

**IN THE HIGH COURT OF SIERRA LEONE
HOLDEN AT FREETOWN**

**THE STATE
VS.
WURIE BARRIE (Alias GORGORHAND)
ALPHA SHERIFF-BANGURA**

**BEFORE THE HONOURABLE JUSTICE M.M SAMBA, J
DATED THIS 15TH DAY OF FEBRUARY 2017**

Counsel:

**A.J.M. Bockarie Esq for the State
Legal Aid Board for the Accused**

Judgment:

1. The accused persons were charged on a two counts indictment dated the 18th day of November 2015 with the offences of Conspiracy contrary to law and rape contrary to Section 6 of the Sexual Offences Act, 2012. The allegation is that on diverse days between the 11th day of September 2014 and the 15th day of September 2014, at Freetown, the accused both accused persons conspired with other persons unknown to rape the victim and that on the 13th day of September 2014 at Freetown, the 1st accused Wurie Barrie intentionally had sexual penetration with one Ntuma Fofana without her consent. The Prosecution tendered in evidence the following Exhibits:

1. Exhibit A1-5 being the VCS of the A1;
2. Exhibit B 1-6 being the VCS of A2;
3. Exhibit C1-2 being the charge statement of A1;
4. Exhibit D 1-2 being the charge statement of A2;
5. Exhibit Z1-3 being the Medical Report tendered for identification;
6. Exhibit E1-2 being the committal certificate dated 14th June 2015

2. Three witnesses testified on behalf of the prosecution to wit:

PW1 was Marie Conteh;

PW2 was the victim, Ntuma Fofana;

PW3 was the Medical Doctor attached to the Rainbow Center at PCMH, Fourah Bay Road, Freetown.

3. I use this opportunity to thank both Prosecutor AJM Bockarie Esq for his final address which to say the least made very interesting read on points of law and fact. No final address was submitted on behalf of the accused.

4. Burden and standard of proof

4.1. The prosecution has a duty to prove its case beyond reasonable doubt to gain a conviction on the offence as charged. See the case of *Woolmington Vs. DPP* which said principle of law has been adopted in all criminal cases within the

Sierra Leone jurisdiction.¹ This principle of law is not without exception. Where an accused pleads insanity to an alleged crime, it will remain the duty of the accused to prove that his situation falls within the M'Naughten rules. There are also statutory exceptions, which provide that where a defence is based on any exception, proviso or qualification, the accused will have the burden of proof in proving that the exception applies in his situation. In respect of the level of the burden of proof on the part of the Prosecution, I refer to the well known case of *R Vs. Edwards* (1975) QB 27 and *Miller Vs Minister of Pensions* (1947) 2 AER 372.

4.2. I am mindful of the fact that an accused is entitled to an acquittal if there is no evidence direct or circumstantial, establishing his guilt. I have cautioned myself that all doubts must be resolved in favour of the accused person. I have also cautioned myself that there is no direct corroboration in respect of whether it was the accused himself who sexually penetrated the victim, P. I shall now proceed to evaluate the evidence and the law before me.

5. The Law

5.1. The Sexual Offences Act, 2012, Act No. 12 of 2012 with amendments, consolidates the law relating to sexual offences. Section 6 of the Sexual Offences Act 2012, under which the accused is charged, creates the offence of rape to wit:

5.2. A person who intentionally commits an act of sexual penetration with another person without the consent of that other person commits the offence of rape and is liable on conviction to a term of imprisonment not less than five years and not exceeding fifteen years.

6. The Elements of the Offence

6.1. The offence of rape contrary to Section 6 of the Sexual Offences Act, 2012 is complete if the prosecution proves the following elements:

- A person must have committed the offence. In the instant case, the allegation is that the accused, Wurrie Barrie who himself is a human being and therefore a person, allegedly committed the act.
- The 'Sexual penetration' is **any act which causes the penetration to any extent of the vagina, anus or mouth of a person by the penis or any part of the body of another person or by an object**. In the instant case, the allegation is that the victim's vagina was sexually penetrated by A1 by use of his penis.
- The act of sexual penetration must be without the consent of the person so penetrated. The allegation is that the victim, Ntuma Fofana did not consent to her penetration by A1.

6.2. *Mens Rea* – As is with all criminal offences, the prosecution must prove that at the time of commission of the offence A1 had a guilty mind. Save in exceptional circumstance, the intention behind a criminal act can only be proved

¹ *The State Vs. Francis Mohamed Fofana Komeh & John Mans* (unreported).

by inference. See Para 1010 of the 36th Edition of Archbold's Pleadings, Evidence and Practise in Criminal cases of 1966 which reads *"the intention of the party at the time when he commits an offence is often an essential ingredient in it, and in such 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"*.

The Prosecution opened its case on the 9th day of March 2016 by putting PW1 on the witness stand.

7. Evidence Analysis

7.1. PW1 was Marie Conteh, DPC 9103 Conteh, M attached to the FSU, Harbour Police Station. She told the Court that on 13th day of September 2014, whilst on duty, a rape of rape was reported against both accused persons. She said on that same day she obtained statements from the victim and her witnesses. She issued the victim a police medical report form which was later returned endorsed by the medical doctor.

7.1.1. PW1 told the Court that on the 14th day of September 2014, together with DPC 9928 Mangay A, she obtained a VCS from A1. She said A1 was cautioned and questioned in Krio and that he made his responses in Krio which she recorded in English. At the end of the interview, the said VCS was read over and explained to A1 in Krio which he admitted to be true and correct by affixing his right hand thumb print on each page of the statement. There being no objection by Counsel for the A1, his VCS was tendered as Exhibit A1-5.

7.1.2. She told the Court that on the 14th day of September 2014, together with Detective Sergeant 7304 Kabba, A, she obtained a VCS from A2 after he was cautioned and questioned in Krio and making his responses in Krio which was recorded in English. At the conclusion of his interview, same was read over and explained to A2 in Krio which content he admitted to be true and correct by affixing his right hand thumb print. There being no objection by Counsel for A2, his VCS was tendered as Exhibit B1-6.

7.1.3. PW1 told the Court that together with DPC 13282, Conteh, PM, she obtained charge statements from both A1 and A2 separately. She said A1 and A2 were cautioned and questioned separately in Krio and they each made their responses separately in Krio which was recorded in English separately; that at the end of obtaining their charge statements, same was read over and explained to them separately in Krio which they separately admitted to be true and correct by affixing their right hand thumb print on their respective charge statements separately. There being no objection by Counsel for A1 and A2, the said charge statement were tendered as Exhibits C1-2 and D1-2 respectively. PW1 tendered the endorsed medical form hereinbefore referred for identification and same was marked Exhibit Z1-3. Exhibits A1-5 and B1-6 were read in open court.

7.1.4. On the 16th day of March 2016, Counsel for A2 informed the court that A2 would rather have his plea put to him again. It was so done and A2 changed his plea of none guilty to one of guilty.

8. PW2 was the victim, P. She appeared to me to appreciate the importance of telling the truth. She professed her faith to be Muslim and that she knows what the Koran says about telling lies. She told the Court that on the day of her testimony, that is 17th day of February 2016, she was 11 years old.

8.1. She told the Court that on the 11th day of September 2014, she was watching a movie when she was called upon and informed the accused was at the house with a message from her mother, PW1. PW2 went out in the compound to answer to the accused person's call. The accused gave PW2 two pairs of slipper he had taken to the house on the instructions of PW1 at aunty Sara's apartment. PW2 took the slipper to her own apartment and returned to aunty Sarah's apartment as asked to do by the accused. She told the Court that she was asked by the accused to go into the bedroom of aunty Sarah's children which she did. She said the accused then laid her on a bed, removed the trousers and panty she had on and inserted his finger into her vagina. P said she felt pain; she cried; the accused threatened to kill her if she told anyone about what he had done to her. P dressed up and returned to her apartment.

8.1.2. P told the Court that there was no one in aunty Sarah's apartment when the incident took place and that the accused had the key to aunty Sarah's apartment. It is now clear why the accused in cross examination of PW1 suggested that he did not live at the apartment on the day of the alleged incident. My understanding of the incident led is that the accused use to live with PW1 then moved over to aunty Sarah's apartment and had just moved to another location about the date of the alleged incident but he still kept the keys to aunty Sarah's apartment.

8.1.3. She said the accused was taken to the police station where a complaint was made against him. PW2 told the Court that her mother was given a police report form and that she was taken to the Rainbow Centre where she was examined and treated.

8.1.4. In answer to cross examination, P denied being given the slipper by the accused in the presence of one Isata. She insisted the accused gave her the slipper in aunty Isata's apartment. She denied that the accused said goodbye to the said Isata and left for his office. P told the Court that the accused use to live with aunty Sarah but then moved out. She said she saw the accused open the door to aunty Sarah's apartment when she went to answer his call. P, confirmed by this statement that indeed, the accused had a key or keys to aunty Sarah's apartment. She again reiterated that the accused did put his finger into her vagina.

8.1.5. PW3 was Kellie Marrah attached to the FSU, Kissy Police Station as an investigator. He told the Court that he recognized the accused against whom a complaint of sexual penetration had been made on the 12th day of September 2014 by PW1 on behalf of her daughter, PW2. He said he obtained a statement from PW1 and his colleague, DPC 9956 Gborie L.K obtained a statement from

PW2; a medical report form was given to PW1 for the examination and treatment of PW2 at the Rainbow Center.

8.1.6. PW3 told the Court that based on the complaint, together with DPC 10113 Johny Paul Sesay, he obtained a VCS from the accused. He explained the procedure followed before obtaining the VCS from the accused. The accused objected to PW3 tendering of the said statement on the grounds that the statement was not voluntarily made by the accused; that the police officer held on to his right thumb and fixed same on each page of the VCS. In light of the above, a *voir dire* was conducted; Kellie Marrah, hereinbefore referred and John Paul Sesay (PW5) testified as to the procedures followed before the accused person's statement was taken. The accused opened his case on the *voir dire* on the 19th day of August 2016, at the end of which his objection to tendering of his statement was overruled. His statement and charge statement were therefore accepted and tendered as B1-7 and C1-2 respectively.

9. PW4 was Dr. Matilda King. She told the Court that on the 12th day of September 2014 while on duty, she received and treated the victim, P. She said she saw no physical injury on P but that her hymen was completely ruptured; that the rupture was an old rupture. She reduced her findings into a report on the medical report form which she tendered as Exhibit A1-3. She confirms P was a child aged 9 years at the date of the alleged offence. She confirmed the victim was sexually penetrated on the 11th day of September 2014.

10. The Prosecutor closed the State's case on the 18th day of November 2016 and tendered the Committal Certificate, Exhibit D1-2 from the Bar. The accused was put to his election to wit:

- a. Make an unsworn statement from the dock;
- b. Make a sworn statement and be subjected to cross examination and call witness(es);
- c. Rely on statement from the police.

11. The accused chose to make a sworn statement and opened his case on the 18th day of November 2016 led by his Counsel. He denied the allegation against him. He admits he was asked by PW1 to take slipper and some meat to her home which he did; he confirms what was said in testimony by the victim P, when she said she was in her own apartment and upon being called she came outside to answer to the accused person's call from her own apartment; he gave the slipper to Isata Tarawally who gave same to the victim. He told the Court that he removed the meat from the bag and put it in one Sarah Kamara's freezer. This piece of evidence confirms PW2 testimony when she said she saw the accused open aunty Sarah's door and also, it is certain that the accused did enter aunty Sarah's apartment.

11.1. In answer to cross examination, the accused told the Court that he was taken to the police station on allegation of sexual penetration of P. He told the Court that he did not tell the police in his statement about Isata Tarawally. Even though the accused told the Court in chief that he is an office assistant at Afro

International, he denied on oath ever having told the police he worked for Afro International. He said he never told the police that he was called upon by Sarah Kamara in respect of the allegation herein; that he did not tell the police PW1 asked her to take meat and slipper to her house even though she said that in chief; he denied telling the police PW1 is the mother of the victim even though he confirmed in cross that PW1 is P's mother. Even though he admitted as PW1 said that it was PW1 who sent him to her house, the accused told the Court that he never told the police that PW1 sent him to her house. Without saying much, one could see that most of what the accused said on oath in testimony is an afterthought.

12. Counsel closed the case for the defence on the 2nd day of December 2016.

13. I note that offences of a sexual nature against a child need to, by law, be corroborated to gain conviction. Sections 6, 7, 9 and 10 of the Prevention of Cruelty to Children's Act 1960 provide for the following:

- a. abusing a child under the age of thirteen and fourteen years of age;
- b. abusing a child between thirteen and fourteen years of age;
- c. indecent assault and attempt to have carnal knowledge;
- d. procuration.

13.1. Section 45 of the Sexual Offences Act No. 12 of 2012 amended and repealed Section 6, 7, 8, 9, 10, 11, 12, 13 and 15 of Cap 31 but not Section 14 of same which means that an offence allegedly committed under section 6, for the purposes of this judgment, must be corroborated in a material particular as a matter of law. Section 6 of the said Cap 31 reads:

Whosoever shall unlawfully and carnally know and abuse any child under the age of thirteen, whether with or without her consent, shall be guilty of felony, and shall be liable on conviction before the supreme court to imprisonment with or without hard labour, for a period not exceeding two years.

13.1.2. I refer to Section 14 of Cap 31, Prevention of Cruelty to Children's Act, 1960 which states as follows:

No person shall be convicted of any offence under Section 6, 7, 9 or 10 of this Ordinance upon the evidence of one witness unless such witness be corroborated in some material particular by evidence implicating the accused.

14. I have read Exhibit B1-7, the VCS of the accused to the police upon his arrest. In his free narrative, the accused told the police that he worked as an office assistant at the Money Gram office of the Afro International Exchange Bureau; he did not suggest any way the police would have known this if he had not told them so. He said in his statement that one day when he went to the victim's house having been sent there by the victim's mother, he met the victim, P, on the day in question when he was asked by the victim's mother to drop some stuff off at her house. He suggested that upon arrival, he met one Bakarr, then about 10

or 11 years old and the victim in an uncompromising position and he asked the said Bakarr to leave the house.

14.1. He told the police that on another occasion, some three days after the alleged incident involving Bakarr, he went again to the victim's house where he met the victim in her mother's room with only her panty on. He then played with the victim's breasts and inserted his finger into the victim's vagina. He said the victim, P asked her to stop what he was doing because she had a sore on her vagina and he stopped. This piece of evidence ties very well with that of PW4. I refer to the testimony of PW4, the medical doctor when she said that the victim's rupture was an old rupture even though she was informed about the incident on the day before the examination and treatment.

14.1.2. He said on the 4th day of September 2014, he was asked by the victim's mother to take some meat and slipper to her home which he did. I take note of the difference in date and hold that it does not affect the material evidence before this Court. He said he did not meet the victim at home so he had to shout her name out. This ties with the testimony of PW2 who told the Court that she was called out loud to answer to the accused because she was busy watching a movie when the accused went to her home.

14.1.3. He said the victim left him after collecting the slipper and meat and he closed the doors of the house and returned to his office. One would wonder which door the accused referred to in his statement but going back to the testimony of PW2, the victim, P, she did say that the accused had a key to the apartment of aunty Sarah where she was allegedly sexually penetrated and that she did see the accused open the door to that apartment and lock same after the alleged incident. It is therefore clear and supportive of PW2's testimony that the door here referred to was the door of the apartment when the victim was sexually penetrated.

14.1.4. In his statement, the accused said he told his mother when she enquired about the allegation that he inserted his finger into the victim's vagina. The accused went further to say why he inserted his finger into the victim but that really is irrelevant to this judgment so I will not countenance his reasons given in his statement.

15. I again refer to the interpretation section of the Sexual Offences Act of the definition of sexual penetration thus:

any act which causes the penetration to any extent of the vagina, anus or mouth of a person by the penis or any part of the body of another person or by an object. In the instant case, the allegation is that the victim's vagina was sexually penetrated by the accused by use of his penis.

15.1. Suffice it to say that the accused person's fingers being part of his body, insertion of his finger into the victim's vagina will constitute sexual penetration. The accused admitted that at the time of the said incident, he knew the victim was a child. In sum, the accused confessed to having sexually penetrated the

victim, X. He can be convicted on his confession statement. As succinctly put by Lord Ridley, J in *R v Walters Sykes*, "... the law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a judge may, if he thinks fit. Convict him on any of the crime upon it."

16. In light of the above, I hold that the Prosecution has proven its case beyond all reasonable doubt that the accused, Foday Bendu, did sexually penetrate a child, P. I find Foday Bendu guilty of the offence of Sexual Penetration contrary to Section 19 of the Sexual Offences Act, 2012 as charged in the indictment dated 15th day of July 2015.


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Hon. Jst. Miatta Maria Samba