

RAPE UNDER THE NIGERIAN LAW

BY KEHINDE ADEGBITE, ESQ., LL.M., BL

INTRODUCTION

Rape is one of the oldest crimes in human history. Rape is a crime in all countries of the world but definition and punishment differ from place to place. It has also been noticed that rape cases are reported more in the Western world than many other parts of the globe. For example, in Africa and Asia, rape victims usually lack the courage to speak out or report their experiences to the law enforcement agencies due to negative societal attitude prevalent in such climes. Rape thrives in secrecy and in a culture where victims are even blamed for what happens to them, instead of the perpetrators.

However, in attending to this all-time important subject, I have decided to break it down, both in terms of the language and style of writing. The article is written in simple language, devoid of technical words and phrases as well as legal citations and where citations are given, they are minimal. My experience over the years has made me know that a topic of this nature will be better understood, if prepared and delivered in a question-and-answer manner. That is exactly what I am doing here now. I have formulated 50 questions, covering all the crucial aspects of the subject of discussion and have also provided answers to them in accordance with the position of the Nigerian law, while references are made to foreign jurisdictions only when necessary.

1. What is rape?

In a simple language, rape may be defined as a sexual intercourse between a man and a woman or a girl against the will or consent of the female partner. Going by the provision of law, rape is defined under **section 357 of the Criminal Code** which applies to the Southern part of Nigeria as:

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.

In the Northern part of Nigeria, it is defined under **section 282 of the Penal Code** as:

(1) A man is said to commit rape who ... has sexual intercourse with a woman in any of the following circumstances:- (a) against her will; (b) without her consent; (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt; (d) 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 the man to whom she is or believes herself to be lawfully married; (e) with or without her consent when she is under fourteen years of age or of unsound mind.

(2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.

The two definitions above show that in Nigeria, rape can only be committed by a man against a woman and not vice versa. In other climes, this is not the case because it has been recognised that a man may also be a victim of rape and it may be perpetrated by any person, including a woman. For example, in the US¹, the Department of Justice defines rape as:

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

In the UK², under section 1 of the Sexual Offences Act (2003), it is defined as:

(1) A person (A) commits an offence if—

¹. An updated definition of rape, available at <http://www.justice.gov/opa/blog/updated-definition-rape> (visited last on 2nd December, 2015).

². A critical analysis of the UK's definition of rape shows that the offence can only be committed by a man, though a man, like women, could also be a victim. Under the Department of Justice's definition, on the other hand, both men and women may be victims or perpetrators. It is observed that both the US and UK's definitions make use of the word "penetration", instead of "carnal knowledge" or "sexual intercourse" as found in the Nigerian definitions of rape, which means that rape may be committed where a person's vagina, anus or mouth is penetrated with penis, object or any part of one's body whether there is sexual intercourse or not.

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents...

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

2. Upon being raped, what should a victim do?

A victim of rape must first proceed to a nearby Police Station to lodge a complaint. A victim must not change her dress, must not wash or shower after the incident and must not remove anything from the scene of crime because doing so may negatively affect pieces of evidence that the Police may need to hold the perpetrator accountable. Usually, it is the Police that will take the victim to a hospital for medical examination. It is advisable that medical examination should be carried out as soon as possible, preferably on the day of the incident.

3. If the Police refuse to act after a report of rape has been made to them, what can a victim do?

A victim should write a petition to the Commissioner of Police in that State, giving details of the officers who attend to her on the day her complaint is lodged, the name of the Police Station and other necessary information. If this step does not produce a desired result, she may contact a lawyer. There are equally NGOs³ that provide legal assistance and support to rape victims.

4. What is consent?

It refers to permission or freedom and capacity to make a choice on whether to have sex or not. When a woman says “no” to sex, her “no” should be taken as “no”.

5. Can consent be withdrawn or given in the middle of a sexual intercourse?

It is possible that a woman who gives her consent to a sexual intercourse at the beginning may later change her mind in the course of the “act” and it is also possible that a woman who does not give her

³. One of such organisations is the Women’s Clinic, located at the Faculty of Law, University of Ibadan, Ibadan.

consent at the beginning may later decide to consent to it. Can it be said that there is rape in any of the situations? Under the Nigerian law, it is doubtful if rape can be successfully proved in any of the two cases because “consent” is not clearly defined in the Criminal or Penal Code. However, under the UK’s Sexual Offences Act, consent is extensively defined and it amounts to rape, if a man continues sexual intercourse after a woman withdraws her consent or starts a sexual intercourse where there is no consent, not minding the fact that consent is given midway⁴.

6. Is rape committed when a sexual intercourse takes place with a sleeping or drunken woman?

Yes. It is a case of rape because it means that there is no consent.

7. What is punishment⁵ for rape?

Nigeria – life imprisonment (maximum but it may be less)

India- life imprisonment or death

France- 15 years’ imprisonment to death

US- life imprisonment

UK- life imprisonment

Saudi Arabia- death

North Korea- death

Israel- 16 years’ imprisonment

China- death

Egypt- death

8. What is the punishment for making a false allegation of rape against any man?

There is no criminal penalty for making a false allegation of rape against a man in Nigeria. However, if after trial, a suspected rapist is found to be innocent of the allegation, he may bring a civil action (technically called malicious prosecution) to claim for damages. An

⁴. See, sections 75 – 76 of the Sexual offences Act, 2003.

⁵. Rohit B., “This Is What They Do To Rapists In Different Countries Around The World”, available at <http://www.scoopwhoop.com/inothernews/punishing-rape-globally/> (visited last on 5th December, 2015).

action for defamation, after trial, is, on the other hand, not likely to succeed.

9. How can one establish a case of rape in court?

In a case of rape, the prosecutor must be able to prove the following elements beyond reasonable doubt:

1. that an accused person has sexual intercourse with a woman against her will;
2. that the act of sexual intercourse is proved by penetration of the accused person's penis into the woman's vagina;
3. that the victim is not his wife.

10. Can rape be proved where a victim does not sustain any physical injury or in the case of a virgin, where her virginity is still intact?

It is possible to prove rape in any of these situations, provided that there is evidence to establish penetration and lack of consent. Sustaining physical injury is not compulsory, though it may help a case better if present. Rape is complete on penetration, even if the hymen is still intact.

11. Is it compulsory to have medical evidence in proving a case of rape?

It is good to have medical evidence in establishing rape but it is not compulsory. A case of rape may be convincingly proved, without medical evidence, where the accused person makes confessional statement or there is an eye witness.

12. Is a medical report obtained from a private hospital acceptable in court?

Yes. It is acceptable. However, in practice, it is medical reports from government-owned hospitals that are usually tendered in court.

13. What are the defences to a person accused of committing rape?

- a. Presence of consent
- b. Lack of penetration
- c. Marital relationship
- d. Insanity- no offence is committed, if a madman rapes a woman.

14. Is a rape suspect entitled to be defended by a lawyer at the expense of the State/Government?

No. A rape suspect may obtain the services of a lawyer of his choice but if he is financially handicapped to secure one, the State is not obligated to provide him a legal representative free of charge, unlike in the case of persons standing trial for murder or armed robbery⁶. A rape suspect may as well decide to represent himself without a lawyer.

15. Does a rape victim need to have her own lawyer?

No. Once a rape case is reported to the Police, the latter will commence investigation; take statements of the victim and that of the perpetrator and other witnesses, if any. The Police may also procure medical report and if, in their opinion, there is sufficient evidence in respect of the case, forward all the pieces of evidence compiled in a case file to the Ministry of Justice which will, in turn, ensure that the perpetrator is charged to court and prosecuted accordingly. A lawyer, from the Ministry, will be a legal representative of the State as well as the victim. Rape, being a criminal case, is regarded as an offence against the State and this is why the victim will not have to pay any money to the Government lawyer for him or her to prosecute the perpetrator. However, any victim who wishes may decide to secure the services of an independent lawyer who will also attend court each time the case comes up. Such a lawyer is called *watching brief counsel* because he or she can only be seen but cannot be heard.

16. Which court can try perpetrators of rape in Nigeria?

Only State High Courts can try perpetrators of rape in Nigeria because it is a serious offence. It is beyond the power of a Magistrate's Court to handle, unless it is temporarily pending before such court within which it will be properly brought before a High Court.

17. Does a rape victim have the power to withdraw the case against a perpetrator in court?

Technically and legally speaking, no! Once a case of rape is in court, only the Attorney-General can discontinue the case. Rape is a

⁶. These are capital offences where a suspect must always be defended by a lawyer. If an accused person standing trial for murder, for instance, is too poor to hire the services of a lawyer, the State must provide him a lawyer free of charge.

*felony*⁷; not being a minor offence, it is beyond the power of a victim to withdraw or discontinue it. In fact, it is an offence⁸ in itself for a rape victim to agree to discontinue or withdraw the case and the punishment prescribed by law for doing so is 7 years' imprisonment. However, in practice, this position of law has been seen to be compromised in some cases. Also, in practice, a case of rape may be struck out by a court, if a victim refuses to attend court for the purpose of giving evidence.

18. If witnesses refuse to attend court to give evidence, what can a victim do?

A victim does not have much to do in this regard. The prosecutor knows the appropriate application to make to the court in order to compel any uncooperative witness (es) to be in court, though the victim's assistance may be needed in tracing the address of such witness.

19. How can a woman contribute to her being raped?

In law, once a woman refuses to have sex with a man, it is not a defence that she has earlier consented to kissing or to have willingly entered the house of the rapist.

20. How many rape cases have been successfully concluded in Nigeria?

There is no reliable statistics⁹ on the number of rape cases that have ever been concluded in the Nigerian courts but judging from cases reported in the law reports, many cases have been successfully concluded.

But experience has also shown that a lot of rape cases have gone unreported and even where they are reported, it is usually difficult to get witnesses because victims are often ashamed of coming out to testify in court, especially adult victims. Negative attitude and insensitive investigation methods of the law enforcement agents, e.g. the Police, are also a source of discouragement to rape victims.

⁷. It is a crime which attracts a punishment of not less than three years imprisonment and which is usually tried by a court not lower than a high court e.g. rape and murder. However, magistrate court may try few felonious cases.

⁸. See, section 127 of the Criminal Code.

⁹. The claim in some quarters that only 18 rape cases have ever been concluded in Nigeria is unfounded and cannot be true.

21. Is a man accused of rape entitled to be released on bail?

A man accused of rape is not entitled to be released on bail by the Police. Though a bailable offence, the bail can only be granted by a State High Court. Upon arrest by the Police, he cannot be detained beyond 48 hours. He must be taken before a court of law, usually a Magistrate's Court which will order the detention of the suspect in prison custody, pending his proper arraignment in a State High Court. While the suspect is in the prison custody, a bail application may be filed on his behalf before a State High Court. However, in some Nigerian States, a Magistrate's Court may grant bail to a rape suspect.

22. Can a man be raped?

Under the Nigerian law, a man cannot be a victim of rape. However, in places like the UK, a man may be raped (i.e. either by anal or oral sex) by another man. But it is still impossible to sustain a case of rape against a woman in a situation where the latter forces a man to have sexual intercourse with her. This is simply because there is no definition of rape which captures such occurrence. Even the American Department of Justice's definition, as wide as it is, does not cover where real sexual intercourse is perpetrated by a woman against a man. Under the American definition, a woman may be charged with rape, if the woman penetrates a man's anus either with her fingers or any object. Under the UK's law, however, a woman cannot be a perpetrator of rape because rape can only be perpetrated with the use of a male penis.

23. Can a woman be charged for raping a woman or man?

No. A woman cannot be charged with rape in Nigeria and many other places. However, a woman may be charged with rape, if she aids¹⁰ a man in any manner to forcefully have sexual intercourse with another woman.

24. Can a husband be charged for raping his wife?

Under the Nigerian law, a husband cannot be charged for raping his wife¹¹. Contrastingly, in the UK and many other European countries, it amounts to rape if a man forcefully has sex with his wife.

¹⁰. She will be tried as an accomplice.

¹¹. See, section 6 of the Criminal Code.

25.Can a man be charged for raping his daughter?

Yes. Incest is not an offence under the Nigerian law; so, he can only be charged with rape.

26.If a rape victim kills her attacker in self-defence, can she be charged with murder or manslaughter?

She may be charged with murder or manslaughter, depending on the circumstances of each case. She may however be set free, if she is able to justify her action in the circumstances she found herself.

27.If a rape victim dies in the course of a sexual intercourse, what offence can a perpetrator be charged with?

The perpetrator may be charged with either manslaughter or murder, depending on the peculiar circumstances of each case but certainly not rape anymore.

28.Can rape be proved without the evidence of a third party?

Yes. It may be proved without the evidence (corroboration) of a third party, especially where medical evidence strongly connects the accused person to the crime or the accused person confesses to have committed it.

29.Can a rape case be heard in camera or a victim be allowed to wear mask in court?

Usually, a rape case, like every other case, must be heard in the open court where, though press-men may be barred, other members of the public may watch the proceedings. The rape victim may not be allowed to wear mask. This is because the court needs to be able to see and watch the demeanour of the victim in order to form an opinion on whether she is a credible witness or not. No doubt, rape is a heinous; yet, the supposed rapist is presumed to be innocent and can only be found guilty, if the case against him is proved beyond reasonable doubt.

30.Should rape victims be asked embarrassing questions in court?

It is most likely that, no matter what, a victim of rape may be confronted with certain discomfoting questions under cross-examination by the lawyer representing the accused. This is a task that

must be performed in order to ensure that the accused person is not unjustifiably punished and bearing in mind that the punishment for rape is severe. However, the court is empowered by law not to allow questions that tend to expose the rape victim to ridicule¹².

31. Should underage children who are victims of rape be required to appear in court to give evidence?

Like adult victims, children too must appear in court to give evidence if a perpetrator is to be held accountable. However, in some exceptional cases, especially where a victim is of extreme tender age, her evidence may be taken in camera¹³. This is likely to be so upon the application of the prosecution.

32. Can rape be committed by fingering or entering a woman's genital with an object?

Under the Nigerian law, it is not possible to commit rape without the use of a male penis. It is however immaterial whether the penetration is only slight or that there is no ejaculation. All that is needed to be proved is that the penis penetrates the vagina, even if it is just its tip.

33. Can rape be committed by having anal sex with a woman?

It may amount to sexual assault but not rape under the Nigerian law.

34. What is the difference between rape and sexual assault or defilement?

In relation to rape, there must be a penetration of vagina with a penis without the consent of the female counterpart, while in a sexual assault, there need not be sexual intercourse at all. For example, inappropriate touching of a woman may amount to sexual assault. In the case of defilement, on the other hand, it is a sexual intercourse with a girl under eleven (11) years. It is immaterial in this situation whether there is consent or not as the law presumes that such a girl is incapable of giving consent. The crime also carries life imprisonment but the case must be prosecuted within two months of its commission.

¹². See, sections 227, 228 and 234 of the Evidence Act, 2011.

¹³. See, section 36 (4) (a) of the 1999 Constitution of Nigeria (as amended).

35. Is there age limit as to who can be charged with rape?

A male under 12 years of age is incapable of committing rape under the Nigerian law¹⁴. So, if it is alleged that a boy below 12 years commits rape, as soon as it is established that the boy is below 12 years, the case will be dismissed for lack of jurisdiction, even if he has attained puberty. He may however be punished for indecent assault.

36. Is attempted rape a crime? If yes, what is the punishment?

Yes. It is a crime and on conviction, it carries 14 years' imprisonment.

37. Is it a defence that a rape victim dresses provocatively?

No. It is not a defence.

38. Can rape be committed where a rapist and his victim have had sex in the past?

Yes. A woman has right to refuse sex on a particular occasion, not minding the fact that it has taken place between them in the past.

39. Does it matter if a rape victim does not resist her attacker or shout for help during the incident?

What is important is to prove that there was no consent to have sex. However, convincing a court on the issue of lack of consent may be achieved faster, if it is also established that the victim shouted or resisted in the course of the forced intercourse.

40. Can a man be accused and tried of raping a prostitute?

Yes. It is not a defence to the offence of rape that a victim is a common commercial sex worker. In Nigeria, prostitution is neither legal nor clearly illegal¹⁵ but a court of law will not come to the aid of an aggrieved party in this kind of "contract" because it is inconsistent with public morality and decency. For example, if a prostitute after collecting money from a customer refuses to give him sex, such customer cannot receive any remedy at law and he cannot justify rape on the basis that he has paid for the sex.

¹⁴. This is provided for under section 30 of the Criminal Code. However, there is no similar provision under the Penal Code.

¹⁵. Kehinde Adegbite, *Learning the Law in Nigeria*, 2015, Lagos: Princeton Publishing Company, pp. 161-162.

41.Can a guy be accused and tried for raping his girl-friend?

Yes.

42.Can a rape victim sue for financial compensation?

That is possible only after the rapist must have been tried and found guilty of committing the crime.

43.Can a woman raped some years ago still report at a Police Station?

Yes, if it is possible to gather evidence which may be subsequently presented in court but in case there is no evidence, the implication is that the victim can no longer get justice. It is therefore advisable that rape incidents be reported as soon as they occur, at best within 24hours. A rape case can also be charged to court many years after its occurrence but unlike election petition cases, there is no time limit within which it must be concluded.

44.How can a woman raped in Police or Prison custody get justice?

Any woman raped while in the custody of the Police or Prison Authorities may complain to the head of such public institution and if no desirable step is taken following the complaint, the victim may contact a lawyer through her family who will in turn write a petition to the National Human Rights Commission. It must be noted that evidence is important and so, a victim must strive to obtain a medical report.

45.Is it legally permitted to abort a pregnancy occasioned by rape?

No. The Nigerian law on abortion is very strict. Abortion is only permitted if a pregnancy threatens a woman's or girl's life.

46.Is there government support for victims of rape in Nigeria?

There is no special institutional support for victims of rape in Nigeria. Like other crimes, victims of rape need to lodge complaint of their experience in any Police Station close to the scene of crime. However, some NGOs¹⁶ exist that assist rape victims, especially in places like Lagos, Port Harcourt and Abuja.

47.What are the effects of rape?

Rape is a heinous crime and it usually leaves a victim emotionally disorganised. It may also lead to the following: (a) unwanted pregnancy, (b) transmission of sexual diseases e.g. HIV/AIDS, (c) abortion, (d) suicide

¹⁶. Mirabel Centre is one of such organisations.

tendencies, (e) trauma, (f) loss of self-esteem, (g) untimely death, (h) damage to body organs, among others.

48.What are the causes of rape?

So many factors are responsible for the commission of rape. It is impossible to exhaust the list. However, some of the causes, both immediate and remote, are the following: (a) negative and judgmental societal attitude towards victims of rape, (b) drug abuse, (c) pornography, (d) seductive dressing, (e) spiritual reason, (f) poor, gender-insensitive, victim-insensitive and unscientific police investigation, (g) reluctance of victims to speak out and give evidence in court, (h) weak judicial system, etc.

49.Should the punishment for rape be reviewed?

The punishment may be reviewed which will require judicial officers not to impose penalty below 14 years' imprisonment where rape is established, while in some other cases maximum punishment should be imposed, especially if established that the perpetrator is a serial offender. The law as it is appears to give judicial officers wide discretion in terms of the punishment they may impose. It is noted that in some cases, judicial officers impose penalty which is considered ridiculously low¹⁷.

50.Should the definition of rape be reviewed?

In view of different advancements of the modern world, the definition should be expanded. It is suggested that the US Department of Justice's definition should be adopted.

CONCLUSION

How can the rising rate of rape cases be stemmed in Nigeria? There is need for a multi-dimensional approach but above all, there must be awareness and proactive campaign against rape, while an enabling environment must also be created to ensure that rape victims can come out to report the offence.

¹⁷. In the case of Ogunbayo v. State (2007) 5 SCM 154, the trial court found the accused person guilty of rape and imposed 7 years' imprisonment on him with an option of fine of N5000.

Law enforcement agents must show empathy to rape victims and must not be judgmental by seeing victims as the cause of what happens to them. Investigative capacity of the Police especially needs to be enhanced through the introduction of forensic techniques of evidence gathering. The Criminal Procedure Law also needs to be amended to accommodate the peculiarity of rape cases. For example, victims of rape should be offered some protection and confidentiality within the scheme of criminal justice architecture and this is possible by ensuring that only persons such as the victims, witnesses, lawyers, and necessary court staff who have some role to play in a court session are allowed to be present, while proceedings are on-going.

ABOUT THE WRITER

Kehinde Adegbite is a lawyer of over 10 years' post-call experience. He attended the University of Ilorin where he studied law and later proceeded to the Nigerian Law School, Abuja for his Bar Finals. He was called to the Bar in 2003. He obtained his LL.M degree from the University of Ibadan, Ibadan. Since his call, he has remained in active legal practice. He has worked with Olalekan Ojo & Co., Ibadan; Bode Ayorinde & Co., Ibadan and the Chambers of Chief Wole Olanipekun, SAN, Lagos. He is at present a Principal State Counsel, Ministry of Justice, Ibadan, Oyo State.

He is the author of **HOW TO WRITE YOUR WILL WITH EASE** and **LEARNING THE LAW IN NIGERIA**. The author is presently working on another book titled **WHAT THE LAW SAYS ABOUT MARRIAGE AND DIVORCE**. His books, though useful for lawyers, are written essentially for non-lawyers.

The writer blogs at www.gettipsforeveryday.blogspot.com His books are available for sale in all major bookshops in Nigeria. For more information, contact: barrykehinde@yahoo.co.uk; 0708-291-8395