

Wayee Nimely of the City of Zwedru Grand Gedeh County, Liberia APPELLANT
Versus His Honour **emery S. Paye** Assigned Judge, Seventh Judicial Circuit Court
and the Ministry of Justice APPELLEES

LRSC 11

HEARD: NOVEMBER 9, 2010 DECIDED: JANUARY 21, 2011

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

Wayee Nimely, appellant, was indicted for rape during the February, A.D. 2008 term of the 7th Judicial Circuit Court, Grand Gedeh County. The indictment charged that the appellant raped a girl, Grace Kanneh, 13 years old.

On March 28, 2008 the appellant, through his counsel, filed a motion to advance the case on the trial court's docket to which motion the state interposed no objection. The court thus granted the motion and trial commenced on April 2, 2008. When the appellant was arraigned he entered a plea of not guilty.

Four witnesses testified for the state. Grace Kanneh, the private prosecutrix, was the first to testify. She informed the trial court that while she and her little sister were coming from study class one evening, the appellant called her and she and her sister went there and the appellant gave money to her sister to go and buy candy. Then, according to the witness, appellant invited her in his room and closed the door and she began to shout because she thought the appellant wanted to kill her. The witness said that the appellant then put cloth in her mouth, tore her under clothes and had sexual intercourse with her. She said while in the process, her brother's wife called her but the appellant told her not to answer; that her brother's wife forced the appellant's door open and she went out. She further testified that when her brother returned home from work in the night, his wife explained what had happened and he called the police who arrested the appellant.

Isaiah Kanneh, the brother of Grace Kanneh, was the second person to testify for the

state. He said when he returned home from work on March 5, 2008, at about 10:00 p.m., he was informed that his sister, Grace Kanneh, had been raped by Wayee Nimely. He said when he went to the appellant's house to inquire, the appellant refused to open his door, so he called the police.

The third witness for the state was Zeon Freeman, a police officer. He told the trial court that on March 5, 2008, Isaiah Kanneh reported to the police that his sister had been raped; that based on the report the police arrested the appellant and sent Grace Kanneh to the hospital. The witness said that the appellant admitted during investigation that in January 2008 he had consensual sex with Grace Kanneh but on the day of his arrest, he simply invited her to collect and wash his clothes, but her aunty called her so she left. According to the witness, Grace Kanneh told him at an interview, that appellant had been having sex with her since December 2007, but he told her not to tell anyone; that if she tells anyone, she would die. So she did not tell anyone. He further said Grace Kanneh also told him that on March 5, 2008, while she and her little sister were coming from study class one evening, the appellant called her in his room; that he sent her sister to buy candy and when she entered the appellant's room, he grabbed her and had sex with her; that while in the process, her aunty called her but the appellant told her not to answer; that after having sex with her the appellant opened the door and let her out.

The fourth and final witness for the state was Othello M. Davis, County Health Officer, Grand Gedeh County. He testified that a patient named Grace Kanneh was taken to the Martha Tubman Memorial Hospital in Zwedru, Grand Gedeh County on March 5, 2008. He said when the patient was examined, it was discovered that her hymen was broken and there was an offensive discharge from her vagina and the ovary in the vagina area was painful. He said that the patient was treated for sexual and gender based violence and discharged.

When the state rested evidence, the defense took the stand and also produced four witnesses. The first witness for the defense was Wayee Nimely, appellant. On the direct examination he was asked: "Mr. Witness, how old are you or what is your age or when were you born?" And he answered; "I am 17 years old, I was born in the year 1990,

November 19." He then narrated that he and Grace Kanneh lived in the same community and that Grace Kanneh usually helped his brother's wife to wash her clothes and she sometimes helped him too. He said that on March 5, 2008 at about 7:00 p.m. when Grace was passing, he called her in his room and asked her to wash his clothes; that while talking to her, her brother's wife saw Grace's little sister at his door and she asked the whereabouts of Grace. After that, according to the witness, Grace left and went home. He said he was surprised that the police went to his house at night and arrested him and charged him with rape. He said at the police station, he was questioned whether he and Grace were loving and he said yes. He also said he informed the police that Grace told him she had a boy-friend before.

The second witness for the defense was Victoria Sneh. She testified that Grace used to go to the appellant and take his clothes to wash and that sometimes Grace sent her little sister to the appellant. She said on Wednesday morning, March 5, 2008, when she went to draw water Grace told her that her stomach was hurting and that blood was dropping in her panties.

The third witness for the defense was Patricia Gediah. She testified that she was present when Grace and the appellant entered the room and she even heard Grace laughing. She said Grace's brother's wife went to the appellant's house and asked Grace what she was doing there and Grace told her she was visiting and she told Grace she will tell her brother that "she was loving". The witness said she told Grace's brother's wife "you know the girl has been loving to a Lebanese man and you know that she brought Twenty United States Dollars (US\$20.00) from the Lebanese man to celebrate her birthday." At that point, according to the witness, Grace's sister-in-law later said she regretted calling the police.

When both sides rested evidence, the trial judge charged the jury who went in their room of deliberation and brought a verdict of "guilty" against the appellant on April 7, 2008. A motion for a new trial was filed by the appellant's counsel, heard and denied. The trial court entered final judgment on April 12, 2008 adjudging the appellant guilty of rape and sentenced him to life imprisonment. The appellant excepted to the final judgment and announced an appeal to this Court.

From the testimonies of witnesses summarized herein above, including the testimony of the appellant himself, who is accused, there is no denial that he had sexual intercourse with Grace Kanneh, a girl 13 years old. And this happened not once, not twice, but at divers times. In fact, the appellant told the police that he and Grace Kanneh "were loving". There is no denial, also, that grace Kanneh, the victim, was 13 years old at the time of the incident, as no contention was raised concerning her age by anyone. The new rape law under which the appellant was indicted provides at *Section 14.70*:

Offence: "A person who has sexual intercourse with another person (male or female) has committed rape if:

"(a)(i) He intentionally penetrates the vagina, anus or any other opening of another person (male or female) with his penis without the victim's consent; or

(ii) He/she intentionally penetrates the vagina or anus of another person with a foreign object or penis without the victim's consent.

(b) The victim is less than eighteen years old, provided the actor is eighteen years of age or older."

The appellant in this case was charged for committing statutory rape because the victim, Grace Kanneh was below the age of consent. Statutory rape is sexual intercourse with a person under the statutory age of consent, which, under Liberian law, is set at 18 years. In statutory rape the state only need to prove 1) that the accused person, 18 years and above, indeed committed the act of rape and 2) the victim was below age 18, the age of consent. In other words, statutory rape is a strict liability crime which does not concern itself with force and resistance as necessary elements. And consent is not a defense.

The clear intent of the statutory rape law is to protect juveniles, especially teenage girls below age of consent from sexual intercourse. The policy underlying such a statute is

a presumption that because of their innocence and immaturity, juveniles are prevented from appreciating the full magnitude and consequences of their actions. Put another way, the act is intended to protect young children from illicit acts of sexual intercourse by making their consent legally impossible. So, the aspect of witnesses testimonies in this case which say that Grace Kanneh was "loving " to the appellant implying that she consented to have sex with the appellant is not relevant and cannot vindicate the accused, so long the victim was 13 years old. In statutory rape cases, the age of the victim at the time of the act is a fact upon which the criminality of the act absolutely depends.

But it is not everyone who has sexual intercourse with a female below age 18 in this country that can be held for rape. The new rape law specifically provides that rape is committed "if the victim is less than 18 years old, provided the actor is 18 years of age or older." [Emphasis provided).

So, the clear indication is that where the actor is not 18 years or older, his act does not amount to rape. In the case before us, there is evidence that the appellant, the actor, was less than 18 years at the time he had sexual intercourse with Grace Kanneh. The appellant testified in open court that he was 17 years old; that he was born on November 19, 1990. Simple mathematical calculation of appellant's age as at the time of his arrest on March 5, 2008 will show that he was indeed below age 18. His actual age at that time was 17 years, 4 months 14 days.

The averment that the appellant was 18 years was contained in the magisterial writ issued against the appellant. It appears that it was the brother of the private prosecutrix who stated the age of the appellant. How he determined the age of the appellant is anybody's guess. Relevant portion of the magisterial writ provides: "On Wednesday, March 5, 2008 at 24:00 hours, defendant Wayee Nimely, age 18, a resident of City Hall Community was arrested base[d] on the complaint filed by Isaiah Kanneh..." While the writ issued at the instance of the state put the appellant's age at 18, the indictment was silent on the age of the appellant. In our opinion, the proper thing was to have stated the appellant's age in the indictment and during trial, produce evidence that he was indeed 18 years old when he had sex with Grace Kanneh, who was at the time, 13 years

old.

The primary source of one's age in this jurisdiction is his/her birth certificate or passport. Other personal and/or public documents which require statement of age may also be introduced into evidence to establish one's age. In the absence of documents, the testimony of the father or mother may be admissible to establish a person's age. Furthermore, the law provides that the private prosecutrix may testify as to her own age, and where her testimony is not disputed, it is sufficient proof of her age, taken in connection to her youthful appearance. *Section 42, 65 AM JUR 2d, Age of victim.*

We see in the records that Grace Kanneh, the private prosecutrix, testified that she was 13 years old. During trial the court posed a question to her: "Miss witness, do you know your age, and if your answer is yes, how old are you?" She answered:

"Yes, I am 13 years old." (*See minutes, 38 th day jury sitting, Wednesday April 2, 2008*).

In the absence of any dispute, the trial court accepted that Grace Kanneh was thirteen years old on the strength of her own testimony. We hold that by the same token, the testimony of the appellant given under oath in open court that he was 17 years old at the time of the act of rape which was never disputed, should have also been accepted by the trial court. If the state had evidence to refute the appellant's testimony concerning his age, it should have presented it in rebuttal. The state having failed to do so, we must accept that the appellant was 17 years old and was therefore a juvenile when he had sex with Grace Kanneh, another juvenile at the time.

A juvenile is defined as a "child who is under the age of eighteen years". *Section 11.11(a) Juvenile Procedural Code.*

Under Liberian law, a juvenile is incapable of committing a crime. What this means is that our law presumes that a juvenile cannot understand and appreciate the repercussion and consequences of his/her own act. This common law treatment of youthful offenders is still recognized under our law today. At common law, children

were considered to lack the requisite *mens rea* to commit crime, as they were generally considered impulsive, more likely to engage in risky behavior, and less likely to calculate the long term consequences of any particular action. Even where some juveniles were considered to have the same ability to make reasoned decisions as adults, it was nevertheless held that a juvenile's ability to theoretically understand the difference between "right" and "wrong" does not mean that he/she should be held to the same standards as an adult.

Following the same reasoning, our law forbids treating juveniles as adults for purposes of crime. Instead, Liberian law considers a juvenile who has committed an act which, if committed by an adult to be a crime, a juvenile delinquent. A "juvenile delinquent is a juvenile who has attained the age seven years but is under age eighteen...and who has been adjudicated to the status of juvenile delinquent by the court on the basis of a finding that he has committed an act which if committed by a person over the age of eighteen years would be a crime." *Section 11.11(b), Juvenile Procedural Code.*

Matters involving juveniles are within the exclusive jurisdiction of the juvenile courts and of the magistrate courts in areas where there is no juvenile court established. And the Juvenile Procedural Code is designed "... to provide a due process of law for the just determination of all causes coming within the jurisdiction of the juvenile court ... to protect the welfare of juveniles and the community. The code shall be liberally construed to the end that each juvenile coming under juvenile court jurisdiction shall receive such care, guidance and control, preferably in his own home, as will conduce to the juvenile's welfare and the best interest of the Republic. In the instances when such juvenile is removed from the control of his parents, guardian or other custodian, the court shall secure for him care as nearly as possible equivalent to that which should have been given him by his parents. In furtherance of this end, informal preliminary conferences and negotiations terminating in decrees entered upon consent shall be a primary objective." *Section 11.3, Juvenile Procedural Code*

Section 11.60 of the Code provides:

"No adjudication by the juvenile court of the status of any juvenile made in any special

proceeding hereunder shall be deemed a conviction, nor shall such adjudication operate to impose any civil liability, nor shall any juvenile be found guilty or be deemed a criminal by reason of such adjudication, nor shall juveniles be charged with crime or convicted in any court except as set forth in the exception and provisos contained in section 11.21(a)."

Section 11.21(a) of the Code provides:

"Special proceedings concerning any juvenile who is alleged to be a juvenile delinquent, except that proceedings involving any juvenile sixteen years of age or over who is alleged to have done an act which if committed by a person over the age of eighteen years would be a crime punishable by death or life imprisonment, shall not originate in the juvenile court which does not have jurisdiction over any such proceeding unless an order of the Circuit Court having jurisdiction thereof removing the proceeding to an appropriate juvenile court, based on a finding that it is in the best interest of such juvenile and the public, is made; provided, however, that if a juvenile sixteen years of age or older is charged with a lesser offense which would be a felony if committed by a person over the age of eighteen years, the juvenile court, if it concludes after full investigation that it is in the best interest of such juvenile or of the public, may in its discretion waive its jurisdiction and certify such juvenile for proper criminal proceeding to any court which would have trial jurisdiction of such offense if it were committed by a person over the age of eighteen years; but no juvenile below the age of sixteen years shall be so certified; and provided further, that if a juvenile is charged with any violation of the Vehicle and Traffic Law constituting an infraction as defined therein, such charge shall be tried in the traffic court having jurisdiction thereof"

The exception provided under the foregoing section states in effect that the circuit court shall have jurisdiction over proceedings involving any juvenile, sixteen years of age and over, who is alleged to have committed an act, which if committed by a person over the age of eighteen years would be a crime punishable by death or life imprisonment, unless the circuit makes an order removing the proceeding to an appropriate juvenile court, based on finding that it is in the best interest of such juvenile and the public. We must note, however, that in cases where the circuit court assumes

jurisdiction, the court must, first of all, take due note that the matter involves a juvenile. But in the case before us the circuit court did not take due cognizance that Wayee Nimely was a juvenile. The court proceeded against him on the wrong notion that he was a full grown adult. Perhaps, had the court taken such note, it may have in its discretion, forwarded the case to the magistrate court in Grand Gedeh County in keeping with the statute, since there is no juvenile court in that jurisdiction.

Secondly, Section 11.21(a) of the Code provides in no uncertain terms that the best interest of the juvenile and the public must always be paramount. Again, we say that had the 7th Judicial Circuit, Grand Gedeh County treated the appellant as a juvenile, his welfare and the interest of the public would have been paramount in considering his punishment. But this was not the case. Instead, this youthful offender was sentenced to life imprisonment as if he was an adult and he has remained in detention since his arrest on March 5, 2008. This is against the spirit and intent of our Juvenile Procedural Code.

Section 11.42 of the Code provides:

a juvenile of the age of sixteen years or over shall not be placed in any prison, jail, lockup or police station unless there shall be no other safe and suitable place for his detention and it is necessary for his protection or the protection of the public or if his conduct or condition is such as to endanger the safety and welfare of others in the detention facility provided for other juveniles, and unless when so placed in the prison, jail, lockup or police station it shall be in a segregated section of such premises where the said juvenile cannot have contact with persons over eighteen years of age confined therein." No justification was provided by the trial court for the detention of the appellant in prison where he mingled with adults who were charged and some convicted for all sorts of criminal activities.

As we see it, the purpose of the Code is to provide for the care, protection, and wholesome development of juveniles; remove from juveniles who commit delinquent acts the consequences of criminal behavior and substitute a program of treatment and rehabilitation for their welfare and the interest of the public. And the Code intended

that these purposes be achieved in a family environment as much as possible or in a safe and suitable institution. It was never the intent of the Legislature in enacting the Code for a juvenile delinquent to be tried using the same standards as adults and punished as was done in this case. Under the circumstance where the appellant was subjected to rigorous treatment under our penal laws, found guilty and incarcerated in adult detention facility where he has remained for almost three years, we can not confirm the sentence of life imprisonment imposed on him by the trial court. He must be released into the custody of his parents who will closely monitor and supervise him until he reaches age 21.

WHEREFORE, the ruling of the trial court adjudging the appellant who was a juvenile at the time he committed rape guilty and sentencing him to life imprisonment is reversed. The appellant is hereby ordered released from detention into the custody of his parents who will monitor and supervise him until he reaches age 21 years. The Clerk of this Court is ordered to send a mandate to the judge of the 7th Judicial Circuit, Grand Gedeh County to resume jurisdiction over this case and give effect to this judgment. IT IS SO ORDERED.

Ruling reversed

COUNSELLORS ELIJAH Y. CHEAPOO, SR. AND J. D. BARYOGAR JUNIUS OF THE OFFICE OF THE PUBLIC DEFENDERS APPEARED FOR APPELLANT. COUNSELLORS SAMUEL JACOBS AND M. WILKINS WRIGHT OF THE MINISTRY OF JUSTICE APPEARED FOR APPELLEE.