

## **PROSECUTION OF CHILD RAPE IN NIGERIA: BEYOND THE CRIMINAL CODE AND THE PENAL CODE**

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### **Abstract**

*This paper takes a critical look at the prosecution of child rape in Nigeria under the substantive criminal legislations. It extensively examines salient issues like penetration, the need for corroboration, the nature of corroborative evidence required, consent, leniency of punishment, different views held by Courts on some of these issues and the absence of a Rape Shield Law in Nigeria. These salient issues have become impediments faced by the prosecution and have led to the presence of only a few reported child rape cases in courts and merely a handful of successful convictions of child rapists despite the overwhelming occurrence of child rape in our society today. This paper advocates for the enactment of a new Criminal Code and Penal Code to reflect new sexual social vices like child rape, spousal rape, female to male rape, male to male rape and so on and to set a mandatory sentence of life imprisonment for the crime of rape and the introduction of Rape Shield Laws which will provide laws to guide the courts during rape trials and further protect the child victim during trial.*

### **Introduction**

Child rape also known as defilement<sup>1</sup> is on the rise in Nigeria. According to the Nigeria Violence Against Children Survey, carried out by the National Population Committee, with the support of UNICEF and US Centers for Disease Control and Prevention, one(1) in four(4) girls and one in ten(10) boys experience sexual violence.<sup>2</sup> It should be noted that despite these

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<sup>1</sup> In the Northern States of Nigeria where the Penal code is operative, it is generally called rape but in the Southern States wherein the Criminal Code is operative, it is called Defilement when the affected child is below sixteen years or an idiot.

<sup>2</sup>Anuforo, E. "Protecting Nigeria Children against Violence"30/08/2015 available at <http://www.ngrguardiannews.com2015/09/protecting-nigerian-children-against-violence/> (accessed 23/01/2016).

statistics, majority of child sexual abuse cases largely go unreported and thus there is no way of knowing the actual statistic. The rise in child rape cases is alarming and highlights the vulnerability of children who are indeed innocent, to such violations. This sad tale goes on and it is not by any chance limited to Nigeria.<sup>3</sup> The Penal Code and the Criminal Code criminalise child rape. Nigeria is also a signatory to International Instruments and Articles which criminalise this offence.<sup>4</sup> Despite these, the rate of success in child rape prosecutions in our Courts is low. Using reported Court-room decisions as a yard stick, only 50% succeeded.<sup>5</sup> This cannot be considered a successful statistic for a country where the incidence of child and baby rape has currently hit a statistics of up to 70% of the total reported rape cases in Nigeria.<sup>6</sup>

The aim of this article is to highlight the potholes faced by a child victim, such as the need for compulsory corroboration of a child's testimony before the accused can be convicted, the different views held by the Courts on whether the corroborative evidence must link the accused to the act or merely show that the crime was indeed committed, the lack of medical facilities in Nigeria hospitals to provide an adequate medical report to link the suspect

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<sup>3</sup> South Africa seems to be the country with the highest record of rape in the whole world; with a rape incident said to occur every twenty-six (26) seconds, including rape of babies as young as two weeks old. (Achunike & Kitause, "Rape Epidemic in Nigeria" 33).

<sup>4</sup> Such international instruments include; African Charter on the Rights and Welfare of the Child 1990, Rome Statute which was ratified by Nigeria on 27<sup>th</sup> September, 2004; Convention on the Elimination of all forms of Discrimination Against Women ratified on 13<sup>th</sup> June, 1985.

<sup>5</sup> Out of the child rape cases (affected children ranged from 5years to 13years old girls) examined in this article, there were convictions at the trial court level. On Appeal, the Appellate Court substituted the offence with attempted rape in two cases, four of the appeals were upheld with the accused persons discharged and acquitted and only six cases had the appeal dismissed and sentences affirmed.

<sup>6</sup> Achunike, H.C. & Kitause, R.H, "Rape Epidemic in Nigeria: Cases, Causes, and Consequences & Response to the Pandemic", Vol.2, Issue 1. (2014) *IMPACT: International Journal of Research in Applied natural and Social Science*. 33.

to the crime, the lenient punishment meted out by the courts to offenders when found guilty of rape and lastly the tortoise-paced judicial system seems to have dissuaded victims of child rape from seeking justice from our Justice system, thus making the path of justice the road less travelled.

This paper suggests the need for a new substantive criminal Law in Nigeria that will revisit the definition of rape and increase its ambit so that more sexual offenders can be covered under this offence, and also set a mandatory sentence of life imprisonment for convicted offenders. The writer strongly advocates the enactment of Rape shield Laws in Nigeria to specifically regulate rape trial proceedings by containing guidelines as to evidence of a child victim of rape; how it should be collected, questions that should not be asked to the child, give adequate room for the child's privacy to be protected, make provisions for a severely traumatised child to give evidence through an intermediary and also contain fast track provisions so that these cases are granted priority during trial.

### **Defining the Victim of Child Rape**

There is no universally accepted legal definition of a child neither is there a statutory consensus between the Criminal Code and the Penal Code as to the definition of a child. The meaning of Child is usually given based on the context in which it is being used. The Criminal Procedure Act which governs criminal proceedings in the Southern part of Nigeria except Lagos State define a child as a person who has not attained the age of 14years<sup>7</sup>.The Criminal Procedure Code, its counterpart in the North, omits the definition of a child. It should be noted that this definition given by the Criminal Procedure Act is contrary to the Administration of Criminal Justice Law 2011, Lagos which governs criminal proceedings in Lagos State, as it defines a child as a person who has not attained the age of 18years<sup>8</sup>.

For the sake of this article, the writer adopts the definition given by the Criminal Procedure Act because it is the procedural

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<sup>7</sup> section 2(1) CPA.

<sup>8</sup> section 371.

enactment used alongside the Criminal Code in the South, bearing in mind that the Criminal Procedure Code fails to provide a definition. Thus a child for the sake of this article is a person who has not attained the age of 14 years.<sup>9</sup>

### **Child Rape Under Nigerian Laws**

The laws relating to rape is contained in different statutes in Nigeria depending on the part of the Country. In the Southern States of the Country the Criminal Code is applied and its counterpart is the Penal Code (Northern States) Federal Provisions Act of 1959 in the Northern States except the Northern States where the Sharia Penal Law is applicable.<sup>10</sup> It is worthy of note that since the enactment of these two statutes there has not been any amendments to either of them. The provisions of these Laws are discussed below:

### **Child Rape under the Penal Code**

The Nigeria Penal Code which is applicable in the Northern part of Nigeria defines rape in Section 282(1) as follows:

A man is said to commit rape who..... has sexual intercourse with a woman in any of the following circumstances-

- (a) against her will;
- (b) without her consent;
- (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt;

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<sup>9</sup> It should be noted that in the definition given herein of the ‘victim of child rape’ is covered by various Statutes in Nigeria. The Criminal Code in defining rape provides that it can be done to ‘any woman or girl...’; the Penal Code mentions ‘...a woman’ but goes on to include ‘...when she is under fourteen years’; the Violence Against Persons (Prohibition) Act 2015 in its definition describes the victim of rape as ‘another person’. This paper submits that a person under 14 years can be a victim of rape by virtue of these statutory definitions.

<sup>10</sup> Currently applied in 12 (twelve) islamic States: Zamfara, Kano, Sokoto, Katsina, Bauchi, Borno, Jigawa, Kebbi, Yobe, Kaduna, Niger, Gombe.

- (d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
- (e) *with or without her consent, when she is under fourteen years of age or of unsound mind.*<sup>11</sup>

The above definition limits the definition of rape; it is narrower than the definition of rape under the Criminal Code. The term ‘sexual intercourse’ implies only penal penetration, unlike the Criminal Code’s use of “carnal knowledge” which implies that penetration of the vagina by the use of other parts of the body or foreign objects. This definition is not gender neutral as it excludes males from being victims of rape. Unlike the Criminal Code that creates the offence of defilement, the Penal Code makes no clear cut Provision for that offence but section 218(1)(e) of the Penal Code provides for the same category of children protected under sections 218 and 221 of the Criminal Code.

It should be noted that this definition provides for the victims ‘...under fourteen years of age’ but makes consent immaterial in proving rape for this category. Section 39(b) (c) provides that Consent is not consent if given by a person of unsound mind or an intoxicated person, if such person is unable to understand the nature and consequence of that to which he gives consent or by a person who is under 14years of age. In the light of these provisions, the victim of rape under the Penal code only has the onus to prove lack of consent when she is fourteen years old and above and not of unsound mind. The punishment for the crime under the Penal Code is ‘imprisonment for a term which may extend to fourteen (14) years and shall also be liable to a fine.’<sup>12</sup>

### **Child Rape under the Criminal Code**

The Criminal Code of Nigeria, applicable in the Southern part of Nigeria, in section 357 defines rape as:

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<sup>11</sup> Emphasis provided.

<sup>12</sup> section 283 Penal Code.

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 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.

A person found guilty of rape under the Criminal Code is liable to imprisonment for life, with or without caning. Specifically relating to Children, Section 218 provides for the defilement of girls under 13 years as follows:

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

Any person who attempts to have unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning.

Section 221 further provides that

Any person who-

- (1) has or attempts to have unlawful carnal knowledge of a girl being of or above thirteen years and under sixteen years of age; or
- (2) knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her, is guilty of a misdemeanor, and is liable to imprisonment for two years, with or without caning.

Unlawful carnal knowledge as explained in section 6 of the Criminal Code Act implies penetration which takes place otherwise than between husband and wife. The use of 'carnal knowledge' gives room for a broader definition of rape and

defilement than that of the Penal Code, as penetration could be interpreted to include penetration by foreign objects and not only the penile organ.

Unlike the Penal Code which makes consent of no significance when the victim is under fourteen years, the Criminal Code gives no provision for that, it only provides what not to consider as consent in the general definition of rape. Consent, which was 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 of the act is not consent. In the light of this, does the prosecution in the Southern States still have the onus to prove lack of consent despite the age of the victim? The omission by the draftsmen of the Criminal Code to clearly state the exact age of consent is an oversight, which has left room for assumptions.<sup>13</sup>

The Criminal Code sets a limit of two months within which charges must be brought in all cases of defilement.<sup>14</sup> This limitation is probably for the sake of maintaining evidence but it is not realistic as most affected children do not even speak up before these two months period elapses.

Both definitions under the Criminal Code and the Penal Code are gender restrictive, indicating that only a woman can be raped in Nigeria. A more welcome and embracing definition is given in section 1 of the Violence Against Persons (Prohibition) Act 2015:

A person commits the offence of 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;

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<sup>13</sup> Section 221 and 218 of the Criminal Code only requires “unlawful carnal knowledge” for defilement; and unlawful carnal knowledge in the Criminal Code is penetration which takes place but not between husband and wife. It can then be assumed that penetration which takes place when the child (below 16 years by the provisions of section 218 and 221 of the Criminal Code) is not a wife is necessarily defilement, regardless of consent. Thus can it be implied that the age of consent is 16 years?

<sup>14</sup> Section 221 CC.

- (b) the other person does not consent to the penetration;  
or
- (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.

The writer applauds this ground breaking definition as it takes into consideration the lacunas in the Criminal Code and the Penal Code. The Violence Against Persons (Prohibition) Act 2015 is gender neutral, it also takes cognizance of the fact that a person can be raped through the vagina, anus or mouth and that a person can be raped with an object and any part of the body. Unfortunately, the Violence Against Persons (Prohibition) Act 2015 is only applicable in the Federal Capital Territory, Abuja.

Beyond any statutory provision that can be given, the offence of child rape is despicable. It has no logical explanation. In *Edwin Ezigbo v. The State*<sup>15</sup>, Muhammed J.S.C had this to say about the offence of child rape:

The facts revealed in this appeal are sordid and can lead to a conclusion that a man can turn into a barbaric animal. When the ‘criminal’ was alleged to have committed offence of rape, he was 32 years. His two young victims: Ogechi Kelechi, 8 years old and Chioma, 6 years, were, by all standard underage. What did the appellant want to get out of these underage girls? Perhaps, the appellant forgot that by nature, children, generally, are like animals. They follow anyone who offers them food. That was why the appellant, tactfully, induced the young girls with ice cream and zobo drinks in order to translate his hidden criminal intention to reality, damning the consequences.

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<sup>15</sup> (2012) 16 NWLR Pt. 1326, p. 318.



Honestly for an adult man like the appellant to have carnal knowledge of underage girls such as the appellant's victims is very callous and animalistic. It is against the laws of all human beings and it is against God and the State.

### **Proof of Child Rape**

In Nigeria, the onus of proof in a criminal case rest on the prosecution. It has the burden to prove its case beyond reasonable doubt.<sup>16</sup> It has to prove the guilt of the person charged beyond reasonable doubt. It should be noted that the standard required is proof beyond reasonable doubt and not proof beyond every shadow of doubt.<sup>17</sup> Generally in the proof of rape, it is the duty of the prosecution to establish the following:

- I. That the accused had intercourse with the victim,
- II. that the act of sexual intercourse was done without his/her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation,
- III. that the Prosecutrix was not the wife of the accused,
- IV. that the accused had the *mens rea*, the intention to have sexual intercourse with the victim, without his/her consent or that the accused acted recklessly not caring whether the victim consented or not;
- V. that there was penetration.<sup>18</sup>

Dealing specifically with defilement of an 11 year old girl, brought under Section 218 of The Criminal Code of Delta State Rhodes J.S.C in the case of *Boniface Adonike v. The State* stated that to succeed in a case of defilement, the prosecution must prove beyond reasonable doubt that:

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<sup>16</sup> Section 135, 139 Evidence Act 2011.

<sup>17</sup> per Okoro J.S.C, *Boniface v. The State* SC.168/2013, LN-e-LR/2015/4.

<sup>18</sup> Per Inyang Okoro, J.S.C. supra.

1. the accused/appellant had sex with a child, who was under the age of 11 years,
2. there was penetration into the vault of the vagina
3. the evidence of the child must be corroborated.

In the case of child rape the elements to prove are the same as rape; except that with child rape it is immaterial whether the act was done with or without the consent of the affected child. It is an absolute prohibition. The policy rationale is that a girl under the age of 13 is too young for one to have carnal knowledge of her and so consent becomes inconsequential and it is deemed to be vitiated by her immaturity.<sup>19</sup> The writer notices with alarm that the courts have failed to note this difference and in some cases have put the consent of a child victim into question. In *Ogunbayo v.State*,<sup>20</sup> the Supreme Court quoted the records from the trial court with approval stating inter alia; *'From the foregoing, Respondent proved the two essentials of unlawful carnal knowledge of the 1<sup>st</sup> PW by appellant and that she was ravished and this was without her consent were proved beyond reasonable doubt.'* In the earlier case of *Queen v. Kufi*,<sup>21</sup> the affected child was a 10 year old girl and the court held that, *'in a charge of rape, consent is most material, and the prosecution has to prove that the accused had carnal knowledge of the complainant, despite her age, without her consent'*. The court went on to hold that the affected 10 year old child did not give her consent. The question of consent should never have arisen, bearing in mind the ages of the victim. Succinctly, a child cannot consent to sex. That is the position of the law.<sup>22</sup>

The crux of the offence of rape is penetration, even when the victim is a child. The prosecution is faced with the challenge of

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<sup>19</sup>Hon. Justice. Peter Akhime Akhiero "Protecting the Rights of Victims in Trials for Sexual Offences", at the Workshop Organised by Glow (Global Leadership of Women): An Initiative of the International Association of Women Judges (IAWJ) in Benin City, Edo State. 30/4/2015.

<sup>20</sup> (2008) Vol.6 LRCNCC. 132.

<sup>21</sup> (1960) WRNLR 2.

<sup>22</sup> *Boniface v. The State*. Supra.

proving penetration. In *Posu v. The State*<sup>23</sup> the Supreme Court held penetration to be the most important ingredient of the offence of rape. The fact that the Prosecutrix alleges insertion of the accused penis into her vagina has been held not to prove penetration.<sup>24</sup> Over the years the courts have had diverse views on what amounts to penetration. In *Iko v. The State*,<sup>25</sup> the Supreme Court commendably held that penetration, however slight is sufficient to ground conviction for rape and it is not necessary to prove an injury or the rupture of the hymen to constitute rape. It was further held that:

*The fact that a prosecutrix who is allegedly defiled is found to be virgo intacta (i.e a virgin) is not inconsistent with partial sexual intercourse and the court will be entitled to find that sexual intercourse has occurred if it is satisfied on that point from all the evidence led and the surrounding circumstances of the case. Where a penetration was proved but not of such a depth as to injure the hymen, it was held sufficient to constitute the crime of rape.*

In the case of *Upahar v. State*<sup>26</sup> medical report showed that the hymen of the Prosecutrix was lax, lacerated but showed no evidence of active bleeding, the Court of Appeal held, per Obadina, JCA that:

... the hymen was lax, meaning loose, slack, not tense, or rigid or tight. Exhibit C states the hymen was lacerated but there was no active bleeding, exhibit C does not state what could have caused laceration .... Exhibit C does not say that the hymen of the Prosecutrix i.e PW3 in this case was broken. It could not have been possible for the hymen to be lax if there had been a *complete penetration*.<sup>27</sup>

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<sup>23</sup> (2012) 10 LRCNCC. 60.

<sup>24</sup> *Okoyomon v. The State* (1972)1 NMLR 292.

<sup>25</sup> (2001) 14 NWLR (Pt. 732) 221.

<sup>26</sup> [2003] 6 NWLR. 230.

<sup>27</sup> Emphasis provided.

In the light of the seeming inability of the prosecution to prove *complete penetration*, the Court of Appeal set aside the conviction of the 1<sup>st</sup> Appellant for rape and substituted it for the conviction of attempted rape and set aside the conviction of the 2<sup>nd</sup> appellant for abetment of rape and substituted it with a conviction of abetment of attempted rape. The position taken by the Court of Appeal raises cause for alarm, as it requires a broken hymen and ‘complete penetration’, against the numerous pronouncements by the Apex courts of the land that penetration no matter how slight is enough to prove rape.<sup>28</sup> The position of the law concerning penetration is that it is not necessary to prove that the hymen was ruptured or that there had been emission of semen. The slightest penetration of the vagina is sufficient.<sup>29</sup> This paper humbly agrees with Dr. O.A Orifowomo and M.O.A Ashiru<sup>30</sup> in their submission that:

The slightest penetration of the vagina by the penis is sufficient. It is not necessary that the hymen was ruptured or that there was ejaculation.

Corroboration is a necessary evil that confronts a lawyer in the quest to prove child rape<sup>31</sup>. The corroboration of the victims’ evidence in a rape case is not statutory requirement but it is birthed out of practice. In *Ogunbayo v. The State* (2008) on an appeal from the decision of the Court of Appeal, Ibadan Division, affirming the conviction of the appellant in respect of the rape of the 13year old Prosecutrix, the Supreme Court held that

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<sup>28</sup> *Posu v. The State, Ogunbayo v. The State* supra.

<sup>29</sup> Okonkwo .C, *Criminal Law in Nigeria* ( Ibadan, Nigeria : Spectrum Books Limited, 1980), 273.

<sup>30</sup> Ashiru M.O.A. and Orifowomo O.A, “Law Of Rape in Nigeria and England: Need to Re-Invent in the Twenty-First Century”, Vol.38, 2015, *Journal of Law, Policy and Globalization*. 32 available at <http://www.iiste.org> accessed 29/02/2016.

<sup>31</sup> Corroboration is a piece of evidence which confirms, reinforces or supports another piece of evidence of the same fact. Agaba J.A, *Practical Approach to Criminal Litigation in Nigeria (Pre-Trial & Trial Proceedings)* 1<sup>st</sup> edition. (Abuja, Nigeria: LawLords Publication, 2011 ), 699.

Although corroboration is desirable, but it is settled that whether a particular evidence can be corroboration is for the trial judge to decide.... It need be stressed that corroboration is not the rule of law that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the Prosecutrix.<sup>32</sup>

Previously, corroboration was required before a person can be convicted of the offence of child rape by virtue of section 197(5) of the repealed Evidence Act 1990.<sup>33</sup> The extant Evidence Act 2011 completely omits this section, so it seems corroboration of child rape under the Evidence Act 2011 has been dispensed with. Interestingly, though the Evidence Act 2011 omits defilement from offences needing corroboration, the provisions of sections 218 and 221 of the Criminal Code still requires corroboration. Does the elimination of corroboration to secure the conviction for defilement under the Evidence Act 2011 affect the requirement for corroboration required under the Criminal Code? This is another reason why this paper opines that the Criminal and Penal Code provisions are in dire need of a review.

Another angle that makes corroboration compulsory in the prosecution of child rape is the fact that in all cases of child rape, the main witness to the heinous crime is a child. Under the repealed Evidence Act, a child who had not attained the age of fourteen years old could give both unsworn and sworn evidence depending on the result of the preliminary investigation carried out by the trial judge<sup>34</sup>. Under the old Evidence Act the sworn testimony of a child requires no corroboration but the unsworn evidence of a child needs corroboration. However, this is no longer the position. By the provision of the extant Evidence Act 2011, a

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<sup>32</sup> per Ogbuagu, JSC at page 146-147. *Supra*.

<sup>33</sup> Section 197(5) of the repealed Evidence Act 1990 provided that '*a person shall not be convicted of the offences mentioned in sections 218, 221, 223 or 224 of the criminal code upon the Uncorroborated testimony of one witness*' Section 218 and 221 of the criminal code pertains to defilement of girls under 13years, under 16years and imbeciles/idiots.

<sup>34</sup> Section 155 & 183 Evidence Act 1990.

child below 14years cannot give sworn evidence. Section 209(1) Evidence Act 2011 states that:

A child who has not attained the age of 14years is tendered as a witness; such a child shall not be sworn and shall give evidence otherwise than on oath or affirmation; if in the opinion of the court he possesses sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

By virtue of section 209(3) of the Evidence Act 2011, such evidence given must be corroborated by some material evidence in support of such testimony implicating the defendant. A child who has attained 14 years shall give sworn evidence if he has sufficient intelligence to understand the questions and can give rational answers.<sup>35</sup> The position of the extant Evidence Act puts an added burden on the prosecution were the victim is below 14 years old as such a victim can only give unsworn evidence and such evidence must be corroborated by an independent evidence. In *Igbine v. The State*<sup>36</sup> were a 7 year old girl was raped, the court was faced with a situation were the only eye witness to the heinous act was the victim's brother who was under 14 years old, the court held that the unsworn evidence of a child cannot corroborate the unsworn evidence of the victim. Hence the corroboration was deemed not sufficient and the appeal was allowed. The unsworn evidence of a child witness stands on a single, but fragile leg. In other words, because the evidence is not solidly on the ground, it requires support or another independent confirmation.<sup>37</sup>

The nature of corroboration is another weight on the shoulders of the prosecution. In *Iko v. State*<sup>38</sup> the Supreme Court

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<sup>35</sup> Section 209(2) Evidence Act 2011.

<sup>36</sup> (1997) 9 NWLR (Pt. 519) 101.

<sup>37</sup> Osadolor F.O. *Source Book on The Law And Practice of Evidence In Nigeria* 1<sup>ST</sup> Edition (Daveprints Associates, Benin City, 2004), 216.

<sup>38</sup> *Iko v. The State, Supra.*

held that in a charge of rape, the corroborative evidence must confirm in some material particulars that:

1. Sexual intercourse has taken place, and
2. that it took place without the consent of the woman or girl, and also
3. that the accused person was the man who committed the crime.<sup>39</sup>

The Court further held that the nature of corroboration depends on the peculiar facts of each case but that where rape is denied then the court looks for a medical evidence showing injury to the private part of the complainant, injury to other parts of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed.<sup>40</sup>

The court also stated in *Upahar v. State* that the corroborative evidence must be such that tends to show that the crime has been committed, but that it was committed by the accused.<sup>41</sup> In *Igbine v. The State*<sup>42</sup> the court held the medical report was not corroborative as it only showed the offence was committed but failed to connect the accused to the crime. *Okpanefe v. The State*.<sup>43</sup> The victim alleged that the accused had earlier raped her but she did not report the incidence to any one, he called her a week later and had carnal knowledge of her again, her obvious pains alerted her mother who reported to the police and she was taken to the hospital, but the medical report could not pin the accused to the crime but simply stated that:

My findings: old rupture of the hymenal ring ... my opinion, the girl definitely had sexual intercourse with somebody: but had lost her virginity more than seven days ago. I can neither confirm nor exclude the

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<sup>39</sup> per Iguh, JSC at page 1187, supra.

<sup>40</sup> per Katsina- Alu, JSC at page 1193.

<sup>41</sup> *Upahar v. State*. Supra.

<sup>42</sup> *Igbine v. The State* Supra.

<sup>43</sup> (1969) 1 ALL NLR 420.

participation in the intercourse of Mr Francis Okpanefe by any type of examination available here. This might be done in a criminal laboratory only.

The Supreme Court held that the trial court was wrong in convicting the accused on the medical report, as the report did not implicate the accused in any way, hence the appeal was allowed and the accused discharged and acquitted. In *Boniface v. The State*<sup>44</sup> in addressing the issue raised by the appellant that the medical report did not link him directly to the crime; the Supreme Court set a different view from earlier judgments that the medical report must directly link the accused to the act when it held that:

The examination of the PW1 by the medical doctor and the medical report generated there from was meant to confirm whether there was indeed sexual intercourse on the minor as alleged. The doctor was not present when the offence was committed therefore he would not include in the report that the appellant had sex with the young girl.

The courts seem to be torn as to whether the medical report must positively identify the accused as the perpetrator of the crime or just confirm that indeed the crime was committed. Considering the nature of the crime where the *actus reus* is usually done behind closed doors and bearing in mind that the victims in most cases do not undergo medical checkup immediately after the heinous act and the hospitals in Nigeria are not yet equipped with facilities to fully run a Deoxyribonucleic Acid (DNA) analysis to link the accused to the act.<sup>45</sup> The position of the apex Court in *Boniface* is a more victim friendly and that of the court in *Upahar* is a bit

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<sup>44</sup> *Boniface v. The State*. Supra.

<sup>45</sup> NAN. "Activists Lament Rising Incidences of Child Sexual Abuse" available at <http://www.ngrguardiannews.com/2015/03/activists-lament-rising-incidences-of-child-sexual-abuse/>. accessed 22/1/2016.



unrealistic in line with the lack of DNA facilities in Nigeria and it puts additional burden on the already traumatised victim.<sup>46</sup>

It should be noted at this point that corroboration can come in from other sources; it must not always be with the aid of a medical report. In *Iko v. State*<sup>47</sup> it was held that admission of the offence by the accused to other persons may amount to sufficient corroboration. In *Popoola v. State*<sup>48</sup>, the extra judicial statement made by the accused was considered enough corroborative evidence as the statement was direct, cogent, positive and gave strong support to the evidenced of the Prosecutrix. No medical report was used.

The age of victim is of importance in the prosecution of child rape; the prosecution has to establish that the victim falls within the age limit fixed by the relevant enactment under which the accused is being charged. Proof may be by any legal means such as the certificate of birth or the *viva voce* testimony of her parents.<sup>49</sup>

The writer notes with dismay the leniency at which the court sentences convicted offenders of child rape despite the maximum punishment given by Statutes. Section 218 of the Criminal Code provides that, *for the offence of defilement of girls below 13 years the offender is liable to life imprisonment with or without caning*, and for attempted defilement, *the offender is liable to imprisonment for fourteen years, with or without caning*. For the defilement of girls above thirteen years and under sixteen years

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<sup>46</sup> This should serve as a push for better forensic investigative techniques in Nigeria. Corroboration no doubt has its use; it avoids condemning the wrong person, but should the victim be responsible for providing such corroboration? The presence of a great forensic technique will help prove decisively if the accused is the rapist or not without placing extra burden on the victim to recall who was in the vicinity when the act occurred or on the overworked doctor who just wants to treat the victim for injuries and does not bother about seeking for corroborative evidence to bring the perpetrator to justice.

<sup>47</sup> *Iko v. The State*. Supra.

<sup>48</sup> (2013) 17 NWLR (Pt. 1382). 96.

<sup>49</sup> Hon. Justice. Peter Akhime Akhiero, "Protecting the Rights of Victims in Trials for Sexual Offences". Supra.

and of idiots or imbecile, the offender is liable to imprisonment for two years, with or without canning.<sup>50</sup> Rape under the Penal Code Act is punishable *to a term which may extend to fourteen years and shall also be liable to fine*. In *Olaleye v. The State*<sup>51</sup> brought under the Penal Code for rape of a child between 12 and 13 years, the trial court sentenced the accused to a menial 3 years imprisonment with hard labour. Inyang J.S.C in the case of *Boniface Adonike v. The State*,<sup>52</sup> while hearing an Appeal from the confirmation of the conviction of the accused to 6 years imprisonment with six strokes of the cane for the charge of defilement stated:

I wish it was more than this and unfortunately, there is no appeal against the sentence. This type of case should be an opportunity for sentencing authorities to really come out vehemently to show that society abhors the type of conduct exhibited by the appellant on this innocent girl of just five (5) years.... I wish I have the power to increase his punishment. I could have done it in order to serve as deterrence to would-be rapists.

These lenient prison terms tend to ridicule the justice process and in no way act as a deterrent to future offenders.

The tortoise-paced judicial system in Nigeria is also a major impediment to the prosecution of more child rape cases in Nigeria. The victim spends years seeking justice and a lot of money which would never be recovered as the Nigerian Laws do not provide for the compensation of child rape victims. In *Ogunbayo v State*,<sup>53</sup> the case commenced at the trial court in 1987 and was finally brought to an end 21 years later by the Supreme

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<sup>50</sup> There seems to be no logical explanation for this distinction between punishment for the offence of defilement of girls below 13 and defilement of girls above 13 years but below 16 years. With the former punishable by life imprisonment and the later punishable by a 2 years imprisonment term under the Criminal Code. We do not know the intentions of the draftsmen but this distinction makes light of the offence of defilement when the affected child is above 13 years old.

<sup>51</sup> *Olaleye v. The State*, supra.

<sup>52</sup> *Boniface v. The State*. Supra.

<sup>53</sup> *Ogunbayo v. The State*. Supra.

Court in 2008; at this time the 13 year old victim was already 34 years old! This is a terrible situation for a crime of such a delicate nature; justice should not take a life time. Justice delayed is justice denied.

In the light of these analyses, it is quite clear that to meet the standard set by the Penal Code, Criminal Code and the Courts is a herculean task. This high stake is now a clog in the wheels of justice.

### **What Is the Way Forward?**

The bitter truth is that the Criminal Statutes in Nigeria are old and in dire need of an overhaul. The Criminal Code commenced operation on the 1<sup>st</sup> of June, 1916; it governed both Southern and Northern Nigeria, until the 30<sup>th</sup> of September, 1960 when the Penal Code was enacted to govern the Northern States. Times have changed, new situations have emerged like child rape, spousal rape, female to rape male, lesbian rape, male to male rape and so on and these ancient laws are not up to the task of governing such situations. Thus there is a lacuna in our laws, a gap that is over 40 years wide for the Penal Code and a 100 years wide for the Criminal Code.

A unified age is needed in our legal system at which a child can legally consent to sexual intercourse. This will put to rest the issue of consent when the victim is a child. The provisions of both the Criminal Code and Penal Code remain vague on this aspect.<sup>54</sup> In the United States of America, 30 States set the age of consent at 16 years; 8 set it at 17years; and 12 set it at 18 years depending on the jurisdiction.<sup>55</sup> This fixed age to a large extent puts to rest the issue of consent during trial and saves the prosecution the task of proving lack of consent when the victim falls below the legal age.<sup>56</sup>

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<sup>54</sup> Section 31 Childs Right Act, 2003 places the age of sexual consent at 18 years.

<sup>55</sup> Eugene Volokh, "Statutory Rape Laws and Age of Consent in U.S", The Washington Post, May 1, 2015, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/01/statutory-rape-laws-in-the-u-s/> Accessed 11/03/2016.

<sup>56</sup> This brings to mind the case of 13year old Ese Oruru taken from her home in Bayelsa to kano State by 25year old Yunusa Dahiru in August 2015 . Ese was

The privacy of child rape victims seem to be a forgotten issue as law reports provides detailed information on the victims; their names, addresses, schools and these are all open to public scrutiny and future reference.<sup>57</sup> This writer strongly advocates a high level of privacy, the use of pseudo names or out rightly forbidding the names of victims to be published, trials involving children should be conducted in camera or the child's testimony can be given in camera or through an intermediary like the victim's parents. The Constitution of the Federal Republic of Nigeria guarantees the privacy of citizens. Section 37 of the 1999 Constitution provides that *'The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.'* The Courts have being given the powers to conduct trials in private when the need arises.<sup>58</sup> These provisions give the courts legal backing to protect the privacy of witnesses during trial and this will in no way

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finally recovered by her parents with the aid of the authorities in February 2016 and brought back home pregnant and wedded to Yunusa, Yunusa is currently facing charges ranging from abduction to rape of a minor, but public opinions differ as some quarters argue that it was a love story and Ese voluntarily went with Yunusa and married him, so she consented to whatever sexual activities followed and thus yunusa cannot be charged for rape. It is quite sad that a 13 year old can be considered as having the requisite *mentes* to consent to sexual intercourse. Samuel Oyadongha, "Ese Oruru: Yunusa charged with criminal abduction", Vanguard online, March 9, 2016, <http://www.vanguardngr.com/2016/03/ese-oruru-yunusa-charged-with-criminal-abduction/> accessed 13/03/2016.

Ugoji Egbujo, "Ese Oruru and other dangerously pregnant matters", Vanguard Online, March 12, 2016. <http://www.vanguardngr.com/2016/03/ese-oruru-and-other-dangerously-prtegnant-matters/> accessed 12/03/2016.

The prosecution in this case has their task cut out for them as the issue of consent already raised by the public has to be dealt with extensively.

<sup>57</sup> The cases of *Ogunbayo v. State* (Supra), *Edwin v. The State* (supra), *Upahar v. The State* (supra) all reveal the identities of the victims, the case of *Jegade v. The State* (2001) 14 NWLR (Pt. 733) 264 goes a step further by revealing even the primary school of the affected child.

<sup>58</sup> Sections 204, 205 of the Criminal procedure Act; Section 225 of the Criminal Procedure Code, LFN 2004; Section 200 and 202 of the Criminal Justice Administration Law Lagos, 2011.

tamper with the right of the accused person, it merely serves as a way to protect what is left of the victims' dignity.

In handling crimes of sexual offences, most countries have evolved beyond the normal criminal statutes and developed Rape Shield Laws to protect the victims during trial. A Rape shield law limits the defendant's ability to introduce evidence or cross examine rape complainants about their past sexual behavior and also prohibits the publication of the identity of an alleged rape victim. The Violence against Women Act of 1994 created a Federal rape shield Law in the United States.<sup>59</sup> Most jurisdictions of the United States of America have developed forms of rape shield laws. The rape shield laws in Minnesota<sup>60</sup> provides in subdivision 1 that the victims testimony does not need to be corroborated, the rape Shield laws of Wisconsin allows the testimony of a child witness to be taken outside the court room, in any place and day taking into consideration the mental and physical health of the child, the testimony of the child can then be televised to the general court. The Evidence Act 2011 contain some sections which serve as a shield during trial for rape victims, section 227 and 228 prohibits the asking of indecent and scandalous questions to the victim during trial. The Sexual Offence Act Bill 2013,<sup>61</sup> which is yet to be assented to by the President, also contains a form of shield for rape victims during trial, sections 30-32 makes provision for the court to declare a witness, a child or a person with mental disabilities 'a Vulnerable witness' with the following shields:

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<sup>59</sup> NCPCA Rape Shield 2011 available at <http://www.ndaa.org/> accessed 10/03/2016.

<sup>60</sup> Supra

<sup>61</sup> It was passed into law on June, 4<sup>th</sup> 2015 by the National Assembly, it still waits presidential assent. Only the draft of the Bill is yet available. Available <http://www.nassnig.org/document/download/download/1347> accessed 19/1/2016. It should be noted that the SOA2013 if assented to by the president of Nigeria it will supersede all other Laws relating to child sexual Offences. Section 48 and 49 provides that the law amends, repeals and supersedes all other sexual related offences in force from the time of the commencement of the Act.

1. Such witness can give evidence under the protective cover of a witness protection box;
2. Such witness can be directed to give evidence through an intermediary;
3. Court proceedings may not take place in open court;
4. Prohibition of the publishing of the identity of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family.
5. any other measures which the court deems just and appropriate.<sup>62</sup>

Though these provisions are laudable, there is still need for a specific rape shield law to protect child victims of rape. A rape shield law that will contain procedural and evidential rules to cover areas like the evidence of a child victim of rape; how it should be collected, questions that should not be asked to the child, give adequate room for the child's privacy to be protected, make provisions for a severely traumatised child to give evidence through an intermediary and also provide psychological and medical care for child victims. Fast track procedures should also be contained in the Rape Shield Laws to encourage accelerated hearings.

A mandatory sentence of life imprisonment should be introduced. As earlier stated the Criminal Code and Penal Code set a maximum punishment of imprisonment for up to fourteen years, leaving the exact term to the Courts' discretion. This discretion seems to be abused by the trial judges on the altar of leniency. In order to effectively curb the occurrence of child rape in the society, the punishment has to be severe and consistent, thus the need for a mandatory sentence of life imprisonment<sup>63</sup>. Fines should be added to prison terms to serve as a form of compensation for the victims. Sadly, as stated by a Nigerian Legal Practitioner; Ayo Akintunde

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<sup>62</sup> Section 31 (4) (a)(b)(c)(d)(e) of the Sexual Offence Act Bill 2013.

<sup>63</sup> The Sexual Offence Act Bill 2013 sets the mandatory punishment of life imprisonment for the offence of defilement in section 7.

Esq. ‘...the victim of a crime is the forgotten man in our criminal justice system.’<sup>64</sup>

The Police Force plays an important role in the successful conviction of a child rapist. Medical evidence is most times needed during trial to corroborate the victims’ evidence during trial, thus the victim must have been taken to the hospital for proper medical examination. Herein begins the delicate role of the police, as they most times constitute first contact with the victim even before a lawyer is called in. The Police are saddled with the role of taking the victim and the suspect (if apprehended) to a reputable Government hospital and ensuring the proper medical examinations are carried out. If this stage is handled improperly the prosecution’s case is lost already. This writer appeals to the members of the Nigerian Police Force to handle investigations concerning complaints of child rape diligently and carefully to help the victims’ case at the trial stage.

Lastly, in the light of these grossly inadequate laws and before any legislative reform takes place, the courts should engage in a form of judicial activism in the interpretation of Statues regarding child rape. The Courts can apply the Mischief rule of interpretation of statutes to find out the defect the particular law sought to cure and then cure that defect. The mischief rule of interpretation is purposive in nature as it seeks to ascertain the reason behind the legislation.<sup>65</sup>

### **Conclusion**

When a crime occurs and a victim steps out to officially lay a complaint with the constituted authority and the perpetrator goes scot free due to some technicalities and archaic laws, then the Justice system is deemed to have failed such victims, from the Legislature to members of the Bar and the esteemed Judges at the Bench. In a civilized society, justice can only be found where there is an effective justice system; a justice system with good laws,

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<sup>64</sup> Hon. Justice. Peter Akhime Akhiehiero, “Protecting the Rights of Victims in Trials for Sexual Offences”. *Supra*.

<sup>65</sup> Okoye O, *Law in Practice in Nigeria: (Professional Responsibilities and Lawyering Skills)* 1st edition ( Enugu: Snaap Press Nigeria Ltd., 2011), 377.

where justice is delivered timeously and is free of archaic laws or a tortoise paced judiciary. The justice system is duty bound to protect every class of persons in the society, from the rich to the poor, the elite and the common the old and even the helpless little child. The Penal Code and Criminal Code do not adequately protect the child victim of rape. Finally, it should be noted that; ‘...a Nation that cannot protect her children is an endangered Nation. This is because such a Nation may be wittingly or unwittingly destroying the most valuable human resource base that would define and sustain her future’.<sup>66</sup>

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<sup>66</sup> Solomon Arase, Nigeria Inspector General of Police at The International Conference Centre, Abuja during the lunch of the UN Year of Action to End Violence Against Children. Available at <http://www.ngrguardiannews.com/2015/09/protecting-nigerian-children-against-violence/>. (accessed 23/01/2016).