

Optimizing the Law to Curb Rape of Females in Nigeria

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Abstract

The recent noticeable rise in cases of rape of females in Nigeria suggests that the extant laws in place to tackle this menace are not effective. In this paper, therefore, we attempted an identification of the “weak” areas in the extant laws which hinder or have the potential to hinder the successful prosecution of cases of rape against females in Nigeria. We discussed the response of Nigerian laws to these “weak” areas. We therefore suggested some actions that can be taken to strengthen these “weak” areas in the laws which will consequently make them more effective in tackling the rising cases of rape of females in Nigeria.

Key Words: Law, Rape of Females, Nigeria.

1. Introduction

The rising incidents of rape of females including the girl child suggest that the current approach of Nigerian law is not the legal solution to this problem. Discourse on cases of rape of females is increasingly dominating the public space in Nigeria. This may be because of the rise in the number of Police reported rape cases in Nigeria in the first five months of 2020.¹ This figure may be comparatively lower than is actually the case because “for various reasons, including the fear of stigmatization, police extortion, and a lack of trust in the criminal justice system, the vast majority of sexual assault victims do not make formal reports at police stations”²

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¹ The Nigeria Police Force disclosed that it received a total of 717 rape cases between January to May 2020 (“Rape: 717 Cases Reported in Five Months in Nigeria” <http://saharareporters.com/2020/06/15/rape-717-cases-reported-five-months-nigeria> (accessed 13/7/2020))

² Kunle Adebajo “Fact Check: Are 2 million Nigerians raped every year? Here is what we know” *ICIR* <https://www.icirnigeria.org.cdn.ampproject.org/v/s/www.icirnigeria.org/fact-check-are-2-million-nigerians-raped-every-year/amp/> (accessed 13/7/2020).

In recent times, it became apparent that children are also increasingly constituting a sizeable proportion of victims of rape in Nigeria³. The problem is not in tabulating the number of cases of rape (including that of children) recorded within a specified period, the problem is how many of such cases bothering on rape, including rape of minors, have been successfully prosecuted in Nigerian courts⁴ or the culprits handed the appropriate punishment in the circumstance.

Rape, apart from the psychological trauma on the victims⁵ is a criminal offence globally including Nigeria. Nigerian legislations punish rapist with imprisonment including life imprisonment.⁶ However, as we have noted the number of convictions secured for rape cases is grossly insignificant compared to the number reported to the Police⁷. Our concern is the apparent ineffectiveness of sanctions in deterring the would-be perpetrators of the act, on adults and shockingly on children despite the sentence of life imprisonment attached⁸. We, in the circumstance, seek for an answer.

Also Kunle Adebajo "REPORT: Brazen police extortion is frustrating rape victims' quest for justice in Nigeria" *ICIR* <https://www.icirnigeria.org/report-police-extortion-is-frustrating-rape-victims-quest-for-justice-in-nigeria/> (13/7/2020)

³ For instance, Gift Agiriga "Epidemic" of Rape Assailed in Nigeria" <https://www.voanews.com/africa/epidemic-rape-assailed-nigeria> (accessed 22/7/2020), Joy Ngozi Ezeilo "The Rape Scourge in Nigeria" <https://www.thisdaylive.com/index.php/2020/06/30/the-rape-scurge-in-nigeria/> (accessed 22/7/2020); Idoko C.A, Nwobodo E.D, Idoko CI "Trends in Rape Cases in a Nigerian State AfriHealth Sci. 2020, 20 (2) 668-675 <https://doi.org/10.4314/abs.v20i2.17> (accessed 6/4/2021)

⁴ There are varying figures on the number of people convicted for rape in Nigeria over the years. For instance, a lawyer, Evans Ufeli, was shockingly reported to have claimed that Nigeria recorded only 18 rape convictions in its legal history see <https://www.premiumtimesng.com/news/top-news/192895-only-18-rape-convictions-recorded-in-Nigeria-legal-history-lawyer-html> (accessed 6/4/2021). However see a more realistic assessment in Kunle Adebajo "Fact Check: No, it is not true Nigeria has recorded only 18 convictions for rape" <https://www.icinegia.org/fact-check-no-it-isnt-true-nigeria-has-recorded-only-18-convictions-in-rape-cases/> (accessed 6/4/2021) where Adebajo assessed rape convictions from 1973 to 2019 to 65 cases.

⁵ Md. Abdul Wohab, Sanzida Akhter "The effects of childhood sexual abuse on children's psychology and employment" *Procedia Social and Behavioral Science* 5 (2010) 144-149 <https://www.sciencedirect.com/science/article/pii/S1877042810014370/pdf?md5=> (accessed 12/5/2021), Karl Hanson, R. "The Psychological impact of sexual assault on women and children: A Review" *Annals of Sex Research* 3, 187-232 (1990) <https://doi.org/10.1007/BF00850870> (accessed 12/5/2021)

⁶ Criminal Code Act (Cap. C38) Laws of the Federation of Nigeria 2010, section 358.

⁷ For instance, a 2017 Nigerian Bureau of Statistics reports shows that there were 2279 reported cases of rape in Nigeria with no conviction cited in Nduka Orjinmo "We are tired: Nigerian women speak out over wave of violence" www.bbc.com/cdn.ampproject.org (assessed 6/4/2021)

⁸ n 6

Apart from the apparent ineffectiveness of sanctions, there are also cases of the inability of prosecution to prove beyond reasonable doubt the culpability of accused persons due mainly to inability to master and pragmatically manipulate available evidence to achieve the purpose of securing a conviction. The concern the researchers have is to identify the pitfalls facing a prosecutor and suggest ways, to the prosecutor and “the public” on how to deal with them. In this respect we posed two questions: first, what are the pitfalls facing a prosecutor in the trial of an accused person for rape? Secondly, how can a prosecutor legally tackle these pitfalls?

Also, a number of factors have been identified⁹ as assisting the rise in the number of rape cases in Nigeria particularly as it affects the girl child and we strongly believe that if we can inhibit the effect of these factors the incidents of rape of women and particularly children will be significantly reduced. We therefore posed the question, how can the law be manipulated to counter factors enabling rape of women and children in Nigeria?

This work is divided into four parts. The first Part deals with the Pitfalls that hinder attempts to curb the rape of females, including the girl child, in Nigeria while the second Part deals with suggested legal responses to these pitfalls. The third Part deals with Suggestions on how to improve the legal responses to the pitfalls hindering attempts to curb the rape of females in Nigeria and the fourth part deals with the Conclusion.

2. Pitfalls Facing Prosecutor in the Trial of accused Person for Rape

a. Punishment for Rape

As we noted the offence rape attracts as much as life imprisonment in most laws in Nigeria¹⁰ however despite the relatively long period of incarceration the incidents of rape, including rape of the girl child, have continue to increase. Studies have shown that although prison is an important option for incapacitating and punishing those who commit crimes however data show long prison sentence do little to deter people from committing future crimes¹¹. The belief that imprisonment will reduce crime has been described as

⁹ Chiazor IA, Ozoya MT, Udume M & Eghareva ME “Taming the Rape Scourge: Issues and Actions” (2016) 14 (3) Gender & Behaviour 7764-7785

¹⁰ See for instance, Criminal Code Act, section 358.

¹¹ National Institute of Justice “Five Things About Deterrence” <https://nij.ojp.gov/topics/articles/five-things-about-deterrence#five> (accessed 25/5/2021)

merely a “belief” as “...there is little (if any) evidence to support the idea that imprisonment can reduce crime on any significant scale anywhere in the world”¹² Indeed “...Research to date generally indicates that increases in the *certainty* of punishment, as opposed to the *severity* of punishment, are more likely to produce deterrent benefits”.¹³ It is therefore not surprising, in view of this, that increase in rape cases have continued flourish over the years in Nigeria despite the life imprisonment imposed on convicted offenders.

b. Evolving Meaning of Rape in Nigerian laws

Criminal Code Act of Nigeria describes Rape in the following term,

Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of an offence which is called rape.¹⁴

This offence can be committed against a woman or a girl child.¹⁵ It is therefore held¹⁶ to be wrong for counsel to argue that a person who raped a 9 years old girl should not be charged with rape but with defilement of girls under 11years. The Penal Code applicable to Northern Nigeria has similar provisions¹⁷ but introduced an interesting innovation¹⁸.

The Criminal Code Act explains that the term “unlawful carnal knowledge” means carnal connection which takes place otherwise

¹² Lukas Muntingh “Punishment and Deterrence: Don’t Expect Prisons to Reduce Crime” https://www.researchgate.net/publication/301275894_Punishment_and_sterrence_Don't_expect_prisons_to_reduce_crime (accessed 31/5/2021)

¹³ Valerie Wright “Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment” The Sentencing Project <https://www.sentencingproject.org> (accessed 31/5/2021)

¹⁴ Criminal Code Act (Cap. C 38) Laws of the Federation of Nigeria (LFN) 2010, section 357. This is replicated in the Criminal Code Laws of most States in southern part of Nigeria. See for instance, Criminal Code Law (Cap. 36) Laws of Anambra State 1991, section 308 Criminal Code Law (Cap. 30) Laws of Enugu State 2004, section 308.

¹⁵ Onoyiwa v. State (2018) LPELR- 44255 (CA)

¹⁶ Ibid

¹⁷ Penal Code Act, section 282

¹⁸ More will be said on this innovation in the later part of this work.

than between husband and wife¹⁹ while “carnal connection” or “carnal knowledge” when used in defining an offence, so far as regards that element of it, is complete upon penetration.²⁰ “Penetration” in this context means the “penetration” of the penis into the vagina and any or even the slightest penetration being sufficient to constitute the act sexual intercourse.²¹ In other words, partial or incomplete penetration of the vagina by the penis of the accused is sufficient to prove the offence of rape.²² Consequently “emission” of semen and rupture of hymen are not necessary to prove the offence of rape.²³

The Violence against Persons (Prohibition) Act 2015 provides²⁴, A person commits the offence of rape if –

- a. He or she intentionally penetrates the vagina, anus, or mouth of another person with any other part of his body or anything else,
- b. The other person does not consent to the penetration, or
- c. The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.

This Act has obviously expanded the meaning of rape to include penetration of anus or mouth of the victim. Further, the instrument of penetration does not need to be the penis as in the Criminal Code Act but any part of his body or anything else. The Act also expressly recognizes the gang rape.²⁵ The provisions of this Act supersede the Criminal Code Act, Penal Code Act and Criminal Procedure Act.²⁶ The only snag is that this law is applicable only to the Federal Capital Territory of Nigeria²⁷ and not to the States of Nigerian Federation. The States are left to birth their own legislation on this area.²⁸ However, the legislations in these States have essentially the

¹⁹ Criminal Code Act Cap.(C 38) Laws of the Federation of Nigeria (LFN) 2010, section 6.

²⁰ Ibid, Aliyu v. State (2019) LPELR- 47421 (SC)

²¹ Natsaha v. State (2017) LPELR-42359 (SC)

²² Isa v. State (2016) LPELR- 4001 (SC), Ogunbayo v. State (2007) LPELR-2323 (SC)

²³ Ibid

²⁴ Violence against Persons (Prohibition) Act, section 1 (1).

²⁵ Violence against Person (Prohibition) Act, section 1 (2)(c).

²⁶ Violence against Person (Prohibition) Act, section 45 (2).

²⁷ Violence against Person (Prohibition) Act, section 47.

²⁸ Constitution of the Federal Republic of Nigeria, section 4 (7), Part II of Second Schedule and Section 2 of Part III of Second Schedule.

same provisions with Violence Against Persons (Prohibition) Act including the provision on rape. For instance, Enugu State Violence Against Persons (Prohibition) Law²⁹ provides,

- (1) A person commits the offence of rape if-
 - (a) He intentionally penetrates the vagina, anus or mouth of another person no matter how slight with his sex organ or any other part of his body or anything else;
 - (b) The other person does not consent to the penetration; or
 - (c) The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the Act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person by impersonating his spouse/partner³⁰

The Violence Against Persons (Prohibition) legislations changed the existing meaning of rape under Nigerian Law since the first legislation in 2015. First, rape is now no longer complete only and exclusively on the slightest penetration of the vagina with the penis without consent but includes penetration of the vagina with any other part of the body or “anything else.” Further, the subject of the “slightest penetration” is now not limited to the vagina but includes the anus and mouth of the victim. This expansion by the Violence Against Persons (Prohibition) legislations raises the possibility of the perpetrators of forced gay sodomy to be charged for rape in Nigeria. Prior to VAPP legislations they would not have been charged for rape.³¹

c. Proof of Rape under Nigerian Law

- (a) *Proof Necessary Elements of Rape:* Generally a person seeking to prove the offence of rape in Nigeria is required by law to do so beyond reasonable doubt.³² The Supreme Court of Nigeria has interpreted “proof beyond reasonable doubt” in different ways. In *State v. Onyeukwu*,³³ *Pats- Acholonu JSC*³⁴ made this apt explanation,

²⁹ Law No. 2 of 2019.

³⁰ Violence against Person (Prohibition) Law No.2 of Enugu State, Section 3 (1)

³¹ Indeed Sodomy, even with consent, is prohibited by parts of the Criminal Code which outlawed such practices. See for instance Criminal Code Act, sections 214, 215 and 217

³² Evidence Act, section 135 (1), See *Yusuf v. FRN* (2017) 43830(SC)

³³ (2004) LPELR-3116 (SC)

...it must be stated and emphasized that proof beyond reasonable doubt does not mean or import or connote beyond any degree of certainty. The term strictly means that within the bounds of evidence adduced and staring the court in the face, no tribunal of justice worth its salt would convict on it having regard to the nature of evidence led and the law marshaled out in the case...

To Rhodes- Vivour JSC this term simply means “establishing the guilt of the accused person with compelling and conclusive evidence”.³⁵ In *Ewugba v. FRN*³⁶ Rhodes- Vivour sees the nature evidence required to establish the guilt of the accused person in “proof beyond reasonable doubt” cases as one which must be “Compelling and reliable.” In *Ajayi v. State*³⁷, Fabiyi JSC defines this phrase as simply meaning “...establishment of all the ingredients of the offence charged in tandem with the dictates of section 138 of the Evidence Act and section 36 (5) of the 1999 Constitution (as amended)...”³⁸ In *State v. Salawu*³⁹ Adekeye JSC explained the phrase thus,

...if at the conclusion of trial, on the entire evidence the court is left with no doubt that the offence was committed by the accused, the burden is discharged...⁴⁰

In *Afolahan v. State*,⁴¹ Peter- Odili JSC, quoting Tobi JSC in *Ani v. State*,⁴² stated this phrase to mean that “... the facts proven must by virtue of their probative force establish guilt...”⁴³ In *Dahiru v. State*⁴⁴ Bage JSC explained that the term simply means “...establishing the guilt of the accused person with compelling and

³⁴ Pp. 44-45

³⁵ *Smarth v. State* (2016) LPELR-40827 (SC) p.27 para. B-D; *Hassan v. State* (2016) LPELR-42554 (SC) p. 27 para. D-F; *Nwankwoala v. FRN* (2018) LPELR-43891 (SC) p. 15 para. B-E.

³⁶ (2017) LPELR-43891 (SC) Pp. 7-8, para. D-A.

³⁷ (2013) LPELR-19941 (SC)

³⁸ Pp. 30-31, para. D-A.

³⁹ (2011) LPELR- 8552 (SC)

⁴⁰ P. 47 para. C-F.

⁴¹ (2017) LPELR-43825 (SC)

⁴² (2009) 16 NWLR (Pt. 1168) 443.

⁴³ Pp. 41-43 para. B-A

⁴⁴ (2018)LPELR-4419

conclusive evidence, a degree of compulsion which is consistent with a high degree of probability...⁴⁵

There are two cardinal things a person seeking to prove rape need to prove beyond reasonable doubt in this context. First, he needs to establish that the carnal knowledge she had with the accused person was without her consent or willingly given.⁴⁶ Further, he needs to establish that there was a penetration⁴⁷ of vagina⁴⁸ no matter how slight.⁴⁹ As Kekere- Ekun JSC explained,⁵⁰

The most important and essential ingredient of the offence is penetration. The Court will deem that sexual intercourse is complete upon proof of penetration of the penis into the vagina. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse.⁵¹

- (b) *Place of Direct and Circumstantial Evidence*: Rape usually takes place in situation that involves only the victim and the accused so it is difficult to find corroborating evidence in most cases to the direct evidence of the victim. In such cases, the Courts usually fall back on circumstantial evidence for corroboration. In *Omotola & Ors. v. State*⁵² Oguntade, J.S.C observed,

The nature of circumstantial evidence and its reliability in criminal cases have been considered by this court on several occasions. In *Ukorah v. State* (1977) 4 SC 111 at 115-116, this Court per Idigbe J.S.C. observed: "Circumstantial evidence is as good as, sometimes better than, any other sort of evidence, and what is meant by it is that there is a number of circumstances which are accepted so as to make a complete and unbroken chain of evidence. If that is established to the satisfaction of

⁴⁵ Pp. 10-11, para. E-G; See *Ayinde v. State* (2019) LPELR-47835 (SC) p. 10, para. C- F.

⁴⁶ *Popoola v. State* (2013) LPELR-20973 (SC) p.32

⁴⁷ With the introduction of the VAPP legislations this will include any part of the body of the accused beyond sex organ and even includes "anything else"

⁴⁸ Also With the introduction of the VAPP legislations this will include anus and mouth.

⁴⁹ *Natsaha v. State* (2017) LPELR-42359 p.37

⁵⁰ *Natsaha v. State* (2017) LPELR-42359 at p. 30 (paras. D-F)

⁵¹ See: *Posu Vs the State* (2011) ALL FWLR (Pt.565) 234 @ 250 B - E; *Jegade Vs The State* (2001) 14 NWLR (R.733) 264; *Ogunbayo vs The State* (2007) ALL FWLR (Pt. 355) 408.

⁵² (2009) LPELR-2663 (SC)

the jury they may well and properly act upon such circumstantial evidence" (Humphrey, J., in *Rex v. Chung and Miao*, cited in *Wills on Circumstantial Evidence*, Seventh Edition (1936) p.324). And, again, the learned author of *Wills on Circumstantial Evidence* on the same page makes reference to a direction of the court (and to which, we think, we should draw attention, with approval) in the case of *Emperor v. Browning* 39 IC 322 where it was stated: "In a case in which there is no direct evidence against the prisoner but only the kind of evidence that is called circumstantial, you have a two-fold task; you must first make up your minds as to what portions of the circumstantial evidence have been established, and then when you have got that quite clear, you must ask yourselves, is this sufficient proof? It is not sufficient to say, "if the accused is not the murderer, I know of no one who is. There is some evidence against him, and none against anyone else. Therefore, I will find him guilty." Such a line of reasoning as this is unsound, for experience shows that crimes are often committed by persons unknown who have succeeded in wholly covering their tracks..." See also *Adie v. State* [1980] 1-2 SC 116."⁵³

Generally, the courts in Nigeria are empowered to convict a person based on the uncorroborated evidence of a victim but they are reminded by rules of practice that to do so would be inadvisable. The Supreme Court of Nigeria as stated the position as follows:

...In any case, it is not a rule of law but one of practice that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix. In such a case, the trial Court is required to warn itself that it is unsafe to convict on the uncorroborated evidence of the prosecutrix and could convict after paying due attention to the warning if it is satisfied with the truth of her evidence.⁵⁴

⁵³ Ibid, Pp. 42-43, para. C

⁵⁴ See *Sunmonu v. IG* (1957) WRMLR 23; *R v. Graham* (1910) 4 CR App Rep 218; *R v. Pitts* (1914) 8 CR App Rep 65; *Reckie v. The Queen* 14 WACA 501; *Ibeakanma v. The Queen* (1963) 2 SCNLR 191 at 195

Where the victim is a child, the position of the law is different. The Nigerian Evidence Act permits the court to receive evidence of children even when not given on oath. However, where a sole witness is a child⁵⁵ and he gives unsworn evidence as required by law, the courts should not convict an accused person based on such unsworn evidence without corroboration.⁵⁶

d. Factors propping incidents of Rape in Nigeria

There are several factors identified as propping increased incidents of rape cases in Nigeria and they include exposure to modernity,⁵⁷ mishandling of cases by law enforcement agents, Peer Group Pressure/ Influence, myth about sex,⁵⁸ influence of indecent dressing⁵⁹ and nature of adolescents.⁶⁰ Surprisingly attempt was made to implicitly narrow perpetrators of rape to mainly adolescents.⁶¹ However, available data suggests that the perpetrators cut across all age bracket.⁶²

It is also postulated in another work⁶³ that Child sexual abuse among adolescents with physical contact happened most frequently

⁵⁵ A person who is less than 14 years. See Evidence Act, section 209 (1).

⁵⁶ Evidence Act, section 209 (3).

⁵⁷ By "modernity" it is meant things like adolescents in Nigeria today being "bombarded by modernizing influences. They read about sex in novels, books, magazines and newspapers. It is said that the adolescents also "Watch various types of pornographic movies aside from being exposed to sexually overloaded advertisements in newspapers and the television. All these and the sexually graphic music, movies, obscene literature directed at the adolescents arouse their interest in sex." (Ibid, 7772)

⁵⁸ For instance, "some believe that without premarital sexual intercourse, boys are bound to have small testicles, suffer from pimples, have difficult erection and not be able to perform well when married. Girls, on the other hand are bound to have small breasts, experience early menopause, painful menstruation and painful nipples when breastfeeding their babies. In addition, some HIV infected men hold to the superstitious belief that if they have sex with a virgin, that they would be cured of AIDS." (Ibid, 7773)

⁵⁹ "Indecent dressing among women and girls are inappropriate mode of dressing that often exposes part of one's body that ought to be covered from public view. This mode of dressing often attracts the opposite sex and causes them to have lustful thoughts that may eventually lead to raping women" (Ibid, 7774)

⁶⁰ This is explained to mean that "Adolescents generally have very strong desire for sex. This propels them into wanting to experiment on anything including rape in order to satisfy their sexual drive" (Ibid)

⁶¹ n 9. In at least two of the factors they canvassed, adolescents are portrayed as being most susceptible to the influence of these factors.

⁶² For instance, Ezeugwu EC, Ohayi SR, Iyoke AC, Nnaji HC (Supra note 5, p.182)

⁶³ Manyike PC, Chinawa Josephat M, Aniwada Elias, Udechukwu NP, Odutola Odetunde, Chioma T. Awoere "Child Abuse among Adolescents in Southeast Nigeria: A concealed public health behavioral issue" (2015) 31 (4) Pak J. Medi Sci 827-832

in a public place or a house other than the victim's⁶⁴, and most perpetrators were known to the victims. Based on other works in this area, the work postulates that child pornography usually causes arousal but it is not known if the pornography makes the perpetrators to act based on their arousal⁶⁵ although it seems to be part of the constellation about what causes them to abuse.⁶⁶ The work also postulates of the possible link between viewing violent pornography and repeat abuse by perpetrators.⁶⁷ This postulation is however based on non-Nigerian studies. The problem is that studies on this relationship over the years have not been definite. While a lot of studies does not see any relationship in any aspect between viewing pornography and violent rape⁶⁸ some suggest otherwise.⁶⁹ Others acknowledge that there are some relationship but not significant.⁷⁰ However, as Jessica Brown observed,⁷¹

It's⁷² a tricky sea to research –but until the answers are more definitive, the evidence so far suggests that the

⁶⁴ However, Ezeugwu EC, Ohayi SR, Iyoke AC, Nnaji HC (Supra note 5, p.182) suggest that rape equally occur in the victim's residence.

⁶⁵ Manyike PC, Chinawa Josephat M, Aniwada Elias, Udechukwu NP, Odotola Odetunde, Chioma T. Awoere (supra note 15, 830)

⁶⁶ Ibid

⁶⁷ Ibid, 831

⁶⁸ For instance, Raquel Kennedy Bergen and Kathleen A. Bogles "Exploring the Connection Between Pornography and Sexual Violence (2000) 15(3) Violence and Victim 227-234, Ferguson CJ, Hartley PD "The Pleasure is momentary...the exposure damnable? The influence of Pornography on Rape and Sexual Assault" (2009) 14 (5) Aggression and Violent Behaviour 323-329, Kutichinsky B "The Effects of Easy Availability of Pornography on Incidence of Sex Crimes: the Danish Experience" (1973) 29 (3) J Soc. Iss. 163-181, Michael Castleman MA "Evidence Mounts: More Porn Less Sexual Assault" <http://www.psychologytoday.com.cdmamproject.org/v/www.psychology.com/us/blog/all-about-sex/201601/evidence-mounts-more-porn-less-sexual-assault> (accessed 18/8/2020)

⁶⁹ B. Kutichinsky "Pornography and Rape: theory and practice? Evidence from crime data in four countries where Pornography is easily available" (1991) 14 (1-2) Int. J. Law Psychiatry 47-64, Diana EH Russell "Pornography and Rape" (1995) 12 (2) Prevention in Human Services 45-79, Flood M "The harm of Pornography Exposure among Children and Young People" (2009) 18 (6) Child Abuse Review 384-400, "Is there Connection Between Porn Culture and Rape Culture? Report of National Center for Sexual Exploitation (an American conservative non-profit group known for its anti-pornography advocacy) <https://fightnewdrugs.org/violence-is-rape-connected-with-porn/> (accessed 18/8/2020)

⁷⁰ Brown J.

⁷¹ "Is Porn harmful? The evidence, the myths and the unknowns" <https://www.bbc.com/future/article/20170926-is-porn-harmful-the-evidence-the-myths-and-the-unknowns> (accessed 18/8/2020)

⁷² Relationship between pornography and sexual aggression.

likelihood that porn has a negative effect very much depends on the individual consuming it

There is not much research into this area in Nigeria. However, the few researches in this area tend to suggest⁷³ a link between pornography, or at least a part played by pornography⁷⁴, in inducing rape. According to Fredrick O. Oshiname, Akintayo O. Ogunwale, Ademola J. Ajuwon among the "substances" used by perpetrators of date rape to facilitate their action includes being subjected to watch pornographic movies.⁷⁵

Apart from these, it is argued that "rape culture is allowed to continue when we buy into ideas of masculinity that see violence and dominance as "strong" and "male" and when women and girls are less valued"⁷⁶ Indeed, throughout history, rape has been used as a weapon of war and oppression⁷⁷

3. Legal Responses

a. *Punishment for Rape*

Although punishment for rape is well spelt in legislations⁷⁸ however there is also a statutory mandate on a judge or any arbiter not to impose maximum sentence on first offenders.⁷⁹ Such arbiter has statutory leverage to even impose a fine in lieu of imprisonment.⁸⁰ Indeed, such leverage implies that it is only when the fine is not paid that imprisonment will be considered.⁸¹ The

⁷³ Subomi Plumptre "The Rise of Internet Porn and its Generational impact" <https://www.google.com/search?q=subomi%20plumptre%3A%20the%20rise%20of%20internet%20porn%20and%20its%20generational...&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&source=hp&channel=np> (accessed 17/8/2020)

⁷⁴ Fredrick O. Oshiname, Akintayo O. Ogunwale, Ademola J. Ajuwon "Knowledge and `` Perceptions of Date Rape among Female Undergraduates in a Nigerian University" (September 2013) 17 (3) African Journal of Reproductive Health 137-148.

⁷⁵ Ibid, 144-145.

⁷⁶ "16 ways you can stand against rape culture" <https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture> (accessed 14/6/2021)

⁷⁷ ibid

⁷⁸ Criminal Code Act (Cap C 38) LFN 2010, section 358.

⁷⁹ See for instance section 416 (2) (d) of Administration of Criminal Justice ct 2015.

⁸⁰ See for instance Section 420 of Administration of Criminal Justice ct 2015.

⁸¹ Ibid. See Ogbuagu JSC's observation in Ogunbayo v. State (2007) 8 NWLR (Pt. 1035) 157 at 185 to the effect that the trial court was wrong to have sentenced the appellant in this instance to seven years imprisonment with option of ne of ₦ 5000 instead of a fine of ₦5000 in default of seven years imprisonment.

leverage of fine will not be available where a law prescribes the minimum period of imprisonment to be applied.⁸²

b. Evolving Meaning of Rape in Nigerian laws

From our discussion so far Rape within the precincts of Nigerian law will therefore involve all sexual acts or acts of sexual coloration carried out without prior consent of the victim. If the victim consented to such acts, then the offence of rape will not result.

The definition of Rape in the Criminal Code envisages absence of consent which invariably means that where the victim consents it will no longer be rape. However, there might be doubts as to whether a girl child falls within this definition of rape in view of the issue of consent. The provisions of the Criminal Code legislations, however, appears to have the girl child in contemplation as potential victim of rape. The employment of the term “woman or girl” in the definition of rape⁸³ evinces such contemplation. The courts seem to agree with this position. For instance, in *Onoyiwa v, State*,⁸⁴ counsel for the accused argued that the accused should not have been charged with the offence of the rape of a 9 year old girl instead he should have been charged with defiling of a girl under 11 years.⁸⁵ However this argument was rejected by the court who felt that the accused can be charged for the offence of rape since the definition of the offence envisages both “woman” and “girl”.⁸⁶ VAPP legislations do not differ from the Criminal Code on this issue. Instead of gender specific terms like “woman or girl” used the Criminal Code, VAPP uses “person” which can accommodate a woman or a girl in its definition. It therefore appears that under extant relevant legislations in on this issue in Nigeria the girl child can be a victim of rape in same circumstances as a woman. The Penal Code is innovative in the respect. It clearly outlays rape with persons under 14 years or of unsound mind⁸⁷

⁸² ` See for instance, Administration of Criminal Justice ct 2015, Section 420 (4).

⁸³ n 28.

⁸⁴ N 29

⁸⁵ Criminal Code Law of Bendel State, sections 358 and 218 respectively. Bendel State was already extinct and replaced by two other States, Delta and Edo, by the time this case was commenced. However, le gislations of the defunct Bendel State applied for a while in these new States.

⁸⁶ *Onoyiwa v. State* (2018) LPELR- 44255 (CA) Per Philomena Mbua Ekpe ,J.C.A (Pp. 9-12, paras. E-D). The learned justice relied on the Oxford Advanced Learners Dictionary of “girl” to hold that since rape can be committed on a woman or girl, it is therefore proper to charge the accused person for rape of a 9 years old girl.

⁸⁷ Penal Code Act, section 282 (1) (d)

c. *Proof of Rape under Nigerian Law*

A Constitutional requirement for a person charged with committing criminal offences in Nigeria, including rape, is that he has a right to be presumed innocent until the prosecution proves the contrary.⁸⁸ This therefore places enormous responsibility on the prosecution to carefully present the case of the victim while being wary that any negligence in his prosecution may be exploited to hilt by the defence. In this regard, the prosecutor must be conversant with the legal position on consent and penetration with respect to rape cases. In addition, the prosecutor must know when to resort to and the “quality” of circumstantial evidence to use in corroborating the direct evidence of the victim because of the absence, in most cases, of direct evidence from a witness corroborating the commission of the offence. Although tendering of evidence to corroborate direct evidence is not part of our statutes but our courts feel uncomfortable convicting an accused without it.

d. *Factors propping incidents of Rape in Nigeria*

The response of the law to factors propping incidents of rape in Nigeria depends on the factor in review. For instance, there is no law addressing such factors as modernity,⁸⁹ Peer Group Pressure/Influence, myth about sex,⁹⁰ influence of indecent dressing⁹¹ and nature of adolescents. Other factors like mishandling of cases by law enforcement agents and pornography elicited some responses from the law. Nigeria Police Force is the principal law enforcement agent in Nigeria and most cases of rape are first reported to them.⁹² Nigeria Police officers are empowered to investigate an allegation of crime in accordance with due process and report finding to the Attorney-General.⁹³ Some form laws are generally in place to regulate the sale and consumption of pornography at least in the public space in Nigeria⁹⁴. This regulation is not without

⁸⁸ Constitution of the Federal Republic of Nigeria 1999 (as amended) section 36 (5). See also *Yusuf v. FRN* (2017) 43830(SC)

⁸⁹ n 55

⁹⁰ n 56

⁹¹ n 57. There has been pockets of unlawful attempts to impose some form of dress code by individuals to curb perceived “indecent dressing” but such attempts have no convincing legal backing. Even, the “policing” of dressing in places like Kano State based, presumably, on enforcement of Sharia Law has a doubtful Constitutional base.

⁹² n 1

⁹³ Nigeria Police Act 2020, section 31

⁹⁴ Criminal Code Act (Cap C 38) LFN 2010, sections 233B- 233D

constitutional backing.⁹⁵ Private circulation⁹⁶ and consumption of pornography is not largely prohibited except for child pornography.⁹⁷

4. Recommendations

a. *Punishment for Rape*

As we earlier noted⁹⁸ in this work, researches indicate that increases in the *certainty* of punishment, as opposed to the *severity* of punishment is likely to deter would be rapist. The extant provisions on legislations dealing with rape in Nigeria and judicial application of these provisions suggests that the emphasis in Nigeria seems to be more *severity* than *certainty*. The extant provisions on rape all prescribe a punishment.⁹⁹ However, as we earlier noted¹⁰⁰ the courts are given the latitude¹⁰¹ to impose a punishment less than what the status prescribed. Sadly, this leverage has been used by the courts to impose punishments which tended to trivialize the effect of rape on the victims. For instance, the latitude has resulted in a trial court sentencing an accused to seven years imprisonment with hard labour with an option of fine five thousand naira.¹⁰² In another case, the accused person was sentenced to, instead of the offence prescribed in the statute, to five years imprisonment and a fine of ₦100,000.00 (One Hundred Thousand Naira).¹⁰³ The imposition of these lesser punishments, in our view, does not meet the gravity of the offence¹⁰⁴ and leaves room for *uncertainty* as to punishment. As a way of bringing certainty in the punishment of offenders,¹⁰⁵ we

⁹⁵ Constitution of the Federal Republic of Nigeria 1999, sections 37 and 45 (1).

⁹⁶ As opposed to "Public Consumption" which prohibited by laws such as in Criminal Code Act (Cap C 38) LFN 2010, sections 233B- 233D

⁹⁷ Cybercrime (Prohibition Prevention etc) Act 2015, section 23

⁹⁸ Section 2.1

⁹⁹ Usually, imprisonment for life.

¹⁰⁰ Section 3.1

¹⁰¹ n 76 and n 77.

¹⁰² See *Ogunbayo v. State* (2007) 8 NWLR (Pt. 1035) 157. However, as we noted *Ogbuagu JSC* was of the opinion, in this case, that the proper position of the law is that the fine should be the punishment and that it is upon a failure to pay the fine that the seven years imprisonment will be considered. (n 76). This position even makes it more ridiculous that a person may, within the confines of the law, escape severe punishment for heinous crime like rape by paying a paltry sum.

¹⁰³ *Ologun v. State* (2015) LPELR-25962(CA)

¹⁰⁴ Victims of rape usually experience a host physical and psychological trauma. See for instance, "The impacts of sexual assault on women" <https://aifs.gov.au/publications/impacts-sexual-assault-women> "Effects of Rape: Psychological and Physical Effects of Rape" <https://www.healthypalace.com/abuse/rape/effects-of-rape-psychological-and-physical-effects-of-rape> (accessed on 20/9/2021)

¹⁰⁵ Even where the convict is a first offender.

suggest that the various provisions in the legislations providing punishment for rape make their provisions *minimum* punishment for rape. This will bar the possibility of creating uncertainty in the punishment of rapists by letting them escape with a lesser punishment than what was prescribed in the legislations even if they are first offenders. We are not unaware of the provisions which mandate courts not to impose maximum sentence on first time offenders¹⁰⁶ however these provisions are essentially for non-capital offences and are such do not apply to capital offences. We suggest that rape should, in this respect, be viewed as serious as capital offence.¹⁰⁷

b. Evolving Meaning of Rape in Nigerian laws

The expansion of meaning of rape within Nigerian law, is commendable. However, there remains a crucial issue that has been ignored in these provisions on definition of rape in the Criminal Code and subsequent VAPP legislations. Crucially, there has been a feeble attempt to answer the question of consent when a female child is raped. The interpretation of the Court in ascribing ability to consent on a girl child, is patently wrong and is contrary to the provisions at some existing statutes on this issue. The Child's Right Act 2003 and similar legislations in the various states in Nigeria clearly outlaws sex with a child.¹⁰⁸ The issue of consent is irrelevant here because it is implied here that a child cannot give consent to sex. The opposite of this provision in the Child's Rights Act and similar legislations is suggested in the interpretation of the court in the case earlier discussed.¹⁰⁹ Interestingly, the law makers of the Penal Code applicable in Northern Nigeria are in agreement with this position in affirming that a 14 year old girl is incapable of giving consent¹¹⁰. We recommend that the position of the Child's Right Act and other similar legislation on the issue of sex with a child

¹⁰⁶ See for instance Administration of Criminal Justice Act 2015, section 416 (1) (d)

¹⁰⁷ The psychological effect of rape on the victim is unquantifiable. Rape often lead to Posttraumatic Stress Disorder (PTSD) which can be likened to "killing" the victim psychologically. "...People with PTSD have intense disturbing thoughts and feelings related to their experience that last long after the traumatic event has ended..." <https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd> (accessed 20/9/2021)

¹⁰⁸ Child's Rights Act, section 31 (1) and for instance, Child's Rights Law of Anambra State, section 34 (1).

¹⁰⁹ Section 3.2

¹¹⁰ Penal Code Act, section 282 (1) (d). We however limitation of consent should not be pegged at 14 years but extended to under 18 years which the globally recognized age childhood.

should be adopted in interpreting provisions of other legislations on rape where the victim is a girl child. This will imply that in rape cases where the girl child is the victim, the prosecution will never be required to prove the issue of consent as the court implied in the case of *Onoyiwa v. State*¹¹¹ even in Southern Nigeria.

c. *Proof of Rape under Nigerian Law*

The issue of generalizing consent in rape cases to include the girl child has been dealt with in the preceding Section. Our focus here will be on the “safe ground” practice of requiring corroboration before conviction for commission of crime. As we pointed out this practice is not a requirement of our statute but merely a creation of the courts. Tobi JSC stressed as much when he reiterated, that:

...I am not comfortable with the case law that corroboration is necessary to secure conviction of the offence of rape. This is because I see no statutes foisting on the prosecution evidence of corroboration before convicting an accused...¹¹²

Tobi went on to trace this practice by Nigerian courts to the Jury system in England where the Jury rather than the judges are saddled with the convictions for criminal offences. According to him, the practice was that the Judges usually warned the jury of the danger of convicting based on the uncorroborated evidence of the complainant. Tobi then concludes that such warning is not necessary in Nigeria where there is no jury system. In other words, it is for every court to be conscious of the evidence he relies on to convict an accused person. A court can therefore convict based on the evidence of the victim/complainant alone if it has sufficient ground to believe the veracity of the victim/ complainants testimony. Along this line, we advocate that the courts should also feel “safe” to convict based on uncorroborated circumstantial evidence. This will help to clear some “slippery peels” in the path of the prosecutor in securing a successful conviction for rape. Indeed, the low number of people successfully convicted for rape over the years illustrates the enormity of the task faced by the prosecution in securing conviction in cases of rape.

¹¹¹ (2018) LPELR- 44255 (CA)

¹¹² See *Ogunbayo v. State* (supra) at 188

c. Factors propping incidents of Rape in Nigeria

Advocating for legislations, as we may be tempted to do, to curb some alleged factors propping rape incidents of rape in Nigeria such as modernity,¹¹³ Peer Group Pressure/ Influence, myth about sex,¹¹⁴ influence of indecent dressing¹¹⁵ may be walking a legal slippery slope that may cascade into a host of human rights-violating provisions. We therefore limit our Recommendations to a few of these factors.

We sought for answers to the issue of policemen refusing or neglecting to investigate rape cases reported to them within precincts of Police Act but disappointingly found none. It may be that the originators of the Act did not envisage that policemen can ever shirk their responsibility of investigating crimes reported to them based on personal whim. The Act therefore need to tweaked¹¹⁶ to accommodate sanctions for policemen who, under any guise, refuse to investigate cases of suspicion of commission of crime reported to them.

Controlling adult consumption of pornography is always difficult to control in any country where fundamental rights are strictly observed. Legal issues such as invasion of right to privacy are bound to arise in situations where attempts are made to control such rights. The government, at best, can only control the public display and consumption of pornography at least from the Nigerian stand point. Indeed, the distinction between public and private becomes blurred in world-wide web. Information streams by-pass” public” screening straight to private domain much like the pay-per-view system. The best most government has done in the circumstance is to place age limit on persons that can consume such information.¹¹⁷

5. Conclusion

As we have seen, several factors combine to strength the scourge of rape against females in Nigeria. These factors include punishment prescribed in the various legislations in Nigeria for those convicted of the offence of rape. We noted that latitude given to judges by Nigeria’s criminal justice system to sometimes¹¹⁸ results in lower and

¹¹³ See Evidence Act, (n 55)

¹¹⁴ n 56

¹¹⁵ n 57.

¹¹⁶ There is no provision in the Police Act that takes care of this situation.

¹¹⁷ Like Nigeria has done. See Cybercrime (Prohibition Prevention etc) Act 2015, section 23

¹¹⁸ Especially for first time offenders.

often ridiculous punishment being meted to convicted rapist of females. This we saw breeds uncertainty as to the punishment that awaits rapist and fuel the deterrence effect of Nigerian law in this area.

We also pointed out that although the meaning of rape has evolved in Nigeria Legal System beyond actual physical copulation or attempted copulation with females without their consent to for instance, inserting anything to the female genital or anus without consent, the issue of impliedly ascribing the right to consent or not female children is against the provisions of new legislations in Nigeria in this area.

In addition, we pointed out the emphasis by the Courts on corroboration before conviction in an offence of rape is not a requirement of any legislation in Nigeria but apparently borrowed from English legal system which is jury based¹¹⁹.

Lastly, we discussed factors that may predispose people to rape in the first instance as we gleaned from some available data. We discovered that it will be difficult to make effective legislations to tackle curb these factors because of the possibility of human rights violations.

We therefore suggested that to ensure certainty in the punishment for offence of rape the current prescribed punishment for rape in various legislations in Nigeria be made the minimum punishment for rape. This will mean that the Court cannot sentence any convict¹²⁰ for lesser period. We went further, in view of the proven long term adverse psychological effect of rape on the victims, to advocate for capital punishment for convicts.

We additionally advocate for some of our legislations to excise the requirement of consent as it relates to rape of children and replace same with provisions similar to that in the Child's Rights legislations which outlawed under 18 year olds from sex irrespective of consent. Also our courts should deliberately de-emphasise the requirement of corroboration before conviction of an offender for rape and feel "safe" to convict based on a cogent and compelling uncorroborated evidence, whether direct or circumstantial.

Lastly, we argued that although it was not possible to deploy legislations to curb some factors that facilitate rape of females due to human rights considerations, the existing laws can be amended to hold police men who neglect, down play or refuse to investigate

¹¹⁹ See the case of *Ogunbayo v. State* (supra)

¹²⁰ Including first time offenders.

cases of rape reported to them accountable and therefore punished accordingly.

We do not claim to have exhausted all the possible legal approaches to tackle the issue of rape of females in Nigeria in this work but we feel that this is a modest attempt and that if the suggestions in this work is implemented it will assist in strengthening the law to effectively contribute in the quest to curb the scourge of rape of females in Nigeria.