IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN

THE STATE

VS

ALUSINE SULAIMAN KARGBO

COUNSEL:

J.A.K. Sesay Esq. and with him A. Jalloh Esq., State Counsel & E.Y. Mannah State Counsel for The State

O.C. Spencer-Coker & C. Sembie for The Accused

JUDGMENT DELIVERED ON THE 30TH DAY OF MAY, 2017 BY HONOURABLE MR. JUSTICE MONFRED MOMOH SESAY - JA

INTRODUCTION

The Accused, Alusine Sulaiman Kargbo, is charged on a one-count Indictment with the offence of sexual penetration of a child contrary to Section 19 of The Sexual Offences Act, 2012 Act No.12 of 2012. The Prosecution alleges that the Accused between the 27th day of February and the 2nd day of March, 2016 at Freetown in the Western Area of The Republic of Sierra Leone, engaged in an act of sexual penetration with a child, Alice Fatmata Amadu.

When the Accused first appeared before me on Thursday, the 8th December, 2016 The Prosecution applied for his trial by Judge alone pursuant to Section 144(2) of The Criminal Procedure Act, 1965 Act No.32 of 1965 (i.e. The CPA) as repealed and by Section 3 of The Criminal Procedure (Amendment) Act, 1981 Act No.11 of 1981. I accordingly ordered that the Accused be tried by a Judge alone instead of by Judge and jury.

The Accused was then arraigned and he pleaded NOT GUILTY.

By virtue of the order for trial by Judge alone, I became the Judge of both facts and law and I must therefore keep in mind and direct myself that in all criminal cases including this one, it is the duty of The Prosecution to prove the guilt of The Accused and they should do so beyond reasonable doubt. It means

therefore that I can only find the Accused guilty of the offence charged if The Prosecution leads evidence proving beyond reasonable doubt every element of the offence charged.

The leading case on the burden and standard of proof is Woolmington v DPP (1935) AC 481 at 482, a House of Lords of England decision in which Lord Sankey enunciated the rule when he said:

"throughout the web of English Criminal Law, one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception .... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Denning J (as he then was and now deceased) explained the meaning of the phrase "beyond reasonable doubt" in the case of Miller v Minister of Pensions (1947) 2 AER 372 at 373-374 in the following terms:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt; but nothing short of that will suffice"

This rule of law has been adopted, affirmed and applied in this jurisdiction which is a common law country and there is a countless number of local cases (reported and unreported) in which the rules on the burden and standard of proof have been applied.

One such case is Labour-Jones v R (1964-1966) ALRSL 471 at 473 CA in which Bankole-Jones, in delivering the Judgment of the Court of Appeal of Sierra Leone, quoted with approval the dictum of Goddard, Lord Chief Justice in the case of R v Hepworth (1955) 2AER at 920 in the following terms:

"The point is that the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the accused's guilt. If that is done, that will be enough"

Another local reported case is that of Koroma v R (1964-1966) ALRSL 424 at 548 CA in which Bankole-Jones said that:

"This Court is concerned with the question whether, whatever form of words was used, it was made quite clear to the jury that it was for the prosecution to establish the guilt of the prisoner and, if the guilt of the prisoner was not established, the prisoner must as of right and not by way of favour, be found not guilty. If that is done, that is enough."

In an unreported Court of Appeal case CR/APP7/2000 Between Soluku Jermil Bockarie v The State, Honourable Justice N.C. Browne-Marke JA (as he then was now Justice of the Supreme Court of Sierra Leone) in delivering the majority judgment of the Court in April, 2008 had this to say, "The principle enshrined in Woolmington's case applied to all criminal cases, is without doubt. It applies more strongly, where the judge is both Judge of law and fact … the legal burden of proof in a criminal case always rests on the prosecution, and that it never shifts; and that the burden lies on the prosecution to prove every element of the offence with which an accused has been charged beyond reasonable doubt"

Other local cases in which these principles have been applied include Bob-Jones v R (1967-1968) ALRSL 267; Amara v R (1968-1969) ALRSL 220; The State v David Sahr Bona (unreported) in which I delivered judgment on the 11th day of April, 2017 after trial by this Court; The State v IsatuMansaray (unreported) which judgment I delivered on the 22nd day of December, 2016 after trial by this Court: The State vs Abdul Conteh (unreported) which judgment I delivered on the 4th May, 2017 after trial by this Court.

The line of cases (local and foreign) is endless on these principles of law on the burden and standard of proof and I shall apply them in this matter in which I sit as a Judge of both facts and law.

THE ELEMENTS OF THE OFFENCE

As stated earlier in this judgment, the Accused is charged with the offence of sexual penetration of a child contrary to Section 19 of The Sexual Offences Act, 2012 Act No.12 of 2012. Section 19 of The said Act provides as follows:

"A person who engages in an act of sexual penetration with a child commits an offence and is liable on conviction to a term of imprisonment not exceeding fifteen years (emphasis mine).

"Sexual penetration" is defined in Section 1 of the Act as "Any act which causes penetration to any extent of the virgina, anus or mouth of a person by the penis or any other part of the body of another person, or by an object."

"Penetration" is defined at page 861 of the Sixth Edition of Oxford Advanced Learner's Dictionary of Current English by A.S. Hornby as "the act or process of making a way into or through something."

It is my considered opinion that the definition of "sexual penetration" in the Act is wide enough to include penetration by the penis or other parts of the body such as the finger or objects such as stick, pen or candle into the virgina, anus or mouth of another person.

The victim of the penetration should be a child and "child" is defined in Section 1 of the Act as "a person under the age of eighteen".

There are therefore two elements from the definition which are:

(i) act of sexual penetration; and
(ii) the victim of the penetration should be a child.

Another element which the Prosecution should prove in this case as in all criminal cases is the mens rea which, I hold, should be the intention to engage in an act of sexual penetration. Intention, however, cannot be proved directly but indirectly from the things that the Accused said or did at the time of committing the unlawful actus reus i.e. act of sexual penetration.

I rely on the law as stated by the Learned Authors of Archbold Pleading, Evidence & Practice 36th edition at paragraph 1010 page 364, where they wrote as follows: "The intention of the party at the time when he commits an offence is often an essential ingredient in it, and, in such a case, it is as necessary to be proved as any other fact or circumstance laid in the indictment. Intention, however, is not capable of positive proof, it can only be implied from overt acts". (emphasis mine)

Another element to be proved by the Prosecution in a sexual offence like this one is corroboration. The same Learned Authors of the same edition of Archbold (supra) wrote at paragraph 1299 as follows: "Corroboration is looked for, and the jury should be warned of the danger of acting without it, in all cases of sexual offences, irrespective of the age or sex of the complainant or other party involved, and even if the only issue is that of the identity of the person

alleged to have committed the offence ... and failure to give such warning will be fatal to the conviction" (emphasis mine)

What then is corroboration in law ?

The issue of what constitutes corroboration was considered and resolved by The Court of Criminal Appeal of England in the leading case of R v Baskervill (1916-1917) AER 38 at 43, where Viscount Reading, CJ in delivering the judgment of the Court made a pronouncement on the nature of corroborative evidence of general application. He said:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him – that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by Statute. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration .... The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime".

From this dictum of Viscount Reading CJ, for evidence to be corroborative, it should meet the following requirements, namely:

(i) that it must come from a source independent of the witness to be corroborated;
(ii) that it must implicate the Accused in material particular i.e. that the crime was not only committed but that it was committed by the Accused; and
(iii) that it can be direct (or positive) or indirect (or circumstantial).

Corroborative evidence may also consist of a single piece of evidence or pieces of evidence taken together and their cumulative effect implicates the Accused in material particular. (see Thomas v Jones (1921) KB 22)

Corroborative evidence has been held to take different forms including:

1. Admission or confession of guilt by the Accused (see R v Dossi (1918) 13 Cr. App Rep 158)
2. Lies or false statement by the Accused (see Creditland v Knowler 35 Cr. App. Rep. 48 & R v Lucas (1981) 2 AER 1008)

For a lie to be corroborative, it must meet the following conditions:

(i) it must be deliberate;
(ii) it must relate to a material issue;
(iii) the motive for the lie should be the realization of guilt and fear of the truth; and
(iv) it should be shown by evidence that the statement is clearly a lie (see R v Lucas supra). Mere denials without more do not constitute a lie.

3. The distressed conditions of the victim, in certain circumstances, can be corroborative of the evidence of the victim if observed by another person. (seeR v Redpath (1962) 46 Cr. App. Rep. 319; Fromhold v Fromhold (1952) ITLR 1522).
   Distressed conditions of victims have been held to include: stressed and frightened looks, trembling, crying, feeling pain from injury suffered from the alleged sexual assault, looking or appearing disheveled, torn clothes, pants, bruises or wounds on the body etc. (see Moses KamauWaweru v Republic (1988) eKLR Court of Appeal of The Republic of Kenya)
4. Testimony of an eye witness or somebody who caught (or saw) the Accused and the victim red-handed in the act or in compromising situations such as being found in a room or other isolated places and either or both Accused and victim were naked or half naked.

Whatever the nature of corroborative evidence, it should be bourne in mind that it is required (particularly in sexual offences) to "minimize the possibility of fabrication and maximize the implication of the Accused" (see Cross on Evidence 6th Edition by Colin Tapper at page 248)

It should be noted that corroboration is however not required as a matter of law under The Sexual Offences Act, 2012 because there is no provision in the said Act for corroboration. This is unlike the predecessor Act i.e. The Prevention of Cruelty To Children Act, Cap 31 of The Laws of Sierra Leone, 1960 as amended which had unlawful carnal knowledge created by Sections 6 and 7 of the said Act and indecent assault created by Section 9 of the said Act. Under

Cap 31 and particularly by Section 14, there is an expressed provision and requirement for corroboration of the victim's evidence without which no Accused should be found guilty and convicted for the offences of unlawful carnal knowledge, indecent assault and procuration created therein.

Corroboration would therefore be required under The Sexual Offences Act, 2012 as a matter of practice. (see paragraph 1299 of Archbold (supra))

I am persuaded by these rules on intention and proof thereof and on corroboration and I shall apply them in this matter.

From the above review of the law on sexual penetration, I hold the considered view that for The Prosecution to prove the guilt of the Accused beyond reasonable doubt, they must prove each of the following four elements:

(i) that the Accused engaged in the act of sexual penetration with the victim, Alice Fatmata Amadu;
(ii) that at the time the offence was committed, the victim was a child i.e. a person below the age of eighteen (18) years;
(iii) that the Accused had the intention, at the time of the offence, to engage in an act of sexual penetration with the victim; and
(iv) corroborative evidence confirming the story of the victim.

THE EVIDENCE

I shall now proceed to consider the evidence of both The Prosecution and The Defence.

(a) The Case For The Prosecution

The Prosecution called four (4) witnesses, namely:

(i) Patrick Mathew Conteh (i.e. Detective Police Constable (DPC) 13282 attached at the Family Support Unit (FSU) Grafton Police Station Freetown as Prosecution Witness (PW) 1 who testified on Saturday, the 17th December, 2016;
(ii) Brima Sama as Additional Witness (PC 10978) attached to The Law Officers Department as Process Server who testified on Saturday, the 17th December, 2016 as PW2;
(iii) Alfred Favour Conteh (i.e. the Registrar of this Court) who testified on Saturday, the 17th December, 2016 as PW3; and

(iv) Dr. Matilda King who testified on Saturday, the 7th January, 2017 as PW4.

The Prosecution also tendered six (6) exhibits including:

(i) The Voluntary Cautioned Statement (VCS) of The Accused as Exhibit A^{1-7};
(ii) The Charge Statement (CS) of the Accused as Exhibit $B^{1\&2}$;
(iii) Unserved Subpoenae for Alice Fatmata Amadu as Exhibit C;
(iv) The depositions of Alice Fatmata Amadu as Exhibit D^{1-4};
(v) Endorsed Police Medical Request Form as Exhibit E^{1-3};
(vi) Committal Warrant as Exhibit F^{1-3}.

PW1: Patrick Mathew Conteh

He is DPC 13282 and attached at the FSU, Grafton Police Station and one of the investigators of this matter. He said he recognised the Accused and that he knew the victim, Alice Fatmata Amadu.

He told the Court that he recalled the 3rd March, 2016; that he was on duty when the Accused was arrested and brought to the Police Station by one Kadija Pyne and Henry Sam Kamara who made a report against the Accused on behalf of victim and that he obtained Statement from her and other witnesses.

He said on the same day, himself and his colleague, DPC 15007 Kanu A.D., obtained a VCS from the Accused which he tendered as Exhibit A^{1-7}. He further told the Court that a few days later, he obtained Statement from victim and issued her a Police Medical Request Form for examination and treatment at the Rainbow Centre and that the endorsed Medical Request Form was returned to him later which he identified as Exhibit Z^{1-3}.

He said on the 2nd April, 2016, himself and his colleague, DPC 10789 Folleh F.A.S., obtained a CS from the Accused which he tendered as Exhibit $B^{1\&2}$.

Under cross-examination, the witness said the Accused denied the allegation and that the Accused told him that the victim called him and told him she was in Bonthe.

The witness was not re-examined.

PW2: Brima Sama is PC 10978 attached to The Law Officers Department as Process Server and he told the Court that his duties included to receive subpoenae from State Counsel and serve them on witnesses.

He told the Court that he recalled the 14th December, 2016; when he received subpoenae from State Counsel, A. Jalloh Esq. to serve on Alice Fatmata Amadu at C-Line, Grafton, New Camp, Freetown.

He said he went to the said address but first went to the Police Station for directions. He said when he got to the address, he asked residents from house to house but could not find her. He said he returned to the office and reported to State Counsel, A. Jalloh Esq. He tendered the unserved subpoena as Exhibit C.

The witness was neither cross-examined nor re-examined.

PW3: Alfred Favour Conteh

He told the Court that he was the Registrar of this Court and that he lived at No.6 Tejan Street, Congo Water, Wellington, Freetown. He said his duties included to receive and keep court files and exhibits.

He said he had the case file in respect of this matter which was the original file and it contained the depositions of Alice Fatmata Amadu which were duly signed by both the Committing Magistrate and deponent. He tendered the depositions as Exhibit D^{1-4}.

The witness was neither cross-examined nor re-examined.

In Exhibit D^{1-4}, Alice Fatmata Amadu said that she lived at C-Line, New Camp, Grafton and that she was fifteen (15) years old and a JSS II pupil of Joshua International Secondary School. She said she knew the Accused as her boyfriend.

She told the Court below that she recalled Saturday, the 27th February, 2016; that she returned home from laundering and her Grand Mother, Kadija Pyne, was annoyed with her saying she had stayed away too long; that she then left and went to the Accused and they both left Grafton and came to Kroo Bay area where they slept in a single room in a mud house and that the Accused asked her to have sex with her and she agreed; that they had sex twice that night. She said the following morning, the Accused left for Grafton and upon his return, he called her telling her to return home and that he had been arrested. She said that

she returned home and her Grand Mother asked her where she had been and that she explained everything that had transpired between her and the Accused; that her Grand Mother took her to a Police Station and reported the matter and that the Police issued her a Medical Request Form for examination and treatment at the Rainbow Centre; that they went to the Rainbow Centre where she was examined and treated and that she returned the endorsed Medical Report to the Police and made a Statement.

Under cross-examination by the Accused in the Court below, the deponent said it was the Accused (not his Uncle) who called her and told her to return to Grafton.

PW4: Dr. Matilda King

She told the Court that she lived at No.3 Gooding Drive, Off Regent Road, Lumley, Freetown and that she was a medical doctor attached to the Rainbow Centre, Fourah Bay Road, Freetown and Rokupa Government Hospital, Wellington, Freetown. She said her duties at the Rainbow Centre included to examine, treat and write reports on victims of alleged sexual assaults.

She further told the Court that she recalled the 7th March, 2016 and that she was on duty at the Rainbow Centre when she had cause to examine one Alice Fatmata Amadu; that during the virginal examination of victim, she found that her hymen was completely ruptured and there was no physical injuries found on the victim. She said she also ascertained the age of the victim as fifteen (15) years.

She said she prepared a report which she tendered as Exhibit E^{1-3}.

She said hymen was a thin membrane that partially covers the entrance into the virgina and it could be ruptured by any forceful blunt object such as penis, finger, candle, stick etc. and that the immediate consequence of rupture of hymen included bleeding, pain and tear in the virgina.

Under cross-examination, the witness said she saw victim on the 7th March, 2016 and that victim was not bleeding when she saw her. She said she did not discover any fluid in victim's virgina and she found out that the alleged sexual assault occurred on the 27th February, 2016. She said the victim had been sexually active before the alleged incident occurred and that she could not tell what caused the hymen to rupture in this case.

This witness was not re-examined.

The Prosecuting Counsel, A. Jalloh Esq, then tendered the Committal Warrant which was admitted and marked Exhibit F^{1-3} and closed the case for The Prosecution.

Before I proceed to consider the case for The Defence, let me pause and consider the depositional evidence of Alice Fatmata Amadu (i.e. Exhibit D^{1-4}) and the VCS and CS of the Accused tendered as Exhibit A^{1-7} and $B^{1\&2}$ respectively.

Exhibits D^{1-4} was tendered and admitted pursuant to Section 65 of The CPA which provides under the rubric "Deposition and Statements" as follows"

"Where any person had been committed for any offence, the deposition of any person taken before the Committing Magistrate may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence on the trial of that person … The conditions hereinbefore referred to are the following:

(a) the deposition must be the deposition of a witness whose attendance is stated to be unnecessary in accordance with the provisions of Section 127, or of witness who cannot be found or whose attendance cannot be procured without an amount of delay, expense or inconvenience which in the circumstance of the case, the Court considers unreasonable, or who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of procurement of the accused or on his behalf;

(b) it must be proved at the trial either by a certificate purporting to be signed by the Magistrate before whom the deposition purports to have been taken or by the clerk to such Magistrate, that the deposition was taken in the presence of the accused and that the accused or his advocate had full opportunity of cross-examining the witness;

(c) the deposition must purport to be signed by the Magistrate before whom it purports to have been taken: Provided that the provisions of this Section shall not have effect in any case in which it is proved –

(i) that the deposition, or where the proof required by paragraph (b) is given by means of a certificate, that the certificate was not in fact signed by the Magistrate by whom it purports to have been signed; or

(ii) where the deposition is that of a witness whose attendance at the trial is stated to be unnecessary as aforesaid, that the witness has been duly notified that he is required to attend" (emphasis mine)

I am satisfied that the Prosecution has fulfilled the conditions laid in Section 65 of The CPA through PW2, Brima Sama and PW3, Alfred Favour Conteh. PW2 said as Process Server, he received subpoenae from State Counsel, A. Jalloh Esq. on the 14th December, 2016 to serve on Alice Fatmata Amadu as witness in this matter and that on that same date, he went to the address of the said witness at C-Line, New Camp Grafton but did not find her.

I am satisfied that The Prosecution made reasonable efforts to get the witness, Alice Fatmata Amadu, to come to Court and testify but unsuccessfully. The witness was not found. PW3 on his part said he was Registrar of this Court and tendered the deposition of Alice Fatmata Amadu. He confirmed that the deposition was the original copy and was signed by both the witness/deponent and the committing Magistrate.

Both PW2 and PW3 were not cross-examined that is to say, their evidence was not challenged by the defence.

I therefore hold that the depositional evidence of Alice Fatmata Amadu is properly before me and I shall give it the weight it deserves in this matter.

This then leads me to the question of the legal position on the weight to give such evidence in the trial of an Accused person when a witness in the Preliminary Investigations in the Court below did not appear and testify and therefore not available to be cross-examined at the trial.

It is my considered opinion that now that the said deposition is properly before me, I can give it the weight it deserves and determine the issues raised by the material facts in it. I seek legal support from the case of Rex (Respondent) v Yusufu Kano (Appellant) (1940) 6 West African Court of Appeal (WACA) 106 judgment delivered in Lagos on the 1st July, 1942 by the Court consisting of Kingdom CJ, Butler Lloyd and Francis JJ all of Nigeria. The Court said as follows:

"As we understand the case submitted to us we are asked our opinion on one point only, namely, did the Court come to a correct decision in point of law in deciding that it could convict the accused on the depositions of witnesses whose

attendance could not be procured, made evidence under Section 27 of Chapter 15 and not objected to at the time. We answer in the affirmative"

This was a case stated by the High Court in Nigeria for the consideration of W.A.C.A.

In the present matter the depositions tendered is the evidence of the victim of the alleged sexual assault, Alice Fatmata Amadu and therefore the principal/star witness in this matter. I shall return to this issue later in this Judgment.

Let me now consider the Statements of the Accused to the Police which have been tendered by the Prosecution as part of their case i.e. the VCS as Exhibit A^{1-7} and the CS as Exhibit $B^{1\&2}$.

In Exhibit A^{1-7}, the Accused said as follows:

That the allegation against him that he engaged in an act of sexual penetration with victim, Alice Fatmata Amadu, was not true.

He said the victim was his lover and their relationship only lasted for two (2) weeks during which he did not have sex with her.

He said he was a footballer who moved around the country playing football and that on one occasion, he was at King Tom on Sunday, the 28th February, 2016 to play football when victim called him and told him she was in Bonthe. He said that before that call, his friend known as Alias Armani, told him that the victim had absconded from home and asked him whether he knew her whereabout. He said he denied knowing her whereabout and the victim had called him and told him she was in Bonthe and that he promised victim's Grandmother that anytime victim called him, he would let her talk with her. That victim's Grand Mother requested him to go with her to the police and explain what he knew about victim and her whereabout.

After his free narrative, the police asked him whether he had had sex with victim and he denied but admitted had had love relationship with victim for two weeks only. He then begged the police for the matter not to be charged to Court.

In Exhibit $B^{1\&2}$, the Accused said he relied on his Statements as in Exhibit A^{1-7}.

My initial reaction is that the Accused Statement to the Police is a flat denial to the allegations against him that he had sexual penetration with the victim. He

however begged the police for the matter not to be charged to Court. Why would an innocent man, as the Accused holds himself out, beg for the matter not to be charged to Court ? I would have thought that such an innocent man would insist that the matter be charged to Court to enable him clear his good name and character that would have been tainted by such an allegation as this one. I shall return to this issue shortly in this judgment.

(b) The Case for TheDefence

At the close of the case for The Prosecution, I put the Accused to his election and he elected to rely on his Statements to the Police tendered as Exhibits A^{1-7} and $B^{1\&2}$ and that he had no witness to call.

The Defence Counsel, O.C. Spencer-Coker then closed the case for the defence. This was on Saturday, the 14th January, 2017. I then gave directions on the filing of Closing Addresses i.e. that both Prosecuting and Defence Counsel to file their respective Closing Addresses on or before Saturday, the 28th January, 2017. The Prosecution complied and filed their Closing Address dated the 28th day of February, 2017.

Although the Prosecution filed their Closing Address late, I wish to commend them for the said Closing Address as it was of some assistance to me in writing this judgment. I would encourage them to continue to write Closing Addresses which will not only assist the Court in writing a reasoned judgment and deliver same on time but will also assist the professional growth of Counsel.

The Defence team has up to the time of delivering this judgment not filed the Closing Address. I have noted with concern in several judgments I have delivered in recent times the Defence Counsel's failure to do Closing Address which I have held, is due to shere negligence particularly as there are always more than one Counsel in the Defence Team as in the present matter where there are two Counsel on record for the Accused. I would continue to advise the Defence Team to wake up to their responsibilities to both the Court and their Client, the Accused.

REVIEW OF THE EVIDENCE AND THE LAW

I shall now proceed to evaluate the evidence before me and relate it to the relevant law on the issues raised and to see whether or not The Prosecution has made out a case against the Accused.

But before I do so, I wish to remind and direct myself sitting as a tribunal of both facts and law that it is the duty of The Prosecution to prove the case against the Accused and they must do so beyond reasonable doubt. If they succeed, I am bound by law to find the Accused guilty and convict him but if they fail, I am equally bound by law to find the Accused not guilty and consequently acquit and discharge him. If, after considering the totality of the evidence led before me, there is reasonable doubt in my mind that the Accused committed the offence charged, I must resolve that doubt in favour of the Accused and find him not guilty and accordingly acquit and discharge him.

I shall proceed in this exercise by considering the elements of the offence each of which The Prosecution must prove. I have held earlier in this Judgment that the Prosecution must prove four (4) elements namely:

(i) that the Accused engaged in the act of sexual penetration with the victim, Alice Fatmata Amadu;
(ii) that at the time the offence was committed, the victim was a child, i.e. a person below the age of eighteen (18) years;
(iii) that the Accused had the intention, at the time of the offence, to engage in an act of sexual penetration with the victim; and
(iv) corroborative evidence confirming the story of the victim.

(i) <u>That the Accused engaged in the act of sexual penetration with the victim, Alice Fatmata Amadu</u>

The evidence The Prosecution led in support of this element included the story of the victim, Alice Fatmata Amadu, as in her depositions tendered as Exhibit D^{1-4} and the evidence of Dr. Matilda King.

Let me start with the evidence of Dr. Matilda King who testified as PW4. She told the Court that on the 7th day of March, 2016, she had cause to examine the victim, Alice Fatmata Amadu during which examination, she found out that the victim's hymen was completely ruptured and such rupture could be caused by a forceful entry into the virgina of objects such as penis, finger, pen, candle, stick etc. and that the immediate consequences of such rupture was bleeding, tear, pain from the virgina.

She tendered the Medical Report as Exhibit E^{1-3} which contains the same information as her testimony.

Under cross-examination, she said that when she examined the victim, she did not see any fluid in her virgina and that the victim had been sexually active before the alleged sexual assault.

By this evidence, the doctor was only able to confirm that indeed the victim had been sexually active i.e. her virgina had been penetrated several times before this alleged incident.

She could not tell however who or what penetrated her virgina.

That gap in the testimony of Dr. Matilda King is filled by the story of the victim as contained in her depositions. She said therein that the Accused was her boy friend and that when she returned late from laundering on Saturday, the 27th February, 2016, her Grandmother, Kadija Pyne was angry with her and reprimanded her; that she decided to go to the Accused and explained to him what had happened; that she and the Accused left Grafton and came to Kroo Bay area where they slept and the Accused had sex with her twice and that the following day, the Accused left her and returned home at Grafton where he was arrested; that the Accused called her on a phone and advised her to return home at Grafton.

I have noted earlier in the judgment that the Accused denied having had any sexual penetration of the victim but admitted that she was his girl friend.

I do not believe his denial of having had sex with the victim. I believe his admission that they were lovers and I believe the story of the victim as in her depositions and in particular, where she said,

"I and the Accused then left Grafton and came to Kroo Bay area. While there on the following night we slept in a single room in a mudhouse. On Tuesday night the Accused asked me to have sex and I agreed. I took off my pants lay on the bed. Accused took off his trousers and pants and inserted his penis into my virgina and sexed me. When he finished I saw a white-coloured discharged on my virgina. We did it twice" (emphasis mine)

From these pieces of evidence, I feel sure that the Accused indeed engaged in the unlawful actus reus (i.e. the sexual penetration) with the child victim, Alice Fatmata Amadu. Consequently, I hold that The Prosecution has proven this element beyond reasonable doubt.

I wish to note here that the victim said when the Accused requested for sex, she agreed. As a matter of law, consent of the child victim is not a defence to the crime of sexual penetration. I refer to Section 4 of The Sexual Offences Act, 2012 which provides that,

"Subject to Section 24, a person below the age of 18 is not capable of giving consent for the purpose of this Act, and, accordingly it shall not be a defence to an offence under this Act to show that the child has consented to the act that forms the subject matter of the charge".

The Defence did not however raise the issue and I have already held that The Prosecution has proven this element beyond reasonable doubt.

(ii) That at the time the offence was committed the victim was a child i.e. a person below the age of eighteen (18) years

The victim herself, Alice Fatmata Amadu, in her depositions tendered as Exhibit D^{1-4} said that she was fifteen (15) years old at the time of the offence i.e. in February, 2016.

DPC 13282 Patrick Mathew Conteh, told the Court that when the report was made to him and after obtaining Statement from the victim, he issued a Police Medical Request Form to her for examination and treatment at the Rainbow Centre which he identified as Exhibit Z^{1-3}. The Medical Form was subsequently endorsed by Dr. Matilda King after examining victim and she tendered the endorsed Medical Request Form as Exhibit $E^{1-}3$. Endorsed on this exhibit are the name and age of victim as Alice Fatmata Amadu and 15 years respectively. These pieces of evidence I hold, could have been told to the Police by both victim and her Grand Mother, Kadija Pyne, when they visited the Rainbow Centre.

Dr. Matilda King also told the Court that during the course of her examination of the victim, she ascertained the age of the victim as fifteen (15) years. I also hold that she would have been told the age by the victim and her Grand-Mother when they visited her on the 7th March, 2016 at the Rainbow Centre.

Incidentally, these pieces of evidence in support of the age of the victim were not contested by the Defence.

I am therefore satisfied that the Prosecution has proven that at the time the offence was committed, the victim was a child i.e. a person under the age of eighteen (18) years to wit, fifteen (15) years. I so hold.

(iii) That the Accused had the intention, at the time of the offence, to engage in an act of sexual penetration with the victim

As stated earlier in this judgment, intention of the Accused cannot be proved directly but indirectly i.e. it can be only implied from the overt acts of the Accused i.e. the things the Accused said and/or did.

The evidence before me on this issue is that of the victim as contained in her depositions i.e. Exhibit D^{1-4}. She told the Court below how the Accused took her from Grafton to Kroo Bay area, kept her in a single room and slept with her on several days and in particular on Tuesday night, whist they were in bed, the Accused requested for sex and she agreed and she said they had sex twice.

Furthermore, both the victim in Exhibit D^{1-4} and the Accused in his VCS i.e. Exhibit A^{1-7} said that they are lovers i.e. they were in a boy friend – girl friend relationship. Why would a boy friend take victim, his girl friend, who was under 18 years and under parental care at Grafton and abscond with her to as far as Kroo Bay area, get her into a room, sleep with her on the same bad and request of her that they have sex ? The only logical inference or conclusion to draw from these overt acts of the Accused is that he had the intention to sexually penetrate the victim.

I am therefore satisfied that The Prosecution has also successfully proven this other element of the offence beyond reasonable doubt. I so hold.

(iv) Corroborative evidence confirming the story of the victim

I have held in this judgment that corroborative evidence can take different forms including admissions or confessions of guilt by the Accused, distressed conditions of the victim as observed by another person, lies told by the Accused and testimony of an eye witness who caught the Accused and victim red-handed in the act or in compromising circumstances such as being found in a room or other isolated places half-naked or naked etc.

In the present matter, the Prosecution has led evidence and relied on lies told by Accused as evidence of corroboration.

The Prosecution argued that the Accused told a lie about the whereabout of victim when asked by victim's Grand Mother and the Police and submitted that this lie met R v Lucas (supra) test and therefore amounted to corroboration.

The victim, in her depositions, told the Court below that on Saturday, the 27th February, 2016 when she returned late from laundering and her Grand Mother was angry with her, she went to the Accused at his Grafton residence and explained her problem with her Grand Mother to the Accused; that the Accused then absconded with her to Kroo Bay area where he harbourd her and had sex with her twice on the Tuesday night; that the Accused returned to Grafton the following Saturday when he was arrested and that upon his arrest, the Accused called her on a phone and advised her to return home at Grafton which she did immediately and upon her return, she said that her Grand Mother asked her about her whereabout and that she explained everything that had happened between her and the Accused who was her boy friend.

When she completed her evidence-in-chief in the Court below, the Accused cross-examined her and the witness/deponent denied that she was called by the Accused's Uncle who brought her back to Grafton. The witness/deponent said it was the Accused who called her directly and not his Uncle as suggested by the Accused.

Also, in his VCS i.e. Exhibit A^{1-7}, the Accused confirmed that he was told by his colleague that the victim had absconded from home and that her relations were looking for her; that he was a footballer and whilst he was at Kingtom, Freetown playing football, the victim called him on his phone and told him she was in Bonthe. He further said that on the 3rd March, 2016 about 9:00am, he was at his residence at Grafton when the victim's Grand Mother went to him looking for victim and asked him for her and that he told her that victim had called him and told him she was in Bonthe and that he promised the Grand Mother that whenever she called, he would let her speak with her; but that the old woman insisted that they go to the Police Station for him to explain what he knew of the whereabout of the victim.

From these pieces of evidence I find as follows:

(i) that the Accused and victim were lovers;

(ii) that the Accused absconded with victim from Grafton on Saturday, the 27th February, 2016 and took her to a house/room around Kroo Bay area and harboured her for about a week;

(iii) that he left her at Kroo Bay area and returned to Grafton where, through the efforts of victim's Grand mother, he was arrested;

(iv) that immediately before his arrest, the victim's Grand mother went to him and asked him for victim and he told her victim had called him from Bonthe;

(v) that when he made Statements to the Police, he told the Police that during the time victim absconded from home, she was in Bonthe.

I hold that the Accused told a lie on the issue of the whereabout of the victim during the one week the victim disappeared from her home at Grafton. He knew she was in a house/room at Kroo Bay area where he had taken and harboured her for the purposes of sexually exploiting and/or abusing her but he told a lie twice that she was in Bonthe. Twice i.e. once to the victim's Grandmother and then to the Police.

What then are the legal requirements for a lie to be corroborative of the story of the victim ? The Court of Appeal of England (Criminal Division) set out the criteria in the case of R v Lucas (1981) 2 AER 1008 in the following terms:

"To be capable of amounting to corroboration the lie told out of Court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realization of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the Statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness"

This dictum was quoted with approval in Cross on Evidence, 6th edition by Collin Tapper at page 250

I am satisfied that the lie told by the Accused which particulars I have stated above meets the Lucas criteria. The lie is not only deliberate but it relates to a material issue. In this case, the whereabout of the victim when she disappeared from her Grafton home is material. Her relations, particularly her Grand Mother, were not only worried but went out to look for her and the Grand Mother visited the Accused's residence as she knew he had been after victim to have sexual relationship with her. It was the Accused who had eloped with the victim from Grafton to Kroo Bay area and harboured her and sexually abused

her and yet when he reappeared at Grafton leaving her at the hide out and was asked by the Grand Mother and Police about victim's whereabout, he told them, albeit on separate occasions, that victim had called him from Bonthe. It relates to a material issue as this was the time when she disappeared and was being looked for and further, it was the period that the cover of their underground love affairs was blown up.

The motive for this was deliberate or willful. It followed the Accused realization of his guilt and fear of the truth. He realized his guilt of having hidden the victim from her relations during which he sexually abused/penetrated her. This was the truth.

It has also been shown by evidence that the Statement that victim had called her from Bonthe was clearly a lie. He was with victim and when he left her and was arrested, it was him who called victim and advised her to return home at Grafton which she did immediately.

I am persuaded by the rules set out in R v Lucas (supra) on lies told by the Accused and the circumstances under which they can be corroborative of the story of the victim and I shall accordingly apply them in this matter.

In this matter, the evidence which shows that the Accused told a lie is that of Alice Fatmata Amadu, who is the victim of the alleged offence and not an accomplice. I believe her story and I do not believe the story of the Accused relating to the whereabout of the victim when she disappeared from Grafton. It is a lie told by the Accused. To have told the truth of the whereabout of the victim would have resulted in, according to Lord Lane, Chief Justice, in Lucas (supra) the Accused sealing his fate. Lord Lane CJ said that "Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration .... It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate."

I am therefore satisfied that the Prosecution has proven the last element of the offence i.e. corroboration by leading evidence of lies told by the Accused which I hold met the Lucas criteria and therefore corroborative of the story of the victim that the Accused sexually penetrated her. I so hold.

CONCLUSION

I have taken the pains to analyse the totality of the evidence before me and the relevant law relating to the issues raised and from this analysis, I find as follows:

(i) That the victim, Alice Fatmata Amadu, lived with her Grand Mother and other relations at C-Line, New Camp, Grafton in the Western Area of The Republic of Sierra Leone;

(ii) That at the time of the offence charged, i.e. in February, 2016, the victim was a child i.e. she was fifteen (15) years old;

(iii) That the Accused lived in the same Grafton Community where the victim lived;

(iv) That the Accused and the victim were lovers;

(v) That on a Saturday in February, 2016, the victim returned late from laundering and her Grand Mother, Kadija Pyne, was angry with her and reprimanded her;

(vi) That she used that anger of her Grand Mother as an excuse and went to the Accused, her boyfriend and the Accused eloped with her to Kroo Bay area where he harboured and sexually abused her for about a week i.e. had sexual penetration with victim;

(vii) That due to the victim's disappearance from her home, her relations, particularly her Grand Mother, were anxiously looking for her and the Grand Mother visited Accused residence at Grafton to enquire for victim;

(viii) That the Accused left victim at the Kroo Bay area hide out and returned to his Grafton residence when victim's Grand Mother met him and asked for victim;

(ix) That the Accused told victim's Grandmother that victim had called him and told him she had gone to Bonthe but that the old woman was not satisfied with his explanation and insisted that they go to the Police Station for him to explain what he knew about her whereabout;

(x) That on arrival at the Police Station the Accused was arrested and he phoned the victim and told her to return home as her relations were worried about her disappearance and whereabout;

(xi) That victim accordingly returned home and when her Grand Mother asked her where she had been, she explained that the Accused who

was her boyfriend eloped with her to Kroo Bay Area, harboured her in a single room in a mud house and had sexual penetration of her;

(xii) That when the Accused was asked by the victim's Grand Mother and the Police about the whereabout of victim, he told a lie that the victim had called him and said she was in Bonthe; and

(xiii) That indeed the Accused engaged in an act of sexual penetration with the victim who is a child.

Based on the above findings, I am satisfied that the Prosecution has successfully proven the guilt of the Accused beyond reasonable doubt. Consequently, I find the Accused, Alusine Sulaiman Kargbo, guilty of the offence of sexual penetration of a child contrary to Section 19 of The Sexual Offences Act, 2012, Act No.12 of 2012 and I accordingly convict him of the said offence.

Allocutus and Sentence

See my minutes/notes in the file

Convict sentenced to 7 years imprisonment
minus time already spent

Hon. Mr. Justice MonfredMomoh Sesay JA

30/5/17