**EDET OKON IKO**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

FRIDAY, 13TH JULY, 2001.

SC. 177/2000

**LEX (2001) - SC. 177/2000**

**OTHER CITATIONS**

3PLR/2001/160 (SC)

(2001) 14 NWLR (Pt.732) 195

**BEFORE THEIR LORDSHIPS**

EMANUEL OBIOMA OGWUEGBU, JSC (Presided)

ANTHONY IKECHUKWU IGUH, JSC

ALOYSIUS IYORGYER KATSINA ALU, JSC

UMARU ATU KALGO, JSC (Read the Lead Judgment)

AKINTOLA OLUFEMI EJIWUNMI, JSC

**BETWEEN:**

EDET OKON IKO – Appellant

AND

THE STATE - Respondent

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, CALABAR JUDICIAL DIVISION

2. CROSS RIVERS STATE HIGH COURT, UYO JUDICIAL DIVISION (Nkop J. Presiding)

**REPRESENTATION**

O. R. ULASI. Esq. -for the Appellant

C.J. UDOH, Esq., Senior State Counsel, Ministry of Justice, Akwa-Ibom State Uyo -for the Respondent.

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

CRIMINAL LAW AND PROCEDURE - RAPE:- Meaning of - Ingredients of - Most important and essential ingredient of the offence – Requirement for corroboration – Whether a matter of statute or practice – When absence of corroboration would lead to acquittal

CRIMINAL LAW AND PROCEDURE – RAPE – CORROBORATION:- Proof of – Whether evidence of insertion of penis into vagina of alleged victim is not ipso facto sufficient proof of penetration in the absence of corroborative evidence

CRIMINAL LAW AND PROCEDURE – RAPE – DEFILEMENT OF A VIRGIN:- Rule that evidence of even the slightest penetration, will be sufficient to constitute the act of sexual intercourse – Virgin (virgo intact) – Proof of partial sexual intercourse - Where a penetration was proved but not of such a depth as to injure the hymen – Whether sufficient to constitute the crime of rape

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Corroboration - What constitutes - Purpose of corroborative evidence - Class of criminal cases in which corroboration is required to prove the guilt of the accused

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Contradiction in evidence of witnesses - When will affect conviction

CRIMINAL LAW AND PROCEDURE – EVIDENCE – MEDICAL REPORT:- Criminal proceedings – Rape – Proof of - When corroboration is required as a matter of practice if not a matter of law – Absence of medical or other evidence to support the evidence of penetration - When deemed fatal to case of prosecution

CRIMINAL LAW AND PROCEDURE:- Burden of proof - Whether prosecution has throughout the burden to prove beyond reasonable doubt the guilt of the person charged – Effect of failure thereto

CRIMINAL LAW AND PROCEDURE – SUSPICION:- Rule that suspicion, no matter how high, cannot ground criminal responsibility – Implication for the burden/onus of proof on prosecution in criminal cases

CRIMINAL LAW AND PROCEDURE – CORROBORATION:- Cases where court may convict with or without corroboration (after warning itself) – Rape cases - Where court warns itself of the danger of convicting on the uncorroborated evidence of the prosecutrix but goes on to erroneously rely on pieces of evidence as corroboration which are not – Effect

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Rape proceedings - Where the record of proceedings discloses evidence which is sufficient corroboration of the evidence of the prosecutrix – Where trial court fails to attach weight to same – Where prosecution fails to appeal such failure – Whether appellate court can intervene

CHILDREN AND WOMEN LAW: *Women and Rape/Sexual Violations/Justice Administration* - Young girl raped by taxi driver who had been paid to take her to Uyo, where her school was located – Failure of trial court to properly evaluate evidence or ascribe weight to evidence adduced – Failure of prosecution to place all evidence before court or appeal wrongful summing up of judge – Effect ETHICS – PROSECUTION:- Rape cases – Failure to prove essential elements of offence – Failure to appeal erroneous evaluation and ascription of weight to evidence – Failure to advance key evidence required to ground conviction – Attitude of court thereto – Effect

ETHICS – TRIAL JUDGE:- Failure to properly evaluate and ascribe probative value to evidence adduced in criminal proceedings – Wrongful summing up – Implication for justice administration

EDUCATION AND LAW – TRANSPORT LOGISTICS:- Transport and care of young women to places of education – Security of – Young girl raped in taxi by driver detailed to drop her off in boarding school - Rape arising therefrom – Implication for justice administration

HEALTHCARE AND LAW – RAPE CASES:- Medical examination of alleged victim – When constitutes vital corroboration – Effect of failure to introduce same in evidence – Implication for justice administration

TRANSPORTATION AND LOGISTICS:- Public transport – Taxi – Security of unattended young persons using same – Where leads to allegation of rape of young school girl – How treated

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- When Supreme Court will interfere with concurrent findings of the trial court and the Court of Appeal

EVIDENCE:- Primary role of trial curt in the evaluation of evidence and the ascription of probative value to such evidence – Justification - When an appellate court is deemed to be in as good a position as the trial court to evaluate evidence which has been given in a case – Whether extends to cases where such function rests on the credibility of the witness

INTERPRETATION OF STATUTE:- Section 357 of the said Criminal Code – Interpretation of

WORDS AND PHRASES:- “Corroboration” – Meaning of in rape cases

**MAIN JUDGMENT**

**KALGO, JSC** (Delivering the Lead Judgment):

The appellant, Edet Okon Iko, was charged with the offence of rape contrary to section 358 of the Criminal Code of the then Cross River State. He was tried by Nkop J. (as he then was) at Uyo High Court in the Uyo Judicial Division. He was found guilty of the offence at the end of the trial and was sentenced to 7 years imprisonment with hard labour. He appealed to the Court of Appeal Calabar which heard and dismissed his appeal. He now appeals to this Court.

The facts of this case, as I understand them, would appear to be as follows; PW2, Asuquo Etim Nyong, is the father of PW1, Grace Asukwo Etim, the prosecutrix and victim of the offence. On 2nd of May 1982, PW2 who was then living at Creek Town, Calabar with his family handed over his daughter PW1, to the appellant a taxi driver, to take her to Uyo. PW 1 was then a student of Christian Secondary Commercial School, Uyo. PW2 told the appellant to drop PW1 at Itam Junction. He gave the appellant N5.00 and asked him to give PW1 N1.00 on dropping her at Itam Junction so that she could use the amount for her transport fare to a house at Uyo before proceeding to the school.

On that day, the appellant arrived at Uyo at about 6pm. He did not drop PW I there but took her with other passengers to Ikot Efre Itak village where he dropped all the passengers, except PW I. He came back to Uyo with PW 1 where they arrived at 8pm. PW I said that on their way back to Uyo from Ikot Efre Itak village, the appellant asked her to spend the night in his house at Uyo that night. She said no; but the appellant drove his vehicle with her to his house at No. 2 Effiong Ukpong Street. There, PW1 refused to enter the house, came out of the vehicle, removed all her luggages from the vehicle (comprising a bag of gari, a bag containing books and her clothes) and wanted to take a motor cycle to her house. The appellant took back the luggages into his vehicle and promised to take her direct to her house at Akpan Etuk Street. PW 1 then entered the vehicle and the appellant took her to Akpan Essien Street instead of Akpan Etuk Street, and asked her to come down and go home. PW1 said she then cried and begged the appellant to take her home. It was raining heavily at this time. The appellant wound up the glasses of the vehicle doors and locked the vehicle with only him and PW1 inside. The appellant struggled with PW 1 inside the vehicle and finally overpowered her, removed her pant and had sexual intercourse with her. He then drove her back to his house where he again off-loaded her luggages and put them in his house. He told PW I to wait for him as he was going to park his vehicle. He then drove away. This was after 9.00pm. PW I then ran out of the house (leaving her luggages in the appellant’s house) and entered No.5 Efftong Ukpong Street (appellant’s neighbours). PW 1 said she narrated her ordeal to a woman (PW4) and her husband whom she found in the house where she slept until the following morning. The following morning, PW 1 reported the incident to her father PW2, who in turn reported the matter to the Police in Uyo and the appellant was later arrested. This is the gist of what happened in this case as narrated by the witnesses at the trial.

In this Court, the parties filed and exchanged briefs of argument as required by the rules of Court. The appellant raised only one issue for determination of this Court, which reads:

“whether the learned Justices of the Court below were right in holding that from the evidence adduced at the trial court, the testimony of PW1 contained no serious contradictions and was only amply corroborated in all material respects, including the question whether or not there was consent.”

For the respondent, 5 issues were formulated as follows:

“l. Whether there is a material contradiction in the evidence of PW1 and PW2 in respect of the prosecution’s case sufficient in law to impugn the appellant’s conviction.

2. Whether there is material contradiction in the evidence of PW1 and PW4 in the prosecution’s case sufficient in law to impugn the appellant’s conviction.

3. Whether, in the circumstances of this case, failure to call a medical Doctor by the prosecution to testify is sufficient in law to impugn the appellant’s conviction.

4. Whether the evidences (sic) of PW1 was sufficiently corroborated so as to merit the conviction of the appellant.

5. Whether, in the circumstances of this case, the conduct of PW1 amounts to consent.”

Looking at the grounds of appeal filed by the appellant in his notice of appeal in this case, it is clear to me that the only issue raised by him was properly distilled from the grounds of appeal. On the respondent’s issues, it appears to me that issue 3, was not supported by any ground of appeal filed by the appellant and since there was no cross-appeal by the respondent, that issue cannot be argued in this appeal and is hereby struck out. The other 4 issues of the respondent can properly be argued together as set out in the only issue raised by the appellant.

The charge against the appellant in the trial court reads:

”STATEMENT OF OFFENCE

RAPE CONTRARY to section 358 of the Criminal Code.

PARTICULARS OF OFFENCE

Edet Okon Iko on the 2nd day of May, 1982 at Akpan Essien Street. Uyo in the Uyo Judicial Division had carnal knowledge of Grace Asuquo Etim without her consent.”

The appellant pleaded not guilty to the charge after it was read and explained to him in Ibibio, the language he understood. The prosecution called 4 witnesses to prove their case and the appellant gave evidence in his own defence but called no witness. Counsel for the parties addressed the trial court before the case was adjourned for judgment.

“Rape” in legal parlance means a forcible sexual intercourse with a girl or a woman without her giving consent to it. The most important and essential ingredient of the offence is penetration and consent of the victim is a complete defence to the offence.

Let me first deal with the question of consent. PW1 emphatically denied that she consented to the appellant having sexual intercourse with her throughout his testimony. He maintained complete innocence all through. The learned trial Judge, after considering the sequence of events in the case, came to this conclusion on p.49 of the records:

“I am unable in the circumstances to agree that the little girl consented to the ordeal she passed through with the accused person, that evening.”

The Court of Appeal also agreed with him on his assessment of the evidence before him and found that there was no consent by PW1 and that everything that happened to her on that day was dope against her will. I have also carefully examined the evidence adduced at the trial and find myself in complete agreement with the lower courts that there was nothing to indicate from the evidence that the issue of consent has arisen in this case.

I shall now examine the questions of contradictions in the evidence of the prosecution witnesses. There is no doubt that there were some contradictions in the evidence of PW1 and PW2, her father, on the question of whether she was to be dropped at Itam junction or Uyo town. Whereas PW2 maintained that his instructions to the appellant was to take PW1 to Itam junction as he (the appellant) was not going direct to Uyo. PW1 said that the instruction was that she should be taken to Uyo. And although the learned trial Judge did not resolve the contradiction as such, he believed the evidence of PW1 that she was to be dropped at Uyo motor-park.

The next item of contradiction also centred around the pant of PW l . This was mentioned in the evidence of PW3 and PW4. PW 1 said her pant was torn and PW3, the investigating Police Officer said she told him that her pant was not torn. PW4 said that when PW1 came to her in the night in question, PW1 looked as if she was holding her pant, but PW1 did not show the pant to her, On this issue, the evidence of PW4 did not contradict the evidence of PW1 or PW3; but the evidence of PW1 and PW3 contradicted each other on whether the pant was torn or not. Unfortunately, the pant was not produced in Court as Exhibit and the trial court did not use it in coming to its decision. In fact, the learned trial Judge, considering this evidence, said:

“It is not possible to resolve this conflict since the pant was not tendered in evidence. However, failure to tender the pant, to my mind, is not sufficient to demolish the case for the prosecution...”

I agree with him on this point.

The 3rd item of contradiction mentioned in the appellant’s brief is in the evidence of PW4 when she said that on 2/5/82, she was in her uncle’s house, whereas PW1 said she met her (PW4) in her husband’s house on that day at No. 5 Effiong Ukpong Street. The learned trial Judge believed PW1 that she spent the night in question with PW4 in the latter’s house. PW4 confirmed this in her testimony; she was not asked and she did not say that No. 5 Effiong Ukpong Street was her Uncle’s, and there was no suggestion that it was not. What is important in her testimony was the fact that PW1 came to meet her in the house on 2/5/82 in the night and spent the night with her in the house. PW4 confirmed this.

From all the 3 items of contradictions I examined above, there is none of them which appears to me to be of any vital importance or of such substance as to affect the conviction of the offence of rape. I also agree with the Court of Appeal when it held on p. 105 of the record that:

“The learned trial Judge had a proper and full appraisal of the all the evidence before him and found that there was no material contradiction...”

in the evidence of the prosecution. It is now well settled that for contradictions on evidence of witnesses for the prosecution to affect conviction, they must be sufficient to raise doubt as to the guilt of the accused. In the instant case, the minor discrepancies in the evidence of the prosecution witnesses are not, in my view, sufficient, by themselves, to entitle the appellant to an acquittal. See Ogoala vs. State (1991) 2 N W LR (Pt. 175) 509 at 525; Nwosisi vs. Slate (1976) 6 SC 109; Ejigbadero vs. State (1978) 9 - 10 SC 81; Alano vs. A.G., Bendel State (1988) 2 N W LR (Pt. 75) 201; Ayo Gabriel vs. Slate (1989) 5 NWLR (Pt. 122) 457 at 468 - 469.

I shall now consider the question of corroboration raised in the appellant’s issue for determination. The learned counsel for the appellant submitted in his brief that the Court of Appeal erred in affirming the views of the learned trial judge that the evidence of PW1 was amply corroborated. Counsel further submitted that the fact that the appellant took PW1 to his house and asked her to wait for him while he went to park his vehicle and that PW1 ran away to the house of P W4 where she told PW4 and her husband what happened to her, cannot constitute corroboration in law. He cited the case of Francis Okpanede vs. The State (1969) I ALL NLR 420 at 423 - 424.

The learned counsel for the respondent however submitted in her brief that although as a rule of practice courts always insist that it is unsafe to convict on the uncorroborated evidence of a prosecutrix like PW l, the court can still convict without it, if the court is fully satisfied of the truth of the evidence of the prosecutrix. She cited the cases of R vs. Barry (1925) 18 Cr. A.R. 65; R vs. Graham (1910) 4 Cr. A.R. 218 and Sunmonu vs. Police (1957) WRNLR 23. Learned counsel further submitted that in this case. the learned trial Judge was satisfied of the truth of PW1’s evidence which he found to be amply corroborated before he convicted the appellant. She referred to the trial Judge’s findings on pp. 50 - 51 of the record and the views of the Court of Appeal on them on p. 105 of the record.

“Corroboration” in my understanding simply means “confirming or giving support to” either a person, statement or faith. What then constitutes corroboration in law? In R vs. Baskerville (1916 - 17) ALL E.R. Reprint 38 at 43, Lord Reading CJ defined what evidence constitutes corroborative evidence for the purpose of the statutory and common law rules when he said:

“We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or contending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confines in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rules of practice at common law or within that class of offences for which corroboration is required by statute.”

It therefore follows, in my view, to ask: what is the purpose of corroborative evidence? In D.P.P. vs. Hester (1972) 57 Cr. A.R. 212 at 229, Lord Morris said:

“The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible, and corroborative evidence will only fill its role if it itself is completely credible evidence.”

The above two quotations put together would appear to mean that while corroborative evidence must be independent and capable of implicating the accused in relation to the offence charged, it must be credible and must go to confirm and support that evidence which is sufficient, satisfactory and credible, whether the case is one in which it is required by statute or by rules of practice.

I now come to consider the class of criminal cases in which corroboration is required to prove the guilt of the accused. It is common ground that in all cases where the law provides that corroboration is necessary, a conviction of an accused can only be valid when there is such corroborative evidence. That is the case where statutory corroboration is required. But there are other cases in which though there is no statutory requirement for corroboration, yet as a matter of practice, corroboration, though not essential, is almost always required before conviction. The latter is mostly in cases of complainants in sexual offences, accomplices or where children give evidence on oath. Any witness in any of these categories would conveniently be regarded as “suspect” witness and that is why the law requires that if any conviction is to be based on their evidence, the judge must warn himself or the jury, as the case may be, of the danger of convicting on the uncorroborated evidence of such witness. Lord Diplock in D.P.P. vs. Hester (supra) explained the danger sought to be cleared by this rule when he said on p. 244 of the report that:

“The danger sought to be obviated by the common law rule in each of these three categories of witnesses is that the story told by the witness may be inaccurate for reasons not applicable to other competent witnesses: whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy as in the case of children and some complainants in cases of sexual offences. What is looked for under the common law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged.”

In the instant appeal, we are dealing with the first category of those witnesses i.e complainants in a sexual offence. Rape is a sexual offence and PW1 is the prosecutrix and the complainant in the case.

The learned trial Judge has quite properly recognised the issue of corroboration in sexual offences like this one when on p. 50 of the record he said:

“Corroborative evidence is such evidence that goes to support or strengthen the assertions of the complainant. There is no statutory provision in this country that makes such corroboration mandatory. It has however been considered expedient that, as a matter of practice, the Courts should be very slow to convict on the uncorroborated evidence of the complainant. This has been the view held in quite a number of cases decided in this country.”

(Italics mine)

I agree entirely with the learned trial judge that what he said is the correct legal position in this country on the issue of corroboration of the evidence of a complainant in a sexual offence. It would also appear tome that by that statement, he had warned himself of the danger of convicting on the uncorroborated evidence of the complainant (PW 1) in this case. The learned trial Judge then proceeded in his judgment to ask a pertinent question. He said:

“The question to examine now is whether there is anything outside the evidence of the PW1 to corroborate her evidence.” By saying this, it appears to me very clearly that he has heeded the warning and that he did not intend to convict on the evidence of PW1 alone. He would look for corroborative evidence. What then did he find as corroborative evidence? On p. 50 of the record from lines 16 - 25, he dealt with the issue of the pant when he said:

“The PW 1 swore that the under pant she wore at the material time was torn during the struggle. The police who investigated the case swore that he was told by the PW1 that the pant was torn. It is not possible to resolve this conflict since the pant was not tendered in evidence. However, failure to tender the pant, to my mind, is not sufficient to demolish the case for the prosecution, because there are more other evidence which serve as corroboration.”

He then proceeded on the same page to list what he found to be corroboration thus:

“First, the accused himself admitted he took the PW1 to his house and asked her to wait there while he went to park the vehicle.

Secondly, the PW1 said she ran away from the house of the accused person into the house of the PW IV at No. 5 Effiong Ukpong Street. This has been confirmed by the accused when he said that by the time he return (sic) from where he went to park the car, the PW1 had left his house to a place he did not know. She ran and left her luggage in the house of the accused. It was the following day that she went with her father and took the bags away.”

These are the only pieces of evidence which the learned trial Judge found to be corroborative evidence and of which he was satisfied before convicting the appellant. The Court of Appeal agreed with the learned trial judge that this constituted ample corroboration of the evidence of PW1 that she was raped and refused to interfere with the Judge’s findings.

With due respect to the Court of Appeal, I think they were wrong to affirm that the trial judge’s finding of corroboration as listed by him properly constituted ample corroboration of the offence of rape on PW1. The only 2 items of corroboration listed by the learned trial judge were:

(i) the fact that the appellant admitted bringing PW1 to his house; and

(ii) that PW1 ran away from the house when the appellant went to park his vehicle.

What have these 2 items got to do with the confirmation that PW1 was actually raped? There was no doubt or dispute that PW1 was in the appellant’s house on the night in question and she ran away to the house of PW4 where she spent the night. The appellant did not dispute this in his evidence at the trial. It is also true that PW1 told PW4 and her husband what happened between her (PW1) and the appellant. This will not, in any respectful view, constitute corroboration of the material aspect of rape, but can be evidence of the consistency of the conduct of the PW1 with her evidence at the trial. See R vs. Lillyman (1896) 2 QB 167; R vs. Osbarrie (1905) 1 K.B. 551; R vs. Hedges 3 Cr. APP. R 263.

It is trite law that evidence in corroboration must be independent testimony, direct or circumstantial, which confirms in some material particular not only that an offence has been committed but that the accused has committed it. See R. vs, Baskerville (supra). In this case, the evidence which the learned trial judge found to be corroboration and which was confirmed by the Court of Appeal is not such evidence. I find no such other evidence in this case.

It is my respectful view, and having regard to the authorities I have quoted earlier in this judgment that although corroboration of the evidence of the complainant in a rape case is not essential in law, it is always looked for in practice. In the case of Ibeakanma vs. Queen (1963) 2 SCNLR 191 at 194 - 195, this Court said:

“It is an established practice in criminal law that though corroboration of the evidence of the prosecutrix in a rape case is not essential in law, it is, in practice, always looked for and it is also the practice to warn the jury against the danger of acting upon her uncorroborated testimony.” (Italics mine)

In the Ibeakanmas case (supra) the appellant was charged with rape in that he had sexual intercourse with a married woman against her will. The appellant denied the offence. The trial judge relied on the scar on the appellant’s shoulder as a result of a bite by the complainant during the intercourse, as corroborative evidence and he convicted the appellant. The Supreme Court found that in the absence of any other evidence implicating the appellant on the offence of rape, the scar on the appellant’s shoulder alone did not constitute corroboration. The appellant was discharged and acquitted.

The essential and most important ingredient of the offence of rape is penetration and unless penetration is proved, the prosecution must fail (See R vs. Hill I East RC 439). But 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. (See R vs. Allen 9C & P 3 1).

In the instant appeal, PW1 testify that:

“There in the van, he had carnal knowledge of me. When the accused overpowered me, he inserted his penis into my vagina and had carnal knowledge of me once.

The learned trial Judge believed this evidence and held that:

”What is required is evidence that the accused inserted his penis into the victim’s vagina. Once that has been proved, the insertion, no matter how slight, is sufficient penetration in law.”

The Court of Appeal also agreed with this finding by the trial Judge and confirmed the conviction of the appellant. I am of the view, that both the trial court and the Court of Appeal are wrong on this point. There was no medical or other evidence to support the evidence of penetration apart from what PW 1 said. The two pieces of evidence which the learned trial Judge found to be corroborative evidence are in my view not corroboration of the crime of rape in law. The circumstantial evidence in this case is not sufficient at all to connect the appellant with the actual commission of the offence.

The fact that PW1 said that the appellant inserted his penis into her vagina is not Ipso facto sufficient proof of penetration in the absence of corroborative evidence in a case of this nature. This is because as I said earlier, the evidence of the prosecutrix, PW1 in this case, needs in practice to be corroborated in material particular implicating the appellant before he could be found guilty of rape. I find support in this view in the case of Simon Okoyomon vs. The State (1973) 1 SC 21 at p. 33. In that case, the accused was charged with the offence of having unlawful carnal knowledge (rape) with a girl under 14 years without her consent. The evidence was that “the accused fell her down, removed her pant and his own pair of shorts, and started to have carnal knowledge of her. She shouted and hailed PW3, the accused, covered her mouth with a piece of cloth. She was lying on her back as the accused lay on her and inserted his penis into her vagina, shaking his waist up and down on her.” The Supreme Court considered the whole evidence and finally found that there was no evidence of penetration just because the complainant said the accused inserted his penis into her vagina. The Court held on p. 33 of the report:

“(a) That we are of the view that the prosecution had not established that the accused did have unlawful carnal knowledge of the prosecutrix in the sense that there had been penetration as required by section 300 of the Criminal Code. It was not enough that the prosecutrix alleged the insertion of the accused’s pennis into her vagina or that he lay on her. See Jos N. A. Police vs. Allah No Gani (1968) NMLR 8...

In the Okoyomons case, (supra) the evidence of the complainant PW4 was substantially corroborated by that of PW3 who was together with her before the accused took PW4 away to where he had sexual intercourse with her. In fact, she saw the accused on top of PW4 during the act. That was why in the absence of proof of penetration, the accused was found guilty of attempted rape - (a lesser offence) by the Supreme Court.

From all what I have said above, I am of the firm view that there is need to corroborate the evidence of PW1 in material particular in the circumstances of this case as a matter of practice and that the 2 items listed by the learned trial Judge in his judgment as constituting such corroboration cannot amount to corroboration in this case. The Court of Appeal was therefore wrong to accept them as ample corroboration. I resolve the only issue for determination in this appeal in favour of the appellant.

For all the reasons stated above, this appeal must succeed and I allow it. I find that there are good and substantial reasons for me to interfere with the concurrent findings of the trial court and the Court of Appeal in the circumstances of this case. I so do.

Accordingly, this appeal succeeds and it is allowed. The conviction and sentence passed on the appellant by the trial court and affirmed by the Court of Appeal are hereby set aside. The appellant is hereby acquitted and discharged.

**OGWUEGBU, JSC:**

I have read in advance the judgment of my learned brother Kalgo, JSC just delivered and for the reasons given by him which I hereby adopt, I, too, allow the appeal.

Though corroboration is not required in law, it is considered unsafe to convict of rape on the uncorroborated testimony of the prosecutrix. See Inspector General of Police vs. Sunmonu (1957) WRNLR 23 and R. vs. John Alexander Graham (1910) 4 Cr. App. R. 218. The learned trial Judge recognised the legal principles laid down by this court on corroborative evidence in sexual offences and when he proceeded to ask himself whether there is anything outside the evidence of PWI which corroborated her evidence, I understand it to mean that it was not safe to convict on the evidence of PWI alone. He listed two circumstances which he held to be independent testimony connecting the appellant with the crime:

(i) The admission by the appellant that he took PW 1 to his house; and

(ii) the fact that PW1 ran away from his house when the appellant went to park his vehicle.

These cannot be the independent testimony which affects the appellant by connecting or implicating him with the crime. See R. vs. Baskerville (1916/17) ALL E.R. (Reprint) 38. The court below was therefore in error in affirming the conclusion of the learned trial Judge that the circumstances set out above corroborated the evidence of PW I. There was indeed no corroborative evidence, direct or circumstantial implicating, the appellant with the offence charged.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Kalgo, JSC, I allow this appeal and set aside the judgment of the court below. The appellant is acquitted and discharged.

**IGUH, JSC**:

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kalgo, JSC and I am in agreement that there is merit in this appeal and that the same ought to be allowed.

It is not necessary for me to recount all over again the unpleasant facts of this case as the same have been fully taken care of in the leading judgment. It is enough to say that the appellant was at the High Court of Justice of the former Cross River State of Nigeria, holden at Uyo charged with the offence of rape contrary to section 358 of the Criminal Code. The particulars of the offence were that the appellant on the 2nd day of May, 1982 at Akpan Essien Street, Uyo in the Uyo Judicial Division had carnal knowledge of the prosecutrix, Grace Asuquo Etim, without her consent. He was at the conclusion of his trial on the 30th day of May, 1986 found guilty as charged by the trial court and sentenced to 7 years imprisonment with hard labour. His appeal to the Court of Appeal, Calabar Division, was on the 11th day of May, 2000 dismissed. He has now appealed to this court.

The main issue upon which this appeal turned is whether the evidence of PWI, the prosecutrix, was sufficiently corroborated to warrant the conviction of the appellant.

In this regard, the learned trial Judge was satisfied that the essential particulars of the evidence of the prosecutrix were corroborated. Said he:

”The evidence of the PW1 does not require hundred per cent corroboration, and that of course is not possible. All that is needed is that the most essential particulars of the evidence be corroborated. That has been done in this case and I am satisfied with it.”

I will return to this finding of the trial court later in this judgment. I need only state at this stage that the learned trial Judge, having found the evidence of the prosecutrix fully corroborated had no difficulty in accepting the same as true. He said:

“Accused reached the Uyo Motor Park, but refused to drop the PW I there when the PW1 asked him to drop her there he took her to his house at No. 2 Effiong Ukpong Street. Accused said he took the PW1 to his house because the PW1 would not like to go back home on a motor-cycle. I do not believe this. I believe that he just took her home against her wish.

There at home, the PW1 removed her luggage, but the accused collected them from her and put them back into the vehicle. He deceived her, he was taking her back to where she lived.

Instead, he took her to an isolated Akpan Essien Street in that rainy evening. There he stopped, wound up the glass in the door of the vehicle.

He started to struggle with the PW1. The PW1 resisted, but the resistance was short-lived for it was not long before accused overpowered her and removed her pants, inserted his penis into her vagina and had carnal knowledge of her.

He drove her back to his house and was prepared to make her spend the night there even after the first round of sexual intercourse. He left her in his house and went to park his vehicle. During that time, the PW1 ran away into the house of the PWIV at No. 5 Effiong Ukpong Street, and there she slept till the following morning.

The following morning, she went to her father at Calabar and reported all that happened to her, to him.

I wish to say here that I believe all that this witness has said. I do not believe the accused person. When this sequence of events is carefully considered, it is difficult to agree with the defence counsel that the victim in this case had given her consent to the sexual intercourse between her and the accused. Here was a girl who, as alleged in the charge before it was amended, was under the age of 16 years, exposed to this type of hazard, in a cold rainy night and on a dark road where houses were not nearby. What was the poor little girl to do, either than to yield to the mounting pressure from the accused? This does not show that she did it with consent. If she did it with consent, she would have stayed on in the house with the accused that night. She would not have run out to No. 5 Effong Ukpong Street. She would not even have rushed to her father the following day to report the incident. She would have kept it to herself. I am unable in the circumstances to agree that the little girl consented to the ordeal she passed through with the accused person, that evening.”

I think it is necessary to observe that the learned trial Judge in accepting the above evidence of PW1 did warn himself of the danger of convicting the appellant on the uncorroborated evidence of the prosecutrix. He was, however, able to identify two pieces of evidence which, with respect, he conceived amounted to corroboration of the most essential particulars of the evidence of PW1.

Enumerating the two pieces of evidence which he found were corroborative of the evidence of PW1, the learned trial Judge stated:

”The question to examine now is whether there is anything outside the evidence of the PW1 to corroborate her evidence... First, the accused himself admitted he took the PW1 to his house and asked her to wait there while he went to park his vehicle.

Secondly, the PW1 said she ran away from the house of the accused person into the house of the PWIV at No. 5 Effiong Ukpong Street. This has been confirmed by the accused when he said that by the time he returned from where he went to park the car, the PW1 had left his house to a place he did not know. She ran and left her luggage in the house of the accused. It was the following day that she went with her father and took the bags away. The evidence of the PWI does not require hundred per cent corroboration, and that of course is not possible. All that is needed is that the most essential particulars of the evidence be corroborated. That has been done in this case and 1 am satisfied with it.”

I will later in this judgment consider to what extent these two pieces of evidence corroborated the essential particulars of the evidence of PW I in this case and whether the court below was right when it held that the evidence of PW1, as found by the trial court, was “amply corroborated”. In legal parlance, any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act is guilty of the offence of rape. See section 357 of the said Criminal Code. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. See R. vs. Marsden (1891) 2 Q.B. 149; Rutherford vs. Rutherford (1923) A.C. 1. It has, however, been held that any, even the slightest penetration, will be sufficient to constitute the act of sexual intercourse. The fact that a prosecutrix who is allegedly defiled is found to be virgo intacta (i.e. a virgin) is not inconsistent with partial sexual intercourse and the court will be entitled to find that sexual intercourse has occurred if it is satisfied on that point from all the evidence led and the surrounding circumstances of the case. Where a penetration was proved but not of such a depth as to injure the hymen, it was held sufficient to constitute the crime of rape. See R. vs. M’Rue 8 C & P 641; R. vs. Allen 9 C & P 31 etc. Proof of the rupture of the hymen is thereforelin necessary to establish the offence of rape. See R. vs. Hughes 2 Mood 190.

Adverting now to the evidence of the prosecutrix on the question of what happened between the appellant and herself, she testified thus:

“It was after the accused had indicated his willingness to drop me at Akpan Etuk Street that I entered the vehicle. At Akpan Essien Street, the accused stopped and asked me to get down from the vehicle. I then cried and begged him to take me to our house. At that time it was really dark and it was raining. The accused wound up the glass of the vehicle, and locked the vehicle... The accused started to struggle with me and attempted to remove my pants. I refused and resisted. After a prolonged struggle inside the van, the accused overpowered me and removed my pants. There in the van, he had carnal knowledge of me. When the accused overpowered me, he inserted his penis into my vagina and had carnal knowledge of me once. After the sexual intercourse the accused took me back to his house at No. 2 Effiong Ukpong Street. By that time, it was past nine (9) p.m. There he removed my loads and put them into his house. He asked me to wait for him at his house to enable him go and park his vehicle. He did not tell me where he was going to park his vehicle. He did not park it in his compound. When he left the house to go and park his vehicle, I ran out of his room to No. 5 Eftiong Ukpong Street where I spent the night.”

Without doubt, the above description of what the prosecutrix was allegedly subjected to by the appellant would constitute the clearest case of rape if appropriately believed and/or corroborated. The learned trial Judge, as I have already indicated, after duly warning himself, found the evidence of PW1 satisfactorily corroborated. Accordingly, he was obliged to accept the entire evidence of the prosecutrix as true. It is now convenient to consider whether, as found by the learned trial Judge and affirmed by the Court of Appeal, the most essential particulars of the evidence of PW1 were corroborated as required by law or at all.

I should, perhaps, start by stating that the word “corroboration” has been held not to be a technical term of art and means no more than evidence tending to confirm, support and strengthen other evidence sought to be corroborated. See D.RP vs. Kilborrne (1973) A.C. 729 at 758.

Corroboration of the testimony of a witness must be offered by independent evidence which affects the accused person by connecting or tending to connect him with the offence charged. See R. vs. Baskerville (1916) 2 K. B. 658 at 667 (C.C.A.); R. vs. Jones (1939) 27 Cr. App. Rep. 33 ( C.C.A); R. vs. Hartley (1941) 1 K. B. 5 (C.C.A.). The corroboration need not consist of direct evidence that the accused person committed the offence, nor need it amount to a confirmation of the whole account given by the witness, provided that it corroborates the evidence in some respects material to the charge in issue. See R. vs. Rice (1963) I Q.B. 857; R. vs. Goldstein (1914) 11 Cr. App. Rep. 27 (C.C.A). The law is however settled that the required corroboration must not merely establish that a crime has been committed but must go to identify the accused with the crime in some material particular. See R. vs. Munrana and another (1938) 4 WACA 39 at 41; R. vs. Baskerville 12 Cr. App. Rep. 81; R. vs. Preprah and others 4 WACA 34 at 36; R. vs. Nkelagu (1960) 5 FSC 217. On a charge of rape, for example, the corroborative evidence must confirm in some material particulars that:

(1) Sexual intercourse has taken place, and

(2) that it took place without the consent of the woman or girl, and also

(3) that the accused person was the man who committed the crime. See James vs. R. (1971) 55 Cr. App. Rep. 299 (P.C).

Reverting once again to the two pieces of evidence which the trial court found were corroborative of the testimony of PW 1 and affirmed by the court below, these constitute as follows:

(i) That the appellant admitted he took PW1 to his house and

(ii) That PW 1 ran away from the house of the appellant when the said appellant went to park his vehicle.

And I ask myself whether these two pieces of evidence are unequivocally referable to or confirm that the prosecutrix had definitely been raped without any shadow of doubt. I think not.

In this respect, I must stress that suspicion, no matter how high, cannot ground criminal responsibility. In my view, the facts that the appellant admitted that he drove PW1 to his house and that PW1 ran away from the house of the appellant when he went to park his vehicle are neutral facts which do not necessarily and conclusively point to any specific criminal conduct on the part of the appellant. I cannot, therefore, accept that these two pieces of evidence corroborate the essential elements of the offence of rape with which he was charged. In my view, the Court of Appeal was in error when it affirmed the finding of the trial court that the evidence of PW1 was amply corroborated by the two pieces of evidence in issue.

I think I ought to state at this stage that it is not a rule of law that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix. The proper direction which is now a well established rule of practice is that it is not safe to convict on the uncorroborated evidence of the prosecutrix; and the court may, after paying due attention to the warning, nevertheless convict the accused person if it is satisfied with the truth of her evidence. See Sunmonu vs. Inspector General of Police (1957) W.R.N.L.R. 23; R. vs. Grahcon (1910) 4 Cr. 218; R. vs. Pitts (1914) 8 Cr. App. Rep. 126; R. vs. Berry (1924)18 Cr. App. 65 etc. On the issue of the warning, it is settled that no particular form of words need be used by the court but the Judge must use simple and plain language that will, without doubt, convey to the jury that there is a danger in convicting on the complainant’s evidence alone. The jury should then be told that bearing that warning well in mind, they must look at the particular facts of the case and if, having given full weight to the warning that it is dangerous to convict, they came to the conclusion that in the particular case the complainant is, without any doubt, speaking the truth, then the fact that there is no corroboration, as I have already stated, cannot be any matter of great moment and they are entitled to convict the accused accordingly. Even where there is such a warning but matters are suggested by the trial court as being corroborative of the relevant evidence which are not in fact so, the conviction, in a proper case, may be quashed on appeal. See R. vs. Phillips 18 Cr. App. Rep. 115; R. vs. Whitehead (1929) 1 K.B. 99, 21 Cr. App. Rep. 23; R. vs. Henry Ross 18 Cr. App. Rep. 141; R. vs. Keeling 28 Cr. App. R 121 etc. It will be necessary later in this judgment to revert to this aspect of the law with regard to corroboration.

In the present case, there can be no doubt that the learned trial Judge duly warned himself of the danger of convicting the appellant on the uncorroborated evidence of the prosecutrix. But he erroneously relied on two pieces of evidence already set out as being corroborative of the evidence of the prosecutrix. I think there lies the flaw on the judgment of the learned trial Judge which, with respect, was erroneously affirmed by the Court of Appeal.

Perhaps, I should observe that I did carefully examine the entire evidence led on behalf of the prosecution in the case and observed that PW2, the father of the prosecutrix, testified under cross-examination that the appellant admitted the offence when he came to his house with his father and the owner of his vehicle to beg for his forgiveness. His evidence ran thus:

“Q.Q: What did your daughter tell you when she came back to you?

Ans. She told me that you forced her and had sexual intercourse with her inside your vehicle.

Q.Q: Did PW1 show you any torn dress which she said was torn as a result of this incident?

Ans. She brought a torn pant and showed to me, I don’t know where she kept it.

Q.Q: Did I and my father and the owner of the vehicle come to your house to see you?

Ans. Yes. You came to beg me.

Q.Q: Did you tell my father that I forced your daughter and had sex with her on that day?

Ans: Yes, and that was why he brought you to my house to beg.”

It is crystal clear that the above testimony of PW2, if believed, was sufficient corroboration of the evidence of the prosecutrix. This is because it is not only an admission that sexual intercourse had taken place between the appellant and the prosecutrix, it is also an affirmation that the sexual intercourse took place without the consent of the prosecutrix and that the appellant was the person who committed the crime. Admission of an offence by an accused person to other persons may amount to sufficient corroboration in law. So in R. vs. Francis Kufi(1960) WNLR 1, the accused was charged with indecent assault against a young girl of 10 years. It was held, and rightly in my view, that the admission of the offence by the accused to the father of the girl was sufficient corroboration in law.

The real problem in the present case, however, is that the learned trial Judge gave no consideration whatsoever to the above piece of material evidence led against the appellant by PW2. All that the learned trial Judge did was to set out the relevant evidence tendered before the court by PW1, the prosecutrix. At the end of this exercise, the learned trial Judge, as he was entitled to do, believed the evidence of the prosecutrix. Having fully set out the relevant evidence of PW l, the learned trial Judge observed:

“I wish to say here that I believe all that this witness has said.”

He did not, however, give any consideration whatever to the said vital piece of evidence of PW2. He neither indicated whether that piece of evidence was reliable and established nor did he as much as mention it, even in passing, throughout his judgment.

It cannot be over-emphasised that the evaluation of evidence and the ascription of probative value to such evidence are the primary functions of the court of trial which saw, heard and assessed the witnesses as they testified in the witness box. See Akinloye & Anor vs. Eyilola & Ors. (1968) NMLR 92 at 95; Woluchem vs. Gudi (1981) 5 SC 291 at 320 etc. It is only where an appellate court is in as good a position as the trial court to evaluate evidence which has been given in a case, such as where the issue is essentially a matter of inference that can be drawn from proved facts, not resting on the credibility of witnesses as a result of their demeanour in the witness box or of the impression of them by the trial court that it must not hesitate to do so. See Okafor vs. ldigo 111(1984) 5 SC 1 at 36; The Registered Trustees of the Apostolic Faith Mission & Anor. vs. James & Anor. (1987) 2 NWLR (Pt. 61) 556 at 567.

In the present case, whether or not the testimony of PW2 is true on the issue of his evidence that the appellant came to beg him for the rape on his daughter is entirely a matter that rests on the credibility of the witness which this appellate court is not in a position to resolve. I think in the absence of a definite finding on the issue by the trial court, it would be entirely speculative for this court to hold that the pieta of evidence in question is reliable and therefore corroborative of the evidence of the prosecutrix on the issue of rape for which the appellant was charged.

The position, as I see it, is that this is a case in which the learned trial Judge, after duly warning himself, erroneously identified two pieces of evidence as corroborative of the testimony of the prosecutrix. It was on this basis that he proceeded to accept her entire testimony on the issue of rape as true. Those two pieces of evidence are, in fact, no corroboration, no matter how remotely, of the evidence of PW 1. Without doubt, if the learned trial Judge, after warning himself, frankly held that there was no corroboration of the evidence of the prosecutrix and that in the absence of such corroboration, it would be unsafe to convict but that he was nevertheless satisfied with the truth of her evidence and convicted the appellant, it may well have been that the conviction would have been unassailable. But his mind was left with the belief that he found certain matters to be corroboration, whereas they were not. In such circumstance, there may be no other option open to this court than to allow the appeal. See R. vs. Parker (I 925) 18 Cr. App. Rep. 115. This is because although the necessary warning relating to corroboration was clearly given by the learned trial Judge, that exercise was rendered nugatory by the trial Judge himself by enumerating matters as corroboration which were in fact not so. In such a situation, it cannot be possible for this court to say with any degree of certainty that, with a proper direction, the court must still have come to the same conclusion as it did. See R. vs. Phillips (supra).

So, too, in R. vs. Ross 18 Cr. App. Rep. 141 at 142, Hewart L.C.J. on facts which are not too dissimilar to those in the present case had this to say, namely:

“In a case of this kind, corroboration of the story of the prosecutrix, though not essential in law, is required in practice. It is the well-settled practice to warn juries that it is not safe to convict on the uncorroborated testimony of the prosecutrix. To tell the jury that something is corroboration which is not corroboration may have a more unfortunate result than the omission of any warning on the matter... Here a matter was treated as corroboration which was not corroboration... The conviction must be quashed.”

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Kalgo, JSC that this appeal succeeds and it is hereby allowed. The conviction and sentence passed on the appellant are hereby set aside and it is ordered that he be acquitted and discharged.

**KATSINA-ALU, JSC:**

I have had the privilege of reading in draft the judgment of my learned brother Kalgo, JSC in this appeal. I entirely agree with it.

The appellant stood trial in the High Court, Uyo, on a charge of rape contrary to section 358 of the Criminal Code. The particulars of the offence were that at Akpan Street, Uyo, on the 2nd of May, 1982, he had carnal knowledge of one Grace Asuquo Etim without her consent.

At the trial, the prosecutrix and three other witnesses testified for the prosecution. The appellant also gave evidence in his defence. He called no other witness.

The prosecutrix Grace Asuquo Etim testified as PW1. Part of her evidence-in-chief reads as follows:

“On that day, the accused brought passengers to Creek Town, from Uyo, my father saw him and hired him to take me from Creek Town to Uyo. My father paid the accused the sum of N5.00 (Five Naira). On other occasions I used to pay a fare of four Naira from Creek Town to Uyo. My father had instructed the accused to handover the balance of one Naira to me when we reached Uyo. I entered the vehicle to Creek Town and the accused drove the vehicle to Uyo. The vehicle was a pick-up van. When we arrived at the Uyo Motor Park, I asked the accused to drop me there but he refused, I had known the number of the vehicle at the time of this incident but I have now forgotten it. We arrived at Uyo at about 6 p.m. I wanted to go to No. 26 Akpan Etuk Street, in Uyo. Accused took me to Ikot Efre Itak where he dropped some other passengers. There at Itak, all the other passengers dropped. I was the only passenger remaining in the van. The accused drove me back to Uyo. We arrived at Uyo at about 8 p.m. The accused suggested to me on our way back to Uyo that I should come with him and spend the night at his house. I told him I would not come with him. The accused drove to No. 2 Effiong Ukpong Street where he lived and there he said he was going to give me something to eat. I came out of the van. I removed my loads comprising a bag of garri, a bag containing my clothes and my books. I wanted to take a motor-cycle and go home. The accused came and collected the loads back from me and put them in his van. He did not tell me why he did this. He then turned to the direction of our street and said he would take me to our house. It was after the accused had indicated his willingness to drop me at Akpan Etuk Street that I entered the vehicle. At Akpan Essien Street. the accused stopped and asked me to get down from the vehicle. I then cried and begged him to take me to our house. At that time it was really dark and it was raining. The accused wound up the glass of the vehicle, and locked the vehicle. The accused and I were at that time inside the vehicle. One man on a bicycle came and asked the accused what the problem was but the accused did not say anything. I was still crying inside the vehicle. Since the accused did not say anything to the man, the man left. I said nothing to the man. The accused started to struggle with me and attempted to remove my pants. I refused and resisted. After a prolonged struggle inside the van, the accused overpowered me and removed my pants. There in the van, he had carnal knowledge of me. When the Accused overpowered me, he inserted his penis into my vagina and had carnal knowledge of me once. After the sexual intercourse the accused took me back to his house at No. 2 Effiong Ukpong Street. By that time, it was past nine (9) p.m There he removed my loads and put them into his house. He asked me to wait for him at his house to enable him go and park his vehicle, I ran out of his room to No. 5 Effiong Ukpong Street where I spent the night.”

This witness disclosed that the Police took her to St. Luke’s Hospital, Anua, Uyo where she was examined by a Doctor. The Doctor was not called to give evidence nor was the report of his findings tendered in evidence.

It is an established practice in criminal law that though corroboration of the evidence of the complainant in a rape case is not a statutory requirement, it is, in practice, always looked for. In other words, it is now a well-established practice, by the courts in Nigeria, that in cases of rape, the evidence of the complainant must be corroborated. The nature of the corroboration must necessarily depend on the peculiar facts of each case. Where rape is denied by the accused, the sort of corroboration the courts must look for is medical evidence showing injury to the private part of the complainant, injury to other parts of her body which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused or on the place where the offence is alleged to have been committed.

Where the prosecution evidence is not sufficiently strong to warrant a conviction, it would be unsafe to convict merely on the accusation of the woman who alleges that she has been raped. The Judge must warn himself against the danger of convicting a man on such uncorroborated testimony. See Ibeakanma vs. Queen (1963) 2 SCNLR 191 at 195; Reekie vs. Queen 14 WACA 501. In the latter case, the West African Court of Appeal held at p. 502 as follows:

“in cases of a sexual character, it is eminently desirable that the evidence of the complainant should be strengthened by other evidence implicating the accused person in some material particular. It is true that there is nothing in law to prevent the court from convicting on the uncorroborated evidence of the complainant, but it is an established rule that the presiding Judge must direct himself and the assessor in such a case on the desirability of there being corroboration of the complainant’s evidence.”

In Ibeakanrna.v case, this court held at p.195 thus:

“In the present case, the learned trial Judge attached importance to the scar which he said the complainant’s bite had left on the shoulder of the appellant. The appellant’s explanation was that it was a bite inflicted on him by one of his children five days before the date on which he was alleged to have raped the complainant.

The Police witness stated in his evidence that he took the appellant to the hospital and that he was examined by the doctor. As the appellant did not deny that the mark on his shoulder was caused by a human bite, it must be assumed that the object of the appellant being taken to the doctor for examination was for the purpose of determining whether the bite was inflicted on the previous day or five days earlier, The doctor’s evidence or report would have enabled the Court to determine whether the complainant’s story was the correct one or whether the appellant’s was. As this was not done, we think it was wrong and a misdirection on the part of the learned trial Judge to have concluded that it was the complainant’s bite which left the scar on the appellant’s shoulder. It was equally wrong in the circumstances to have treated the bite as a corroboration of the complainant’s evidence”

In the present case, although PW 1 claimed she was examined by a doctor, no medical evidence was called. Again, in answer to a question in cross-examination, she said “my pants were torn”. Her said pants was not tendered in evidence. Yet again, she said under cross-examination that she did not know the exact spot where the offence was alleged to have been committed. So, that the evidence of P W 1 that she was raped by the appellant was not corroborated in any way whatsoever. The trial Judge rightly warned himself against the danger of convicting the appellant solely on the evidence of the complainant. He therefore found corroboration of the evidence in the fact that “first, the accused himself admitted he took the PW 1 to his house and asked her to wait there while he went to park his vehicle. Secondly, the PW1 said she ran away from the house of the accused person into the house of the PW IV at No. 5 Effiong Ukpong Street,” With all due respect, the trial Judge was wrong to have treated these facts or circumstances as corroboration of the complainant’s evidence.

I find myself unable, on the facts and circumstances of this case, to accept that the guilt of the appellant was proved with the satisfaction required in criminal cases. I am therefore in complete agreement with my learned brother Kalgo, JSC that this appeal has merit and must be allowed. Accordingly I, too, allow this appeal and set aside the conviction and sentence of the appellant. The appellant is acquitted and discharged.

**EJIWUNMI, JSC:**

I have before now been privileged to have read in advance the judgment just delivered by my learned brother, Kalgo, JSC. The facts of this case have been carefully set out in the said judgment, and for reasons given, the appeal was found meritorious. I also agree that the appeal should succeed, but I would add a few words of my own.

The basic facts in this case are not in dispute. The appellant was charged for the offence of rape contrary to section 358 of the Criminal Code, in that on the 2nd day of May, 1982, he unlawfully had carnal knowledge of Grace Asuquo Etim without her consent. At the end of the trial at the High Court, he was found guilty of the offence and sentenced to a term of imprisonment of 7 years with hard labour. He appealed to the court below against that decision of the trial court, but his appeal was dismissed. He has now appealed to this court. Pursuant thereto, his learned counsel filed two grounds of appeal, which I do not consider necessary to set down here. However, on these two grounds of appeal, his learned counsel in the brief filed on his behalf raised only one issue for the determination of the appeal. Though the learned counsel for the respondent also filed a respondent’s brief in which issues were also raised for the determination of the appeal, but it is not necessary to refer to them. This is because, the only issue germane to this appeal is that raised in the appellant’s brief. It reads:”Whether the learned Justices of the court below were right in holding that from the evidence adduced at the trial court, the testimony of PW1 contained no serious contradictions and was only amply corroborated in all material respects, including the question whether or not there was consent.”

Undoubtedly, for the offence of rape to be established by the prosecution, it is a cardinal requirement that the prosecutiox did not give her consent to the act of the appellant. In other words, the unlawful carnal knowledge of the prosecutrix by the appellant must be proved beyond a shadow of doubt that it was without the consent of the prosecutrix. Before considering whether that ingredient of the offence was established, I will dwell briefly upon another aspect of a necessary ingredient of the offence of rape. This aspect of the proof of the offence of rape is that there must be evidence that there was intercourse in the sense that the penis of the appellant entered the vagina of the prosecutrix. It is pertinent in this context to refer to the provisions of section 357 of the Criminal Code. It reads:

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

As I have said above, sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. See R vs. Marsden (1891) 2 Q.B. 149; Rutherford vs. Rutherford (1923) A.C. I. It has also been held that the slightest penetration will be sufficient to constitute the act of sexual intercourse.

In the instant case, it became therefore the duty of the prosecution to establish that there was the act of sexual intercourse as explained above and that without the consent of the prosecutrix.

The trial court in coming to its conclusion reviewed the evidence before the court. I do not need to restate those facts as they have been sufficiently reviewed in the lead judgment of my learned brother, Kalgo, J SC. The narration of the events leading to the alleged rape of the prosecutrix clearly showed that the appellant, a motor driver who was charged for a fee to take the prosecutrix to a particular point in Uyo and drop her there chose to drive her to several places before the alleged rape took place.

The learned trial Judge after a consideration of all these events then said at page 47 of the Record of Proceedings; thus:

“I am unable in the circumstances to agree that the little girl consented to the ordeal she passed through with the accused person, that evening.

From this observation, the question that has been of some concern to me is whether the learned trial Judge was there considering all that happened to the enforced movement of the girl by the appellant in his vehicle or the offence of rape for which he was charged.

I do not confess to some difficulty in ascertaining the thrust of the observation of the learned trial judge in all the circumstances. Though it is manifest that references were made to what constitute rape as charged, but I do, and with the greatest respect to the learned trial Judge, [find] that had the offence of rape for which the appellant was charged addressed directly, then the errors that the court fell into with regard to the corroborative evidence which reliance was placed upon to convict the appellant would perhaps have been avoided. In this context, I refer to the two items of corroboration identified by the learned trial Judge. These were:

(i) the fact that the appellant admitted bringing PW1, to his house; and

(ii) that PW1 ran away from the house when the appellant went to park his vehicle.

Now, it is settled that evidence which would be acceptable as corroborative of the evidence of the prosecutrix must be such evidence as would support the consistency of the evidence of the prosecutrix, or such evidence as would show that the offence was committed, but it must also identify the appellant in some material particular with the commission of the offence. See R vs. Rice (1963) 1 Q.B. 857; R vs. Goldstein (1914) I I C.R. App. Rep. 27 (C.C.A.); R vs. Baskerville 12 C.R. App. Rep. 81; R vs. Preprah & Ors. 4 WACA 34 at 36; R vs. Mumuna & Anor. (1938) 4 WACA 39 at 41 and R vs. Nkelagu (1960) 5 FSC 217.

With the greatest respect to the learned trial Judge, having regard to the established principles discussed in those cases and others dealing with situations of this kind, I fail to see how those items listed above can be said to be corroborative of the story of the prosecutrix that she was raped, as alleged, by the appellant. The court below also in my humble view also fell into error in upholding the judgment of the trial court.

I think also that it must be borne in mind that in all criminal cases, the prosecution has throughout the burden to prove beyond reasonable doubt the guilt of the person charged. See Miller vs. Minister of Pensions(1947) 2 ALL E.R.372, 373; Lori vs. State (1980) 8 - 11 SC 81; Ameh vs. State (1978) 6 - 7 SC 27.

In the instant case, there was no evidence that proved beyond reasonable doubt that the appellant raped the prosecutrix as alleged. I therefore must reverse the judgments of the court below and the trial court convicting the appellant of this offence of rape. The judgments of the court below affirming the judgment of the trial court is hereby set aside. The appellant is hereby discharged and acquitted for the above reasons and fuller reasons given in the judgment of my learned brother Kalgo JSC.