

SENTENCING RAPE OFFENDERS IN NIGERIA: AN APPRAISAL

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Abstract

Sentencing is arguably the most important area of the criminal justice system. The duty of courts to impose the right sentences seem simple, however, it is paradoxically the most incoherent and extremely difficult task in criminal justice delivery. This is owing to the facts that, courts are often confronted with serious decision of policy to decide which among the conflicting objectives of criminal sentencing that is applicable to a particular facts of a case before proceeding to impose the right quantum and quality of sentence that can serve the real essence of justice. This paper using doctrinal research methodology in appraising sentencing in rape offences, found that, the prevalence of rape in Nigeria is borne out of the failure of courts to award just, consistent and proportionate sentences, as to send the right signal to society. It is suggested that rape offenses be classified based on the seriousness of the act forming the offence for the purpose of sentencing also, specific sentencing guidelines for rape be made to promote uniformity, consistency and transparency in sentencing rape offenders and the enactment of Sex Offenders Registration Act is as well recommended to clearly specify the implications of registering sex offenders.

Keywords: Punishment, Rape, Sentencing, Sentencing Guidelines, Sex-Offenders Registration.

1. Introduction

Rape is simply unlawful carnal knowledge, or non-consensual sex involving penetration without consent.¹ It is the cruellest violation of a victim's fundamental rights, and besides being a heinous crime, it is by all standards a grave offence which often leaves a victim traumatised and dehumanised.² In some countries rape is a capital offence punishable by death.³ In Nigeria, it is considered an offence next to capital offence and punishable by imprisonment up to the longest term of life imprisonment.

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¹ *Posu v State* (2011) 2 NWLR (pt. 1234) 393 at 418, para. H (SC); *Olali v Nigerian Army* (2016) 4 NWLR (pt.1502) 358 at 382, para. C (CA)

² *Ibrahim v State* (2015) All FWLR (pt. 770) 1401 at 1419, para. A (CA); *Posu case* (n1) 418, para. A (SC).

³ N Karim, 'Factbox- From Bangladesh to Iran, Countries Where Rape Carries the Death Penalty' (13 October, 2020) available at <<http://news.trust.org/item/202010131048-jvh1t/>> accessed on 12 February, 2020.

Rape has been on the increase and the rising incidences of the offence have occasioned a global rape epidemic raising serious concern, and provoking discussions and public protest or demonstration around the world.⁴ In Nigeria, there is virtually no day without a reported case of sexual violence especially rape in the media.⁵ According to the Nigeria Bureau of Statistics, more than 2,200 cases of rape and indecent assault were reported in 2017,⁶ while between January to May, 2020 alone, the Inspector General of Police (IGP) Mohammed Adamu revealed that a total of 717 rape incidents were recorded in Nigeria.⁷

To curb this menace there is the Penal Code, the Criminal Code and the Violence Against Persons (Prohibition) Act/Law (VAPP Act/Law) in Nigeria which proscribe rape and prescribe stiff punishment for offenders, yet rape has continued to ravage the country especially minors who constitute about 72 percent of the total rape victims in Nigeria.⁸ . This paper therefore examines the application of the laws against rape to understand where the problem lies and the possible solutions.

2. The Offence of Rape

Rape as an offence was for several years considered as a crime committed by only men against women. Penal legislation impliedly considered women incapable of committing the offence of rape and the male folk incapable of being a victim of rape. In the English case of *DPP v Morgan*,⁹ rape was defined as the intentional intercourse with a woman without her consent or intercourse with an unwilling woman. The Supreme Court of Nigeria in the case of *Muhammadu v State*¹⁰ defined the offence of rape as the unlawful sexual intercourse or carnal knowledge by a man of a woman or girl without her consent, by force, or by means of threats or intimidation, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or by impersonating the husband

⁴ M Ganguly, 'Protesting Sexual Assault in India Isn't a Conspiracy: Authorities Blame Critics After Rape and Murder in Uttar Pradesh State' (6 October, 2020) available at <<http://www.hrw.org/news/2020/10/06/protesting-sexual-assault-in-india-isn-t-a-conspiracy>> accessed on 12 February, 2021; Aljazeera, 'Nigerians Take to Streets to Protest Against Sexual Violence' (5 June, 2020) available at <<https://www.aljazeera.com/amp/news/2020/6/5/nigerians-take-to-streets-to-protest-against-sexual-violence>> accessed on 12 February, 2021.

⁵ Nextier SPD, 'Sexual Violence: Why the Rise?' (10 June, 2020) available at <<http://reliefweb.int/report/nigeria/sexual-violence-why-rise>> accessed on 11 February, 2021.

⁶ N Orjinmo, 'We Are Tied: Nigerian Women Soak Out Over Wave of Violence' (BBC News, Lagos, 4 June, 2020) available at <<https://www.bbc.com/news/amp/world-africa-52889965>> accessed on 11 February, 2021.

⁷ I Ilo, 'In Five Months, 717 Rape Cases Reported, 799 Suspects Arrested in Nigeria IGP' (15 June, 2020) available at <<http://www.icirigeria.org/in-five-months-717-Rape-Cases-Reported-799-Suspects-Arrested-in-Nigeria-IGP/>> accessed on 11 February, 2021

⁸ Nextier (n5)

⁹ *DPP v Morgan* (1976) AC 182 (HL)

¹⁰ (2020) 17 NWLR (pt. 1753) 252 at 267 268, paras. H-A (SC)

of a married woman.¹¹ This restricted definition of rape in Nigeria is a product of section 282 of the Penal Code and section 357 of the Criminal Code. The Penal Code is applicable to states in northern Nigeria while the Criminal Code is applicable to states in southern part of Nigeria. According to section 282 of the Penal Code:

282 (1) A man is said to commit rape who, save in the case referred to in subsection (2), 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 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 another man 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 unsound mind.

(2) sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.¹²

Section 357 of the Criminal Code provides that:

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.¹³

In both Codes, the defendant must be a man while the victim of rape must be a woman. Despite the use of the phrase 'any person' under section 357 of the Criminal Code, the interpretation by the court does not however include a woman but the phrase is strictly construed to mean 'any man.' A male under the age of 12 years is however presumed by law to be incapable of having carnal knowledge¹⁴ and it follows that he cannot be guilty of the offence of rape or attempted rape but may be convicted of the offence of indecent assault pursuant to section 176 of the Criminal Procedure Act.¹⁵ Also, a husband cannot

¹¹ *Ibid.* See also *Ogunbayo v State* (2007) 8 NWLR (pt. 1035) 157 at 178, paras. B-D (SC); *Posu v State* (2011) 2 NWLR (pt. 1234) 393 at 414, para. F, 416, paras. D-E (SC).

¹² Penal Code Law (PC) Cap.89 Laws of Northern Nigeria 1963. See also Penal Code Law of Benue State 2004 s.283

¹³ Criminal Code Act (CC), Cap. C38 LFN 2010

¹⁴ CC, s30

¹⁵ Criminal Procedure Act (CPA) Cap. C41 LFN 2010

be guilty of rape upon his wife who has attained puberty,¹⁶ he may however where he uses force or violence to assert his right to intercourse be convicted for assault.¹⁷

There are two basic elements to substantiate the offence of rape in Nigeria they are (1) sexual intercourse or penile penetration and (2) the absence of consent or unlawfully obtained consent.¹⁸ Corroborative evidence is also required as a matter of practice but it is not the law that there must be corroboration of the evidence of the victim. In the case of child rape, the only requirement for proof of rape or defilement of a minor/child is the element of sexual intercourse or penetration.¹⁹ A child is *dolic incapax* and cannot give consent to sexual intercourse, because the child cannot give what he/she does not have.²⁰ The presence or absence of the element of consent in a charge for rape of a minor cannot excuse the defendant from criminal liability in so far as penetration is proved. The most important ingredient of the offence of rape is penetration.²¹ Penetration no matter how slight is sufficient evidence to prove rape and it is not necessary to prove an injury or the rupture of the hymen or the emission of semen to constitute the offence of rape.²²

The phrase ‘sexual intercourse,’ ‘carnal knowledge’ or ‘penile penetration’ is held to mean the same thing²³ The Court of Appeal in *Adenekan v The State of Lagos*²⁴ defined sexual intercourse as the physical activity of sex usually describing the act of a man putting his penis inside a woman’s vagina.²⁵

The meaning of rape in Nigeria has been statutorily expanded with the enactment of the Violence Against Persons (Prohibition) Act (VAPP Act) 2015. The VAPP Act expanded the concept of rape beyond penile penetration of the vagina to include penetration of the mouth and anus not only by the penis but with any part of the human body or any object. It also expanded the liability for the commission of rape to include any person whether by a man or a woman. Section 1 of the VAPP Act defines rape thus:

- 1 (1) A person commits the offence of rape if:
 - (a) He or she intentionally penetrates the vaginal, anus or mouth of any other person with any other part of his or her body or anything else;

¹⁶ PC s282(2); CC, s6

¹⁷ *R v Miller* (1954)2 QB 282 (HL)

¹⁸ *Benjamin v State* (2019) 15 NWLR (pt. 1696) 541 at 553, paras. A-E (SC)

¹⁹ CC, s218; PC, s282(1)(e); *Muhammadu v State* (2020)17 NWLR (pt. 1753) 252 at 268, paras.A-C (SC)

²⁰ *Lucky v State* (2016) All FWLR (pt.857) 567 at 596, paras. B-C (SC)

²¹ *Ogunbayo v State* (2007) 8 NWLR (pt. 1035) 157 at 182-183, paras. G-B (SC)

²² *Adenekan v The State of Lagos* (2021)1 NWLR (pt. 1756) 130 at 195, para. B (CA). See also *Iko v The State* (2001) FWLR (pt. 68)1161 (SC).

²³ *Ahmed v Nigerian Army* (2016) 17 NWLR (pt. 1540)34 at 50-51, paras.H-A (SC); *Adenekan* (n22) 189, para. H (CA).

²⁴ (2021)1 NWLR (pt. 1756)130 (CA)

²⁵ *Adenekan v The State of Lagos* (2021)1 NWLR (pt. 1756) 130 at 189, paras. E-F (CA).

- (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 additive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse.

Penetration in relation to the VAPP Act could be said to mean the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice no matter how slight. Under the VAPP Act the two elements of penetration and lack of consent must be proved in all cases for the prosecution to succeed in the prosecution of the offence of rape. This is because the Act does not make the distinction between rape of a child who is incapable of giving consent and the rape of an adult as distinguished under section 282(1)(e) of the Penal Code and section 218 of the Criminal Code. Section 282(1)(e) of the Penal Code provides that ‘a man is said to commit rape who, save in the case referred to in subsection (2), has sexual intercourse with a woman ...with or without her consent, when she is under fourteen years of age or unsound mind.’ While section 218 of the Criminal Code provide that ‘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.’

In sexual offences, it is very desirable that the evidence of the prosecutrix is buttressed by corroborative evidence.²⁶ ‘Corroborative evidence’ or ‘corroboration’ is evidence which confirms or tends to show that the story of the victim/prosecutrix is true and that it is the accused person that committed the crime.²⁷ The nature of evidence that can corroborate the evidence of the prosecutrix or victim of rape could be from, the defendant’s statement, medical evidence and the testimony of other witnesses *etcetera*.²⁸ The evidence need not be direct evidence or amount to a confirmation of the whole account given by the prosecutrix, it must however be credible evidence which confirms in some material evidence to the charge in question.²⁹

Corroboration in rape cases is very desirable, but no longer a requirement of law.³⁰ Prior to the enactment of the Evidence Act 2011, Section 179(5) of the then Evidence Act

²⁶ *Mohammed v State* (2018) 13 NWLR (pt. 1635) 85 at 98 paras. F-G (SC)

²⁷ *Ezigbo v State* (2012) All FWLR (pt. 638)847 at 853, paras B-C (SC); *Mohammed v State* (n26) 103-104 paras. G-A (SC)

²⁸ *Mohammed* (n26) 101 paras. A-B (SC);

²⁹ *Ezigbo v The State* (2012) All FWLR (pt. 638) 847 at 853, paras C-D (SC)

³⁰ *Mohammed* (n26) 103 paras. A-C (SC)

2004³¹ provided that a person cannot be convicted for the offence of rape upon the uncorroborated evidence of one witness. However, section 204 of the Evidence Act 2011 has effectively bowdlerised rape and other sexual offences from this corroborative requirement. Corroboration is not required as a matter of law to secure conviction for the offence of rape.³² Even the evidence of the prosecutrix alone if cogent and reliable can ground conviction in rape cases.³³ Though it is not the law, the proper direction is that it is not safe to convict on the uncorroborated evidence of the prosecution. The court may warn itself and after paying due attention to the warning, nevertheless convict the defendant if it is satisfied with the truth of prosecutrix's evidence.³⁴ Where there is enough evidence on ground from which the trial court can reach a decision then there is no need to warn itself of the danger of acting on the uncorroborated evidence of the prosecutrix.³⁵

3. Punishment for Rape in Nigeria

The offence of rape in Nigeria is considered to rank next to capital offence³⁶ and the maximum punishment in all the main statutes criminalising rape in Nigeria is a sentence to life imprisonment and in addition the offender may be liable to pay fine, to pay compensation, be caned, have his/her name maintained in the register for convicted sexual offenders or be declared by the court as a dangerous sex offender. Specifically, the punishment for rape under the Penal Code is a term up to a maximum of life imprisonment with fine. According to section 283 of the Penal Code, 'whoever commits rape shall be liable to be punished with imprisonment for life or for any less term and shall also be liable to fine.'³⁷

Under the Criminal Code, the punishment for rape is a sentence to imprisonment for life with or without caning.³⁸ Section 358 of the Criminal Code does not accord the courts the discretion for any lesser term of imprisonment other than the mandatory imprisonment for life,³⁹ the discretion is only on whether or not to impose caning in addition. The section provides that 'any person who commits the offence of rape is liable to imprisonment for life, with or without caning.' Though the law allows a court the discretion to impose a fine in lieu of imprisonment where a statute prescribes

³¹ Evidence Act Cap. E14 LFN 2004, s.179(5)

³² *Ogunbayo* (n21) 179, para. C (SC); *Mohammed* (n26) 100 paras. F-H (SC)

³³ *Mohammed* (n26) 104 para. D (SC)

³⁴ *Ibid* (n26) 100 paras. B-C (SC)

³⁵ *Habibu Musa v State* (2013)9 NWLR (pt. 1359) 214 at 237-238, paras. F-B (SC); *Mohammed* (n26) at 99 para. A (SC);

³⁶ *Popoola v State* (2014) All FWLR (pt. 715) 200 per Ngwuta JSC at 218-219, paras. G-B (SC)

³⁷ PC, s283. See also the Penal Code Law of Benue State 2004, s284.

³⁸ CC, s358

³⁹ *Lucky v State* (2016) All FWLR (pt.857)567 at 607, paras. E-H (SC)

imprisonment but is silent on the option of fine.⁴⁰ This is however not appropriate for a serious offence as rape. The Supreme Court in the case of *Thomas v State*⁴¹ warned that such discretion should not be made in favour of convicts for serious felonies as follows:

Where a court has authority under any written law to impose imprisonment for any offence and has not specific authority to impose a fine for that offence, the court may, in its discretion, impose a fine in lieu of imprisonment. However, this power is to be very rarely used in cases of serious felonies. Indeed, in a case of manslaughter, a sentence of fine is hardly an appropriate punishment.⁴²

Under the VAPP Act, the punishment for rape must include imprisonment (except for persons below 14 years who may be given an option of fine), compensation and registering the convict as sex offenders.⁴³ Also, the court may in addition declare the offender as a dangerous sexual offender if such a person has (a) more than one conviction for a sexual offence; (b) been convicted of a sexual offence which was accompanied by violence; or (c) been convicted of a sexual offence against a child.⁴⁴ A rape offender not below 14 years must therefore be imprisoned without an option of fine for a minimum term of 12 years or where it is a gang rape for a minimum of 20 years.⁴⁵ A rape offender below the age of 14 years may be imprisoned for a maximum period of 14 years or be considered for other treatment in lieu of imprisonment like fine⁴⁶ in addition, must pay compensation to the victim and shall have his or her name maintained in the register of sex offenders,⁴⁷ or may be declared a dangerous sexual offender where appropriate.⁴⁸

The VAPP Act is commended for introducing, though insufficiently some guidelines for sentencing rape offenders like prescribing minimum starting point for sentencing generally and minimum and maximum sentences for gang rape and rape by child offender. However, it does not specify if an order of court is needed to maintain a person's name in the register of sex offender, it also does not state the details of the sex offender to be maintained, the length of time the name is to be maintain, the circumstances that may warrant a removal of the name, and the implication of the name being in the register of sex offenders. Similarly, the limits of period and implications of the declaration of a person as dangerous sexual offender are also not stated under the

⁴⁰ *Thomas v State* (1994) NWLR (pt. 337) 129 at 138-139, paras. H-A (SC); *State v Okechukwu* (1999) 9 NWLR (pt.368) 273 at 295 296, paras. H-B (SC); *Barewa Pharmaceuticals Ltd v FRN* (2016)17 NWLR (pt. 1540) 63 at 114, paras. F-H (CA);

⁴¹ (1994) 4 NWLR (pt. 334) 129 at 138-139, paras. H-B (SC)

⁴² *Ibid*

⁴³ VAPP Act, s1(2),(3) and (4)

⁴⁴ *Ibid*, s43

⁴⁵ *Ibid*, s1(2)

⁴⁶ *Ibid*, s1(2)(b)

⁴⁷ *Ibid*, s1(2)(3)(4)

⁴⁸ *Ibid*, s43

VAPP Act. There is the need for a law or guidelines to clearly make provisions for the above deficiency in the VAPP Act.

Several countries around the world have laws regulating the registration of sex offenders including the United Kingdom,⁴⁹ United States,⁵⁰ Australia,⁵¹ Canada,⁵² New Zealand⁵³ *etcetera*. In Australia, the Sex Offenders Registration Act (SORA) 2004 of the State of Victoria categorised sex offences into four (4) classes for the purpose of registration. A convict of class 1 and 2 offences are subject to a mandatory registration order,⁵⁴ while offenders of class 3 and 4 offences are subjected to registration at the discretion of the court.⁵⁵ Class 1 offences involve rape against a child. Class 2 offences include sexual offence against a child not involving penetration (such as sexual assault, assault with intent to rape, and indecent act with a child or an individual with cognitive impairment) and child pornography offences or those relating to child prostitution. Class 3 offences involve rape of an adult (over 18 years). While class 4 offences include sexual offences against an adult not involving penetration such as sexual assault, sexual servitude or threats to commit a sexual offence.⁵⁶

As regarding the length of time to which an offender's details may be maintained in the register of sex offender, section 6(3) of the Australian SORA provides that an adult offender, convicted of two or more class 1 offences or three or more class 2 offences will be subjected to mandatory lifetime registration. Where an offender is convicted of one class 1 offence or two of class 2 offences, the name of the offender will be maintained in the register for 15 years, while a conviction of one class 2 offences will attract registration for 8 years. In the case of a child offender and offenders of class 3 and 4 offences, registration is not automatic but at the discretion of the court and for a reduced length of time.⁵⁷

Section 50 of SORA provides the implications and responsibility of registration. Offenders required to be registered are to report to a police station within 7 days of release from prison; registered offenders are required to report any intention to travel interstate and the expected return date; they cannot travel overseas unless specific permission is given by a competent authority. There are other restriction on the use of social media and

⁴⁹ Sex Offences Act 2003

⁵⁰ Sex Offender Registration and Notification Act 2006

⁵¹ Sex Offenders Registration Act 2004

⁵² Sex Offender Information Registration Act 2004

⁵³ Child Protection (Child Sex Offender Government Agency Registration) Act 2016

⁵⁴ Sex Offenders Registration Act 2004 (Vic) s6 and 7

⁵⁵ *Ibid*, s11

⁵⁶ L Warren and Associates, 'Sex Offender's Register: Implications & Responsibilities' (2 February, 2018) available at < <https://leannewarren.com.au/sex-offenders-register-implications-responsibilities/>> accessed on 7 February, 2021.

⁵⁷ Sex Offenders Registration Act 2004 (Vic) s6(3)

internet. An offender who fails to register as required may be convicted and sentenced to imprisonment for a maximum for 5 years or made to pay fine.⁵⁸ The law also enumerates the information required to be entered on the register of sex offender.⁵⁹

The VAPP Act is made superior regarding provision on similar offences in any other law including the Criminal Code, the Penal Code and the Criminal Procedure Code by dint of section 45(2) of the VAPP Act. This implies that the definition and punishment for rape under the VAPP Act supersedes those of other enactments on the subject.⁶⁰ The VAPP Act however does not cover the field since child rape or indecent assault is not covered under the Act.

4. Judicial Attitude to Sentencing Rape Offenders in Nigeria

Sentencing is post-conviction stage of the criminal justice process where the defendant after been found guilty is brought before the court for the determination and imposition of punishment.⁶¹ The general purpose or objectives of sentencing is to promote respect for the law in order to maintain a just, peaceful and safe society and to promote initiatives to prevent crime.⁶² The court in determining a sentence has a duty to choose for each particular case one or more among the conflicting objectives of criminal sentencing that is more appropriate or even possible before the right quantum and quality of sentence is imposed to achieve the chosen sentencing objective. Section 401(2)(a)-(g) of the Administration of Criminal Justice Act (ACJA) 2015 outlines six (6) sentencing objectives which the court shall have in mind in determining a sentence and among which the court may choose one or more to apply to each particular case. These sentencing objectives are prevention, restraint, rehabilitation, deterrence, education and retribution.⁶³

Prevention punishment is punishment for the purpose of preventing a repetition of wrongdoing by disabling the offender.⁶⁴ or restraint as objectives of sentencing proposes the making of an offender incapable of committing an offence by taking him out of society. It is concerned with confinement, abridgement or limiting the offender's opportunity to commit crime.⁶⁵ Rehabilitation or reformation as a sentencing objective assumes that criminal behaviour is the result of social or psychological disorders, and that the treatment of such disorders should be the primary target of correction.⁶⁶

⁵⁸ Warren (n56)

⁵⁹ Warren (n56)

⁶⁰ The VAPP Law of Benue State 2019 does not have this superiority provision.

⁶¹ JR Nolan and Others, *Black's Law Dictionary* (6th edn, West Publishing Co. 1998) 1363

⁶² Administration of Criminal Justice Act (ACJA) 2015 s5; *Posu v State* (2011) 2 NWLR (pt. 1234) 393 at 418, para. A (SC)

⁶³ ACJA 2015, s401(2)(a)-(g)

⁶⁴ BA Garner and Others, *Black's Law Dictionary* (7th edn, West Publishing Co. 1999) 1248

⁶⁵ Garner, (n63) 1315-116

⁶⁶ VV Tarhule, *Corrections under Nigerian Law* (Innovative Communications 2014) 31

Deterrence is aimed at discouraging the offender or others with similar vices from further committing or committing an offence.⁶⁷ Education as an objective of sentencing incorporates some elements of deterrence, retribution and rehabilitation to justify punishment as a way of helping the offender to gain knowledge and educate the community about the immorality of the offence.⁶⁸ The theory of retribution demands that an individual who violates societal rules deserves punishment proportionate to the harm caused,⁶⁹ the punishment is considered the debt which the offender owes the victim and the society by his violation so that until he serves that punishment, the debt remains unpaid and guilt hangs on him.⁷⁰

The statutory punishment for rape creates the appearance that the legislature had chosen at least retribution and restraint as the main objective for sentencing rape offenders. This can be inferred from the longest term up to life imprisonment prescribed in all statutes against rape. Also a mandatory term of imprisonment is the default punishment, and in addition, the offender will/may be liable to caning, fine, compensation, or be registered as sex offender *etcetera*. Despite the stiff punishment as statutorily intended for rape offenders, the laws against rape still accords courts wide range discretionary powers to impose as minimal as a day imprisonment term or an option of fine by implication of law, except however the VAPP Act which to some extent provides a higher minimum sentence.

The discretion in sentencing, though must be exercised judicially and judiciously,⁷¹ is regrettably, very often than not, exercised by trial courts not on the basis of established principles and rules, but in accordance with idiosyncratic sentimental disposition of judges.⁷² The wide discretion and an individualised approach to justice retained by judges at the stage of sentencing in Nigeria not only lead to the imposition of punishment which do not reflect the chosen objective of sentencing rape offenders but also seems not to be proportionate to the seriousness of the offence and often lead to wide range disparity and inconsistency in sentencing. For instance, in the case of *Lucky v State*⁷³ the trial court convicted the defendant for the offence of rape and during sentencing the court acknowledged that rape and defilement within its jurisdiction is fast assuming a frightening dimension. In rejecting the plea for leniency, the trial court held that it is the duty of the court to send the right signal to would-be rapists and discourage the rampancy

⁶⁷ *Ibid* 17.

⁶⁸ J Hampton, 'The Moral Education Theory of Punishment' (1984) (13) (3) *Philosophy & Public Affairs* 208 238 available at <<https://www.jstor.org/stable/2265412?seq=1&cid=pdf>> accessed on 10 February, 2021

⁶⁹ Tarhule, (n66) 11

⁷⁰ *Ibid*

⁷¹ *Ademoye v State* (2014) All FWLR (pt. 729) 1210 at 1216 para B (CA)

⁷² *Doripolo v The State* (2012) LPELR 15415 (CA) per Saulawa, JCA at 37-39.

⁷³ *Lucky v The State* (2016) 13 NWLR (pt. 1528) 128 (SC); (2016) All FWLR (pt. 835) 567 (SC).

of the widespread crime by punishing those found guilty severely. It is clear from the above facts that the court chose retribution, deterrence and prevention as its sentencing objective, regrettably, the trial court went ahead to sentence the convict to a term of imprisonment of five (5) years with hard labour or with an option of fine of three hundred thousand naira only (N300,000.00). The Supreme Court in condemning the sentence as not reflective of the chosen objective of sentencing held that:

The sentence imposed by the trial court is not only a contradiction in terms of the court's stated intention to rid his jurisdiction of the offences of rape and defilement, but a contemptuous and contumacious departure or derogation from. Rather than achieve the purpose set out in the preamble to the judgment, the sentence imposed is an invitation for defilement and rape within His Lordship's jurisdiction. With respect to His Lordship, the sham of prison term he imposed on the appellant is an attack on law and moral basis for prison term. I was tempted to revisit the sentence in this case but that would have violated the principle that appellate court cannot disturb a sentence imposed unless there is an appeal against the sentence. A violation of that principle would be as much a wrong as the punishment imposed on the appellant and there is a truism that two wrongs do not make a right.⁷⁴

Inconsistency and wide range disparity in sentencing is replete in Nigeria where the same judge or different judges in the same jurisdiction may impose different sentences on equally culpable offenders whose crimes are indistinguishable and who committed the offences in almost similar circumstances. For instance in the case of *State v Masiga*⁷⁵ the trial court convicted the defendant for rape of a girl aged ten (10) years but sentenced him to a fine of N20,000.00 (twenty thousand naira only) or 6 years imprisonment whereas in *Isa v Kano State*⁷⁶ the convict who raped an eight (8) year old girl was sentenced to ten (10) years imprisonment and in addition, the court imposed a fine of N10,000.00 (ten thousand naira) on him and in default of payment of the fine to serve an additional one year jail term.

Similarly in the case of *Ahmed v Nigerian Army*⁷⁷ the defendant an army officer was convicted of the offence of rape of an eleven (11) year old girl. Even though he raped or had sexual intercourse with the victim on several occasions, the trial court sentenced him to only a term of four (4) years imprisonment. While in the case of *Olali v Nigerian Army*⁷⁸ the defendant also an army officer who was convicted for a singular act of rape

⁷⁴ Per Ngwuta JSC at 163, para. H; 164, paras. C-G; 165, para. A.

⁷⁵ (2018) 8 NWLR (pt. 1622) 383 (SC)

⁷⁶ (2016) All FWLR (pt. 822) 1773 (SC)

⁷⁷ (2017) All FWLR (pt. 869) 813 (SC)

⁷⁸ (2016) 13 NWLR (pt. 1502) 358 (CA)

of a thirteen (13) year old girl was sentenced to eight (8) years imprisonment. By a brief examination of the facts of both cases without overlooking the despicable acts, *Ahmed* who repeatedly raped a younger child of 11 years ought to have been punished more than *Oladi* who in a singular act raped a teenager of 13 years, but the reverse was the case.

Also in *Lucky v State*⁷⁹ the accused who raped an eleven (11) year old girl was given an option of fine after been sentenced to ten (5) years jail term while in *Natsaha v State*⁸⁰ the defendant who lured and raped a child of three (3) years of age under the pretext of sending her to buy beancake for him was sentenced to ten (10) years imprisonment.

There are very few reported cases in Nigeria where rape offenders are sentenced to over ten years jail term upon conviction. For an offence like rape which is considered to rank next to capital offence and attracts a sentence up to imprisonment for life, the punishment as imposed by Nigerian courts leaves one to wonder whether the sentences imposed are actually proportionate and reflects the seriousness of the crime committed. Even in situation of gang rape the court awards as light as three (3) years jail term. For instance in the case of *Posu v State*,⁸¹ the two defendants with impunity slapped, tore the dress and pant, and raped the prosecutrix on the street in the presence of the PW1. They also slapped PW1 their friend who tried to prevail on them to desist from the dastardly act. Yet the trial court upon conviction sentenced the appellants to only three (3) years imprisonment.

The apex court have in a plethora of decisions condemned this light sentences and described this heinous and disgraceful act especially on minors as being callous, heartless, barbaric and animalistic, yet the punishment has continued to be too lenient. In *Adonike v State*⁸² the Supreme Court per Muntake-Coomassie JSC held that heavier punishment ought to be imposed on rape offenders, especially against the backdrop of the rise in rape cases nowadays.⁸³ In *Posu v State*,⁸⁴ the Supreme Court held that a light sentence for the offence of rape must never be imposed, as this may have the unsavoury effect of turning rape into a past-time by flippant youths.⁸⁵ The court went further to lament that:

The appellants were sentenced to three years in prison. Since there was no cross-appeal there is nothing that can be done on the strange sentence. The prosecutrix suffered an ordeal that was the stuff of a nightmare. A ferocious and indiscriminate attack by two callous, wicked men. To my mind where, as in this case there is

⁷⁹ (2016) 4 NWLR (pt. 1528) 128 (SC)

⁸⁰ (2017) All FWLR (pt. 898) 127 (SC)

⁸¹ (2011) 2 NWLR (pt. 1234) 393 at 406, paras.C-E, 408-409, paras. G-B (SC)

⁸² (2015) All FWLR (pt. 772) 1631 at 1677 para. B (SC)

⁸³ *Ibid.*

⁸⁴ (2011) 2 NWLR (pt. 1234) 393 (SC)

⁸⁵ *Ibid* 418, paras.A-B (SC)

overwhelming compelling evidence that two men took turns to rape a defenceless young girl in degrading and horrific circumstances I think the appellants should forfeit their place in a decent society for a much longer period. Three years in prison cannot be adequate for such an act.⁸⁶

In *Ezigbo v. State*⁸⁷ where the defendant raped two children severally and was sentenced to only two years imprisonment. The Supreme Court in condemning the act and punishment held that:

The facts revealed in this appeal are sordid and can lead to a conclusion that a man can turn into a barbaric animal. When the appellant was alleged to have committed the offence of rape, he was 32 years. His two young victims: Ogechi Kelechi, 8 years old and Chioma Kelechi 6 years, were by all standard, underaged. What did the appellant want to get out of these underaged girls? Perhaps the appellant forgot that by nature, children, generally are like animals. They follow anyone who offers them food. That was why the appellant tactfully induced the young girls with ice cream and zobo drinks in order to translate his hidden criminal intention to reality, damning the consequences. Honestly, for an adult man like the appellant to have carnal knowledge of underaged girls such as appellant's victims is very collous and animalistic. It is against the laws of all human beings and it is against God and the state. Such small (under aged) girls and indeed all females of whatever age need to be protected against callous acts of criminally like-minded people of the appellant's class. I wish the punishment was heavier so as to serve as deterrent.⁸⁸

Similarly in *Popoola v State*⁸⁹ where the rapist was sentenced to five (5) years imprisonment the Supreme Court of Nigeria expressed disapproval and disappointment on the quantum of sentences on such heinous crime as follows:

I cannot fail to express my disappointment however on the lenient terms of imprisonment of five years dished by the trial High Court which not having been appealed against has to remain, sadly in a heinous crime such as this.⁹⁰ The offence appeared to be a heinous and heartless act. The sentence meted out by the trial court amounts to abdicating its role as a judicial officer. I condemned such type of

⁸⁶ *Ibid* 420, paras. A-B (SC)

⁸⁷ (2012) All FWLR (pt. 638) 847 at 856, paras. B-F (SC)

⁸⁸ *Ezigbo v. State* (2012) All FWLR (pt. 638) 847 at 855, paras. A-C (SC)

⁸⁹ (2014) All FWLR (pt. 715) 200 (SC)

⁹⁰ Per Peter Odili JSC at 215, paras. F-G

sentence. The sentence is unnecessarily lenient and loose. Since the appellant did not appeal against the sentence, there is nothing the Court of Appeal can say on appeal.⁹¹ I join my learned brother in expressing disappointment that the appellant was given a lenient term of five years in prison. I think that the severity of punishment for rape with particular reference to statutory variety, should rank next to capital punishment.⁹²

The inadequacy or lack of proportionality of punishment for rape may be attributed to the absence of categorisation of the offence based on the seriousness of the acts constituting the crime for the purpose of sentencing. There are no statutory sentencing guidelines for rape and this gives room for inconsistency and lack of transparency in sentencing. The VAPP Act though specified minimum sentence for gang rape, however other categorisation like the heinous and heartless act of rape on minors, rape with weapon, rape induced by the use of drugs, rape with violence and injury, retaliatory rape, rape by persons in position of trust or authority and rape by sadistic or serial rapist *etcetera* are not considered by the VAPP Act for the purpose of sentencing. Also the VAPP Act has not been completely adopted in Nigeria since only 18 out of the 36 states as at January, 2021 have enacted the VAPP Law.⁹³ States like Rivers, Imo, Delta, Bayelsa *etcetera* have not enacted the law including the entirety of the north-east and north-west states except Kaduna, Bauchi and Yobe states.⁹⁴ To minimise large sentencing disparity as well as achieve greater consistency, including ensuring transparency in sentencing there is need for laws, rules or sentencing guidelines to categorise rape and provide mechanism that can promote uniformity, consistency and transparency in sentencing.

In India, the Indian Penal Code as amended by the Criminal Law (Amendment) Act 2013 classified rape for the purpose of punishment. Rape generally is punished by a minimum imprisonment of 10 years to life and fine,⁹⁵ aggravated rape is punished by a minimum of 10 years to life with fine,⁹⁶ rape on a woman under 16 years is punished by a minimum of 20 years to life with fine,⁹⁷ rape against children below 12 years is punished by a minimum of 20 years to life with fine or death,⁹⁸ rape by husband on his separated wife

⁹¹ Per Muntaka Coomassie JSC at 217, paras. F-G.

⁹² Per Ngwuta JSC at 218 219, paras. G-B.

⁹³ Rule of Law and Empowerment Initiative, 'VAPP Tracker' available at <<http://www.partnersnigeria.org/vapp-tracker/>> accessed on 11 February, 2021.

⁹⁴ States that have enacted the VAPP Act/Laws include: 1.FCT, 2.Kaduna, 3.Anambra 4.Oyo 5.Benue 6.Ebonyi 7.Edo 8.Ekiti 9.Enugu 10.Osun 11.Ogun 12.Cross River 13.Lagos 14.Plataeu 15.Bauchi 16.Akwa Ibom 17.Abia 18.Kwara and 19.Yobe.

⁹⁵ Criminal Law (Amendment) Act (CLAA) 2013, s376(1)

⁹⁶ CLAA, s.376(2)

⁹⁷ *Ibid*, s.376(3)

⁹⁸ *Ibid*, s376AB

by minimum of 2 years and maximum of 7 years imprisonment with fine,⁹⁹ rape by a person in authority by minimum of 5 years and maximum of 10 years imprisonment with fine,¹⁰⁰ gang rape is punished by minimum of 20 years imprisonment with fine,¹⁰¹ gang rape of woman under 16 years is punishable by life imprisonment or death with fine,¹⁰² gang rape on woman under 12 years is punishable by imprisonment for life with fine, or with death,¹⁰³ punishment for repeated rape offender is imprisonment for life or with death.¹⁰⁴

5. Conclusion and Recommendations

Rape is the cruellest violation of fundamental rights which leaves its victims traumatised and dehumanised. It is a crime ranked next to capital offence in Nigeria and is punishable by a maximum term of life imprisonment and in addition, the offenders may be liable to canning, fine, compensate the victim, be registered as a sex offender or be declared as a violent sex offender.

Despite the stiff punishment intended for rape offenders, the attitude to sentencing by trial courts leaves much to be desired. Appellate courts have in a plethora of decisions belaboured the duty on courts not to impose light sentences for the offence of rape yet trial courts impose very light sentencing which are not proportionate to the severity of the offence and inconsistent to the court's chosen objective of sentencing. The sham sentences most often imposed are at best an invitation to rape. The inadequacy/non-proportionality or discrepancy in sentencing is a result of the wide range sentencing discretion accorded courts beside the minimum and maximum punishment prescribed by law.

The enactment of the VAPP Act which expanded the meaning of rape and placed higher starting point for sentencing rape offenders and for gang rape has not resolved the challenges since not fewer than half of the states of the federation have not domesticated the Act. Also, the VAPP Act does not recognise the peculiarities of proof of child rape and failed to specify the implications of registering sex offenders or declaring a convict a dangerous sex offender.

It is suggested that clear sentencing guidelines specifically for the offence of rape be made for Nigerian courts. The model of classification of rape offenders based on the severity of the acts for the purpose of sentencing; the prescription of sentencing ranges and other means of dealing with rape offenders in Australia and India should be adopted.

⁹⁹ *Ibid*, s376B

¹⁰⁰ *Ibid*, s376C

¹⁰¹ *Ibid*, s376D

¹⁰² *Ibid*, s376DA

¹⁰³ *Ibid*, s376DB

¹⁰⁴ *Ibid*, s376E

Also, Sex Offenders Registration Act/Law should be enacted to clearly state the responsibilities and implications of registering sex offenders; the implications of declaring convicts as dangerous sex offender; and specify the details of sex offenders to be entered in the register among others. The VAPP Act should be amended to provide with clarity that the element of consent is not required for the proof of the offence of rape committed against minors.

Prosecuting counsel should always appeal or cross-appeal extremely light sentences to provide appellate courts with the requisite jurisdiction to review those sentences. Finally, sentencing laws or guidelines for rape should provide mechanism for considering the interests of victims and the community. The above recommendations if implemented will promote uniformity, consistency and transparency in sentencing rape offenders.