**PULLEN OSADIAYE**

**v.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

15TH APRIL, 1977.

SUIT NO. SC 179/1976.

**LEX (1977) - SC 179/1976.**

OTHER CITATIONS

(1977) 4 S.C. 69

2PLR/1977/54 (SC)

**BEFORE THEIR LORDSHIPS**

ATANDA FATAI-WILLIAMS, J.S.C.

CHUKWUNWIKE IDIGBE, J.S.C.

ANDREWS OTUTU OBASEKI, J.S.C.

**ORIGINATING COURT(S)**

HIGH COURT OF BENDEL STATE, HOLDEN AT BENIN CITY

**REPRESENTATION**

Mr. O. O. JIBOWU - for the Appellant

Mr. M. E. AGIDI, Acting Legal Adviser, Bendel State - for the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE:– Murder – Proof of –

CRIMINAL LAW AND PROCEDURE:– Rape – Sex initiated under state of insensibility produced by alcohol or drugs - When evidence is deemed not adequate to sustain rape

CHILDREN AND WOMEN LAW: *Women and Justice Administration* – Young woman who died after group-sex during which alcohol and drug was consumed –Respiratory depression as cause of death - Failure of prosecution to prove relevant elements necessary to sustain a charge of murder - Effect

HEALTHCARE AND LAW:- Drug abuse – use of over-the-counter-drugs and alcohols by young persons – Implications for justice administration

HEALTHCARE AND LAW: Proof of murder due to respiratory depression associated with shock arising from drug ingestion – ‘Madras’ tables - Post-mortem examination which could not identify specific drug – What prosecution must prove

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Finding of facts by trial court – Erroneous findings not supported by evidence - When appeal court would interfere with same

EVIDENCE – BURDEN OF PROOF IN CRIMINAL TRIALS:- Murder – Cause of death - Principle that it lies on all material times on the prosecution to show that accused person was responsible for the death of the deceased – Failure to discharge same – Duty of trial court thereto

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

Baby Eweka (the deceased) and her cousin one Magdaline Ohonba (3rd P.W.) went to the house of one Samuel at Plymouth Road, Benin City (one of those discharged at the close of the prosecution’s case) to return some gramophone records which they had earlier borrowed from Samuel for a party. On arrival there, the two girls (Baby Eweka and Magdaline Ohonba) met five boys in the room occupied by Samuel in the house. Samuel offered the two girls a bottle of stout each. They sat down and drank the stout. As they were drinking, Magdaline remarked that she had been told that stout has a way of “worrying” those who drink it. Hearing this, the appellant went out and bought some white tablets with the letters MS written on them and which were referred to in evidence as “madras”. He gave Magdaline one of the tablets and the deceased three. The girls took the tablets given to them with their stout. After this, Samuel and Magdaline started to “neck”. After some time, one of the remaining four boys was asked to leave and he left. Thereafter there was a sex orgy during which the boys had sexual intercourse with the two girls in turn. After the sex orgy, Magdaline became dizzy and also observed that Baby seemed dizzy too. But, they left for home by themselves, and did not complain of rape or assault to family members. The next day, Baby became sick and died. The accused and the other boys were charged for her murder.

DECISION(S) APPEALED AGAINST

In a reserved judgment, the learned trial judge after reviewing the evidence adduced before him found as follows:

“I am satisfied on the evidence of the 3rd P.W. that the accused was one of the three young men who abnormally and savagely assaulted the genital tract of the deceased by the excessive shearing force of the sexual act. And I am left in no doubt that the purpose of giving the drug madras to the deceased was to overpower her refusal to have sex. Or to put it another way the intention of the accused in administering the drug to the deceased was to make her insensible; to make her incapable of exercising her will which she had earlier indicated, namely “I will not have sex”. Not only was sex had with her while unable to exercise her will by Samuel but it was also had with her in that state by the accused and one other. In short, she was raped. And the drug was administered to her to facilitate the commission of the offence called rape...

I am satisfied that the accused knew the effect on the human body of the drug madras: that he bought and administered it to the deceased under the pretext that it was something to counteract the supposed adverse effect of stout and that his intention was to facilitate the commission of the offence of rape which is a felony and therefore an offence for which the offender can be arrested without warrant. Therefore do I form the view that the act of the accused comes under section 254(5) of the Criminal Code in that I find as a fact that he ‘administered an overpowering thing’ to the deceased for the purpose stated in section 254(4) of the Criminal Code namely ‘for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant’ vis rape as defined in section 298 of the Criminal Code and illustrated by the case of R. v. Camplin above mentioned.”

ISSUE(S) FOR DETERMINATION ON APPEAL

Whether there was any evidence adduced by the prosecution to show what effect the tablet known as madras could have on those who take it.

Whether the learned trial judge was in error when he held that the respiratory depression which caused the death of the deceased was induced by the said tablet.

DECISION OF [CURRENT] COURT

1. Evidence shows that none of the two girls directly concerned complained of rape to anybody either during the orgy which took place in rooms in a compound or on their arrival back in their own house or even after Baby began to vomit. There was before the court no evidence of rape as found by the trial judge. He was certainly in error in making such a finding.

2. The finding of the trial judge that it was the tablet “madras” taken by the deceased which caused the respiratory depression which caused her death was glaringly erroneous as no evidence was adduced to show the ingredients or contents of each of the tablets, or that they are capable of causing the respiratory depression, or that no other drug or tablet was taken by the deceased before coming to the house of Samuel on the day in question.

3. While the conduct of the accused and his friends is to be deprecated, they were however being tried for murder – and not for their morals. To convict any of them of the offence, it must be proved beyond any reasonable doubt that the death of the deceased was caused by the tablets which the appellant gave her. This the prosecution had failed to do. Therefore, in the absence of such clear and direct evidence to connect the cause of the death (in this case, “respiratory depression”) with the appellant (i.e. the MS tablets administered by the appellant to the deceased), we did not think it was safe to allow the conviction to stand.

Appeal allowed. Conviction and sentence passed on the appellant set aside and he is ordered to be acquitted and discharged.

**MAIN JUDGEMENT**

**FATAI-WILLIAMS, J.S.C.** **(Delivering the Judgment of the Court):**

In the High Court of Bendel State sitting at Benin City, the first accused, now appellant, was convicted of the murder of one Baby Eweka. Originally, three other persons were charged with the appellant. After the close of the-case for the prosecution, however, the learned trial judge held that no case had been made out against them sufficient enough to warrant calling on them for their defence. He accordingly discharged them leaving only the appellant to defend himself.

The facts on which the conviction of the appellant was based may be summarised as follows. In the evening of 26th November, 1973, Baby Eweka (the deceased) and her cousin one Magdaline Ohonba (3rd P.W.) went to the house of one Samuel at Plymouth Road, Benin City (one of those discharged at the close of the prosecution’s case) to return some gramophone records which they had earlier borrowed from Samuel for a party. On arrival there, the two girls (Baby Eweka and Magdaline Ohonba) met five boys in the room occupied by Samuel in the house. The house is in a compound. Samuel offered the two girls a bottle of stout each. They sat down and drank the stout. As they were drinking, Magdaline remarked that she had been told that stout has a way of “worrying” those who drink it. Hearing this, the appellant went out and bought some white tablets with the letters MS written on them and which were referred to in evidence as “madras”. He gave Magdaline one of the tablets and the deceased three. The girls took the tablets given to them with their stout. After this, Samuel and Magdaline started to “neck”. After some time, one of the remaining four boys was asked to leave and he left. Thereafter there was a sex orgy during which the boys had sexual intercourse with the two girls in turn. After the sex orgy, Magdaline became dizzy. She then described what followed as follows:-

“Accused 2 (Samuel) went and bought two tins of milk and gave me one and gave one to the deceased. We drank all. The deceased and I got up and went home. I don’t know how I got home. I discovered the next morning at about 8 a.m. that I was in my home. That morning my sister was vomiting. My relations and I took her to hospital where she died:”

In answer to a question put to her under cross-examination, Magdaline said that it was Samuel who actually bought the tablets but that it was the appellant who gave her one tablet and the deceased three tablets.

On their way home, the two girls ran into Julius Ohonba (P.W.6) who is the brother of Magdaline and a cousin of the deceased. P.W.6 asked Magdaline where they were coming from and she replied that she had been out with the deceased. She did not say anything either about the sex orgy or about the tablets, not even about how the deceased was behaving.

Sunday Odulade (P.W.4) who lived in the same compound as the appellant, is a trader in patent medicines. He said he was in his shop on 23rd November, 1973 at about 8 p.m. when the appellant came to buy two tablets of “madras”. After paying 20 kobo for each tablet, he collected the two tablets and left. When questioned by the learned trial judge about the effect of the tablet on those who take it, the witness replied:-

“I do not know H madras is a poison... I do not know what madras tablets do.” Under cross-examination he explained further as follows:

‘This was the first time Accused one bought madras tablets from me. I don’t know if people who have severe headaches use it.”

Dr. John Aideyan (P.W.1), the doctor who performed the post-motem examination on the body of the deceased, testified as follows:

‘There was a posterior laceration of the vagina and vulva associated with haemorrhage and blood clots in the vagina. The above inconsistent with excessive shearing force (that is movement in and out of the vagina) causing a combination of imparted and distentional laceration and contusion of labia, vulva and vagina.”

After stating that the deceased also had generalised peritonitis and that the probable date of death was 26th November, 1973, he went on to express the opinion that death was due to respiratory depression associated with shock. In answer to a question asked by the Court, the doctor replied -

‘The severe attack could not cause death but peritonitis could.”

He was then cross-examined at length as to the actual cause of the deceased’s death. To this question the doctor replied:

‘The cause of death was respiratory depression. It is possible that the non-specific generalised peritonitis could cause death if not treated. Peritonitis means an infection of the bowels and can be caused by specific organism... Sexual act can cause peritonitis. But in this case, death was not due to the peritonitis but to severe respiratory depression that could be drug induced. I could not identify the drug that induced the severe respiratory depression.

I do not know the quantity of the drug she took. The time it takes to kill the victim depends on the quantity of the drug taken. Apart from being drug induced, death due to respiratory depression can be caused by infection of the nerve systems and by head injuries as in a motor accident ... The deceased had no head injuries nor did she show evidence of nervous infection and so both these causes are ruled out.”

In his defence, the appellant admitted buying the tablets for the girls but explained that he did so at the girls’ request. He denied knowing the effect of the tablets on the human body. He denied having sex with the girls on the night in question. He said that after the visit to Plymouth Road, both girls left for their home hale and hearty and that when he visited them the following morning he found them washing their clothes.

In a reserved judgment, the learned trial judge after reviewing the evidence adduced before him found as follows:

“I am satisfied on the evidence of the 3rd P.W. that the accused was one of the three young men who abnormally and savagely assaulted the genital tract of the deceased by the excessive shearing force of the sexual act. And I am left in no doubt that the purpose of giving the drug madras to the deceased was to overpower her refusal to have sex. Or to put it another way the intention of the accused in administering the drug to the deceased was to make her insensible; to make her incapable of exercising her will which she had earlier indicated, namely “I will not have sex”. Not only was sex had with her while unable to exercise her will by Samuel but it was also had with her in that state by the accused and one other. In short, she was raped. And the drug was administered to her to facilitate the commission of the offence called rape...

I am satisfied that the accused knew the effect on the human body of the drug madras: that he bought and administered it to the deceased under the pretext that it was something to counteract the supposed adverse effect of stout and that his intention was to facilitate the commission of the offence of rape which is a felony and therefore an offence for which the offender can be arrested without warrant. Therefore do I form the view that the act of the accused comes under section 254(5) of the Criminal Code in that I find as a fact that he ‘administered an overpowering thing’ to the deceased for the purpose stated in section 254(4) of the Criminal Code namely ‘for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant’ vis rape as defined in section 298 of the Criminal Code and illustrated by the case of R. v. Camplin above mentioned.”

The learned trial judge also considered the evidence relating to the behaviour of the girls after the orgy. He then convicted the appellant of the murder of the deceased after finding finally as follows:

“The next morning she was found seriously ill and taken to the hospital. The father was sent for and before he got to the hospital in the course of the day the deceased had died. Of what? Of respiratory depression that the drug induced. There is no evidence that she took any other drug. The only drug she was known to have been taking was that bought and administered to her by the accused. The effect on her was immediate and I have no doubt that it was on account of that effect on her that the accused and Samuel took the girls as near their home as it no doubt was safe to do before leaving them.”

At the hearing of the appeal against the conviction, learned counsel for the appellant contended that since no evidence was adduced by the prosecution to show what effect the tablet known as madras could have on those who take it, the learned trial judge was in error when he held that the respiratory depression which caused the death of the deceased was induced by the said tablet.

Learned counsel for the respondent, when asked to do so by the court, was unable to refer us to any evidence indicating that the particular tablet, whether taken alone or with stout, could cause respiratory depression. He conceded, with commendable frankness, that the learned trial judge did not even find that it was the excessive sexual intercourse to which the deceased was subjected which caused her death.

After considering the points urged upon us, we were constrained to hold that the findings of the learned trial judge were fallacious in two important respects. Firstly, the learned trial judge found that the girls were raped by the appellant and the other boys originally charged with him. Not only is there no evidence in support of this finding which, in any case, is not part of the case for the prosecution, the evidence that was adduced indicated that she was not raped. This is clear from the testimony of Magdaline Ohonba (P.W.3) which reads, in part, as follows:-

“We each took our tablets with stout. After this, Accused 2 began to romance me. He was rubbing his hand on my body. After some time the four accused persons asked the fifth boy to leave the room and he did. Of the four accused persons, three were sitting with the deceased. They are Accused 1, Accused 2, and Accused 4. Accused 3 sat with me. After the fifth had left Accused 2 began to have sexual intercourse with the deceased. There were two beds in the room. I sat on one bed with Accused 3 and the deceased sat on the second bed with Accused 1, Accused 2 and Accused 4. After the fifth boy had left Accused 2 asked me to go out. I went out. Accused 1, Accused 3 and Accused 4 did leave the room with me leaving only Accused 2 with the deceased in the room. Accused 1 took me to the room of the fifth boy in the same compound. In the room we met the fifth boy. After some time, Accused 2 came to us in the other room. Accused 1 left and went into the room where the deceased was. The two rooms are close to each other. After some time Accused 1 came out and join us in the other room. Accused 4 then went into the room where the deceased was. After some time, he came to join us. Then Accused 3 took me into the room where the deceased was. In the room I saw the deceased lying on the bed face upwards. I called her by her name, she did not answer and was looking at me. I saw some blood on her pants she had on. Accused 3 then had sexual intercourse with me on the other bed where he and I had sat. After we had finished the sexual intercourse, Accused 1, Accused 2 and Accused 4 came into the room. I became dizzy. Accused 2 went and bought two tins of milk and gave me one and gave one to the deceased. We drank it all. Then the deceased and I got up and we went home.”

When questioned about the state she said she found the deceased on the bed, she replied:-

“I did not shout for help when I discovered that the deceased could not respond when I called her because my tongue was heavy.”

Added to the above is the evidence of their cousin Julius Ohonba (P.W.6) who saw them on their way home after the orgy. This witness testified as follows:-

“I see Exh. ‘T. It Is the statement I made to the police. I did not say that they were staggering in the statement. I asked P.W.3 where they were coming from and she told me that she went out with the deceased.”

In fact, this witness gave more details of this encounter in his written statement (Exh. 7) made to the Police on 29th November, 1973, that is, three days after the incident. Part of the statement reads:-

“It happened that at about 2 a.m. on 26th November, 1973, I came out to urinate so I saw two ladies coming. I did not identify them as my sisters until when they came to our entrance. I saw that they were my sisters by name Magdaline and Baby. I asked my junior sister Magdaline where they were coming from. She told me that she went out with Baby. She did not tell me the place or name of the place they went. I was annoyed and left them for my room. Baby did not talk to me that night. I heard when they closed the door of our house.”

From the above, it is clear that the two girls directly concerned did not complain of rape to anybody either during the orgy which took place in rooms in a compound or on their arrival back in their own house; none was made even when Baby began to vomit. Furthermore, there is no evidence leading to the irresistible conclusion that the deceased had sex with the appellant and the two boys (discharged at the close of the case for the prosecution) under a state of insensibility produced by drinks (the stout) or drugs (the MS tablet). For this reason, we took the view that there was no evidence of rape as found by the learned trial judge. He was certainly in error in making such a finding.

Secondly, the learned trial judge found that it was the tablet “madras” taken by the deceased which caused the respiratory depression which caused her death. This finding is glaringly erroneous for the following reasons. No evidence was adduced to show the ingredients or contents of each of the tablets, or that they are capable of causing the respiratory depression, or that no other drug or tablet was taken by the deceased before coming to the house of Samuel on the day in question. We recalled that P.W.4, the man who was in charge of the patent medicine store and who sold two of the tablets to the appellant on the night in question said that he did “not know what madras tablets do”. We also adverted to part of the testimony of the doctor who performed the post mortem on the body of the deceased. This is what he said -

“Death was not due to peritonitis but to severe respiratory depression that could be drug induced. I could not identify the drug that induced the severe respiratory depression ... I do not know the quantity of the drug she took. The time it takes to kill the victim depends on the quantity of the drug taken.”

In the face of this testimony by the doctor, we could not see how the learned trial judge could have found, as he did, that it was the “madras” tablets which the deceased took that caused the respiratory depression which eventually caused her death.

We certainly deprecated what the appellant and his friends did to the deceased and her friend (P.W.3) on the night in question. They were, however, not being tried for their morals. The appellant and his friends were charged with murder. To convict any of them of the offence, it must be proved beyond any reasonable doubt that the death of the deceased was caused by the tablets which the appellant gave her. This the prosecution had failed to do. Therefore, in the absence of such clear and direct evidence to connect the cause of the death (in this case, “respiratory depression”) with the appellant (i.e. the MS tablets administered by the appellant to the deceased), we did not think it was safe to allow the conviction to stand. We therefore allowed this appeal at the hearing on 24th March, 1977, set aside the conviction and sentence passed on the appellant, and ordered that he should be acquitted and discharged. We now give our reasons for doing so.

Appeal allowed.