AN APPRAISAL OF THE OFFENCE OF RAPE UNDER NIGERIAN LAWS

Abstract

This paper examines the offence of rape under Nigerian laws with the aim of determining the state of the law on rape in order to identify the loopholes contained therein and make necessary recommendations. The methodology adopted in the course of this research is the doctrinal methodology. The researcher used both primary and secondary methods of data collection. Some of the findings of this work are: The Nigerian Criminal Code and Penal Code are lacking in their provisions on the offence of rape such as its provisions on who can commit rape, on whom rape can be committed, what objects and parts of the body can be used to commit the office, marital rape and so on. However, the researcher found that the Violence against Persons (Prohibition) Act of 2015 (VAPP Act) has gone a long way in covering up these loopholes. Unfortunately, this VAPP Act still retains the archaic view on marital rape. Some of the recommendations made in this paper are: amendment of the Criminal Code and Penal Code to reflect modern developments being major criminal statutes in Nigeria, amending VAPP Act in respect of its archaic provision on marital rape, adoption of the provisions of the Child Rights Act by states and adoption of the provisions of the VAPP Act by states.

Keywords: Rape, Victim, Consent, Penetration.

1. Introduction

Rape is one of the oldest crimes in human history. Rape is a global crime but its definition and punishment differ from place to place. The dilemma facing the whole world is that on one hand, a rapist should not go free without punishment and on the other hand an innocent man should not be convicted on the basis of an allegation made by a person who consented to sexual intercourse or an allegation made out of malice where neither rape nor sexual intercourse occurred at all.Based on this dilemma, various countries have made great efforts to amend their laws to conform to recent developments on the offence of rape in order to bring offenders within the arms of the law. The laws on rape in Nigeria are considered below.

2. Appraisal of the Offence of Rape under the Criminal Code

The Criminal Code in its definition of rape stated the elements of rape as follows:

> 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.[744]

A detailed consideration of these elements is considered below.

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[744]Criminal Code, *Ibid*, s.357.

2.1 Capacity

According to section 30[745] of the criminal code,a male person under the age of 12 years is presumed to be incapable of having carnal knowledge. It follows from this that he cannot be guilty of the offence of rape or attempted rape although on such a charge he may be convicted of indecent assault.[746] The presumption is one of law and cannot be rebutted by showing that the accused has reached the state of puberty even though he is below the age of 12 years. A husband cannot be guilty of rape against his wife.[747] However, this privilege or immunity is of limited effect. If the marriage has been dissolved or a competent court has made a separation order containing a clause that the wife be no longer bound to cohabit with her husband then the implied consent to have intercourse given by the wife at marriage is thereby revoked and while the order is in force, it will be rape for the husband to have intercourse with the wife without her consent.[748] The mere fact that a wife has presented a petition for divorce does not by itself revoke the implied consent to intercourse.[749] An undertaking by the husband (in lieu of an injunction) "not to assault, molest or otherwise interfere with his wife ..." is equivalent to an injunction and has the effect of revoking the implied consent to intercourse.[750]Although a husband may not be guilty of rape upon his wife, yet if he uses force or violence to exercise his right to intercourse, he may be guilty of assault or wounding.[751] Also a woman cannot be guilty of rape against a man because according to section 357[752], the offence can only be committed against a woman or girl. In every case where a person is incapable of committing rape, he or she may be charged with the offence by virtue of section 7[753]for aiding, counselling or procuring the commission of the offence.[754]

From the above analysis, it is clear that the provisions of the Criminal Code on who can commit the offence of rape and who the offence of rape can be committed upon is grossly lacking. The inability of a woman to be guilty of rape depicts a great injustice to men and does not conform to what happens in the 21st century. Women are no longer naive and under the control of men. They no longer hide their sexuality as in the olden days.On the issue of marital rape, the provision of the Criminal Code still portrays the common law position where women are seen as property of their husbands. This is no longer the case. Women have now been enlightened about their rights as a person. This provision of the Criminal Code does great injustice to women.

2.2 Carnal knowledge

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[745]Criminal Code, *Ibid*.
[746] Criminal Procedure Act, s. 176.
[747] Unlawful carnal knowledge is defined under s. 6 as carnal connection which takes place otherwise than between husband and wife.
[748]*R v. Clarke* (1949) 33 Cr. App. R. 216.
[749]*R v. Miller* (1954) 2 Q.B. 282.
[750]*R v. Steele*(1977) Crim. L.R. 290
[751]*R v. Miller(supra)*.
[752]Criminal Code, *op cit.* P. 68.
[753]*Ibid*.
[754]*See R v. Ram* (1893) 17 Cox 609- Husband raped maid. Wife convicted as principal in the second degree; *R v. Cogan and Leak* (1975) Crim. L.R. 584.

The carnal knowledge must be proved. For this purpose it is not necessary to prove that the hymen was ruptured or that there has been an emission of semen. The slightest penetration of the vagina is sufficient.[755] But there cannot be rape without penetration.[756] Although the offence of rape is complete upon penetration,[757] it has been held that the act of sexual intercourse which follows is part of the offence itself, so that aid given after penetration makes the aider a party to the offence.[758]

In defining carnal knowledge, the court in *R v. Seidu*[759] held that the term carnal knowledge means sexual intercourse and that this is only complete upon penetration. Thus penetration rather than emission of semen or ejaculation of sperm determines whether there has been carnal connection or not, at least for purposes of the offence of rape and other sexual offences. Owing to the utmost importance attached to the establishment of penetration in rape trials, it is pertinent to note the following essential points on penetration under the criminal code: Penetration, however slight, is sufficient. In other words, it is sufficient if any part of the male organ reaches the vaginal lip known in medical terms as "*Labia Menorah*",[760] Penetration must be via the vagina and not the anus or any other part,[761]also, penetration can only be by a male organ and not any other object. It therefore inevitably follows that penetration of the vagina by finger, stick, an effigy of penis or any other object[762] cannot amount to rape. This can at best be classified and punished as injury occasioning harm;[763] indecent assault;[764] or assault with intent to commit unnatural offence.[765] Thus under the Criminal Code, the traditional definition of penis-vaginal connection is retained,[766]neither ejaculation of semen nor rupture of the female hymen is necessary to constitute rape;[767] and once there is penetration and the sexual intercourse continues, any aid given after penetration makes the aider a party to the offence.[768]

It is submitted that the provision of the criminal code that the slightest penetration of the vagina is commendable. However, the code is lacking because it only makes provision for penetration by the male genitals and not other objects. It also does not make provisions for penetration of

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[755]Criminal Code, *loc cit*., s.6.
[756]*R v. Kufi* (1960) W.N.L.R. 1.
[757]*Loc cit*., s. 6.
[758]*R v. Mayberry* (1973) Qd. R. 211 (Skermen J. dissenting)
[759] [1960] WRNLR 32

[760]*Iko v. State* [2001]35 W.R.N. 1; *State v. Maigemu* [1973] L.L.R. 117 @ 121; *R v. Kufi(supra)*. In *Iko v. State(supra)*, the court stated in clear terms that the essential and most important ingredient of the offence of rape is penetration and that unless penetration is proved, the prosecution must fail.
[761]*Iko v. State(supra)*; *R v. Khan* [1990]2 All E.R 788.
[762]*R v. Gatson* 78 CAR 164.
[763]Criminal Code, *op cit.* s. 355.
[764]*Ibid*. s. 360.
[765]*Ibid*. s. 352.
[766] OBamgbose, 'A Reflection on the Past, Present and Future of Rape Law' (2002) Vol II *JPBL* p.128 at p. 129.
[767] In *R v. Marsden* [1891]2 Q.B. 149 where the prisoner contended that there was no emission of seed(semen), the court held that this is not necessary to prove the offence of rape. Also in *R v. Hughes* (1841)9 C & P 752 where the prisoner's claim was that since there was no rupture of the hymen, he could not be found guilty of the offence of rape, the court held that this also is not a sine qua non to obtaining conviction against an accused, and that all that was required is that there is penetration.
[768]*R v. Mayberry (supra)* ; *Kaitamaki v. Queen*[1984]3 W.L.R. 137.

other parts of the body. These loopholes are very significant as they do not cover the various ways of committing the offence which has been discovered in modern times. The Act ought to be amended to include penetration by other parts of the body such as the fingers and objects such as a stick. Furthermore, it is important to remove from the Act the restriction of penetration to the vagina. Other parts of the body such as the anus, the mouth and other parts should be included.

2.3 The Unlawful Element

Besides the requirement that there must have been a carnal knowledge of the victim by the accused, it is very important that such carnal connection be unlawful. In *Idowu v. State*,[769]the court held that a carnal knowledge is unlawful if it is "contrary to law". Unlawful carnal knowledge is defined in the Criminal Code as carnal connection which takes place otherwise than between husband and wife.[770] The phrase has also been held in an English case to mean "carnal connection other than between husband and wife"[771] and In *R v. Chapman*,[772]the term unlawful carnal knowledge was held to mean "illicit intercourse", that is, intercourse outside the bonds of marriage. It has been opined[773] that this is what makes rape a sexual offence, for where the carnal knowledge is lawful and with consent, it cannot be said to amount to rape.

It is submitted that the position that what makes sexual penetration unlawful is not just non consent but also that it was done outside the bonds of marriage has two sides to it. It can pose as an advantage on one hand and a disadvantage on the other hand. Making sexual penetration outside the bonds of marriage unlawful can be an advantage on both moral and economic grounds. First on moral grounds, it will help to stop the act of fornication and eradicate unwanted pregnancies and its risks. It will also reduce the act of abortions which also puts lives in danger and dumping of children by young people who have no means of livelihood and cannot cater for the child. On economic grounds, unwanted pregnancies are part of the reasons young girls drop out of school and never get to use their potentials which will help develop the country. Their male counterparts may be forced to drop out of school to do menial jobs in order to cater for the child. This may bring to a halt the future of these young people who may not be able to pick up from where they dropped off. This definition of unlawful sexual penetration will help stop these mishaps from happening. On the other hand, this definition of what makes sexual penetration unlawful may constitute a disadvantage to women who are married. In fact, this position of the law is the reason why men who rape their wives cannot be brought to justice under the Nigerian legal system. It allows a man to rape his wife if she does not consent to sexual intercourse which is wrong. This simply encourages sexual violence because the man could beat the woman and even inflict injuries on her just to achieve his aim. It is therefore submitted that this definition should be expunged to avoid such life threatening hardships on women. This is because the moral and economic advantage of this definition as highlighted above can still be achieved through other means like proper parental guidance.

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[769] [1998]3 NWLR (pt. 582) 394.
[770] section 6 of the Criminal Code, Cap C. 38, LFN 2004.
[771] *R v. R* (Husband) [1991]4All E.R. 481.
[772] [1959]1 Q.B. 100.
[773] OBamgbose, *op cit.* p. 4.

At common law, the rule is that a husband could not be convicted of raping his wife as principal in the first degree. This common law rule is traceable to the jurisprudential writings of Hale[774] who posited that a husband could not be convicted of a rape allegedly committed on his wife. His reason for this submission was that by her matrimonial consent and vow, the wife had given up her body to the husband. As a result, the husband cannot be said to be raping a woman who legally belonged to him.It is fundamental to note however that the above is not to say that sexual intercourse as between husband and wife cannot be unlawful even in the Nigerian context. Thus carnal connection as between husband and wife may be unlawful where there has been a judicial separation or *decree nisi*[775] of divorce or nullity, an injunction against molestation, an undertaken to the court not to molest or a formal deed of separation, even though it does not contain a cohabitation clause or a non-molestation clause.[776]Similarly, a husband may be convicted as a secondary party to rape[777] committed by another on his wife; for, as Hale puts it, though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another.[778]This position of the law is commendable.Thus, it can be deduced from all the foregoing that for the offence of rape to be proved, there must have been an unlawful carnal knowledge.

2.4 Consent

In *Akpan v The State*,[779]in deciding whether lack of consent is an essential ingredient of the offence of rape, the court held that 'rape is the unlawful carnal knowledge of a girl or woman without her consent. Thus, it can be deduced from the above definition of the court that an essential ingredient of the offence of rape is that the intercourse must be without the woman's consent. The law is such that even when consent was obtained by force or threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act, the offence could be said to have been committed. The court further held that the prosecution must prove that the accused had carnal knowledge of a woman or girl despite her age without her consent. Similarly, the court in *Ogunbayo v The State*,[780] in deciding whether or not a person who had carnal knowledge of a woman without her consent is guilty of rape, held that: the issue of consent is of extreme importance. In the case of *Idris Rabiu v The State*,[781] the court defined rape as an "act of sexual intercourse committed when the woman's resistance is overcome by force or fear, or under other prohibitive conditions".[782] The underlying theme from the foregoing cases is that consent is central to the offence of rape. Where there is consent from the woman or girl to the sexual intercourse, then the charge of rape must fail. But where there is absence of consent, and there is penetration of the vagina however slight the penetration, then the offence of rape is established.

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774 1 PC 629.

775 This is a court order that does not have any force until such time that a particular condition is met, such as a subsequent petition to the court or the passage of a specified period of time.

776 *R. v. Roberts* [1986] Crim LR 188, CA.

777*R. v. Cogan and Leak(supra)*.

778*Lord Castle haven's case* (1631) 3 state Tr . 401.

779 (2014) LPELR- 22740(CA)P. 47,Para A-B.

780 (2007)8 NWLR (Pt. 1035)157 at 178.

781 (2005)7 NWLR (Pt. 925)491.

782 (2015) INCC 578 at 590.

To succeed therefore, the prosecution must prove lack of consent on the part of the woman or girl.

This requirement is a distinct element of the crime of rape and another significant area that has witnessed changes in recent times. Under the common law, a victim was expected to show that she resisted to her utmost ability. This often entailed actual physical resistance to the sexual advance and mere verbal objection to such advance would not suffice. Thus in 1889, the Supreme Court of Nebraska reversed a conviction on the ground that the woman submitted when she had the power to resist.[783] In a similar vein, a Wisconsin court defined non-consent as utmost resistance. The court held that the victim had not adequately demonstrated her non-consent. The court further stated that not only must there be absence of mental consent but also there must be the most vehement exercise of every physical means or faculty within the woman's power to resist penetration of her person. [784] This condition was notwithstanding the fact that a man is physically stronger than a woman by nature or that the attacker may be armed and that such struggle may lead to the victim's death or being badly injured. The reasoning for the above position was apparently based on the fact that a woman is expected to jealously guard her chastity and should shudder at the bare thought of dishonour to her person. Another reason is the importance attached to chastity and virginity and the popular view that any woman at that period would resist to the utmost any attempt to violate her person.

However, with time this utmost resistance requirement disintegrated, as a subtle change of emphasis occurred in the middle of the 19th century as shown in the cases of *R v. Camplin*[785] and *R v. Fletcher*.[786] The test since then was not "was the act against her will?" but "was it without her consent". This distinction emphasizes the fact that it is not necessary for the prosecution to prove a positive dissent as was the practice at common law; it is enough that she did not consent. Thus, where an accused had intercourse with a woman who he had been rendered insensible by giving her liquor in order to excite her,[787] and where he had intercourse with a woman who was asleep[788] he would be guilty of the crime of rape even though in the two cases, there was no utmost resistance as required at common law.

In rape trials, the courts have held severally that where there is a possibility that the prosecutrix consented, the case of the prosecution must fail. In*Iko v. The State*,[789] for instance, the court held that the most essential ingredient is penetration and consent on the part of the victim is a complete defence to the offence.[790]

A clear distinction must however be drawn between consent and submission. While consent is a willing state of the mind to proceed with the act in question i.e. act of sexual intercourse, submission may be due to threat, fear or intimidation. In *R v, Day*,[791] the prisoner, a well-built

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[783]*People v. Dohring* 59 NY 374 1874.
[784]*Brown v. State* 127 Wis 199 (1906)
[785] (1845)1 Den 89
[786] (1859) Bell CC 63
[787]*R v. Camplin(supra).*
[788]*R v. Mayers* (1872)12 Cox CC 311; *R v. Young* (1878)14 Cox CC 114
[789](*Supra).*
[790]*Igboanugo v. State* (supra); *Kaitamaki v. Queen(supra).*
[791] (1841)9 C & P 722.

man, offered to accompany a ten year old girl on a lonely lane where he carnally knew her. This was held by the court to be submission and not consent. According to the court in that case, every consent involves a submission; but by no means follows that a mere submission involves consent.[792] Also, in *R v. Olugboja* [793] the victim was held to have submitted out of fright because of what she experienced with the first accused person when she was struggling to resist.

However to Smith and Morgan,[794] an attempt to draw a distinction between consent and submission conceals a great difficulty. It is the submission of the learned scholars that there is no distinction between the two concepts. Furthermore, in a contra-distinction to the position of the learned authors above, Owoade argued that there is a palpable difference between the two: submission and consent. According to him, though the two words may appear similar, there is a distinction. Consent is synonymous with approval, cooperation and a positive form of consensus.[795] One cannot agree less with Owoade.

The distinction between the two concepts cannot by any argument be swept under the carpet. As a practical example of the distinction existing between consent and submission, if a victim had submitted to the next culprit in a gang rape owing to the experience she had with other culprits while trying to resist, as was the case in *R. v. Olugboja*,[796] could it be said that this is consent and not submission? With due respect to the learned authors, this will be submission and not consent. And even to use their own example of a woman submitting to sexual intercourse because her fiancé threatened to break up with her if she did not allow him sex, this cannot in any way be compared with a situation where a woman is being slept with at gun point or at dagger-drawn point. While there is evidence of congeniality in the former case (as between fiancé and fiancée), no such evidence exists in the latter case. Therefore, contrary to the assertion of the erudite authors above that the distinction engenders a great difficulty, it is submitted that it has simplified the task for the court and reduced the too-accused-friendly interpretations imposed on words of statutes by some judges.

On the charge of rape, absence of consent is very important and the prosecution has to prove that the accused had carnal knowledge of a woman or girl, despite her age, without her consent.[797] It is no excuse that the complainant is a common prostitute; that she has consented to intercourse on other occasions; or that she is the accused person's concubine. But these facts may make the court reluctant to believe the complainant's denial of consent in the instant case.[798]

2.4.1 Consent obtained by fraud

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[792] Per Lord Coleridge (1841), C&P 722 at 724.

[793] [1981]3 All E.R 443. This is a case where the victim was raped by two Nigerian brothers. When she was raped by the 1st accused, she fought tooth and nail to prevent her violation but she was beaten blue black by the said accused until he had his way. On being approached by the 2nd accused for the same purpose, she submitted/succumbed without putting up any resistance.

[794] JCSmith, & BHogan,; *Criminal Law* (London: Butterworth 1980).

[795] AOwoade, 'A Note on Rape' (1990) Vol I *Ogun State University Law J0uurnal* p.25.

[796][1981]3 All E.R 443.

[797]*R v. Kufi*, Supra.

[798]*Ibid*.

Consent obtained by fraud, misrepresentation, force or by means of threat or intimidation or fear of harm is no consent. Consent given because of exhaustion after persistent struggle and resistance would appear to be no consent. Usually evidence of some struggle or resistance by the complainant may be the best proof of lack of consent but this is not always necessary. To have carnal knowledge of a sleeping woman is rape. It is also rape to have carnal knowledge of a woman by impersonating her husband. Submission by a person of intellect or a person who is too young to understand the nature of the act done is not consent.[799]

As to the maxim that fraud vitiates consent, it is clear that no consent is effective which is obtained by fraud relating to the nature of the act,[800] or to some other fundamental matter. It is however important to note that not all frauds will vitiate consent. It then follows that while some frauds will vitiate consent, others will not affect it at all. The purview of fraud that will vitiate consent is widely considered by the English court in *R v. Linekar*[801]. The complainant in this case was a woman of thirty who worked occasionally as a prostitute. On the evening in question, she was working as such near a cinema in Streatham. The defendant approached her and a fee of £25 was agreed upon. They had sexual intercourse on the balcony of a block of flats and then the defendant made off without paying. The complainant knocked at a nearby door looking distressed and nearly naked and complained she had been raped. The defendant was subsequently apprehended and charged with rape. The bone of contention before the court was whether the complainant's consent to sexual intercourse was vitiated by the defendant's decision not to pay her, namely by fraud. The defendant was found guilty of rape in the court of first instance. On appeal, the matter for determination was the criteria to be applied vis-a-vis the kinds of fraud that will actually vitiate consent, and hence lead to a conviction for rape and not a lesser offence. To aid their decision, their Lordships reviewed a wide variety of pertinent English and Commonwealth authorities. The starting point was the historic case of *R v. Flattery*[802] where a medical doctor had carnal knowledge of the victim on the pretext that he was treating her medically. The victim consented to the treatment and in no way to the sexual intercourse. This was held to be rape. The above case was followed by *R v. Williams*[803] in which a singing instructor had sexual intercourse with the victim on the ground that he was helping her to treat her breathing which was not quite right. He was held rightly convicted for rape since the consent was obtained by fraud. It is therefore necessary that a crucial distinction should be drawn between a consent given under a deception or mistake as to the thing itself, namely the act of sexual intercourse, and consent to that act of sexual intercourse itself induced by a deception or mistake as to a matter antecedent or collateral thereto.[804] While the former will vitiate consent, the latter will not.According to Alan Reed:[805]

> The crux of the decision relied on by their Lordships in Linekar, is that fundamentally there was consent to the act of sexual intercourse itself.

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[799]C O Okonkwo, *Okonkwo and Naish: Criminal Law in Nigeria*, 2nd edn, (Ibadan: Spectrum Books, 1980) P. 273.

[800]*R v. Flattery* (1877) 2 Q.B.D. 410.

[801] (1995) QB 250

[802]*Supra*

[803] [1923]1 K.B. 340

[804] Fraud in the inducement does not destroy the reality of the apparent consent; fraud in the factum does. *R. v. Harms* (1944)2 D.L.R. 61.

[805] RAlan, 'Contra Bonos Mores: Fraud Affecting Consent in Rape' (1995) Vol II *New Law Journal* p. 176.

> The "victim" knew the nature of the act and the identity of the person and consented to sexual intercourse in full knowledge of those crucial determinations. The fraud itself related to an ancillary matter … the prostitute consented to sexual intercourse itself clearly knowing the nature of the act and identity of the defendant. The fraud was related to a subsidiary concern that she should receive payment in the sum of £25.

It can therefore be said that not all frauds will vitiate consent in rape cases. The above submission on fraud and its effect on consent is in line with the provisions of the Nigerian Criminal Code where it is provided that a consent obtained 'by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman, by impersonating her husband[806] will be void.

Apart from the above clear cases of fraud, consent obtained by threat or intimidation cannot stand. Hence, in R v. Jones,[807] Jones had sexual intercourse with his daughter and threatened that he would kill her if she told anybody. This was held not to be consent. If the complainant understood the nature of the act to be done, the fact that the accused deceived her about the state of his health is immaterial.

2.5 Intention

The mental element of rape is intention to have sexual intercourse without the woman's consent or with indifference as to whether she consented or not. In the English case of *D.P.P v Morgan*[808]the House of Lords held that if an accused person believed that the woman was consenting he should not be guilty of rape even though he had no reasonable grounds for his belief. The decision was criticized because there was no requirement that the belief should be reasonable. The Sexual Offences (Amendment) Act 1976 amended the law relating to rape in England by providing that a man commits rape if he has sexual intercourse with a woman who does not consent to it or he is reckless as to whether she consents to it. The amendment in effect confirms the decision in *D.P.P v Morgan*.[809]

The principle of this decision is valid in Nigeria. If an accused person pleads that he believes the woman was consenting, he does not thereby bear the burden of establishing honest and reasonable mistake of fact under *section 25*. As the prosecution has the burden of proving the actus reus (intercourse without the woman's consent) and mens rea (intention to have it without her consent) of the offence of rape, it must prove as part of its case that the accused intended to have sexual intercourse without the woman's consent. A mistaken belief that she was consenting, even though unreasonable will negative that intention.

3. Appraisal of the Offence of rape under the Penal Code Act

[806]Criminal Code, *op cit.* s. 357.
[807] (1861)4 L.T. 154
[808] (1975) 2 ALL E.R. 347.
[809]*Supra.*

A man is said to commit rape who, except in the case of sexual intercourse by a man with his own wife, if she has attained puberty, has sexual intercourse with a woman in any of the following circumstances: against her will, without her consent, with her consent when her consent has been obtained by putting her in fear of death or of hurt, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married with or without her consent, when she is under fourteen years of age or of unsound mind.[810]

From the above definition, it is obvious that the northern and southern parts of Nigeria require the same elements to be proven and both share the same loopholes.

4. Appraisal of the Offence of rape under the Violence against Persons (Prohibition) Act 2015

On the 25th day of May 2015, the past president of Nigeria, Dr. Goodluck Ebele Jonathan recorded a milestone when he signed into law the Violence Against Person (Prohibition) Act 2015. With the introduction of this Act, the traditional definitions and elements of rape as provided in the Penal Code and Criminal Code have come under threat in an attempt to expand the frontiers of the offence of rape to cover novel ways and methods of sexual gratifications. Section 1[811] of the Act provides as follows:

> (1) A person commits the offence of rape if -(a) He or she intentionally penetrates the vagina, anus or mouth of another person with any part of his or her body or anything else; (b) The other person does not consent to the penetration; or (c) The consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse. (2) A person convicted of an offence under subsection 1 of this section is liable to imprisonment for life except: (a) Where the offender is less than 14 years of age, the offender is liable to a maximum of 14 years of imprisonment. (b) In all other cases, to a minimum of 12 years imprisonment. (c) In the case of rape by a group of persons, the offenders are liable jointly to maximum of 20 years imprisonment without an option to pay fine.

The above stated provision has unlike the Criminal Code Act and the Penal Code Act made provisions to cover the various developments that have occurred in the present century. Compared to the Criminal Code and Penal Code,this Act has covered almost all the many loopholes pointed out in this paper regarding the Criminal Code and Penal Code. The above provision of the VAPP Act now makes it possible for a woman to be prosecuted for the offence of rape. It contemplates the commission of the offence of rape using other parts of the body and objects than the penis and commission of the offence on other parts of the body than the vagina.

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[810]Penal Code*op cit* s. 282.

[811] Violence Against Person (Prohibition) Act 2015

The Act went further to make extensive provisions for the protection of victims in court during trial[812] and outside the court.[813] The Act further made provisions for the rehabilitation of victims.[814]Its provisions are indeed highly commendable.However, It is not enough to make laws. Effort must be made for the proper implementation of these commendable laws for there to be a visible and positive difference in our society regarding the offence of rape.

However, like the other Nigerian laws, this law does not recognize marital rape. This is evident in the above definition where it included the phrase "in the case of a married person by impersonating his or her spouse ". It is submitted that this position of the law is archaic and does not conform to modern developments on rape. Women are no longer viewed as the property of men which can be abused as they wish. The said provision should therefore be expunged.

5. Appraisal of the Offence of rape under the Nigerian Constitution

Although the Nigerian Constitution does not expressly prohibit the offence of rape, it clearly prohibits acts of torture or other inhuman or degrading treatment.[815] The offence of rape falls under this section of the Constitution. In most cases, this crime involves violence and intimidation and may be accompanied with physical injury and/or mental and psychological damage.[816] In the light of the definitions in the Nigerian statutes above, one can say that rape is an offence that poses enormous problems in all societies. The offence of rape is not only an inhuman act but without doubt a serious one, highly reprehensible in the moral, religious and legal sense. It erodes the personal dignity and personality of the victim.

6. Appraisal of the Offence of rape under the Child Rights Act

One of the Nigerian laws which have prohibited the offence of rape is the Child Rights Act. The law in its *section 31*[817] states as follows:

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

Furthermore, the Act in *section 11*[818] emphasized the need to protect children from such heinous offences. it provides as follow:

> Every child is entitled to respect for the dignity of his person, and accordingly, no child shall be- a. subjected to physical mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse; b.

[812]*Ibid.,* Section 38 &39.
[813]*Ibid.,* Section 28-36.
[814]*Ibid.,* Section 46.
[815] The Constitution of the Federal Republic of Nigeria (as amended) 1999, s. 34 (1)a.
[816] O Bamgbose, *op cit.* p. 4.
[817]Cap C50, Laws of the Federation of Nigeria, 2010.
[818]*Ibid*

subjected to torture, inhuman or degrading treatment or punishment; c. subjected to attacks against his honour or reputation; or d. held in slavery or servitude, while in the care of a parent, legal guardian or school authority or any other person or authority having the care of the child.

According to the Supreme Court of Nigeria in the case of *Adonike v. State*[819] "a child cannot consent to sex".It is submitted that the position of the law that consent of a child to sexual intercourse is immaterial is a satisfactory device to show the level of condemnation of the act by the law. This provision of the Act is commendable but should not only be made but be implemented. The law has done its part in protecting children from rape. It is now for our judges and law enforcement agencies to take these laws seriously and implement them to the latter. In the case of a child whether male or female, our judges should not be swayed to sympathy for the defendant when found guilty of the crime of rape upon a child. They should take into consideration the disgusting and animalistic nature of performing such an act on a child and brace up to the task of pronouncing life sentence on those found guilty of this crime. This will go a long way to deter the society at large from performing such heinous acts. At this juncture it must be noted that under the provisions of the Child's Rights Act[820], the general law remains that a child is a person below the age of eighteen years.

7. Conclusion

The Nigerian Criminal Code and Penal Code were enacted in the 1900s borrowing old ideas. Their provisions on sexual offences have undergone very minor and insignificant changes or amendments.The VAPP Act went a very long way to cover most of the loopholes contained in the Criminal Codeand Penal Code.However, it still contains one great loophole which is the fact that it does not recognise marital rape. This enactment still encourages rape in marriage. This view is archaic and does not conform to modern developments as in the laws of other developed countries.[821]Notwithstanding the fact that the VAPP Act has gone a long way to cover the loopholes in the Criminal Codeand Penal Code, they are still Nigerian statutes which are in use and should not contain such archaic definitions.

8. Recommendations

There have been so many developments in this 21st century which the criminal and penal codes have not recognized. In fact, these laws still operate with the common law requirements for the proof of the offence of rape. These laws are archaic and do not provide solutions to fast increasing improvements and changes nowadays. The Violence against Person Prohibition Act 2015 has however, taken care of most of these loopholes. Notwithstanding the provisions of the VAPP Act, it is hereby recommended thatit is still important to amend the provisions of our Criminal Code and Penal Code on rape to reflect and tackle the problems of the 21st century being major statutes on crime in Nigeria. It is further recommended that the Violence against Person Prohibition Act 2015 be amended in respect of its provision on marital rape. This

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[819] 2015) 7 NWLR (pt 1458) 237-288, *Ezigbo v. State* (2012) 16 NWLR (pt 1326) 318-338.

[820] *Ibid*, s. 277.

[821] USA, South Africa, England, etc

amendment should not only apply to husbands but also to wives alike. It is also recommended that states should adopt the provisions of the VAPP Act 2015. This is because the Act was made to apply only in Abuja.[822] It is pertinent to note at this juncture that Anambra State has already adopted the provisions of this Act.[823]It is further recommended that states adopt the provisions of the Child Right Act particularly, its provisions on rape. Also, judges are encouraged to braceup to their duty to give stern punishment (life sentence) when a defendant is found guilty of such a heinous crime.. Government, NGOs, communities and well to do persons should take into consideration the building and development of witness protection centres and rehabilitation centres which will be readily available to persons of all cadres in the society.

[822] Sections 47 & 27.
[823] Violence Against Persons (Prohibition) Law of Anambra State 2017.