IN THE HIGH COURT OF SIERRA LEONE

HOLDEN AT FREETOWN

THE STATE

V

KELLY JAWARA

COUNSEL

J.A.K. Sesay State Counsel for The State &

E.T. Jalloh State Counsel for The State

O.C. Spencer-Coker for The Accused

JUDGMENT DELIVERED ON THE 14TH DAY OF APRIL, 2020 BY

HONOURABLE MR. JUSTICE MONFRED MOMOH SESAY – JA

INTRODUCTION

The Accused, Kelly Jawara is charged on a one-count Indictment with the offence of sexual penetration contrary to Section 19 of The Sexual Offences Act, 2012 Act No. 12 of 2012. The Prosecution alleges that on the 27th day of October, 2017 at Freetown in the Western Area of the Republic of Sierra Leone the Accused engaged in an act of sexual penetration with Kadiatu Tunkara, a child.

The Accused first appeared before me on Thursday, the 8th December, 2016 and he was arraigned and pleaded NOT GUILTY.

The Prosecution then applied for his trial by a judge alone instead of by a judge and jury pursuant to Section 144(2) of The Criminal Procedure Act, 1965 Act No. 32 of 1965 (i.e. The CPA) as repealed ad replaced by Section 3 of The

Criminal Procedure (Amendment) Act, 1981 Act No. 11 of 1981. I accordingly ordered that the Accused be tried by a judge alone instead of by judge and jury.

By virtue of the order for trial by judge alone, I became the judge of both facts and law and I must therefore keep in mind and direct myself that in all criminal cases including this one, it is the duty of the Prosecution to prove the guilt of the Accused beyond reasonable doubt. It means therefore that I can only find the Accused guilty of the offence charged if the Prosecution leads evidence proving beyond reasonable doubt every element of the offence charged.

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

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

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

> "The degree is well settled. It need not reach... certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so

> strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved be yond reasonable doubt; but nothing short of that will suffice."

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

One such case is Koroma v R (1964 – 1966) ALRSL 424 at 548 CA in which Bankole-Jones said:

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

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

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

In an unreported Court of Appeal Case, Cr. App. 7/2000 Between Soluku Jermil Bockarie v The State, Honourable Justice N.C. Browne-Marke JA(as he then was now Justice of the Supreme Court of Sierra Leone) in delivering the majority judgment of the Court in April, 2008, had this to say:

> "The principle enshrined in Woolmington's case applied to all criminal cases is without doubt. It applied more strongly where the judge is both Judge of law and fact ... the legal burden of proof in criminal case always rests on the prosecution, and that it never shifts; and that the burden lies on the prosecution to prove every element of the offence with which an accused has been charged beyond reasonable doubt" (emphasis mine).

Other local cases in which these principles have been applied include Bob-Jones v R (1967 – 1968) ALRSL 276; Amara v R (1968 – 1969) ALRSL 220;

The State v Moses Alieu Lansana (unreported) in which I delivered judgment on the 30th January, 2020 after trial by this Court etc.

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

THE ELEMENTS OF THE OFFENCE

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

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

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

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

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

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

There are therefore two elements of the offence from the definition which are:

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

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

I rely on the law as stated by the Learned Authors of Archbold: Pleading, Evidence and Practice, 36th Edition at paragraph 1010 page 364, where they wrote as follows:

"The intention of the party at the time when he commits an offence is often an essential ingredient in it, and, in such a case, it is as necessary to be proved as any other fact or circumstances laid in the indictment. Intention, however, is not capable of positive proof, it can only be implied from overt acts" (emphasis mine)

Another element which the Prosecution must prove in an allegation of a sexual offence of this nature is corroboration. The same learned Authors of the same edition of Archbold (supra) wrote at paragraph 1299 as follows:

"Corroboration is looked for, and the jury should be warned of the danger of acting without it, in all cases of sexual offences, irrespective of the age or sex of the complainant or other party involved and even if the only issue is that of the identity of the person alleged to have committed the offence ... and failure to give such warning will be fatal to the conviction." (emphasis mine)

What then is corroboration in law?

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

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to

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

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

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

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

Corroborative evidence has been held to take different forms including:

1. Admissions or confessions of guilt by the Accused (See R v Dossi (1918) 13 Cr. App. 158).
2. Lies or false statement by the Accused (see Creditland v Knowler 35 Cr. App. Reg.48 and R v Lucas (1981) 2 AER 1008)

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

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

3. Distressed conditions of the victim, in certain circumstances, can be corroborative of the evidence of the victim if observed by another person (See R. Redpath (1962) 40 Cr. App. Rep. 319: Fromhold v Fromhold (1952) TLR 1522)

Distressed conditions of victims have been held to include stressed and frightened looks, trembling, crying, injury from the alleged sexual assault such as bruises, wounds etc, looking or appearing dishevelled, torn clothes etc (see Moses Kamau Waweru v Republic (1988) eKLR Court of Appeal of the Republic of Kenya)

4. Testimony of an eye witness or somebody who caught (or saw) the Accused and the victim red-handed in the act or in compromising situations such as being found in a room or other isolated places and either or both Accused and victim were naked or half naked etc.

Whatever the nature of the corroborative evidence, it should be bourne in mind that it is required (particularly in sexual offences) to "minimize the

possibility of fabrication and maximize the implication of the Accused"(see Crosscon Evidence, 6th Edition by Colin Tapper at page 248)

It should be noted that corroboration is not however required as a matter of law under The Sexual Offences Act, 2012 because there is no provision in the said Act for corroboration. This is unlike the predecessor Act i.e. The Prevention of Cruelty to Children Act, Cap 31 of The Laws of Sierra Leone, 1960 as amended which had unlawful carnal knowledge created by Section 6 and 7 of the said Act and indecent assault created by Section 9 of same. Under Cap 31 and particularly by Section 14, there was an expressed provision and requirement for corroboration of the victim's evidence without which no Accused should be found guilty and convicted for the offences of unlawful carnal knowledge, indecent assault and procuration created therein.

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

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

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

(i) That the Accused engaged in an act of sexual penetration with the victim, Karina Kadija Haja Hamzie;

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

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

(iv) Corroborative evidence conforming the story of the victim.

THE EVIDENCE

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

(a) **The Case For The Prosecution**

The Prosecution called five (5) witnesses, namely:

(i) DPC 15139 Momoh Alfred Songa of the Family Support Unit (FSU) who testified on Tuesday, the 12th and Tuesday, the 19th February, 2019 as Prosecution Witness (PW) I;

(ii) Kadiatu Tunkara, the victim who testified on Tuesday, the 19th February, 2019 as PW 2;

(iii) Rugiatu Dumbuya, mother of victim who testified on Tuesday, the 19th February, 2019 as PW 3;

(iv) Mustapha Rogers, a former pupil and class mate of victim who testified on Tuesday, the 26th February, 2019 as PW 4; and

(v) Dr. Olabisi Claudius-Cole who testified on Tuesday, the 30th July, 2019 as PW 5.

The Prosecution also tendered three (3) exhibits including:

(i) The Voluntary Cautioned Statement (VCS) of the Accused as Exhibit A^{1-8};

(ii) The Charge Statement (CS) of the Accused as Exhibit $B^{1\ \&\ 2}$; and

(iii) The endorsed Police Medical Request Form as Exhibit C^{1-4}

PW 1: DPC 15139 Momoh Alfred Songa

He was one of the Investigators of this matter and he told the Court that he was attached at the FSU Kissy Police Station, Kissy and that he recognised the Accused and that he knew the victim, Kadiatu Tunkara.

That he recalled the 27th October, 2017 and that he was on duty on a Friday when victim and her mother arrived at the station and made a report of

sexual penetration against the Accused and the matter was allocated to him for investigation. That he obtained statements from victim and her mother and issued a police medical request forms to victim's mother to take victim for examination and treatment at Rokupa Government Hospital and Rainbow Centre. That both reports were endorsed and returned to the Police which she identified as Z & Y^{1-4}.

He said on the 29th October, 2017, himself and his colleague, D/Sgt 10183 Mansaray, P.B. obtained a VCS from the Accused which he identified and tendered as Exhibit A^{1-8}. That on the 3rd November, 2017 himself and his colleagues, D/Sgt 10282 Turay, S.A. and D/Insp. Hawa Mansaray visited the scene of crime at the George Washington School Compound, Upper Peacock Farm, Wellington and that upon their arrival, the victim led them to one of the classrooms where she alleged the Accused sexually penetrated her. That his colleague D/Sgt 10282 Turay S.A. took photographs of the scene which photographs he identified as X^{1-5}.

That on the 22nd November, 2017 himself and his colleague, D/Sgt 10282 Turay, S.A. charged the Accused with the offences of conspiracy and sexual penetration and that they obtained a CS from the Accused which he identified and tendered as Exhibit $B^{1\&2}$.

Under cross-examination by the Accused himself, the witness said he was not a medical doctor and so he did not observe semen on the victim's pants. That the scene of crime was regular classroom not a converted classroom as he had said in the Magistrate Court during the Preliminary Investigations.

That he charged the Accused based on the documentary evidence available and on the advice of the Director of Public Prosecutions (DPP).

He said the victim's pants and torn skirts he had spoken about were with the Exhibit Clerk to whom he had handed over the said items. That the pants

was not torn but the skirt was torn; that the nature of the tear on the skirt was the hem that got loosened and that it was grey in colour and that he saw the said skirt himself.

That the victim identified the part of the skirt that was torn and that she did not say what instrument was used to tear her skirt but that she said it got torn during the struggle. That he saw the skirt just after the victim was interviewed by his female colleagues and that he had the skirt in Court.

The witness was not re-examined.

Under cross-examination by the Court, the witness, said that the classroom where the alleged incident is said to have occurred was a regular not a converted classroom.

PW2: Kadiatu Tunkara

She told the Court that she was a pupil at George Washington International Academy, Peacock Farm, Wellington and that she was eighteen (18) plus and that on the 27th October, 2017, she was sixteen (16) years plus.

That she knew the Accused as her former Principal and that she recalled the 27th day of October, 2017 and that on that day, she was in school when one of the teachers, Mr. Ngaujah, came into the class and called her and said he wanted to talk to her. That she came out of the class and went with Mr. Ngaujah downstairs and he showed her to Mr. Jawara as the one who wanted to talk to her. That they went into a classroom that has an inside room and that he saw Mr. Jawara sitting and Mr. Ngaujah told her it was Mr. Jawara who wanted to talk to her and he, Mr. Ngaujah, left them.

That Mr. Jawara then invited her into the said inside room and that she refused but that Mr. Jawara insisted and that since he was her principal, she did

not want to disobey him and so she entered and sat at the door and that Mr. Jawara sat on a bed.

That he told her he loved her and that she got angry at those words, got up and wanted to go out but that he grabbed her and pushed her inside the inner room and closed the door and stood at the door. That she wanted to get up but that he slapped her and fought with her; that she was shouting and screaming but that he held her throat.

She said he opened his trousers, pushed her into the bed, tore her skirt and removed her pants; that she was still fighting but that he inserted his penis into her virgina.

That afterwards, she got up but very dizzy and that after sometime, she went outside and went to her classroom, collected her bag from her friend. That her friend Mustapha Rogers, asked her what had happened but that she was unable to speak; that her said friend continued to ask her what had happened and that she went to the gates, stopped a motorcycle, rode on it and went home.

She said when she got home, she saw her grandmother, aunt and sister and passed out and that when she gained consciousness, she explained everything that had happened to her grandmother and that she called her mother on telephone and that they went to the police station and statements were obtained from her, her grandmother and aunt and that she was referred to hospital i.e. Rainbow Centre where the doctor examined and treated her and that she returned the endorsed medical form to the police which paper she identified as Z^{1-4}.

Under cross-examination by the Accused himself, the witness said she was in class and lessons was going on on the day of the incident and that it was Mr. Thomas Fyfe who was teaching them Mathematics; That she was well but did not take notes as Mr. Thomas Fyfe did not give notes; that she sat in the

front roll and could clearly see Mr. Fyfe from where she sat. That he wore black trousers and shirt and wore shoes which colour she could not tell.

That the Mathematics lesson was at 11:15am and that Mr. Ngaujah entered the class at the end of the lesson i.e. at 12:00 noon.

That she could not recall the topic that was taught; That there was no roll call that day and denied she was absent from school that day. That the Mathematics lesson lasted for one hour.

That Mr. Ngaujah wore a brown trousers and green and red shoes but that he could not remember the colour of his shirt.

She disagreed that all the rooms in the school except the Principal's office were classrooms and that the alleged encounter lasted for ten minutes.

That there was debate going on besides lessons.

She denied that the West African Examinations Council (WAEC) registration exercise was going on as well on that day and that she was not involved in the debate.

That indeed the Accused did to her what she had alleged.

The witness was not re-examined.

PW3: RUGIATU DUMBUYA

Shhe told the Court that she was a business woman and knew the Accused as the former principal of her daughter, the victim; that she gave birth to the victim on the 12th November, 2000.

She said that she recalled the 27th October, 2017 and that she was in Bo when she got a call from her mother on a Friday who told her something about

the victim; that she called the proprietor of the school and told him what her mother had told her.

That she then returned to Freetown the following day and that when she arrived, the victim had already been taken to the police station and she joined them and that victim made a statement and she was referred to hospital and that she took victim to the hospital where she was examined whilst she waited outside and that the doctor later called her and told her the findings; That the doctor also gave her the prescription for the medicines for victim and that the doctor gave her a note for the police requesting them to collect the endorsed police medical request form which she took to them.

Under cross-examination, the witness said she had met the Accused before as principal of the school, she denied having met the Accused and pleaded with him to continue to have victim in the school even though she was unruly. That she did not take kindly to the disciplinary action taken by the Accused against the victim.

That the birth date of the victim she had given was correct and that on her return from Bo she did not visit the school except on the date the police took the victim to the scene of crime.

That she did not talk to the Accused about the allegation and that she spoke to other people such as victim's classmate, Rogers and that Rogers told him that he was in class when Mr. Ngaujah came to call victim and she took excuse from the Class Teacher and left with Mr. Ngaujah and that later victim came back to the class crying and held on her skirt where it was torn and that she assisted her take her school bag and accompanied her out of the class until she took a motorcycle and went home.

That he told her the class had English Language lesson and that there were a few of them in the class and he told her victim was crying and her shirt

was torn and because she was in distress, he assisted her take her bag and accompanied her out of class. That Rogers did not tell her WAEC verification was in progress that day. That she would be surprised to learn that victim said in the Magistrate Court that she went straight home after the alleged sexual assault and did not return to the class. That Rogers did not tell her who did what to victim.

The witness was not re-examined.

PW 4: Mustapha Rogers

He told the Court he was a pupil of George Washington International Academy and that he knew the Accused as his former principal and the victim as his schoolmate.

That he recalled the 27th October, 2017 and that he was in class i.e. they had a combined class of Senior Secondary School IV (SSS IV) and that whilst in class, Mr. Ngaujah entered and called victim and she left. That she was away for up to an hour and when she returned, he observed bruises round her neck and he asked her what had happened but that she did not say anything. That he took her bag and they went out and that the victim went home.

Under cross-examination, the witness confirmed that on that day, he was in class taking Mathematics lesson but could not tell how long the lesson lasted. That he did not have a timetable and could not tell when the lesson started but that it was a single lesson/period and that he was in the class throughout the lesson.

That he saw the victim that day and he sat in the second roll but that he could not tell the dress the Mathematics teacher wore; that he also saw Mr. Ngaujah but could also not tell the clothes he wore.

He said the school had a debate that day but that both himself and the victim did not take part as they were in class upstairs whilst the debate was held downstairs; that there was a WAEC verification going on that same day and that both himself and the victim were involved in that verification exercise; that he would not be surprised to learn that victim had told the Court that there was no such WAEC verification that day; that he would also not be surprised that victim said when Mr. Ngaujah called her, she stayed away for about ten minutes.

That the verification involved all pupils of SSS IV and denied that it lasted for all of the morning as there was a debate.

That he did not meet anyone at the gate when he went to accompany victim and denied that Mr. Ngaujah was at the gate at that time.

That he only saw bruises on victim and nothing more; he agreed that he had said in the Magistrate Court that he also saw victim's skirt was torn.

That he did not speak to victim's relation and that he would be surprised to learn that victim's mother had told the Court that he spoke to her.

The witness was not re-examined.

PW 5: Dr. Olabisi Cladius-Cole

She said she was a private medical practitioner and also attached to the Rainbow Centre at Fourah Bay Road, Freetown and that her duties included to counsel survivors, take the full history of the incident and do a complete physical examination of the victim and collect forensic evidence, treat victims, make follow-up appointments and write report of their findings and do a summary in the medical certificate.

That she recalled the 30th October, 2017 when she had cause to see, examine, and treat Kadiatu Tunkara and that she wrote a report of her findings which she tendered and was admitted as Exhibit C^{1-4}.

She said "hymen" was a collar of tissue that surrounds the opening to the virgina and it was usually present; that she found that the victim's hymen was completely ruptured which meant that it was completely absent and that its absence may be caused by sexual penetration, gymnastics, riding bicycle, injuries etc.

That she had been a medical doctor for over 32 years during which time she has done over10,000 of such examinations.

Under cross-examination by the Accused himself, the witness confirmed that she wrote all of what she had read and that she examined the victim on the 30th October, 2017; that she did not observe any bodily injuries nor any sperm on the victim and that the complete rupture of the hymen showed that there was a likely incident of sexual penetration.

The witness was not re-examined.

Under cross-examination by the Court, the witness said that it was difficult to state whether a rupture was old or new because of healing that occurs and that sometimes, the rupture would take between three and seven days to heal and may vary in victims due to their nutrition, healing qualities and that she could not remember how old the rupture was in the victim as the examination was done since 2017.

This was on Tuesday, 30th July, 2019 after which there followed several adjournments mainly due to the failure of the Prosecution to proceed with their case.

On Tuesday, the 17th December, 2019, the Prosecuting Counsel was absent without excuse after he had been duly notified and I therefore thought that it was unfair to continue to adjourn the matter particularly as the Accused was on remand. I therefore closed the case for the Prosecution.

But before I proceed to consider the case for the Defence, let me pause and consider the statements made by the Accused to the police which have been tendered by the Prosecution as Exhibits A^{1-8} and $B^{1\&2}$.

In Exhibit A^{1-8}, the Accused denied the allegation and explained that on the 27th October, 2017 at 10:30am he was in school and in the course of going round, he met victim standing in the steps whilst classes were going on and that he instructed her to go to class but that she did not bulge and he therefore gave her two strokes on her buttocks; that victim walked off angrily up the steps and that he thought she would go to her class. That he went down stairs to the principal, Mr. Washington, who loaned him Le100,000.00 as fare to go to Kabala to see his other. That he left for Kabala and was on his way when he got a call from the principal who asked him to return as there was a report against him for having had sexual intercourse with victim; that at the time he got the call, he was close to Kabala and so he decided to reach and see his mother before returning to Freetown.

That on Saturday, 28th October, 2017 he was on his way from Kabala and he met Mr. Washington at Makeni who told him that he had gone there to pick him up and that on Sunday, the 29th October, 2017, himself and Mr. Washington returned to Freetown and reported at the police station.

In answering questions put to him by the police after his free narrative, the Accused said he had a Higher Teachers' Certificate (HTC) and had taught for five years at his said school where Mr. Washington was the principal and victim was his pupil.

That he knew Mr. Ngaujah as his colleague teacher and he denied sending Mr. Ngaujah to call victim for him on the 27th October, 2017and further denied proposing love to her and forced her to have sex in a room in the classroom in the course of which he slapped her and tore her skirt.

The Accused denied having a room in the school compound where he usually relaxed and that he was surprised for victim to make such allegation against him.

He pleaded with the police not to charge the matter to Court as he had a lot of family responsibilities.

In Exhibit $B^{1\&2}$, the Accused explained that before the alleged incident, they had driven victim from the school on several occasions because she was a rude pupil and that on the last occasion when they drove her from school for three days her mother called and pleaded with him that they accept her back in school and that he directed her to talk to Mr. Ngaujah who was in charge of discipline; that he assisted victim's mother to plead on her behalf and that it was just after victim was accepted back in school that she accused him of sexual assault.

My initial reaction is that the Accused has not only flatly denied the allegations but he is suggesting that the victim is making the allegation against him because of the disciplinary action he had taken against her due to her misconduct in the school. I shall return to this issue later in this judgment.

(b) **The Case For The Defence**

At the close of the case for the Prosecution, I put the Accused to his election and he elected he would rely on his statements to the police as contained in Exhibits A^{1-8} and $B^{1\&2}$ for his defence and that he would call one witness, Mr. Janneh.

DW: Mohamed Janneh

He told the Court that he was stone miner at Wilberforce Village and that he knew the Accused as one of the teachers at Washington School and that the Accused taught his son, Foday Janneh; that he knew Kadiatu Tunkara, the victim.

He said he recalled one morning when he went to the school to pay the fees for his son and that he met teachers beating /punishing the victim in the steps and that he asked the Accused what was the matter; that the Accused explained that victim was being punished because she was not in class whilst her colleague pupils were in class and that he pleaded with the Accused to stop the punishment which he accepted; That he called and advised her that it was for her own good that she was being punished and advised he to return to class; that she left and went upstairs whilst he went downstairs to the principal, Mr. Washington, to pay his son's fees after which, he went home.

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

The Accused, who had been abandoned by his Defence Counsel, closed his case. This was on Tuesday, the 4th February, 2020. I directed that both parties do their respective Closing Addresses which was done after which I withdrew the file for judgment which I reserved. I now deliver same.

REVIEW OF THE EVIDENCE AND THE LAW

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

But before I do so, I wish to remind and direct myself sitting as a tribunal of both facts and law that it is the duty of the Prosecution to prove the case against the Accused and they must do so beyond reasonable doubt. If they

succeed, I am bound by law to find the Accused guilty and convict him but if they fail, I am equally bound by law to find the Accused not guilty and consequently acquit and discharge him. If, after considering the totality of the evidence led before me, there is reasonable doubt in my mind that the Accused committed the offence charged, I must resolve that doubt in favour of the Accused and find him not guilty and accordingly acquit and discharge him. This is what the law says or provides.

I shall proceed in this exercise by considering the elements of the offence EACH of which the Prosecution must prove. I have held earlier in this judgment that the Prosecution must prove four elements, namely:

(i) that the Accused engaged in an act of sexual penetration with the victim, Kadiatu Tunkara;

(ii) that at the time the Accused engaged in the sexual penetration with the victim, she was a child i.e. a person below the age of eighteen (18) years;

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

(iv) corroborative evidence confirming the story of the victim.

Before I proceed to consider the elements as stated above, let consider a procedural issue which has caught my attention and which I consider relevant in this matter. This has to do with the fact that the Prosecution failed to tender the committal warrant which is the nexus between this Court and the Court below where the Preliminary Investigations was conducted. As explained earlier in this judgment, I closed the case for the Prosecution on Tuesday, the 17th December, 2019 due to the absence of the Prosecuting Counsel without excuse and persistent adjournments of

the matter since Tuesday, 30th July, 2019 caused mainly by the failure of the Prosecution to proceed with their case.

The question which I must now ask and answer is whether such failure by the Prosecution to tender the committal warrant is fatal to their case. In order to answer this question, I would have to consider some relevant provisions of the relevant law. Incidentally, the Prosecuting Counsel did not avert his mind to this issue and therefore did not assist the Court.

My eyes caught Sections 120, 136 & 137 of The CPA which, in my view, are relevant on this issue. They provide as follows:

Section 120(1):

> "If the Court considers the evidence sufficient to put the Accused on his trial, the Court shall by warrant commit him for trial upon indictment before the Supreme Court (now High Court) and shall, until the trial, either admit him to bail or send him to prison for safe-keeping. The warrant of such first named Court shall be sufficient authority to the keeper of any prison appointed for the custody of prisoners committed for trial, although out of the jurisdiction of such Court." (emphasis mine)

Section 136 (1) as repealed and replaced by Section 2 of The Criminal Procedure (Amendment) Act, 1970, Act No. 1 of 1970 provides that:

> "No indictment shall be preferred in respect of any criminal offence unless there has been a committal for trial consequent upon a preliminary investigation in accordance with the provisions of Part III or an inquiry or inquest held in accordance with the provisions of the Coroners Act, except –

(a) in the case of information known as ex-officio information by the Attorney-General,

(b) in cases of indictments which, by any enactment may be preferred by the direction or with the consent of a judge:

Provided that any indictment in regard to any criminal offence may be preferred with the written consent of a judge without any prior committal for trial consequent upon a previous preliminary investigation in accordance with the provisions of Part III or an inquiry or inquest held in accordance with the provisions of the Coroners Act:

Provided further that where the accused has been committed for trial the indictment may include either in substitution for a in addition to counts charging the offence for which he was committed any counts founded on facts or evidence disclosed in the depositions being counts which may be lawfully joined in the same indictment." (emphasis mine)

Section 137 provides that:

"Every indictment, when signed, shall be filed in the Supreme Court. The fact that the indictment has been so signed shall be equivalent to a statement that all conditions required by law to constitute the offence charged, and to give the Court jurisdiction have been fulfilled in the particular case." (emphasis mine)

My reading of these provisions informs me as follows:

i. that the general rule is that no indictment shall be filed in the High Court for the trial of an accused except there has been a committal of the accused for trial at the High Court

following a judicial preliminary investigations or an inquest or inquiry;

ii. that an indictment can be properly filed for the trial of an accused without his committal upon a previous preliminary investigations or inquiry or inquest and that such other situations include ex-offico information by the Attorney General or indictments filed by the direction or consent of a judge.

iii. that an indictment duly signed and filed is sufficient evidence or of proof to give the High Court jurisdiction to hear and determine the matter.

iv. that there is no legal requirement to tender the committal warrant as evidence or proof that a committal took place.

I must say here that the practice in this jurisdiction is for the Prosecuting Counsel to tender the Committal Warrant of an Accused at the close of the case for the Prosecution. In those case where there was no committal following a previous preliminary investigations, inquiry or inquest, the Prosecuting Counsel simple informs the Court/Judge of the procedure by which the Accused was brought to the High Court.

From the foregoing, I hold the considered opinion that an omission to tender the committal warrant does not take away the jurisdiction from the High Court to hear and determine the case. In this matter the Prosecuting Counsel omitted to tender the Committal Warrant or to address the Court on how or through which process the matter was brought to the High Court. There is however an indictment dated the 22nd day of June, 2018 and duly signed by a State Counsel (i.e. a Law Officer) both on the face and at the back and by the provisions of Section 137 of The CPA (supra), the indictment as filed is evidence that "all

conditions required by law ... to give the jurisdiction have been fulfilled in the particular case."

The omission to tender the Committal Warrant in this case is therefore not fatal. I so hold.

Having raised and answered this jurisdictional issue as caused by the omission to tender the Committal Warrant, I shall now proceed to consider the elements separately and the evidence and law in support of each.

(i) **That the Accused engaged in an act of sexual penetration with the victim, Kadiatu Tunkara.**

The evidence the Prosecution led in support of this element included the story of the victim, Kadiatu Tunkara, Mustapha Rogers and Dr. Olabisi Claudius-Cole.

The victim told the Court that on the 27th October, 2017, whilst she was in class having Mathematics lessons, Mr. Ngaujah came and called her out and led her to the Accused in a classroom that had an inside room and the Accused proposed love to her but that she turned down his love proposal; that the Accused gripped her and had sex with her by force and that in the course of the struggle, her skirt got torn and she sustained bruises around her neck. That after that encounter, she returned to the class, picked her bag and went home; that her friend, Mustapha Rogers, asked her what had happened but that she was unable to explain. That the encounter between her and the Accused lasted for about ten (10) minutes.

Mustapha Rogers, on his part, said that on the said 27th October, 2017, he was in class having lessons when Mr. Ngaujah came into the class and called victim and they left and that later, victim returned to class, picked her bag and left.

That he observed bruises around victim's neck and asked her what had happened but that she did not say anything. He confirmed that on that day, there was a WAEC verification of candidates for all SSSIV pupils including the victim.

Dr. Olabisi Claudius-Cole, on her part, told the Court that she examined victim on the 30th October, 2017 and found that victim's hymen was completely ruptured and that she did not observe any physical injuries on victim; that she also could not tell the age of the rupture in victim i.e. whether it was old or new;

I note that there are material contradictions in the evidence of these three Prosecution witnesses.

Firstly, whilst Mustapha Rogers said he observed bruises around victim's neck when she returned to the class after the alleged sexual assault, the medical doctor who is an expert witness said she did not observe any physical injuries on the victim. She endorsed this same finding in Exhibit C^2 under the heading "Physical Injuries" that, "No injuries seen" The Prosecuting State Counsel submitted in his Closing Address on this issue that the medical doctor did not observe any physical injuries on victim because the doctor did the examination on the 30th October, 2017 i.e. three days after the alleged incident. However, the Prosecution did not lead any evidence to support that submission. Submissions must be based on evidence led.

Secondly, the victim herself told the Court that on that day, there was no WAEC verification of candidates in the school but Mustapha Rogers told the Court that there was such verification for all SSS IV pupils including the victim.

Furthermore, Mustapha Rogers told the Court that he never spoke to victim's mother, Rugiatu Dumbuya but victim's mother told this Court that she spoke to Mustapha Rogers who told her the story as he had told the Court. She

added that Mustapha Rogers told her that when victim returned to the class, she was crying and held her torn skirt.

These are material contradictions in the evidence of the Prosecution witnesses and which undermine their credibility and that of their respective evidence. I sohold.

Besides, whilst the victim alleged that the Accused had sex with her in and inner room of a classroom in the school, the investigating officer (i.e PW1) told the Court that the classroom identified to the police by the victim as the scene of crime was a regular or normal classroom not a converted one as he had told the Court below during the Preliminary Investigations. The investigating officer further told the Court that he took photographs of the said scene of crime which he identified as X^{1-5} but these were not tendered before the Court. Why would the Prosecution not tender such material evidence in support of their case? The Prosecution did not also tender the skirt which the victim said got torn in the course of the struggle between her and the Accused. PW 1 also told the Court that he collected the pants of the victim as exhibit in the matter. It was also not tendered.

The Accused, on his part, flatty denied the allegation and suggested that the victim maliciously accused him of this crime because of disciplinary action the school authorities including him had taken against her for her persistent misconduct and rudeness. He said in his statement to the Police (i.e. Exhibit A^{1-8}) that on the day of the alleged incident, he met the victim in the steps whilst classes were going on and when he told her to go to class, she refused and so he gave her two lashes on her buttocks. The Accused called Mr. Mohamed Janneh who testified and confirmed the story of the Accused i.e that he went to pay fees for his son at the school and met the Accused punishing the victim and that when he enquired why, the Accused explained that victim was not in class; that

he pleaded with the Accused to stop the punishment and advised the victim to return to class as it would be in her own interest.

It is also incredible and unimaginable that a teacher can forcefully sexually assault a fernal pupil in the school during school hours with the other pupils and teachers and others around. This is more incredible as victim said she screamed and shouted whilst she struggled with the Accused.

In view of the above material contradictions and short comings in the Prosecution's case, I am not sure whether the Accused committed the offence as alleged. I believe the explanation by the Accused that the allegation is malicious.

I therefore hold the considered opinion that the Prosecution has failed to prove this element.

(ii) **That at the time the Accused engaged in the sexual penetration with the victim, she was a child i.e. a person below the age of eighteen (18) years**

I have already held that the prosecution has failed to prove the first element and because of that, I do not think that it would serve any useful purpose to consider this element and the remaining two elements i.e. the intention of the Accused to engage in sexual penetration with the victim and corroborative evidence.

As I said in an earlier judgment I delivered in the matter of The State v David Rogers in March, 2020, it is more difficult to prosecute a criminal offence than to pass an examination. In an examination, a candidate can get say 85% and is graded first class; that is to say, the candidate need not get all the question or answers correct. However, in the prosecution of a

criminal offence, the Prosecution must prove each and every element separately beyond reasonable doubt. Even of the prosecution succeeds in proving say four out of five elements of the offence charged, the Prosecution would still fail in the same way as if it did not prove any or some of the elements.

Consequently, I hold the considered view that the Prosecution has failed to make a case against the Accused.

CONCLUSION

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

(i) That the victim, Kadiatu Tunkara, was a fifteen (15)-year old pupil of SSS IV at George Washington International Academy, Peacock Farm, Wellington, Freetown in the Western Area of the Republic of Sierra Leone;

(ii) That the Accused, Kelly Jawara, is a teacher at the said school;

(iii) That there are material contradictions in the evidence of main witnesses for the Prosecution namely Kadiatu Tunkara (the victim), Mustapha Rogers, Rugiatu Dumbuya, Dr. Olabisi Claudius-Cole and Momoh Alfred Songa such that I am in doubt whether the Accused committed the crime charged;

(iv) That the Prosecution also failed to put before the Court evidence which they had in support of their case. Such evidence included the photographs of the alleged scene of crime, the torn skirt and pants;

(v) That the victim, Kadiatu Tunkara, had had lots of disciplinary problems with the school authorities including the Accused for which she was disciplined including being driven from school for shorts periods and

given a few lashes;

(vi)That the allegation of sexual penetration by the victim against the Accused is malicious and is due to the disciplinary actions taken by the school authorities including the Accused for her persistent or repeated misconduct in school.

Based on the above findings, I hold the considered view that the Prosecution has failed to prove the case against the Accused, Kelly Jawara, for the offence of sexual penetration of a child contrary to Section 19 of The Sexual Offences Act, 2020, Act No. 12 of 2012. Consequently, I hereby acquit and discharge the said Accused of the said offence.

.....

Hon. Mr. Justice Monfred Momoh Sesay

Justice of the Court of Appeal

14/4/2020