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THE OFFENCE OF RAPE UNDER THE NIGERIAN CRIMINAL JURISPRUDENCE: AN APPRAISAL

*Cyril Ezechi Nkolo**

Abstract

Man is naturally and ordinarily selfish. Consequently, man is moved to action by his appetites, desires and passions. In order to stem the selfishness of man and to protect the society and the dignity of the female folk, the offence of rape was criminalized and punishment prescribed to serve as deterrence as well as to protect the society. Accordingly, the offence of rape is criminalized in Nigeria with the corresponding punishment/sanctions. This article appraises the existing legal framework on rape with a view to ascertain its adequacy or otherwise in addressing this social ill. The paper demonstrates that the meaning/scope of the offence of rape in Nigeria is very parochial vis-à-vis other jurisdictions and needs to be revisited. The paper also shows that spousal rape has no place under the Nigerian Law and this is a very big lacuna and infringement on the fundamental rights of women. The ingredients/requirements which must be proved to establish the offence of rape appears cumbersome and complex. However, the punishment section of rape under the Criminal Code Act is highly commendable and the life

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imprisonment as provided by the code should be a mandatory sentence given the evil effect of rape and should not be left to the discretion of the judges.

Introduction

The incident of rape in Nigeria has been on the increase in the recent years. Rape is real. It is committed in bedrooms and dark alleys, at parties, in offices, under the flyover, bridges, within families, etcetera. The number of women being raped all over the world yearly is staggering.¹ Rape has devastating consequences on its victims, their families and the society in general. The victims of this act face grave physical and psychological problems years after the incident and may carry the scar for life. These include serious injuries, HIV infections, mental disorder, economic disorder and mental breakdown of their families

The complexity of sex crimes derives from a historical background against women. The legal history of rape is particularly ignominious. Under the English Common Law from which our laws developed, rape was a crime against property not a person. A woman's reproductive capacity in the form of her chastity was considered property and was essential to establishing patriarchal inheritance rights.²

A woman's sexuality was owned by the father and transferred to the man who became her husband. Rape laws protected the economic interest of men. Consequently, rape was

¹ Oba, Caroline O. 'The Prosecution of Rape in Nigeria: An Agenda for Reform'. [2012] (4) *The Justice Journal* 93

² Carol Tracy and Terry Fromson, 'Rape and Sexual Assault in The Legal System', Paper Presented to the National Research Council of the National Academics Panel on Measuring Rape and Sexual Assaults in the Bureau of Justice Statistics House Hold Surveys Committee on National Statistics June 5, 2015, 4

originally considered as the theft of this property. The body integrity of the woman was irrelevant. This concept has continued to influence the attitude of the court and the society with regard to sex crimes.

There are provisions in Nigerian's Criminal Law that criminalize this offence and prescribe punishment for its commission. This article aims at appraising the relevant provisions of the law as it relates to rape with a view to ascertaining its adequacies or otherwise in addressing this social ill.

Meaning of Rape under Nigerian Criminal Law

Rape has been defined as having sexual intercourse with a non-consenting female, with the knowledge by the accused that his victim was not consenting.³ Okonkwo,⁴ opined that rape is the most serious kind of sexual assault and is punishable with imprisonment for life with or without whipping. It is the unlawful penetration of the female organ without her consent or if consent is given, it was induced under duress, undue influence, or other factors.⁵

The offence of rape is consummated where a man has unlawful carnal knowledge of a woman or a girl without her consent or against her will or with her will or consent if the consent is obtained by force or by means of threat or intimidation of any kind or by fear of death or possible bodily harm or by any means of

³ Kharisu SC, *The Law of Crimes in Nigeria*, (Kuduna, Ahmadu Bello University Press, 2010) 86.

⁴ Okonkwo and Nash, *Criminal Law in Nigeria, 2nd Edition*, (Ibadan, Spectrum Publishers, 2003) 271

⁵ Alubo AO, 'New Dimension to Rape in International Criminal Law: Prescription for Nigerian Criminal Law', *A Colossus in the Legal Firmament: Essay in Honour of Olise Agbakoba*, (Ibadan, constellation publishers. 2008) 465.

deceit, falsehood or fraudulent representation as to the nature of the act.⁶

The legal definition of rape is contained in section 357 of the Criminal Code Act and Section 282 of the Penal Code Act.

Section 357 of the Criminal Code defines rape as:

*Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent, if the consent is obtained by force or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape*⁷

Section 358 provides that;

*Any person who commits the offence of rape is liable to imprisonment for life with or without caning*⁸

The Penal Code Act also defines rape in Section 282 thus:

1. 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 ways:
 - (a) against her will
 - (b) Without her consent
 - (c) With her consent; when her consent has been obtained by putting her in fear of death or of hurt
 - (d) With her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married

⁶ *Adeoti v State* (2009) ALLFWLR (part 454), 1450 (SC)

⁷ Criminal Code Act CAP C38 Laws of the Federation of Nigeria 2004, Section 357

⁸ Ibid

(e) With or without her consent, when she is under fourteen years of age or of unsound mind

2. Sexual intercourse by a man with his wife is not rape, if she attained the age of puberty.⁹

A careful perusal of sections 357 of the Criminal Code and 282 of the Penal Code indicates the basic features for rape to be said to have been committed. Thus, a man must have sexual intercourse with a woman without her willing and informed consent. Against her will refers to a situation where the victim is in such a state that she can neither say yes or no.¹⁰ In *R v Camplin*,¹¹ the accused had sexual intercourse with a woman after getting her drunk to excite her. The court held that the victim was put into a position where she could not have truly expressed her will. Against her consent implies that the victim did not expressly or impliedly express consent. Establishing lack of consent is very crucial. That is what transforms the lawful activity of sexual intercourse into the very serious crime of rape.¹² The word "against her will" is used in the Penal Code while the word consent is used in both codes.

Attempts to distinguish against her will and against her consent appears not to have been resolved. According to Smith and Hogan,¹³ this fine distinction, is a distinction without a difference. However, it has been opined by some scholars that the proper test in case of rape was the intercourse without her consent and not was

⁹ Penal Code Act Cap 89, Laws of the Federation of Nigeria 2004, Section 282

¹⁰ Chukkol K.S, *The Law of Crimes in Nigeria*, (Kaduna, Armadu Bello University Press, 2010) 323

¹¹ (1873) 12 COX CR. C. 311

¹² Clarkson C.M.V, *Understanding Criminal Law*, 3ed (London Sweet and Maxwell 2001) 191

¹³ Smith and Hogan (3rded. London, Oxford University Press, 220

the act against her will.¹⁴ This may be seen as a distinction without a difference but it emphasizes that it is not necessary for the prosecution to prove a positive dissent by the woman, it is enough that she did not consent.¹⁵ Thinking in the same vein, Chukkol opined that;

The prosecution can secure conviction not by showing that sexual intercourse took place while the victim was saying no. It suffices if the victim did not expressly or impliedly say yes. Against her will is more difficult to prove as the victim may not always be in a position to express dissent.¹⁶

Also, implicit in both statutes is that where consent was given by the woman but such consent was obtained by fraud, putting her in fear of death or hurt, intimidation, force or in the case of a married woman by personating her husband is not true/genuine consent and the accused or defendant will be held liable for rape.¹⁷ Legally, it is obvious from both statutes that rape can only be committed by man against a woman. In other words, under both statutes, women are not capable of committing rape. It is worthy of note that a young man below twelve years cannot be guilty of rape as there is a presumption of law that such a person is incapable of having carnal knowledge.¹⁸

Under the Nigerian law as can be gleaned from both statutes, a husband cannot be guilty of raping his wife neither can a

¹⁴ Chukwumaeze U.U [2005] Sexual Offences And Gender Consciousness, Nigerian Journal of Legal Studies, (6) 13

¹⁵ Ibid

¹⁶ Op cit, 323

¹⁷ Sections 357 of the Criminal Code and section 282 of the Penal Code

¹⁸ Section 30 of Criminal Code Act 2004, Section 5 of the Penal Code.

woman be convicted for rape.¹⁹ However, under section 282(2) of the Penal Code, a wife who has not reached puberty cannot be taken to have consented, on marriage, to having sexual intercourse with her husband. Technically speaking, those in Hausa community marrying under aged girls can be charged with rape.²⁰ There is no reported case in this regard. As Chukkol observed: that would, of course, appear in congruous and illogical and it is not surprising that the young wives do not lay complaints.²¹ It is pertinent to note that these classes of persons who cannot be found guilty of the offence of rape can be legally charged and convicted of the offence of aiding, counseling and procuring the commission of rape.

The term unlawful carnal knowledge is used in the Criminal Code Act to describe the act of rape while sexual intercourse is used in the Penal Code. Section 6 defines carnal knowledge thus:

When the term carnal knowledge or the term carnal connection is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration. Unlawful carnal knowledge means carnal connections which takes place otherwise than between husband and wife.²²

The words "Sexual Intercourse" are not defined by our codes, the Criminal Code and the Penal Code. However, the court of Appeal, Ibadan Division in *Ndewinu Posu and Another v State*²³ defined sexual intercourse as follows:

Sexual intercourse is deemed complete upon proof of penetration of the penis into the Vagina. Even the

¹⁹ The definition of rape in sections 357, and 282 of the Criminal Code and Penal Code respectively. Such can be brought under section 7 of the Criminal Code Act

²⁰ Chukkol, K.S, Op cit, 330

²¹ Ibid, 330

²² Criminal Code Act Section 6

²³ (2011) 45 NSCQR (Part 2) 713 (SC)

slightest penetration is sufficient to constitute the act of sexual intercourse. The fact that the prosecutrix who is alleged defiled is found *Virgo Intact* (Virgin) is not inconsistent with partial sexual intercourse and court will be entitled to find that sexual intercourse has occurred if it is satisfied on that point from all the evidence led and surrounding circumstances of the case. In the instant case, prosecution was able to establish penetration, therefore, the trial court rightly convicted the accused persons of rape with which they were charged.

The implication is that the offence of rape is committed on penetration per vagina only and it is complete even where there is no ejaculation.²⁴ The same principle of law was expressed by the Supreme Court in *Ogunbayo v State*²⁵ when the court held 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 the Vagina. Emission is not a necessary requirement ... Thus, the proof of the rapture of the hymen is unnecessary to establish the offence of rape.

Obvious from the definition of sexual intercourse and carnal knowledge as articulated above is that an impotent man cannot be liable to the offence of rape. For males, the word "Penetration" implies sexual potency of the accused. Where the male organ, penis, cannot be erected at all, there will be such penetration per *Vagina* to make him liable for rape.²⁶ In the American case of *Breddy v Commonwealth*²⁷, the Virginia Supreme Court set aside

²⁴ *Iko v State* (2001) 14 NWLR (Part 732) 48 (CA)

²⁵ (2007) ALLFWLR (Part 365) 408 (SC)

²⁶ *Chukkol S. K. S*, Op cit 320

²⁷ (1946) 184 va, 765, 36 S. E. rd 549 (SC)

the conviction of the appellant on the ground that being impotent, he could not have committed the offence of rape. This is predicated upon the law that the *actus reus* of the offence of rape is the penetration of the vagina with the penis. The *mens rea* of rape is an intention to have sexual intercourse with a woman knowing that she did not consent or being reckless as to whether she consented or not.

In Britain, the sexual offences Act, defines rape thus:

- (1) A person (A) commits an offence if:-
 - (a) He intentionally penetrates the Vagina, anus, or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration
 - (c) 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.²⁸

Under the Violence Against Persons (Prohibition) Act 2015, rape has been defined as follows:

1. (i) A person commits the offence of rape if:
 - (a) He or she intentionally penetrates the Vagina, anus or mouth of another person with any other part of his or her body or anything else.
 - (b) The other person does not consent to the penetration or
 - (c) The consent is obtained by force or by means of false and fraudulent representation as to the nature of the act or the use any substance or addictive capable of taking

²⁸ Section 1 of the Sexual Offences Act 2003

away the will of such a person or in the case of a married person impersonating his or her spouse.

2. A person convicted of an offence under subsection (i) of this section is liable for 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 imprisonment. (b) In all cases, to a maximum 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 maximum of 20 years imprisonment without an option of fine.
3. The court shall also award appropriate compensation to the victim as it may deem fit in the circumstance
4. A register for convicted sexual offenders shall be maintained and accessible to the public.²⁹

A community reading of the British Sexual Offences Act 2003 and the Violence Against Persons (Prohibition) Act 2005 shows an expanded definition of rape. This indeed is a novelty. These statutes expanded the definition of rape to penetration of the vagina, mouth or anus of another person with any part of his or her body or anything else. The obvious implication is that under both statutes, the offence of rape can now be committed by men and women. According to Smith and Hogan, for the first time in England and Wales, rape includes non-consensual *fellatio*. Also, section 79(3)³⁰ of the English Act, makes it clear that surgically reconstructed body parts are included as part of the body. A person with his surgically reconstructed penis, can rape a female with her surgically reconstructed vagina. Thus, rape can be committed by

²⁹ Sections 1 (1), (2), (3) and (4) of Violence Against only to the Federal Territory. Persons Act, 2015 Applicable

³⁰ Section 79(3) of the English Sexual Offences Act, 2003

the penetration of the Vagina, mouth or anus of person without his or her consent using penis, finger, tongue, as well as other subjects such as candle, stick or toys.

Furthermore, rape is now defined in terms of penetration rather than sexual intercourse. Under the Criminal Code Act, rape is defined in terms of having carnal knowledge or carnal connection while in the Penal Code, the term sexual intercourse was used. Section 282 of the Penal Code Act in the explanatory section provides that mere penetration is sufficient to constitute sexual intercourse while section 6 of the Criminal Code Act provides that, when the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration. Expressing this more pungently, Chukwumaze, observed that;

The definition of rape requires penile-vaginal contact. The least degree of penetration *Per Vaginam* is sufficient but the penetrating object must be the penis and nothing more, otherwise is not rape.³¹

This ingredient or requirement is not provided in both the English Sexual Offences Act 2003 and the Violence Against persons (Prohibition) Act 2015. Under these Acts, an impotent man can commit rape hence the erection of the penis and its penetration into the vagina of a woman is no longer the only means by which rape can be committed. The crucial element of rape still remains the absence of consent under these statutes. The sexual Offences Act provides that, A person commits rape if: (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis (B) does not consent to the penetration.³² Section 75 of the Act further creates a rebuttable presumption that the complainant

³¹ Chukwumaze, U.U. Op cit 17

³² Section 1 (a) and (b) of the English Sexual Offences Act 2003

did not consent and the defendant had *mens rea* where violence or threat of violence was used against the complainant or a third person.³³ The Violence Against Persons in this regard states that: A person commits rape If:- (a) He or she intentionally penetrates the Vagina, anus or mouth of another person with any part of his or her body or anything else (b) the other person does not consent to the penetration or the consent is obtained by force, threat, intimidation etc. This is the position of the law under section 357 of the Criminal Code Act and section 282 f the Penal Code Act. Consequently, lack of consent of the victim is very crucial in establishing the offence of rape. In this regard, the Supreme Court in *Affor Lucky v State*³⁴ held that; the essential ingredients of the offence of rape which the prosecutrix must prove include that the act of sexual intercourse was done without the consent or that the consent was (if any) obtained by fraud, force, threat, intimidation, deceit or impersonation.

It is pertinent to note that the *mens rea* of rape under the English Sexual Offences Act 2003 requires an intentional penetration and that the defendant did not reasonably believe that the victim was consenting.³⁵ This latter *mens rea* can be broken down into two questions and only if the answer to both these questions is yes, will the defendant be found not to have *mens rea*.³⁶ (i) Did the defendant believe that the victim was consenting (ii) was the believe reasonable. Section 1 (2) of 2003 Act states: whether a believe is reasonable is to be determined having regard to all the circumstances, including any steps (the defendant) has

³³ English Sexual offences Act 2003 Section 75

³⁴ (2016) 66 NSCOR (Part 2) 494 (SC)

³⁵ Section 1 (2) (b)

³⁶ Catherine Elliot and Frances Quinn, Criminal Law, 8th ed, London, Pearson, 2010, 170

taken to ascertain whether the (victim) consents.³⁷ There in effect two reasonableness element. D^s believe must be reasonable, and in assessing that, the process by which he came to that believe must be reasonable.³⁸ The Sexual Offences Act did not define the key element in section (1) (c) and (2). The term all the circumstances is not defined by the Act. Its meaning or import is left to the conjecture and discretion of the courts. This may not ensure certainty in this aspect of the Act. In *R v Ts*,³⁹ the court of Appeal seems to be interpreting this as allowing personal characteristics to be taken into account. This reasonableness of the defendant's believe is not provided for in the Violence Against Person Act 2015 as well as in the Penal Code Act and Criminal Code Act.

The Violence Against Persons Act created new elements which is neither contained in the Penal Code and the Criminal Code nor in the English Sexual Offences Act. These include: (i) gang raping or rape by group of persons. The offenders are liable jointly to a maximum of 20 years⁴⁰ imprisonment. (ii) Award of appropriate compensation to the victim as the court may deem fit.⁴¹ (iii) Maintenance of a register of convicted sexual offenders which shall be made accessible to the public.⁴²

These elements are very crucial today where gang rapping is very common but was not captured by the previous statutes. The twenty years maximum imprisonment term appears inadequate to reflect the seriousness of the offence. It is accordingly recommended that it should be increased. The maintenance of register of convicted offenders is commendable in that besides

³⁷ English Sexual Offences Act Section 1 (2)

³⁸ Smith and Hogan, Op cit 810

³⁹ (2008) EWCA, 170 (CA)

⁴⁰ Section (2) (c)

⁴¹ Section (3)

⁴² Section (4)

record purposes it will serve as a stigma on such persons and will probably serve as deterrence to others. It is pertinent to note that the Violence Against Persons (Prohibition) Act 2015, only applies to the Federal capital territory by virtue of section 26 of the Act. It is recommended that this should be extended to all parts of Nigeria.

Appraisal/Relevant Laws on Rape under the Nigerian Criminal Jurisprudence

A closer scrutiny of the provisions of the laws on rape as exhibited above reveals that for an act to conduce to rape, certain elements/ingredients must be established. It is pertinent to note that both the criminal code and the penal code did not comprehensively define these ingredients so as to provide an insight as to the real intention of the legislature as well as to guide the members of the Bench and Barr with regard to rape cases. However, their definitions could be gleaned from case laws and definitions from other jurisdictions. These ingredients/elements of the offence of rape will be examined seriatim and here we go.

Consent

The element of consent is very critical in determining whether conduct addressed by rape and sexual assault statutes is criminal.⁴³ The definition of consent differ across jurisdictions. However, statutory and judicial definitions identify two different issues or factors with regard to consent, namely, whether the individual freely consented and if so, whether the individual had the capacity to consent. Consent entails given or expressing permission, positive

⁴³ Carol Tracy and Terry Fromson, 'Rape and Sexual Assault in the Legal System', paper presented to the National Research Council of the national Academics Panel on measuring Rape and Sexual Assaults in the Bureau of Justice Statutes House Hold Surveys Committee on National Statutes June 215, 4

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cooperation in an act or an attitude pursuant to an exercise of free will and knowledge of the act⁴⁴. Consent is a voluntary yielding to what another proposes or desires, agreement, approval or permission regarding some act or purpose, especially given voluntarily by a competent person.⁴⁵ For the purposes of this part, a person consents if he agrees by choice and has the freedom and capacity to make that choice.⁴⁶ It is the absence of the victim's consent that transforms sexual intercourse into rape. The victim's consent must be real and not a mere submission given under pressure. In *R v Olugboja*,⁴⁷ the defendant threatened to keep a girl in his bungalow overnight. He made no explicit threat of violence and she did not resist sexual intercourse. The court held that on the evidence, she had not given genuine consent, but had merely submitted under pressure of his threat. Consent connotes that the consent is voluntary and freely given.⁴⁸

The Penal Code, the criminal code, the English Sexual Offences Act and Violence Against Persons Act provides for situations where though consent was given, it is considered in law as no consent. In this category were situations where the consent is obtained by force, threat, or intimidation of any kind or fear of harm or fraud. Consent obtained by force amounts to rape. However, force as a vitiating element of consent requires evidence of reasonable resistance. Only through evidence of some sort of overt behaviour such as a verbal "no" or an attempt to push away the defendant can the prosecution meet its burden of proving non

⁴⁴ California Penal Code Section 251.6 (2012)

⁴⁵ Blacks Law Dictionary 368.

⁴⁶ Sexual Offences Act 2003 Section 74

⁴⁷ (1981) 1WLR 1382 (HL)

⁴⁸ Killichasisaree K. International Criminal Law, (Oxford, Oxford University Press, 2001) 112

consent.⁴⁹ Accordingly, factors that have influenced courts view of non consent include the amount of resistance the victim offered, the threat of force and the danger to the victim if she resisted. Articulating this rule more pungently, the Court of Appeal in *Igbanugo v State*⁵⁰ states that:

In the instant case, '*exabundantia cautela*', the torn wears of the victim, her escape at the earliest time, the injuries, the force testified by Dr. Grant Nwoko (P.W.I), the distressed condition of the victim when corporal Israel saw her are corroborative evidence enough of want of consent

In practical terms, force means resistance. This is because acquaintance rapists don't use force unless victim resists their advances. In other words, force and resistance are two sides of the same coin. If force is an element, then, so is resistance.⁵¹

Threat-of-force also constitutes a vitiating element with regard to consent. The actual use of force is not required to satisfy the threat-of-force requirement. To satisfy the threat-of-force requirement; the prosecution has to prove that the victim honestly feared imminent and serious bodily harm and that the fear was reasonable under the circumstances.⁵² In *Jones v State*⁵³ the defendant grabbed a woman by arm choked her and forced her into his car. He took the woman to a seclude place, forced her to commit oral sodomy. He later raped her. He was convicted of rape. He appealed against his conviction on the ground that there was no

⁴⁹ Joel, Samaha, Op cit, 364

⁵⁰ (1992) 3 NWLR (Part 228) 176

⁵¹ Bryden, David "Redefining Rape" [2000] Buffalo Criminal Law Review (vol.3) 318

⁵² Joel Samaha, Op cit, 372

⁵³ (1984) 682 P.d2 757 Okla Criminal Appeal Cases. (A)

immediate and greatly body harm. The court of Appeal affirmed his conviction and said that:

In Oklahoma, a woman threatened with rape is not required to resist to the uttermost, instead, she is not required do more than her age, strength, and the surrounding circumstances make reasonable. In the light of the facts of this case, as recited above, we find that there was more than ample evidence to establish that the prosecutrix submitted due to the threats of great bodily harm.

Deception is another factor that nullifies or vitiates consent. Cases of deception fall into two categories, fraud in the fact and fraud in the inducement.⁵⁴ Fraud in fact, in rape, occurs when the rapist convinces his victim that the act consented to was something other than sexual intercourse. In *Moran v People*⁵⁵ Dr. Moran told a patient he needed to insert an instrument into her vagina for treatment. She consented. The Doctor rather engaged in intercourse with her. The Doctor was convicted of rape. On appeal, the argument of the Doctor that the woman consented was rejected because he deceived the woman. Intentional deception as to the purpose of the act creates a conclusive presumption that the woman did not consent to the act and that the man did not reasonably believe she did.⁵⁶ Fraud in the inducement is not rape. Fraud in the inducement, in rape, occurs when the fraud is in the benefits promised, not in the fact. In *Boro v Superio Court*⁵⁷, the defendant tricked several women into believing he could cure their fatal blood diseases by having sexual intercourse with them. He convinced them that they had two choice: they could undergo an extremely

⁵⁴ Joe Samaha, Op cit 373

⁵⁵ (1872) 25 Mich. 356

⁵⁶ British Sexual Offences Act 2003 Section 76

⁵⁷ (1985) 210 Cal. RPT 122 (AC)

painful and expensive surgery or have intercourse with a donor, Boro, who had been injected with a special serum. The court ruled that the women consented even though Boro used fraud to induce them to have sexual intercourse with them.

Capacity

Capacity is defined as the mental ability to understand the nature and effect of one's acts.⁵⁸ Capacity to give consent for rape under the statutes appear very complex and involves a lot of variables which include the follow: age, lack of capacity, unconsciousness etc.

Age

Most jurisdictions have statutes establishing age of consent and a perpetrator will be found guilty if the victim is below the specified age regardless of whether the victim consented or not. In Nigeria, the Criminal Code provides that any person who has or attempts to have unlawful carnal knowledge of a girl of being or above thirteen years and under sixteen years of age is guilty of a misdemeanour and is liable for imprisonment for two years.⁵⁹ It also provides that: a person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or omission.⁶⁰ The Penal Code provides that a man is said to commit rape who ... with or without her consent when she is under fourteen years of age or of unsound mind.⁶¹ Under the Criminal Code, a girl below sixteen years is incapable of

⁵⁸ Bryan G.A. (ed) Black's Law Dictionary, 10th ed. (USA, Thomas Rulers, 2014) 249.

⁵⁹ Section 221 (1) and (2)

⁶⁰ Section 30

⁶¹ Section 282 (e)

given consent while under the Penal Code it is fourteen years. These age limitations is reasonable given the nature of Nigerian environment. The rationale behind age limitation is that children lack maturity to consent to sexual activity and these offenders use the children's lack of maturity as a tool to coerce, control and manipulate them.⁶² In other words, these provisions are designed to protect the younger ones from the heinous crime of rape, and, is commendable.

Lack of Capacity

Consent obtained from the victim who does not possess the capacity to understand the consequence(s) of her action due to injuring, compulsion or disability is not valid. The Criminal Code provides that: A person is not criminally, responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to control his actions or of capacity to know that he ought not to do the act or make the omission.⁶³ Section 51 states that: Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind is incapable of knowing the nature of the act ...,⁶⁴ Articulating this principle of law, the Court of Appeal in *Achukwu v State*,⁶⁵ held that: An accused who erects the defence of insanity must show that he was at the relevant time, suffering from either mental disease or from natural infirmity as the case may be, which deprived him of the capacity to understand what he was doing, control his actions or

⁶² In the matter of B.W. 313 S.W. 3rd 818 (Tex 2010) <http://www.fhi.org/about-us/ucr/in-crime-intheus/2010/tables/10tbl138x/s> accessed noveber20, 2018.

⁶³ Criminal Code Laws of the Federation 2004 Section 28

⁶⁴ Penal Code Section 51

⁶⁵ (2015) ALLFWLR (Pt 779) 1079 (CA)

know that he ought not do the act or make the omission. Thus, consent obtained from a person of unsound mind is not valid.

Unconsciousness

Unconsciousness renders a person incapable of given consent. Unconsciousness can take the form of a sleeping victim as well as one who is unconscious due to intoxication, sedation, strangulation or physical trauma. The implication of rape effectuated under any of the above mentioned circumstances is that the victim(s) would not be able to report vividly what transpired during the time of the unconsciousness. The perpetrator will be found guilty not because the victim was in a position to give any form of consent. According to Kharisu,⁶⁶ sexual intercourse can amount to rape in a situation where the victim is in such a situation that she can neither say yes or no. In the English case of *R v Camplin*⁶⁷, the accused had sexual intercourse with a woman after getting her drunk to excite her. In another case of *R v Mayers*⁶⁸, the accused victim was asleep. The Courts held in both cases that the victims were put in a position where they could not have truly expressed their will. All the prosecution has to show is that the rape victim(s) did not expressly or impliedly express consent.⁶⁹ It is important to note that intoxication by the victim of the rape does not render the victims consent invalid unless the intoxication was inflicted on the victim by another person, maliciously without the victim's consent.⁷⁰ This

⁶⁶ Kharisu S.C, Op cit 322

⁶⁷ (1978) AC 705 (CA)

⁶⁸ (1873) 12 COX CR. 311 (CA)

⁶⁹ Karisu SC, Op cit, 323

⁷⁰ See sections 29 (1) and (2) of the Criminal Code Act 2004 and Section 44 and 52 of the Penal Code Act, 2004

point was clearly amplified by the Court of Appeal in *Achukwu v State*⁷¹ when the court held that:

By the provisions of sections 44 and 52 of the Penal Code a person in a state of intoxication is presumed to have the same knowledge which he would have had if he had not been intoxicated. An act done by a person by reason of intoxication caused by something administered to him without his knowledge is not an offence. So while self intoxication under section 44 is not a defence, induced intoxication constitute a statutory defence.

Thus, sexual intercourse with a victim who is under the influence of induced intoxication without the victim's consent is rape. This position of the law is commendable. It is very obvious that many woman are raped under intoxication induced by the rapists and this impact on their ability to assess danger, resist attack and capacity to consent. Articulating this effect metaphorically, Teresa⁷² wrote that:

If recreational drugs were tools, alcohol would be a sledge hammer, few cognitive functions or behaviours escape the impact of alcohol, a fact that has long been recognized in the literature. Alcohol is a central nervous system depressant. As the consumption of alcohol increases, its effect increases as well. A small amount of alcohol eases tension, a large amount removes inhibitions, and a still large amount prevents the potential victim from resisting the aggressor.

Consequently, consent induced by fraud, compulsion to submit due to use of force or threat of force or coercion or facilitated by alcohol or drugs is invalid.

⁷¹ (2015) Supra, 1090

⁷² Teresa Scalzo, 'Prosecuting Alcohol Facilitated Sexual Assault, 2007 Available at <http://www.ndaa.org/pdf/pub-prosecuting-alcohol-facilitated-sexual-assaultpdf>-accessed June, 2020.

Penetration

One of the ingredients that need to be established by the prosecution is penetration into a woman's vagina is one of the most fundamental element or ingredient that must be proved to establish the offence of rape under our law, the Criminal Code Act and the Penal Code Act. The Criminal Code Act provides that, when the term "Carnal knowledge" or "Carnal Connection" is used in defining an offence, it is implied that the offence, so as regards that element of it, is complete upon penetration.⁷³ In *Ogunbayo v The State*,⁷⁴ the court held that: It has been held that the most important ingredient of the offence of rape is penetration. However, penetration with or without emission is sufficient even where the hymen was not ruptured. The slightest penetration will be sufficient to constitute the act of sexual intercourse. The *actus reus* of rape is penetration of the vagina with the Penis. The implication is that a woman cannot commit rape in Nigeria. Also, an impotent man whose organ or penis does not erect at all cannot commit rape hence, there is nothing that will penetrate the vagina. In the American case of *Breddy v Commonwealth*,⁷⁵ the Supreme Court set aside the conviction of the appellant on the ground that being impotent, he could not have committed the offence of rape.

It is humbly submitted that our extant law on the definition of rape and consequently, penetration is very parochial compared with other climes. Under the 2015 Violence Against Persons Act applicable only Federal Capital Territory and the English Sexual Offences Act 2003, definition of rape and penetration has been expanded thus: the penetration of vagina, mouth or anus of another person with any part of his/her body or anything else by any person

⁷³ Criminal Code Act 2004 Section 6

⁷⁴ (2007) 45 NSCOR (Part 2) 713 (SC)

⁷⁵ (1946) 184 VA, SE2d 549 (SC)

whether male or female. These Act are more encompassing. It is recommended that the law on rape should be amended to reflect the modern trend on the subject.

Spousal Rape

It is very obvious from the various statutory provisions as articulated above that spousal rape is not known to Nigerian law. In other words, no husband can be charged let alone be convicted for rape against his wife in Nigeria. This traditional view of spousal rape cut across cultures and prevailed for over centuries. Historically, many cultures have the concept of spousal conjugal right to sexual intercourse with each other.⁷⁶ The proposition of Christianity and in particular, Saint Paul's teaching is very eloquent on this. His teaching goes thus:

Let the husband render to his wife the affection due to her, and likewise also the wife to the husband. The wife does not have authority over her body, but the husband does. And like wise, the husband does not have authority over his own body but the wife does. Do not deprive one another except with consent for a time, that you may give yourselves to fasting and prayers, and come together again so that Stan does not tempt you because of your lack of self-control.⁷⁷

The most Common Law theory behind the impossibility of spousal rape is the implied consent theory, which is structured around contract law. According to Mathew Hale, the Chief exponent of this theory, the husband cannot be guilty of rape committed by himself upon his lawful wife for by their mutual

⁷⁶ Atidoga D F, 'The Jurisprudence of the Criminalization of Spousal Rape: Nigeria and English Law in Perspective' [2010] *Ebonyi State University Law Journal* (1) 271

⁷⁷ Holy Bible, 1 Corinthians, 7: 3- 5 New King James Version

matrimonial consent and contract, the wife hath given up herself in this kind under her husband, which she cannot retract. Consequently, sexual intercourse by the wife can only be revoked upon separation.⁷⁸

However, with the development of the concept of human rights, the belief of marital right to sexual intercourse is gradually becoming unpopular. In December 1993, the United Nations High Commission for Human Rights published the declaration on the Elimination of Violence Against Women.⁷⁹ Sequel to this, many countries over the world have criminalized spousal rape. In England and Wales, marital rape exemption was abolished in 1991 by the House Lords in *R v R*.⁸⁰ In this case, the House of Lords per Lord Keith of Kington stated that:

Contortions being performed in lower courts in order to evade the marital right exemption were indicative of the absurdity of the rule, and held, agreeing with the earlier judgement of the Court of Appeal in the same case that the "fiction of implied consent have no useful purpose to serve today in the law of rape" and that the marital right exemption was a "common law fiction" which had never been a true rule of English Law. R's appeal was accordingly dismissed and he was convicted for rape of his wife.

Spousal rape is not recognized by the Nigerian Criminal Justice system. The old belief on marital rape still holds sway in Nigeria. In most Nigerian cultures, a wife is seen as a legitimate property of her husband. Thus, like all other inanimate properties, the husband is vested with powers to deal with her as he deems fit. Consequently, the husband cannot be questioned on the means or

⁷⁸ UNICEF, *The Progress of Nations*, 1997, 48

⁷⁹ Atidoga, D. F (n39) 280

⁸⁰ (1992) AC 591 (HL)

methods he may decide to have sex with his wife and the wife being his property cannot refuse to consent to the act.⁸¹ There are statutory provisions to this effect in Nigeria. The criminal code provides that "unlawful carnal knowledge" means carnal connection which takes place otherwise than between husband and wife.⁸² The Penal Code provides that, sexual intercourse by a man with his own wife is not rape if she has attained puberty.⁸³

We humbly submit that this practice and provisions of the law, amounts to a breach of the Fundamental Human Rights of women in Nigeria. The constitution provides that every individual is entitled to respect for the dignity of person and accordingly, (a) no person shall be held in slavery or servitude ...⁸⁴ The constitution also under the Fundamental Objectives and Directive Principles provides that:

The social order is founded on ideals of freedom, equality and justice. In furtherance of the social order,

- (a) every citizen shall have equality of rights, obligations and opportunities before the law.
- (b) the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced.⁸⁵

Furthermore, the constitution also provides that the state shall protect, preserve and promote the Nigerian cultures which enhance human dignity and are consistent with the fundamental

⁸¹ Criminal Code Act 2004, Section 6

⁸² Penal Code Act 2004, Section 282

⁸³ Ibid

⁸⁴ The Constitution of the Federal Republic of Nigeria 1999 (as amended) Section 17 (1), (2) (a) and (b).

⁸⁵ Section 21 (a) Ibid

objectives as provided in this chapter ...⁸⁶ Although sections 17 and 21 are under the Directive Principles, when combined with section 34 and interpreted together, it is clear that the extant law on spousal rape amounts to an infringement on the rights of women and should be reversed to be in accord with the modern practice.

The key words in section 34 are slavery and servitude. Slavery means involuntary servitude, specifically the legalized social institution in which humans are held as property or chattels, complete subjection of person to another.⁸⁷ Servitude means state of subjection to any claim, demand or control.⁸⁸ This implies that under the extant law on rape, women are perceived as slaves. This is contrary to section 34 of the constitution which protects the dignity of every Nigerian and prohibits slavery or servitude in any form or shape except as derogated there from by the law. We, therefore, recommend that spousal rape should be criminalized in Nigeria in view of the spate of its occurrence and to protect women.

Punishment for Rape

After being convicted under section 357 of the Criminal Code,⁸⁹ Section 358⁹⁰ of the Criminal Code prescribes the punishment for rape as follows: Any person who commits rape is liable to imprisonment for life with or without caning. Section 283 of the Penal Code provides that, whoever has carnal intercourse against the order or nature with any man, woman or animal shall be

⁸⁶ Mitford M.M (ed), *The New International Comprehensive Dictionary of the English language*, (USA, Typhoon media Corporation, 2010) 1181

⁸⁷ (n 49) 115v

⁸⁸ Ibid

⁸⁹ Criminal Code Act 2004, Section 357

⁹⁰ Ibid

punished with imprisonment for a term which may extend to fourteen years and shall also be liable to a fine.⁹¹

It is very apparent that the Penal Code appears to be more liberal than the Criminal Code which provides life imprisonment. With respect, we submit that the punishment section under the Criminal Code which provides for life imprisonment is commendable given the spate of rape in Nigeria today and the devastating effects on the victims and society. It is very pertinent to examine here the argument of Kharisu Chukkol against the life imprisonment punishment imposed by the Criminal Code for committing rape. Emphasizing the evil nature of a rapist and while life imprisonment punishment should be imposed, the court in *Shuaibu v Kano State*,⁹² Observed as follows:

A rapist is worse than an animal. He throws overboard the limit of his legal rights and he can, shamelessly, deprive another person, more painfully, female children of the under age of their rights of protecting the chastity and sanctity of their body and mind. He is all out to pollute such chastity and sanctity. He is a cancer in the society.

It is very pertinent to examine here the argument of Kharisu Chukkol against the life imprisonment term provided by the Criminal Code as punishment for the offence of rape. He opined that the life imprisonment as contained in the Criminal Code may have been imposed on Nigeria in 1904 because of the danger that the rape victim could well be the women folk of the 'Super' race (ie the while colonialists). On the other hand, he argued that the Penal Code from inception was made to apply to an 'independent' black country in Africa and perhaps, it was felt that 'natives' who rape their own 'kith and kin' should be allowed a measure of

⁹¹ Penal Code Act 2004,

⁹² (2016) 65 NSCQR (Part 1) 387 (SC)

compassion. He further argued that the notion that punishment must fit the crime should apply in this case and to equate the punishment of rape with that of manslaughter where a person is actually killed is, to say the least, unjustifiable. Unless of cense we can equate a woman's privacy, modesty and chastity with the life of a human being which no person of common sense will readily do. He finally submitted that in the absence of aggravating circumstances, it makes greater sense to have the accused sentenced to five years term of imprisonment.⁹³

However, while the learned author is entitled to his opinion, we, with respect submit that his argument is no longer tenable when compared with the punishment for rape in other climes. In Britain, the English Sexual Offences Act 2003 provides for life imprisonment as punishment for rape. In America, most of the model Penal Codes provides for life imprisonment for rape. Most recently, the Violence Against Persons Act, 2015 applicable only in the Federal Capital Territory of Nigeria provides for life imprisonment.

Furthermore, his argument that life imprisonment in the Criminal Code was one of the machinations of the colonial masters to protect their women folk is not logical. The law from its clear language was not made for any particular class. How many white women were in Southern Nigeria then. The few that were there then were highly protected by available security agencies and lived in Government Reserved Areas. The life imprisonment term for rape was made in accordance with the prevailing moral standard, the perception of women and total condemnation of the heinous crime of rape in their countries then.

⁹³ Kharisu S.C. Op cit 334

Also, the argument that the Penal Code from inception was to apply to an 'independent' black country in Africa and perhaps, it was felt that the natives who rape their own kith and kin should be allowed some a measure of compassion appears not to be very logical. Although law should contain reasonable dose of morality depending of the culture of the particular society, law should be distinct from morality. It should be certain and clear to ensure uniformity, certainty and order in its application. Perhaps, the major reason for the fourteen year imprisonment term in the Penal Code is part of the romance and dichotomy created by the colonial masters to ensure that the North was not offended taking cognizance of the Muslim doctrines to avoid trouble during the indirect rule.

Finally, the argument of the learned author that equating a woman's privacy, modesty and chastity with life of a human being and therefore, with that of manslaughter appears not so logical. The law on manslaughter is different from that of rape and both govern different situations. The law makers, whether the colonialists or blacks no doubts had examined the consequences and effects of the offence of rape on the victim and on the society before the imposition of life imprisonment. As indicated above, all jurisdiction, including the Federal Capital Territory of Nigeria provides for life imprisonment. Recently, the Supreme Court made the following observation with regard to the punishment prescribed for rape:

... By section 382 of the Criminal Code any person who commits rape is liable to imprisonment to life. The law recognizes the severity and barbaric nature of the offence of rape and thus prescribes life imprisonment for any offender. In my opinion, a conviction for rape ought to attract the maximum punishment prescribed by law. It

should no longer be handled with kids gloves.⁹⁴ I am of the view that sentencing the appellant to five years only for the offence of rape made a mockery of the entire trial.

According Clarkson,⁹⁵ the harm here is the violation of another's interests in bodily security, autonomy and privacy. In addition, such offence can involve degradation, humiliation and psychological trauma. In the same vein, Joel⁹⁶ opined that; rape is a serious crime even if victims suffer no physical injury, not even minor cuts and bruises. That is because rape violates intimacy and autonomy in a way that physical injuries cant. Even less – invasive sexually generated touching such as pinching buttocks or fondling breasts, is treated as a serious felony.

The fourteen years provided in the Penal Code is part of strategy by the colonial masters to romance and respect the Islamic practices of the North to avert crises. Again, it is also reflection of the cultural back ground of the North then with regard to the perception of women and consequences of rape on the victim. Today most people in the Northern part of Nigeria sequel to the spate of rape now call for death sentence and castration of the perpetrators. We therefore, submit that life imprisonment is preferred. This is in accordance with the modern practice.

Conclusion

The article has tried to examine the relevant previsions of the law on rape with a view to identifying their strengths and weaknesses. Areas of weaknesses identified include the parochial nature of the definition of rape vis-à-vis the definition of rape in other climes.

⁹⁴ *Aforluck v State* (2016) 66 NSCQR (Part 2) 494 (SC)

⁹⁵ Clarkson C.M.V., *Understanding Criminal Law*, 3rded.(London, Sweet and Maxwell 2001) 192

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The ingredients required by the law to establish or prove rape by the prosecutor are so complex and varied compared with other crimes. Accordingly, most rapist escaped unpunished. Spousal rape has no place in our law. However, the punishment section under the Criminal Code is commendable. The position of our law on marital rape amounts to an infringement on the constitutional rights of women.

Recommendations

1. The definition of rape should be revisited and expanded in accordance with the modern trend/practice
2. The punishment for life imprisonment as provided under the Criminal Code should be made a mandatory sentence given the evil effects of rape and the heinous nature of the acts of the rapists. It should not be left to the discretion of individual judges.
3. Spousal rape/marital rape should be criminalized in Nigeria. Women are not slaves or personal properties of men by marriage. Women should not be compelled to engage in sexual intercourse by their husbands when they are not disposed for that. Where a wife unreasonably refuses her husband conjugal rights the remedy is not to rape her. The law makes provisions for adequate and appropriate relieves.
4. The punishment for spousal rape may not be life imprisonment but adequate punishment should be provided to protect women and restore their human dignity.
5. Compensation of victims and publication of the names of convicted sexual offenders as provided for under the 2015 Violence Against Persons (prohibition) Act applicable only to the Federal Capital territory should be extended to the entire country.