

THE NIGERIAN JURIDICAL REVIEW

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THE REQUIREMENT OF CORROBORATION IN THE PROSECUTION OF SEXUAL OFFENCES IN NIGERIA: A REPEAL OR REFORM?*

Abstract

Previously, in many common law jurisdictions, the position was that for a charge of rape, defilement or other forms of sexual offence to be proved beyond reasonable doubt, the prosecution must offer corroborative evidence outside the usual testimony. After some intense lobbying, this provision requiring corroboration has been expunged from the Evidence and procedural law of many jurisdictions. As a result, there have been cry outs and criticisms against the law on certain grounds. However, a sexual offence is an offence under the Code and it is quite discriminatory that a different means of proof should be prescribed for these offences. How will it be if the Acts of Criminal Procedure in Nigeria prescribe a different form for proving Robbery, another for Forgery and the likes? The purpose of this paper is to examine whether the removal of Section 179(5) of the repealed Evidence Act,¹ which required corroboration of sexual offences, is justifiable.

1. What is Corroboration?

The word ‘corroborate’ is derived from two Latin words “*cor*” and “*robur*” which means “to strengthen”. Lord Reading in *King v. Baskerville*² defined corroboration as: “some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.” The Nigerian Supreme Court in *Nwambe v. State*,³ defined corroboration as the confirmation of a witness’ evidence by independent testimony. In *Director of Public Prosecutions v. Kilbourne*,⁴ Lord Simon stated: “Corroboration is therefore nothing other than evidence which “confirms” or “supports” or “strengthens” other evidence... . It is, in short, evidence which

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¹ Cap, E14, LFN 2004.

² (1916) 2 K.B. 658.

³ (1995) 3 SCNJ 77.

⁴ (1973) A.C. 729.

renders other evidence more probable.” Bargen and Fishwick⁵ define the concept as follows:” Corroboration refers to the need for the complainant’s evidence to be supported by some other independent evidence implicating the accused person”.⁶

From the definition of Lord Reading above, it is noticed that one of the problems with legal scholars and judges is that they have accorded the concept of corroboration a meaning which is akin to testimony itself. Corroboration is not a total testimony or evidence which reiterates the case against the accused. Corroboration is, instead, an independent piece of evidence that confirms the testimony of the complainant or the evidence adduced by the prosecution. As seen from its etymological view, to corroborate is “to strengthen” and not “to repeat”.⁷

2. History of Corroboration

Corroboration in law is a practice which originated from Romano-Canonical influence in Law. In the Old Testamentary recordings of the Bible, it is said that: “At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death”⁸ and;”One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established.”⁹

In the New Testament it is phrased as follows;”But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established”¹⁰ and; “In the mouth of two or three witnesses shall every word be established.”¹¹

In Roman law,¹² the history of the concept of corroboration can also be traced from the Justinian Code. There, it read:

The Emperor Constantine to Julian, Governor we have already directed that witnesses should testify after having been sworn,

⁵ J. Bargen and E. Fishwick, *Sexual Assault Law Reform: A National Perspective*, (New York, UN Office of the Status of Women, May, 1995).

⁶ *Ibid.*, p. 69.

⁷ See Lord Hewart C.J’s dictum in *R. v. Whitehead*, where the learned Law Lord stated that corroboration was not repetition.

⁸ Holy Bible (KJV), Deuteronomy 17:6.

⁹ Holy Bible (KJV), Deuteronomy 19:15.

¹⁰ *Ibid.*, Matthew 18:16.

¹¹ *Ibid.*, II Corinthians 13:1.

¹² Which forms the foundation of Civil Law.

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and that the preference should be given to those of honourable reputation. In like manner, we have ordered that no judge shall in any case readily accept the testimony of only one witness; and now we plainly order that the evidence of only one witness shall not be taken, even though he should be distinguished by senatorial rank.¹³

Against the word of a Cardinal, for example, forty-four witnesses were required.¹⁴ The same constitution appears in the Theodosian Code¹⁵:

We have previously commanded that before they give their testimony, witnesses shall be bound by the sanctity of an oath, and that greater trust shall be placed in witnesses of more honourable status. In a similar manner, we sanctioned that no judge should easily allow the testimony of only one person to be admitted in any case whatever. We now manifestly sanction that the testimony of only one witness shall not be heard at all, even though such witness should be resplendent with the honour of the glorious Senate.

The basis of the corroboration rule is in ‘the rule of numbers’ which is that the more the number, the stronger the evidence. The introduction of corroboration rule into the Scottish legal system was based on the disbelief of the judge to deliver credible judgement, which was characteristic of ancient Europe.¹⁶ This paved the way for the introduction of corroboration to enable a judge deliver very probable and sound judgements. This agrees with the biblical injunction that, “Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses; but one witness shall not testify against any person to cause him to die”.¹⁷ It was also believed at that time that judges were as ignorant as any individual viewing the case at all and because of lack of professionalism of the judges, there was a need for many witnesses. However, with the growth of legal scholarship in the late 18th and 19th century, there emerged formal rules guiding

¹³ Book IV Title XX Concerning Witnesses. The instruction is dated 334 AD cited in Wigmore, *Evidence* (3rd ed., 1940) p. 2032.

¹⁴ J. H. Wigmore, *Evidence* (3rd ed.), (UK: McNaughton Rev., 1940) p. 2032.

¹⁵ *Ibid.*, The Trustworthiness of Witnesses and of Instruments (*De Fide Testium et instrumentorum*). Interestingly, the testimony of a single Bishop might be in a different category (see also Sirmondian Constitution 333).

¹⁶ *Carlo way Law Review on Scottish law* cited in Wigmore., *op cit.*, p. 2034.

¹⁷ Holy Bible (KJV), Numbers 35:3.

criminal and civil trials. There were formal standards of discharging the burden of proof which includes, the ‘balance of probabilities’ in civil cases and proof ‘beyond reasonable doubt’ in criminal cases.¹⁸ An American author, Irving Younger states that, “Gradually, as other modes of inquiry into the truth became fashionable, the rather primitive formalism of the rule of number gave way to conceptions of evidence and of proof more congenial to the modern mind.”¹⁹ Hence, such codified rules of procedure paved the way for expunging of the concept of corroboration from the legal system of many European countries.

The above is one of the reasons why the expunging of corroboration is commendable. The concept is a mechanical one which does not fit into the system of modern juristic practice. Such perfunctory rules have been done away with owing to advancement of modern society and the dynamism of law.

3. Views on Corroboration

There are divergent views on the issue of corroboration, some of which have threatened to erode the originality of the concept and have helped some mediocre judges shy away from handing out judgements without fear and favour. However, judicially, there are two discernible views on corroboration²⁰, which can be classified into two schools of thought, namely:

- a. The Liberal view; and
- b. The Restrictive view.

The Liberal View is that which construes the written testimony in the light of the situation presented and tends to effectuate the spirit and purpose of the maker. It resolves all reasonable doubts in favour of the written testimony.²¹ In applying the liberal view on the issue of corroboration, judges tend to use circumstantial evidence to determine corroboration. In *Igboanugo v. State*,²² the trial judge stated that “corroboration need not be direct, oral evidence. It is quite sufficient even if it is merely circumstantial

¹⁸ Evidence Act, 2011, as amended, ss. 134 and 135

¹⁹ Irving Younger, “The Requirement of Corroboration for Prosecution of Sex Offences in New York”, *Fordham Law Review*, (1971), Vol. 40 Issue 2, p. 264

²⁰ See Glanville Williams, “Corroboration - Accomplices”, (1962)3 Crim. L.R. 588.

²¹ W. Lile., *et al.*, *Brief Writing and the Use of Law Books*, 3rd edn, (1914) cited in Wigmore., *op cit.*, p. 242.

²² [1992] 3 N.W.L.R. (Pt.128) 259.

evidence of the accused person himself.”²³ This appears to be the position where the accused testimony is inconsistent or false. For instance, in *R. v. Knight*²⁴, the lies of the accused were held to corroborate the story of the complainant. However, in *Francis Okpanefe v. State*,²⁵ although the Supreme Court referred to *R v. Knight*, it arrived at a different conclusion when it held that circumstantial evidence was not sufficient corroboration.²⁶

The Restrictive View, on the other hand, adopts a strict construction and considers words narrowly, usually in their historic context. It resolves all reasonable doubts against the applicability of a particular word.²⁷ Applying this view to the issue of corroboration, the judges usually require direct evidence which points to the fact that the accused is actually the one that committed the crime.²⁸ Judges in this school are prone to making the mistake of regarding corroboration as repetition. There is the need to apply caution in this regard as over reliance on this approach will most likely result in unjust consideration of the case of the complainant.

4. Corroboration of Sexual Offences

The repealed Evidence Act²⁹ in S. 179(5) provided thus:

A person shall not be convicted of the offence mentioned in Sections 218, 221, 223, or 224 of the Criminal Code upon the uncorroborated testimony of one witness.

The relevant sections of the Criminal Code³⁰ are as follows:

S. 218: Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning.

Any person who attempts to have unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is

²³ *Ibid.*, p. 262.

²⁴ [1966] 1 All ER 647,649.

²⁵ (1969) ANLR 411.

²⁶ *Ibid.*, Ademola, CJN called the plea of *alibi* “spurious”.

²⁷ W. Lile., *et al.*, *op. cit.*

²⁸ *Olaleye v. State* (NSCC [1970] 250).

²⁹ Cap E14, LFN, 2004

³⁰ Virtually all the states in the south where the Criminal Code used to apply have their respective Criminal Code Laws (CCL). In Enugu state, there is CCL, Cap 30, Revised Laws of Enugu State, 2004. In Lagos, it is retained as Cap 17, Laws of Lagos State. The provisions are similarly worded but may sometimes be differently named or classified.

liable to imprisonment for fourteen years, with or without caning.

S. 221: Any person who-

- (1) has or attempts to have unlawful carnal knowledge of a girl being of or above thirteen years and under sixteen years of age; or
- (2) knowing a woman or girl to be an idiot or imbecile, has or attempts to have unlawful carnal knowledge of her; is guilty of a misdemeanour, and is liable to imprisonment for two years, with or without caning.

S. 223: Any person who-

- (1) procures a girl or woman who is under the age of eighteen years to have unlawful carnal connection with any other person or persons, either in Nigeria or elsewhere; or
- (2) procures a woman or girl to become a common prostitute, either in Nigeria, or elsewhere; or -
- (3) procures a woman or girl to leave Nigeria with intent that she may become an inmate of a brothel elsewhere; or
- (4) procures a woman or girl to leave her usual place of abode in Nigeria, with intent that she may, for the purposes of prostitution, become an inmate of a brothel, either in Nigeria or elsewhere; is guilty of a misdemeanour, and is liable to imprisonment for two years.

S. 224: Any person who-

- (1) by threats or intimidation of any kind procures a woman or girl, to have unlawful carnal connection with a man, either in Nigeria or elsewhere; or
- (2) by any false pretence procures a woman or girl to have unlawful carnal connection with a man, either in Nigeria or elsewhere; or
- (3) administers to a woman or girl, or causes a woman or girl to take, any drug or other thing with intent to stupefy or overpower her in order to enable any man, whether a particular man or not, to have unlawful carnal knowledge of her; is guilty of a misdemeanour, and is liable to imprisonment for two years.

Collectively, these offences are referred to as Sexual offences.³¹ All the sections listed above contain a *proviso* that: "a person

³¹ They are differently named in the various State Criminal Code Laws but the offences are the same. For instance, in Enugu State CCL Cap 30, they are grouped under a section as offences against morality. Sections 196-216.

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cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness.” By this provision, it is obvious that as far as the legal content of these sexual offences are concerned, there is a mandatory requirement for corroboration. The prosecution in order to secure a conviction must adduce evidence to corroborate the complainant’s testimony. However, under the Evidence Act, 2011,³² the former section 179(5) has been expunged. This is clearly a reform of the law but obviously not a repeal of the requirement of corroboration for sexual offences under Nigerian law. By the provisions of Evidence Act, there is a clear indication that corroboration is no longer required, as a matter of law, for the conviction of any person that commits any of these sexual offences. Thus, the court may now convict on the strength of the case and no more on the corroborative evidence. This apparent contradiction in the present state of the law is the main crux of this discourse.

Lawyers and judges have in the past been criticised for displaying bias in their treatment of women who are victims of sexual assault. It has been argued that this biased treatment of women comes from views about women which are based on myths and stereotypes.³³ These views fail to recognise the dignity of womanhood. In their report on Sexual Assault Law Reform, Barga and Fyswick³⁴ argue that stereotypes of women differ according to the category into which they are usually placed. Accordingly, the degree to which ‘she’ may lie depends upon the category of “woman” into which she is placed.

Corroboration was required in almost all cases of sexual assault and corroborative evidence was usually defined in an absurdly narrow way.³⁵ The rule was based on myths and beliefs about women which are incorrect and clearly discriminatory. According to Woods:

It is stressed that the present practice is regarded as being grossly offensive to women and discriminatory. Is it really

³² It was passed in May, 2011 and it repealed Evidence Act, Cap. E14, Laws of the Federation, 2004.

³³ D. Malcolm, *Equality before the Law, Justice for Women and Women’s Equality*, Parts 1 and 2, (Australia, Commonwealth Government Publishing Service, 1994).

³⁴ J. Barga and E. Fyswick, *op. cit.*, p. 70.

³⁵ See for example *R. v. O’Reilly* (1967) 2 QB 772 and *R. v. Richards* (1965)2 QB 354 at 360.

possible that rape victims as a class are more prone to falsehood than, for example, businessmen giving evidence in cases where their own financial advantage is in issue? Why not have a rule that judges should always warn juries that it would be “dangerous to convict” on the uncorroborated evidence of a businessman?³⁶

The common law rule was justified by the need to protect the accused person against the risk of unjust conviction:

Because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.³⁷

This had the effect of placing sexual offence complainants in a category of unreliable witnesses. There is no evidence to suggest that sexual assault complaints are false. In fact, a report from India and Britain³⁸ showed that the rate of rapes is not commensurate with the convictions for rape. The report from India showed that rape was the fastest growing crime in India with over 22,900 incidences in 2011 and yet the rate of conviction for the offence was completely incommensurate.³⁹

³⁶ G. D. Woods., *Sexual Assault Law Reform in NSW: A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981 and Cognate Act*, (NSW, Department of the Attorney General and of Justice, 1981), p. 28.

³⁷ *R. v. Manning; R. v. Henry* (1968) 53 Cr. App. Rep. 150 at 153, per Salmond LJ.

³⁸ In Britain, the government estimates that as many as 95% of rapes are never reported to the police at all. Of the rapes that were reported from 2007 to 2008, only 6.5% resulted in a conviction on the charge of rape. The majority of convictions for rape resulted from an admission of guilt by the defendant, whereas less than one quarter of all those charged with rape were convicted following a successful trial. Prosecutors have accepted a number of failures in dealing with rape, particularly since the publication in 2007 of the Without Consent report, which was highly critical of some aspects of the way the police and prosecuting authorities deal with rape cases. see <http://www.hindu.com/2010/04/28/stories/2010042861390800.htm> last accessed on 01/06/2012

³⁹ *Ibid.* It is pertinent to mention that these countries have abolished the corroboration rule.

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In *SanthoshMoolya and SurendraGowda v. State of India*⁴⁰, the Indian Supreme Court stated thus:

Any statement of rape is an extremely humiliating experience for a woman, and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her, and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for.⁴¹

According to Justice Sathasivam, quoting an earlier judgments, When a First Information Report is lodged by a lady with regard to the commission of offence like rape, many questions would obviously crop up for consideration before she finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only giving it a serious thought, must have decided to lodge the FIR.⁴²

It is a brave female or parent who knows what she faces in the criminal justice process that will come forward to make a complaint about the violator. In Nigeria, it is almost a term of opprobrium as the victim of such offence is looked upon with scorn. Sometimes, it leads to stigma. Many parents have concealed such offences against their female children or even compounded felonies to avoid making such public. For the few who are courageous enough to come to court, they face a process which considers their testimony as insufficient and unreliable.

In fact, in a country like Trinidad and Tobago, court sessions on sexual offences are conducted in camera and the names of the complainant and the accused are not published. The truth is that most offences of this nature are committed in private and that leaves the victim as the sole witness and also the sole “exhibit” as a result of the after-effects.

⁴⁰ Reported in Crime Against Women, FIR, Fundamental Rights, Gender, Human Rights, Sexual Offences, Uncategorised Victims by *NNLRJ India* on April 2010 at <http://www.hindu.com/2010/04/28/stories/2010042861390800.htm> last accessed on June 1, 2012.

⁴¹ A Bench of Justices comprising JJs. P. Sathasivam and R.M. Lodha.

⁴² Accessed at <http://www.hindu.com/2010/04/28/stories/2010042861390800.htm> last accessed on June 1, 2012.

The requirement of corroboration had led to absurd consequences such as those described by Roch J in the English case of *R. v. Chance*.⁴³ In that case, it was pointed out that:

Where for example, a woman was raped and then robbed in her own home; presumably a judge would be required to explain to the jury that it would be dangerous to convict the accused on the uncorroborated evidence of the victim in relation to her story of the sexual assault, but not dangerous as far as the robbery was concerned.⁴⁴

In the case of *Francis Okpanefe v. State*,⁴⁵ the appellant appealed against a decision of the appeal court convicting him on a two-count charge of rape and attempted rape. The complainant (1st P.W), who was found by the learned trial judge to be a girl aged twelve years at the time of the alleged offences, in her evidence said that the accused called her and asked her to bring him water and when she did so he pushed her into his room and forcibly had sexual intercourse with her against her will. She did not make a report to her parents or to anyone else of what the accused had done. A week later the accused again called her and, when she went, forced her into his room and, according to her, again forcibly had sexual intercourse with her against her will but, as a result, she was this time in pain and could not walk properly so that her mother seeing this questioned her and she then told her mother what had happened. On the second occasion the accused gave her a shilling because she was crying. The 2nd P.W., the mother of the accused, confirmed the story of the complainant as to finding her in a distressed condition and said a shilling dropped from the complainant's clothes when she examined her. In the medical report tendered as evidence by the prosecution the fact that the girl had been forcibly raped as a result of the rupture of her hymeneal ring. However, the doctor in the report said there was no connection between the appellant and the rape. The court held that the earlier complaint made to her mother, the money and the medical report and the fact that the appellant's plea of alibi failed was not sufficient to amount to corroboration.⁴⁶

⁴³ [1965]1 All ER, 611.

⁴⁴ *Ibid.*

⁴⁵ (1969) ANLR 411.

⁴⁶ See *Anomo v. Anomo*[1997] EWCA Civ 2097

5. A Reform under the Evidence Act, 2011

The need for corroboration in the proof of sexual offences has been expunged from the Evidence Act, 2011. The implication of this is that in cases where there is need to prove the commission of any of the sexual offences, corroboration is no longer required, at least procedurally. When compared with other offences which require corroboration, it is discovered that historically the use of corroboration in proof of sexual offences is faulty. This can be gleaned from the three major offences requiring corroboration in almost every rule of evidence in any country in the world-Perjury, Sedition and Treason. These three have their roots in the common law system⁴⁷. It was the severity of the punishments that accompanied these offences that paved the way for the requirement of proof through corroboration. Years after, the rules on corroboration still exist in proving these offences.

There is a suspicion that in sexual cases the presumption of innocence⁴⁸ to which the defendant is entitled is likely to give way to “the respect and sympathy naturally felt by any tribunal for a wronged female ...”⁴⁹ This alleged danger of unfair prejudice against the accused has two elements. First, the heinousness of the offence may arouse such indignation in the judges and that they will be hasty to convict. Secondly, judges are thought to be “pre-inclined to believe a man guilty of an illicit sexual offence he may

⁴⁷ In medieval England, there was a form of punishment called “Attainder” for any person that commits either the offence of treason or sedition. The most important consequences of attainder were forfeiture and corruption of blood. For treason, an offender's lands were forfeited to the king. For felonies, lands were forfeited to the king for a year and a day and then, because felonies were considered a breach of the feudal bond, escheated (forfeited) to the lord from whom the offender held his tenure. Subsequently, in *Magna Carta* (1215), the crown renounced its claim to forfeiture in the case of felony. Even harsher than attainder was the doctrine of corruption of blood, by which the person attainted was disqualified from inheriting or transmitting property and his descendants were forever barred from any inheritance of his rights to title. All forms of attainder—except the forfeiture that followed indictment for treason—were abolished during the 19th century. See Wigmore., *op. cit.*, note 16.

⁴⁸ Constitution of the Federal Republic of Nigeria, (CFRN) 1999, as amended, section 36 (5).

⁴⁹ J.H. Wigmore., *Evidence in Trials at Common Law* (Boston, Chadbourne, Little Brown & Co, 1978), p. 331.

be charged with, and it seems to matter little what his previous reputation has been”.⁵⁰

A third element relates to the fact that the Commission of a sexual offence “is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent”.⁵¹ All these justifications have been criticised.⁵² There is therefore little or no firm basis for the existing corroboration rule. Moreover, there are several positive arguments in favour of amending it, which in our opinion are formidable and convincing.

Five arguments⁵³ are posited in favour of reform as follows:

1. The rule encourages the false assumption, which is insulting and derogatory to women; that women “are by nature peculiarly prone to malice and mendacity and particularly adept at concealing it.”⁵⁴ This is clearly an assumption which is in breach of the constitutional right of freedom from discrimination⁵⁵ which gave rise to women rights movements globally.
2. The need to give the warning in every case, regardless of the strength of the evidence or the extent to which corroboration is in fact available, will inevitably suggest that every complainant should be viewed with suspicion. There may be many cases where such suspicion is unfounded. For example, there are some cases which are strong in several respects, but contain nothing which amounts in law to corroborative evidence. In such cases, almost the last thing the judges rehearse in their mind before verdict is the warning that it would be dangerous for them to convict.
3. The form of the warning - to the effect that it is dangerous for the judge to convict on the complainant's uncorroborated

⁵⁰ *Ibid.*

⁵¹ See C.B. Cato, “The Need for Reform of the Corroboration Rule in Sexual Offences”, (1981) *New Zealand Law Journal*, p. 339.

⁵² NCJRS., “The Rape Corroboration Requirement : Repeal Not Reform” (1972) 81, *Yale Law Journal*, Vol. 81 (7), pp. 1365 - 1375 available at www.ncjrs.gov/app/publications/abstract last accessed on June 21, 2012.

⁵³ UK Law Commission Report on Corroboration of Evidence in Criminal Trials (Law Com 202, CM 1620) cited in Irving Younger, *op. cit.*, p. 211.

⁵⁴ *Ibid.*

⁵⁵ CFRN, 1999, section 42 .

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evidence, but that he may do so if satisfied beyond reasonable doubt of the defendant's guilt - is almost a contradiction in terms, and therefore a likely confusion.

4. The corroboration warning adds little or nothing to the existing rules on the burden and standard of proof, and is therefore an unnecessary and anachronistic extension of them.
5. The technical distinction between evidence which does and evidence which does not amount to corroboration is subtle and difficult for a judge to apply, and may be even more difficult to understand. Errors in judge's summing up on corroboration therefore result in a disturbing number of mistrials in rape cases.⁵⁶

However, there was never a basis for such law in the proof of sexual offences against females. The introduction of such was based on a stereotyping and bias. In Iran for instance, to secure conviction against an accused for rape, there is formally a need for corroboration of the testimony by up to four witnesses.⁵⁷ This is ridiculous, degrading and therefore clearly unconstitutional.⁵⁸

The assumption that a woman may make false allegations motivated by fantasy or the other oft-quoted reasons, with their implications of untrustworthiness, was said to be insulting. Considering the situation in our local milieu, it is clear that no woman or girl would falsify allegations and subject herself going through such societal stigmatization and distinction as a result of her plight.

The rules of corroboration are also unclear on what or what does not constitute corroboration. This can be gleaned when comparison is made between the cases of *Okpanefe v. State*;⁵⁹ *Ipahar v. State*;⁶⁰ *R. v. Knight*⁶¹ and *Anomo v. Anomo*.⁶² Further

⁵⁶ Irving Younger., *op. cit.*, p. 212.

⁵⁷ Ertürk Y. *Integration of the human rights of women and the gender perspective: Violence against women (Mission to the Islamic Republic of Iran (New York, United Nations Economic and Social Council, Commission on Human Rights, 2006) (E/CN.4/2006/61/Add.3).*

⁵⁸ CFRN, 1999, ss. 34 &42: rights to dignity of the human person and freedom from discrimination.

⁵⁹ *Supra*.

⁶⁰ *Supra*.

⁶¹ [1966] 1 A.E.R. 647.

⁶² *Supra*.

complications arising from the nature of the defence case also affect the way in which the principles of corroboration applied. A simple example is where a defendant admits to having sexual intercourse but denies that it was non-consensual (a very common defence to a rape allegation); traces of semen found on the complainant or at the scene would ‘corroborate’ an allegation of sexual intercourse or contact but would not corroborate the allegation of lack of consent, whereas bodily injuries such as scratches or bruising, or torn clothing, could.

A further criticism of the rules was the fact that they were an exception to general principles and considered to be a glaring anomaly, and contrary to the interest of justice.⁶³ As Karibi-Whyte said in *Abdu Mohammed v. State*,⁶⁴ “unless corroboration is required by law, the evidence of a single witness of the right probative value has always been accepted as sufficient proof for the offence as charged.” The evidence of a prosecutrix should be judged based on the strength of her case and the accused should, according to the law, be found guilty only if the prosecutrix can prove the accused beyond reasonable doubt. The formal rules of proof in law should be applied and not any other perfunctory method of proof in cases of law. Our legal system has developed the formal rules of proof and this should be applied to sexual cases. Therefore, the removal of the need for corroboration makes the procedural law lucid but has not cleared every uncertainty which existed as a result of the corroboration rules. The existence of the provision in the affected sections of the Criminal Code implies that for the prosecution to prove its case beyond reasonable doubt there must be other evidence in corroboration of the complainant’s testimony. This has the effect of producing the same result as under the repealed Evidence Act. Moreover, the court has no discretion to deny the admissibility of the corroborative evidence since the Evidence Act does not abrogate the application of any existing law. The Act provides thus: “Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.”⁶⁵ It is, therefore, our position that the rule of corroboration as it applies to sexual offences does not merit just a reform but a repeal. The Criminal Code and Criminal Code Laws

⁶³ *Okpanefe v. State (Supra)*.

⁶⁴ [1991] NSCC 265.

⁶⁵ Evidence Act, 2011 as amended, section 3.

of the affected states need to be amended to reflect the same position under the Evidence Act. The established formal rules of proof as it applies to even more serious crimes should also apply in respect of sexual offences.

6. The Attitude of the Court after the Abrogation

There has not been any Nigerian case to explain the attitude of the court to the present state of the law. However, the attitude of the courts in Britain is quite relevant as Nigerian courts tend to follow their steps. Shortly after the corroboration rules' abrogation in the UK, two applications for leave to appeal against convictions for indecent assault were heard by the Criminal Court of Appeal in *R v Makanjuola* and *R v Easton*.⁶⁶ It was argued that the judge should have, in his discretion, given the full corroboration warning notwithstanding its abolition. The basis of this was that the underlying rationale of the common law rules could not just disappear overnight. The Court of Appeal dismissed such contentions on the basis that because the rules had been abrogated by statute, any attempt to re-impose the same, albeit by way of a quasi application of the same warning requirement under a different label, was against policy.⁶⁷

In *Makanjuola*,⁶⁸ Lord Taylor CJ summarised the post-abolition position in these terms:

1. Section 32(1) (of the Criminal Justice and Public Order Act 1994) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
2. It is a matter for the judge's discretion what, if any, warning, he/she considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he/she chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised, and the content and quality of the witness's evidence.
3. In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so

⁶⁶ [1995] 3 All ER 730.

⁶⁷ *Ibid*, at 732 per Lord Taylor CJ..

⁶⁸ *Supra*.

simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will be the need for an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

4. If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.
5. Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's view of the evidence and his/her comments as to how the jury should evaluate it rather than as a set-piece legal direction.
6. Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.
7. Finally, the Court of Appeal will be disinclined to interfere with the judge's exercise of his/her discretion save in a case where that exercise is unreasonable.⁶⁹

Makanjuola has been followed in other common law jurisdictions in numerous cases.⁷⁰

In *HKSAR v. Chan Sau Man*,⁷¹ the CA rejected the argument that the trial judge had erred by failing to give a corroboration direction. Counsel for the applicant submitted that although the rule that a jury should be 'warned of the danger of convicting without corroboration had been abrogated', the old rule that 'a warning had to be given should not entirely be rejected'. He relied on Lord Taylor CJ's comment in *Makanjuola*⁷², that:

⁶⁹ See *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223.

⁷⁰ See, for example, *R v. Chu Ip Pui* [1997] HKLRD 549 at 552; *HKSAR v Li Kam Shing* [2004] HKCU 1033 at [43]; *Leung Chi Keung v. HKSAR* [2004] HKCU 1283 at [25]; and *HKSAR v. Khan Arshed* [2003] 4 HKC 409 at 415-16.

⁷¹ [2001] 3 HKLRD 593.

⁷² *Supra.*, p. 596.

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Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution.

Such an argument was, however, rejected by the court:

This was a straightforward case where the complainant's evidence, the accuracy of her evidence and her veracity, on the central issue stood alone. The judge had meticulously pinpointed all the areas in the evidence where her account was materially disputed and had invited the jury to look at her evidence with care. In the circumstances, the judge was perfectly entitled, in the sensible exercise of his discretion, to adopt this course.⁷³

It follows from the above that without the mechanical rules of corroboration, a judge has wide discretion in deciding how to sum up a case. Although it was suggested in *Makanjuola* that if there is an evidential basis for suggesting that the evidence of a witness may be unreliable, it may be appropriate for the judge to warn the jury to exercise caution in dealing with such evidence, however, the judge is no longer obliged to give a full warning on uncorroborated evidence.

7. Position in other Jurisdictions

a) England

The sexual offences in the Crimes Ordinance are similar to those governed by the Sexual Offences Act 1956 of the United Kingdom.⁷⁴ The requirements of corroboration set out in the Sexual Offences Act, 1956 (which were closely related to the corroboration warning required for complainants in sexual offences) in relation to offences of procuring unlawful sexual intercourse and prostitution were repealed by section 33(1) of the Criminal Justice & Public Order Act, 1994. The common law requirement for corroboration warning was repealed by section 32 of the 1994 Act.

b) New South Wales

⁷³ *Supra.*, p.599.

⁷⁴ UK, SOA, 1956, cited J. H. Wigmore *op. cit.*, p. 331.

In New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 abolished the corroboration requirement in cases of sexual assaults. Under the new provision the judge is given discretion to comment where appropriate on the weight to be given to the evidence of the individual witness. There is also a statutory requirement that the judge warn the jury that a late complaint is not necessarily a false one and that there may be good reasons why a victim of a sexual assault may hesitate or refrain from making a complaint.

c) Singapore

The position in Singapore is aptly captured by Rajah JA in *XP v. Public Prosecutor*⁷⁵:

There is no formal legal requirement for corroboration (see s 136 of the Evidence Act), nor is it a strict rule that judges must remind themselves of the danger of convicting based on the testimony of one complainant. However, there is good reason for the case law-devised reminder that a complainant's testimony must be unusually convincing in order to prove the Prosecution's case beyond a reasonable doubt without independent corroboration.

Since the warning is not a rule of law and as section 136 of the Evidence Act expressly does away with the formal, legal need for corroboration, a judge who concludes that a witness's testimony is unusually convincing will not be bound to formally direct himself as such. If the appellate court disagrees on the evidence that the witness was unusually convincing, or finds a reasonable doubt notwithstanding the ostensible credibility of the testimony, then the conviction will be set aside because a reasonable doubt exists, and not because the judge did not remind himself of the standard.

d) India

As considered earlier, the Indian Supreme Court has held⁷⁶ that there is no requirement for corroboration in sexual offences.

e) Barbados

The Sexual Offences Act of Barbados provides in Section 28 as follows:

⁷⁵ [2008] 4 SLR(R) 686; [2008] SGHC 107, HC(Appellate), VK Rajah JA, 4 July 2008

⁷⁶ *SanthoshMoolya and SurendraGowda v. State of India*, see above n 43.

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Subject to section 31, where an accused is charged with an offence under this Act, no corroboration is required for a conviction but trial Judge shall warn the jury that it may be unsafe to find the accused guilty in the absence of corroboration.

It can be gleaned from Section 31 of the Ac⁷⁷ that the need for corroboration in sexual offences is dispensed with. However, it is at the judge's discretion to warn himself. Here, corroboration is not a necessity but a tool.

f) Trinidad and Tobago

One innovation to protect the victim of a sexual offence in Trinidad and Tobago is that court sessions are done in camera unless the court directs otherwise and in reporting the case, the real name of the victim is not used. Also, independent testimony is not a necessity. One is concerned with what the law describes as corroboration. Corroboration is independent evidence which implicates a person accused of a crime by connecting him with it. In sexual offences cases, judges were required to warn the jury that it was dangerous to convict a person upon the uncorroborated evidence of a woman who complained that she was the victim of a sexual offence.⁷⁸ The reason for this warning was the mistaken belief or widely held perception that women often lie about being raped. The law in Trinidad and Tobago,⁷⁹ expressly removed this requirement. Section 15A of the Evidence Act states that it is not obligatory for the Court in sexual offences cases to give the jury a warning about convicting the accused on the uncorroborated evidence of the complainant. The judge however can exercise his discretion to advise the jury of the need for corroboration.

The question of whether a judge is required to give the jury a corroboration warning in sexual offences cases was considered by the Court of Appeal of Trinidad and Tobago in *Mymoon v The State*.⁸⁰ The appellant was convicted of serious indecency on a minor. The minor was under the age of sixteen years. The Court stated that section 11 of the Administration of

⁷⁷ SOA, 1991, Barbados, section 31, cited in P. Murphy, *Murphy on Evidence* (11th edn, Oxford: Oxford University Press 2009) 635.

⁷⁸ P. Murphy, *op. cit.*, p. 635.

⁷⁹ The Evidence Act Chapter 7:02 and the Administration of Justice Miscellaneous Provisions Act (No. 28 of 1996).

⁸⁰ TT 2002 CA 81 (Criminal Appeal No. 73 of 2000) decided 10 October 2002.

Justice Miscellaneous Provisions Act (No. 28 of 1996) removed the requirement for a full corroboration warning to be given where a person is charged with a sexual offence. The Court explained that the position now is that a trial judge has discretion whether or not to give the old corroboration warning to the jury in matters of sexual offences. It was not obligatory. The precedent is the English case of *R. v. Gilbert*.⁸¹ The Privy Council in that case held that the question whether to give a corroboration warning in sexual offence cases is a matter for the discretion of the trial judge.

g) United States of America

It seems that legislating on such sexual crimes in the United States is left to the different states. Many American jurisdictions follow the common law rule, imposing no requirement of corroboration in sex offense cases.⁸² It is fairly well known, however, that charges of sexual misconduct are easy to make and difficult to rebut.⁸³ Accordingly, several states have chosen to depart from the common law rule.

The United States Supreme Court's decision in *Carmell v. Texas*⁸⁴ exemplifies this point in the area of evidential rights. In that case, the court examined the constitutionality of a Texas statute that repealed a corroboration arrangement for cases of rape and sexual assault. Under the old arrangement, a rape defendant

⁸¹ (2002) 61 WIR 174.

⁸² E.g., *Herndon v. State*, 2 Ala. App. 118, 56 So.85 (1911); *People v. Gump*, 17 Cal. App. 2d 221, 61 P.2d 970 (Dist. Ct. App. 1936). But cf. *People v. Gidney*, 10 Cal. 2d 138, 73 P.2d 1186 (1937); *McQueary v. People*, 48 Colo. 214, 110 P.2d 210 (1910). Additional cases are collected in Wigmore, *op.cit.* note 16 above, p. 2061.

⁸³ A classic expression of this perception is that of Lord Chief Justice Hale: "The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.... It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, the never so innocent." 1680 Pleas of the Crown I, 633, 635, cited in Wigmore, *op. cit.*, above n 16, at pp. 342-45.

⁸⁴ *Carmell v. Texas*, 529 U.S. 513 (2000) (hereinafter: "*Carmell*").

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could not be convicted upon his complainant's testimony if the latter was not corroborated by the complainant's prompt outcry or by evidence extraneous to the complainant.⁸⁵ The new statute provided that the jury can convict the defendant on the uncorroborated testimony of such a young complainant if it finds it credible beyond all reasonable doubt.⁸⁶

h) South Africa

According to Kriegler⁸⁷ a Judge of the Constitutional Court of South Africa, sexual offences have distinctive features which require exercise of caution in order to ensure that justice is done. He opined that sexual offences are inherently intimate and committed in seclusion where only the accused and the victim are privy to the commission, therefore, "the adjudicator of the facts must throughout be cautious of the special problems in sexual offence cases and it must be clear from the Court's evaluation of the facts, that the evidence was approached and considered in this manner."⁸⁸

It is pertinent to note that the rule of corroboration is not a statutory requirement in South African law. In fact, the opposite view forms part of Section 208 of the Criminal Procedure Act,⁸⁹ which provides that an accused may be convicted on the evidence of a single witness. It has however, become a rule of practice and has been consistently applied by the courts. Therefore, the South African courts have come to hold disparate views on the issue of corroboration in sexual offences.

i) Hong-Kong

The rules on corroboration in sexual offences in Hong Kong were abolished in 2000.⁹⁰ The corroboration rules were said to work particularly to the disadvantage of victims of sexual offences. Although obviously not gender specific, it is an undeniable fact that the majority of 'victims' in such cases are females. The rules were said to be inflexible and unfair, especially when they were required irrespective of the particular facts of the case or the perceived reliability of the complainant's evidence, as the law required that a standardised warning be given in all circumstances.

⁸⁵ See Tex. Code Crim. Proc. Ann., Art. 38.07 (Vernon 1983) cited in *Carmell*.

⁸⁶ See *Carmell*, at 518-519.

⁸⁷ In *S v D* (1992) 1 SACR 143.

⁸⁸ Nikki Naylor, *Evidentiary Rules*, Women's Legal Centre, p. 2-4, cited in *S v. D* (*supra*)

⁸⁹ CPA South Africa, Act 57 of 1977 as amended.

⁹⁰ The Evidence Ordinance, 2000, Hong Kong, s. 4B.

The proposal for the abolition of corroboration in sexual offences was given new impetus in 1998. It was reignited in *HKSAR v. Kwok WaiChau*.⁹¹

j) Australia

Section 341(5) of the Evidence Act, South Australia, 1929 provides that in proceedings in which a person is charged with a sexual offence, the judge is not required by any rule, law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

k) Canada

In 1983, amendments were made to the Criminal Code that specifically abolished some rules that perpetuated bias against women. Section 274 of the Canadian Criminal Code provides that, in relation to certain sexual offences, no corroboration was required for a conviction and, further, that the judge should not instruct the jury that it was unsafe to convict in the absence of corroboration. The special rules of corroboration were repealed according to the Criminal Justice and Public Order Act, 1994.

Also, the old rule that a judge must warn a jury of the dangers of convicting a defendant on the uncorroborated evidence of an accomplice or the victim of a sexual assault was abolished. Similarly, magistrates acting in their summary capacity no longer need to give the corroboration warning.

Conclusion

There are no (or no longer) formal rules regarding corroboration of a woman's testimony in cases of sexual assault in many parts of the world (e.g., parts of Latin America, Canada, Fiji, Ghana, Israel, South Africa, the United Kingdom, the United Republic of Tanzania, Zimbabwe and most parts of the United States).⁹²

⁹¹ [1998] 3 HKC 354.

⁹² H. Combrinck, "Criminalisation of Sexual Violence in sub-Saharan Africa." Prepared for the World Health Organization, Geneva, 2003; J. Du Mont & D. Parnis, "Constructing Bodily Evidence through Sexual Assault Evidence Kits" *The Griffith Law Review*, (2001), 10: 63–76; J. Lemaitre & A. Constantin., "Review of Sexual Crime Legislation in Five Latin American Countries" [draft]. Prepared for the World Health Organization, Geneva, 2002; M. J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*. (Villanova: Villanova University School of Law, Working Paper Series, No. 20, 2004); K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" *Canadian Journal of Women and the Law*, (1997), 9:149–177; *Requirement of Corroboration in Rape Trials Overturned by Fiji Court*

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However, the requirement of many legal systems to meet “a particular level of proof in order to prosecute”, coupled with the widespread distrust of women, has led to the continued demand for authentication of a victim’s claim.⁹³

The historical assumption of an inherent lack of credibility of the evidence of women and girls in sexual offences cases which led to the evolution of the corroboration rules under the common law is now widely regarded as discredited and without any scientific basis. It was therefore vital that the common law practice should be abrogated, and that the statutory provisions, which are based on the same discredited assumption, be abolished consequentially. Assessments of credibility should be made not by assumption but by a full evaluation of the merits of the case.

There must be sustained efforts by the State (such as continuous training of law enforcement personnel and judicial officers, sensitizing the media, educating the public) to challenge the stereotype attitudes dominant in Nigeria which help to perpetuate violence against women and girls. Such progress as this will help the society’s move towards a wholesome legal and overall development.⁹⁴

of Appeal. (London: International Centre for the Legal Protection of Human Rights, 2006) available at <http://www.interights.org/page.php?dir=About&page=equalityprogramme> activities. Php, last accessed on June 12, 2012; S. Pearce, *Violence against Women and HIV/AIDS in sub-Saharan Africa: the Enforcement of Rape Laws in Tanzania, Zimbabwe and South Africa.* (Toronto: Faculty of Law, University of Toronto, 2005) (The HIV/AIDS in Africa Project Papers); M. Ajzenstadt & O. Steinberg, “Never Mind the Law: Legal Discourse and Rape Reform in Israel” *Affilia: Journal of Social Work*, (2001), 16:337–359; J. Temkin, “Prosecuting and Defending Rape: Perspectives from the Bar” *Journal of Law and Society*, (2000), 27: 219–248. Available at www.advocatesforyouths.org/publications/457 last accessed on June 12, 2012.

⁹³ K. E. Edward & M. D. MacLeod, “The Reality and Myth of Rape: Implications for the Criminal Justice System”. *Expert Evidence*, (1999) 7:37–58.

⁹⁴ For instance, Sweden has the best laws on prostitution in the world and this was achieved with an objective look on the way to curb sex trade. In Sweden, the red-light districts or taverns are not raided and the prostitutes arrested. Instead what the Swedish authorities did was consider the fact that since it was a society built on the tenets of Democracy, there was a need to ensure equality of all persons in the State. Therefore, any act of any person to purchase the

The evidence of a prosecutrix should be judged based on the strength of her case and the accused should according to the law be found guilty only if the prosecutrix can prove the commission of the offence beyond reasonable doubt. It is not unlikely that had this been the law in the time of *Okpanefe v. State*,⁹⁵ the decision would have been different.

The reform envisaged by the amendment in the Evidence Act is indeed laudable and in furtherance of justice for victims of sexual offences.⁹⁶ This has, however, not totally removed the obstructive barrier and discrimination occasioned by the corroboration requirement in sexual offences in Nigeria by virtue of the provisions of the Criminal code. We therefore humbly suggest that the corresponding provisions in the Criminal code should be equally repealed at the earliest opportunity to give effect to the current global trend in the protection of rights of women and girls.

body of another through any form of consideration was criminalised. See Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services", Ministry of Industry, Employment and Communications, *Violence against Women*, (October, 2004) Vol. 10 No. 10, 1187-1218.

⁹⁵ *Supra*.

⁹⁶ One of the fastest growing crimes in the world, yet conviction rates for rape and other sexual offences are still very low globally. Available at www.guardian.co.uk/UKnews/rape_convictions_rates_still_very_low.htm last accessed on June 12, 2012.