹⁰⁸ No: SC 177/2001 as cited in

that day, the appellant arrived at Uyo at about 6pm. He did not drop the victim there but took her with other passengers to IkotEfreItak village where he dropped all the passengers except the victim. He came back to Uyo with the victim where they arrived at 8pm. The victim said that on their way back to Uyo from IkotEfreItak village, the appellant asked her to spend the night in his house at Uyo that night. She said no; but the appellant drove his vehicle, with her to his house at No.1 EffiongUkpong Street. There, the victim refused to enter the house, came out of the vehicle, removed all her luggage from the vehicle (comprising of a bag of garri, a bag containing books and her clothes) and wanted to take a motor cycle to her house. The appellant took back the luggage into his vehicle and promised to take her direct to her house at AkpanEtuk Street. The victim then entered the vehicle and the appellant took her to AkpanEdetEsie Street instead of AkpanEtuk Street, and asked her to come down and go home. The victim said she then cried and begged the appellant to take her home. It was raining heavily at this time. The appellant wound up the glasses of the vehicle doors and locked the vehicle with only him and the victim inside. The appellant struggled with the victim inside the vehicle and finally overpowered her, removed her pant and had sexual intercourse with her. He then drove her back to his house where he again offloaded her luggage and put them in his house. He told the victim to wait for him as he was going to park his vehicle. He then drove away. This was after 9.00pm. The victim then ran out of the house (leaving her luggage in the appellants house) and enters No.5 EffiongUkpongstreet (appellant's neighbors). The victim said she narrated her ordeal to a woman (PW4) and her husband whom she found in the house where she slept until the following morning. The following morning the victim reported the incident to her father, who in turn reported the matter to the Police in Uyo and the appellant was later arrested. This is the gist of what happened in this case as narrated by the witnesses at the trial.

In that case, the trial court convicted the accused on these facts and the conviction was upheld by the court of appeal. Dissatisfied, the accused appealed to the Supreme Court where the question of corroboration was one of the grounds of appeal. The learned counsel for the appellant submitted in his brief that the court of Appeal erred in affirming the views of the learned trial judge that the evidence of the victim was amply corroborated. Counsel further submitted that the fact that the appellant took victim to his house and asked her to wait for him while he went to park his vehicle and that the victim ran away to the house of PW4 where she told PW4 and her husband what happened to her, cannot constitute corroboration in law.¹⁰⁹

The learned counsel for the respondent however submitted in her brief that although as a rule of practice courts always insist that it is unsafe to convict on the uncorroborated evidence of a victim, the court can still convict without it, if the court is fully satisfied of the truth of the victim's evidence which he found to be amply corroborated before he convicted the appellant.¹¹⁰

The court explained that corroboration must be independent testimony which affects the accused by connecting or tending to connect him to the offence. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that it has been committed by the accused. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute.¹¹¹

¹⁰⁹The court in this case cited the case of *Francis Okpanefe v The State* (1969) 1All NLR 420, particularly at 423 - 424

¹¹⁰Citing the case of *R v Berry* (1925); *IGP v Sunmonu* (1957) WRNLR 23

¹¹¹ *Ibid* (n -3) 200

Continuing, the court held that the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.

The case of *State v Akingbade*,¹¹² took the indispensability of corroboration in rape cases to a preposterous and incomprehensible extent when the learned trial Judge found as follows:

I have no doubts that the accused took most improper liberties with the girl who was only anxious to get the job. The accused committed the crime with which he is charged, but there is a practice in Nigerian courts which has for all practical purpose ripened into law – that is the requirement of corroboration before conviction for rape even though the act does not call for corroboration.¹¹³

The obvious absurdity here is that the Judge stated that he had no doubt that the accused person committed the crime. If the judge is so convinced, the intriguing question is why did he not convict the accused person?¹¹⁴ This is the display of the highest level of slavery to a practice that is not founded in law and represents a real case of poverty of logic.

It is clear from the foregoing that even though corroboration requirement for rape is merely a matter of practice in Nigeria, it has become a legalized practice which is duly and dutifully observed by judges. Failures to so do will undoubtedly lead to the conviction so obtained being quashed; thereby laying too much emphasis on technicality. This has been demonstrated in a number of Nigerian cases as seen above. It is therefore an established

¹¹² (1971) All NLR 508

¹¹³Noted at page 510

¹¹⁴YinkaOlomajobi, *Human Rights on Gender, sex and The law in Nigeria* (Lagos: Princeton Publishing Company, 2015) 67

practice in criminal law in Nigeria, that though corroboration of the evidence of the complainant in a rape case is not a statutory requirement, it is, in practice, always looked for.

In other words, it is now a well-established practice, by the courts in Nigeria that in cases of rape the evidence of the complainant must be corroborated. It is submitted here that this position is an erroneous one. It is submitted therefore that since corroboration is not a requirement of the law, it would be better if it must be used in rape cases, for the court to look at the facts of each case on its own merit and not necessarily looking for corroborative evidence before conviction.¹¹⁵

On the other hand, there are cases where the courts have held that a conviction on uncorroborated evidence may be had if the court is satisfied, after due warning itself on the dangers of convicting on uncorroborated evidence, of the truth of the complainant's evidence. One of such cases is the case of *State v Ogwudiegwu*,¹¹⁶ where it was held that the offence of rape, in order to secure a conviction, corroboration of evidence of the complainant implicating the accused is not essential, but a judge must warn himself of the risk of convicting on the uncorroborated evidence of the complainant.

Also, in the case of *Iko v State*,¹¹⁷ the court stated in unequivocal terms that apart from instances where the law required corroboration in sexual offences, the court had made it part of its practice to always demand that a victim of rape adduces evidence independent of her to support her claim that she had been raped. The court went further to stress that where the uncorroborated evidence of the prosecutrix was the sole evidence to be relied upon, then the Judge must warn himself before going ahead to convict.

¹¹⁵ Ibid (n-3) 202

¹¹⁶(1968) NMLR 117

¹¹⁷(2001) 14 NWLR (pt. 732) 221

In *Ibeakanma v Queen*¹¹⁸ the court maintained that it is an established practice in Criminal Law that though corroboration of the evidence of the prosecutrix in a rape case is not essential in law, it is, in practice always looked for and it is also the practice to warn the jury against the danger of acting upon her uncorroborated testimony. Here, the appellant was charged with rape in that he had sexual intercourse with a married woman again at her will. The appellant denied the offence. The trial Judge relied on the scar on the appellant's shoulder as a result of a bite by the complainant during the intercourse, as corroborative evidence and he convicted the appellant. The Supreme Court found that in the absence of any other evidence implicating the appellant on the offence of rape, the scar on the appellant's shoulder did not constitute corroboration. The appellant was discharged and acquitted not for want of corroborative evidence but for lack of prove beyond reasonable doubts.

In the judgment of the court, it was stated that the proper direction was that it was unsafe to convict on the uncorroborated evidence of the prosecuting. The distinguishing Court stated while observing that:

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

Also, in the case of *IGP v Sunmonu*,¹¹⁹ it was held that it is not a rule of law that in a charge of rape an accused person cannot be convicted on the uncorroborated evidence of a prosecutrix, but the proper direction is that it is not safe to convict on the uncorroborated

¹¹⁸(1963) 2 SCNLR 191

¹¹⁹(1957) WRNLR 23

evidence of the prosecutrix; but that the jury may, after paying attention to the warning, nevertheless convict if they are satisfied of the truth of her evidence.

Lord Diplock in the celebrated case of *D.P.P. v Hester*¹²⁰ explained the danger sought to be cleared by this rule when he said that:

in some other cases, a corroboration warning must be given: the judge must remind himself or warn the jury of the danger of convicting on uncorroborated evidence. Cases in this category include rape and indecent assault. Provided that a warning is given, a defendant can be convicted even if there is no corroboration.¹²¹

One would want to know further what the nature of the warning advocated by then courts before the conviction is? It should be noted that in England where the principle emerged and is applicable, the trial by the jury is in force. In view of the fact that the jury convicts, the procedure in England is that the judge should warn the jury of the danger of convicting on the uncorroborated evidence of the complainant. This condition is not necessary in Nigeria where the jury structure is no more. What is the practical effect of the law expecting the trial judge to warn himself of the danger of convicting without corroboration? Assuming he does not warn himself of the danger of convicting without corroboration? Assuming he does not warn himself in reality and writes down in his judgment that he did, how valuable is that in the whole accurate searching process? Is the Nigerian law on this not conceited then?

In *Upahar v State*,¹²² the august Justice of the Supreme court pointed out most insightfully that in *Iko v The State*,¹²³ decided eight years after the decision in *Sambo*,¹²⁴ it was held that it is not the rule of law is that an accused person in a charge of rape cannot be convicted on the

¹²⁰(1973) AC 296

¹²¹Ibid

¹²² (2003) 6 NWLR (Pt.816) 230

¹²³(2001) 14 NWLR (Pt. 732) 221

¹²⁴ The case of *Sambo v State* [1993] 6 NWLR (Pt. 300) 399

uncorroborated evidence of the prosecution. The proper direction is that it is not safe to convict on the uncorroborated evidence of the prosecution. The court may, after due attention to the warning, nevertheless convict the accused person if it is satisfied with the truth of her evidence.

Thus it has been variously held by the courts that corroboration requirement in rape case is not an express requirement of the law. In the more recent case of *Lucky Jacob Akpan v State*,¹²⁵ the court settled the seeming controversy when it held that prior to the amendment of Nigeria's Evidence Act in 2011,¹²⁶ scholars and other text writers had greeted, with forceful disapprobation, the practice which required corroboration of the evidence of a rape victim.¹²⁷ Their well taken reservations, notwithstanding, courts, still, clung to the practice of requiring corroboration of the evidence of the prosecutrix. The courts stated and acknowledged the beneficial provisions of section 201 of the Evidence Act, 2011 which, according to the court has effectively, bowdlerized sexual offences from the corroboration requirement.¹²⁸

Section 201 of the Evidence Act 2011 specifically provides that a person charged with treason or with any of the felonies mentioned in section 40, 41 and 42 of the Criminal Code Act cannot be convicted, except on his own plea of guilt, or on the evidence in open court of two witnesses at least to one overt act of the kind of treason or felony alleged, or the evidence of one witness to one overt act and one other witness to another overt act of the same kind of treason or felony. It is obvious from the above provisions of the law that the offence of rape was not mentioned as one of those offences where corroboration is required. It therefore,

¹²⁵(2014) LPELR-22740 (CA)

¹²⁶ Y. Osibanjo, *Cases and Materials on Law of Evidence* (Lagos: Macmillan Nigeria Publishers Ltd, 1992)111; O.S Oyelede, *Corroboration in Akintola and Adedeji (eds), Nigerian Law of Evidence: A Book of Readings* (Ibadan: University of Ibadan Press, 2006) 116.

¹²⁷ Under the provisions of sections 201, 202,203, and 204 of the Evidence Act 2011 which provides for the situations where corroboration is required, the amended Evidence Act did not provide that corroboration is required in rape cases.

¹²⁸In the said provision, which provide for one of the situations where corroboration is required, the amended Evidence Act did not provide that corroboration is required in rape cases.

suffices to state with certainty and without equivocation that the law today is that corroboration is not a requirement for the offense of rape, whether by law or practice. From the above, one can assert without prevarication that there is no statute foisting on the prosecution, evidence of corroboration before convicting an accused. Section 357 of the Criminal code which is similar to states criminal Codes, does not provide that evidence of corroboration is necessary. The above apart, neither section 201 of the amended Evidence Act nor the Criminal Procedure Act provide for corroboration in the offense of rape. There is no basis for the requirement of corroboration in rape cases.

Contrary to the impression often presented to the public about rape, it is an offence that usually involves intimate partners or acquaintances, tends to occur in private, and does not always involve violence. In most cases, the offence is committed in the private. Although, in some cases, the scream and call for succor from the victim attracts the public, that is not a consistent spectacle. After all, the prosecutrix herself may not like to be seen by the public when the rape act is committed. She would rather prefer reporting the rape after the act and thereby making it problematic to secure corroboration from the evidence of any eye witness. That is the more reason why it is difficult to secure evidence of corroboration that the accused inserted his penis into the vagina of the prosecutrix. The abrogation of the rule will emancipate justice from the bondage it has been placed by the application of the old corroboration rule.

The requirement of corroboration in rape cases is not a mandatory legal requirement. Even where corroboration is required as a matter of practice, it is submitted that the court should look at the facts holistically and determine whether the accused is guilty as charged. Where

the evidence of the prosecutrix alone is sufficient, the court is enjoined to convict notwithstanding that it is not corroborated.¹²⁹

4.2 Comparative Analysis with other Jurisdictions.

So many countries have advanced in their provision on the law of rape. Some of these countries have gone far ahead to redefine rape. This, the VAPP Act does too but as noted in this work, the VAPP has its limitation in scope. This sub topic will discuss the concept of rape from foreign jurisdiction, with the selection of just England and South Africa.

4.2.1 Rape under English Law

The United Kingdom seems to be among the first to lay down a concrete and organized law for the offence of rape. The sexual offences Act of England 1956 provides in a very encompassing manner in Section 1 for the offence:

Rape of a woman or man:

1. It is an offence of a man to rape a woman and another man.
2. A man commits rape if –
 - a. He has sexual intercourse with a person (whether vagina or anus) who at the time of the intercourse does not consent to it.
 - b. At the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.
3. A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

The following is distillable from the above section: firstly, that a man or a woman can be a victim of rape. This is unlike the Criminal code and Penal code, which out rightly makes

¹²⁹ Ibid

woman the only victim of rape by virtue of their provisions. The Act makes it an offence for a man to rape a woman or another man; secondly, under the Act, a person is guilty of rape once he penetrates the victim's vagina or anus. Thus there is recognition of anal intercourse, which is absent under the criminal code and penal code. Thirdly, the mental element (mensrea) required to ground conviction, is either intention or recklessness. In other words, the perpetrator must have intended to carry out the act. It goes further to cover situations where although he might not expressly have the intention but was reckless to find out whether the other party was consenting or not. Fourthly, where a person impersonates a woman's husband, he is guilty of rape. This is in consonance with the Nigerian provision of rape.¹³⁰

However, the Act has been amended and a new Act of 2003 has been passed into law. This is the Sexual Offence Act of England 2003. Its provisions are similar to the old Act,¹³¹ the wordings are somewhat different with additions. For clarity, Section 1 provides as follows:

1. A person (A) commits an offence if –

He intentionally penetrates the vagina, anus or mouth of another person (B) with his penis

a. B does not consent to the penetration and

b. A does not reasonably believe that B consents

2. Whether a belief is reasonable is to be determined having regard to all the circumstances including any steps A has taken to ascertain whether B consents.

3. Section 75 and 76 apply to an offence under the section.

4. A person guilty of an offence under this section is liable, on conviction or indictment, to imprisonment for life.

¹³⁰Section 357 of the Criminal Code; Section 282

¹³¹Sexual Offences Act 1956

Rape is a sexual offence that has attracted the most public attention in the United Kingdom until 1994; this was an offence that could only be committed against woman by man through penetration of vagina with the penis, in the eyes of the law. The sexual intercourse used to be one ‘outside marriage’ unless there was a relevant court order, for instance a decree of judicial separation, a husband could not be convicted of an offence of rape against his wife. This rule was however overturned by the House of Lords in *R v Regina*.¹³²

Under Common Law, the intercourse must be without consent. A person is said to have consented, where the person agrees and has the capacity to make that choice.¹³³ The 2003 Act has attempted a clarification of the law by providing a non – exhaustive statutory list of situations where, there was no consent. In two situations, the presumption is conclusive; this is where the defendant intentionally deceives the victim as to the nature or purpose of the penetration as in the case of *R v Flattery*¹³⁴ and secondly, where he intentionally induce consent by impersonating a person known personally to the victim. The remaining presumptions are evidential or rebuttable presumption. For the purpose of clarity, the provisions of the Act are reproduced verbatim.

Section 76:

1. If in proceeding for an offence to which this section applies, it is proved that defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed;
 - a. That the complainant did not consent to the relevant act, and
 - b. That the defendant did not believe that the complainant consented to relevant act.
2. The circumstance are that –

¹³² (1992) AC 59, 610

¹³³Section 74, Sexual Offended Act 2003

¹³⁴Supra

- a. The defendant intentionally deceived the complainant as to the nature or purpose of the relevant act.
- b. The defendant intentionally induces the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

In discussing rape under English law, it is relevant to reiterate that originally rape used to be limited to the penetration of the vagina with the penis. The position was also that rape could only be committed against a female. However the Criminal Justice and Public Order Act, 1984, expanded the offence to cover penetration by the penis to the vagina or anus of any person male or female, who did not consent to it. This has also been extended to penetration of the mouth with the penis; the victim must also not always be female.¹³⁵

Like in Nigeria, a husband could never be convicted of rape against his wife.¹³⁶ However in the United Kingdom today, it is possible for a husband to be convicted of raping his wife and the sentences can range from 4 to 19 years, depending on the specifics of the case, as well as mitigating and aggravating factors, such as having no previous convictions, previous good character and remorse. Life imprisonment can be handed out if the situation demands.¹³⁷

Unlike in Nigeria, the required mensrea is for the accused to prove that he believed that the victim was consenting. It is no longer important to prove intention, knowledge or subjective recklessness. The requisite fault element for rape is now negligence. By the provision of *Section 1(2)*¹³⁸ whether a belief is reasonable is to be determined having regard to all circumstances, including any steps A had taken to ascertain whether B consented.

¹³⁵ Section 1(a) Sexual Offences Act, 2003

¹³⁶ It should be pointed out that the VAPP Acts definition of the offence of rape changed this in the Jurisdiction of Abuja where it is applicable. Therefore it does not preserve the immunity of the husband from being charged with rape of his wife. A wife under the Act may be charged with rape of her husband. Thus under the VAPP Act, there could be rape within marriage if either party is not consenting.

¹³⁷ Noble Solicitors, A guide to marital rape Law <<https://www.noblesolicitors.co.uk/about/a-guide-to-marital-rape.html>> accessed 24, May 2021; R v R (1992) 1 AC 599

¹³⁸ Sexual Offences Act 2011

Under *Section 5* of the Act,¹³⁹ a statutory offence is created. It runs thus:

1. A person commits an offence if:
 - a. He intentionally penetrates the vagina, the anus or mouth of another person with penis and the other person is under 13.

A person guilty of an offence under this section is liable, on conviction on indictment to imprisonment for life. The effect of these provisions is that children under 13 years cannot consent to sexual activity. The law is concerned with the protecting of the immature from the risks of psychological harm that are believed to result from sexual activity before attaining a sufficient degree of sexual maturity. Also the Act covers provision on sexual activity with persons who because of mental disorder lacks the capacity to give consent.¹⁴⁰ Still under the statutory offence of rape, it is an offence to have sexual intercourse with a child less than 16 years of age.¹⁴¹

4.2.2 Rape under the Law of South Africa

The sexual Offence Act 2011 as applicable in South Africa provides that a man commits the offence of rape if he has sexual intercourse with a woman without the woman's consent; and knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not.¹⁴²

In summary of the provisions, even where consent is purported to have been given by a minor (under ages 13 and 16), such consent is invalid and it would still amount to a sexual offence on the part of the accused person, where he is 18 years and above.

¹³⁹ Ibid

¹⁴⁰ Sections 34, 35 and 36, Sexual Offences Act 2003 (as applicable in England)

¹⁴¹ Section 9, Sexual Offences Act, 2003

¹⁴² Section 3(1) (a) (b) Sexual Offence Act 2011 (as amended)

The Nigerian position as a federal unit or entity is same as that of South Africa. Rape is still gender specific however, with the emergence of the Violence Against Persons (Prohibition) Act 2015, rape is no longer gender specific. That Act¹⁴³ as already stated provides that a woman can be a major actor in the offence of rape. That is a woman can also rape a man. This is an interesting innovation in Nigerian Law; howbeit this Act is applicable to Abuja.

In South Africa, grounds have been broken to cover rape within a marriage, non-marital relationship, abuse by parents, guardians other family members and anyone residing with the victim, provisions similar to those of England has been made in South Africa and wife rape is no more alien to the law.¹⁴⁴

As provided for in *section 4 (1)* of the Act¹⁴⁵ a person (hereinafter called 'the offender') commits the offence of grievous sexual assault upon another (hereinafter called the 'victim') where, in the circumstances specified in subsection 3, the offender:

- a. Penetrates the vagina or anus of the victim with-
 - i. A body part other than the penis of the offender; or
 - ii. An object manipulated by the offender
- b. Causes another person to penetrate the vagina or anus of the victim by-
 - i. A body part other than the penis of the offender; or
 - ii. An object manipulated by that other person;
- c. Places his penis into the mouth of the victim;
- d. Causes another person to place his penis unto the mouth of the victim;
- e. Places his or her mouth onto the vagina, vulva, penis or anus of the victim;

¹⁴³ VAPP Act 2015

¹⁴⁴Section 8

¹⁴⁵ Sexual Offence Act 2011 (as applicable in South Africa)

f. Causes another Person to place his or her mouth onto the vagina, vulva, penis or anus of the victim.

In Nigeria as already stated, the punishment for the offence of rape varies; depending on the law or code the charge was brought. Under the Criminal code, the offender shall be liable to imprisonment for life, with or without canning.¹⁴⁶

It is important to observe that in Nigerian law (apart from Abuja where the VAPP Act is applicable), rape is still a gender specific offence, as the victim must be a female. This is because the definition of the offence still restricted to the penetration of the female vagina by the male penis. For attempted rape the offender shall be liable to fourteen years imprisonment, with or without canning.¹⁴⁷ If the charges were brought under the Penal Code, an offender, if convicted to rape, shall be liable to a term of life imprisonment or a lesser term and a fine.¹⁴⁸

Though there is no specific punishment for attempted rape in the Penal code, the court may have recourse to section 95 of the Penal Code in considering a sentence in a matter of attempted rape. This section provides:

Whoever attempts to commit an offence punishable with imprisonment or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence shall, where no express provision is made by this Penal Code or by any other act or law for the time being in force for the punishment of such attempt, be punished with imprisonment for a term which may extend to one half of the longest term provided for that offence or with such fine as it provided for the offence or with both. Under the Child Rights Act, for a charge of rape, the punishment is life imprisonment.¹⁴⁹

¹⁴⁶ Section 358 Criminal Code

¹⁴⁷Section 359 Criminal Code

¹⁴⁸Section 283 Penal Code

¹⁴⁹ Section 31 (2) Child Right Act

In South Africa, rape of a female under 16 years is punishable with a minimum sentence of life imprisonment under certain conditions¹⁵⁰ and the rape of a woman over 16 years carries a maximum of 10 years imprisonment.

4.3 Conclusion

This chapter examined the definition and proof of rape in different Acts as applicable in Nigeria and compared it with the definition and proof of rape in other jurisdiction like England and South Africa. It should be noted that there is still hope as to the redefinition of the offence of Rape. The *Violence Against Persons (Prohibitions) Act, 2015* remains the most recent enactment as it concerns violence against person and specifically the offence of rape. It has redefined the offence. It is no doubt that the 21st Century world has its own diverse challenges and also successes as it concerns the application of laws in different jurisdictions and the punishment of individuals found to have violated the law. In that light, it can be boldly stated that the VAPP Act has a good future and where implemented with all sincerity and purpose will lead to a better society with a relatively reduced cases as it concerns the perpetration of the offence of rape.

Conventionally, the evidence of victims of sexual offences has been regarded as uniquely disposed to make – believe or fabrication, perhaps, enthused by hindrances, vindictiveness or penitence. The corroboration rules were envisioned to moderate the peril arising from the fact that complaint of sexual offences are easy to make but difficult to dispose. Aside that as seen from the work, the corroboration of the confession of the prosecutrix need not be corroborated since it can stand on its own as sufficient evidence to convict an accused.

¹⁵⁰ Section 10 (1) Sexual Offences Act 2011 (as amended)

CHAPTER FIVE

SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.0 Introduction

This is the final chapter of this research work. It contains a brief summary of what was discussed in the preceding chapters as well as some recommendations and conclusion.

5.1 Summary

In chapter one, this work examined what the offence of rape is all about. Here, the work defined and explained the ingredients of the offence of rape, that is; Non Consent, Force and Penetration. Therefore, it means that in a sexual intercourse between a man and a woman where consent is not given freely and there is use of force and there was penetration of the anus, vagina or any other body part, it will amount to rape.

Chapter two looked at the conceptualizing of the offence of rape. Here, rape was looked at through the lenses of the laws (Criminal Code, Penal Code and the Child rights Act) and at the end it was discovered that both the Penal Code and the Criminal Code make the same provisions as to the offence but the Child Rights Act took a new position giving definition of who a child is in section 277. There it was noted that a sexual intercourse with a girl below the age of 18 years is rape and it is immaterial whether or not the girl consented.

Furthermore, in chapter three, the work went further to discuss the provisions under the VAPP Act as it concerned rape. It was discovered and pointed out that the VAPP Act made a radical change to the definition of rape. The Act also and as a move development made provisions for an agency that would work together with the court and Faith based organizations to combat rape and also bring to book rapists. Important to note also is that *section 1(3)* has made a provision where courts shall award appropriate compensations to the victims of rape.

Finally in Chapter four, corroboration was entertained as the matter of focus. Here, the work noted importantly that the requirement of corroboration in rape cases is not a mandatory legal

requirement. Even where it is required as a matter of practice, it is submitted that the court should look at the facts holistically and determine whether the accused is guilty as charged.

This work generally, has revealed that the offence of rape in Nigeria is based not only on the definitions provided by the Criminal code and the Penal code. It also as a matter of importance has revealed that the enactment of the VAPP Act, 2015 has redefined what rape is. Based on the definition of the Criminal Code and Penal Code, rape can only be committed by a man upon a woman and culpability of an accused is dependent on the proof of the basic elements of penetration, consent and corroboration. The VAPP Act has redefined the above by changing the fact that rape can be committed by a man alone. Rape is defined under section 1 of the Act as ‘unlawful carnal knowledge of another person’s vagina, anus or mouth with any other part of his or her body or anything else. In England where the Nigerian definition of rape was gotten from, the word ‘unlawful’ is no longer part of their definition under the *Sexual Offence Act 2003*. In Abuja the VAPP Act is applicable. It can be said that the VAPP Act on this part reflects modern development and also constitutes a violation of the fundamental human rights of a married woman to the dignity of her human person.

Another element of the Law of rape as seen in this work is the requirement of corroboration. In the case of *Iko v State*¹⁵¹ the court stated that corroboration is not required to prove any fact but corroboration is usually required in practice. The courts usually require that a sexual offence be corroborated by independent evidence. In other Jurisdictions like England and South Africa as noted in this work, the requirement of corroboration has been abolished and a person can be convicted for a rape on the evidence of the victim (prosecutrix).

The requirement of corroboration in rape case is not a mandatory legal requirement even where corroboration is required as a matter of practice, it is submitted that the court should

¹⁵¹(2001) LPELR –1480 SC

look at the facts holistically and determine whether the accused is guilty as charged. Where the evidence of the prosecutrix alone is sufficient, the court is enjoined to convict notwithstanding that it is not corroborated.¹⁵²

Noted too is the issue of rehabilitations, protection and compensation of rape victims. This was also discussed in the course of this work and it was found that the VAPP Act has made provisions for the rehabilitation and compensation of rape victims, not as a form of profit but as recognition of the violation on the victim and means to help the victim to recover. In the light of this new development by the VAPP Act, it can be seen that the Nigerian Law on rape is no longer archaic and discriminatory.

5.2 Recommendation

The state of the Nigerian law as long as the Criminal code and Penal Code still remain the same is archaic and stagnant. It has remained unchanged for over a long time and is a reflection of the law in the nineteenth Century England whereas the law on rape in England has evolved over the years. In the twenty first Century, the status of women has changed as the role of women in the home and in the society is being recognized, marriage is now recognized as a partnership and there is a paradigm shift from subjection of women to equality of men and women in and out of marriage. There is now a greater emphasis on the freedom from discrimination and respect of the dignity of all human beings irrespective of sex or race, hence, the need for the expansion of the jurisdiction of the application of the VAPP Act. As was already been pointed, the VAPP Act is good law generally as it touches the rights of some against every form of violence. However, the Act is only applicable in

¹⁵² E.E. Alope, *Criminal Law and Sexual Offences in Nigeria* (1st edition, Princeton and Associates Publishing co. Ltd, 2016) 203

Abuja and some selected states that have enacted a mirroring legislations.¹⁵³In other parts of the country, especially States that are yet to domesticate the VAPP Act by enacting mirroring legislations, when cases of violence especially rape are brought before the court, the courts have to either apply the Criminal Code or the Penal Code.¹⁵⁴Decisions made under these Acts have not been favorable to some persons. For example the Codes do not recognize marital and male rape but the VAPP Act recognizes them.

In addition, this work recommends that the Nigerian National Assembly should take a hint from England (English Parliament) by passing an Act stopping the old corroboration regime in rape cases.¹⁵⁵ The enactment of Criminal Justice and Public Order Act¹⁵⁶ in England authorized the bench to reach a pronouncement without applying the ceremonial warning which was hitherto an unavoidable prerequisite. The amended section allows juries and/or judges to make informed and unprejudiced judgments from facts presented before them on a case by case basis as opposed to the former system where the judge would have to warn the jury, or where he is sitting alone, warn himself of the danger inherent in convicting without corroboration.

5.3 Conclusion

Rape which is the most serious violation of one's bodily integrity is no longer something to be personalized. It is a cankerworm which has eaten up deep into the system of the Nigerian

¹⁵³ The following states have domesticated the VAPP Act: Oyo, Osun, Ogun, Lagos, Enugu, Ekiti, Ebonyi, Benue, Anambra, Cross Rivers, Kaduna, Plateau, Bauchi, Akwalbom, Abia, Kwara, Yobe, Jigawa, Kogi, Bayelsa, Rivers, Edo.

¹⁵⁴ As applicable in the Southern and Northern parts of Nigeria

¹⁵⁵ The corroboration rules were abolished in 1987 in relation to some specific offences including a range of sexual offences. The abolition has gone even further and provided that the judge should not instruct the jury that it may be unsafe to convict in the absence of corroboration. This approach has been criticized as inflexible because categories are again relied on and the Judge's discretion is also fettered, albeit in a different direction

¹⁵⁶Particularly section 32 of the Criminal Justice and Public Order Act of 1994

society. Hence, it must be fought with every weapon the law has to offer. The major solution to the scourge of rape in Nigerian society is the instrument of the law. The law therefore has to be forward and proactive in dealing with it. The Nigerian legislature should therefore keep pace with other Jurisdictions in order to consistently meet the needs of the people and further the course of Justice. As long as this is done, the law will truly be a panacea to the offence of rape in Nigeria and even though the menace may not be completely wiped out. It is only then that the victim of rape in Nigeria can truly say where there is a right, there is a remedy.

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