**IN THE HIGH COURT OF THE GAMBIA**
**SPECIAL CRIMINAL DIVISION**
**CRIMINAL CASE No: HC/123/11/BK/013/D1**

**BETWEEN:**

**THE STATE** **COMPLAINANT**

**AND**

**ALASAN TOURAY** **ACCUSED PERSON**

**WEDNESDAY 15th FEBRUARY 2012**
**BEFORE HON. JUSTICE EMMANUEL A. NKEA**

**ACCUSED PERSON PRESENT**
**MRS. A. D BWALA FOR THE STATE PRESENT**
**MRS O. UDUMA FOR THE ACCUSED PRESENT**

## JUDGMENT

The accused person herein is charged before this Court for having on the 25th day of January 2011, at Banjulinding Village, The Gambia forcefully had carnal knowledge of one MARIAMA JALLOW a girl under the age of 18 contrary to Section 121 of the Criminal Code. The accused person pleaded not guilty to the offence. The Prosecution led evidence through four (4) witnesses and tendered two (2) exhibits in support of its case while the accused person led evidence as the sole witness in his defence.

The case of the prosecution is that on or about the 25th day of January 2011, the prosecutrix (PW2) was sent by her grandmother (PW1) to borrow a wheel barrow from the accused. The accused asked the prosecutrix to go into his room and pick up the wheel barrow. As she went inside, the

accused followed her, grabbed her, tied her mouth with a head scarf, undressed her and then forcefully had carnal knowledge of her. As the prosecutrix went home crying after the incident, she met with PW1 the way. PW1 observed her and found blood running down her legs, her clothes were also stained with blood. The prosecutrix then told PW1 how she had been sexually assaulted by the accused. PW1 took the soiled clothes to the accused residence where she raised an alarm. As people gathered, the accused seized the blood stained clothes from her but later returned same to PW1 through one of his relatives. PW1 then made a complaint to the police, and the accused was arrested. Whilst with the police, the accused volunteered a statement to PW3 which is in evidence as exhibit "A". The prosecutrix was first taken to the Health Centre at Banjulinding and then to the Royal Victoria Teaching Hospital where was medically examined by PW4 and a report to that effect was issued. This report is in evidence as exhibit "B".

In his defence, the accused denied ever having intercourse with the prosecutrix and stated that he was only made to thumbprint on exhibit "A" at the police station.

At the end of the testimonies the prosecution waived its rights to address me while the defence filed and adopted an eight page written brief of arguments.

In her written address to the Court, Mrs. O. Uduma of learned counsel for the defence framed the following two issues for determination:

(1) Whether the prosecutrix was raped by the accused having regard to the position of the law on corroboration?
(2) Whether the prosecution has proved the charge of rape against the accused beyond reasonable doubts?

In support of the first issues, learned defence counsel referred the Court to a plethora of authorities both case law and statutory. In particular, counsel referred the Court to the case of POSU v. THE STATE (2011) LPELR, OKEYAMOR v. THE STATE (2005) INCC, 499 and Section 180 (2) of the Evidence Act to argue that corroboration is not only statutorily required for a Section 121 offence, but also that the prosecution must prove that the accused had contemptuous sex with the prosecutrix. She submitted that if anything, exhibit "A" has established that the sexual intercourse was consensual. Learned Defence counsel further referred the Court to the English cases of DPP v. KILBOURNE (1973) AC 729 @ 746, and DPP v. HERTER (1973) AC 296 to contend that the need for corroboration will only arise if the evidence which should be corroborated appears credible and capable of believe. In this regard counsel submitted that the evidence of PW1 and PW2 on the alleged forcible coitus of the prosecutrix by the accused cannot be believed in light of the evidence of PW4. It is for this reason that counsel urged the Court to rely on the reasoning in the case of BOJANG v. THE STATE (1997-2001) GLR, 98 to discharge and acquit the accused person.

On the second issue, counsel merely reargued the issue of corroboration citing different authorities. I do not find it convenient and necessary to reproduce such arguments here.

To succeed under Section 121 of the Criminal Code, the prosecution must establish that the accused had unlawful carnal knowledge of the prosecutrix without her consent. This requires the prosecution to prove the following beyond reasonable doubts:

(a) That there was unlawful carnal knowledge of the prosecutrix.
(b) That the prosecutrix did not give her consent.
(c) That the accused is the man who did the act.

With regards to whether there was unlawful carnal knowledge of the prosecutrix, I must say straight away that the evidence on record suggests that there was sexual intercourse between the accused and the PW2. The prosecutrix testified how the accused tied up her mouth before ravishing her. In exhibit "A", the accused does not deny the act, but rather states that it was the prosecutrix who held him by her hand and pulled her to the bed paving the way the act. I have observed that exhibit "A" was tendered and admitted in evidence without any objection from the defence. The cautionary statement therefore becomes part of the case for the prosecution and I am bound to consider its probative value ***(NWACHUKU v. THE STATE (2007) 31 NSCQR 312-359)***. Admission of an offence or any part thereof by an accused to other persons may amount to sufficient corroboration in law ***(IKO v. THE STATE (2001) 14 NWLR (Pt. 732).*** The

admission, in exhibit "A" is, in my view, the best means of corroborating the act of sexual intercourse alleged by the prosecutrix. I see the later retraction of the accused when he testified on oath as an afterthought. From the foregoing I am satisfied that the accused had sexual intercourse with the prosecutrix and this I shall hold as a fact.

The lone issue which must now be resolved is whether the prosecutrix consented to the act of sexual intercourse. To demonstrate that the act was not consensual, PW2 gave evidence of how her mouth was tied with a head band and how her clothes were stained with blood following the act. PW1 sought to support this evidence by stating that she saw blood dripping from the genital organ of the prosecutrix and found her clothes stained with blood. These pieces of evidence were badly damaged, by exhibit "B" and the evidence of PW4. In exhibit "B" Dr. Secka who examined the prosecutrix within hours of the alleged rape stated as follows: **"*(1) hymen is absent, (2) no recent injuries (3) whitish vaginal discharge seen*"**. Under cross examination, he admitted that the rupture of the hymen was not a recent act and that the whitish vaginal discharge was a normal female occurrence. From the evidence of PW4, I find as a fact that the hymen of the prosecutrix was not broken on that day. The evidence of blood dripping from the female genital organ of the prosecutrix and blood stains on her clothes seems to me to be an exaggeration or a mere figment of imagination. From my analyses of these pieces of evidence, I am satisfied that the sexual intercourse was consensual and this I shall hold as a fact.

Although the presence of consent has been held to be a complete defence to the offence of rape ***(IKO v. THE STATE (supra)***, and in as much as Section 121 of the Criminal Code is silent on the issue of consent by minors, I hold the strong view that minors of about 12 years cannot give a valid consent to sexual intercourse. However, I can invent the law. With the presence of consent, the charge fails.

I should have proceeded at this point to discharge and acquit the accused person. However, since the prosecutrix is below 18 years, and the accused was not lawfully married or had any other proper cause to have sexual intercourse with her, I find that the facts on record sufficiently proves the offence of defilement. It is for this reason that I will find the accused guilty for defilement contrary to Section 127 of the Criminal Code. The accused person is according convicted under Section 127 of the Criminal Code.

## PREVIOUS CONVICTION

**Mrs. A.D. BWALA:** My Lord, there is nothing known.

**COURT**: I take that the convict has no previous criminal record.

## ALLOCUTUS

**Mrs. Uduma:** My Lord we are on bended knees asking for the court to temper justice with mercy. The convict is an old man. I urge the court to invoke section 29 of the Criminal Code which allows for a lesser sentence in favour of the convict.

## SENTENCE

I have listened to the plea for leniency and have considered the fact that the convict is a first time offender, as mitigating circumstances in his favour. However, having sexual intercourse with a child of 12 years is an absurd and outrageous conduct, which in my view falls short of the contemporary standards of modesty and decency. The purpose of our Criminal Law will be defeated, and moral decadence will take central stage in our society if it were to be accepted that children can validly consent to sexual intercourse. I shall not engage in any act of judicial activism here. I shall leave this issue for those who exercise legislative power to decide. It is a food for thought for parliament. There appears to be a rampant upsurge of aged men lying with children fit enough to be their great-grand children. This trend must be discouraged. I shall accordingly,

**EMMANUEL A. NKEA**
**JUDGE**

**SENTENCE THE CONVICT ALASAN TOURAY**

1. To 10 years imprisonment with hard labour.
2. Sentence to run from the 25th day of January 2011 being the day the convict was first taken into custody.
3. There shall be no further Order.

**ISSUED AT BANJUL, UNDER THE SEAL OF THE COURT AND THE HAND OF THE PRESIDING JUDGE THIS 15th DAY OF FEBRUARY 2012**

**.....**
**REGISTRAR**