

THE LEGAL IMPLICATION OF CHILD RAPE IN NIGERIAN: ARE SENTENCING LIMITS ADEQUATE?

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ABSTRACT

In Nigeria, it is an offence for a person of opposite sex to have carnal knowledge of a female child even with the consent of the female child. Consent is immaterial because a female child is incapable of consenting to the act. Punishment on conviction is life imprisonment. Nigerian courts award far less than life imprisonment on conviction. This paper examines this practice of the Nigerian courts and comes to the conclusion that the courts are not faring well. It suggests jail terms that are much higher than the present jail terms being imposed by the courts to appropriately emphasize the heinous nature of the crime. It recommends the 'education' of Judges on adequate sentence and the sensitization of prosecutors for the offence, on the need to appeal or cross-appeal against inadequate sentence.

Keywords: *Sentencing, unlawful carnal knowledge, Nigerian Girls below eleven years and below fourteen years, corroboration, conviction.*

1. INTRODUCTION

Unlawful carnal knowledge is one of the offences created, for the reason that the act is immoral. It is for this reason that an offence of unlawful carnal knowledge is dubbed an offence against morality. In Nigeria two basic enactments exist that provide for acts that constitute offences. One is the Penal Code that is operational in Northern Nigeria and another is the Criminal Code that is operational in Southern Nigeria. For an offence of unlawful carnal knowledge to be committed, there must be penetration of the female reproductive organ with the organ of the person of the opposite sex. Again, there must be lack of consent. However, where consent was obtained, but by fraud, misrepresentation or impersonation, such content becomes negative by these circumstances and amount to no consent. For a child, where consent has been obtained, the offence is still committed because a child is incapable of consenting to sexual intercourse. According to the Supreme Courts of Nigeria, "a child cannot consent to sex" (*Adonike v. State* 2015, 237). The position of the law that consent of a child to sexual intercourse is immaterial is a satisfactory device to show the level of condemnation of the act by the law. This level of condemnation has further been supported by the jail term of life imprisonment, on conviction for the offence.

In spite of these attempts by the law to show grave condemnation of unlawful carnal knowledge of a girl-child, the jail terms meted out to convicts are less than life imprisonment provided for in the statutes. By the provisions of section 218 of the Criminal Code Act (Cap C38, Laws of the Federation of Nigeria, 2010), the jail term is life imprisonment. Under section 283 of the Penal Code (Cap 89, Laws of Northern Nigeria, 1963) the jail term is also life imprisonment. The contents of these codes have been replicated by all the States of the Federation as State Laws and also by Abuja, the Federal Capital Territory. The jail terms imposed by the courts are not just less but ridiculously less, so much so that they have watered down the seriousness of the offence as projected in the life imprisonment jail term, provided for in the statutes.

This paper has chronicled the condemnable and in fact, abominable nature of the offence of unlawful carnal knowledge of female children and proceeded to highlight some of the provisions in the statute that criminalize such acts. It has however justified the maximum jail term provided for in the statutes for persons that commit the offence and lamented the gravely reduced jail terms that the courts impose on convicts. It has by recommendation, suggested that an increased jail term, even to life imprisonment is desirable, for that would deter

would-be pedophiles from such unwholesome behaviour. It recommended that at Nigerian Judges conferences, Judges should be 'educated' on appropriate jail terms, while at Bar conferences, prosecutors for the offence should be sensitized on the need to appeal or cross-appeal against paltry sentence.

2. THE CONDEMNABLE AND ABOMINABLE NATURE OF THE OFFENCE

The act of unlawful carnal knowledge of a girl-child as condemnable and abominable in nature, is best appreciated when one understands who a child is. Generally, a child is a person below eighteen years of age. This is the age set out by several international instruments. Example, Article II of African Charter on the Rights and Welfare of the Child, 1989 and Article I of the United Nations Convention on the Rights of the Child, 1990. The said Article I however stipulated below 18years, as the general rule. In the exact words of the Article, "a child means every human being below the age of 18years unless, under the law applicable to the child, majority is attained earlier. (Emphasis supplied). In Nigeria, the general law remains that a child is a person below the age of eighteen years. In Nigeria, the principal enactment on the Rights of the Nigerian Child, Child's Rights Act, (Cap C50, Laws of the Federation of Nigeria, 2010) has so provided in section 277. According to that section "child, means a person under the age of eighteen years.", while specific laws, in making certain provisions provide for lower age, as the age for which a person could be termed a child. A good example of reduction of age with respect to specific laws and creations of laws is found in the provisions of the Criminal Code and the Penal Code. These are the principal enactments on crime in Nigeria. The former is in force in the 16 Southern States of Nigeria while the latter is in force in the 19 Northern States of Nigeria and Abuja, the Federal Capital Territory, in respect of sexual offences. Some examples shall be cited under both Codes

- A child is a person below the age of eleven years: Section 218 of the Criminal Code provides for punishment of life imprisonment for having unlawful carnal knowledge of a girl under the age of eleven years and fourteen years imprisonment for an attempt to commit the offence.

By the provision of section 219 of the Code, life imprisonment also awaits any

person who has kept a brothel and permits a girl under eleven years therein, for the purpose of being unlawfully known.

- A child is a person above eleven years of age but below thirteen years of age: Section 219 of the Code provides for punishment of two years imprisonment for a person who has kept a brothel and allows a girl above eleven years but below thirteen years therein, for the purpose of being unlawfully carnally known.

By the provision of section 222 A(1) of the Code, two years imprisonment also awaits a person who, having the custody, charge or care of a girl under thirteen years causes or encourages such girl to be unlawfully carnally known.

A child is a person below the age of fourteen years: Section 282 of the Penal Code makes it an offence for a man (a male human being of any age, as explained in section 4 of the Code) to rape a girl below fourteen years and under section 283, punishes same, with imprisonment for life. In the examples, the Criminal Code used the expressions "unlawful carnal knowledge" or "unlawfully carnally known" while the Penal Code used the expression "rape". The expressions used by the Criminal Code show that carnal knowledge could be lawful and not constitute a crime, and only constitutes a crime, when it is unlawful. Carnal knowledge is "unlawful" if, in the general contemplation of the Code, it is without consent of the person who has been had carnal knowledge of. If however, the person who has been had carnal knowledge of, is a child, the crime is committed, even if the child consented to it. This is so because consent of a child is no consent, for the law presumes that a child is incapable of consenting to sexual relationship. Where carnal knowledge is unlawful as used in the Criminal Code, that constitutes "rape" as used in the Penal Code. "Unlawful carnal knowledge" or being "unlawfully carnally known" as used in the Criminal Code and "rape" as used in the Penal Code are therefore synonymous.

This paper shall be a discourse of unlawful carnal knowledge of a girl-child below eleven years as contemplated by sections 218 and 219 of the Criminal Code and rape of girl-child below fourteen years as

contemplated by sections 282 and 283 of the Penal Code.

Unlawful carnal knowledge of a girl below eleven years or rape of a girl below fourteen years contemplate the penetration of the female organ of the girl with the male organ of a person, with or without the consent of the girl. Trauma and psychological devastation are usually the state of girls under the ages of eleven or fourteen years, who have been violated. One is usually at pains and shall continue to be, on what could attract a person to have sexual relationship with a little girl, as young as below eleven years or below fourteen years. Sometimes, the victims are as young as five years as in the case of *Adonike v. State supra*. For want of words, the actions of pedophiles are not only condemnable but abominable. These justified the grave punishment of life imprisonment for committing the crime and fourteen years imprisonment for attempting it. Under the Penal Code, there is no provision for the offence of attempt.

3. THE STATUTORY PROVISION ON UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN BELOW ELEVEN YEARS

The Criminal Code has made elaborate provision on defilement of female children, under the age of eleven years. In the exact words of the Code in section 218, “Any person who has unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for life, with or without whipping. Any person who attempts to have unlawful carnal knowledge of a girl under the age of eleven years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without whipping. A prosecution for either of the offences defined in this section must be begun within two months after the offence is committed. A person cannot be convicted of either of the offences defined in this section upon the uncorroborated testimony of one witness”.

The entire provision of the Code for this offence as quoted above shows nothing but an outright condemnation of the despicable act and the need to deal ruthlessly with those that dare it. This contention can readily be inferred from the punishment of life imprisonment, on conviction for the commission of the crime and fourteen years imprisonment on conviction for the attempt to commit the crime. The punishments may have whipping in addition to them.

The Code has provided for “striking when the iron is red hot”, when it further provided for prosecution of a suspect of the crime of unlawful carnal knowledge or an attempt of it, “within two months” after the act was perpetrated. These offences are among very few offences where the Code provided for a maximum time limit, within which the prosecution of a suspect must commence.

The Code is not altogether unfair to a person suspected of having committed the offences and who is facing prosecution. This is so because the Code has provided for corroboration of evidence that the crime(s) was/were committed, before conviction could be secured.

The obvious effect is that where there is no corroboration there shall be no conviction. The Code, by the provision for corroboration is therefore insisting that the courts must be satisfied that the crime(s) was/were committed, before they convict. One may quickly guess that the provision for corroboration is because there is need for the courts to be sure that the crime(s) was/were committed before they convict, since the punishment on conviction is as high as life imprisonment and fourteen years, for the substantive offence and the attempt, respectively.

Where the substantive offence or even attempt was in fact committed, corroborative evidence, even in the absence of eye witness, is never difficult to come by. This is so because corroborative evidence need not be evidence of persons that saw (as the crime(s) is/are always committed in secret or enclosure and nobody sees) but piece of evidence that would confirm the story of the victim, that the crime(s) was/were committed. The corroborative evidence could comprise of blood from the private part of the victim or deposits of sperm in and around the area for the substantive offence, or torn part of the victim, for an attempt of the offence. It could be by other material evidence including that the accused person offered money to the parents of the victim of the crime for the purpose of persuading them not to report the crime to the police (*Ezigbo v. State* 2012, 318 at 336).

Generally, in assault (including sexual assault of which unlawful carnal knowledge is one), consent of the victim negatives the offence. However, where the consent has been obtained by the use of threats or intimidation or by fraud, such consent is invalid (*Okonkwo and Naish* 1990); (*Popoola v. State* 2015, 96). By the provisions of section 357 of the Criminal Code, consent is no consent in respect

of a woman or girl up to or above eleven years of age, "if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm or by means of false or fraudulent representation as to the nature of the act, or in the case of a married woman, by personating her husband." The strict rejection of the offence of having unlawful carnal knowledge of a girl-child under eleven years of age has made way for the removal of consent as a defence to the commission of the crime. Where the victim of unlawful carnal knowledge is a girl-child under the age of eleven years, the offence is committed, even if she consented to it. This is so because at the tender age of below eleven years, a girl-child who has consented to sexual relationship undoubtedly never understood the nature of the act that she has consented to. According to the Supreme Court of Nigeria, "a girl under the age of 11 years is a child and so is not capable of consenting to sex. The court would hold that she did not consent even if she did consent." (Adonike v State 2015, 237).

4. THE STATUTORY PROVISION ON RAPE OF FEMALE CHILDREN BELOW FOURTEEN YEARS

The Penal Code has the provision on this subject in its section 282 in these words.

"A man is said to commit rape who... has sexual intercourse with a woman... with or without her consent, when she is under fourteen years of age or of unsound mind".

The section did not provide for when prosecution shall commence and whether there can only be conviction if the testimony of one witness is corroborated, as provided for in the Criminal Code.

Just like in the Criminal Code, the Penal Code in its section 283 provided for punishment on conviction as life imprisonment. It further provided that the jail term may be less than that, but whether life imprisonment or less, a fine shall also be imposed. The Penal Code, unlike the Criminal Code did not provide for an offence of attempt.

The jail term of life imprisonment (although lesser term could be imposed) and fine are indications of the high level condemnation of the crime. A further grave condemnation of the offence is evinced in the absence of attempt as an offence. By the absence of attempt, there is no middle course. It is either that an accused person never committed the offence or he did. Evidence of outright condemnation of the

offence is also clear from the provision of the Code that it is immaterial that the girl-child consented to the sexual act.

In all, unlawful carnal knowledge of a girl below eleven years under the Criminal Code and rape of a girl below fourteen years under the Penal Code share two prominent characteristics. First, the commission of the offence carries life imprisonment. Second, once the act is perpetrated the offence is committed, even if the child gave consent to it. Under the Criminal Code, this second similarity is principally built on case law, as could be seen in the Supreme Court decision in *Adonike vs. State supra*, that "a child cannot consent to sex". Under the Penal Code, this second similarity is statutorily provided for in section 282 wherein the offence of rape is defined.

Sentencing on Conviction

So soon as a person accused of unlawful carnal knowledge or rape is so found, the court proceeds to the issue of allocations and evidence of previous conviction (if any). While the one consists of facts that would reduce the jail term (from life imprisonment), the other is meant to show whatever previous bad records the convict has, with a view to encouraging the court to impose severe jail term. The law in its wisdom is aware of the possibility of a person who has been convicted of the offence, of having issues that could be raised on *allocutus* and also, of not having any previous conviction(s), but still provided for the stiff jail term of life imprisonment, on conviction. The intention of the law makers, one would guess, is to adequately punish a person who has committed the despicable crime and by that adequate punishment, deter others who would dare the commission of such offence.

Unfortunately, the courts in Nigeria have on conviction imposed jail terms that are ridiculous, unserious, annoying and irritating. This was reflected in the case of *Adonike v. State supra*. The facts of the case are briefly as follows:- On or about the 16th day of June, 2010, the appellant invited and requested one Iwebunor Gabriel, a girl of five years, to buy a sachet water for him. She bought it and on her return to hand same over to the appellant, the appellant lured her into his room, pulled off her pant and had carnal knowledge of her. He was arrested, tried and convicted under section 218 of the Criminal Code Cap 48 Volume II, Laws of defunct Bendel State of Nigeria, 1976 as applicable to Delta State of Nigeria. The Law

has identical provision with the provision in Section 218 of the Criminal Code. He was sentenced to six years imprisonment with six strokes of the cane. The convict appealed against his conviction to the Court of Appeal Benin Division whereat the conviction was affirmed for which he further appealed to the Supreme Court of Nigeria that again confirmed the conviction. Okoro J.S.C who delivered the lead judgment of the court, with which his brother Justices (Mahmud Mohammed the Chief Justice of Nigeria who presided) Muntakea -Coomassie, Rhodes-vivor, and Ngwuta J.J.S.C. unanimously agreed, and on the paltry sentence of six years imprisonment and six strokes of the cane for the convict, pronounced as follows:

“The appellant herein was sentenced to six years imprisonment with hard labour and six strokes of the cane. I wish it was more than this and unfortunately, there is no appeal against the sentence” (at 266).

Agreeing with Okoro J.S.C that the sentence was grossly inadequate, and stating that the jail term ought to be life imprisonment, Muntaka-Coomassie J.S.C pronounced as follows:

“The appellant, a pedophile deserved no less than to be kept out of circulation... especially against the backdrop of then (*sic*) rise in rape cases nowadays. Lucky appellant who has not appealed against the sentence! Had the trial Judge and indeed the court below by chance sentenced the accused/appellant to death or life imprisonment I would have kept mum” (at 283-284).

Concurring with Muntaka-Coomassie J.S.C that there was need for increased sentence and opining that such increased sentence would deter potential pedophiles, Okoro J.S.C had this to say:-

“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. Be that as it may, if he does not repent, he may not be as lucky as he was in this case” (at 266).

The view of imposing heavy jail term so as to deter would-be rapists of girl-children had earlier been emphasized by the Supreme Court of Nigeria in the court’s earlier decision in the case of (*Ezigbo v. State* 2012, 318). In this case, the appellant, aged thirty-two years, used to lure Ogechi Kelechi aged eight years and Chioma Kelechi aged six years into his shop and make love to them. He lured them with ₦30.00 or ₦10.00 or Ice cream or zobo drink.

He was tried and convicted of the offence of rape under section 282(1) of the Penal Code, which criminalizes having sexual intercourse “with a woman... with or without her consent when she is under fourteen years of age...” The punishment on conviction is life imprisonment as provided in section 283 of the Penal Code Law Cap 89, Law of Northern Nigeria, 1963.

He was sentenced to two years imprisonment and Five Hundred Naira fine or three months imprisonment on failure to pay the fine. He appealed against the decision of the Courtⁱ, to the Court of Appeal High Court of Niger State that dismissed the appeal, for which he further appealed to the Supreme Court that also dismissed the appeal. Deprecating the sentence on the appellant and advocating a more severe jail term that would deter potential rapists, Muhammad J.S.C *inter alia* pronounced as follows:

“Honestly, for an adult man like the appellant to have carnal knowledge of underaged (*sic*) girls such as 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. Such small (underaged) (*sic*) girls and indeed all females of whatever age need to be protected against callous acts of criminally like minded (*sic*) people of the appellant’s class. I wish the punishment was heavier so as to serve as deterrent” (at 120).

5. CONCLUSION

Jail terms as sentences on convicts for the offence of unlawful carnal knowledge of a girl-child below eleven years in Southern Nigeria as provided for in section 218 of the Criminal Code or rape of a girl-child below fourteen years in Northern Nigeria as provided for in section 282 of the Penal Code is grossly inadequate and makes fun of the seriousness of the offence, for which the Codes provided for life imprisonment. This contention has been attested to, by the comments of the Justices of the Supreme Court of Nigeria in the afore examined cases. At all times that the ridiculous jail terms were imposed, the Justices lament their inability to deal with the issue of sentence. The Justices of the Supreme Court crave a very severe jail term even up to the maximum of life imprisonment provided for in the Codes because of the unacceptable nature of the offence. The Supreme Court Justices can no less be correct. One can say that it is for lack of adequate adjectives to qualify the criminal acts of pedophiles that one could describe the acts as condemnable, barbaric, immoral or devoid of

reasoning; or callous and animalist; or heinous and heartless (*Popoola v. State* 2013, 96).

The negligible sentence imposed on convicts of the offence of unlawful carnal knowledge of girl-children of below eleven years and rape of girl-children below fourteen years cannot but amount to the courts abandoning their role to do justice in such circumstance. This was the disappointment with trial judges by Justices of the Supreme Court, in the case of *Popoola v. State supra*. Here, the prosecutrix, a student of Abeokuta Grammar School Abeokuta, Ogun State, Nigeria was dragged into the school farm and raped and the appellant convicted and sentenced to five years imprisonment by High Court of Ogun State, Abeokuta. He unsuccessfully appealed to the Court of Appeal Ibadan Division. He further appealed to the Supreme Court where the appeal was again dismissed and Muntaka-Coomassie J.S.C pronounced that

“The offence appeared to be heinous and heartless acts. The sentence meted out by the trial court amounts to abdicating its role as a judicial officer. I condemned such type of sentence. The sentence is un-necessarily lenient and loose (at 120).

Ngwuta J.S.C totally agreed with the condemnation made by his brother Justice of the Supreme Court and recommended that sentence on conviction “should rank next to capital punishment” (at 122).

The situation is not a hopeless one. In Nigeria, Judges attend conferences annually. In those annual conferences the Justices of the Supreme Court who condemn the paltry sentences on convicts for the offence of unlawful carnal knowledge or rape of girl-children should ‘educate’ the trial judges on the appropriate sentence in such circumstances. Again, just like Judges, legal practitioners (whether as private legal practitioners or legal practitioners with the Ministry of Justice in the States, who prosecute criminal cases) hold annual conferences. At these conferences, legal practitioners should be sensitized on the need to appeal against inappropriate sentence. What is more, whenever a convict appeals against their conviction, the legal practitioner should not in responding to the appeal miss the ready opportunity of cross-appealing against sentence. It is not in doubt that the appellate courts would always allow such cross appeals, for they await them. In *Adonike v. State supra*, Okoro J.S.C had this to say at page 266, “the appellant herein

was sentenced to six years imprisonment with hard labour and six strokes of the cane. I wish it was more than this and unfortunately, there is no appeal against the sentence.”

REFERENCES:

- 1 *Adonike v. State* (2015) 7 NWLR (pt 1458) 237-288.
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- 4 Criminal Code Cap 48 Vol II Laws of defunct Bendel State of Nigeria, 1976, 789-996.
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- 6 Okonkwo and Naish, *Criminal Law in Nigeria* (Ibadan: Spectrum Law Publishing, 1990) 1- 398.
- 7 Penal Code Cap 89 Laws of Northern Nigeria, 1963, 1-194.
- 8 *Popoola v. State* (2013) 17 NWLR (pt 1382) 96-125.
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