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Review Article

Joint Charge against Defendants in Rape Cases - A Legal Impossibility?

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Abstract

The successful prosecution of offences, including sexual offences like rape, is sometimes dependent on the framing of the charge or information by the Prosecutor. This takes additional complexity where the offence is committed by two or more suspects. In framing the charge, should the defendants be charged in one count or several counts for the rape of the victim but in the same charge sheet or information? And where two or more persons set out to commit rape but only one of them penetrated the prosecutrix, can all the defendants be charged in one count with rape? Or is it only the defendant who penetrated the victim that can be charged with rape whilst others are charged in different count with kindred offences like sexual assault or attempt to commit rape? This paper examines the rules of drafting of charges within the context of sections 7 of the Criminal Code Act and similar provisions in the Penal Code in relation to the vital ingredients of rape and argues that where two or more suspects are accused of actively participating in the commission of rape in jurisdictions where the Criminal Code Act applies, they should be charged jointly in the same count and in the same charge sheet or information. Whereas in jurisdictions where the Penal Code applies, each person who penetrated the victim should be charged with rape whilst others should be charged with abetting the rape in a separate count but in the same charge sheet. Adopting a doctrinal methodology, a critical examination of the relevant authorities in Nigeria and other jurisdictions will be undertaken. It will be recommended that where more than one defendant is charged in a count for rape, this should not vitiate the charge as such charge is actually technically valid.

Keywords: Rape, Defilement, Charges, joint offenders, joint defendant.

1.0 INTRODUCTION

Rape and defilement have proven to be one of the flagrant forms of sexual assault against a person. It is a violent and heinous crime usually perpetrated against women and girls. It constitutes a violation of a person's fundamental human rights, and it is a form of gender-based violence which knows no border. The World Health Organization (WHO) defines rape as a form of sexual assault, while the Centre for Disease Control and Prevention (CDC) include rape in their definition of sexual assault; they term rape as a form of sexual violence [1].

Rape and defilement cases in Nigeria have increased exponentially in recent years to the extent that it is now being referred to as an endemic. According to the National Survey on Violence against Children in Nigeria conducted in 2014, one in four women had experienced sexual violence in childhood with approximately 70% reporting more than one incident [2].

Similarly, in a report of National Bureau of Statistics, 2,279 cases of rape and indecent assault were reported in 2017 [3]. Unfortunately, overwhelming majority of perpetrators of these heinous crimes go unpunished due to several factors. Many cases are not reported due to fear of stigmatization and trauma. Many reported cases are not prosecuted for varied reasons. Many of the prosecuted cases are unsuccessful as rate of

[1] Krug, Etienne G. eds. (2002). "World Report on Violence and Health" (PDF). World Health Organization. p. 149.

[2]Rape and Murder of Student in Church Spark Outrage across Nigeria < *https://www.theguardian.com/global-development/2020/jun/02/and-of-student-in-church-spark-outrage-across-Nigeria*> accessed 12th June, 2020

[3] https://thenigerialawyer.com/defilement-and-rape-in-nigeria-why-death-penalty-is-not-desirable/

conviction is very low due to the very technical requirements of the law and its application in relation to sexual offences [4].

Overtime, rape has been distinctively divided into several types: Date rape, Gang rape, Power rape, Anger or Retaliatory rape and Sadistic rape [5]. Amongst these types are situations that warrant more than one perpetrator of the offence. What is then the position of the law in charging multiple offenders or perpetrators of rape or defilement committed in the course of the same transaction? How will these perpetrators be charged? In a count or separate counts? In the same charge sheet or separate charge sheet? This write up is an attempt at proffering answers to these issues in a bid to minimize failure of prosecution on account of faulty charges or information.

Against the above backdrop, this paper seeks to examine the rules of drafting charges generally in the Nigerian criminal justice system as well as ingredients of the offence of rape and defilement before proceeding to examine the proper approach to drafting of charges in rape cases in Nigeria and other jurisdictions especially where multiple offenders are involved. There will be a brief insight into and a critical examination of the case of *Ofordike v State* [6].

The first part of the article introduces the paper, the second part examines the rules and principles of drafting of charges in Nigerian criminal law, the third part speaks on the ingredients of rape and defilement, the fourth part examines drafting of charges in rape cases in Nigeria and other jurisdictions, while the fifth part gives an analysis of the case of *Ofordike v State*, the last part concludes the paper.

2.0 Definition and general rules for drafting of charges

A 'charge' is a statement of offence or statements of offences with which a person is charged in a summary trial or trial by way of information before a court of law [7]. From that definition, it can be seen that the word 'charge', within the context of criminal trial, may mean the formal accusation of an offence against a person, sometimes referred to as a count [8]. It may also refer to the formal document, referred to as a charge sheet, containing one or more of such accusation. Depending on the context, therefore, a 'charge' may mean a count in a charge sheet or the charge sheet itself. The charge or information, as it sometimes called at the High Court, is the originating process by which a criminal proceeding is instituted [9].

The main purpose of a charge is to give the defendant sufficient notice of the case against him. As such, the charge is required to contain such particulars as the identity of the defendant, the time and place of the alleged offence and the statutory description of the alleged offence. It however need not contain the exact date of commission of an offence, it is sufficient if it is stated that it was committed 'on or about' a particular date or 'sometime' in a particular year [10]. Once the charge discloses an offence with the necessary particulars that should be brought to the notice of the defendant to avoid him being prejudiced or embarrassed, such a charge is good in law [11].

As part of measures to guarantee fairness of criminal trials, charges to be file in court are required to be drafted in accordance with certain rules. There are essentially four rules guiding the drafting of charges. These rules, which we shall briefly consider in turn, are:

1. The rule against ambiguity
2. The rule against duplicity
3. The rule against misjoinder of offenders; and
4. The rule against misjoinder of offences

A. Rule against Ambiguity

Every charge must be unambiguous and clear enough to provide the defendant with sufficient particulars of the offence against him [12]. A charge is said to be bad for ambiguity where the particulars are omitted, wrongly stated, or stated in a disorderly manner [13]. A defendant in a criminal case must not be left in doubt as to what he is to face at the trial. A charge should not be framed in such a manner as to constitute a trap set to catch the defendant [14]. The rule against ambiguity is a rigid rule which, unlike the other rules, admits of no exception. However, a breach of the rule does not vitiate a charge where the effect of the breach is minor or otherwise technical without

[4] In fact, by 1999, only one in 13 prosecuted cases of rape in England ended in conviction. See Home Office, Rape and Sexual Assault of Women, findings from the BCS (2002).

[5] https://legalpediaonline.com/rape-under-the-nigerian-laws

[6] (2019) LPELR-46411(SC)

[7] Section 494(1) Administration of Criminal Justice Act, 2015 (ACJA)

[8] *Jubrin v State* (2021) LPELR 56233 (SC) 84 adopting the definition in Bryan A Garner (ed), *Black's Law Dictionary* (11th ed) (Thomson Reuters 2014) 282; *Okoye v COP* (2015) LPELR 24675 (SC) 70; *FRN v Ibori* (2014) LPELR 23214 (CA) 43

[9] *Kronaghea v FRN* (2018) LPELR 43684 (CA) 8

[10] *Ankpegher v State* (2018) LPELR 43906 (SC) 14-18

[11] Section 196(1) ACJA; *Olatunbosun v State* (2013) LPELR 20939 (SC) 20; *Ogbomor v State* (1985) LPELR 2286 (SC); *Exaro v State* (2021) LPELR 56751 (CA) 8

[12] *IGP v Sonoma* (2021) All FWLR (Pt 1110) 348 SC.

[13] *Shaibu v State* (2014) LPELR 24465 (CA); *Ibrahim v State* (2015) 11 NWLR (Pt 1469) 164.

[14] *FRN vBodunde* (2016) ALL FWLR (Pt 828) 812-813.

misleading the defendant [[15]] or occasioning miscarriage of justice [[16]]. Where the breach is substantial, it will nullify the charge [[17]].

B. Rule against Duplicity

This rule focuses on each count. The rule is that a count shall not contain more than one offence except in permitted circumstances provided by statute.[18] A charge is therefore bad for duplicity if it contains more than one offence or where two or more offences are lumped together in the same count [[19]]. A defendant must be charged for each offence in a separate count in the charge sheet or information. A charge that is bad for duplicity may not necessarily invalidate the charge or the trial except where it occasions a miscarriage of justice [[20]]**.** Exceptions to this rule include cases of general deficiencies in money or criminal misappropriation of money, criminal breach of trust [[21]], statutory exceptions based on the schedule to the Law [[22]], overt acts of treason and treasonable felonies [[23]].

C. Rule against Misjoinder of Offenders

This rule focuses both on the count and the charge sheet. The rule states that every person who is alleged to have committed an offence shall be charged and tried separately for the offence alleged against him [[24]]. In other words, no two persons are to be charged together in the same count or on the same charge sheet. Exceptions to this rule include:

(a) Where two or more persons are alleged to have jointly committed the same offence, they may be charged and tried together not only in the same charge sheet but in the same. Count [[25]].

(b) Where more than one person commits different offences in the course of the same transaction, they may be charged and tried together on the same charge sheet though not in the same count [[26]]. In considering whether offences are committed in the course of same transaction, the test must always 'do these acts, considered together, portray any continuity of purpose?'. To answer this question, one must therefore look at proximity of place, time and transaction.

(c) Where a person is accused of committing an offence and another of abetting or being accessory to or for attempting to commit such offence, the two of them may be charged together in the same charge sheet though in the same count [[27]].

(d) Where a person is charged for an offence of theft, criminal misappropriation, criminal breach of trust or of receiving or retaining or assisting in the disposal or concealment of the subject matter of such offence, they may be charged and tried together on the same charge sheet by in different counts [[28]].

(e) Persons accused of offences committed during a fight or series of fights arising out of another fight and persons accused of abetting these offences may be charged and tried together on the same charge sheet but in different count [[29]].

D. Rule against Misjoinder of Offences

This focuses on the charge sheet. The general rule is that for every distinct offence with which a person is charged, there shall be a separate charge sheet and a separate trial [[30]]. There are however exceptions to this rule which allow two or more offences to the charged on the same charge sheet and tried together accordingly. The exceptions are:

(a) Where several offences were committed by the same defendant within a period of 12 months, any three (3) of such offences may be included on the same charge sheet regardless of whether such offences were committed within the same transaction or not [[31]].

(b) Where different offences are committed within the same transaction, all such offences may be charged together in one charge sheet. To come under this exception, the acts or omission constituting the offence(s) must be so connected to each other as to form the same transaction.

(c) Offences which form the same transaction. Any number of offences committed by a defendant in the course of the same transaction having regards to the proximity of time and place as well as the continuity of action and

[15] *Ogbomor v State* (1985) LPELR 2286 (SC) (1985) 2 SC 289.
[16] *Osigwe v Police* (1966) NMLR 212, *Enahoro v R* (1965) 1 ALL NLR 125.
[17] *IGP v Sonoma* supra.
[18] Section 209 ACJA.
[19] *Lawan v FRN* (2022) LPELR 56968 (CA) 14-15; *FRN v Abubakar* (2020) LPELR 52291 (CA) 63-65, *Auwal v FRN* (2022) LPELR 57318 (CA) 16.
[20] *Onwuamadike v State of Lagos* (2019) LPELR 48987 (CA) 16, *Mamman v FRN* (2010) LPELR 25592 (CA)
[21] Sections 197, 198 ACJA
[22] See for instance the charge for Housebreaking and Stealing or Burglary and Stealing as in the Appendix to the Act.
[23] Sections 37, 38 and 41 Criminal Code, sections 410, 411 and 412 Penal Code.
[24] Section 208, ACJA.
[25] Section 151 Administration of Criminal Justice Law (ACJL) Lagos, 208(a) ACJA, *Okotie v COP* (1961) WRNLR 91.
[26] Section 151(a) ACJL, 208(d) ACJA.
[27] Section 151(b) ACJL, 208(b) ACJA.
[28] Section 208(e) ACJA.
[29] Section 208(f) ACJA.
[30] Section 209 ACJA.
[31] Section 209(a) ACJA, 153(1) ACJL Lagos

community of purpose may be charged in the same charge sheet [32].

(d) Acts which, when combined, constitute an offence can be charged distinctly in the same charge sheet. For instance several overt acts which constitute an offence but which may constitute another offence when some or all of the acts are combined, the person may be charged and tried at a single trial for the offences constituted by each of those acts and offence constituted when some of those acts are combined [33].

(e) Acts or omissions causing doubt as to which of several offences they constitute. When it is not certain which particular offence has been committed, the defendant may be charged and tried on a single charge sheet for all or any one or more of such offences or all the offences [34].

(f) Offences that falls within two definitions. Where it is alleged that a person has committed offences that has the same elements but are constituted under different laws, the person may be charged and tried for all the offences on the same charge sheet under the different laws in which the offences have been constituted [35].

(g) Incidental offences in the same transaction. Where a single act or omission, the facts or combination of facts constitutes more than one offence, the defendant may be charged and tried at one trial for one or more of those offences on the same charge sheet [36].

2.01 General effects of a defective charge

A defendant may raise objection to the validity of the charge against him on the ground that it is defective. Any objection to a formal defect in a charge should be taken before a plea, otherwise the objection will be taken as waived [37]. However, the ACJA appears emphatically to suggest that an objection to a defective charge is to be taken after the defendant has taken his plea [38]. A defect in the charge may not vitiate the charge or a trial based on it unless it is material and shown to have prejudiced the defendant [39].

It should be noted that an error or omission in reproducing the exact wordings in the relevant law should not be a reason for declaring the law unwritten or non-existent [40]. A charge which does not contain the exact words in the charging section is not necessarily bad if the defendant is not misled in the circumstance **[41].** A defective charge may be amended in which case the plea of the defendant, if already taken, must be taken again on the amended charge [42].

3.0 Ingredients of the offence of Rape/Defilement

Section 282 of the Penal Code which is applicable in the Northern part of Nigeria defines rape as follows:

(1) A man is said to commit rape when he 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 [43].

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

The definition presumes only penetration of a vagina by a penis and discriminates against women and girls who may have been raped by use of a foreign object or may have been penetrated orally or anally by the penis. This definition is obsolete and does not accord with present day realities. The section should be amended to include the penetration of any opening of the body of the women with the penis or any object or substance.

With respect to rape, the Criminal Code Act which is in *pari-materia* with the provisions of Penal Code applicable in Northern Nigeria states 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 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 in the case of married woman by personating her husband is guilty of an offence called rape [44].

The Act also provides that any person who commits the offence of rape is liable to imprisonment for life with or without caning [45] and any person who attempts to commit the offence of rape is guilty of

[32]Section 209(c ACJA
[33]Section 213 ACJA
[34]Section 214 ACJA
[35]Section 212 ACJA
[36]Section 215 ACJA
[37]*Idi v State* (2020) ALL FWLR (Pt 1072)759.
[38] Section 396 (2) ACJA.
[39]*PML Securities Co Ltd v. FRN* (2018) All FWLR (Pt 966)168 at 174-175.
[40]*Ogbomor v State* (ibid).
[41]*Alao –Akala v FRN* (2014) ALL FWLR (Pt 738) 857.
[42] *Adejobi & Anor v. State* (2011) LPELR-97(SC) at 37.
[43]*Mamudav State* (2019) ALL FWLR (Pt 1023) 4.
[44]Section 357 Criminal Code Act, LFN 2004, 282 Penal Code.
[45]Section 358 ibid.

felony and liable to imprisonment for fourteen years with or without caning [46].

It is imperative at this point to refer to the Criminal Code's definition of 'carnal knowledge' since that is the key word in the offence. According to section 6 of the Criminal Code Act, the offence of rape is complete upon penetration. Further, unlawful carnal knowledge is one which takes place otherwise than between husband and wife.

The provisions of Violence against Persons (Prohibition) Act, 2015 [47] (VAP) has succeeded in giving a more encompassing definition of rape as opposed to the Criminal Code and Penal Code. Section 1 of the Act defines rape as follows:

"(1) A person commits the offence of rape if-
he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;
the other person does not consent to the penetration; or
the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or addictive capable of taking away the will of such person or in the case of a married person by impersonating his or her spouse" [48].

The prosecution, in securing a conviction for rape, has to prove certain ingredients beyond reasonable doubt, that is:

a. That the defendant had sexual intercourse with the prosecutrix.
b. That the act of sexual intercourse was done without the consent or that the consent (if any) was obtained by fraud, force, threat, intimidation, deceit, or impersonation.
c. That the prosecutrix was not the wife of the defendant.
d. That the defendant had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the defendant acted recklessly not caring whether the prosecutrix consented or not.
e. That there was penetration [49].

From the provisions of the Criminal Code, Penal Code and the recent Violence Against Persons (Prohibition) Act, penetration and consent are the most important and essential ingredients of the offence of rape [50].

Defilement on the other hand appears to require only penetration. Once penetration and the age of the girl under thirteen years are proved, the offence is established whether there is consent or not [51] but prosecution of the offence must commence within two years [52]. The offence is also referred to as statutory rape [53].

3.01 Penetration

Penetration is an essential ingredient for proof of the offence of rape and defilement. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina [54]. Emission is not a necessary requirement. Any or even a slightest penetration will be sufficient to constitute the act of the intercourse. Thus, where the penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape. Therefore, proof of the rupture of the hymen is unnecessary to establish the offence of rape [55].

In view of the critical nature of this requirement in rape or defilement cases, there is the question as to whether a person who has not himself penetrated the prosecutrix can be charged with or convicted of these offences. That enquiry is at the heart of this paper and shall be considered in due course.

3.02 Consent

The Black's Law Dictionary [56] defines consent as an agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person. It is an affirmative defence to assault, battery, rape [57], and other related torts [58]. Consent must be freely given and all parties in a sexual situation must feel that they are able to say "yes" or

[46] Section 359 ibid.
[47] Section 1, VAPPA, 2015. This is similar to section 1, Sexual Offences Act 2003 UK.
[48] *Idam v FRN* (2020) ALL FWLR (Pt 1062) 550.
[49] *Lucky v State* (2016) All FWLR (Pt 857) 567 at 581-582, *Haruna v State* (2022) LPELR 57420(CA)38-40, *Adonike v State* (2015) 7 NWLR (Pt 1458) 237 at 264
[50] *Iko v State* (2001) LPELR 1480 (SC)8-9, *Popoola v State* (2011) LPELR 4860 (CA)12
[51] Section 218 of the Criminal Code Act, Cap.C28 Laws of Federation of Nigeria, 2004; *Adonike v The State* (2015) 7 NWLR (Pt. 1458) 237
[52] *Oke v FRN* (1967) N.S.C.C. 76 (SC)
[53] *Bawa v State* (2022) LPELR 56539 (CA),Section 282(e) Penal Code
[54] *Musa v State* (2014) LPELR 41070 (CA)
[55] *Isa v Kano State* (2016) All FWLR (Pt 822) 1773 at 1776, *Ahmed v Nigerian Army* (2010) LPELR 8969 (CA) 11-12, *Idi v State* (2017) LPELR 42587 (SC), *Iko v State* (ibid)
[56] Black's Law Dictionary; Eight Edition, pg 323.
[57] *Iko v. State* (2001) 14 NWLR (Pt. 629)86, *Ahmed v Nigerian Army* (2010) LPELR 8969 (CA)
[58] *Ahmed v Nigerian Army* (supra). Of course, as can be seen above, it is not a defence to defilement of girls under thirteen years.

"no" or stop the sexual activity at any point [59]. At the core of consent lies the philosophy that every individual is a master over his or her body and reserves the right to determine what happens to it, especially in sexual context.

Lack of consent is key to the definition of rape [60]. Consent is affirmative "informed approval, indicating a freely given agreement" to sexual activity [61]. It is not necessarily expressed verbally, and may instead be overtly implied from actions, but absence of objection does not necessarily constitute consent. Lack of consent may result from either forcible compulsion by the perpetrator or an inability to consent on the part of the victim (such as people who are asleep, intoxicated or otherwise mentally compromised) [62]. Where consent to sexual intercourse is obtained after exhaustion from persistent struggle or threat, the defendant will be guilty of rape [63]. Also, to have carnal knowledge of a sleeping woman is also rape because consent is absent. A defendant will equally be guilty of rape if the victim withdraws her initial consent and he still goes ahead to have carnal knowledge of her.

Under the Nigerian law, "consent" is not clearly defined in the Criminal and Penal Codes. It presupposes that the meaning of the term 'consent' can be found elsewhere outside of the Codes. Under the Sexual Offences Act (UK), section 74 [64] seeks to define consent as a situation where the person offers his agreement by choice and at the same time has the freedom and capacity to make that choice. It follows that in relying on such defence, it must be established that the prosecutrix had the capacity to make a choice about whether to take part in the sexual activity at the time in question and the choice was made freely without coercion. Once these two are satisfactorily established, then it can be said that it is consensual sex [65].

4.0 Drafting of Charges in Rape and Defilement Cases

Drafting of charges in rape cases throws up several issues. Ordinarily, applying the basic rules regarding drafting of charges to practical cases generally has never been an easy task. The task becomes more herculean when sexual offences, particularly, rape are concerned. The reason for this is not far-fetched. Some peculiar features of the offence of rape call into question the applicability of some of the basic principles guiding drafting of charges. For instance, under section 7 of the Criminal Code Act [66] both the person that does the act constituting the offence and those that aided him in the commission of the offence, both before or during the act, are all principal offenders and may be jointly charged with the offence. Meanwhile, the offence of rape is dependent on penetration [67]. Where those who aided the man who committed the act of penetration are females and obviously incapable of committing the act of penetration, can they be jointly charged along with the man with rape? Where all the actors are men and each achieved penetration, are they to be jointly charged with rape in the same count or separately charged with rape in different counts for their individual acts of penetration but on the same charge sheet? Where all the role actors are male but only one achieved penetration, can all be jointly charged with rape? Where a single man penetrated more than once, is he to be charged with a single count of rape or separate counts of rape for each penetration? Attempt will be made in this part of the paper to examine a number of these questions.

4.01 General rules relating to parties to an offence and implication for drafting of charges

A crime may be committed by only one person. Sometimes, more than one person is involved in the commission of a crime with each person concerned playing different roles. Where only one person is involved in the crime, the decision as to who to charge would seem to be straightforward. This is hardly the case where two or more persons are involved.

The principal criminal statutes in Nigeria have tried to prescribe the criminal responsibility of participants in crimes. For this purpose, there seems to be slight variation between the position under the Criminal Code in the southern part of the country and the Penal Code in the Northern part of the country. The Criminal Code in section 7 [68] provides:

"When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –

[59] Sexual Assault Prevention and Awareness Centre, University of Michigan, available online at www.sapac.umich.edu/article/49

[60] "Rape" legaldictionary.thefreedictionary.com.

[61] Basile, KC; Smith, SG; Breiding, MJ; Black, MC; Mahendra, RR (2014). "Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements, Version 2.0" (PDF). National Centre for Injury Prevention and Control, Centres for Disease Control and Prevention.

[62] Rape and sexual violence: Human Rights Law and standards in the International Criminal Court. Amnesty International 2011.

[63] Ibid.

[64] Sexual Offences Act 2003 of the UK.

[65] *R v Bree* [2007] EWCA 256.

[66] See for instance section 7 of the Criminal Code, Cap 38, Laws of Oyo State, 2000; same as section 16 of the Criminal Law of Lagos State, 2015.

[67] *Shuaibu Isa v. Kano State* (2016) LPELR-40011(SC) at 13 -14, *Ahmed v Nigerian Army* (2010) LPELR 8969 (CA) 11-12, *Idi v State* (2017) LPELR 42587 (SC), *Iko v State* (2001) 14 NWLR (Pt. 629)86.

[68] See section 7 the Criminal Code of Oyo State (supra); Section 16 of the Criminal Law of Lagos State, 2015.

(a) every person who actually does the act or make the omission which constitutes the office;
(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
(c) every person who aids another person in committing the offence;
(d) any person who counsels or procures another person to commit the offence.

In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission."

On the other hand, Chapters IV, and V of the Penal Code [69] seems to draw a line between those actually doing the act constituting the offence and those aiding or abetting the commission of the offence. Particularly, sections 83 and 85 of the Code provides that:

"83. A person abets the doing of a thing, who –
(a) instigates any person to do that thing;
(b) engages with one or more other person in any conspiracy for the doing of that thing; or
(c) intentionally aids or facilitates by any act or illegal omission the doing of that thing.
85. whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Penal Code or by any other law for the time being in force for the punishment of such abetment, be punished with the punishment provided for the offence."

On the face of the above provisions, the difference between the Criminal Code and the Penal Code regarding classification of parties to crime may not be of much consequence in terms of punishment. However, the difference has far-reaching implications when it comes to drafting of charges. All the parties coming under section 7 of the Criminal Code, including aiders and abettors, are principal offenders who may be jointly charged with the commission of the offence and as such may be charged in the same count. On the other hand, aiders and abettors under the Penal Code are different from the principal offender and cannot be charged jointly with the principal offender with the result that they cannot be charged in the same count.

In terms of treating different categories of participants as principal offenders, the Criminal Code shares some affinity with the Australian criminal law [70].

On the other hand, in terms of drawing a line between principal offenders and aiders and abettors, the Penal Code seems to share a common feature with the English Law which draws a distinction between principal offenders and accessories. Under the English law, a person can only be a principal offender by actually participating in the *actus reus* of the offence. Those who aid and abet can only qualify as accessories. English law recognises that more than one person can be principals to a crime by jointly participating in the *actus reus* of the offence. However, where the participants did not all participate in the *actus reus*, those who aided the commission of the offence one way or the other without actually partaking in the *actus reus* can only qualify as accessories. The rational for the English law in this regard is summarised in Smith and Hogan's Criminal Law [71] as follows:

It is a fundamental principle that criminal liability arises from wrongdoing for which a person is himself responsible and not for the wrongdoing of others. If by performing acts of assistance, an accessory were taken to have brought about the commission of the offence, he would for all purposes become a principal offender …. Anyone whose assistance or encouragement in fact caused another to commit a crime would then be a principal. That is not the law. Accessorial liability is based on the assumption that accessory does not cause the *actus reus*. The distinction between principal and accessory is fundamental and the two ought not to be elided [72].

It must be pointed out, however, that "English law treats the accessory and principal in identical terms for the purposes of procedure and punishment [73]". At least for the purpose of drafting of charges, where the prosecution is not certain as to whether the defendant is a principal or accessory, the charge may allege the doing of the act constituting the offence or being an accessory to the offence. For instance, in *Gianetto v R* [74] where the prosecution was uncertain whether the defendant killed his wife by himself, in which case he would be a principal, or contracted another person to do it, which would make him an accessory, the charge was held to be proper by merely alleging that the defendant killed the wife or was an accessory to her killing.

Similarly, where a number of persons are involved in the commission of the offence and the prosecution is uncertain as to which of them is principal or accessory, the prosecution may jointly charge them in a single count alleging that each of them either did

[69] See for instance Chapter V of the Penal Code, Cap P3, Laws of Jigawa State, 2012.
[70] See *Osland v R* (1998) 73 ALJR 173.
[71] Smith and Hogan's Criminal Law, 4th Edition by David Ormrod and Karl Laird, (England, Oxford University Press) paragraph 8.3 page 208 – 209. See also s. 8, Accessories and Abettors Act, 1861; *Gnango v R* [2011] UKSC 59.
[72] Ibid at page 209.
[73] Ibid at 206.
[74] [1997] 1 Cr App R 1.

the act constituting the offence or was an accessory to it. The apparent lack of precision of such charges have been held not to breach the European Charter on Human Rights which requires that a defendant must know in detail the nature of the case against him [75]. One expects that similar approach is adopted under the Penal Code in Nigeria where there is uncertainty as to whether the defendant caused the *actus reus* or merely aided/abetted it. This is more so in view of the express provision of section 85 of the Penal Code quoted above regarding same punishment for principal offenders and aiders/abettors in cases where there is no provision to the contrary. Obviously, the need for such alternative allegation in a count does not arise under the Criminal Code as both actors and aiders are guilty as principal offenders.

It therefore appears that in the southern States of Nigeria where the Criminal Code applies, persons who participated in crime either as principals or aiders/abettors, are all principal offenders who may be charged together not only in the same charge sheet but in the same count. On the other hand, in the States where the Penal Code applies, only principal offenders (who partake in the *actus reus*) can be charged together in the same count. Aiders and abettors have to be charged in separate count but in the same charge sheet except, probably, where there is uncertainty as to the role played by each defendant in which case the *Mercer v R* [76] approach is recommended.

4.02 Nature of rape and drafting of charges in rape cases

Rape and other sexual offences are species of assault to the human person [77]. Of all sexual offences, rape is the most serious, carrying maximum sentence of life imprisonment [78]. The offence is defined in section 357 of the Criminal Code as follows:

"Any person who has unlawful canal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation 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".

The same offence is defined in section 260(1) of the Criminal Law of Lagos State as 'Any man who has unlawful sexual intercourse with a woman or girl, without her consent, commits the offence of rape and liable on conviction for life'. The Penal Code equally defines rape in terms of a man having sexual intercourse with a woman without her consent [79].

From the wordings of the provisions quoted above and as a matter of common sense, the *actus reus* of rape in Nigeria can only be committed by a man. In other words, the canal knowledge or sexual intercourse as stated in the laws which has been judicially interpreted to mean penetration of the vagina of the prosecutrix by the defendant's penis [80] can only be carried out by a man [81]. This is unlike the offence of sexual assault by penetration introduced by section 261of the Criminal Law of Lagos State which provides that:

"Any person who penetrates sexually the anus, vagina, mouth or any other opening in the body of another person with a part of his body or anything else, without the consent of the person commits a felony and liable on conviction to imprisonment for life"

This provision which is apparently adopted from the English Sexual Offences Act of 2003 [82] makes it clear that the penetration (*actus reus)* can be by any person, male or female as the penetration can be by any part of the body or even by any object [83].

The wordings of the definition of the offence of rape by Nigerian Statutes throw up some fundamental issues in the drafting of charges for the offence, particularly where more than one person is involved in the commission of the offence. For this purpose, we shall consider three scenarios:

(a) Where two or more men were actively involved by aiding each other and each of them actually penetrated the prosecutrix;
(b) Where a man and a woman were actively involved in the commission of the offence, for instance, by the woman luring the prosecutrix to the scene of crime and holding her down to be raped by the man; and
(c) Where two or more men were actively involved in the crime by aiding each other but only one of the them actually penetrated the prosecutrix;

[75] *Mercer v R* [2001] All ER 187. Similar rights are guaranteed in section 36(6) of the Nigerian 1999 Constitution.
[76] Supra
[77] Smith and Hogan's Criminal Law, *op.cit*, page 849
[78] Ibid.
[79] See for instance section 282 of the Penal Code, Laws of Jigawa State 2012.
[80] See *Shuaibu Isa v. Kano State* (supra) at 13 -14.
[81] In this regard, the law in England is not different as it requires the penetration to be by "penis" which obviously is anatomically possessed by "man" whether naturally or surgically created. The only difference is that the penetration under the English Act can be of the "vagina, anus or mouth'. See section 1 of the English Sexual Offences Act, 2003.
[82] See section 2 of the English Sexual Offences Act of 2003.
[83] This is similar to Section 1 of the Violence against Persons (Prohibition) Act, 2015.

4.03 Scenario (a)

Where two or more men were actively involved by aiding each other and each of them actually penetrated the prosecutrix.

Clearly, all the participants in this scenario are all principal offenders both under the Penal Code and the Criminal Code. As such, the issue here is more about the nature and number of the charges to be drafted. The question is:

(a) Whether all the participants are to be jointly charged with rape in the same count in respect of the penetration by each of them, in which case there will be as many joint counts as there are participants; or
(b) Whether each participant is to be separately charged with rape in different count in respect of the penetration by him, in which case there will be as many individual (as opposed to joint) counts as there are participants; or
(c) Whether all the participants are to be jointly charged in a single count of rape regardless of the individual penetration by each of them.

What is clear, however, is that all of them may be charged in the same charge sheet in line with the rule of drafting of charges which allows defendants who committed same or different offences in the course of same transaction to be charged in the same charge Sheet [84].

In dealing with the questions above, it must be recognised that each penetration constitutes a distinct offence of rape as rape is complete upon penetration [85]. As such, it is submitted that there should be a separate count in respect of each penetration. Commenting on section 1 of the English Sexual Offences Act, 2003 which defines rape in terms of penetration of vagina, anus or mouth, Archbold [86] states:

"It is submitted that where there is non-consensual penetration of both the vagina and the anus or the mouth, two offences will have been committed, provided all the other ingredients are present, and there should be separate counts to reflect this. Where there is repeated penetration of, for example, the vagina, common sense should dictate whether there should be more than one count."

With respect to the first question, it is submitted that all the other participants are aiders in respect of the penetration by each of them. Therefore, under the Penal Code, if one of them is charged in one count with rape in respect of the penetration by him, others will be charged in another count with abetting that rape. In that case, with each individual count of rape, there will be one joint count of abetment by the other participants. There will therefore be as many individual counts of rape and joint counts of abetment as there are participants. But under the Criminal Code, all the participants may be jointly charged with rape in the same count in respect of the penetration by each of them with the result that there will only be as many joint counts of rape as there are participants. For instance, if there are three participants, there may be three joint counts of rape against the three of them [87].

As regards the second question, each of the participants may be individually charged in separate count of rape in respect of the penetration by him with the result that there will be as many individual counts as there are participants. The situation here will be the same both under the Penal Code and the Criminal Code. This approach avoids the seeming complications involved in question one. However, it fails to take adequate account of the entire criminal responsibility of the participants. It must be emphasised that apart from being a principal offender in respect of his own penetration, each participant is also criminally liable for aiding the rape committed by each of the other participants and this ought to be adequately captured in the charges to be drafted.

Regarding the third question, it is humbly submitted that such a charge will be technically deficient under the Penal Code. As pointed out above, each penetration constitutes a distinct offence requiring a separate count. Also, a principal offender cannot, ordinarily, be jointly charged with an abettor in the same count under the Penal Code. Therefore, lumping the penetration by each of the participants in the same count will amount to duplicity as no two distinct offences can be charged in a single count [88]. Also, lumping all the participants together in the same count in respect of penetration by each will amount to misjoinder of offenders [89].

As far as the Criminal Code is concerned, such a charge may be competent. Such charge will be deemed to be in respect of the penetration by only one of the participants with the others joined in that count as aiders under section 7. The only problem here is that the

[84] Section 208 ACJA; Section 151 ACJL Lagos State; Haruna v. The State [1972] NSCC 550.

[85] *Shuaibu Isa v. Kano State (supra); Lucky v. State* (2016) LPELR-40541(SC) at 46 – 47.

[86] Archbold Criminal Pleadings, Law and Practice, 2011, Paragraph 20-20, page 1951. This interpretation will be applicable to the Violence against Persons (Prohibition) Act, 2015.

[87] In practice however, the State would normally draft only one single joint count of rape against the three of them. See *Posu v State* (2011) LPELR-1969 (SC)

[88] See section 209 ACJA; Section 152 ACJL; *Onakoya v. FRN* (2002) LPELR-2670(SC) at 51; *Auwal v. FRN* (2022) LPELR-57318(CA) at 16

[89] Section 209 ACJA and 152 ACJ(R&R) L. But see section 108 ACJA and 151 ACJL, for exceptions to the rule. See also *Okojie v. COP*. [1961] WNLR 97.

penetrations by the other participants are abandoned, thereby failing to deal adequately with the criminal responsibility of all the participants. It must be emphasised that if the single count is intended to deal with all the penetrations by all the participants, it will be deficient as it will be bad for duplicity [90].

The third question actually played out in the case of *Posu & Anor v. State* [91]. From the facts [92], the two appellants aided each other in taking turn to rape the prosecutrix and both penetrated her. However, they were jointly charged only with two counts 'conspiracy to commit a felony, to wit Rape and Rape contrary to Section 516 and 358 of the Criminal Code Cap 29, Laws of Ogun State of Nigeria respectively' [93].

In effect, the two appellants were jointly charged in a single count of rape notwithstanding that each of them penetrated the prosecutrix. As we have pointed out above, the charge is not incompetent since the case was tried under the Criminal Code. However, it is our humble submission that there ought to have been two joint counts of rape. Each count would deal with the penetration by each of the appellants. The two appellants would be parties to each count as principal and aider in line with section 7 of the Code. As pointed out above, the single count here has left out the penetration by one of the appellants without criminal responsibility. And if it was intended that the single count was to cover the penetrations by the two appellants, then the charge was incompetent for duplicity.

It is therefore our humble submission that the most adequate approach is as set out in our examination of question one as such charge will not only be technically competent but will adequately deal with the criminal responsibility of all participants in the offence.

4.04 Scenario (b)

Where a man and a woman were actively involved in the commission of the offence, for instance, by the woman luring the prosecutrix to the scene of crime and holding her down to be raped by the man.

The issue here is whether the man and the woman can be charged jointly in the same count with the offence of rape. There is no doubt that the *actus reus* here is only by the man.

Clearly, the scenario would not be much of a problem under the Penal Code which, as can be seen above, draws a line between those doing the act constituting the offence and those aiding or abetting them [94]. As such, under the Penal Code, only the man would be charged with rape whilst the woman is charged with abetting the rape.

The scenario here is similar to the case of *R v Ram* [95] where the husband, with the active participation of his wife, raped their maid. The wife was convicted as a principal in the second degree, that is, an accessory to rape [96]. As such, she could not have been charged with the husband in the same count but in a different count in the same charge sheet.

However, there is no separate provision outside section 7 regarding aiders and abettors under the Criminal Code. As can be seen above, the Code regards aiders and abettors as principal offenders in the same degree as the doer of the actus reus. All are "guilty of the offence and may be charged with actually committing it [97]". The only participant, who may either be charged with the offence, or with counselling or procuring the offence, is a participant under section 7(d) of the Code [98].

As such, it is our humble submission that, as far as the Criminal Code is concerned, the woman in this scenario may be charged jointly with rape in the same count with the man. This may sound strange, but it is consistent with section 7 of the Criminal Code. The Code does not contain any limitation as to the gender of those that may be charged as principal offenders. However, in practical terms does a woman have capacity to commit rape? Within the context of the ingredients of rape as defined in the criminal code she may not be but under section 261, Criminal Law of Lagos State, and section 1 of the Violence Against Persons (Prohibition) Act 2015, a woman may be charged.

It is in this regard that we most humbly disagree with the suggestion by the learned author, Professor C. O. Okonkwo [99] when he stated that 'if a woman assisted a man to rape a young girl, she would presumably be charged with "aiding" rather than with committing rape herself.' It is our humble submission that unlike the Penal Code which expressly provides for abetment and the English law which recognises accessory, there is no separate provision in the Criminal

[90] See note 22 above.
[91] (2011) LPELR-1969(SC).
[92] At pages 13 – 14.
[93] *Posu & Anor v. State (supra) at page 9.*

[94] Sections 83 and 85 Penal Code
[95] (1893)17 Cox CC 609
[96] As earlier discussed above the English law, like the Penal Code, draws a line between the person doing the *actus reus* and accessories (those aiding and abetting)
[97] S. 7, CC, Oyo state; 16 CL, Lagos 2015; *Akran v IGP* (1960) 5 FSC 3
[98] That is, those who counselled or procure the commission of the offence.
[99] C. O. Okonkwo, *Okonkwo and Naish: Criminal Law in Nigeria*, 2nd edition, (Nigeria, Spectrum Law Publishers, 1990) page 157 footnote 5.

Code for 'aiding'. As far as the Criminal Code is concerned, whoever aids the commission of an offence has committed that offence and may be charged with it.

In any event, the same learned author has stated in the same book [100], and rightly in our humble view, that in 'every case where a person is incapable of committing rape, he or she may be charged with the offence by virtue of section 7 of the Code for aiding, counselling or procuring the commission of the offence."

Therefore, in line with the rule of drafting of charges which allows persons accused of jointly committing the same offence to be charged in the same count in the same charge sheet [101], the two defendants in this scenario may be charged in the same count in the same charge sheet.

As far as Lagos State is concerned, in order to avoid the apparent awkward situation of jointly charging a man and a woman with rape in the same count, they may be jointly charged in the same count with sexual assault by penetration under section 261 of the 2015 Criminal Law of the State which carries same punishment as rape under section 260 but is gender neutral [102]. The same can be said of section 1 of the Violence against Persons (Prohibition) Act, 2015.

4.05 Scenario (c)

Where two or more men were actively involved in the crime by aiding each other but only one of them actually penetrated the prosecutrix.

The issue here is whether a person who committed rape by penetrating the prosecutrix and another person who merely aided him in doing so but did not himself penetrate, can be charged with rape in the same count in the same charge sheet. As can be seen from our discussion under scenario (b) above, the Penal Code draws a line between the person doing the *actus reus* and those who merely aided him. As such, in this scenario, as far as the Penal Code is concerned, only the person who penetrated will be charged with rape whilst the aider will be charged with abetting the rape with the result that the two will be charged in different counts but in the same charge sheet.

As for the position under the Criminal Code, from our analysis under scenario (b) above and in line with section 7 of the Code, we humbly submit that all the participants in this scenario may be jointly charged with rape in the same count in the same charge sheet. All of them may also be charged jointly with sexual assault by penetration under section 261 of the Lagos Criminal Law as an alternative to rape or under section 1, Violence against Persons (Prohibition) Act, 2015.

This scenario somehow played out in the Supreme Court case of *Ofordike v State* [103]. We shall examine the case in some detail.

5.0 *Chibuike Ofordike v State* [104]

In that case, Mrs. Dora Karawe (PW1) was accosted by the appellant and his friend, Gedu. They threatened her with a shot gun and broken bottle, removed the sum of N2,000.00 (two thousand naira) contained in her bag, dragged her into the bush and raped her. In her testimony, PW1 testified that '…the appellant tore her skirt, her knicker and pant and that the appellant could not have erection and ordered her to caress his penis so that his penis could be erect and out of fear, she did it and the appellant was able to penetrate her. …' [105].

In his confessional statement admitted as Exhibit A, the appellant stated that:

"Myself and Gedu saw a woman coming towards our direction. Gedu came out from where was standing and stopped the woman by shouting stop, and the woman stopped. We now asked the woman what do you have inside your bag and the woman say (sic) I no get money oh. Gedu now forcefully collected the hand bag from the woman, when Gedu gave the bag to me I now opened the woman's hand bag searched and found the sum of N40 inside the bag. Gedu now said since the woman no get plaint (sic) money we should go and fuck her in the nearby bush. Myself and Gedu now drag the woman to a nearby bush. Two of us forcefully removed the nicker and pint (sic) the woman was putting under her dress. Gedu is the first person who climbed the woman and had sex with her and I was watching the road. After Gedu finished, I now go and climb the woman and had sex with the woman although before I climbed the woman I told her to robb my penis so that it will be stronger for the sex and the woman did so. As the woman was robbing my penis, Gedu shout from where he was standing saying yawa don gass, which means alarm don blow. I saw Gedu running I now quickly dress up and started running. Some people running behind me later at a point I was caught by the people followed me [106]".

It appears that Gedu escaped arrest. The appellant alone was charged with three counts of conspiracy to commit armed robbery, armed robbery

[100] Ibid at page 272.

[101] One of the exceptions to the rule against misjoinder of offenders. See 208(a) (ACJA); Section 151(a) ACJ(R&R) L; *Okojie v. COP*. [1961] WNLR 97.

[102] Commenting on similar provision in s. 2 of the English Sexual Offences Act, 2003, Smith and Hogan's Criminal Law, op.cit, at page 857 states that the "offence can be committed by a person of either sex on a person of either sex."

[103] (2019) LPELR-46411(SC)

[104] supra

[105] *Ofordike v State* (supra) pages 1 -2.

[106] Pages 28 -29.

and rape. He was convicted of conspiracy and armed robbery as charged but the learned trial judge refused to convict for rape but convicted for attempted rape. The convictions were upheld at the Court of Appeal and Supreme Court.

Of direct relevance to our present discourse is the choice of convicting the appellant with attempted rape rather than rape itself.

From the facts, it can be seen clearly that the appellant actively aided Gedu in raping the prosecutrix. The evidence of the prosecutrix as PW1 and the confessional statement of the appellant admitted as Exhibit A are agreed on that point. The only point of difference is as to whether the appellant himself actually penetrated the prosecutrix. PW1 testified that he did but the appellant in his confession stated that he could not before people came to the rescue of the prosecutrix. The trial court gave appellant benefit of doubt and agreed that he did not penetrate. The two appellate courts agreed with the trial court on that point [107].

This case emanated from the High Court of Delta State and was therefore tried under the Criminal Code. From our discussion above and in line with section 7 of the Code, it is clear that the appellant is a principal offender in respect of the non-consensual penetration of the prosecutrix in this case by Gedu. In fact, Okoro JSC who delivered the lead judgment of Supreme Court put the role of the appellant succinctly thus:

He joined Gedu to drag the PW1 into the bush, joined in tearing the lady's dress and pant, watched the environment for Gedu to rape the PW1 and thereafter "climbed" her only to experience low current. Had Gedu not signalled him of persons coming to the rescue of the PW1, the appellant could have completed the act of rape [108].

It is therefore clear that the appellant actively aided Gedu. It is our humble submission, therefore, that he was validly charged with and ought to have been convicted of rape as a principal offender in respect of penetration by Gedu in line with section 7 of the Criminal Code. We humbly submit that the learned trial Judge missed the point by ignoring the role played by the appellant in the penetration by Gedu and focussing only on whether the appellant himself penetrated or not. We also submit, most humbly, that his lordship, Okoro JSC, partially missed the point when he stated, albeit *obiter*, that 'for me, had the learned trial Judge convicted the appellant for rape, I will have no problem because the PW1 who is the owner of her body testified that there was penetration' [109].

His lordship acknowledged that the appellant could have validly been convicted of rape, but again focused on the penetration or otherwise by the appellant without considering the possibility of his conviction on the basis of his assistance to Gedu. In any event, the Supreme Court could not have changed the conviction for attempt to rape as there was no cross appeal by the prosecution in respect of the refusal by the trial court to convict for rape [110]. Had there been a cross appeal on that point, the Court might have had the opportunity to consider the criminal responsibility of the appellant in respect of the aid he rendered to Gedu.

It is conceivable that the position taken by the courts in this case was influenced by the absence of Gedu in the case. If appellant and Gedu were to be tried, the two would most probably have been jointly charged in the same count with rape.

This case can therefore not be an authority for the proposition that an active participant in a crime of rape who did not himself (or even herself) penetrate the prosecutrix cannot be charged with or convicted of rape.

It is our thesis in this paper that such participant, male or female, is guilty of rape as a principal offender under section 7 of the Criminal Code and may jointly be charged in the same count and convicted along with the person who actually penetrated the prosecutrix. On the other hand, under the Penal Code, such participant can only be charged in a separate count in the same charge sheet with abetting the rape.

6.0 CONCLUSION

Drafting good charges is a responsibility of the prosecution which must be undertaken within the applicable rules and principles. In view of the prevalence of sexual offences such as rape and defilement, the prosecutor will invariably be called upon to draft charges for the prosecution of offenders. In the case of joint offenders, it may pose a challenge to the drafter depending on the jurisdiction. We have shown in this article that where the charge is to be laid under the penal code applicable to Northern Nigeria, joint offenders may be charged in different counts in the same charge sheet for the principal offence of rape and aiding or abetting in another count. In the south under the criminal code, different rule applies. Due to the effect of section 7 of the law, both offenders are treated as principal offenders and can be charged in the same count for the rape based on the number of penetrations.

However, it is recommended that the criminal code is amended to separate principal offenders from

[107] See page 34.
[108] Page 33
[109] Page 34

[110] The law is settled that the only way a respondent can challenge a substantive finding of a court on appeal is by filing cross appeal otherwise the appellate court cannot interfere with such finding. See *Cameroon Airlines v. Otutuizu* (2011) LPELR-827(SC) at 41.

accessories or abettors similar to the position under the penal code and English law. As can be seen above, under the penal code and English law, the person who does the act constituting the offence and those aiding him have different criminal responsibilities but similar punishment. Such amendment will address the apparent reluctance by some prosecutors and courts to place principal offenders and accessories on the same pedestal, especially in rape cases. Expectedly, such amendment comes with its own challenges. There may be cases where the specific role played by each participant is uncertain in which case identifying the principal offender from the accessory becomes difficult. In that case, the English solution of drafting the charge in the alternative as shown above may be helpful [111].

Until such amendment is effected, it is hoped that prosecutors and the courts will pay closer attention to the criminal responsibilities of defendants as envisaged under the extant law so as to avoid inherent injustice to victims of crimes especially in rape and defilement cases as we have seen in cases like *Posu* [112] and *Ofordike* [113].

111 See note 97 above
112 supra
113 supra