

REVISITING THE DEFINITION OF RAPE UNDER THE NIGERIAN CRIMINAL JURISPRUDENCE*

Abstract

The offence of Rape in Nigeria is a very heinous offence. It is an offence which the Criminal Code seeks to punish with life imprisonment with or without the option of fine.¹ Despite this serious punishment meant for it, something desires to be done. It is correct to state that the Nigerian Criminal Code has had a very long history having been in existence for more than 50 years. This longevity so to say has somehow affected the offence of rape vis a viz its definition. The definition of the offence of rape in Nigerian Criminal Jurisprudence adopted the narrow approach that was the hallmark of common law which referred to the woman as a property and which did not envisage the possibility of sexual act outside the vagina or outside the sexual organs. The Criminal Code as it exists did not envisage the fact that a husband can actually rape the wife or that an act of rape can be executed without the sex organs of penetration. It did not also anticipate the fact that carnal connection can now take place outside the natural circumference of its original design. Flowing from these among others, it becomes imperative that the offence of rape be redefined to incorporate the current situation of the offence as is obtainable in more modern society. It is these efforts that this work will be geared towards in order to achieve a more holistic definition and in turn call upon the policy makers to quickly associate with the current trends and make the law ever dynamic.

Keywords: Rape, Criminal jurisprudence, Nigeria, Revisiting

1. Introduction

Rape as an offence is prevalent in Nigeria. Folayan *et al* in their paper titled, ‘Rape in Nigeria: a Silent epidemic among adolescents with implications for HIV’ reported that a study conducted in 2013 stated that a survey in Nigeria showed 31.4 and 5.7% of sexually active adolescent females and males, respectively, reported forced sex (rape) at sexual initiation². Women at Risk International Foundation alleged on their website that ‘between 2012 and 2013, about 30 per cent of women in Nigeria experienced one form of domestic violence or another. Findings from a National Survey carried out in 2014 on Violence Against Children in Nigeria confirmed one in four females reported experiencing sexual violence in childhood with approximately 70% reporting more than one incident of sexual violence. In the same study, it was found that 24.8% of females’ ages 18 to 24 years experienced sexual abuse prior to age 18 of which 5.0% sought help, with only 3.5% receiving any services³. Oliver Chukwujekwu Ezechi *et al*⁴ reported that sexual assault through vaginal route only was the commonest type of assault (171; 87.2%), followed by assault through anal penetration only (11; 5.6%). In the remaining thirteen cases, assault was through the mouth (4; 2.0%) and multiple routes (9; 4.6%). Among the twelve male victims, nine (75.0%) were assaulted through the anus. This goes to show that incidents of rape in Nigeria are not restricted to females and penetration not limited to the vagina. The society has made a very concerted effort in curbing the menace of rape. It is therefore understandable that the Law punishes the offence of rape with life imprisonment more than the terms of imprisonment reserved for stealing and the same punishment reserved for manslaughter.⁵ It is to be understood that the prevalence of this offence is as

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¹ See Section 358 of the Criminal Code Cap C38 2004

² Morenike O. Folayan *et al*, Rape in Nigeria: a silent epidemic among adolescents with implications for HIV infection’ Global Health Action 2014,7: 25583 -<http://dx.doi.org/10.3402/gha.v7.25583>

³ <https://warifng.org/rape-stats-in-nigeria/> accessed on 14 Jan, 2020 at 2.14pm

⁴ Ezechi, Oliver Chukwujekwu *et al*. ‘Trends and patterns of sexual assaults in Lagos south-western Nigeria.’ *The Pan African medical journal* vol. 24 261. 20 Jul. 2016, doi:10.11604/pamj.2016.24.261.9172

⁵ Compare Sections 390 CC, Section 325 CC

contained in the definition of the existing offence. It is therefore likely to triple the number when the offence itself is properly defined in line with the current trend of the offence of rape.

2. Conceptual Clarification

In a work of this nature, it is important to seek a clarification of the key concepts chief among which is the offence of rape. The actual fulcrum of this work will then be what is the definition of rape that this work seeks to revisit? What then is the current definition of the offence of rape under the Nigeria Criminal Code? Section 357⁶ of the Criminal Code defines the offence of rape to mean, ‘any person who has unlawful carnal knowledge of a woman or a 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 282 of the Penal Code defines the offence of rape as follows, ‘(1) A man is said to commit rape who, save in the case referred to in subsection (2), 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. The analyses of these provisions on rape show a lot of similarity except that the Criminal Code did not incorporate the aspect of Subsection (e) of the Penal Code that dealt on girls below the age of 14 and of unsound mind. This does not mean that such offence is missing in the Criminal Code. No the Criminal Code dealt with the offence of defilement of girls under 13 and prescribed for a punishment of life imprisonment for same. It is however sad that the said provision limits the commencement of prosecution on such offences to two months mandatorily.⁷

The two sections of the Penal and Criminal Codes therefore opine that any form of sexual connection other than a consensual one is an offence punishable with imprisonment. While the Criminal Code punishes with life imprisonment, the Penal Code punishes with 14 years imprisonment.⁸ It is imperative to state that from the analysis above, the offence of rape can only be committed by a man against a woman. It is also implied that the offence can only be committed also by a man who is not the husband of the woman in question. It is also imperative to state that the carnal connections envisaged by the two codes are sexual connection in the normal order of nature. The support for this assumption is gleaned from the Criminal Code which made provisions for unnatural offences which are offences against the order of nature.⁹ It is correct to state that the offence of rape differs from other sexual offences as contained in the various codes and the punishments also differ. It is to be noted that the offence of rape is complete upon penetration.¹⁰ The offence of rape has been defined in the case of *Posu v. State*¹¹ as an unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man to have sexual intercourse forcibly and against her will. It is the act of sexual intercourse committed by a man with a woman who is not his wife without her consent. In *Jegede v State*¹², the Supreme Court per Belgore JSC defined the offence of rape by adopting the provision of Section 357 of the Criminal Code as follows: ‘The offence of rape is ‘the 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

⁶ Cap C38 LFN 2004

⁷ See Section 218 of the Criminal Code.

⁸ See Sections 358 CC and 283PC respectively.

⁹ See Section 214

¹⁰ See Section 282 (supra)Section 6 CC; See also *Iko v. State* (2001) 14 NWLR (pt. 732) 221 *Ogunbayo v. State* (2007) 8 NWLR (Pt. 1035) 157

¹¹ (2011) 2 NWLR (Pt 1234) P. 392 @ 414 - 416

¹² *Jegede v State* (2001) 14 NWLR (Pt.733) 264. See also *Popoola v. The State* (2013) 17 NWLR (Pt. 1382) P. 96 @ 123

nature of the act, or in the case of a married woman, by personating her husband'. Okoro JSC in *Lucky v State*¹³, pontificated that 'the essential ingredients of the offence of rape which the prosecutrix must prove include the following: (1) That the accused had sexual intercourse with the prosecutrix. (2) That the act of sexual intercourse was done without the consent or that the consent (if any) was obtained by fraud, force, threat, intimidation, deceit or impersonation. (3) That the prosecutrix was not the wife of the accused. (4) That the accused had the means *rea*, the intention to have sexual intercourse with the Prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not. (5) That there was penetration'. In *Sani v Kano State*, where the charge was under Section 282 of the Kano State Penal Code, the Court of Appeal stated that, 'Section 282 (1) of the Penal Code provides thus: '282(1) A man is said to commit rape who, save in the case referred to in Subsection (2), has sexual intercourse with a woman in any of the following circumstance - (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'. It is clear from the position of the Courts that the offence of rape as contained in our Criminal jurisprudence is complete upon penetration and must be committed by a man upon a woman who did not consent or who is not his wife. This position raises the salient questions upon which this work is built. The questions are what if the penetration is not in to the vagina? What is the person penetrated is the wife of the Defendant? What if the person penetration is not a man? The realities on ground show that women can now strap on dildos to penetrate fellow women or even to penetrate men. It is also a possibility that married men may have circumstances to have forceful intercourse leading to penetration on their wives. Another possibility is that a man may penetrate a woman through the anus or mouth or even another man through the anus. The question going round here is whether any of these can amount to the offence of rape. It is pertinent at this point to state that all the scenarios painted here amount to offences covered by the Criminal and Penal Codes but they cannot amount to the offence of rape. It is a fact that most of these offences may be captured under offences against morality in Chapter 21 of the Criminal Code or under the provision for unnatural offences under Section 284 of the Penal Code with a punishment much lesser than that of rape. It is in view of these that it behooves on our legislators to consider revisiting the definition of the offence of rape to be all encompassing with the aim of achieving a deterrent on culprits.

3. Current Trends in the Definition of the Offence of Rape

There are current trends in the definition of the offence of rape to incorporate most of the aspects hereinbefore highlighted. Indeed the United States Department of Justice archives contained a new definition of rape as at 2012¹⁴ to mean, 'the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.' This definition certainly envisaged the possibility of other forms of penetration by different sex other than a man. It is to be noted that before this reviewed definition, the Uniform Crime Report (UCR) Summary Reporting System (SRS) of the United States defined 'Forcible rape' as 'the carnal knowledge of a female, forcibly and against her will.'¹⁵ It is therefore correct to state that the prior definition restricted the offence of rape to forcible penetration by a man on a woman through the vagina. In South Africa, the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁶ defined the offence of rape in Section 3 as follows, 'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape'. It is further to be noted that the Act in its definition section¹⁷ provides that 'sexually penetrates' has a corresponding meaning; 'sexual violation' includes any act which causes—(a)direct or indirect contact

¹³(2016) LPELR-40541(SC)

¹⁴<https://www.justice.gov/archives/opa/blog/updated-definition-rape> accessed on 14-01-2020 by 9.27am.

¹⁵ *ibid*

¹⁶ No 32, 2007

¹⁷ Section 1

between the—(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;(ii) mouth of one person and—(aa)the genital organs or anus of another person or, in the case of a female, her breasts;(bb)the mouth of another person;(cc)any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—(aaa)be used in an act of sexual penetration;(bbb)cause sexual arousal or stimulation; or(ccc)be sexually aroused or stimulated thereby; or(dd)any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or(iii) mouth of the complainant and the genital organs or anus of an animal;(b)the masturbation of one person by another person; or(c)the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and ‘sexually violates’ has a corresponding meaning’. To further expand the meaning and scope of the offence of rape, the Act in Section 4 provides for the offence of compelled rape as follows: ‘Any person (“A”) who unlawfully and intentionally compels a third person (“C”), without the consent of C, to commit an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of compelled rape’. This is very essential since it covers instances where the culprit himself did not commit the crime but used another person to do so. It could be said that our Section 7d of the Criminal Code has covered such instances but as always that Section 7d has invariably met with the issue of a woman procuring a man to commit the offence of rape and whether such can be validly held to amount to the offence of rape instead of just aiding or abetting. The expansion of the scope of the offence as done in South Africa has made it pertinent that rape could be committed by either of the sexes.

Section 48¹⁸, provides as follows, ‘A person (the offender) is guilty of the offence of rape if he or she engages, or continues to engage, in sexual intercourse with another person who—(a)does not consent to engaging in the sexual intercourse; or(b)has withdrawn consent to the sexual intercourse, and the offender knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent (as the case may be).Maximum penalty: Imprisonment for life. (2)A person (the offender) is guilty of the offence of rape if he or she compels a person to engage, or to continue to engage, in— (a)sexual intercourse with a person other than the offender; or(b)an act of sexual self-penetration; or (c)an act of bestiality, when the person so compelled does not consent to engaging in the sexual intercourse or act, or has withdrawn consent to the sexual intercourse or act, and the offender knows, or is recklessly indifferent to, the fact that the person does not so consent or has so withdrawn consent (as the case may be). Maximum penalty: Imprisonment for life. (3)In this section— compels—a person compels another person if he or she controls or influences the other person's conduct by means that effectively prevent the other person from exercising freedom of choice; sexual self- penetration means the penetration by a person of the person's vagina, *labia majora* or *anus* by any part of the body of the person or by any object’. Indeed Nicola Henry, Associate Professor and Vice-Chancellor's Principal Research Fellow, RMIT University on her website¹⁹ stated that, ‘In Australia, rape is defined in gender-neutral terms as the penetration of the vagina, anus or mouth’²⁰. A follow up to this definition highlighted the fact that the offence of rape was defined in Criminal Code Act 1899²¹: as follows: ‘A person rapes another person if: (a) the person has carnal knowledge with or of the other person without the other person's consent; (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's

¹⁸ South Australia Criminal Law Consolidation Act 1935

¹⁹ <https://theconversation.com/rape-sexual-assault-and-sexual-harassment-whats-the-difference-93411>

²⁰ Nicola Henry, ‘Rape, sexual assault and sexual harassment: what's the difference?’ published online on March, 27, 2018 at <https://theconversation.com/rape-sexual-assault-and-sexual-harassment-whats-the-difference-93411>

Accessed on 14 Jan, 2020 at 10.19am

²¹ ss347–349, read with s1 Sexual assault, s352

consent'. The clear fact here is that such definition has removed the narrow approach definition of the offence of rape in Australia.

Section 1 of the Sexual Offences Act of the United Kingdom²², defined the offence of Rape as follows: '(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.' Here again, the definition has gone beyond the penetration of the vagina to incorporate the penetration of the anus or even mouth of another person provided the person penetrated did not consent. It should be noted that the Sexual Offences Act²³ made provisions for penetration using other objects other than sexual organs. Such penetration though is classified under sexual assault. It is pertinent to state that under the current legal regime in Nigeria such penetrations are not covered under rape or under offences against morality or even under assaults on female. Such an act may be brought under cases of assault which somehow has removed same from sexual acts. It is to be noted that World Health Organisation has incorporated Rape into Sexual violence and has defined Rape as physically forced or otherwise coerced penetration— even if slight – of the vulva or anus, using a penis, other body parts or an object²⁴. The current trend here is the trend of expanding the definition and eventually the offence of rape. The definitions here adopted the expansionist theory of definition in order to accommodate most acts which the narrow definition of rape has excluded by that definition.

4. Submissions

This work therefore submits that the narrow definition of the offence of rape in Nigeria needs to be revisited. It is a fact that the narrow definition of the offence of rape has practically made it very difficult to initiate and actually secure a conviction on the offence of rape. It is further submitted that expanding the definition may well obviate the difficulty entailed in securing a conviction and at the same time may serve as a deterrent to acts of sexual violence on women. It is suggested that revisiting the definition of the offence known as rape will bring it into the current trend and at the same time make possible and easier the prosecution and conviction of offenders.

5. Conclusion

The author therefore calls on all relevant agencies including the Law Reform Commission to consider a comprehensive approach to the sexual offences beginning with the offence of rape. It is imperative further to streamline the sexual offences in line with international positions. The issue of homosexuality should bring to the front burner the fact that it is now possible for a man to be raped through the anus and should be accorded the same heinous status as the penetration of a woman. It is also a fact that a woman may now be raped by penetrating the mouth with a sex organ or with any other equipment which may include sex toys. Most importantly, the revision of the current definition will make it possible for married women to be raped by their husbands and vice versa. It is therefore suggested that a revision of the current definition may work well for all involved in the offence of rape in Nigeria. It will protect the rights of married woman. It will protect the rights of victims of homosexual act. It will also protect the rights of victims assaulted with other objects especially in this era of sex toys.

²² 2003

²³ Supra

²⁴ https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf