

ANALYSIS OF SPOUSAL RAPE: A CRIME UNDER THE NIGERIAN CRIMINAL JURISPRUDENCE

By
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Abstract

Spousal rape is simply the act of having sexual intercourse with one's spouse without the valid consent of the said spouse. The concept of spousal rape is not common in Nigeria and the knowledge of same goes a long way in helping spouses especially wives to know that they do have a right in marriage, to politely decline sexual intercourse, at times they are not fit to do so. This paper makes known the fact that a man can indeed be raped by a woman and there is nothing shy about a man speaking up about this dilemma whenever such happens to him. The paper is not gender specific. In essence, it envisaged for both genders with respect to spousal rape. It also discussed how a man can be raped by his wife and what penetration entails in the context. It made findings that indeed, spousal rape is now a crime in Nigeria, even though not directly but according to the Violence Against Persons (Prohibition) Act¹, spouses can be tried and convicted for spousal rape in Nigeria against the other spouse. In making these findings, this work adopted the doctrinal method of research, which involves analyzing of primary and secondary data. It is now certain by this paper and of course the law in Nigeria, that any spouse who is found guilty of having sexual intercourse with the wife, in other words, rape, must be convicted for the said offence. The provision of section 36(12) of the 1999 constitution of Nigeria² as amended will not aid such a person, being that the offence of spousal rape is now a crime in Nigeria. In the final analysis, this paper made recommendations with regards to spousal rape in Nigeria and the way forward.

KEYWORDS: SPOUSE, RAPE, MARRIAGE, WIFE, SEXUAL INTERCOURSE, NIGERIA

1.0 Introduction

The word rape is not new to the ears. It has been in existence for ages now. The word spousal rape, however, is more like an abomination in Africa, especially Nigeria. It has no place in our Laws and therefore not seen as an offence whatsoever. This is the reason some men if not most, sell their conscience to have their way into the vagina or anus of their wives, simply for the sake of sexual gratification, when at that point they know that the woman is not in the mood. Even when told by the women that they are not in the mood, they just pay deaf ears and do as they wish, after all women are seen as their properties.

Women are not the only spouse capable of being victimized, men equally fall prey to this in marriage and some women hide under the guise of being the weaker sex to commit unfathomable acts upon their husbands including rape as well. This paper gives an insight on both genders on the concept of spousal rape and equally bring to the limelight that as at today, spousal rape is now a crime in Nigeria.

2.0 The Concept of Rape

The term rape is sometimes used interchangeably with the term sexual assault. Rape is a type of sexual assault involving sexual intercourse or other forms of sexual penetration carried out against a person without their consent. The act may be carried out by physical force, coercion, abuse of authority, or against a person who is incapable of giving valid consent, such as one who is unconscious, incapacitated, has an intellectual disability, or is below the

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¹ 2015

² Constitution of the Federal Republic of Nigeria 1999 as amended.

legal age of consent.³ Having seen a general definition of rape, it is pertinent to go all in to the Nigerian codes and context and see what rape is about.

2.1. Rape under the Penal Code

Rape is defined under the Penal Code at section 282(I) in reference to who is liable for rape, thus:

A man is said to commit rape who, except in the case referred to in subsection (2) of this section, has sexual intercourse with a woman in any of the following circumstances- (a) against her will; (b) without her consent; (c) with her consent, when her consent has been obtained by putting her in fear of death or 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.⁴

The above definition shows that rape can only be committed against a woman by a man and no one else. It does not give any impression or envisage that a man can be raped, so the whole essence of rape in the penal code is for the benefit of a woman.

2.2. Rape under the Criminal Code

Rape is provided for in section 357 of the code to mean:

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.”⁵

The definition here is similar to that of the Penal Code, save that it used the words ‘Any person’ which means that not just a man but a woman can be convicted of rape as well as a man but, a woman only is capable of being raped, in other words, a man cannot be raped.

2.3 Rape under the Violence Against Persons (Prohibitions) Act 2015

The above Act is also known as The VAPP Act, 2015. It is an Act established to cover so many aspects of violence on anybody, which was not covered in details by the existing Acts and makes some acts offence which before then was not an offence. Rape is among the offences it gave a broader view.

³ Wikipedia, ‘Rape’ *Wikipedia* (2 March, 2018) <<https://en.wikipedia.org/wiki/Rape>> Accessed on 27 January, 2024

⁴ <https://sabilaw.org/wp-content/uploads/2022/04/Penal-Code-Act-1960.pdf>

⁵ <https://www.nigerianlawguru.com/legislations/STATUTES/CRIMINAL%20CODE.pdf>

It defined Rape in its section 1 as:

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 or her body or anything else; (b) the other person does not consent to the penetration; (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 fraud or fraudulent misrepresentation 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.⁶

From the definition above, it can be seen that this VAPP Act gave rape a wider scope. It contained everything which both the Penal Code and the Criminal Code did not envisage, ranging from the fact that indeed, a man can be raped, to the fact that, a woman can also rape a man and not just her fellow woman as provided in the Criminal Code. It specifically used the expression ‘he or she’ talking about both genders.

3.0 Spousal Rape

Spousal rape is also known as Marital rape. It is the act of sexual intercourse with one's spouse without the spouse's consent. The lack of consent is the essential element and need not involve physical violence,⁷ but does not exclude it either. Hitherto, in many countries if not all, spousal rape is legal and never seen or classified as a crime. A husband can forcefully have sexual intercourse with the wife, with or without her consent in so far as they are both married. In Africa, especially Nigeria where women are mostly seen as mere properties of their husbands who can do with or use them as he pleases. Therefore, the concept of spousal rape is an abomination. It is unheard of to say that one's husband raped her. Even in the Nigerian courts, one cannot bring a case of spousal rape for the court to decide, because our Constitution made it clear at section 36(12) thus:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.⁸

The above provision of the Constitution is clear, and both under the definition section of rape and throughout the sections under both the Criminal Code and the Penal Code, spousal rape is not in anyway provided for, let alone, a punishment for it. So, the courts cannot convict on a case of spousal rape, no matter how sentimental the facts of the case appear. Due to the fact that no law in Nigeria made spousal rape a crime, husbands go scot-free without being penalized whenever they have carnal knowledge or sexual intercourse with their wives without her consent. With this, it is clear that wives are mostly not adequately protected in marriage in this aspect, because generally, husbands are the heads of their respective families and also have the final say in certain matters of the family, so it is in the intimacy of the union.

⁶https://sabilaw.org/wp-content/uploads/2021/05/Violence-Against-Persons-Prohibition-Act-2015-VAPP-Act_.pdf

⁷ Wikipedia, ‘Marital Rape’ *Wikipedia* (20 January, 2021) <https://en.wikipedia.org/wiki/Marital_rape > Accessed 27th January, 2021.

⁸ The 1999 Constitution of the Federal Republic of Nigeria (as amended).

Now, spousal rape is specifically criminalized in so many countries, a typical example is the United Kingdom, where the famous landmark case of *R v R* made all the difference therein, decided by the House of Lords in 1991, where it held that Spousal rape otherwise known as Marital Rape is a crime in the English Criminal Law.⁹ So since 1992, the United Kingdom established the Law directly and specifically criminalizing spousal rape, and so did many other countries.

3.1 Spousal Rape in Nigeria as a Crime

The fact is that Nigeria has not specifically criminalized spousal rape under the criminal jurisprudence, in fact, the Penal Code specifically exempted spousal rape in section 282(2) thus:

(2) Sexual intercourse by a man with his own wife is not rape,
if she has attained to puberty.¹⁰

While the Criminal Code did not envisage spousal rape at all, let alone include it in the law. On the other hand, the coming into effect of The Violence Against Persons (Prohibitions) Act 2015, widened the scope of rape and it may surprise you that it made provision for spousal rape, in other words, criminalizing same. In the definition section above, there is no sentence or paragraph that states or suggests that spouses are exempted from the commission and being guilty of rape.

For emphasis sake, section 1 of the VAPP Act is herein reproduced thus:

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 or her body or anything else; (b) the other person does not consent to the penetration; (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 fraud or fraudulent misrepresentation 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.¹¹

Critically analyzing the above section, from the first sentence, it used the expression ‘A Person commits the offence of rape if...’ It did not in any way exclude a husband or a wife, a person can be anybody. One major thing to note is that irrespective of the fact the world and Nigeria in particular sees a woman as the victim of rape in most circumstances, this VAPP Act says otherwise, and states that anybody can be raped and such rape can be by anybody, there is no gender specifics, unlike the Criminal and Penal Code. This also applies to a marriage, whenever the words ‘Spousal Rape’ is mentioned, what should come to mind is both spouses, either the husband or the wife, and not just the wife. The word spousal does not mean wife in any way, it involves the couple exclusively, but it can be said that women, that is, wives are often the victims of spousal rape. In other words, in this work, a spouse being the husband can equally be raped by the other spouse being the wife (and this can sometimes happen in the company of some hired or conspired individuals). So, husbands can go to court to say ‘I was raped by my wife’. A wife can rape her husband by either penetrating the husband’s anus or mouth but not the penis, in fact a penis cannot be penetrated, and even if it could, then of course not by a vagina. Penetration is defined as the

⁹ <https://lawtutor.co.uk/r-v-r>

¹⁰ Supra note 2.

¹¹ Supra note 4.

movement into or through something or someone;¹² by this definition, vagina cannot penetrate a penis, rather the reverse will be the case and this is the reason wives are mostly the victims of spousal rape. In this context, I can infer that whenever a wife rapes a man by penetrating his anus or mouth by anything capable of penetrating, then, it is because of, spite or pleasure seeing the husband suffer usually due to one thing the man might have done or does to her or due to any other thing best known to her.

Fact is, the world has made men believe and have the notion that they can never be victimized by a woman in any circumstance, so when this actual reality happens especially sexually, they shy away and prefer to die in silence than open up on their dilemma, forgetting that they are first human before becoming the man they are. In other words, anything can happen to any human irrespective of gender. Men equally encounter rape though this can be called sexual assault in general if it does not have to do with the penetration of mouth or anus of the man and in the context of marriage, spousal assault, and of course by their wives - this is of course an aside.

The VAPP Act is indeed in line with the chapter two of the Nigerian Constitution and in fact projected the provision for fundamental human rights which protects citizens from being victimized by any person; at section 34(1) of the constitution, it clearly states thus:

Every individual is entitled to respect for the dignity of his person, and accordingly - (a) no person shall be subject to torture or to inhuman or degrading treatment; (b) no person shall be held in slavery or servitude; and (c) no person shall be required to perform forced or compulsory labour.¹³

Analyzing the above section together with the general definition of rape, rape can be said to involve torture, inhuman or degrading treatment, where the perpetrator uses forceful means and violence to have his or her way into the vagina, anus or mouth of the victim, as torture is defined as the act of causing great physical or mental pain in order to persuade someone to do something or to give information, or to be cruel to a person or animal.¹⁴ This is exactly what a victim of rape goes through in the hands of the perpetrator before, during and sometimes after the rape. There is no difference here between rape and spousal rape, so the victims of spousal rape go through the same torture and degrading treatment sometimes involves giving the victim a substance in order to deprive them of their consciousness and will power. These fundamental human rights were envisaged by the VAPP Act which I feel led them not to exclude spouses in the commission and from being guilty of rape, because those spouses that fall prey to rape in marriage are also human beings with rights, just like every other person.

This said VAPP Act, has an intriguing section which I love so much and that is section 45 of the Act, it states thus:

- (1) Any offence committed or proceedings instituted before the enforcement of this Act under the provisions of the (a) Criminal Code, Cap LFN, 2004 (b) Penal Code Cap LFN, 2004 (c) Criminal Procedure Code Cap. LFN, 2004 (d) Any other Law or Act relating to violence defined by this Act as the case may require be enforced or continue to be enforced by the provisions of this Act.

¹² Cambridge Dictionary, 'Penetration' <https://dictionary.cambridge.org/dictionary/english/penetration> > Accessed 27 January, 2024.

¹³ Supra note 5.

¹⁴ Cambridge Dictionary, 'Torture' <<https://dictionary.cambridge.org/dictionary/english/torture> > Accessed 27 January 2024.

- (2) Any provision of the Act shall supersede any other provision on similar offences in the Criminal Code, Penal Code and Criminal Procedure Code.

The above subsection (2) said it all, in essence, the VAPP Act supersedes the provisions of the Criminal code which did not envisage nor include spousal rape as an offence and also, the Penal code which expressly excludes spouses from the commission of rape and being guilty of same as those specific sections has already been seen and provided for above.

4.0 Conclusion

The VAPP Act is applicable only in the Federal Republic of Nigeria (FCT) but it is also applicable in states across Nigeria which have domesticated it in their Laws and of course then called, the VAPP Law of that State. As at 28th January 2024, out of the 36 states in the Federation excluding the FCT, about 33 States have domesticated the VAPP Act except Kano, Katsina, and Zamfara states; Anambra state was the very first state that domesticated the VAPP Act since its enactment.

5.0 Recommendations

Irrespective of the fact that the VAPP Act did not specifically make a provision for spousal rape or marital rape, it did not also exempt spouses from being capable of committing rape in marriage on the other spouse and being guilty of the Act. Therefore, any spouse who suffered or suffers rape in marriage from the other spouse, now has a right under the VAPP Act to commence a criminal action against the perpetrator spouse on the offence of rape and such perpetrator, if found guilty would be punished accordingly under the Act as with every other person. With the VAPP Act, the Criminal Code and Penal Code would not matter anymore as far as rape or spousal rape is concerned by the virtue of section 45(2) of the VAPP Act and the equivalent sections of the VAPP Laws of the various States that have domesticated it in their laws. In Anambra for instance, the equivalent section is section 43 of the VAPP Law of Anambra State, 2017.