ANALYSIS OF LEGAL REQUIREMENTS FOR THE PROOF OF THE OFFENCE OF RAPE IN NIGERIA

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Abstract
This research critically analyses the legal requirements for proving the offense of rape in Nigeria, delving into its definition, essential elements, and the complexities associated with its prosecution. It highlights the key components of unlawful carnal knowledge, consent, and capacity, emphasizing that penetration, however slight, must be demonstrated for a successful conviction. The study also explores the various defenses available to the accused, including consent, lack of penetration, and the implications of marital status, while considering the legal presumption regarding minors. The aim of this research is to analyse the legal requirements of the proof of rape in Nigeria. This research adopted the doctrinal research methodology which included primary and secondary sources of information. The researcher found that the offence of rape under Nigerian law hinges on three main elements: unlawful carnal knowledge, absence of consent, and the capacity of both parties involved. Penetration, however slight, is a vital component for establishing the offence, and it must occur outside of a lawful marriage unless exceptions like judicial separation apply. The researcher recommended inter alia that authorities should implement training programs for law enforcement personnel to enhance their skills in conducting thorough investigations of sexual offenses, ensuring that all relevant evidence, including forensic and medical evidence, is collected and preserved. The researcher concluded that proving the offence of rape in Nigeria involves complex legal requirements, particularly around unlawful carnal knowledge and consent. Thus, victims face significant psychological harm and systemic barriers in seeking justice.

Keywords: Rape, Legal Requirements, Penetration, Consent, and Offence.

1.1 Introduction

The term rape does not have a universally acceptable definition as various learned scholars and jurists have given varied definitions. For the purpose of this discussion, we shall adopt the definition in the Criminal Code to wit:

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> Any person who has unlawful carnal knowledge of a women or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as the nature of the act, or in the case of married woman, by personating Her husband, is guilty of an offence which is called rape.[6]

It is preferable for humans to be treated distinct from animals considering the impact of rape on the individual. In trying to also proffer a definition for the term rape, the Supreme Court of Nigeria in the case of *Popoola v State*[7] states as follows:

> Rape is unlawful carnal knowledge of a girl or woman without her consent, by force, fear or fraud, and it is an essential ingredient of the offence that the intercourse must be without the woman's consent. In other words, a man will be said to have committed rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and at the time, he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it. Even when consent is obtained by force or 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, the offence can be committed.

In *Musa v State*,[8] the Supreme Court summarized rape as follows: "rape is an unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will".[9]

The Penal Code[10] in section 282 states:

(1) A man is said to commit rape who, except in the case referred to in subsection;
(2) of this section, has sexual intercourse with a woman in any of the following Circumstances.
   (a) against her twill;
   (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.
(3) Sexual intercourse by a man with his wife is not rape, if she has attained puberty.

The Violence against Persons Prohibition Act[11] (VAPPA) defines rape as 'when a person intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else without consent, or with a wrongly obtained consent[12].

[6] Criminal Code, Laws of the Federation of Nigeria 2004, s 357.
[7] (2013) 17 NWLR (Pt. 1382) 96.
[8] (2013) 9 NWLR (Pt. 1359) 214.
[9] ibid.
[10] Penal Code, Laws of the Federation of Nigeria.
[11] Violence against Persons Prohibition Act, 2015
[12] Violence against Persons Prohibition Act, 2015. S 1 and 26

It is important to add that mere penetration is sufficient to constitute the sexual intercourse necessary to constitute the offence of rape. The punishment for rape according to the Penal Code is imprisonment for life or for any less term and shall also be liable to fine.

2.1 Elements and Ingredients of the Offence of Rape

When we talk of the elements of rape, we mean unlawful carnal knowledge, penetration, lack of consent from the victim, and the perpetrator's intent to have sexual intercourse, with consent often invalidated if obtained by force, threat, intimidation, deceit, or impersonation. The requirements vary from one jurisdiction to another, but the principles ate generally consistent. Below constitutes an examination of the elements of rape in Nigeria:

A. Unlawful Carnal Knowledge

The carnal knowledge must be proved. For this purpose, it is not necessary to prove that the hymen was ruptured. The slightest penetration of the vagina is sufficient. However, there cannot be rape without penetration. Fundamentally, the general principle of the law of rape is that there must be proof of penetration no matter how slight before the offence of rape can be said to be proved. In *Alli v State*,[13] penetration was held to be the entry of the penis or some other part of the body or a foreign object into the vagina or other body orifice. In other words, the essential and most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution must fail. As mentioned above, penetration, however slight, is sufficient and it is not necessary to prove any injury or the rupture of the hymen to constitute the crime of rape.[14] Emission or ejaculation is not a necessary component neither is resistance, tears, screaming or torn undergarments mandated. As regards penetration, Section 6 of the Criminal Code provides: "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".[15]

In *State v Masiga*,[16] the Supreme Court stated that unless penetration has been sufficiently proved, the offence of rape cannot be sustained. The depth of the penetration or rupture of the hymen are not a necessity once it has been established by credible evidence that there was penetration.

For carnal knowledge to be unlawful, it must be between parties who are not lawfully married. Thus, Section 6 of the Criminal Code defines unlawful carnal knowledge to mean 'carnal connection which takes place otherwise than between husband and wife.'[17] It has been opined[18] that this is what makes rape a sexual offence, for where the carnal knowledge is lawful and with consent, it cannot be said to amount to rape. The phrase has also been held in an English case to mean "carnal connection otherwise than between husband and wife"[19] and in *Idowu v State*[20] the court held that a

[13] (2021) 12NWLR (pt. 1789) 159.
[14] *Iko v The State* (2002) 14 NWLR (Pt 732) 221; *Igbin v The State* (1997) 9 NWLR (Pt 519) 101.
[15] Criminal Code, Act s 6.
[16] (2018) 8 NWLR (Pt. 1622) 383.
[17] Criminal Code Act s 6.
[18] OA Bamgbose, 'A Reflection on the Past, Present and Future of Rape Law', [2002]. *Unib Law Journal*, Vol. 2, 128; C S, Nwakoby and I P Nwakoby, Legal Examination of the Challenge Confronting the Prosecution of Offence of Rape in Nigeria. (2023) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*. Vol. 5 No.1
[19] *R v R (Husband)* [1991]4All E.R. 481
[20] [1998]3 NWLR (pt. 582) 394

carnal knowledge is unlawful if it is "contrary to law." In *R v. Chapman*,[21] the term "unlawful carnal knowledge" was held to mean "illicit intercourse", that is, intercourse outside the bonds of marriage.

More recently, the Court in *Sam v State*,[22] the Court interpreted unlawful carnal knowledge within the meaning of Section 357(1) of the Criminal Code as involving sexual intercourse with a woman or girl without her consent, or where consent is obtained through coercive or deceptive means. Specifically, the Court emphasized that such knowledge becomes unlawful when consent is absent or procured by force, threats, intimidation, fear of harm, or fraudulent misrepresentation, including impersonation of a husband in the case of a married woman.

Thus, it is safe to summarize that a sexual intercourse will be unlawful if it takes place outside the bond of marriage or without consent. The above common law definition of unlawful carnal knowledge which is retained in the Nigerian statute books is the reason why marital rape is not yet legally recognized under the Nigerian criminal justice system. At common law, the rule was that a husband could not be convicted of raping his wife as a principal in the first degree and this is what is codified in Section 6 of the Nigerian Criminal Code. This Common Law rule is traceable to the jurisprudential writings of Hale[23] who posited that the husband could not be convicted of a rape allegedly committed on his wife. His reason for this submission was that by her matrimonial consent and vow, the wife had given up her body to the husband. As a result, the husband could not be said to be raping a woman who legally belonged to him. It is fundamental to note however that the above is not to say that sexual intercourse as between husband and wife cannot be unlawful even in the Nigerian context.

Carnal connection as between husband and wife may be "unlawful" where there has been a judicial separation or a *decree nisi* of divorce or a nullity, an injunction against molestation, an undertaking to the court not to molest or a formal deed of separation, even though it does not contain a non-cohabitation clause or a non-molestation clause.[24] Similarly, a husband may be convicted as a secondary party to a rape[25] committed by another on his wife; for, as Hale puts it, though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another.[26] Thus, it can be deduced from all the foregoing that for the offence of rape to be proved, there must have been an unlawful carnal knowledge. This unlawful carnal knowledge appears, though *prima facie*, to be available only outside the confines of marriage as shown in the clear wordings of the statute. Nonetheless, a close look at the statute will reveal that carnal knowledge can still be unlawful even though it takes place between husband and wife especially where the couple can no longer be referred to as husband and wife under the law either as a result of a deed of separation forbidding cohabitation, an injunction against molestation or an undertaking against sexual intercourse owing to some marital problems.

[21][1959]1 Q.B. 100
[22](2025) LPELR-80925(CA).
[23]Mathew Hale, on the Law of Nature, Reason, and Common Law: Selected Jurisprudential Writings, Edited by Gerald J. Postema. (Oxford University Press, 2017), UNN Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=3076027 accessed on 14/9/2025
[24]*R v Roberts* [1986] Crim LR 188, CA.
[25]*R v Cogan and Leak* [1976] QB 217.
[26]*See Lord Castle haven's case* (1631) 3 state Tr . 401.

B. Consent

There are few other sexual offences apart from rape which require "non-consent" as an element of proof. This requirement is a distinct element of the crime of rape and another significant area that has witnessed changes in recent time. Under the common law, a victim of rape was expected to show that she resisted to her utmost ability. This often-entailed actual physical resistance to the sexual advance and mere verbal objection to such advance would not suffice. Thus, in 1889, the Supreme Court of Nebraska reversed a conviction on the ground that the woman submitted when she had the power to resist.[27]

In a similar vein, a Wisconsin court defined non-consent as "utmost resistance". The court held that the victim had not adequately demonstrated her non-consent. The court further stated that not only must there be entire absence of mental consent but also there must be the most vehement exercise of every physical means or faculty within the woman's power to resist penetration of her person.[28] The reasoning for the above position was apparently based on the fact that a woman is expected to jealously guard her chastity and should shudder at the bare thought of dishonour to her person. In other words, the victim is expected to resist to her utmost.[29] The resistance element expected from the victim however raises a presumption of distrust and general suspicion of victims of rape.[30]

Another reason was the importance attached to chastity and virginity and the popular view that any woman at that period would resist to the utmost any attempt to violate her person. However, with time this utmost resistance requirement disintegrated, as a subtle change of emphasis occurred in the middle of the nineteenth century as shown in the cases of *R. v Camplin*[31] and *R. v Fletcher*.[32]The test since then is not "was the act against her will?" but "was it without her consent" This distinction emphasizes the fact that it is not necessary for the prosecution to prove a positive dissent as was the practice at law; it is enough that she did not assent. Thus, where an accused had intercourse with a woman whom he had rendered insensible by giving her liquour in order to excite her;[33] and where he had intercourse with a woman who was asleep[34] he would be guilty of the crime of rape even though in the two cases there was no utmost resistance as required at common law. Lack of consent can be proved, though not all the time, by bruises, torn clothing, state of the victim etc. For instance, in *Igboanugo v State*,[35] the torn pant, bra and clothes of the prosecutrix were taken as evidence of non-consent. It can also be proved by permitting the defense to introduce evidence of the victim's prior sexual involvement with the accused or other people generally, the assumption being that someone who had engaged in sexual acts previously, or who was promiscuous, would be more likely to have consented. In rape trials, the courts have held severally that where there is a possibility that the prosecutrix consented, the case of the prosecution must fail. In *Iko v State*,[36] for instance,

[27] *People v Dohring*59 NY 374 1874.
[28] *Brown. State* 127 Wis 199 (1906).
[29]O A Bamgbose, 'A Reflection on the Past, Present and Future of Rape Law', *Unib Law Journal*, Vol. 2, 2002, 129; C S, Nwakoby and I P Nwakoby, Legal Examination of the Challenge Confronting the Prosecution of Offence of Rape in Nigeria. (2023) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*. Vol. 5 No.1
[30] ibid.
[31] (1845)1 Den 89.
[32] (1859) Bell CC 63.
[33] ibid.
[34] *R v Mayers* (1872)12 Cox CC 311; *R v Young* (1878)14 Cox CC 114.
[35] [1992]3 N.W.L.R. (pt. 228) p.176.
[36] ibid.

the court held; "the most essential ingredient… is penetration and consent on the part of the victim is a complete defence to the offence."[37]

In the recent case of *Bamigboye v State*,[38] the Supreme Court clarified the legal principle surrounding consent in rape cases, holding that the existence of a cordial or familiar relationship between the complainant and the accused does not negate the possibility of rape. The Court emphasized that what constitutes rape is the absence of genuine consent, and even where consent appears to be given, it is vitiated if obtained through fraud, deceit, threat, or misrepresentation. Thus, the Court reaffirmed that valid consent must be freely and voluntarily given, and any sexual intercourse lacking such consent, regardless of the nature of the relationship, is sufficient to ground a conviction for rape.

A clear distinction must however be drawn between consent and submission. While consent is a willing state of the mind to proceed with the act in question i.e. act of sexual intercourse, submission may be due to threat, fear or intimidation. In *R v Day*,[39] the prisoner, a well-built man, offered to accompany a ten-year old girl on a lonely lane, where he carnally knew her. This was held by the court to be submission and not consent. According to the court in that case 'every consent involves a submission; but it by no means follows that a mere submission involves consent.'[40]Also, in *R v Olugboja*[41] the victim was held to have submitted out of fright because of what she experienced with the 1st accused person when she was struggling to resist. This is a case where the victim was raped by two Nigerian brothers. When she was raped by the 1st accused, she fought tooth and nail to prevent her violation but she was beaten blue black by the said accused until he had his way. On being approached by the 2nd accused for the same purpose, she submitted/succumbed without putting up any resistance. The court held that non-resistance on the part of the prosecutrix in the second rape is no consent but mere submission. To Smith and Hogan,[42] an attempt to draw a distinction between consent and submission conceals a great difficulty. It is the submission of the learned scholars that there was no tangible distinction as between the two concepts.[43] But in a contra-distinction to the position of the learned authors above, Owoade argued that there is a palpable difference between the two: submission and consent. According to him, though the two words may appear similar, there is a distinction. Consent is synonymous with approval, cooperation and a positive form of consensus.[44] One cannot agree less with Owoade. The distinction between the two concepts cannot by any argument be swept under the carpet. As a practical example of the distinction existing between consent and submission, if a victim had submitted to the next culprit in a gang rape owing to the experience she had with other culprits while trying to restrict, as was the case in *R v Olugboja*,[45] could it be said that this is consent and not submission? With due respect to the learned authors, this will be submission and not consent. And even to use their own example of 'a woman submitting to sexual intercourse because her fiancé threatened to break up with her if she

[37] *Igboanugo v State [1992] 3 NWLR* (PT 228)176; *Kaitamaki v Queen* [1984]3 W.L.R. 137.
[38] (2025) LPELR-81145(SC).
[39] (1841)9 C & P 722.
[40] Per *Lord Coleridge* (1841), C&P 722 at 724.
[41] [1981]3 All E.R 443.
[42] JC Smith, B Hogan, *Criminal Law,* (London: Butterworth, 1980), 95.
[43] ibid. 434
[44] A Owoade, 'A Note on Rape', *Ogun State University Law journal*, Vol. 34, 2019, 25; C S, Nwakoby and I P Nwakoby, Legal Examination of the Challenge Confronting the Prosecution of Offence of Rape in Nigeria. (2023) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*. Vol. 5 No.1
[45] ibid.

did not allow him sex',[46] this cannot in any way be compared with a situation where a woman is being slept with, at gun point or at dagger-drawn point. While there is evidence of congeniality in the former case (as between fiancé and fiancée), no such evidence exists in the latter case. Therefore, contrary to the assertion of the erudite authors above that the distinction engenders a great difficulty, the researcher is of the humble view that it has simplified the task for the court and reduced the too-accused-friendly interpretations imposed on words of statutes by some judges. The last point to be noted in respect of consent in rape cases is that fraud will vitiate any consent claimed to have been given by the victim.

However, it is pertinent to note that with the modernization of rape within Nigeria's legal jurisprudence, sexual intercourse with a minor could be seen as rape whether consent was given or not as was decided in the case of *Yakubu v State*[47] the Court held that in cases of rape involving a minor, the issue of consent is legally irrelevant. Although the prosecutrix appeared to have willingly participated in the act, the Court emphasized that by virtue of Section 3(1) of the Jigawa State Violence Against Persons Prohibition Law, 2021, any sexual penetration of a person under 17 years of age constitutes rape, regardless of whether consent was given. The judgment underscores the legal principle that minors are incapable of giving valid consent to sexual intercourse under the law.

It is also pertinent to examine the recent United Kingdom case of *R v Rowland*[48] *(Also known as Timothy Malcolm Rowland case)*[49] where he was charged with rape after an incident in which he engaged in sexual activity with a woman while both were asleep. Rowland, aged 40 at the time of the incident, claimed that he was suffering from sexsomnia, a recognized medical condition characterized by engaging in sexual acts while in a state of sleep, which rendered him unaware of his actions. During the trial, Rowland's defense team presented evidence from medical experts who testified about sexsomnia and its implications, asserting that he had no conscious control over his behavior at the time of the alleged crime. The court found that he could not be held criminally responsible for his actions due to this condition. The jury ultimately cleared Rowland of the rape charge, and the acquittal was upheld by the Court of Appeal. This case highlighted the complexities surrounding consent and criminal liability in situations where medical conditions may impair an individual's awareness and control over their behavior during sleep. It also raised important discussions about the legal definitions of consent and the implications of sleep disorders in sexual offense cases.

C. Capacity

Generally, a person under the age of seven years is not criminally responsible for any act or omission made by such person.[50] And with reference to sexual offence, under the Criminal Code Act, a male person under 12 years is presumed to be incapable of having carnal knowledge and cannot therefore, be guilty of any sexual offence or attempt of it, where having carnal knowledge is in issue.[51] It follows that in today's position of what constitutes rape in Nigeria, a female person under the age

[46] JC Smith, & B Hogan, (N 29) 434.
[47] (2024) LPELR-73306(CA).
[48] [2025] NSWDC 1 (Downing Centre District Court, Judge John Pickering, January 2025.; also available at https://www.theguardian.com/australia-news/2025/jan/30/timothy-malcolm-rowland-sexsomnia-not-guilty-rape-sydney-ntwnfb, accessed on 14/9/2025
[49] ibid
[50] Criminal Code Act s 30.
[51] ibid.

of 12 is equally presumed to be incapable of having carnal knowledge. A husband cannot also be held guilty of rape upon his wife.[52] This is so because there is an implied consent for sexual intercourse given by the wife to the husband at marriage. However, if there is a separation order from a competent court containing a clause that the wife be no longer bound to cohabit with her husband, then the implied consent to intercourse given by the wife at marriage is thereby revoked. Thus, while the order is in force it will be rape for the husband to have intercourse with the wife without her consent.[53] A mere filing of petition for divorce by the wife, without more, does not by itself revoke the implied consent to intercourse. An undertaking by a husband (in lieu of an injunction) 'not to assault, molest or otherwise interfere with his wife …' is equivalent to an injunction and has the effect of revoking the implied consent to intercourse.[54] Importantly, although a husband may not be guilty of rape upon his wife, he may, on the same facts, be held guilty of assault or wounding if he uses force or violence to exercise his right to intercourse.[55] It may, firstly, be argued that under section 357 of the Criminal Code Act, a woman cannot be guilty of committing rape upon a man because according to this section, the offence can only be committed upon a woman or girl. And secondly, it may be argued that such position would not be the case where she is charged under the Violent Against Person's Prohibition Act, 2015 and other like legislations as a man or boy is capable of being raped in those legislations.[56] Arguments on the issue of validity or otherwise of criminal trial or conviction of an offender where such offender is charged with a wrong law or no law at all, has been addressed by the Supreme Court in the case of *Nyame v FRN*,[57] where it held that the accused person need not be charged with the punishment section for his conviction to be valid. That he can be charged under the definition section or the penal section of the law cited in the charge or any other law wrongly cited in the charge or not cited in the charge at all, so far as that law exists prohibiting the act and attaching punishment in respect of the facts showing that the accused committed the offence. In every case where a person is incapable of committing rape he or she may be charged with the offence by virtue of section 7 of the Code for aiding, counseling or procuring the commission of the offence only if he is twelve years old and above.[58]

3.1 Modern Perspective on Rape and Gender Dynamics

The Violence Against Persons (Prohibition) Act 2015 has extended the concept of rape to include intentionally penetrating the vagina, anus or mouth of another person with any other part of his or her body or anything else. The recognition of anal penetration as rape is an indication that concept of rape is embracive of male victims and has rendered rape gender-neutral unlike the Criminal Code definition which is vagina-based and therefore female specific.[59]

In other words, the Violence Against Persons (Prohibition) Act 2015 (VAPP Act) represents a significant advancement in the legal concept of rape in Nigeria, broadening its scope to encompass various forms of penetration beyond traditional understandings. Under the VAPP Act, rape includes the intentional penetration of the vagina, anus, or mouth of another person with any part of the body

[52] Unlawful carnal knowledge is defined in Section 6 of the Criminal Code as carnal connection which takes place otherwise than between husband and wife.
[53] *R v Clarke* (1949) 33 Cr App R 216.
[54] *R v Steele* (1977) Crim LR 290.
[55] R *v Miller* (1954) 2 Q B 282; CCA, s. 253.
[56] Violence Against Persons (Prohibition) Act, 2015 s 1.
[57] (2021) 6 NWLR (Pt. 1772) 289 @302.
[58] *R v Cogan and Leak* (1975) Crim LR 584.
[59] L Atsegbua, *Criminal Law in Nigeria: A Modern Approach*, (Lagos: Malthouse Press Limited, 2021), 196.

or any object, without consent. This inclusive approach acknowledges that sexual violence can affect individuals of any gender, thereby recognizing male victims and making the legal framework more equitable. This shift is crucial in a society where male victims of sexual violence often face stigma and are less likely to report such crimes.[60]

In contrast, the previous legal framework, particularly the Criminal Code, focused primarily on vaginal penetration, which inherently limited its applicability to female victims. This narrow concept not only marginalized male victims but also failed to address the full spectrum of sexual violence that can occur. By expanding the definition to include anal and oral penetration, the VAPP Act acknowledges the reality of sexual violence against all genders, promoting a more comprehensive understanding of the crime.[61] This change is essential in fostering a legal environment that supports all victims, regardless of gender, and encourages reporting and prosecution of sexual offences.[62]

The gender-neutral approach of the VAPP Act responds to the evolving understanding of sexual violence and its impact on society. By recognizing that anyone can be a victim of rape, the Act aims to dismantle the societal stigma that often prevents victims from coming forward. This is particularly important in a cultural context where traditional gender roles can discourage male victims from seeking help or justice. The Act not only provides a legal basis for prosecuting a broader range of sexual offences but also serves as a tool for advocacy and education, promoting awareness about the rights of all individuals to live free from violence.[63]

4.1 Defences Available to a Person Accused of Committing Rape in Nigeria

In Nigeria, the legal landscape surrounding the offence of rape includes various defenses that an accused individual may invoke during prosecution. These defenses are critical in ensuring a fair trial and protecting the rights of the accused while balancing the need for justice for victims of sexual violence. They include:

i. Presence of Consent

The matter of consent has been held constantly to be crucial to the offence of rape. The whole basis of the contention in matters of rape is that an act was done which ordinarily might not have been criminal but for the fact that the person to whom it was done had not given her consent for the doing of such act, it becomes criminal for the simple reason of no consent. Which means if the defendant raises in his defence, that the victim consented to the act, this causes surmountable problems for the case of the prosecution. In *Sani v Kano State*[64], the court examined the provisions of section 282 (1) of the Penal Code which 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;

[60] ibid.
[61] F Anyaogu, 'Violence Against Persons (Prohibition) Act 2015 And Other Existing Gender Legislation: A Comparative Analysis', [2017], *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 8, Issue 1, 35; C P Iloka and I P, Nwakoby, Exposition of the Menaces of Sexual Assault: An Awareness Approach. (2022) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law* (COOUJPPL) Vol.4, Number 1,
[62]ibid.
[63] ibid.
[64] (2017) LPELR-43329(CA).

(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.

In other words, a man will be said to have committed rape if he has unlawful sexual intercourse with a woman who *at the time of the intercourse does not consent to it*; and at the time, *he knows that she does not consent* to the intercourse or *he is reckless as to whether she consents* to it or not. Even when consent is obtained by force or 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, the offence can be committed.

Seeing how the above definition is very much fixated on the absence of consent as the central factor, it means that an accused person can raise the issue of consent as a defence to the offence. Once there is presence of consent, it defeats the entirety of the charge, because in all jurisdictions of the world it is clear that several definitions given to rape are all characterized by *an absence of consent* as a common feature. Adekeye (JSC) in the case of *Isa v State*[65] also attempted a definition of rape in legal parlance as:

> an 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 threat or intimidation of any kind or by fear or 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.

Fabiyi (JSC) in the case of *Posu v State*[66] viewed the offence of rape as:

> An unlawful sexual intercourse with a female *without her consent*. It is an unlawful carnal knowledge of a woman by a man 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*.

Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C. in *Aliyu v State* [67]held in like regard concerning the issue of consent as a tool in the hand of the prosecution and as a defence in the hand of an accused person when she submitted thus:

> …Another vital element of the offence is that the intercourse occurred without the consent of the prosecutrix.
>
> In the instant case, lack of consent was evident in the fact that the appellant corroborated the evidence of PW4, the prosecutrix to the effect that while giving her a lift to Badariya, he deliberately drove past the place where she wanted to disembark and drove her to an uncompleted building. In his extra judicial statement at pages

[65] (2016) LPELR-40011(SC).
[66] (2011) 2 NWLR (Pt. 1234) 393.
[67] (2019) LPELR-47421(SC).

> 77-78 of the record, he admitted parking the car and "fingering her to satisfaction". He also admitted in his oral testimony in Court that he drove her past the place where she wanted to alight.

In the case of *Julius v State*[68], the court submitted thus:

> …Coming to the ingredients that the prosecution must prove to ground a conviction of Rape.
>
> The prosecutrix must prove there was Sexual intercourse without consent. The Prosecutrix/Respondent only stated that the Appellant had intercourse with her and nothing more. The Appellant denied this assertion. There was nothing to show or to prove that, the Appellant indeed had Sexual Intercourse with the Respondent. Mere saying so is not enough to prove such allegation. Apart from the torn pant which evidence is neither here or there, the Prosecutrix/Respondent only reported to the Police Four days after the incident. The evidence of the torn pant is not cogent as the incident was only reported to the police 4 days after. The Respondent did not show the torn pant to her brothers wife she reported to soon after the incident. It could be recalled that the Respondent herself stated that she had no physical injuries from the encounter. There was no medical Report to State the situation of the Rape. There was nowhere in the Respondents testimony she stated categorically that the intercourse if any was without her consent. For Sexual Intercourse to be termed as Rape, *there must be a lack of consent by the Victim*…[69]

In summary therefore, if rape can be interpreted as an unlawful carnal knowledge or non-consensual sex, that is, penetration without consent, then the presence of consent is a defence to an accused person and will grant him full acquittal if proved to the satisfaction of the court. On the other hand, while the presence of consent is a very cogent defence, it does have an exception. It was the opinion of the court in *Isa v State*[70] that:

> …The act of rape is by nature unlawful because the concept involves an aggressive carnal knowledge of a female without her consent. Consent in this context must be devoid of any form of external influence. *A child who is under age is not however capable of giving consent*…

Hence, in the case of a child who is underage, this defence that the victim consented to the act would not stand in court. Section 21 of the Child Rights Act prohibits child marriage while Section 31 provides as follows:

1. No person shall have sexual intercourse with a child.
2. A person who contravenes the provision of Subsection (1) of this section commits an offence of rape…
3. Where a person is charged with an offence under this section, it is immaterial that – (a) the offender believed the person to be of or above the age of eighteen years; or (b) the sexual intercourse was with the consent of the child.

[68] (2019) LPELR-48491(CA).
[69] *Musa v The State* (2013) LPELR 19932; *Ogunbayo v State* (2007); and *Idi v State* (2017) LPELR 2323.
[70] ibid.

Section 277 then defines a child as a person under the age of 18 years.

ii. Lack of Penetration

Notwithstanding the issue of consent as discussed above, it is opined that the most important ingredient of rape is that sexual penetration of the penis into the vagina as that is the real contention. Without proving this fact, there is no ground to even raise the issue of non-consent and all the accused person has to say in his defence is that there was no penetration. In *Julius v. State*[71], it was the defence of the accused person that there was no penetration and thus on that ground there could not have been the occurrence of any rape against which he now stands charged. Following in that regard, it was the contention of the court that:

> …The prosecution did not prove that there was penetration of any sort no matter how slight. The Respondent only stated that the Appellant had Sexual Intercourse with her. She never alluded to the fact that the Appellant Penetrated her. There was no evidence direct or indirect of the penetration of the male organ of the Appellant into the organ of the Respondent. See the case of *Sunday Jegede v The State*[72] where Belgore JSC held:
>
> ”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 or any kind or by fear of harm or by means of false and fraudulent misrepresentation as to the nature of the act or in the case of a married woman, by personating her husband. The Rape is only committed in circumstances set only above with clear evidence of penetration and who was Responsible for it.

It therefore, means that apart from the prosecutrix proving lack of consent, the fact of penetration must also be proved. In the present case, the Respondent never said that there was penetration of any sort. The essential and most important ingredient of the offence of Rape is penetration and if penetration is not proved, the prosecution cannot be said to have proved its case beyond reasonable doubt. Penetration however, slight is sufficient and it is not necessary to prove an injury or the rupture of the hymen to constitute the crime of Rape.[73] It is not enough that the prosecution/Respondent said that the Appellant had Sexual Intercourse with her without her consent but the fact of penetration must be proved beyond reasonable doubt.

It is clear from the holding of the court above that the defence of no penetration is a cogent defence for the accused person. Also, to buttress this fact better, in the case of *Muazu v State*[74] the Court expressed its opinion on the issue of penetration when it said:

> By far, the most important essential ingredient of the offence is penetration and unless penetration is proved beyond reasonable doubt, the prosecution’s case must fail. Thus, prove of penetration is a sine qua non for the proof of rape. However, authorities both at common law and under our statutes are in unison that incomplete or partial penetration is sufficient to prove the offence of rape. In other words, the slightest penetration is sufficient to constitute the act of sexual intercourse and completes the offence. Therefore, proof of rupture of the hymen or any injury is not

[71] ibid.
[72] *Sunday Jegede v The State* (2001) LPELR 1603.
[73] *Iko v State* (2001) 7 SCWJ PG 391; *Okoyomon v State* (1973) 1 SC PAGE 21; *State v Masiga* (2017) LPELR 43474.
[74] *Muazu v State* (2018) LPELR-46768(CA).

> necessary to establish the offence of rape[75]… As held per Ogunbiyi JSC, in Isa v Kano State (Supra) the extent of penetration no matter how slight will serve sufficient proof. Penetration with or without emission, is sufficient even where the hymen is not ruptured.

iii. Marital Relationship

An examination of Section 6 of the Criminal Code which defines unlawful carnal knowledge as carnal connection that take place otherwise than between husband and wife, will reveal that a husband cannot, as a general rule, be guilty of rape on his wife. There is a similar provision under section 282 of the Penal Code which makes the attainment of puberty by the wife the limiting age. This general rule has been justified by Sir Mathew Hale in the seventeenth century. In his own words:

> The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their natural matrimonial consent and contract the wife hath given up herself in this kind into her husband which she cannot retract. [76]

In the Nigerian context where polygamy is prevalent, this rule may not be practicable. However, since the law also recognizes polygamy, it is submitted that the reference to husband and wife in section 6 is not restricted only to parties to a monogamous marriage. There are exceptions to the general rule that a husband cannot be guilty of raping his wife. He may be found guilty of raping his wife in the following instances:[77]

(a) **Decree of judicial separation**. In Clarke,[78]it was held that where a competent court has ordered a decree of judicial separation, the wife is no longer bound to cohabit with the husband.

(b) **Where there is a divorce nisi**. In R v. O‟ Brien,[79]Park J. held that a decree nisi of divorce effectively ended a marriage and so it was possible for the husband to rape his wife.

(c) Also, where an injunction has been granted against a husband from molesting his wife or where he has given an undertaking to the court not to do so, a similar situation will apply.[80]

iv. Insanity

The defence of insanity was very well expatiated in the case of *Taiwo v State*[81] as the court held as follows: “A defence of insanity is an affirmative defence alleging that a mental disorder caused the accused to commit the crime. It is a defence available to all crimes that absolves the accused of liability by virtue of S. 28 of the Criminal Code Act.” Thus, a person who is adjudged completely insane cannot be guilty of the offence of rape.

v. Capacity

According to *Section 30 of the Criminal Code Act*, a male person under the age of 12 years is presumed to be incapable of having carnal knowledge. This is an irrebuttable presumption which

[75]*Iko v The State* (2001) 14 NWLR (PT. 732) 221; *Isa v Kano State* (2016) LPELR 40011(SC); *Agiri v State* (2012) 16 NWLR (PT. 1327) 522, 541; *Shuaibu Isa v Kano State* (2016) LPELR 40011 (SC).

[76] JC Smith, B Hogan, *Criminal Law*, 5thed, (London: Butterworths; 1983), 405.

[77] Blackstone: To have and to hold: The Marital Rape Exception and the fourteenth Amendment, 99 *Harvard Law Report* 1986, P. 1255.

[78] Clarke (1949) 2 ALL E. R. 443. See also Miller (1954) 2 Q.B. 282.

[79] (1974) 3 ALL E. 663.

[80] Steele (1977) 65 Cr. App. Rep 22, (1977) Crim L. R. 290.

[81]*Taiwo v State* (2019) LPELR-47488(CA)

means that he cannot be guilty of the offence of rape, even if it is shown that he has reached puberty, despite his age. He may however be convicted of indecent assault and not rape. However, there is no such provision under the Penal Code and nothing stops the trial or conviction of a child who has attained the age of 7.

This defence however has not come up in any reported case within Nigeria. Another perspective would be the physical capacity in terms of the medical condition of the accused person. If the accused person suffers from erectile dysfunction in the sense that he cannot sustain an erection, it is doubtful if penetration can be achieved in that regard. It is true that this defence of capacity is very rarely used if ever it has been and so the law remains under developed with regards to the capacity of an accused person to commit the crime in the first place. However, with recent developments of the law on sexual offences around various jurisdictions of the world, penetration with an object other than the penis will suffice in the proof of rape and in this scenario, the defence of physical incapacity would not hold ground.

vi. Alibi

The defence of Alibi is available only in crimes of the nature where the presence of the accused person at the scene of the crime cannot be dispensed with at the particular time in order that the crime be committed. Like Housebreaking, the accused person's body must break into a victim's house in order to commit the crime. Rape also, if the penis of the accused person must enter the vagina of the victim, it is obvious that he must be present at the place of the crime when his penis is doing the penetration. A penis cannot be sent on errand. The defence of Alibi simply means "I was not there".

In the case of *Christopher v State*[82], the learned Counsel to the Appellant also accused the Court of failing to consider the defence of alibi put forward by the Appellant. Alibi which is a Latin phrase has been judicially defined and explained. In the case of *Tirimisiyu Adebayo v The State*[83] per ARIWOOLA, JSC averred:

> Alibi means when a person charged with an offence says that he was not at the scene of crime at the time the alleged offence was committed. That he was indeed somewhere else and therefore he was not the person who committed the offence.[84]

Also, in the case of *Kareem Olatinwo v The State*[85]per ARIWOOLA, JSC who again said:

> What does 'alibi' mean? Alibi simply means elsewhere. That is a defence based on physical impossibility of a Defendant's guilt by placing the Defendant in a location other than the scene of the crime at the relevant time. The fact or state of having been elsewhere when an offence was committed.

The onus or burden of proving or establishing an alibi is firstly on the Defendant/Accused who must at the earliest opportunity inform the police in his statement where exactly he was and the people, he was with at the time the offence was actually committed.

[82] Christopher v State (2019) LPELR-48153(CA)
[83] (2014) 8 SCM 34 at 54 B-C
[84]Okosi v State (1989) 1 CL.RN 29 Akum Agboola v State (2013) 8 5CM 157, (2013) 11 NWLR (Pt 1366) Col. 9; (2013) 54 N5QR (Pt 11) 1162.
[85] (2013) 4 SCM 178 at 196

5.1 Requirement of Corroboration in Sexual Offences

The issue of corroboration in sexual offences has attracted a lot of scholarly discussions, and the debate continues. The debate assumed a new dimension in Nigeria when the corroboration requirement was removed from the Evidence Act 2011, a procedural law. Yet the substantive law, Chapter 21 of the Criminal Code still contains the corroboration requirement. This is probably because, by its nature, the offence of rape is not usually committed in public but in private. In *Benjamin v State*,[86] Galumje JSC held that:

> Corroboration in a rape case is evidence which tends to show that the story of the victim, the prosecutrix, shows clearly that it is the accused that committed the crime. Such evidence need not be direct. It is, therefore, some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it. Corroborating evidence must, therefore, be an independent piece of evidence that connects the accused to the alleged offence. It is a piece of evidence that implicates him and thus confirms in some material way that not only was an offence committed but also that the accused committed the alleged offence. It must be flawless, indubitable, credible and not discredited.

In *Kiwo v State*,[87] Ejembi Eko JSC stated:

> The essence of corroboration is not to give validity to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and credible. What corroboration does in effect is to give support to the assertion of the prosecution other than evidence which 'confirms' or 'supports' or 'strengthens' the evidence. It is evidence which renders other evidence more probable.

Wigmore argued for the corroboration requirement in sexual offences because such narrations are straightforward and convincing on the surface, and therefore the court or tribunal would be easily swayed to find in favour of the supposed victim. The requirement of corroboration, he contended, would provide a buffer for the accused who, in most cases, could easily be presumed guilty from the finessed and stoical presentation of the narrations.[88] One can therefore submit that the rules relating to the corroboration requirement in sexual offences originate from the strong belief that some women tend to lie about sexual offences. This is the justification for subjecting allegations of sexual offences to serious scrutiny, such as requiring corroboration from sources independent of the victim.[89]

[86] (2020) All FWLR 725

[87] (2021) 12 NWLR 170

[88] A BudooScholtz, & EC Lubaale, 'Violence Against Women and Criminal Justice in Africa, Sustainable Development Goals Series, Vol. 2, 2022, 25; C P Iloka and I P, Nwakoby, Exposition of the Menaces of Sexual Assault: An Awareness approach. (2022) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law* (COOUJPPL) Vol.4, Number 1,

[89] O Olatunji, 'Penetration, Corroboration and Non-Consent: Examining the Nigerian Law of Rape and Addressing its Shortcomings, *University of Ilorin Law Journal*, Vol. 8, 2012, 82; C S, Nwakoby and I P Nwakoby, Legal Examination of the Challenge Confronting the Prosecution of Offence of Rape in Nigeria. (2023) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*. Vol. 5 No.1

However, the law is that corroboration is no longer a matter of necessity in other to prove rape and other sexual offences. Thus, a defendant could be convicted on the evidence of the prosecutrix only. In the case of *Mutairu v State of Lagos,*[90] the court was faced with the question of 'Whether it is necessary to have corroboration in a rape trial' and the court held inter alia:

> …the Supreme Court has held that in spite of the repeal of statutory requirement of corroboration in cases of rape (sexual offences) it is still desirable in such cases to have the evidence of prosecution strengthened by other implicating evidence against the accused person/defendant. Section 204 of the Evidence Act, 2011 has effectively and effectually liberated sexual offences from the emasculating grip of the requirement of corroboration. Hence, with the present position of the law, the issue is beyond argument, that corroboration is not necessary in order to establish the offence of rape. It is merely desirable, if and when the need arises, to get evidence of the prosecution, to be strengthened by other implicating evidence against the accused person. Additionally, it is significantly important to note, that while Sub-section (1) of Section 209 of Evidence Act, 2011 covers/applies to both civil and criminal proceedings, that of Sub-section (3) of the same thereof, is also not confined to sexual offences alone.

In the case of *Muhammadu v The State*,[91] the apex Court held that an accused person can be convicted on the uncorroborated evidence of the prosecutrix...

The Court of Appeal also averred as follows in the case of *Musa v State*:[92]

> In cases of rape and other sexual offences, it is desirable that the evidence of the prosecutrix is corroborated by other pieces of evidence implicating the accused or tending to confirm the evidence of the prosecutrix. This is apart from the provision of Section 209 (3) of the Evidence Act. There is no rule as to what a corroborative piece of evidence is and how it can be applied but the general proposition is that the corroborative evidence needs not be direct that the accused person committed the offence.

6. 1 Conclusion and Recommendation

In conclusion, the offence of rape in Nigeria remains difficult to prosecute effectively due to legal, procedural, and socio-cultural barriers. For rape law to serve its intended purpose of protecting individuals from sexual violence, there must be harmonization of legal definitions, elimination of archaic legal assumptions such as the marital rape exception, and greater emphasis on victim-centered legal and institutional responses. Only through these reforms can Nigeria achieve a justice system that is both equitable and effective in combating sexual violence. We therefore, recommend that authorities should implement training programs for law enforcement personnel to enhance their skills in conducting thorough investigations of sexual offenses, ensuring that all relevant evidence, including forensic and medical evidence, is collected and preserved; there is need to harmonize all rape laws across Nigeria by revising the Criminal and Penal Codes to reflect the expanded and gender-neutral definitions found in the VAPP Act, ensuring consistency and inclusivity in legal

[90](2021) LPELR-56754(CA)
[91] (2020) 17 NWLR (Pt. 1753) 252 @ 278.
[92] (2021) LPELR-56836(CA).

interpretation and enforcement nationwide; eliminate the marital rape exception by amending Section 6 of the Criminal Code that imply perpetual spousal consent to sexual intercourse. Marital status should not preclude a person from enjoying full sexual autonomy and legal protection against rape; discourage the reliance on corroboration by promoting judicial awareness that the testimony of the victim alone, if credible, can sustain a conviction. Legal education and judicial training should emphasize the removal of corroboration as a legal necessity in sexual offence trials; establishment of specialized sexual offences courts with trained personnel, including judges, prosecutors, and social workers, to handle rape cases with the requisite sensitivity, speed, and expertise. This would reduce victim trauma and improve the chances of successful prosecution and launching of national education and awareness campaigns aimed at reshaping public attitudes on consent, dismantling rape myths, and encouraging victims to report offences. Such campaigns should also target men and boys to address the root causes of sexual violence and promote a culture of respect and accountability. Proving the offence of rape in Nigeria involves complex legal requirements, particularly around unlawful carnal knowledge and consent. Thus, victims face significant psychological harm and systemic barriers in seeking justice.