PROPER SENTENCE IN RAPE CASES AS A MEANS OF ENGENDERING ADEQUATE CLOSURE FOR VICTIMS

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Abstract

The offence of rape is a menace that has ravaged the globe. It has received considerable attention among legal and decent minds, organizations and people of integrity that have the welfare of women especially, and society at heart. The question is, how best can the society protect the feminine gender from rape, avail victims of closure and maintain global decency. Rape is a heinous crime that shatters the emotional, psychological, physical, social and existential walls of its victim and robs the society of sanity. Though prohibited globally, yet, it is as rampant and widespread as it is discussed. Unfortunately, there seems to be an epidemic of injustice in judicial handling of rape

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cases that leave victims without closure. "Proper Sentence" which could be a potent judicial instrument for achieving functional Justice and deterrence in rape cases is often misapplied, rendered weak and ineffective at a point where it is expected to be strong and achieve the desired goal. This article highlights the potency of "proper sentence" in rape cases as a means of engendering adequate closure for victims. It exposes several judicial abuses of justice in rape cases and the need for a review towards achieving adequate victims' closure, functional justice and global sanity.

Key Words: Proper Sentence, Rape Cases, Engendering, Adequate Closure of Victims.

1.0 Introduction

Over the years, the law relating to rape has been the subject of comprehensive global legislative review and substantial change. In spite of national and international laws for the prohibition of sexual violence against women, rape offences abound. Yet, there is under-reporting of rape cases, low arrest of rape suspects, non diligent prosecution, flat conviction, inadequate sentences and high dismissal rates of rape cases. The adjudication of rape cases continues to be a complicated series of inequity from various jurisdictions. Surprisingly, in spite of various sentencing guidelines and laws which seem to be a mandatory potential solution to achieve functional justice in rape cases, the courts are rather using sentencing as a willing tool to neutralize functional justice and deterrence in this

regard. They do this under the cover of interest of justice, as if "interest of justice" is a carte blanche or license for an unimpeded exercise of power even against the relevant rules. This is done to the detriment of rape victims especially the feminine gender and of course the society at large. In effect, rape cases are recklessly prevalent, widespread, and common just as the subject matter is discussed. More so, most of the time, rape victims often face skepticism from the police and the society. At other times, some courts often disbelieve their claims as regards the violent nature of the crime and during trials, most rape victims are often re-victimized in the courtroom. Their credibility is attacked while their past sexual history may also be exposed against their wish. Unfortunately, few convicted rape perpetrators receive inadequate sentences/punishment leaving the victim with no closure. While a good number of convicted rapists do not receive custodial sentence deserving of rape cases, others rather typically serve less than one year in jail. It is as if some courts indirectly, consciously or unconsciously use sentencing in rape cases to make caricature of the offence and /or neutralize functional justice and possibility of deterrence. It cannot be over emphasized that in passing sentence the judge is bound to consider the interest of justice in every circumstance but certainly not at the expense of functional justice. There must be justice for the victim, whose walls of privacy has been shattered, justice for the offender and justice for the society. The research is in five parts. Part I borders on the general introduction, definition and legal implications of rape. Part II discusses the aim of punishment in criminal law. Part III is on criminal justice process and the guidelines in sentencing in

rape cases. Part IV discusses various instances in some jurisdictions where courts have miscarried justice in sentencing in rape cases and consequently aborted functional justice and possibility of deterrence in rape cases. Part V articulates some recommendations and conclusion.

2.0 Rape, Definitions, Implications and the Law

Rape ordinarily is non-consensual sexual intercourse between a man and a woman. Though related to other sexual offences, it is quite different from those others. Prior to the advent of the Violence Against Persons (Prohibition) Act 2015, rape has been traditionally categorized as a gender crime and has been so defined, so that rape is always perceived as a crime committed by men against women and girls[1]. Thus, the feminine gender has always been and seen to be the victim. This understanding and notion were espoused in various decisions of courts. In *Isa v Kano state*[2] for example, the court held that the offence of rape was complete upon the appellant's erect penis penetrating the PWI's vagina and partly ruptured her hymen, however slightly the penetration. The court held that the issue whether PWI consented is irrelevant since she was unable to consent being only 9 years of age as at the time of the act. In *Okoyomon v state*[3] the court held that the offence of rape is committed if a man has sex with a female without her consent and the offence is established once the man's penis penetrates the vagina of the female, no matter how slight the penetration. The emission of semen into the vault of

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1 Section 357 of the Criminal Code.

2 (2016) NGSC 62

3 (1973) ISC p.221

the vagina is unnecessary and if the female is under the age of fourteen her consent is immaterial. *In Ogunbayo v state*[4] the court also held that the offence of rape is complete once there is a penetration, and that it is immaterial whether or not the penetration was not of such depth as to injure the hymen. Thus, in all the case above mentioned, it is always the male genital organ penetrating the female organ, so that the female is always at the receiving end.

Although the Constitution of the Federal Republic of Nigeria 1999(Fourth Alteration) does not specifically prohibit rape, it clearly prohibits torture, and in a kind of finality in section 34(1) provides that every individual is entitled to respect for the dignity of his person and accordingly nobody shall be subjected to torture or inhumane or degrading treatment .Once rape is committed upon a person automatically there is a breach of that person's fundamental right to human dignity and respect for his person (body). The offence of rape depicts torture and inhumane treatment, hence the constitution prohibits the offence of rape indirectly without categorically naming it as such; this is because inhumane treatment can manifest in different forms other than rape.

By way of legal and statutory definition, Section 357 of the Criminal Code Act applicable in the Southern part of Nigeria, in defining rape states:

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[4] (2007) 8 NNWLR pt (1035) 182-183) See also: *Jegede v the state* (2001) 7 SCNJ 135 at 141.

> "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."

Section 357 of the Criminal Code appears to be restrictive in defining rape. First and foremost, it defines rape as unlawful carnal knowledge of a woman or girl without her consent or... That is to say that in the view of Section 357 of the Criminal Code, it is only women and girls that could be victims of rape, while men are the culprits and perpetrators of rape. The section did not consider the possibility of anal or oral rape against the victim. Secondly, the section sees the penis as the only instrument/object that could be used in the commission of the crime of rape without adverting its legal mind to the use of any other objects/instruments such as hand or an object.

According to section 6 of the Criminal Code, the offence of rape is complete upon penetration, and unlawful carnal knowledge is one which takes place otherwise than between husband and wife. Section 6 is simply in alliance with section 357 of the same Criminal Code. Under the code, the punishment for the offence of rape is imprisonment for life[5],

[5] Section 358 of the Criminal Code.

the challenge is how many times have courts applied the life imprisonment punishment in rape cases.

Aside the Criminal Code, Section 282 of the Penal Code applicable in the Northern part of Nigeria provides thus:

> "(1) A man is said to commit rape who … has sexual intercourse with a woman in any of the following circumstances:- (a) against her will; (b)without her consent; (c) with her consent, when her consent has been obtained by putting her in fear of death or 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 the 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. (2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty

The above two definitions presume that rape is only penetration of a vagina by a penis and without including men as possible victims of rape and without considering women and girls who may have been penetrated orally or anally by the penis or who may have been raped by use of an object other than the penis.

However, Section 1 of the Violence Against Persons (Prohibition) Act, 2015 rather proffers a more balanced and all inclusive definition of rape in line with contemporary

happenings and definitions in other jurisdictions. The Act provides:

> "(1) A person commits the offence of rape if- 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; the other person does not consent to the penetration; or 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 or her spouse."

The VAPP Act in defining rape in Section 1, criminalized among other things consent obtained by *fraudulent representation as to the nature of the act.* Any legal minds may curiously wonder what could constitute or amount to fraudulent representation as to the nature of the act of sex or sexual intercourse. It is submitted that a situation whereby a choir director obtained the consent of a chorister to have sex with her by convincing her that the act of sexual intercourse with him will help to improve and enhance the chorister's voice so that she becomes the best singer among the choir or she begins to sing better after the act, amounts to "fraudulent representation as to the nature of the act". Good voice is natural and a not too good voice is only improved through voice training. Research has not proved otherwise or that sex enhances one's voice. Furthermore, a situation whereby a man

obtained the consent of a young girl to have sex with her by convincing her that sexual intercourse with him will help to increase the size of her breast, will certainly amount to "fraudulent representation as to the nature of the act." Research has proved that sex does not change the size of the breast because there is no connection between body growth and sex. Puberty is what causes your body to change in size and shape. It is possible that some women started having sex around the time those changes were taking place in their bodies and so they may have thought that it was the sex they had that caused those changes. It is not. It was just a mere coincidence. However, pregnancy which results from sex can cause changes in a woman's body. During pregnancy of course, hormones cause the breast to approximately double in size and other changes occur[6].

There is also the possibility of misinterpreting Section 1 of the Violence Against Persons (Prohibition) (VAPP) Act, as recognising spousal rape in Nigeria. This research does not associate with such interpretation and will further decline to read into The VAPP enactment words which are not to be found there and which will alter its operative effect[7]. The VAPP Act is categorical in criminalising acts it wished to criminalize and in involving parts of the body it intended to involve in the definition process. A husband cannot be guilty of rape of her wife, though he can be guilty of indecent assault

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[6] Amy; Planned Parenthood Federation of America, https://www. PlannedParenthood.org. Access 27 June, 2023.

[7] See: West Derby Union Vs .Metropolitan Life Assurance Society (1897) A.C. 647 per Lord Hershall at p. 655

on her. This is because both of them *ab initio* had exchanged consent to have conjugal relationship at marriage. That marriage contract is an implied consent to sexual intercourse and that consent can only be withdrawn upon dissolution of the marriage or judicial separation.

Section 1 of the Violence Against Persons (Prohibition) (VAPP) Act, 2015 has in very notable and commendable ways affected and re-defined the offence of rape as provided under sections 357 of the Criminal Code and 282 of the Penal Code. The VAPP has expanded the meaning of rape and its prohibition thereof. While the Criminal and Penal Code and other existing laws limited their scope of rape to protect only females in relation to vaginal penetration without consent, the VAPP Act has taken a giant stride to expand the meaning and scope of rape so that women, girls and men can be victims as well as be perpetrators of rape. The issue of rape being gender biased has been a jurisprudential issue because earlier definitions did not recognise situations where a man could be raped. With the VAPP Act rape is no longer only penetration of the vagina, it includes anus or mouth of another person with any other part of his or her body or anything else within the definition provided by the VAPP Act. Thus, any part of the body, even objects other than penis can be used as an instrument for rape. Interestingly, the VAPP Act has increased the minimum penalty for rape to 12 years or more but not less than that. Progressively too, the VAPP Act recognises the rights of the victims of rape to financial compensation. This will be discussed in detail in this research.

In some other jurisdictions, for example section 1 of the UK Sexual Offences Act (2003),[8] rape is defined thus:

> (1) A person (A) commits an offence if: (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents.
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> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain, whether B consents…
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> (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

The Department of Justice in the US defines rape as: *"Penetration, no matter how slight, of the vagina or anus with anybody part or object, or oral penetration by a sex organ of another person, without the consent of the victim".*[9]
The US and UK's definitions of rape similarly show that the offence can be committed by a man, or a woman where there is conspiracy.

Under The Rome Statute, rape is an international crime. It is a crime against humanity under Article 7(1) (g) and a war crime

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[8] United kingdom.

[9] Michael Joseph and Toluwani Bamigboje: Rape under the Nigerian Laws and the need for Amendment, https://legalpediaonline.com/rape-under-the-nigerian-laws, Accessed 12/12/2022.

under Article 8^2 (2)(xxii). In the Elements of the crime[10], the Statute defines the crime against humanity of rape thus:

> "1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent."

These definitions seem to be more in tune with modern development which shows that the crime of rape is no longer gender based but now a unisex offence in the sense that both male and female could be victims and perpetrators of rape as well[11]. Nonetheless, in spite of the all inclusive definition of rape according to the VAPP, The Rome Statute and other foreign laws, the female gender remains more vulnerable than their male counterpart. The fact remains that this contemporary, all inclusive definition of rape [12] has

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[10] Article 7(1)(g)-1

[11] Section 1 of the Violence against Persons (Prohibition) Act, 2015.

[12] Section 1 of the Violence against Persons (Prohibition) Act (VAPP), 2015.We shall dwell on this in the later page of this work.

automatically changed the traditional definition of rape provided by some statutes.[13] Thus, the act of having a carnal knowledge of a person without his/her consent forms the *actus reus* of the offence of rape. By virtue of section 6 of the Criminal Code, carnal knowledge is complete upon penetration, however slight. On the other hand, the intention to have sexual intercourse with the victim (a woman, a girl or man) without the victim's consent is the *mens rea* in the offence of rape. To establish the offence of rape, the prosecution must prove the mental element that the accused not only intended to penetrate the victim, but knew that the victim was not consenting to it or was reckless as to whether the victim was consenting or not. Therefore, *actus reus* plus the guilty mind and lack of valid defence makes the man guilty. The criminal intention of an offender is necessary to prove his guilt in a criminal trial. The prosecution must prove beyond reasonable doubt that the defendant committed the offence with a culpable state of mind. In *Regina v Prince*[14] where the defendant took an underage girl out of the possession of her father and reasonably believed that she was over age of consent. The Court per Lord Barnwell held that the fact that the defendant's conduct was generally immoral was sufficient to find that the defendant had the *mens rea necessary* for criminal liability. We beg to disagree with the court. Criminal liability is not determined by the morality or immorality of an act. A man may have *mens rea* as it is generally understood, without

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[13] Section 357 of the Criminal Code Act applicable in the Southern part of Nigeria; Section 282 of the Penal Code which is applicable in the Northern part of Nigeria.

[14] (1875)LR 2 CCR. 154

any feeling of guilt on his part. He may indeed be acting with a perfect clear conscience believing his act to be morally and even legally right and yet be held to have *mens rea.* However, the fact remains, that one who breaks the law with a good motive or for conscientious reasons or from religious belief still commits a crime.[15] In the Nigerian case of *Abeke v state*[16] *mens rea* was defined simply as a guilty mind, the state of mind that the accused person must possess at the time of performing whatever conduct and requirement that are stated in the *actus reus*[17]. Thus, the fact that Mr. Prince's conduct was generally immoral was not sufficient to find that the defendant had the *mens rea necessary* for criminal liability.

There could be various forms of rape depending on the nature of the act and the occasion wherein the act occurred. It could be date rape[18], power rape,[19] gang rape, retaliatory rape or sadistic rape. A retaliatory rape which is a manifestation of anger involves expression of hatred and rage towards the victim. In sadistic rape, the rapist in this case is obsessed and forces the victim to act out a part in some sort of role-play, it

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15 See *R v Heron* (1982) 1 All ER 993, See also G Williams, *Salmond on Jurisprudence* 11th Ed. (London: sweet & Maxwell, 1957) 72.

16 (2007) 1 NWLR (pt. 1040) 411 at 429-430)

17 *Ibikunle v state* (2005) 1NWLR (Part 907) 387 at 409-410

18 A date rape is a type of rape in which the individuals have agreed on social engagement with each other. The assailant may be an acquaintance or a person the victim has been dating.

19 A power rapist rather wants to capture, conquer and control his victim. Gang rape is when a group of people participate in the rape of a single victim. This is more devastating to the victim. E Jean Carroll v Donald Trump, U.S Times. May 10, 23.

could involve mutilation, or torture as a means of getting the rapist excited[20].The fact remains that rape is the violation of the personality of its victim which is always traumatic and devastating on the victim. It is an infringement on the victim's rights to privacy, self-preservation and dignity. Therefore, perpetrators of this ugly crime deserve to be severely punished.

3.0 Aim of punishment in criminal law.

Punishment according to the Black's Law Dictionary[21] is a sanction such as a fine, penalty, confinement or loss of property, right or privilege assessed against a person who has violated the law. Both moral blame and legal punishment are social reactions to defiance of social standards or the moral code. Punishment in all its forms is a loss of rights or advantages consequent on a breach of law.[22]

According to H.L.A. Hart, the general philosophy of punishment is that punishment must involve pain or other consequences normally considered unpleasant. It must be for an offence against legal rule and must be for an actual or supposed offender for his offence. It must be intentionally administered by human beings other than the offender; and must be imposed and administered by an authority constituted

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[20] Michael Joseph and Toluwani Bamigboje, Rape under the Nigerian Laws and the need for Amendment, https://legalpediaonline.com/rape-under-the-nigerian-laws, Accessed 12/12/2022.

[21] B. A Garner, Black's Law Dictionary, 9th Ed (West Group St. Paul Minn, 1999) 1247.

[22] Glanville Williams, *Criminal Law*, 2nd edn. (1961) 575.

by a legal system against which the offence is committed[23]. Without delving into the rigours of types of punishment and the different schools of thought on punishment, the aim of punishment may not necessarily be to punish the criminal for committing a crime but that crimes may not be committed. It was George Savile, who once said that "men are not hanged for stealing horses, but that horses may not be stolen"[24] There are usually two major purposes of punishment namely retributive[25] and utilitarian [26] purposes. However, it is submitted that punishment could as well serve both retributive and utilitarian purpose at the same time especially in capital punishment. Unfortunately, rape is not a capital offence. In *R v Nnameri*[27] the accused raped a 13year old girl who bled to death as a result of injuries at the walls of her virgina by the act of intercourse. He was charged with murder under section 316(3) of the Criminal Code but was convicted of manslaughter on the ground that his conduct was not such as to endanger human life. The court relied on the medical evidence which showed that it is not unusual in Nigeria for 13year old girls to have

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[23] H.L.A. Hart, Punishment and Responsibility (Oxford: Clarendon Press, 1968) 3.

[24] First Marquis of Halifax. And a British Statesman and writer. See also Glanville Williams, *Textbook of Criminal Law* (London: Steven & Sons, 1983) 37.

[25] This is an eye for an eye and a tooth for a tooth concept, it is revengeful.

[26] In this concept the that the purpose of punishment is either to deter the public from committing the same offence of to deter the offender from committing the same crime again. See: *Hassan & Owolabi v. Queen.*(1961) 1 All NLR 654. It advocates for Rehabilitation and reformation of the offender.

[27] (1951) 20 NLR 6.

sexual intercourse and that it does not result in death. The court relied on section 316(3) of the Criminal Code for its decision, but maintained that the act of sexual intercourse was not enough to endanger human life. The court would have probably decided otherwise and convicted the accused of murder under section 316(3) of the Code if it were a three year old girl. The act and the purpose has to be one and the same capable of causing death[28]. If the accused had throttled and pressed the girl's throat to prevent her from screaming, it would have been a case of murder. This is because the unlawful purpose is rape and the act which caused death is the act of throttling her throat to enable him perform the unlawful purpose which is rape, provided that the pressure applied is such that is likely to endanger human life.

Section 17 of the Criminal Code [29] acknowledges such punishments as death sentence, imprisonment, whipping, fine and forfeiture as may be inflicted on an offender depending on the nature of the offence and the prescribed punishment. Punishment could be for general deterrence, specific deterrence, rehabilitation and reformation or for social protection. As a general deterrence, punishment aims at societal protection, deterring prospective offenders from committing the same crime. Where an offence is prevalent, it is the mind of the court that severity of sentences imposed will

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[28] See also: C. O. Okonkwo; *Okonkwo and Naish on Criminal Law in Nigeria* , 2NDedn. (Ibadan: Spectrum Law Publishing, 2000) 236.

[29] The Criminal Code Schedule to the Criminal Code Act. Cap. C38 *Laws of the Federation of Nigeria (LFN) 2004*, applicable to Southern Nigeria, (to be herein referred to as the C. C) s. 17.

aid in stamping out the crime. For example, in *Hassan & Owolabi v. Queen*[30] the court held that 'Frauds on the customs are shockingly prevalent and the forgery of commercial documents strikes at the root of all credit; we are not disposed to reduce the sentence by one day as in *State v Michal Ayegbeni*[31]. Thus, the prevalence of a crime in the society is an aggravating factor to be considered in sentencing and punishing offenders. On the other hand when punishment, is applied for specific deterrence, it aims at deterring the offender from indulging in such crime in future after serving the punishment or after release. The aim could also be for the rehabilitation and reformation of the offender for better re-integration into the society. In this way, adequate punishment on offenders could be an instrument for achieving social order and societal protection.

Consequently, every trial court has the inherent power to impose punishment on an accused person standing trial before it, where the accused is found guilty at the conclusion of the trial.[32] In imposing punishment, the court is bound by the provision of the law that created the offence and therefore must consider the punishment prescribed by that law for the offence and cannot go outside the law except where the law states otherwise. There are some offences that carry mandatory sentence e.g. the capital offences. In that case, the trial court

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30 (1961) 1 All NLR 654

31 *State v Michael Ayegbeni*, charge No. U/7C/78 High Court Ubiaja, unreported.

32 Section 402, 417 of the Administration of Criminal Justice Act, 2015, (this is similar to section 367(2) of the repealed CPA and 273 of the CPC).

has no discretion to exercise. The court has to impose the mandatory punishment prescribed by law[33]. Rape is not a capital offence. However, while the Criminal antecedent of the offender[34]; the nature of the offence[35]; the prevalence of the offence in the society[36]; the degree of violence, ruthlessness or otherwise of harm done and Lack of remorse from the offender could aggravate punishment, the age of the offender, [37] status of offender in criminality[38], provocation, plea of guilty, lack of prevalence[39], good work record, family tie etc, could as well mitigate punishment. Indeed, the world would have been a theatre of terror if there is no provision for punishment for crimes.

4.0 The Criminal Justice Process and the Guidelines in Sentencing in Rape Cases

Fundamentally, criminal justice exists for the control and prevention of crimes. The criminal justice process involves all the agencies and procedures set up to manage both crimes and those accused of violating the criminal law.[40] The criminal justice process cannot be conveniently discussed without reference to the criminal justice system since the process takes place within the system. While the criminal justice process

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33 E.g death sentence in murder and arm robbery.

34 *State v Elijah Obi* (1957) WRNLR 91

35 *State v Adebayo*, (1965)2 All NLR 62.

36 *Okoro v The State* (1965) 1 All NLR 283, *Denis & 7ors v The State*.

37 *State v Adeyeye and Anor*, section 30 of the criminal code, Section 2 Children and Young Persons Act, 1946.

38 e.g being a first offender.

39 *Onyilokwu v COP The State*,(1981)2 NCR 49

40 J. A. Inciardi, Criminal *Justice*, 7th ed. (Boston: McGraw Hill, 2004) 139.

involves series of steps beginning with a complaint or information of crime commission, followed by a criminal investigation and arrest, prosecution processes and ending with a probable acquittal/discharge or the release of a convicted offender after serving his term or even the execution of an offender where applicable[41]. The criminal justice system is the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system is made up of the law enforcement, the judicial process and corrections.[42]

According to Reid the accused, like a product goes from station to station in the system, and at each station something is done in the system and something is done to the accused. If the accused "passes" inspection, he/she moves on to the next station. Theoretically, if the accused goes through the entire system and "passes" he/she is ready to return to society.[43] The criminal justice system is the major meeting place of the police and the citizen, and it is here that the clash between the exercise of police powers and the claim of rights by the citizen occurs. Ordinarily, without applying the law yet, everyone in the society is presumed innocent until the person commits a crime or is accused of one. But legally speaking, it is trite that an

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41 *Ibid.,* p. 381

42 *Blacks Law Dictionary*, supra, 381

43 S. T. Reid, *Crime and Criminology*, (Hinsdale Illinois: The Dryden Press, 1976) p. 260 (cited in G. O. S, Amadi, *Police Powers and the Rights of Citizens in the Nigeria Criminal Justice System*, Unpublished Ph.D. Thesis, Faculty of Law, University of Nigeria. (1993) 32 – 33

accused is presumed innocent until proven guilty.[44] As such in Nigeria, the criminal justice process within the system is set on motion the moment a complaint is made to the police by the society or any member of the society or by the police on its own detecting the commission of a crime.[45] Then the accused/suspect is ready for "processing" in the words of Reid. He/she may or may not go through the process of prosecution depending on the outcome of the investigation and his involvement in the alleged crime. Nevertheless, the police lawyer can prosecute,[46]subject to constitutional provision[47]. The accused may even obtain a *nolle prosequi* or withdrawal of charge by the Attorney-General as the case may be, which power overrides that of the police or the private person to prosecute and it is not subject to control by the court.[48] However, although the police have no power to enter a *nolle prosequi*, they can always if circumstance warrants, withdraw their charges from the Court. When any of these exculpating circumstances take place, the accused is free to leave the system and return to the society. Nonetheless, a *nolle prosequi*

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[44] The Constitution of the Federal Republic of Nigeria 1999 as amended, S. 36 (5).

[45] M.C. Onuegbulam, 'Extrajudicial illing and its Challenges to the Nigerian Criminal Justice System' (unpublished Dissertation, Faculty of Law, UNEC, 2013).

[46] The Nigerian Police Act , 2020, Act. No.2, S. 66,

[47] Ss. 174, 211, which relates to the power of the Attorney-General of the Federation and the state as the case may be, to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria except the court martial.

[48] *R v Comptroller of Patents* (1899) 1 Q. B 909 at 914, *State v Ilori* (1983) 1 SCNLR 94.

or withdrawal of a charge is not equivalent to an acquittal, and it is no bar to a new indictment or charge for the same offence[49]. Of course, crimes are not statute barred including the offence of rape[50], and so the accused may be brought back into the criminal justice system if the need arises. Where the accused is found guilty and is sentenced to a prison term, he/she is institutionalised for the process of reformation and rehabilitation before he/she gets back to the society[51]. However, where the accused gets convicted and receives a capital punishment, in the words of Amadi, "the process of reformation and rehabilitation becomes a non-issue since eventually; he/she will be hanged or executed as the case may be or may remain in the prison for life. Yet if given a reprieve, he/she still has a chance of leaving the system and returning to the society.

Sentencing is the very last stage in the administration of criminal justice in court. It is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence. It is the pronouncement by the court or judge upon the defendant after his conviction in criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration or probation. It means the prescription of

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[49] *Clark & Anor v A. G. Lagos State* (1986) 1 QLRN 119. In that case the court held inter alia that the effect of a *nolleproseque* is a mere discharge and not an acquittal. See also the Constitution of the Federal Republic of Nigeria 1999 as amended, S. 36 (9).

[50] The criminal Code (Amendment) Bill 2019, Clause 2 which amended S .218 of the Principal Act.

[51] M.C Onuegbulam, supra 48.

a particular punishment by a court to someone convicted of a crime[52]. In *Walden v Hensler*[53] the courts held that the chief purpose of criminal sentence is to deter those who are tempted to breach its provisions. Thus, sentence and punishment are interrelated but while sentence is the pronouncement of punishment by the court upon the accused, punishment is the pain legally inflicted on the accused for his crime. In serious offences such as rape, it is reasonably expected that adequate sentence and punishment should be administered to the offender at least to serve as deterrence for prospective offenders and accord the devastated victim the closure she/he desires notwithstanding that the deed is irreversible and irredeemable. However, the reverse is often the case. Often times in rape cases, courts rather pronounce sentences that are rather embarrassing and disappointing. At other times, the decision of the court rather imposes additional burden of proof on the prosecution.

In *Okoyomon v The State*[54] the prosecutrix testified that she went to the bush to fetch firewood and as they were there, the accused met them and told her to follow him so that he will show her a spot where there was a lot of firewood. She followed him. On getting to the spot he threw her down and had carnal knowledge of her. They were still in that position when PW1 saw them, the accused got up, pulled up his shorts

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[52] Leonard C. Opara**,** "The Law and Policy in Criminal Justice System and Sentencing in Nigeria" International Journal of Asian Social Science, 2014, 4(7): 886-897

[53] (1987) 163 CLR 561.

[54] (1973) NMLR 292.

and left. It was reported to the police and medical examination was conducted, it was discovered then that the hymen was broken and she had offensive vaginal discharge. The accused denied the allegation. The trial court found him guilty of rape upon the evidence available before the court and sentenced him to four years imprisonment with hard labour. The Court of Appeal affirmed the decision. On further appeal, the Supreme Court in a dramatic summersault reversed the decision of both lower courts and held among other things that the prosecution had not established that there was penetration; that it was not enough to find that the prosecutrix had a venereal disease, that the doctor should have examined the accused person to find out if he had the same type of venereal disease; that there should have been medical examination as to how long the pw4's hymen had been torn and by whom;[55]that the evidence of pw1 has only a limited probative value in corroborating the prosecutrix story that the accused was on top of her, but not as corroborating the actual act of penetration.

However, in *Upahor v The State*[56], the appellants were charged with the offences of conspiracy to commit rape and abetment of rape. The prosecution's case was that on the fateful day, the prosecutrix, then 12years old was returning from stream where she went to fetch water. She met the appellants who forcibly removed the water she was carrying, pushed her inside the bush and the 1st appellant forcibly had carnal knowledge of her with

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55 This is unlike *Upahar v The State* (2003) 6 NWLR (Pt. 816) 230. See also: Joy Ngozi Ezeilo; Women, Law and Human Rights, Global and National Perspective (Enugu: ACENA Publishers, 2011) 338.

56 (2003) 6 NWLR (Pt. 816) 230

the assistance of the 2nd appellant who held her legs apart to allow the 1st appellant's penis into her vagina. The appellants also put sand in her mouth to stop her from crying out or protesting. While they were in this position, PW2 who was going to his farm heard the voice of someone crying in the bush and moved toward that direction. To his greatest dismay he met the 1st appellant on top of the prosecutrix copulating with her without her consent. When the appellants sighted him, they ran away. The appellants denied the allegation in court of course but the trial court found the appellants guilty as charged on the evidence before them. The Court of Appeal upheld the decision of the trial court and held that befitting punishment must be meted out to persons who defile and degrade womanhood and in particular, the ever so helpless girl-child. This will act as a deterrent to others.

Certainly, the above decision is far more soothing and assuring without resorting to unnecessary technicalities which could possibly neutralize functional justice. It sent a message across to the society condemning the act, the perpetrator has been adequately punished and the victim at least received psychological compensation. Without any monetary compensation, the victim must have had at least a feeling of closure that the very person who inflicted pain on her for no reason has been punished by the state. Such closure is enough to the victim the courage to manage his or her broken self. This is the three-way traffic of justice according to Oputa, JSC (of blessed memory). Justice for the society, for the victim and even for the accused. Justice for the accused person is that he/she receives just punishment for their crime.

Rape is generally regarded as the most grievous of all the sexual offences. It involves a severe degree of emotional and psychological trauma; and may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe, coupled with the actual physical harm occasioned by the act of intercourse, associated violence or force and in some cases degradation. After the event, apart from the victim's continuing insecurity, there is the fear of venereal disease or pregnancy for female victims. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and victim. Much importance is also attached to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another[57] and to which the society attaches considerable value.

The English court in *R v Roberts*[58] held that rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances. The sort of exceptional circumstances in which a non-custodial sentence may be appropriate are illustrated by the judicial decision in *R v Taylor*[59] as discussed in this work. There are several variable factors that make it difficult to lay down guidelines as to the proper length of sentence in terms of years. The English Court

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[57] 15th Criminal Law Revision Committee's Report on Sexual Offences, Command Paper 9213 of 1984, which reflects accurately the views of this Court.

[58] (1982) 4 Cr. App. R. (S) 8,

[59] (1983) 5 Cr. App. R. (S) 241.

in the case of *R v Roberts and Roberts*[60] presided over by Lord Lane, C J, made a remarkable attempt and laid down general guidelines as to sentencing for rape and held thus:

Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence. . . . A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly, to emphasise public disapproval. Thirdly, to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case.

This research fully associates with the above court's decision in *R v Roberts*[61]. Considering the heinous nature of the offence of rape and its consequent lasting negative effect, any punishment less than a custodial sentence of at least 5 years is not adequate for punishing a rape offender. A rapist is a menace to the society and should be kept away from his/her prey for sometime for safekeeping of his/her victims and for his/her rehabilitation. In fact, the offender should proceed to a designated center for rehabilitation and counseling session. Rape experiences have caused most of its victims their marriages. So much so that they do not see meaning in conjugal relationship in marriage and as long as this experience lasts, their marriage partners remain in torture for lack of

[60] [1982] 4 Cr App R (S) 8.

[61] Supra.

consummation in their marriage while the victims remain in frustration and brokenness.

Aside the guidelines, Lord Lane identified a considerable number of features which could aggravate punishment for the crime. In another case of *R v Billam*,[62] he reaffirmed the earlier decision in *R v Roberts*[63]. In *R v Billam*[64] Lord Lane C.J, set out more extensive guidelines for sentencing for offences of rape based on four separate starting points which reflect their different levels of seriousness. The court held that for rape committed by an adult without any aggravating or mitigating features, a figure of five years imprisonment should be taken as the starting point in a contested case. Where rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years. The defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls, represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate. The court further held that where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

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62 (1986) 8 Cr App R (S) 48.

63 Supra.

64 (1986])8 Cr App R (S) 48

The Sentencing Advisory Panel to the court proposed three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk proposed by the offender to society.[65]The court considered it right to act on that advice. Thus, in *R v Millberry*,[66] the panel retained the basic structure established in *R v Billam* as stated above, though with some significant modifications to take account of both new legislation and changes[67] in the nature of the offence since the existing guidelines.

According to the court[68], rape should in any event be treated as aggravated where violence is used over and above the force necessary to commit the rape; a weapon is used to frighten or wound the victim; the rape is repeated; the rape has been

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65 Sentencing Advisory Panel, England and Wales Court of Appeal (Criminal Division) (Dec 9, 2002) Dec 9, 2002

66 [2003] Crim LR 207 [2003] 2 All ER 939 [2003] 1 Cr App Rep 25 [2003] WLR 546

67 The legislative changes since 1986 are the Sexual Offences Act 1993 which under the English court allowed boys under 14 to be convicted of rape; the recognition of marital rape as an offence under the same law, the Criminal Justice and Public Order Act 1994, the recognition of male rape as an offence by s.142 of the 1994 Act English law and s.109 of the Powers of Criminal Courts (Sentencing) Act 2000 (formerly s.2 of the Crime (Sentences) Act 1997, that makes a second conviction for a serious offence (including rape or attempted rape), in the absence of exceptional circumstances, attract an automatic sentence of life imprisonment. See also R v R(1991) 4 All ER 481).

68 England and Wales Court of Appeal (Criminal Division)

carefully planned; the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; the victim is subjected to further sexual indignities or perversions; the victim is either very old or very young; the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point. The court further held that the fact that the victim may be considered to have exposed herself to danger by acting imprudently[69] is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is only of minor relevance.

Lord Lane[70], is of the view that the starting point for attempted rape should normally be less than the punishment for the completed offence of rape, especially if it is desisted at a comparatively early stage. Most offences of rape are so serious that a non-custodial sentence cannot be justified for the purposes of that provision. In the case of a juvenile charged with rape, the court will in most cases exercise the power to order detention under the Children and Young Persons Act 1933[71]. In a case of rape by a juvenile, the parents/guardian of the juvenile should also be held responsible because they failed the juvenile by not according him/her good home training.

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69 For instance by accepting a lift in a car from a stranger.

70 In *R v Billam* (*supra*).

71 Section 53(2). Also the Child's Rights Act.

Rape is an international crime. It is a crime against humanity under Article 7(1) (g) and also a war crime under Article 8[2] (2)(xxii) of the Rome Statute. The International Criminal Court (ICC) Trial Chamber VI on 7 November 2019, found Bosco Ntaganda[72] guilty, beyond reasonable doubt, of 18 counts of war crimes and crimes against humanity, committed in Ituri, DRC, in 2002-2003 including rape. Bosco Ntaganda was sentenced to 30 years of imprisonment on 9 November 2019. This is actually the first time an accused has been convicted by the International Criminal Court over various sexual crimes to show us the gravity of rape as a crime and how abhorrent rape is. According to Fremr J, evidence showed that at least three girls under 15 years who were soldiers in the militia were repeatedly raped. Judges further found that FPLC soldiers raped women and killed some of those who tried to resist the sexual assault. There was the case of a 13-year-old rape victim who underwent years of surgery and developed a long-lasting fear that caused her to drop out of school. Though Ntaganda appealed against the judgment but the Verdict and sentence were confirmed in appeals on 30 March 2021. He is presently in ICC custody.

Though this is commendable, but it is worthy of note that Ntaganda voluntarily submitted himself to justice through US

[72] A former Congolese rebel leader. Among his charges were murder, rape, sexual slavery and enlisting and recruiting children under the age of 15 who served within the *Forces Patriotiques pour la Libération du Congo* FPLC (Patriotic Forces for the Liberation of Congo) to actively participate in hostilities.

embassy in Rwanda. Several women, girls and some men across the globe, have been victims of rape and their many perpetrators which should be under the ICC's net for prosecution are moving freely around the world, they have neither been indicted nor are they presently undergoing prosecution. This is a call on the ICC to double its effort toward prosecuting perpetrators of these crimes as deterrence to future perpetrators of same crime. It is not complimentary that since the history of the ICC, It is only one person who merely and voluntarily submitted himself to justice that has been successfully prosecuted, convicted and sentenced for sexual offences he committed among other crimes.

Under the Nigerian law, section 6 of the Criminal Code states that "when the term" carnal knowledge "or the term "carnal connection" is used in defining an offence, it is implied that the offence, so far as regards that element of it, is complete upon penetration."

Section 218 of the Criminal Code provides that:

> "Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning. Any person who attempts to have unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for fourteen years, with or without caning. A prosecution for either of the offences defined in this section shall 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.

However, the Criminal Code Act (Amendment) Bill, 2019 section 2 in an attempt to amend section 218 of the Principal Act tried to remove the limitation period to read thus: "section 218 of the Principal Act is amended by deleting in line 5 the words; "A prosecution for either of the offences defined in this section shall be commenced within two months from the date the offence is committed" This is still in the making process.

Section 357 of the Criminal Code in defining rape provides that:

> "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 impersonating her husband, is guilty of an offence which is called rape".

According to section 358 of the Criminal Code, anyone who commits the offence of rape is liable to imprisonment for live, with or without caning. It is worthy of note that under section 359 of the same Code, an attempt to commit the offence of rape is a felony and attracts a liability of fourteen years imprisonment with or without caning. Notably, there are

remarkable differences between section 358 of the Criminal Code and section 1 of the VAAP Act in defining the offence of rape. These issues will be discussed in detail shortly but suffice it to say that the Criminal Code defined rape in the context of a natural world devoid of unprecedented phenomena, complexities and complications unlike the VAPP Act that is both comprehensive and, hence, for the code only a female could be raped. The code never contemplated or imagined a situation where a man could be sexually violated or raped or even be a vulnerable adult before a woman. Women have always been known as the weaker sex. However, section 1 of the VAPP Act seems to say that circumstance can determine which sex is "the weaker one" depending on the context. The VAPP Act has brought us to the reality of a world where men can become sexually vulnerable before a woman. The Act is a new awakening to the emergence, and reality of a world with such unusual complexities.

Under section 282 of the Penal Code, a man is said to commit rape who has sexual intercourse with a woman in any of the following circumstances-

> Against her will; without her consent; with her consent, when her consent has been obtained by putting her in fear of death or hurt;
> 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;

> With or without her consent, when she is under fourteen years of age or of unsound mind.

A further interpretation of section 282 (e) of the Penal Code will reveal that marriage as from the age of fourteen years for a girl-child is not child marriage in the Northern states where the Penal Code operates. Section 282 (e) of the Penal Code certainly offends Article 1 of the Convention on the Rights of the Child[73], The Child's Rights Act[74] and the Administration of Criminal Justice Act 2015[75]. Article 1 of the Convention on the Rights of the Child in defining a child states: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.' Nigeria has ratified this convention.[76] The Child's Rights Act[77] provides that:

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[73] The United Nations Convention on the Rights of the Child 1989. This is commonly abbreviated as CRC OR UNCRC). It is a human right treaty which sets out the civil, political, economic, social, health and cultural rights of children. It was adopted on 20 November 1989 but came into force on 2 September 1990. Currently 196 countries are parties to it including every member of the United Nations except the United States. See: United Nations General Assembly Session 44 Resolution 25. *www.Convention-on-the-Rights-of–the-Child- A/RES/44/25, 20 November 1989. Accessed 18 April 2023.*

[74] Section 31 LFN 2003.

[75] S 494 (1).

[76] Nigerian government ratified it on 19 April 1991. It has been domesticated hence Child Right's Act 2003. The Act has been adopted in about 26 states in Nigeria.

[77] Section 31 LFN 2003.

> No person shall have sexual intercourse with a child; A person who contravenes the above provision commits an offence of rape and is liable on conviction to imprisonment for life; where a person is charged with an offence under this section, it is immaterial that the offender believed the person to be of or above the age of eighteen years; or the sexual intercourse was with the consent of the child.

In the main, the Administration of Criminal Justice Act 2015[78] defines a child as a person who has not attained the age of eighteen years.

Although, it can be argued that most Northern States where the Penal Code is operative, have not adopted The Child's Rights Act and the Administration of Criminal Justice Act 2015 which are Federal Laws, it should be understood that the intendment of these laws is to protect the girl-child from physical, emotional and psychological abuse and to enhance their normal development. Exposing a child of 14 years to sexual intercourse will be traumatic for her and her age. Therefore, these Northern States should have a rethink and adopt both the Child's Rights Act and the Administration of Criminal Justice Act 2015 for better protection of the Nigerian girl- child.

Nonetheless, Section 1(1) of the Violence Against Persons (Prohibition) Act (VAPP) 2015 has redefined rape under the Nigerian criminal law jurisprudence to meet up with

[78] S 494 (1).

international best standard definitions, hence the definition is now more gender neutral. In defining rape, the section *inter alia* states that:

> 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; 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 or her spouse.
>
> (2) A person convicted of an offence under subsection (1) of this section is liable to imprisonment for life except –
>
> (a) where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years imprisonment;
>
> (b) in all other cases, to a minimum of 12 years imprisonment without an option of fine; or
>
> (c) in the case of rape by a group of persons, the offenders are liable jointly to a minimum of 20 years imprisonment without an option of fine.

(3) The Court shall also award appropriate compensation to the victim as it may deem fit in the circumstance.

(4) A register for convicted sexual offenders shall be maintained and accessible to the public.

Section 1 of the Violence Against Persons (Prohibition) Act, 2015 has affected and re-defined the offence of rape as provided under section 357 of the Criminal Code in various remarkable ways. Firstly, with Section 1 of the VAPP, both women and men are potential victims of rape. Secondly, any part of the body whether penis, hand or an object could be used as an instrument for rape. Therefore, once any of these is used on the victims vagina, mouth or anus without her consent or with her consent if obtained under conditions stated in section 1(1)(c) of the VAPP, the offence of rape is complete. The section in sub (2) (b) has equally impressively increased the minimum penalty for rape to 12 years or more but not less than 12 years. The VAPP recognises the rights of the victims of rape to financial compensation and in further consideration provides that rapists when convicted will have their details entered into a sex offenders' register[79] for public use.

This article appreciates the VAPP for the bold step it took in the dark in expanding the borders of victims of rape to include both male and female, the impressive increase of the minimum penalty for rape to 12 years or more but not less than 12 years. Recognition is also given to the rights of the victims of rape to

[79] Section 1(4) of the VAPP.

financial compensation among other things. It is no longer recondite that anybody whether male or female could be a victim of rape as well as a perpetrator of the same crime. Obviously, the main justification for mandatory minimum sentences for rape by the VAPP Act, is to try to ensure that the sentences imposed fully reflect the gravity of the offence. The VAPP Act, is wise. It is submitted that prescribing for the maximum sentence only, will amount to leaving the courts to decide on a case by case basis what sentence to impose up to the maximum is appropriate. Such will encourage a lot of inconsistencies in the sentences handed down by different judicial officers. Therefore, the VAPP Act's mandatory minimum sentences is a welcome development[80], more so when there is a public perception and outcry that some judicial officers are imposing woefully inadequate sentences for serious crimes, such as rape. It beats every reasonable man's imagination how a normal court will come up with such decisions as in the cases of *State v Bolivia Osigbemhe,*[81] *The State v Ndewenu Posu*[82] and several other similar decisions from other jurisdictions which will be discussed in this research. It is simply absurd. The high incidence of rape and its devastating effects on victims has led to demands for far harsher sentences to be imposed on perpetrators to serve justice and avail victims closure.

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80 Countries such as South Africa, Tanzania, Kenya and Lesotho have similar legislative provisions.

81 HAU/10C/78C (Unreported Decision of the High Court of Auchi).

82 (2011) 3NWLR (Pt.1234) 393.

However, while this research appreciates the VAPP for the attempt in providing for financial compensation of rape victims, it is most unfortunate and appalling to realise that no amount of compensation whether financial or otherwise can restore the victim's violated walls of personality already broken by the perpetrator. It is unfortunately an irreparable loss. The only possible consolation a victim of rape may anchor on is the closure of seeing justice being served on the perpetrator by imposing adequate sentence/punishment for his/her crime. This is why it is most inhuman and callous for any member of the judiciary who is opportune as a judge to give this justice to a rape victim in proved cases to deny him/her the same justice on grounds of mere technicalities and so trivialize the case. It is rather most devastating on victims to witness that their pain is being taken for granted by the State when judges rather treat proved rape cases with such levity as if nothing more than the ordinary has happened or as if it is normal. It makes mockery of victim's emotions and abuses justice when inadequate sentence/punishment is being imposed on perpetrators[83] even in the face of laudable aggravating factors.

Despite all these laws already discussed and more, the offence of rape globally and in Nigeria seems to be on the increase. The question on almost every lip is what is the cause of rape? Does it mean that the punishment stipulated for it in the extant laws is not adequate to deter would-be rapist or are there factors which ostensibly offer more incentives for rape than the risk of

[83] *State v Bolivia Osigbemhe (supra).*

its punishment. The latter seems to be the answer since sentencing in most cases are being used as tools either to strengthen or neutralize functional justice in most rape cases.

5.0 Sentencing as a Willing Tool to Strengthen or Neutralize Functional Justice in Rape Cases in Nigeria and the Globe

Every trial court has the power to impose punishment on an accused person found guilty for an offence at the conclusion of the trial including rape cases. Unfortunately, a lot of inconsistencies that have bedeviled sentencing pattern in rape cases, so that often times, the penalty neither fits the crime, nor serves justice on the offender. Hence, most sentences are rather counter-productive in availing a rape victim some closure and in promoting functional justice. While serious offences should not be trivialized by inadequate sentences[84], at the same time, harsh sentences must not be automatically imposed without taking cognisance of the specific circumstances of each case.

Courts, including Magistrates' Courts have always claimed to deliver their judgments in the interest of justice as if the phrase interest of justice is a *carte blanche* or license for an unimpeded exercise of power, even against the law and rules of court. Justice as a concept is not easy to define objectively.

[84] For example cases of rape involving betrayal of trust, people who use their power in pressurizing their victims to submit to sexual relationship against their wishes, Teachers who threaten to fail students unless they allow him/her to have sexual relationship with them against their wishes. Sexual exploitation of young girls by men old enough to be their father or uncle, thieve who break into people's houses to steal and rape the inmates etc.

Justice is done once it is done in accordance with the law and the procedure laid down for its attainment. According to Eso, JSC, in *Willoughby v I.M.B. Ltd*[85], to leave the attainment of justice at large and ignore the rules is to establish a subjective course of action which could lead to judicial tyranny and the omnipotence of individual judges. Surely, such course will end in chaos and certainly not an attainment of interest of justice according to the law of the land.[86] Though justice may be said to be amorphous, but it is axiomatic that the multiple facets of justice were aptly captured by His Lordship Chukwudifu Oputa, JSC[87] in *Godwin Josiah v. The State*[88] when he said that Justice is not a one-way traffic. It is not for the appellant alone. Justice is not even a two-way traffic. It is really three-way traffic. Justice for the appellant, accused for the heinous crime of murder, justice for the victim, the murdered man, the 'deceased', whose blood is crying to heaven for vengeance and finally justice, for the society whose social norms and values have been desecrated and broken by the criminal act complained of. Thus, what is justice for the offender and the State, may not be justice for the victim. For justice to be justice therefore, it must meet the needs of the offender, the victim and the society. In criminal trial, sentencing is the final responsibility of a judge after conviction of the accused and this is done according to the law of the land irrespective of exercise of discretion in the absence of mandatory minimum

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85 (1987) 1 NWLR (Pt 48)105 at 118

86 *Willoughby v I.M.B. Ltd.* (1987) 1 NWLR (Pt 48)105 at 118.

87 As he then was, now of blessed memory.

88 The Supreme Court of Nigeria decision delivered on Friday, the 25th day of January, 1985 SC.59/1984.

punishment. Even if there is provision for the exercise of discretion, it is exercised judicially and judiciously within the context of the law.

In the Nigerian case of *State v Bolivia Osigbemhe*,[89] the defendant drove to a motor park in the night and met two stranded girls. He offered to give them a ride in his pick- up van to their sister's residence, assuring them of their safety. Rather than take them to their destination, he drove them into the bush and at gun point raped the girls one after the other, repeatedly after which he asked them to get back into the van and drove off. The girls managed to jump out of the van as he drove sustaining injuries. The defendant drove off with their belongings. The case was charged to court. The two girls narrated their ordeal. In a well proved case of rape, the defendant was convicted of rape but the sentence was rather absurd and ridiculous. Quite alright the trial judge Amissah J. remarked thus:

> The behavior of the accused is outrageous and disgraceful and should be seriously deprecated by any decent society. I will be failing in my duty if the accused is not made to suffer for his barbaric act. It is obvious that his insatiable appetite for sex made him to commit the offence…

Then the learned trial judge in a most embarrassing summersault rather held thus:

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[89] HAU/10C/78C (Unreported Decision of the High Court of Auchi).

> …However, I have been moved by the passionate plea for leniency made on behalf of the accused by the counsel. I sincerely hope that he has learnt his lesson. I will show mercy and give him an option of fine.

After making the above judicial remarks, the judge proceeded to impose a fine of N600.00 (Six Hundred Naira) for the first offence of rape on the first girl and N400.00 (Four Hundred Naira) for the first offence of rape on the second girl. For the second round of rape he cautioned and discharged the accused.

Obviously, Amissah J, will claim that he delivered the above judgment in the interest of justice, but the simple question any reasonable man will ask is where is justice delivered in this case? Where is justice for the victims of rape, for the society and even for the accused? Surely, the accused will never learn any useful lesson from the judgment to help in his reformation or rehabilitation. At most, he will remain a terror to women and the society at large because he will believe that his lawyer will plead again and the judge will have mercy on him. Much as this judgment is insensitive to the pains and assault suffered by the victims, the judgment is not only absurd, but an abuse of rule of law, an affront to justice and dangerous to societal security. It is a judicial rape on justice.

In another Nigerian case of *Ndewenu Posu v The State*[90] D1, D2 and P were walking along a road at 7:30 one evening when

[90] (2011) 3 NWLR (Pt.1234) 393.

they met V, a girl known to them. D1 told her that he had been looking for her for a long time and he had finally caught her. He slapped her, fell her to the ground, tore her dress and pant and raped her while D2 held her hands. When P tried to stop them, D2 gave him a slap. When D1 finished, D2 took his turn and raped her. D1 and D2 were convicted for conspiracy and for rape and sentenced to one year for conspiracy and three years for rape. The defendants appealed against the concurrent decision of both the trial court and Court of Appeal for the offence of rape. On Friday 4th February, 2011, the Supreme Court per Mohammed dismissed the defendant's appeal but decried the light sentence. Mohammed JSC held:

> I have been privileged before today of reading in draft the judgment of my learned brother Galadima JSC which has just been delivered. I agree with him that there is no merit at all in this appeal. I may in fact go further to say that the appeal is frivolous. The fact the Appellants, in a rather militant manner and reckless circumstances, had sexual intercourse by force in turn with the prosecutrix, PW2 without her consent, is quite plain from the oral evidence of PW1 and PW2, the torn pants and dress of the prosecutrix removed by force by the Appellants, Exhibits A and B and the medical evidence showing laceration on the inner thighs, bruises at the entrance to the vagina and semen in the vulva of the prosecutrix. *My only concern is the manner with which the trial court treated the Appellants who committed this very serious*

> *offence by giving them very light sentences. (emphasis mine).* All the same, in the absence of any appeal against the sentence there is nothing that can be done.

Perceiving the lack of justice in the trial court's decision Adekeye, JSC in her opinion stated thus:

> I cannot but remark that the sentencing policy of judicial officers needs to be revisited. The purpose of the criminal law is to prevent harm to the society. The offence of rape is by every standard a grave offence which often leaves the victim traumatised and dehumanised. A light sentence as in the case of the appellants must never be imposed. This may have the unsavoury effect of turning rape into a past-time by our flippant youths.[91]

To think that in the face of section 358 of the Criminal Code as part of the Nigerian legislation the above two cases and other similar ones were decided, makes the courts decisions more absurd and a mere judicial mockery. Obviously, justice is the critical element of any good judgment. No one can propose a better idea of a judgment without justice. In these cases, the accused may have been seen to have justice or little justice but in the eyes of the society these judgment bear no justice. The effect of these ridiculous sentences by judges and magistrates in rape cases is that rape is seriously turning into a part-time

[91] pages 417-418

game among men especially, not minding the horrendous effect on its victims and society.

Recently, a 13-year-old girl was allegedly gang-raped in Kaduna and another 12 year old sexually assaulted in Otukpo, Benue State. The assailants reportedly drugged their victims before raping and dumping her in a car parked outside her home in the Kaduna State capital. In March, 2021 a total number of 91 cases of rape were recorded between January and February in Lagos State only while that of gender-based violence were 127[92] according to the Commissioner of Police report[93]. Premium Times earlier reported how four teenagers all 16 years old gang-raped a girl at the Ejigbo area of Lagos on February 18[94]. Meanwhile, the police commissioner disclosed that a total number of 3,258 cases were charged to court between January and February for different offences. Sad enough, apart from a lesson teacher who was sentenced to life imprisonment for defilement and impregnating a 14 year old pupil[95], nothing positive has been heard about these cases charged to court. While justice should not be slaughtered at the altar of speed, yet justice delayed is of course justice denied.

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92 Ifeoluwa Adediran, 'Lagos records 91 rape cases in two months – Police', PremiumTimeswww.//premiumtimes.com, March 23, 2021

93 Hakeem Odumosu

94 PremiumTimes ibid.

95 He was sentenced by the Special Offence Courts Sexual offences and Domestic Violence Court in Lagos on June 7, 2022. http://everydaynewsngr.net 2022/06/07.. See also

In other jurisdictions, such instances of judicial rape of justice in rape cases abound. In Spain, there was a three-day mass protest in April 2018, over the court's failure to convict five men who gang raped an 18year old girl during the Pamplona bull-running festival in 2016. The men had offered to walk the teenager to her car, but instead they took her to the lobby of a nearby building, attacked her, and then stole her phone. She was found crying on a bench. Videos of the assault shot by the accused were used in court but was negatively interpreted in court as evidence that the victim who stayed still and closed her eyes consented to the act. Based on this, the court held that there had been no violence or intimidation and therefore convicted the men of the lesser charge of sexual abuse[96]. The absurdity in the logic of this judgment is that the court seems to be saying that a victim can't be raped unless she screams and fights back. The court did not consider that a drugged victim of rape is incapable of screaming, resisting or fighting back.[97] This is another instance of judicial rape that seems to be giving rapists incentive and soothing scratch to ride on in impunity.

The above Spanish demonstrations so to say ignited fiery rallies in Ireland as a result of acquittal of two rapists on all charges of the rape and sexual assault of a 19-year-old Belfast student. The woman's underwear had been passed around the courtroom. She was on the stand for eight days, while the men,

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[96] Emer O'Toole, "A global Uprising against rape cases injustice," https://policyoptions.irpp.org/magazines/may-2018/a-global-uprising-against-rape-case-injustices/. accessed 6/12/2022.

[97] In *Jean Caroll v Trump* rape case, U.S Times 10 May 2023, Carroll did not scream but the U,S court awarded $5million Dollars damages in her favour against Trump.

by comparison, testified for a half-day each. According to official statements of the Dublin Rape Crisis Centre,[98] while the men were represented by skilled, experienced Queen's Counsel, the young woman has no legal representation. It was rather a case of the victim standing trial instead of the accused standing trial.

A similar incident occurred in the Indian Asifa Bano's case. The trial of seven men suspects began. Among the alleged perpetrators were a retired government official, two serving police officers, and one boy accused of the rape and murder of an eight-year-old Muslim girl, Asifa Bano, in Kashmir in January.[99] Investigators said that the child was drugged, held captive and raped for days. When police tried to register the charge at the court, they were greeted by a Hindu nationalist mob trying to prevent them. In most rape cases it is often the accuser that is on trial instead of the accused being on trial. More so, research tells us that the chances of a rape victim securing justice is regrettably low. Similar case has earlier happened in 1991, when an Indiana sentencing judge imposed a suspended sentence on a convicted rapist. The court stated that she thought it was obviously non-consensual sex,[100] but she didn't believe it was a violent act as most people think of rape.

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[98] Emer O'Toole, "A global Uprising against rape cases injustice,"https://policyoptions.irpp.org/magazines/may-2018/a-global-uprising-against-rape-case-injustices/. accessed 6/12/2022.

[99] Ibid.

[100] Barb Albert, *Criticism of Rape Sentence Grows*, The Indian, Nov. 9, 1991, at 1.

Elsewhere in America, similar bizarre judgments have been delivered in rape cases. In *People v Guthreau*[101], Kathleen woke up to find Neal Guthreau lying naked and uninvited on her bed beside her. Guthreau was a friend of Kathleen's roommate and often visited the house. Kathleen did not like Guthreau and Guthreau was aware of this fact. When she first realized Guthreau was in the room with her, she demanded that he leave. When she realized he was naked, she tried to run from the scene dressed only in a nightshirt. Guthreau forced her back onto the bed. When she began to scream, he covered her mouth with his hand and told her, "You are going to do what I want you to do." At this point, Kathleen was afraid that Guthreau was going to rape and hurt her. He commanded her to undress, she refused and he began to undress her himself. He commanded her to spread her legs and only after further use of brutal force and the threat of additional force Kathleen acquiesced. That was the beginning of her horror. When Guthreau was unable to perform sexual intercourse because of impotence, he demanded that Kathleen help him. After continued insistence, Kathleen finally reluctantly relented and succumbed to his order to orally copulate with him. Once he was physically able to enter her, Guthreau completed having sexual intercourse with Kathleen. After Guthreau left her room, Kathleen, still only clad in a nightshirt-ran into the street directly into the headlights of a neighbor's car. The neighbor brought Kathleen to her home where she was able to report the rape to the police. Based on these facts, a jury convicted

[101] 102 Cal. App. 3d 436, 439-40 (1980);

Guthreau of forcible rape and oral copulation by force and violence. When the time came for sentencing, the judge ordered Guthreau to a year in the county jail, minus time served and good time, so the sentence amounted to just seven months for forcibly raping a woman. When the prosecutor contacted the probation officer prior to sentencing, the probation officer was reluctant to recommend a prison sentence; the officer's justification was that after all, she wasn't hurt. This is callous and annoying.

Similarly, a Manhattan Supreme Court Justice in 1989 justified a minimal sentence of a rapist with an extensive criminal record on the basis that the victim's rape was not like her being "tortured or chopped up"[102]. A Washington Superior Court Judge sentenced a defendant in a statutory rape case to sixty-seven months for second-degree rape of a child of twelve years old. The sixty-seven months was the minimum penalty the judge could impose under Washington's sentencing guidelines. During the sentencing proceedings, the judge indicated his unwillingness to sentence the defendant to even this minimum, that the defendant's use of alcohol and drugs to extort sex out of the victim did not constitute pressure, and that the law was never intended to protect a tramp[103].

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[102] Lynn Hecht Schafran, 'Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist', 20 *FORDHAM URB. L.J.* 439, 440 (1993) (quoting Rose Marie Arce, *Women Rap Rape Judge,* N.Y. DAILY NEWS**,** Feb. 8, 1989, at 12)

[103] Doug Clark, *Judge's Attitude in Child Rape Betrays Kids,* SPOKESMAN REVIEW (SPOKANE, WASH.), June 11, 1997, at B1.

At other times, rape victims are denied protection from family and the State as well. The rapist is protected especially where he/she is a person of rank in the society and the victim's story is not even believed or he/she is blamed as the cause of the rape incident as if the victim invited the rapist to come and rape him/her. The story of Cherry is quite pathetic[104]. At nine, she was raped by the deacon of their local church. Her parents did not believe her story and warned her never to mention that because of the status of the rapist. Eventually, they saw her pregnant. She had the baby at nine and at 11years of age, she was forced to marry her rapist and by 16 she had six kids for the rapist. According to Sherry, the State of Florida failed her. The school, the hospital, the doctors, even the court knew about her case but no body, not even one person protected her.

In almost all the jurisdictions including Nigeria, there must be corroborative evidence to convict an accused person in rape cases. In *Odofin Bello v State*[105] it was held that corroborative evidence is evidence which shows or tends to show not merely that the crime has been committed but that it was committed by the accused. Considering the serious nature of rape offences, the intricacies and technicalities involved in the trial especially in proving the commission of the crime by the accused, the need to accord the victim closure as a psychological therapy and the need to achieve and strengthen functional justice for societal security, it is submitted that rape cases are cases that should be exclusively within the

[104] Phonix News,https:// i.phx.net. accessed 2July 2023.
[105] (1966) 1 all NLR 223 at 230

jurisdiction of State High Courts to the exclusion of magistrate courts. It is to be handled by well experienced, diligent, skilled judges of integrity who have the general wellbeing of the society at heart. This is because, most times, rape cases have been handled with levity and lack of seriousness at magistrate courts and some High Court judges and which has led to miscarriage and abuse of justice.[106] Presently, under section 372 of the Administration of Criminal Justice Act, the magistrate may for the purposes of ascertaining whether it is expedient to deal with a case summarily, either before or during the hearing of the case, adjourn the case and remand the person charged for a period not exceeding forty-eight hours or release him on bail. It is our submission that forty-eight hours is enough time to have justice miscarried, therefore rape cases should be carefully and skillfully handled by competent and experience judges of the High Court.

6.0 Recommendations and Conclusion.

It is no longer recondite to say that the judiciary is the last hope of the common man. While the executive and legislature are making effort to check rape offences by making new laws such as the VAPP Act, the Anti- Torture Act and sentencing policies on rape offences, the judiciary must show competence and live up to expectation to give hope and succor to the vulnerable common man including rape victims who run to it for closure and justice. Due to indifferent judicial approach to rape cases manifest in improper sentence and punishment on rape offenders, the statistics of fresh rape cases, is steadily on a very

[106] *State v Bolivia Osigbemhe, supra.*

high increase so that rape seems to be the order of the day among our sexually reckless men, women and youth in Nigeria and the globe. It is most disheartening and rather unfortunate that despite the heinous nature of the crime, courts variously fail rape victims when they summon courage to approach the court for justice and closure. They end up being persecuted with unnecessary questions which exposes them more to public ridicule. Their cases are often treated with levity and these victims are left without protection or closure, while the rapist is protected and at the end receives little or no punishment and that is, if the case is not dismissed on grounds of technicalities. The high rate of rape cases and the numerous cases of emotional and psychological breakdown of rape victims which often extend to their marriages and the society at large call for a re-think. There is the urgent need for a review of judicial approach to rape cases and functional sentencing policies to deter prospective rapists and engender adequate closure of victims. To do otherwise is to subject the society to sexual recklessness and insecurity which may threaten the institution of marriage.