

## RISING CASES OF RAPE OFFENCES IN NIGERIA: NEW MEASURES TO THE RESCUE\*

### Abstract

*Before now the offence of rape in Nigeria was an isolated incident. It occurred once in a while and when it did it was greeted with incredulity and surprise. However, despite the fact that the offence carries a life term imprisonment, it has now become a daily occurrence Nigeria. It seems that the law as it is, is incapable of deterring the naked and raw urge to subdue and abuse a woman. There exists a conspiracy of silence whenever the offence of rape is committed. It is this conspiracy of silence in relation to rape that this work seeks to unravel with a view to pointing out the areas where the law appears to be encouraging the offence.*

**Key words:** *Rape, Rising Cases, New Measures, Penetration, Criminal Justice System, Tripod*

### 1. Introduction

Rape has a history that almost equaled the history of man's creation. It is on record that the first recorded incidence of rape in the Bible was also in the Book of Genesis.<sup>1</sup> Indeed biblically, rape was a constant feature among men and at a point it was taken as a thing of shame not on the victim but on the family of the master of the person raped.<sup>2</sup> In Nigeria, the offence of rape is a heinous offence and the drafters of the Criminal Code deemed it fit for life imprisonment upon conviction.<sup>3</sup> Culturally, it is an offence which stands on the same pedestal with the offence of murder since a suspect accused of rape is expected to go into hiding while his people make efforts to cleanse the shame on the face of the family of the rape victim. Despite all these, the offence of rape in Nigeria seems to be on the increase and the question on every lip is, what is the cause? Does it mean that the punishment stipulated for it in the extant laws is no longer heavy enough to deter would-be rapist or are there factors which ostensibly offer more incentives for rape than the risk of its punishment? It goes without saying therefore, that if the offence of rape will be on the increase instead of on the decline, certainly the legal system in Nigeria is not doing what it is expected to do.

In this research, it will be very essential to understand the meaning of rape and the elements required to convict for it. We will also look at the salient points that seem to be militating against the successful conviction of a suspect on the offence of rape. A conclusion should be adequate as a means of proffering a recommendation in the fight against rape and the sanctity of our wives, sisters and daughters.

### 2. What is Rape?

Rape has been defined in a variety of ways. The Nigerian Criminal Code in section 357 defines rape as follows,

Any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm or by means of false and fraudulent representation as

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

<sup>2</sup> Gen 34:3-13

<sup>3</sup>Section 357 Criminal Code

to the nature of the act, or in the case of a married woman by impersonating her husband is guilty of an offence which is called rape.

It follows this up by providing in section 358, that the punishment for the offence of rape is imprisonment for life. It is imperative at this point to refer to the Criminal Code's definition of 'carnal knowledge' since that is the key word in the offence. According to section 6 of the Criminal Code Act, the offence of rape is complete upon penetration. Further, unlawful carnal connection is one which takes place otherwise than between husband and wife.

A lot of issues arise with this definition. First is the emphasis that the only person to be raped is a woman. This ostensibly may be as a result of the addendum that the offence of rape is complete upon penetration and since physiologically a woman has no weapon of penetration, she can therefore not be guilty or capable of rape. Furthermore, it may be argued that a woman is imbued with a vagina and to that extent she can be penetrated. These issues ask for clarification. In the world of science and technology, is it not possible for a woman to actually penetrate a man through the anus or even for a woman to penetrate another woman? As this question is raging, there is also the need to clearly understand the status of a woman who procured another man to rape a woman. Will such a woman be liable as a party under section 7d of the Criminal Code?

Furthermore, will the penetration of a woman's vagina with a stick or other such instrument not suffice as rape or must the offence of rape be committed when the penetration is with or by the penis? We will come back to these questions in due course; meanwhile, it is expected in this work that we will look at other definitions of the offence of rape.

In Australia, the punishment for the offence of rape is life imprisonment. Rape was also defined there as follows,

- (2) A person rapes another person if—
  - (a) the person has carnal knowledge with or of the other person without the other person's consent; or
  - (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
  - (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.<sup>4</sup>

In the definition above, it is imperative to observe that rape is not just about carnal knowledge without consent; it includes penetration of the vulva, vagina, anus or even mouth with a penis and even with any part of the body not being the penis. Of course, the definition above entails that a man can and a woman equally can commit the offence of rape.

In South Africa, a person is guilty of the offence of rape if the person ('A') unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B<sup>5</sup>. At this juncture, it becomes imperative that we seek a definition of sexual penetration. Section 1 of the law contains the definition section. It defines 'sexual penetration' to "include any act which causes penetration to any extent whatsoever by-

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<sup>4</sup> Section 349 Criminal Code 1899 Queensland Consolidated Acts

<sup>5</sup> Section 3 Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 South Africa

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and 'sexually penetrates' has a corresponding meaning.

This definition shows further that the offence of rape is not limited to a particular gender in the course of its commission. Furthermore, it shows that rape is not just the penetration of the vagina with a penis but includes much more. It is noteworthy to state that the International Criminal Court for Rwanda has this to say on rape, “rape is a form of aggression” and that “the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts”. It defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive<sup>6</sup>. The International Criminal Tribunal for the former Yugoslavia in the *Delalić case* also held that rape could constitute torture when the specific conditions of torture were fulfilled<sup>7</sup> In the United States, ‘rape’ has been defined as penetration no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.<sup>8</sup>

It can therefore be said that rape is any sexual contact that is accompanied by penetration of whatever orifice of either gender of the human folk without consent. At this, stage, it becomes essential that this work looks at the definition of the term ‘consent’ for it is vivid that the offence of rape exists because consent does not exist.

### 3. Meaning and Types of Consent

Consent is primarily a legal construct that has its origins in three different doctrines of law. The first is informed consent. After World War II, the idea of informed consent primarily emerged in response to coerced or involuntary medical experimentation, which was brutally imposed in Nazi concentration camps. More broadly, informed consent comprises the idea that one should know and provide affirmative agreement to a procedure, be it a science experiment or a medical procedure. The second notion of consent is the legal capacity to consent. This is based on the idea that you have the capacity, knowledge and ability to understand what you are promising in a contract and what is being promised to you. Finally, the third aspect of consent arises from criminal law, and covers amongst other things ‘victimless crimes’. In referring to victimless crimes, there is a need to albeit offer a working definition of same. Victimless crimes are generally used to refer to crimes that actually have no victims. Such crimes include drug use and prostitution among other crimes. In such crimes, the consent of the parties is irrelevant, because the state, crown or ‘the people’ are deemed to be injured, and it is their interest that is protected by the law<sup>9</sup>.

It is very essential to state here at the onset that the Criminal Code did not define the term consent. It presupposes that the meaning of the term ‘consent’ can be found elsewhere

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<sup>6</sup> ICTR, *Akayesu case*, Judgment (*ibid.*, § 1726).

<sup>7</sup> ICTY, *Delalić case*, Judgment (*ibid.*, § 1731)

<sup>8</sup> UCR Definition of Rape

<sup>9</sup>Mindy Jane Roseman, Jaime Todd Gher and Sara Hossain, ‘Consent and International Human Rights Law’, available online at [www.creaworld.org/sites/default/files/3.consent](http://www.creaworld.org/sites/default/files/3.consent) and international human rights law accessed on 28/1/13.

outside the ambit of the Criminal Code. Section 74<sup>10</sup> seeks to define consent as a situation where the person offers his agreement by choice and at the same time has the freedom and capacity to make that choice. It follows that in prosecuting such a matter, the prosecutor must ensure that the complainant had the capacity to make a choice about whether or not to take part in the sexual activity at the time in question and secondly establish that the choice was made freely and not in any way constrained or obtained by coercion. Where these two are satisfactorily established, then it can be said that it is a consensual sex<sup>11</sup>.

Consent is a voluntary, sober, imaginative, enthusiastic, creative, wanted, informed, mutual, honest, and verbal agreement. Consent is an active agreement and cannot be coerced; it is a process, which must be asked for every step of the way; never implied and cannot be assumed, even in the context of a relationship.<sup>12</sup> Consent has also been defined as a verb which means 'give permission for something to happen'<sup>13</sup>. The Women's Centre of Northwestern University, Illinois, defined consent with attachment to sexual consent to mean a voluntary, positive agreement between the participants to engage in specific sexual activity.<sup>14</sup> The University of Michigan Policy on Sexual Misconduct by Students defines consent as 'a clear and unambiguous agreement, expressed in mutually understandable words or actions, to engage in a particular activity. Consent is when someone agrees, gives permission, or says "yes" to sexual activity with other persons. Consent is always freely given and all people in a sexual situation must feel that they are able to say "yes" or "no" or stop the sexual activity at any point.<sup>15</sup> At the core of consent lies the fact that every individual is the master of himself or herself and reserves the right not to be played with or acted upon by another in any manner especially sexual manner without his or her express permission this said permission ought to be obtained by one who wants to act upon the person of the other expressly.

It has been argued in some settings that consent may be categorized into three<sup>16</sup>. For purposes of arriving at our type of consent it is pertinent to touch on the three before moving on with the discourse. The three types of consent include explicit *consent*, *implicit consent* and *opt-out consent*. Explicit consent is referred to as that where the individual has informed knowledge about what information he or she is giving. In explicit consent, he or she has the option to give or not to give the consent required. It is the type of consent required in a sexual matter. It can also be taken as informed consent. Implicit consent on the other hand is consent that is implied from your conduct. It suffices to say that a person reads from your conduct the fact that you said yes or no. This kind of consent is the one that is operational in Nigeria especially when sex is involved. This is so because the general opinion is that a woman's 'no' means 'yes'. In other words, it has been argued that a woman's 'no' is indirectly a 'yes' and that from her conducts while saying 'no' she desires the sexual act. This type of consent is wrong and cannot be used to measure consent in sexual matters. The third type of consent which is the 'opt out' consent entails that the person in question has only one option and that is to withdraw consent. So when faced with the 'opt out' consent, the person is expected to withdraw consent and not

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<sup>10</sup> Sexual Offences Act 2003 of the UK

<sup>11</sup> See also *R v Bree* [2007] EWCA 256

<sup>12</sup> Lanre Adedeji, 'Constructing the Crime of Rape and the Boundaries of Consent' available online at [www.thelawyerschronicle.com](http://www.thelawyerschronicle.com) accessed on 28-1-13 at 11.07am

<sup>13</sup> [www.oxforddictionaries.com/definition/english/consent](http://www.oxforddictionaries.com/definition/english/consent) accessed on 29/1/13 at 12.12pm

<sup>14</sup> Definition sourced from [www.northwestern.edu/womenscentre/issues-information/sexual-assault/defining-sexual-assault](http://www.northwestern.edu/womenscentre/issues-information/sexual-assault/defining-sexual-assault) accessed on 28/1/13 at 11.16am

<sup>15</sup> Sexual Assault Prevention and Awareness Centre, University of Michigan available online at [www.sapac.umich.edu/article/49](http://www.sapac.umich.edu/article/49) accessed on 28/1/13 at 11.12am

<sup>16</sup> This argument is common among those in the medical field

to give it. Simply put, in ‘opt out’ consent the individual is expected to withdraw consent only. From the analysis, it is imperative to hold that ‘explicit’ consent should be the one required in any sexual offence as the other two types of consent cannot justify the offence of rape or in any event any other sexual offence.

#### **4. The Nigerian Situation**

At this point in this discourse, it is pertinent to look at the Nigerian criminal justice system and through its lens to look also at the Nigerian society which encourages offences of rape. It is a statement of fact to say that the Nigerian criminal justice system rests on a tripod comprising the police, the judiciary and the prison. The institution saddled most with the problems of criminal justice administration is the Police. The Nigerian Police prosecutes over 70% of criminal matters in the various courts across the land. Indeed, section 23<sup>17</sup> empowers the Police to prosecute criminal offences in all courts in Nigeria. This statutory provision has received judicial blessings in a plethora of cases.<sup>18</sup> With this power, the Nigerian Police is not only vested with the powers to investigate and arraign, they are also imbued with the power to prosecute. Now, for a complainant in Nigeria, the theoretical provision of the law is that she is at best a witness to the crime and the wrong was done to the society for which the society is expected to exact revenge adopting any of the rationale for sentencing available in law. However, the reality on the ground is that the victim is the arrow-head of the prosecution both financially and materially. It therefore follows that where the victim is not financially buoyant to move the case, the case may suffer an immediate miscarriage. Basically, a victim of a crime is expected to lodge a complaint to the Police who in turn will take it up from there. Of course the lodging of the complaint does not attract any fee. In today’s Nigeria, the victim is expected to lodge the complaint with a certain amount of money. Then she provides some more money to enable the authorities investigate the matter. In a crime of rape, when the victim rushes to the Police station to make a complaint, she is derided and in some cases she is likely to be asked question which further increases the pains. When she eventually succeeds in making the report, she will be given a medical paper and asked to go for test. This test is also at her expense. Most times at the hospital, she meets with a male doctor who further makes inquiries that may even increase the pain of the rape. From there she is now sent back to the Police station where she is made to cough out money to initiate the case at the courts and she also has to pay the prosecuting counsel. This scenario can better be imagined if the defendant is a wealthy man who can afford whatever amount that is required of him. From this point, the victim through the prosecutor is squared against the defendant who is comfortable enough to procure a Senior Advocate of Nigeria as his counsel of choice. It is further pertinent to state that the Police Prosecutor may have only his Senior School Certificate result as the qualification to be a prosecutor and here he is squared against a Senior Advocate of Nigeria whose life is consumed by the knowledge of law.

In court, the victim is made to relive the experience of the rape in the open court since all trials must be in public.<sup>19</sup> She is made to answer questions in open court as to her sexual contacts and the lurid details of each especially if the defendant happens to be an acquaintance. In all these, she is made to sound and appear as a loose woman and eventually at the end of the matter, maybe due to one technicality or the other the matter is decided and defendant discharged for failure to prove beyond reasonable doubt. The victim’s lifestyle has been laid bare and that defendant has been discharged to go and do more. Fast forward to another rape

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<sup>17</sup> Police Act Cap P19 LFN 2004

<sup>18</sup> See *Compt. NPS v Adekanye* (No1) 2002 15 NWLR Pt 790 at 318, *Ajakaiye v FRN* 2010 11 NWLR Pt 1206 at 526

<sup>19</sup> Section 36(3) CFRN 1999

case, and the experience of the last one will be retold with embellishment and the victim decides to take her grievance to God in prayers. The defendant is emboldened in his voyage of illegality and knowing what is obtainable he is encouraged to do more and those who look up to him understand the rule of the jungle and *voila* rape is on the increase.

### **5. Conclusion and Recommendations**

In this discourse, we defined rape and highlighted the absence of consent that renders an otherwise consensual sex a crime. We highlighted the issue of definition of rape in the Nigerian context that is not holistic. The work further looked at the criminal justice system and how it encourages the crime of rape in Nigeria.

It is therefore the recommendation of the authors that there is a need for the review of the law on rape in Nigeria to expand the definition and make it an offence for both sexes. Further, it is recommended that consent should be defined in the Criminal Code. Moreso, the process of the trial of a rape offence should be reviewed. The State should make provisions for the victims of rape and provide counselors for them. Hospitals especially general hospitals may be designated as rape test centers and the employment of nurses or other health care providers to render assistance. Furthermore, the state should set up special courts to try offences of rape and where possible in camera to protect the virtues or dignity of the victim. Prosecution for the offence of rape should be wholly state sponsored and the victim should remain what she is in law and that is a witness. It is our thinking that if these measures are adopted, the rising incidents of rape may be reduced.