A COMPARATIVE APPRAISAL OF CORROBORATION IN THE CRIME OF RAPE IN NIGERIA AND OTHER COMMONWEALTH JURISDICTIONS 2021

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ABSTRACT

This paper is a comparative appraisal of corroboration on the crime of rape in selected jurisdictions. The defining element in the crime of rape is lack of consent. There may be presence or absence of force. Rape shows a site of struggle between a man and woman due to lack of consent resulting in sexual contact with the female body. Contemporary notions about rape portray it as an act rather than violent access to the female body, victims of rape feel less respected or esteemed. This paper, is in this sequence, the introduction, definition of rape, types of rape, ingredients of the offence of rape, mens rea of rape, actus rea of rape, capacity, carnal knowledge, consent, corroboration, corroboration according to the rule of number, corroboration of rape or sexual offences in Nigeria and other jurisdictions, reforms under the Evidence Act 2011, attitude of the court after the abrogation as well a suitable conclusion. The paper adopted the conceptual and doctrinal approach. This paper utilised relevant, textbooks, statutes, and case law. It was the findings of this paper inter alia that are no formal rules regarding corroboration of a woman's testimony in rape cases or other sexual offences in the diverse jurisdictions examined. But, the requirement of many legal systems to meet a particular level of proof in order to prosecute, coupled with the widespread distrust of women, has led to the continued demand for corroboration of a victim's claim
It was recommended there must be sustained efforts by the State such as continuous training of law enforcement personnel and judicial officers. Corresponding provisions in the Criminal Code and Penal law should be amended.

INTRODUCTION

In contemporary Nigeria, the offence of rape is becoming a recurrent topical matter, due to the escalating and worrisome reported cases of rape. This paper is necessitated by the unwarranted evil trend and the persistent clamour for adequate punishment for sexual offenders. Rape is any sexual connection between a male and female without the requisite consent. Victims of rape are sometimes blamed for the unfortunate incident, by some members of the general public. Such females feel less respected or esteemed, thus some women are sometimes not sincere about being rape for fear of stigmatization. These

ultimately create the impression that only bad girls get raped, women provoke rape by their physical appearances, and they also asked for it.[1]

Pedestal myth is one of the first main beliefs which hold women to a higher standard of moral conduct. Essentially, women are placed on a pedestal, they should be virtuous, they should not be sexually active nor should they tell immoral jokes or get intoxicated. The view or opinion that women should be virtuous than men promotes a double standard and gives men a privileged position over women. It would therefore, seem that women are legitimate victims only when the rape gives the semblance of violating traditional female role expectations.

In perpetuating such constructions, legal representation of rape continues the distinction between real rape (that is legal rape) and other degrees of forced intercourse which do not fulfil the legal requirements.[2]

This study adopted the conceptual and doctrinal approach. It gathered, examined and analyzed primary and secondary source materials, such as legations, textbooks, precedents and learned journal articles. The approach in deserving circumstances compared the views and contributions from other common law jurisdictions and incorporated them. It made some observations, conclusions and recommendations for reforms. There are no (or no longer) formal rules regarding corroboration of a woman's testimony in cases of sexual assault in many parts of the world (e.g. parts of Latin America, Canada, Fiji, Ghana, Israel, South Africa, the United Kingdom, the United Republic of Tanzania, Zimbabwe and most parts of the United States).[3]

The historical assumption of an inherent lack of credibility of the evidence of women and girls in sexual offences cases which led to the evolution of the corroboration rules under the common law is now widely regarded as discredited and without any scientific basis. It was therefore vital that the common law practice should be abrogated, and that the statutory

[1] Stewart M. W, Dobbin S. A, and Gatowski S. I, *Definitions of Rape: Victims, Police and Prosecutors,* (4 Feminist Legal Studies 1996), 159.
[2] ibid, 161.
[3] H. Combrinck, "Criminalisation of Sexual Violence in Sub-Saharan Africa." Prepared for the World Health Organization, Geneva, 2003; J. Du Mont & D. Parnis, "Constructing Bodily Evidence through Sexual Assault Evidence Kits" *The Griffith Law Review*, (2001), 10: 63–76; J. Lemaitre & A. Constantin., "Review of Sexual Crime Legislation in Five Latin American Countries" [draft]. Prepared for the World Health Organization, Geneva, 2002; M. J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*. (Villanova: Villanova University School of Law, Working Paper Series, No. 20, 2004); K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" *Canadian Journal of Women and the Law*, (1997), 9:149– 177; *Requirement of Corroboration in Rape Trials Overturned by Fiji Court*

provisions, which are based on the same discredited assumption, be abolished consequentially. Assessments of credibility should be made not by assumption but by a full evaluation of the merits of the case.

The evidence of a prosecutrix should be judged based on the strength of her case and the accused should according to the law be found guilty only if the prosecutrix can prove the commission of the offence beyond reasonable doubt. It is not unlikely that had this been the law in the time of *Okpanefe v. State*,[4] the decision would have been different. This has, however, not totally removed the obstructive barrier and discrimination occasioned by the corroboration requirement in sexual offences in Nigeria by virtue of the provisions of the Criminal code. We therefore humbly suggest that the corresponding provisions in the Criminal code should be equally repealed at the earliest opportunity to give effect to the current global trend in the protection of rights of women and girls. The paper is divided under the following sub-headings, introduction, definition of rape, types of rape, ingredients of the offence of rape, mens rea of rape, actus rea of rape, capacity, carnal knowledge, consent, corroboration, corroboration according to the rule of number, corroboration of rape or sexual offences in Nigeria and other jurisdictions, reforms under the Evidence Act 2011, attitude of the court after the abrogation as well a suitable conclusion.

DEFINITION OF RAPE

Contemporary definition of rape has proved hugely problematic for many feminists. Critique of the various definitions is based largely upon the interpretation of the act of rape from a male perspective and its failure to consider adequate, female experience of acts sexual violence. The English Sexual Offences Act[5] provides that for a man to rape a woman or others man. Under the Act, rape is defined as when: "A person (a) intentionally penetrates the vagina, anus or mouth of another person (b) with penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consent."[6]

[4] (1969) LPELR-25446 (SC). Where the accused asked a girl aged 12 at the time of the alleged offence to bring water to him in his house and when she did so, pushed the girl into his room and forcibly had sexual intercourse with her against her will. She did not report to her parent or anyone until the second time when the accused called her and force her into his room and forcibly had sexual intercourse with her against her will but this time she could not walk properly and on her mother seeing this questioned her and the she told her mother what had happened. The accused was convicted of rape and attempted rape by the trial court and Court of Appeal but was discharged and acquitted by the Supreme Court.

[5] Section 1(1) English Sexual Offences Act, 2003.

[6] This definition replaces that found in the sexual offences Act, 1956, S. (as mended) and S. 1 (1) © and (2) replace S. 1 (2) of the sexual offences (amendment) Act, 1976. The principal changes are that rape can now be

The two elements which comprise the legal definition demand an act a state of mind. The act is that of sexual intercourse with a person who does not consent. The state of mind is that accused does not reasonably believe that his victim consents. It would seem that the old requirement of recklessness as an aspect of the mens rea of rape has been disregarded under the 2003 Act. Today, lack of reasonable belief that the victim consent replaces recklessness as to whether or not the victim consents and whether a belief is legally justifiable is to be determined having regard to all the circumstances of the case, including any steps taken by the accused to determine whether his victim's consent.[7]

In Morgan, it was held that rape was not proved if the man may have believed that the woman was consenting, even if that belief was unreasonable. This cause much disquiet, mainly because it was erroneously supposed that the man needed do no more that assert this belief in consent to secure his acquittal.[8] The Heilbronn Committee, while upholding the decision in Morgan, recommended the declaratory provision as contained in Section 1 (2) of the English Offences Act[9] thus:

> It is hereby declared that if at a trial for a rape offence, the jury has to consider whether a man believed that a woman or man was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.[10]

This is a matter of common sense, and is not peculiar to rape cases. Whenever a court is to determine whether a person knows a fact or foresaw a consequence, the fact that a reasonable man would have known the fact or foreseen the consequence is evidence, that the accused knew or foresaw, but the decision much be made in the light of the whole evidence, including the accused's own testimony (if given) to the effect that he did not know or foresee, as the case may be.[11]

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committed by the penetration of the mouth by the penis (sometimes called "oral rape") and that the mens rea is now extended to situations where the accused had an unreasonable belief in the victim's consent (thereby overruling *DPP v. Morgan* (1976) A.C 182.

[7] ibid. Section 1 (2)

[8] J.C. Smith and Brian Hogan, *Criminal Law*, 10th ed. (London: Lexis Nexis, Butterworths, 2002), 466.

[9] As amended by the 1944 Act

[10] (1975) Cmnd 6352. See also. (1976) Crim. LR.97. It is this declaration that metamorphosed into English Sexual Offences Act. Section 1 (1) (c).

[11] Smith and Hogan, note 8, 467.

The Nigerian Codes[12] differently defined rape, under the Criminal 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, in the case of married woman, by personating her husband, is guilty of an offence which is called rape.[13]

The Criminal Code definition concentrates on vaginal rape without a mention of the organ of the body to be used by prospected rapist. It is also silent on other forms of rape, such as oral and anus rape. Under the penal code:

> A man is said to commit rape if he has sexual intercourse with a woman: (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, (e) with or without her consent, when she is under fourteen years of age or of unsound mind."[14]

The penal Code provision relating to what legally constitutes the offence of rape, appears to be verbose, repetitive and ambiguous. The phrases "against her will" and "without her consent" as used in (a) and (b) above seem to mean the thing just as paragraphs (c) and (d) would seem superfluous as they may have added nothing new. As succinctly put by Chukkol,[15] "Section 282 (1) (C) & (d) of the penal Code really talk of the same thing, i.e., situations where there con not be true consent. When one is put in the fear to yield to an act or where one yields to an act under misconception of a fact, i.e., believing the accused to be

[12] Criminal Code and Penal Codes. The Criminal Code holds sway in the southern part of the country while the Penal Code applies to the northern part of Nigeria.
[13] Section 357, Criminal Code Act (Cap C38) LFN 2004.
[14] Section 282 (1) Penal Code (Cap. 532) LFN (Abuja) 1990.
[15] K. S Chukkol, *The Law of Crimes in Nigeria*, Rvsd Edn (Zaria: ABU Press Ltd, 2010), 323

her husband, there is no consent so to speak of and thus, paragraphs (c) and (d) are really superfluous as they do not add anything new."[16]

In Ghana, rape is defined as the carnal knowledge of a female of sixteen years or above without her consent and whenever a person is being tried for the offence of rape in Ghana, it is important to establish carnal knowledge or unnatural carnal knowledge and the carnal knowledge or unnatural carnal knowledge shall be deemed complete upon proof of the least degree of penetration. Unlike the relevant Nigerian Codes provisions, the law in Ghana, though simplistic, took many issues for granted, particularly as they relate to the various acts that may constitute or invoke lack of consent both on the part of the accused and the victim of this act and this may create some interpretative problems for the judiciary in Ghana.

The Indian Code's provisions seem to be as comprehensive as in the case under the Nigerian Codes. Thus:

> A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions, i.e. (1) against her will, (2) without her consent, (3) with her consent, when consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt, (4) with her consent, when the man knows that he is not her husband and that his consent is given because she believes that he is another man to who she is or believed herself to be lawfully married, (5) with her consent, when, at the time of giving such consent, by reason of unsoundness mind, or intoxication or the administration by him personally or through another, of any stupefying or unwholesome substance she is unable to understand the nature and consequences of that to which she gives consent or (6) with or without her consent, when she is under sixteen years of age.[17]

[16] ibid
[17] Sections 98 and 99 of the Criminal Code (Amendment) Act, 2003 (Cap. 646)

Unlike the English Act, the Indian law restricts the commission of the offence to male accused and also, did not consider oral rape. It nonetheless considers situations where the victims of rape are intoxicated for that purpose by their assailants.

In Kenya, it would seem that the offence rape which was repealed is yet to be re-enacted.[18] What is retained by the 2009 Act in chapter XV dealing with the offences against morality, is the offence of "detention of females for immoral purpose, under which it is a felony for any person to detain another against his or her will in or upon any premises with intend that he or she may unlawfully have sexual connection with that person.[19]

In India, the victim of rape may not know the nature of the act as a result of intoxication inflicted on her by the accused or his agents, but the Ugandan Act did not specify the type of false misrepresentation capable of making the victim of rape not to know the nature of the act. Nonetheless, it would seem that the Nigerian, Indian and the Ugandan codes provisions share some common features and characteristics of great similarity with the Indian and the Ugandan Codes' provisions is the American Law pursuant to the Model Penal Code provision. Here, a male who has sexual intercourse with a female who is not his wife is guilty of rape if;

(a) He compels her to submit by force or by threat of death, serious bodily harm, extreme pain or kidnapping, to be inflicted on anyone or;

(b) He has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge, drugs, intoxicants or other means for the purpose of preventing resistance or;

(c) The female is unconscious or;

(d) The female is less than 10 years old.[20]

The American Law helps us to appreciate the word "girl" as used in the Ugandan Law to mean a female who is less than 10 years old. It would seem that the courts while interpreting relevant codes' provisions do not deviate much from the statutory definitions of the offence

[18] Section 375, Indian Penal Code (Cap. 42) Act, 1973
[19] The Penal Codes Act (cap 63) Laws of Kenya, 2009 has repealed without replacement, Sections 147 to 150 the 2003 and 2006 Acts which defined and ingredients and punishment for the offence of rape.
[20] Section 123, Penal Code Act (Cap. 120) Laws of Uganda 1950.

of rape, except where a particular statute failed to offer a working definition.[21] Thus, the Nigerian Court of Appeal, in *Ahmed v. Nigerian Army*, defined rape in accordance with provisions of relevant statutes.[22]

Under the Nigerian Law, when compared with the American Law, a girl is a female under the age of 14 years and not 10 years as applicable under the Model Penal Code. The common law required that a youth be at 14 years old before he could be charged and found guilty of rape and most American jurisdictions follow this common law principle. The concept is not based on the physical capacity of a youth, but rather on the belief that a boy under the age of 14 should not be punished for the serious offence of rape. Nonetheless, his conduct could justify punishment under other charges.[23] A distinction between a woman's husband and a man, to whom she is married or believes herself often to be lawfully married, may be difficult to draw. If a belief is created in the mind of a woman by the accused to the effect that she is married to a person who is not factually legally her husband, absence of consent may still prevail.[24]

The new definition of rape in contemporary times includes any gender of victim and perpetrator, not just women being raped by men. It also recognizes that rape with an object can be as traumatic as penile/vaginal rape. This also includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity. Many rapes are facilitated by drugs or alcohol; a victim can be incapacitated and unable to consent because of ingestion of drugs or alcohol. A victim may be legally incapable of consent because of age. The ability of the victim to give consent must be determined in accordance with s state statutes. Physical resistance is not required on the part of the victim to demonstrate lack of consent.[25]

[21] Section 213 of the Model Penal Code.
[22] Ibid.
[23] *Igbine v. The State* (1997) 9 NULR (pt. 519) 101.
[24] Gardner T. J and Manian V, *Criminal Law: Principles, Cases and Readings*, 2nd ed. (St. Paul: West Publishing Co., 1980), 468.
[25] https://www.justice.gov/archives/opa/blog/updated-definition-rape

TYPES OF RAPE

There are several types of rape. The forms of rape may be specified based on who is committing the rape, who the rape victim is and the specific actions involved in the rape. The following types of rape are considered[26]

1. Diminished Capacity Rape: The type of rape known as diminished capacity rape is committed when one person forces sexual penetration on another person who cannot consent to the sex act. People with diminished capacity can't consent to sexual acts due to limited physical or intellectual ability. An example would be a person with an intellectual disability. Diminished capacity rape also takes place when a person has no ability to consent to sexual acts due to intoxication.
2. Age-Related Rape: Another form of rape is age-related. This type of rape is often known as statutory rape as specified both in federal and state law. In this case, sexual actions with a person below a minimum age is considered illegal in all cases. Often this age is 12. There is often another age, known as the age of consent. Sexual acts with a person above the minimum age but below the age of consent may be considered rape depending on the perpetrator. Specific ages are specified by state.
3. Incest: Incest is a type of rape dictated by the relationship between the two parties. When the two parties involved in the sex act are closely related (in other words, they are family), it is often rape. Examples of incest includes Parents and children, Uncles and nieces or nephews, Aunts and nieces or nephews. Laws vary by state as to specifically what constitutes incest. Family members account for 7% of rapists.
4. Partner Rape: Partner rape, also known as spousal rape or marital rape, is a type of rape involving a person's partner or previous partner (no matter whether the partners are married).
5. Aggravated Rape: Aggravated rape is a type of rape defined in the law. Aggravated rape involves: Forced sex acts by the threat of death or serious bodily injury, Forced sex acts involving an unconscious or drugged victim, Sex acts with children under the age of 12.
6. Forcible Rape: “Forcible rape” had been defined as “the carnal knowledge of a female, forcibly and against her will.” It only included forcible male penile penetration of a female vagina. The better definition is: “The penetration, no matter

[26] Types of Rape: The Different Forms of Rape, https://www.healthyplace.com/abuse/rape/types-of-rape-the-different-forms-of-rape

how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."[27]

INGREDIENTS OF THE OFFENCE OF RAPE

In a charge of rape, the onus of proof is on the prosecution to establish by evidence the following facts beyond reasonable doubt:

(1) That the accused person had intercourse with the prosecutrix.
(2) That the act of sexual intercourse was done without her consent or the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation.
(3) That the prosecutrix was not the wife of the accused
(4) That the accused had the mens rea, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not.
(5) That there was penetration relying on *Posu & anor v. The State*,[28]

Comprehensive and legally acceptable statement on the ingredients of the offence of rape would be one that embodies both the mens rea and the actus reus of the offence of rape and this has necessitated the adoption of the dictum of the Supreme Court of Illinois in *People v. Faulisi*,[29] which runs thus:

> "In a charge of forcible rape, the fact that the act of intercourse was performed forcibly and against the will of the complaining witness is a necessary element of the crime which must be proved beyond a reasonable doubt. The degree of force exerted by the defendant and the amount of resistance on the part of the complaining witness are matters that depend upon the facts of the particular case. It is, however, fundamental that in order to prove the charge of forcible rape, there must be evidence to show that the act was committed by force and against the will of the female, and if she has use of

[27] https://www.justice.gov/archives/opa/blog/updated-definition-rape
[28] (2011) 3 NWLR 393; *Iko v. State* (2003) 3 ACLR 49.
[29] (2011) 1NWLR (pt. 1227) 89 at 109-110. See also, Smart C, 'Laws Power, the sexed Body, and Feminist Discourse,' *Journal of Law and Society*, vol. 17, No.2 (1990): 194-210.

> her faculties and physical powers, the evidence must show such resistance as will demonstrate that the act was against her will.

It would seem from the above dictum of the American Supreme Court, that the mens rea of rape is the intention by a man to have sexual intercourse with a woman against her will or without her consent while the actus reus is actually having that intercourse (penetration) with her against her will or without her consent.

MENS REA OF RAPE

Except in strict liability offences, the state of the accused's mind at the time of allegedly committing an offence, is material in establishing the commission or otherwise of the offence. Thus, in rape cases, it is not only the physical act of sexual violence that may create practical problems, the mental element requires it to be established that the accused knows that victim is not consenting to intercourse, or is reckless as to whether she is consenting or not. The question has arisen as to whether an honest, but mistaken belief in consent is sufficient to negate the criminal liability of the accused.[30] This problematic situation which held sway in this area of the law even at the time the case *DPP v. Morgan*,[31] was decided, has been tackled and/or modified by some provisions in the English Sexual Offences Act,[32].

ACTUS REUS OF RAPE

The Position of the Nigerian Court of Appeal, which appears to be comprehensively all-embracing, may be adopted to the effect that: "the important and essential ingredient of the offence of rape is penetration, sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement of the offence of rape. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. Therefore, proof of the rupture of

[30] J. O. and S, Feminist Perspectives on Law: Laws Engaging with the Female Body. 395.
[31] 25 111. 2d 457, 185 N.E 2d 211 (1962).
[32] 2003. See also, Section 1 (1) English Sexual Offences Act, (1976) AC 182.

the hymen is unnecessary to establish the offence of rape. In this case, the appellant's contention that the girl was not a virgin at the time of medical examination does not change the fact of rape once the penetration is established. Whether the Prosecutrix is a minor or an adult, to secure conviction for rape, there must first be proof of penetration of the vagina and the penetration must be linked with the accused."[33]

In States utilizing the traditional rape statutes, the state must demonstrate that intercourse occurred. Evidence must be produced showing that the penis penetrated to some extent, into the vagina. Under traditional rape statutes, rape is committed by the penetration of the penis, not a finger, broomstick, or bottle. Assaults of that nature are prosecutable as offence of rape. It is not necessary to show complete penetration or that the accused had an orgasm to prove rape. A showing of partial penetration of the vulva or the labia of the victim is sufficient. Proof of penetration is usually shown by statement of the victim in court and/or by statement of the examining physician.[34]

CAPACITY

A male person less than the age of twelve (12) years is presumed to be unable to have carnal knowledge. Therefore, he cannot be guilty of the crime of rape or attempted rape although based on such a charge he may be convicted of indecent assault. This presumption of law cannot be rebutted by depicting that the accused has attained the state of puberty even he is less than twelve (12) years. Furthermore, a husband cannot be guilty of raping his wife.

However, this immunity is limited and restrictive in nature. Where the marriage has been dissolved by a court of competent jurisdiction, or there is a subsisting separation order that the wife is no longer duty bound to cohabit with her husband, then the implied consent to sexual intercourse provided by the wife during marriage is automatically revoked and during the pendency of the court order, it will be rape for the husband to have sexual intercourse with the wife in the absence of her consent. The mere existence of petition by a wife before a

[33] T. J and V, *Criminal Law: Principles, Cases and Readings*, 468. See also, *Okoro v. The State* (1964) 1 ALL NLR. 423.
[34] *Ogunbayo v. The State* (2007) 8 NWLR (pt. 1035) 157; *The State v. Ojo* (1980) 2 NCR 391; *Jegede v. The State* (2001) 14 NWLR (pt. 733) 264; *Seismograph Services (Nig.) Ltd v. Ogbeni* (1976) 4SC 85, etc.

court for separation/divorce does not automatically revoke the implied consent to sexual intercourse.[35]

It is hereby contended that where a husband uses force or violence to carry out or exercise his right to sexual intercourse, he will be guilty of the crime of rape, as well as assault or wounding.[36] If a person is incapable of committing rape ,he /she can be charged with the offence of rape relying on section 7 of the criminal code for aiding, counselling or procuring the facilitation/commission of the offence.

CARNAL KNOWLEDGE

In proving the offence of rape, carnal knowledge must be established and proved. In this requirement of the law, it is not imperative or expedient to prove that the hymen was ruptured or broken. The slightest penetration of the vagina is enough. It can be safely asserted that there cannot be rape without penetration.[37] Notwithstanding, the aforementioned, the crime of rape is complete once there is penetration or upon penetration.[38]

The position of the law is that the act of sexual intercourse that follows is a component of the offence itself; hence the assistance or aid given after the penetration makes the aider liable or guilty as a party /accessory to the commission of the offence.

CONSENT

The essence of rape is that there was no consent .Hence, it is imperative for the prosecution to adduce evidence proving that the victim did not consent. Consent is a tasking concept. Challenges arises in instances it is alleged that consent was obtained by misrepresentation or given under a mistake or due to threats.[39] For the offence of rape, absence of consent is very fundamental and the prosecution must prove that the accused person had carnal knowledge of a girl or woman, irrespective of her age without her consent. It is no defence that the

[35] See Okonkwo & Nash, *Criminal Law in Nigeria,* 2nd ed. (London: Sweet and Maxwell, 1980), 272.
[36] See *R v. Miller* (1954) 2 Q B 282.
[37] See *R v. Kufi* (1960)W. N. L .R 1.
[38] See *R v. Mayberry* (1973) Qd.R 211.
[39] See Smith & Hogan, Note 8, 467.

complainant has agreed to intercourse with the accused at other previous times, or she is a known prostitute; or she is the accused person girlfriend, mistress or concubine. However, those facts may cast a doubt in the mind of the court in adjudicating in the matter.[40]

Consent got by force or by way of intimidation or threats or fear of infliction of harm is not consent. Consent given due to exhaustion, tiredness, after prolonged resistance and persistent struggle is no consent. Normally, testimony of some resistance or struggle by the complainant shows a credible and best proof of absence of consent but this is not always essential. To have carnal knowledge amount to rape. Rape is also committed to have sex with a woman by personating her husband. Whenever, there is fraud or element of deception, consent is vitiated. It is manifestly clear that there is no consent, if obtained fraud pertaining to the nature of the act, or to some other vital matter.[41] The crux of the rape here is that intention to have sexual intercourse without the woman's consent or with indifference as to if she consented or not.

In Nigeria, the position of the court reached in *Morgan*'s *case* is the applicable position of the law. Where an accused person pleads that he believed the lady consented he is therefore not under any obligation of establishing the defence of honest and reasonable mistake of fact contained in Section 25. This is because the prosecution is under a duty of proving the sexual intercourse without the woman's permission /consent. And intention to have it without her consent of the crime of rape. It must be proved or fulfilled as an integral part of the case that the accused person intended to have carnal knowledge in the absence of the woman's consent. Where there is a mistaken belief that she was consenting/agreeing, although unreasonable will negate that intention.[42]

CORROBORATION

The word 'corroborate' is derived from two Latin words "*cor*" and "*robur*" which means "to strengthen". Lord Reading in *King v. Baskerville*,[43] defined corroboration as: "some additional evidence rendering it probable that the story of the accomplice (or complainant) is

[40] See Okonkwo & Nash note 35, 273.
[41] See *D.P.P v. Morgan* (1975)2 ALL.E.R.347.
[42] See Okonkwo and Nash note 35, 274
[43] (1916) 2 K.B. 658.

true and that it is reasonably safe to act upon it.*"* The Nigerian Supreme Court in *Nwambe v. State*[44], defined corroboration as the confirmation of a witness' evidence by independent testimony. In *Director of Public Prosecutions v. Kilbourne,*[45] Lord Simon stated: "Corroboration is therefore nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence. It is evidence which renders other evidence more probable." Bargen and Fishwick[46] define the concept as follows: "Corroboration refers to the need for the complainant's evidence to be supported by some other independent evidence implicating the accused person."[47] From the definition of Lord Reading above, it is noticed that one of the problems with legal scholars and judges is that they have accorded the concept of corroboration a meaning which is akin to testimony itself. Corroboration is not a total testimony or evidence which reiterates the case against the accused. Corroboration is, instead, an independent piece of evidence that confirms the testimony of the complainant or the evidence adduced by the prosecution. As seen from its etymological view, to corroborate is "to strengthen" and not "to repeat".[48]

CORROBORATION ACCORDING TO THE RULE OF NUMBER

The Code of the Emperor Justinian stated that on any important issue the testimony of a single witness would be inadequate. This general principle, called the rule of number, was taken up in ecclesiastical law which gave it practical effect by specifying, in many instances, the precise number of witnesses necessary to prove a point. Against the word of a Cardinal, for example, forty-four witnesses were required. The rule of number made perfect sense to the canon lawyers of the middle ages, for whom the act of taking the oath itself had probative force. The more times the oath was taken, the greater was the persuasiveness which attached to the testimony that followed. Certainty rested not in careful scrutiny of the significance of each oath with respect to the person taking it, but in a simple count of the number of witnesses. Gradually, as other modes of inquiry into the truth became fashionable, the rather primitive formalism of the rule of number gave way to conceptions of evidence and of proof more congenial to the modern mind. To illustrate, until the early eighteenth century, an

[44] (1995) 3 SCNJ 77.
[45] (1973) A.C. 729.
[46] J. Bargen and E. Fishwick, *Sexual Assault Law Reform: A National Perspective*, (New York, UN Office of the Status of Women, May, 1995), 67
[47] *Ibid,* 69.
[48] See Lord Hewart C.J's dictum in *R v. Whitehead,* where the learned Law Lord stated that corroboration was not repetition.

English jury was free to consider its own extra-judicial knowledge of a cause.[49] This being so, it was difficult to ask the jury to give its verdict automatically to the side with the longer line of witnesses in court. The consequence, ultimately, was that the common law rejected the rule of number; it accepted only prosecutions for perjury where the testimony of a single witness, without corroboration, remained insufficient.[50]

CORROBORATION OF RAPE OR SEXUAL OFFENCES IN NIGERIA AND OTHER JURISDICTIONS.

The repealed Evidence Act[51] in Section 179(5) provided thus: A person shall not be convicted of the offence mentioned in Sections 218, 221, 223, or 224 of the Criminal Code upon the uncorroborated testimony of one witness. Thus, the courts contends that it is unsafe to convict based on the uncorroborated evidence of only the complainant.

Collectively, these are referred to as Sexual offences.[52] All the sections listed above contain a proviso that: "a person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness." By this provision, it is obvious that as far as the legal content of these sexual offences are concerned, there is a mandatory requirement for corroboration. The prosecution in order to secure a conviction must adduce evidence to corroborate the complainant's testimony. However, under the Evidence Act 2011,[53] the former Section 179(5) has been expunged. This is clearly a reform of the law but obviously not a repeal of the requirement of corroboration for sexual offences under Nigerian law. By the provisions of Evidence Act, there is a clear indication that corroboration is no longer required, as a matter of law, for the conviction of any person that commits any of these sexual offences. Thus, the court may now convict on the strength of the case and no more on the corroborative evidence. This apparent contradiction in the present state of the law is the main crux of this paper. Lawyers and judges have in the past been criticised for displaying bias in their treatment of women who are victims of sexual assault. It has been argued that this

[49] See W. Holdsworth, supra note 2, at 137; J. Thayer, A Preliminary Treatise on Evidence 296 (1898).
[50]One court has said, without citation of authority and erroneously, that the common law also required corroboration in prosecutions for rape. *People v. Friedman,* 139 App. Div. 795, 796, 124 N.Y.S. 521, 522 (2d Dep't 1910). But see *People v. Gibson*, 301 N.Y. 244, 93 N.E.2d 827 (1950) where the court properly noted: "At common law, in the case of sexual offenses, it was not necessary that the testimony of the injured female be corroborated. The necessity of corroboration, if it exists at all, must thus be found in a specific statute." Id. at 245, 93 N.E.2d at 827.
[51] Cap E14, LFN, 2004.
[52] They are differently named in the various State Criminal Code Laws but the offences are the same. For instance, in Enugu State CCL Cap 30, they are grouped under a section as offences against morality. Section 196-216.
[53] It was passed in May, 2011 and it repealed Evidence Act, Cap. E14, Laws of the Federation, 2004.

biased treatment of women comes from views about women which are based on myths and stereotypes.[54] These views fail to recognise the dignity of womanhood. In their report on Sexual Assault Law Reform, Bargen and Fyswick[55] argue that stereotypes of women differ according to the category into which they are usually placed. Accordingly, the degree to which 'she' may lie depends upon the category of "woman" into which she is placed. Corroboration was required in almost all cases of sexual assault and corroborative evidence was usually defined in an absurdly narrow way.[56] The rule was based on myths and beliefs about women which are incorrect and clearly discriminatory. According to Woods:

> It is stressed that the present practice is regarded as being grossly offensive to women and discriminatory. Is it really possible that rape victims as a class are more prone to falsehood than, for example, businessmen giving evidence in cases where their own financial advantage is in issue. Why not have a rule that judges should always warn juries that it would be "dangerous to convict" on the uncorroborated evidence of a businessman.[57]

The common law rule was justified by the need to protect the accused person against the risk of unjust conviction. Because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all. This had the effect of placing sexual offence complainants in a category of unreliable witnesses. There is no evidence to suggest that sexual assault complaints are false. In fact, a report from India and Britain[58] showed that the rate of rapes is not commensurate with the convictions for rape. The report from India showed that rape was the fastest growing crime in India with over 22,900 incidences in 2011 and yet the rate of conviction for the offence was completely incommensurate.

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[54] D. Malcolm, *Equality before the Law, Justice for Women and Women's Equality*, Parts 1 and 2, (Australia, Commonwealth Government Publishing Service, 1994).
[55] J. Bargen and E. Fyswick, *op. cit.*, p. 70.
[56] See for example *R. v. O'Reilly* (1967) 2 QB 772 and *R. v. Richards* (1965) 2 QB 354 at 360.
[57] G. D. Woods., *Sexual Assault Law Reform in NSW: A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981 and Cognate Act*, (NSW, Department of the Attorney General and of Justice, 1981), 28.
[58] In Britain, the government estimates that as many as 95% of rapes are never reported to the police at all. Of the rapes that were reported from 2007 to 2008, only 6.5% resulted in a conviction on the charge of rape. The majority of convictions for rape resulted from an admission of guilt by the defendant, whereas less than one quarter of all those charged with rape were convicted following a successful trial. Prosecutors have accepted a number of failures in dealing with rape, particularly since the publication in 2007 of the Without Consent report, which was highly critical of some aspects of the way the police and prosecuting authorities deal with rape cases. See http://www.hindu.com/2010/04/28/stories/2010042861390800.html last accessed on 01/06/2020.

In *Santhosh Moolya and Surendra Gowda v. State of India*,[59] the Indian Supreme Court stated thus:

> Any statement of rape is an extremely humiliating experience for a woman, and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her, and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for.[60]

According to Justice Sathasivam, quoting an earlier judgments, When a First Information Report is lodged by a lady with regard to the commission of offence like rape, many questions would obviously crop up for consideration before she finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only giving it a serious thought, must have decided to lodge the First Information Report.

It is a brave female or parent who knows what she faces in the criminal justice process that will come forward to make a complaint about the violator. In Nigeria, it is almost a term of opprobrium as the victim of such offence is looked upon with scorn. Sometimes, it leads to stigma. Many parents have concealed such offences against their female children or even compounded felonies to avoid making such public. For the few who are courageous enough to come to court, they face a process which considers their testimony as insufficient and unreliable. In fact, in a country like Trinidad and Tobago, court sessions on sexual offences are conducted in camera and the names of the complainant and the accused are not published. The truth is that most offences of this nature are committed in private and that leaves the victim as the sole witness and also the sole "exhibit" as a result of the after effects.

The requirement of corroboration had led to absurd consequences such as those described by Roch J in the English case of *R. v. Chance*.[61] In that case, it was pointed out that:

> Where for example, a woman was raped and then robbed in her own home; presumably a judge would be required to explain to the jury that it would be dangerous to convict the accused on the

[59] Criminal Appeal No. 1498/2007. Reported in Crime Against Women, FIR, Fundamental Rights, Gender, Human Rights, Sexual Offences, Uncategorised Victims by *NNLRJ* India on April 2010

[60] A Bench of Justices comprising JJs. P. Sathasivam and R.M. Lodha

[61] [1965] 1 All ER, 611.

> uncorroborated evidence of the victim in relation to her story of the sexual assault, but not dangerous as far as the robbery was concerned.[62]

In the case of *Francis Okpanefe v. State,*[63]the appellant appealed against a decision of the appeal court convicting him on a two count charge of rape and attempted rape. The complainant (1st P.W), who was found by the learned trial judge to be a girl aged twelve years at the time of the alleged offences, in her evidence said that the accused called her and asked her to bring him water and when she did so he pushed her into his room and forcibly had sexual intercourse with her against her will. She did not make a report to her parents or to anyone else of what the accused had done. A week later the accused again called her and, when she went, forced her into his room and, according to her, again forcibly had sexual intercourse with her against her will but, as a result, she was this time in pain and could not walk properly so that her mother seeing this questioned her and she then told her mother what had happened. On the second occasion the accused gave her a shilling because she was crying. The 2nd P.W., the mother of the accused, confirmed the story of the complainant as to finding her in a distressed condition and said a shilling dropped from the complainant's clothes when she examined her. In the medical report tendered as evidence by the prosecution the fact that the girl had been forcibly raped as a result of the rupture of her hymeneal ring. However, the doctor in the report said there was no connection between the appellant and the rape. The court held that the earlier complaint made to her mother, the money and the medical report and the fact that the appellant's plea of alibi failed was not sufficient to amount to corroboration.[64]

A REFORM UNDER THE EVIDENCE ACT 2011

The need for corroboration in the proof of sexual offences has been expunged from the Evidence Act 2011. The implication of this is that in cases where there is need to prove the commission of any of the sexual offences, corroboration is no longer required, at least procedurally. When compared with other offences which require corroboration, it is discovered that historically the use of corroboration in proof of sexual offences is faulty. This can be gleaned from the three major offences requiring corroboration in almost every rule of evidence in any country in the world- Perjury, Sedition and Treason. These three have their

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[62] *ibid*
[63] (1969) ANLR 411.
[64] See *Anomo v. Anomo* [1997] EWCA Civ 2097

roots in the common law system. It was the severity of the punishments that accompanied these offences that paved the way for the requirement of proof through corroboration. Years after, the rules on corroboration still exist in proving these offences. There is a suspicion that in sexual cases the presumption of innocence[65] to which the defendant is entitled is likely to give way to "the respect and sympathy naturally felt by any tribunal for a wronged female."[66] This alleged danger of unfair prejudice against the accused has two elements. First, the heinousness of the offence may arouse such indignation in the judges and that they will be hasty to convict. Secondly, judges are thought to be "pre-inclined to believe a man guilty of an illicit sexual offence he may be charged with, and it seems to matter little what his previous reputation has been." A third element relates to the fact that the Commission of a sexual offence "is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent." All these justifications have been criticised.[67] There is therefore little or no firm basis for the existing corroboration rule. Moreover, there are several positive arguments in favour of amending it, which in our opinion are formidable and convincing. Five arguments[68] are posited in favour of reform as follows:

1. The rule encourages the false assumption, which is insulting and derogatory to women; that women "are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it."[69] This is clearly an assumption which is in breach of the constitutional right of freedom from discrimination[70] which gave rise to women rights movements globally.
2. The need to give the warning in every case, regardless of the strength of the evidence or the extent to which corroboration is in fact available, will inevitably suggest that every complainant should be viewed with suspicion. There may be many cases where such suspicion is unfounded. For example, there are some cases which are strong in several respects, but contain nothing which amounts in law to corroborative evidence. In such cases, almost the last thing the judges rehearse in their mind before verdict is the warning that it would be dangerous for them to convict.

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[65] Constitution of the Federal Republic of Nigeria, (CFRN) 1999, as amended, Section 36 (5).
[66] J.H. Wigmore., *Evidence in Trials at Common Law* (Boston,Chadbourne, Little Brown & Co, 1978), 331.
[67] NCJRS., "The Rape Corroboration Requirement : Repeal Not Reform" (1972) 81, *Yale Law Journal*, Vol. 81 (7), 1365 - 1375 available at www.ncjrs.gov/app/publications/abstract last accessed on February 21, 2020.
[68] UK Law Commission Report on Corroboration of Evidence in Criminal Trials (Law Com 202, CM 1620) cited in Irving Younger, *op. cit*., p. 211.
[69] ibid.
[70] CFRN, 1999, Section 42.

3. The form of the warning - to the effect that it is dangerous for the judge to convict on the complainant's uncorroborated evidence, but that he may do so if satisfied beyond reasonable doubt of the defendant's guilt - is almost a contradiction in terms, and therefore a likely confusion.

4. The corroboration warning adds little or nothing to the existing rules on the burden and standard of proof, and is therefore an unnecessary and anachronistic extension of them.

5. The technical distinction between evidence which does and evidence which does not amount to corroboration is subtle and difficult for a judge to apply, and may be even more difficult to understand. Errors in judge's summing up on corroboration therefore result in a disturbing number of mistrials in rape cases. However, there was never a basis for such law in the proof of sexual offences against females. The introduction of such was based on a stereotyping and bias. In Iran for instance, to secure conviction against an accused for rape, there is formally a need for corroboration of the testimony by up to four witnesses. It is ridiculous, degrading and therefore clearly unconstitutional.[71] The assumption that a woman may make false allegations motivated by fantasy or the other oft-quoted reasons, with their implications of untrustworthiness, was said to be insulting. Considering the situation in our local milieu, it is clear that no woman or girl would falsify allegations and subject herself going through such societal stigmatization and distinction as a result of her plight. The rules of corroboration are also unclear on what or what does not constitute corroboration. This can be gleaned when comparison is made between the cases of *Okpanefe v. State.*[72] Further complications arising from the nature of the defence case also affect the way in which the principles of corroboration applied. A simple example is where a defendant admits to having sexual intercourse but denies that it was non-consensual (a very common defence to a rape allegation); traces of semen found on the complainant or at the scene would 'corroborate' an allegation of sexual intercourse or contact but would not corroborate the allegation of lack of consent, whereas bodily injuries such as scratches or bruising, or torn clothing, could. A

[71] CFRN, 1999, SS. 34 & 42: rights to dignity of the human person and freedom from discrimination.
[72] *Supra. See also, Ipahar v. State supra, R. v. Knight*, [1966] 1 A.E.R. 647. and *Anomo v. Anomo, supra.*

further criticism of the rules was the fact that they were an exception to general principles and considered to be a glaring anomaly, and contrary to the interest of justice.[73] As Karibi-Whyte said in *Abdu Mohammed v. State,*[74] "unless corroboration is required by law, the evidence of a single witness of the right probative value has always been accepted as sufficient proof for the offence as charged." The evidence of a prosecutrix should be based on the strength of her case and the accused should, according to the law, be found guilty only if the prosecutrix can prove the accused beyond reasonable doubt. The formal rules of proof in law should be applied and not any other perfunctory method of proof in cases of law. Our legal system has developed the formal rules of proof and this should be applied to sexual cases. Therefore, the removal of the need for corroboration makes the procedural law lucid but has not cleared every uncertainty which existed as a result of the corroboration rules. The existence of the provision in the affected sections of the Criminal Code implies that for the prosecution to prove its case beyond reasonable doubt there must be other evidence in corroboration of the complainant's testimony. This has the effect of producing the same result as under the repealed Evidence Act. Moreover, the court has no discretion to deny the admissibility of the corroborative evidence since the Evidence Act does not abrogate the application of any existing law. The Act provides thus: "Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria."[75] It is therefore, the position that the rule of corroboration as it applies to sexual offences does not merit just a reform but a repeal. The Criminal Code and Criminal Code Laws of the affected states need to be amended to reflect the same position under the Evidence Act. The established formal rules of proof as it applies to even more serious crimes should also apply in respect of sexual offences.

THE ATTITUDE OF THE COURT AFTER THE ABROGATION

There has not been any Nigerian case to explain the attitude of the court to the present state of the law. However, the attitude of the courts in Britain is quite relevant as Nigerian courts tend to follow their steps. Shortly after the corroboration rules' abrogation in the UK, two applications for leave to appeal against convictions for indecent assault were heard by the

[73] *Okpanefe v. State (Supra).*
[74] 4 [1991] NSCC 265.
[75] Evidence Act, 2011 as amended, Section 3.

Criminal Court of Appeal in *R v. Makanjuola* and *R v. Easton.*[76] It was argued that the judge should have, in his discretion, given the full corroboration warning notwithstanding its abolition. The basis of this was that the underlying rationale of the common law rules could not just disappear overnight. The Court of Appeal dismissed such contentions on the basis that because the rules had been abrogated by statute, any attempt to re-impose the same, albeit by way of a quasi application of the same warning requirement under a different label, was against policy.[77] In *Makanjuola,*[78] Lord Taylor CJ summarised the post abolition position in these terms:

1. Section 32(1) (of the Criminal Justice and Public Order Act 1994) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
2. It is a matter for the judge's discretion what, if any, warning, he/she considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he/she chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised, and the content and quality of the witness's evidence.
3. In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will be the need for an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.
4. If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
5. Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's view of the evidence and his/her comments as to how the jury should evaluate it rather than as a set-piece legal direction.

[76] [1995] 3 All ER 730.
[77] *Ibid*, at 732 per Lord Taylor CJ.
[78] supra

6. Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
7. Finally, the Court of Appeal will be disinclined to interfere with the judge's exercise of his/her discretion save in a case where that exercise is unreasonable. *Makanjuola* has been followed in other common law jurisdictions in numerous cases.[79]

In *HKSAR v. Chan Sau Man,* [80] the Court of Appeal rejected the argument that the trial judge had erred by failing to give a corroboration direction. Counsel for the applicant submitted that although the rule that a jury should be 'warned of the danger of convicting without corroboration had been abrogated', the old rule that 'a warning had to be given should not entirely be rejected'. He relied on Lord Taylor CJ's comment in *Makanjuola,*[81] that:

Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. Such an argument was, however, rejected by the court: This was a straightforward case where the complainant's evidence, the accuracy of her evidence and her veracity, on the central issue stood alone. The Judge had meticulously pinpointed all the areas in the evidence where her account was materially disputed and had invited the jury to look at her evidence with care. In the circumstances, the judge was perfectly entitled, in the sensible exercise of his discretion, to adopt this course. It follows from the above that without the mechanical rules of corroboration, a judge has wide discretion in deciding how to sum up a case. Although it was suggested in *Makanjuola* that if there is an evidential basis for suggesting that the evidence of a witness may be unreliable, it may be appropriate for the judge to warn the jury to exercise caution in dealing with such evidence, however, the judge is no longer obliged to give a full warning on uncorroborated evidence. The corroborative testimony should implicate the accused person in some specific particular material to the offence charged. It is not sufficient that the evidence seems to corroborate any aspect of the story adduced by the complainant.[82]

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[79] See, for example, *R v. Chu IpPui* [1997] HKLRD 549 at 552; *HKSAR v Li KamShing* [2004] HKCU 1033 at [43]; *Leung Chi Keung v. HKSAR* [2004] HKCU 1283 at [25]; and *HKSAR v. Khan Arshed* [2003] 4 HKC 409 at 415- 16.
[80] [2001] 3 HKLRD 593.
[81] *Supra*, 596.
[82] See Okonkwo & Nash note 35, 278

England

The sexual offences in the Crimes Ordinance are similar to those governed by the Sexual Offences Act 1956 of the United Kingdom.[83] The requirements of corroboration set out in the Sexual Offences Act, 1956 (which were closely related to the corroboration warning required for complainants in sexual offences) in relation to offences of procuring unlawful sexual intercourse and prostitution were repealed by section 33(1) of the Criminal Justice & Public Order Act, 1994. The common law requirement for corroboration warning was repealed by section 32 of the 1994 Act.

India

As considered earlier, the Indian Supreme Court has held that there is no requirement for corroboration in sexual offences[84].

United States of America

It seems that legislating on such sexual crimes in the United States is left to the different states. Many American jurisdictions follow the common law rule, imposing no requirement of corroboration in sex offense cases.[85] It is fairly well known, however, that charges of sexual misconduct are easy to make and difficult to rebut. Accordingly, several states have chosen to depart from the common law rule.

The United States Supreme Court's decision in *Carmell v. Texas*[86] exemplifies this point in the area of evidential rights. In that case, the court examined the constitutionality of a Texas statute that repealed a corroboration arrangement for cases of rape and sexual assault. Under the old arrangement, a rape defendant could not be convicted upon his complainant's testimony if the latter was not corroborated by the complainant's prompt outcry or by evidence extraneous to the complainant. The new statute provided that the jury can convict the defendant on the uncorroborated testimony of such a young complainant if it finds it credible beyond all reasonable doubt.

South Africa

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[83] UK, SOA, 1956, cited J. H. Wigmore op. cit., p. 331.
[84] *SanthoshMoolya and Surendra Gowda v. State of India,* (2008) 4 SLR (R 686).
[85] E.g., *Herndon v. State*, 2 Ala. App. 118, 56 So.85 (1911); *People v. Gump*, 17 Cal. App. 2d 221, 61 P.2d 970 (Dist. Ct. App. 1936). But cf. *People v. Gidney*, 10 Cal. 2d 138, 73 P.2d 1186 (1937); *McQueary v. People*, 48 Colo. 214, 110 P.2d 210 (1910).Additional cases are collected in Wigmore, *op.cit.* note 16 above, p. 2061.
[86] *Carmell v. Texas*, 529 U.S. 513 (2000) (hereinafter: "*Carmell*").

According to Kriegler[87] a Judge of the Constitutional Court of South Africa, sexual offences have distinctive features which require exercise of caution in order to ensure that justice is done. He opined that sexual offences are inherently intimate and committed in seclusion where only the accused and the victim are privy to the commission, therefore, "the adjudicator of the facts must throughout be cautious of the special problems in sexual offence cases and it must be clear from the Courts evaluation of the facts, that the evidence was approached and considered in this manner."[88] It is pertinent to note that the rule of corroboration is not a statutory requirement in South African law. In fact, the opposite view forms part of Section 208 of the Criminal Procedure Act,[89] which provides that an accused may be convicted on the evidence of a single witness. It has however, become a rule of practice and has been consistently applied by the courts. Therefore, the South African courts have come to hold disparate views on the issue of corroboration in sexual offences.

Australia

Section 341(5) of the Evidence Act, South Australia, 1929 provides that in proceedings in which a person is charged with a sexual offence, the judge is not required by any rule, law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

Canada

In 1983, amendments were made to the Criminal Code that specifically abolished some rules that perpetuated bias against women. Section 274 of the Canadian Criminal Code provides that, in relation to certain sexual offences, no corroboration was required for a conviction and, further, that the judge should not instruct the jury that it was unsafe to convict in the absence of corroboration. The special rules of corroboration were repealed according to the Criminal Justice and Public Order Act, 1994. Also, the old rule that a judge must warn a jury of the dangers of convicting a defendant on the uncorroborated evidence of an accomplice or the victim of a sexual assault was abolished. Similarly, magistrates acting in their summary capacity no longer need to give the corroboration warning.

[87] In *S v. D* (1992) 1 SACR 143.
[88] Nikki Naylor, Evidentiary Rules, Women's Legal Centre, 2-4, cited in *S v. D* (supra).
[89] CPA South Africa Act, 57 of 1977 as amended.

REASONS FOR HIGH RATE OF CONVICTIONS IN RAPE CASES

The extent and instances of rape have always depicted a new set of evidential and challenges for prosecutors. Rape offences are almost invariably perpetuated in secrecy without witnesses and thus, the determination of the crux issues in most cases depends on the courts assessment of diverse accounts from the complainant and the accused. The issue of Consent is repeatedly among those main issues. In most rape cases, the prosecutrix must make the court believe that the victim did not consent and that the accused did not reasonably thought that she or he consented. The court is under a duty to determine the state of mind of both parties during the rape incident for determination.

There are contentions in our contemporary society: that a drunk person cannot complain if she is raped; if there are previous consensual sexual activity between the parties, it minimizes or eliminates a female's right to refuse consent on another occasion, or to legally withdraw consent to continuous sexual activity on the same occasion; that rape will cause vaginal harm ; It is also stated that that a woman wearing a short skirt or revealing too much vital parts of her body deserves what she got..

Each of those assertions, and many more, are deeply and completely flawed; the law provides that a person consents if he/ she agree by choice, and have the liberty and capacity to make that decision.

The psychological effect of sexual offence is overwhelming. Victims are affected by the prejudice surrounding such offences, as they weigh down with guilt and shame which makes them hesitant to report. And when they do report, rape's effects of fear and trauma can make a victim unable to give accurate account of their experience. The investigation and trial of rape matters, requires sustained efforts and commitment throughout the proceedings.

In the United Kingdom, the issue whether an accused person will be charged with a criminal offence depends on the Crown Prosecution Service (CPS). Prior to charging, prosecutors must be contented that there are sufficient evidence to warrant a conviction and that prosecuting the case is in the public good. This method requires prosecutors not only to anticipate the defense case but also to assess them as well. They must recognize factors which can objectively crumble the prosecution case, while conceding that not every defense case stands a chance of succeeding.

When an accused person is charged with an offence, prosecutors are obligated to provide the defence and the court with any material evidence, that enhances or undermines the prosecution's case or help the case for the defence. His overall interest is that justice should be done. These includes mobile phone messages, social media conversations or photographs, torn clothing's and tools. Police officers face the enormous duty of reviewing thousands or even tens of thousands of pages of downloaded digital material, where applicable usually single-handedly.

Police officers investigating rape offences are often urge to conduct several such investigations, many necessitating similar digital-material reviews at the same time. The difficulty in managing such a herculean workload has led to complainants and suspects awaiting longer periods before decisions are made about charging.

The law protects suspects from spending many months on bail without trials, In some instances, the police simply releasing suspects under investigation, without bail conditions. While some rape matters are abandoned perpetually in a state limbo for months or even years. Sometimes, rape victims and their families are reluctant to report rape cases to the police because of stigmatization .While some victims also refused to report rape abuses due to threats to their lives. Persons vulnerable by their own peculiar circumstances and the crimes perpetrated against them have been empowered and courageous to disclose their abuse in ever-greater numbers. These advances should be championed and built upon.

The prosecution's duty of disclosure must be discharged religiously to facilitate a fair trial process, and the scale of this duty in the face of the magnitude of evidence created by digital communication must be harnessed with strategies that ensure all such reviews are regulated by the facts of the case.

Other reasons for low the rate of convictions are lack of adequate training and lack of finance. None of these can be achieved, without the unmanageable burden on investigative officers is solved by the provision of more resources, human, financial and technological.

The government must continue be committed to securely convictions in rape cases, to serve as a deterrent to potential rape offenders. Rape and Serious Sexual Offence units any lawyers in ministries of justice throughout the nation must strive to surmount problems relating to poor convictions. Both they and the police officers, whose essential task is to investigate and build cases, must be sufficiently rewarded by improved funding.

The government must be holistically committed to the fair, speedy and effective prosecution of rape and o offences by proper investment, adequate legal reforms in a modern and effective justice delivery system.[90]

CONCLUSION

There are no (or no longer) formal rules regarding corroboration of a woman's testimony in cases of sexual assault in many parts of the world (e.g., parts of Latin America, Canada, Fiji, Ghana, Israel, South Africa, the United Kingdom, the United Republic of Tanzania, Zimbabwe and most parts of the United States).[91]

However, the requirement of many legal systems to meet "a particular level of proof in order to prosecute,", coupled with the widespread distrust of women, has led to the continued

[90] Jennifer Knight, *Why do so few rapes result in a conviction?* Available at https://www.aljazeera.com/indepth/opinion/rapes-result-conviction 7 May 2020

[91] H. Combrinck, "Criminalisation of Sexual Violence in sub-Saharan Africa." Prepared for the World Health Organization, Geneva, 2003; J. Du Mont & D. Parnis, "Constructing Bodily Evidence through Sexual Assault Evidence Kits" *The Griffith Law Review*, (2001), 10: 63–76; J. Lemaitre & A. Constantin., "Review of Sexual Crime Legislation in Five Latin American Countries" [draft]. Prepared for the World Health Organization, Geneva, 2002; M. J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*. (Villanova: Villanova University School of Law, Working Paper Series, No. 20, 2004); K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" *Canadian Journal of Women and the Law*, (1997), 9:149– 177; *Requirement of Corroboration in Rape Trials Overturned by Fiji Court*

demand for authentication of a victim's claim. The historical assumption of an inherent lack of credibility of the evidence of women and girls in sexual offences cases which led to the evolution of the corroboration rules under the common law is now widely regarded as discredited and without any scientific basis. It was therefore vital that the common law practice should be abrogated, and that the statutory provisions, which are based on the same discredited assumption, be abolished consequentially. Assessments of credibility should be made not by assumption but by a full evaluation of the merits of the case. There must be sustained efforts by the State (such as continuous training of law enforcement personnel and judicial officers, sensitizing the media, educating the public) to challenge the stereotype attitudes dominant in Nigeria which help to perpetuate violence against women and girls. Such progress as this will help the society's move towards a wholesome legal and overall development.[92]

The evidence of a prosecutrix should be judged based on the strength of her case and the accused should according to the law be found guilty only if the prosecutrix can prove the commission of the offence beyond reasonable doubt. It is not unlikely that had this been the law in the time of *Okpanefe v. State*,[93] the decision would have been different. The reform envisaged by the amendment in the Evidence Act is indeed laudable and in furtherance of justice for victims of sexual offences.[94] This has, however, not totally removed the obstructive barrier and discrimination occasioned by the corroboration requirement in sexual offences in Nigeria by virtue of the provisions of the Criminal Code be equally repealed at the earliest opportunity to give effect to the current global trend in the. Corresponding provisions in the Criminal Code/Penal law should be amended to incorporate corroboration as a vital principle our criminal jurisprudence in proving the offence of rape. Judicial officers presiding over rape cases in courts of competent jurisdictions must always watch out for other

[92] For instance, Sweden has the best laws on prostitution in the world and this was achieved with an objective look on the way to curb sex trade. In Sweden, the red-light districts or taverns are not raided and the prostitutes arrested. Instead what the Swedish authorities did was consider the fact that since it was a society built on the tenets of Democracy, there was a need to ensure equality of all persons in the State. Therefore, any act of any person to purchase the body of another through any form of consideration was criminalised. See Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services", Ministry of Industry, Employment and Communications, *Violence against Women*, (October, 2004) Vol. 10 No. 10, 1187-1218.

[93] Supra.

[94] One of the fastest growing crimes in the world, yet conviction rates for rape and other sexual offences are still very low globally. Available at www.guardian.co.uk/UKnews/rape_convictions_rates_still_very_low.html last accessed on February 12, 2020.

possible means of proving rape that points irresistibly that the accused person committed the offence of sexual assault / rape outside the prosecutrix evidence.